## Articles

# Some Recommendations for a New Legal and Regulatory Structure for the Management of the Offense of Unlawful Interference with Civil Aviation

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## I. Introduction

The single existing flaw in the regulatory structure applicable to terrorism and unlawful interference with civil aviation is the deplorable state to which the legal structure has sunk. Taken collectively, the Tokyo, Hague and Montreal Conventions[1] appear to ensure the peaceful, orderly, and expeditious conduct of international air transport and the administration of swift and appropriate justice for those who unlawfully interfere with such operations. Unfortunately, this has not been the case as there is no uniformity in the States' actions regarding adjudication and extradition of offenses. No State can act alone, yet the States have not demonstrated that they can act collectively. International law which fails to implement its policies and requirements through States is impotent. In the words of Judge Abraham Sofear:

> [T]he law applicable to terrorism is not merely flawed, it is perverse. The rules and declarations seemingly designed to curb terrorism have regularly included provisions that demonstrate the absence of international agreement on the propriety of regulating terrorist actively. On some issues, the law leaves political violence unregulated. On other issues the law is ambivalent, providing a basis for conflicting arguments as to its purposes. At its worst the law has, in important ways, actually served to legitimize international terror, and to protect terrorists from punishment as criminals. These deficiencies are not the product of negligence or mistake. They are intentional.[2]

Traditionally, responses to terrorism have been classified as peaceful

1. For a detailed discussion of these Conventions, *see* R.I.R. Abeyratne, *Attempts at Ensuring Peace and Security in International Aviation*, 24 Transp. L.J. 27 (Summer 1996).

2. *See* Abraham D. Sofer, *Terrorism and the Law*, 64 Foreign Affairs 901, 902-03 (Summer 1986).

and coercive. The United Nations Charter provides in Article 2(3) that all members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. This is reiterated in, *inter alia*, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, which states:

> States shall . . . seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice . . . . The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.[3]

The Declaration provides that only after every effort has been made to deal with a terrorist attack by peaceful means should States resort to military action.

This view is, of course, by no means universal. In some cases—for whatever reasons, ideological, political or military—States immediately opt for a coercive response to terrorist activity and receive no greater admonition from the rest of the international community than a verbal condemnation. These "deviations," however, do not detract from the general rule that peaceful remedies should be exhausted first. This is an area of law where one cannot expect to find an absolutely consistent practice.

There is another respect in which the peaceful and coercive responses are not on the same plane. This relates to the sources of the governing international laws. The rules governing the coercive responses are part of the law on the use of armed force. For the most part, this is customary international law (even though, of course, its roots may lie in treaties, particularly the UN Charter). It follows that these rules are binding on all subjects of international law, with the theoretical exception of those who "opted out" at the inception of the rules.

By contrast, the rules governing peaceful response are contained in treaties. This means that these rules have the advantage of being clearer and less ambiguous than the customary law on the use of force, but it also implies one important shortcoming: these rules are binding only on those States that have ratified or acceded to the relevant treaties and, even then, only on a strictly reciprocal basis. In other words, they are not universally applicable.

What we are left with is a rule which, in effect, says that peaceful

3. Annex to G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28 U.N. Doc. A/8028 (1970) (adopted without vote).

measures must be tried and exhausted before coercive measures are used. This rule, however, fails to compel States to exhaust any particular peaceful measures. In the absence of advance agreement, we are presumably thrown back on *ad hoc* negotiations, which may be more or less wholehearted.

## II. The Problem with Treaties and Peaceful Responses

All treaties enshrine the universal principle *aut dedere aut judicare.* This principle essentially means that contracting States on whose territory those reasonably suspected terrorist acts occur must either try them or hand them over to whichever other contracting State requests their extradition in accordance with the treaties. A State cannot, according to the treaties, allow terrorists to go free. Contracting States also have universal jurisdiction to try, within their territories, those suspected of acts of terrorism. However, it does not always happen that way.

There are four major problems with these types of treaties. First, not enough States are parties to the multilateral treaties. In particular, not enough States that actually count in this field are parties—that is, those States on whose territory terrorists seem consistently to end up. Italy, for instance, was not a party to the 1979 New York Convention on the Taking of Hostages[4] at the time of the *Achille Lauro* affair. The 1984 hijacking of a Kuwait aircraft is another example where the hijackers were allowed to escape owing to the fact that Algeria was not a party to the relevant treaties and, accordingly, could not be compelled to "extradite or punish" them.

Second, there is the problem, which is by no means unusual, that both the multilateral and bilateral treaties contain no effective enforcement provisions. If a party fails to comply with the treaty—refuses to hand over a suspected terrorist, for instance—the other parties can do no more than apply the traditional peaceful sanctions authorized by the international community; not the kind of sanctions that could be expected to deter a firmly recalcitrant State. In the *Achille Lauro* case, where Egypt failed to comply with the *1979 New York Convention on the Taking of Hostages* and Italy failed to abide by its 1983 extradition treaty with the United States, neither country faced relevant consequences.

A third problem with these treaties is that none of them (with a few exceptions) specifies that terrorist-type acts are not to be deemed "political offenses" and thereby exempted from extradition. This needs clarification because most terrorist acts are, of course, inspired by political motives. It is simply that the methods used are such that the advantages normally accorded to political offenses should not apply.

4. G.A. Res. 34/146, U.N. GAOR, 34th Sess.

Finally, there is a fourth problem with these treaties: the obligations of the States' parties to search for and arrest suspects are treated in an insufficiently rigorous way. These obligations are crucial because the "extradite or prosecute" rule can obviously be rendered meaningless if States allow suspects to remain hidden or to abscond.

The 1988 Maritime Convention,[5] a significantly analogous instrument on the subject, imposes no specific obligation to search for suspects believed to be present in the territory of a State party. Regarding arrest, the Convention merely requires a State to arrest suspects "upon being satisfied that the circumstances so warrant" and "in accordance with its law".[6] The Convention repeats the language used in a number of the earlier treaties, the Hague Convention, the Montreal Convention, and the 1973 and 1979 New York Conventions. States are thus left a large measure of discretion to decline to arrest suspects for reasons more "political" than "evidential."

On the positive side, it could be said that we have now reached a situation when there is general consensus among the international community that terrorism is to be condemned. The Peace Accord of 1995 between the Palestine Liberation Organization and Israel, and NATO's presence in Bosnia-Herzegovina are recent results of universal attempts at recognizing the futility of violence and terrorism.

A further positive development is that the international community seems to be moving closer toward consensus on a definition of terrorism. Once we have an accepted definition, those who commit terrorist acts will no longer be able to escape the consequences of those acts by "defining them away," claiming the acts are legitimate forms of national liberation warfare or other legitimate "irregular" warfare. A compelling example of this development is a resolution on terrorism adopted by consensus of the UN General Assembly in 1985. The resolution unequivocally condemned as criminal, "all acts, methods and practices of terrorism wherever and by whomever committed."[7] It also gave, in its preamble, certain clues as to what is encompassed by the term "terrorism as acts . . . which endanger or take innocent human lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings . . . acts covered by the existing conventions relating to various aspects of the problem of terrorism,"[8] including those already mentioned above.

In 1987, a further resolution condemning terrorism was adopted by the UN General Assembly, though this time with opposing votes from

5. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988.

6. *Id.*

7. G.A. Res. 40/61, U.N. GAOR, para. 1 (1985) (adopted without vote).

8. *Id.*

the United States and Israel. This resolution actually proposed that a conference convene to agree on a definition of terrorism.[9] The United States and Israel were opposed to this proposal, fearing that a definition might emerge distinguishing terrorism as something intrinsically different from the activities of national liberation movements.[10] Indeed, it is clear that a number of third world States and other States have long taken precisely this view, that it is quite legitimate for those fighting for self-determination to resort to terrorist action.[11] Our goal of consensus on the question of what constitutes terrorism is, therefore, still some distance ahead.

Another heartening factor is that we have at least some conventional framework for rational, peaceful responses to terrorist activity. We also have rules limiting resort to military responses, which at least put some brakes on those who would favor simply "eliminating" all those whom they characterize as terrorists. It is also encouraging that the idea that hijackers are pirates has never been accepted. Such an idea, at least in the way it has been advanced, would serve only to legitimize the use of force against anyone ideologically or politically opposed to the State purporting to exercise "universal jurisdiction" and to escalate the spread of violence in the world. While it is true that terrorists are in a way "modern enemies of mankind" and every State should endeavor to search for, try, and punish them on its own territory, this does not entail a license to use force in the territory of other States or against ships or aircraft of other States. If such a license were given by international law, our present conditions of relative anarchy would be at risk of turning into one of absolute anarchy.

Notwithstanding the above, it is disheartening that in an overall sense, the existing structure of law relating to terrorism has failed to provide the international community with an effective system of control of the offense from a legal perspective. As a first step, States should take serious note of United Nations General Assembly admonitions:

> States [should] . . . contribute to the progressive elimination of the causes underlying international terrorism and to pay special attention to all situations, including, [*inter alia*], colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien occupation, that may give rise to international terrorism and may endanger international peace and security.[12]

The above provision refers to some elements of structural violence which

9. G.A. Res. 42/159, U.N. GAOR, para. 12 (1987).

10. *See* U.N. Doc. A/C.6/42/SR.31, at 6-7 (1987), U.N. Doc. A/C.6/42/SR.33 at 6-9 (1987).

11. *See e.g.*, the debates surrounding the adoption of Res. 40/61 and 42/159.

12. *See* G.A. Res. 40/61, U.N. GAOR, para. 1 (1985). *See also* G.A. Res. 42/159, U.N. GAOR, para. 12 (1987).

are believed by the General Assembly to stand in the way of the elimination of terrorism.

The problem of terrorism and the need for a practical approach to solving this problem was eloquently highlighted by the Ghanaian representative in the Security Council in a debate following the Israeli interception of the Libyan airplane in February 1986. He stated:

> the international community, including the [Security] Council, must summon the necessary political will to delve into the reasons why the frustrations of the dispossessed are vented in this manner. A glib condemnation of terrorism alone, without a scientific and impartial study of its origins will not, we're afraid, eradicate the phenomenon.[13]

## III. An Enhanced Role of the International Civil Aviation Organization (ICAO) in Aviation Security

In the absence of legislative strength, one of the measures of assuring aviation security lies in a re-examination of the role played by ICAO in the field of aviation security. ICAO has adopted, through its 184 Contracting States, Annex 17 to the Chicago Convention which elicits Standards and Recommended Practices (SARPs) on international co-operation. Standard 3.2.1 requires each Contracting State to co-operate with other States in order to adapt their respective national civil aviation security programs—which are required to be established by Standard 3.1.1 of the Annex. The Annex contains several provisions which are calculated to ensure aviation security, provided the provisions are followed by all States. In practice, unfortunately, this does not happen.

As a further means of ensuring States' compliance with its SARPs in critical areas such as aviation security, ICAO has developed its Strategic Action Plan (SAP). This plan, when fully implemented, will ensure more co-operation among States in areas critical to civil aviation, such as security. It is therefore necessary to dispel the myth that State sovereignty grants States the absolute right to refuse to follow their international obligations as enshrined in the principles of international law.

### A) The ICAO Strategic Action Plan

The ICAO SAP is primarily aimed at promoting the principles enshrined in the Chicago Convention[14] in the most efficient manner so that the challenges posed by modern exigencies of civil aviation are met. The SAP would accomplish the following:

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13. U.N. Doc. S/PV. 2655/Corr. 1 (1986).

14. Convention on International Civil Aviation, Apr. 4, 1947. ICAO Doc. (7300) 6 (opened for signature at Chicago on Dec. 7, 1944, entered into force on Apr. 4, 1947).

1. ensure that ICAO maintains its position as the main standard-setting body for international civil aviation;
2. encourage national ratification of instruments of international air law and maintain a common aviation system worldwide;
3. ensure that ICAO continues to focus on the exploration and development of aviation issues of a multilateral nature in the fields of legal, economic and technical regulation and thereby remains a world forum for these issues;
4. identify priorities for ICAO and seek to ensure that sufficient resources are made available to respond to the major challenges concerned; and
5. develop a continued efficient and cost-effective mechanism in ICAO for the management of technical co-operation activities.[15]

The issues that have been identified by ICAO for the triennium 1996-1998 as requiring the above action are:

1) Communications, navigation and surveillance/air traffic management (CNS/ATM)
2) Airport and airspace congestion
3) Commercial developments and economic regulation
4) Financial resources
5) Unlawful interference
6) Human factors in flight safety
7) Environmental protection
8) Human resources
9) Enhancement of ICAO Standards
10) Safety oversight
11) Legal aspects of the challenges.

The legal aspects of these issues form separate studies by themselves and have been addressed in great detail elsewhere.[16] Of primary relevance are the legal issues that underline the above objectives of ICAO in introducing the SAP to the international aviation community and seeking co-operation in its implementation. Such an analysis would enable States to

15. ICAO Assembly Working Paper, A29-WP/39 EX/8, Appendix at 8 (1992).

16. *See* R.I.R. Abeyratne, *Aircraft Engine Emissions and Noise*, 24 ENVTL. POL'Y AND L. 238 (Sept. 1994). *See also* R.I.R. Abeyratne, *General Principles of Liability of States as Providers of Space Technology in the Field of Air Navigation*, XXIV EUR. TRANSPORT L. 553 (1994); *The Evolution from FANS to CNS/ATM and Products Liability of Technology Producers of the United States*, 43 ZEITSCHRIFT FÜR LUFT-UND WELTRAUMRECHT (German Journal of Air and Space Law) 156 (June 1994); *The Liberalization of Air Transport Services with GATT - Some Legal Issues*, TRADING L. AND TRADING L. REP. 165 (Jan.-Feb. 1994); *The Challenge of Airports and Planning Laws*, 23 ENVTL. POL'Y AND L. 262 (Apr. 1993); *Legal Aspects of the Unlawful Interference with International Civil Aviation*, XVIII AIR AND SPACE L. 262 (1993); *The Effects of Unlawful Interference with Civil Aviation on World Peace and the Social Order*, 22 TRANSP. L.J. 449 (Spring 1995); *The Air Traffic Rights Debate - A Legal Study*, XVIII, Part I ANNALS OF AIR AND SPACE L. 3 (1993); *The Economic Relevance of the Chicago Convention - A Retrospective Study*, XIX, Part II ANNALS OF AIR AND SPACE L. 3 (1994); *The WorldWide Air Transport Conference and Air Traffic Rights, - A Commentary*, XXX EUR. TRANSPORT L. 131 (1995); and *Tobacco Smoking in Aircraft - A Fog of Legal Rhetoric?* XVIII AIR AND SPACE L. 50 (1993).

acquaint themselves with their legal responsibilities and duties towards compliance with the international regulation of aviation security.

It is an incontrovertible fact that the SAP cannot be implemented unilaterally by ICAO without the co-operation of its member States. Fundamentally, and from a legal standpoint, the position of ICAO in the international aviation community is not one that is compatible with being absolutely legislative. ICAO sets guidelines on civil aviation and facilitates the adoption of treaties and regulations, with the approval of its member States. It is then up to the member States themselves to implement them. Therefore, the SAP is essentially a two sided issue and may be adequately subsumed by the adage "one cannot clap with one hand." The obligations of ICAO member States are paramount in giving teeth to ICAO's Standards and Recommended Practices and other guidelines, as much as in satisfying or otherwise accepting treaties of air law that the States themselves have adopted under ICAO auspices.

### B) Origin of the SAP

During the 1988-1990 triennium, as a measure to meet the challenges faced by civil aviation in the nineties, the ICAO Council developed a tentative inventory of the major challenges facing civil aviation and the resulting implications to ICAO. The 27th Session of the Assembly reviewed this inventory, noting the need for States and the Organization to keep pace with the rapidity of change and developments in civil aviation, and decided that the Council should develop a global strategy of implementation priorities for the economic, technical and legal fields for the next decade. The Council took up this matter again in 1990 and determined that in order to prepare a cohesive response to the critical issues concerned, it would develop a strategic action plan looking beyond the traditional triennial programming process. Also, in order to obtain a clear position of States and their views on major challenges facing aviation, the Council decided to seek the views of States and the industry. Accordingly, a State letter was issued on January 16, 1991[17] with information on each of the challenges identified and seeking views on the objectives, scope and framework of the strategic action plan.

According to information given by ICAO to the 29th Assembly, responses to the State Letter were received from 47 States, the Airports Association Council International (AACI), the International Air Transport Association (IATA), and the International Co-ordinating Council of Aerospace Industries Associations (ICCAIA). Support for the Council's initiative for development of a strategic action plan was widespread. The identification of the forthcoming challenges was also widely accepted.

17. ICAO Assembly Working Paper, EC2/65-91/6.

Substantive and extensive comments were made by a large number of respondents regarding these challenges and proposed action to combat them.

The Council consequently established a Working Group, comprising Representatives of 10 States from all ICAO regions, to give detailed consideration to the challenges identified and the responses to the State Letter and develop a strategic action plan "to provide a structure and monitoring mechanism for the Organization's priority activities." This Group worked intensively in both formal and informal meetings over the period August 1991 to June 1992, in close co-operation with a multidisciplinary Secretariat team formed especially to participate in the activity concerned.

The Working Group placed particular emphasis on consultation with the industry, as well as with States, so as to ensure that the strategic action plan would be relevant, practical and contemporary. Accordingly, the Group reviewed the views of States, AACI, IATA and ICCAIA as expressed in their replies to the State Letter. The Group also received presentations by the Directors General of AACI and IATA as well as the IFALPA Representative to ICAO on their perceptions of the major challenges facing international civil aviation and of ICAO's future role.

As a preliminary step, the Working Group classified the major challenges to international civil aviation into three basic types in a format which would provide flexibility for coverage of a broad range of issues. The currently identified challenges for international civil aviation at large were classified into these three types as follows:[18]

| A. Technological/technical | B. Economic/financial | C. Human/social |
|---|---|---|
| Communications, navigation and surveillance/air traffic management (CNS/ATM) | Commercial developments and economic regulation | Unlawful interference |
| Airport and airspace congestion | Financial resources | Human factors in flight safety |
| | | Environmental protection |
| | | Human resources |

However, while noting that the role of ICAO in these challenges was essentially one of an operational or regulatory nature, the Group made its observation clear that most of the challenges had some legal content. When considered together with other issues and challenges reflected in the above format, the legal issues concerned were of considerable importance for civil aviation in general and ICAO in particular, which led the Group to establish a fourth classification which related to legal aspects of the challenges.

18. ICAO Assembly Working Paper, A29-WP/39 EX/8, Appendix at 8 (1992).

The Working Group also proceeded to analyze the nature of each of the individual challenges concerned and their legal aspects, the related action already in hand by ICAO, the views of States and the industry, and the relevant activities of other bodies, including some which are not aviation-based but which are increasingly having implications for the work of ICAO (e.g. the European Community and the ITU). Finally, the Group considered the need for additional action, if any, by ICAO in relation to each of the challenges concerned. Further, the Group considered the more general need for increased emphasis on ratification or implementation of instruments of international air law, standards, recommended practices and related material.

This analysis established both a basis for action in relation to each of the currently identified challenges and provided a framework for developing an overall strategy for ICAO.

### c) The Strategic Action Plan

Based on the conclusions of its Working Group, the Council developed a structure for ICAO's SAP, which, although in its fetal stage, represents a blueprint for the Organization which needs to be developed over the 1996-1998 triennium.

Council noted there were a number of forces at work which underlined the need for leadership by a strong and effective ICAO. First, the Council observed that there is increasing involvement of non-aviation sectors (for example, satellites and communications) in civil aviation and an increasing consideration of aviation within the context of wider policy initiatives (for example, the trade negotiations under the auspices of the General Agreement on Tariffs and Trade or the environmental protection measures both within and outside the United Nations system). Second, there is an increased "globalization" of civil aviation itself, exemplified by foreign and multinational ownership, alliances of airlines, joint marketing arrangements, computer reservation systems, and multinational approaches to both technical and economic regulation of air transport services, along with increasing interaction between domestic and international air transport services. Third, there are also increased economic, political, environmental and other social pressures on civil aviation policy or operations, particularly on a national or regional basis, including rapid transitional changes in socio-economic systems in some regions which have global effects. At the same time, in many States, civil aviation still has to be considered as an essential public utility which contributes at a fundamental level to socio-economic development and, in some areas, provides service to otherwise inaccessible points.

It was recognized that the need to respond to these pressures and the

increased complexity and cost of aviation equipment (which is continually being enhanced) have also increased financial constraints on civil aviation. The SAP was therefore designed to address these constraints which are believed to have a significant bearing on a fundamental concern of the Council: the continuing divergence amongst individual States and regions in the level of conformity with existing Standards and Recommended Practices (SARPs), with potential global implications for the safety, regularity and efficiency of civil aviation.

The importance of the changing context for civil aviation has repeatedly been echoed in the presentations to the Council Working Group by representatives of the industry. These representatives stressed *inter alia* that, in their view, ICAO needed to revise its role, structure, and functioning to avoid the risk of being overtaken, either by technology or by the emerging roles of other global or regional bodies.

In light of the above considerations, the Council formulated the following premises as the basis for development of the SAP:

1. There is a need for ICAO to place greater emphasis on bridging disparities among States and regions by assisting States in addressing the implementation of facilities, services and procedures required for consistency in the application of SARPs;
2. There is a need for ICAO to promote consistency between SARPs and the provisions applying to domestic services where these provisions have implications for international services;
3. It is necessary for ICAO to develop new SARPs in a timely manner, but only where these are essential to a globally co-ordinated approach to the introduction of new equipment or techniques and/or where they have positively identified economic benefits;
4. ICAO should place greater emphasis on timely ratification of instruments of international air law;
5. ICAO should assign more meaningful priorities to work program tasks and to focus on issues of greatest priority;
6. In order to accomplish the above, ICAO should project a higher public profile and play a stronger and more catalytic role in co-ordinating and representing international civil aviation;
7. ICAO should develop improved communications with its Contracting States to establish closer relations with other organizations, including both public and private sector bodies in civil aviation and non-aviation bodies where relevant, and to ensure effective and timely consultation, proper co-ordination and avoidance of duplication of effort; and
8. There is a continuing need for ICAO to review the working procedures of the Council and all subordinate bodies as well as the structure and functioning of the Secretariat, to ensure greater efficiency, flexibility and speed of reaction, to release resources for priority tasks, and to reflect the increasingly multidisciplinary nature of many of these tasks.

### D) PROGRESS OF THE SAP

The Council intended very early in the 1992-1994 triennium to translate the blueprint of broad strategy contained in the existing structure of the SAP into specific implementation programs. This was expected to be done by linking the Plan directly to the Program Budget, defining specific tasks, determining priorities and allocating responsibilities for these tasks, and setting target dates for their implementation.

The Council was conscious that the tasks concerned represented only new challenges or challenges with over-riding priority, and it does not underestimate the importance of the large volume of traditional recurring work not covered by the SAP. However, the Council believed that there was a need for a critical review of all traditional tasks to ensure that only those essential for the future were retained. Therefore, the Council intended to undertake such a review on the basis of broad objective criteria such as:

1. the current or future relevance of the task;
2. the direct relevance and interest of the task to a substantial number of States in different regions;
3. whether the task had a clearly defined output which would make an effective contribution to the safe, regular, efficient and economical development of international air transport services;
4. whether the output of the task provided an effective contribution by international air transport services to the socio-economic development of States;
5. whether the task partly or wholly duplicated work which was being performed satisfactorily elsewhere; and
6. whether the output of the task warranted its fully allocated costs in relation to the overall Program Budget.

The Council also intended to study and modify, as necessary, the structure and functioning of the Organization including, *inter alia*:

1. continuing review of the working procedures of the Council and its subordinate bodies, including the functioning of the Secretariat, with an emphasis on multidisciplinary program management;
2. consideration of adapting existing work of other bodies for incorporation into Annexes or advisory material;
3. continuing review of policy regarding technical co-operation activities; and
4. a substantive review of all Assembly Resolutions in force with a view to assessing their continuing relevance, to streamline and clarify the current and future roles and activities of the Organization.

Apart from carrying out the above work, the Council intended to continue developing the SAP by reviewing, updating and rolling forward

periodically to reflect developments regarding the major challenges as presently defined, and new priority challenges that may arise.

While all this activity would require some diversion of increasingly scarce resources from other tasks, the Council believed that the benefits to be achieved from identification of priorities and increased productivity and efficiency would more than justify the effort. The Council also believed that the work concerned was of fundamental importance if ICAO was to continue to respond effectively to, and not be overtaken by, the rapidly changing civil aviation context.

Therefore the SAP is intended to provide a framework for the priority activities of ICAO within the context of the major challenges facing international civil aviation into the next century. In the context of this objective, ICAO believes that, out of necessity, the SAP can highlight only immediate and direct efforts focused on key issues. The many other activities of the Organization, because of their recurring nature or currently lower priority, do not feature specifically in the Plan, although they are of considerable importance and often underpin the strategic objectives of ICAO as are reflected in the Chicago Convention and developed accordingly by the international aviation community at Assembly sessions of ICAO and other relevant fora.

The basic structure for the SAP was adopted by the Council in July 1992. The Council has now further developed the Plan to incorporate a more detailed program of action on each issue, to monitor these programs on a continuing basis, and to update and roll the Plan forward periodically to reflect new developments regarding the major challenges facing international civil aviation as presently defined as well as new priority challenges that may arise.

### E) Status of ICAO Regulations Relating to the SAP

The foregoing discussion leads to the inexorable question: whether ICAO can reasonably expect the implementation of its SAP by its member States. The inherent difficulty of course, which effectively precludes one from answering this question with an unreserved "yes," lies in the intrinsic fact that the implementation of ICAO Standards and Recommended Practices is by no means a legal obligation on the part of States, at least from the standpoint of international law. Notwithstanding the fact that international law has been the subject of criticism on the question of its mandatory powers and the effect of sanctions under international law, obligations of States towards ICAO Standards and Recommended Practices (SARPs) seemingly occupy a much lower profile than those which are attendant upon the adherence to principles of international law.

The 29th Session of the ICAO Assembly, held in Montreal in 1992, noted that there were widely expressed and fundamental concerns regarding, *inter alia,* the inadequate and often non-representative level of responses to State letters regarding the implementation of ICAO SARPs, the costs (to ICAO and States) of implementation, the potential for differing interpretation by individual States of ICAO SARPs. Underlying these concerns is the need to assure no dilution of safety standards for civil aviation anywhere in the world. In order to address these concerns, the Assembly adopted Resolution A29-3, which recognizes *inter alia* that:

1) the interdependence of international civil aviation makes aviation a prime candidate for benefits deriving from the concept of globalization of which global harmonization of national rules for the application of ICAO standards is an important element;
2) international aviation now comprises: mega-air carriers, both national and multinational, and various alliances of airlines for global operation; transnational ownership of airlines; and multinational manufacture of aeronautical products;
3) States have agreed in the Aircraft Agreement of the General Agreement on Tariffs and Trade (GATT) to ensure that civil aircraft certification requirements and specifications on operating and maintenance procedures are not barriers to trade;
4) global harmonization of national rules in international civil aviation is desirable for effective implementation of the GATT obligation;
5) individual States interpret and apply the ICAO safety standards differently resulting in dissimilar operations which can be costly;
6) a relatively small number of States generally reply to the ICAO Secretariat's requests for comments or agreement on ICAO proposed standards, resulting in decisions being based on a relatively small number of responses with consequences that are neither helpful to achieve rule harmonization nor in the best interest of the safe and orderly development of international civil aviation;
7) global rule harmonization could facilitate the implementation of the Protocol Article 83 *bis* of the Convention on International Civil Aviation that authorizes States to transfer to each other by agreement certain safety functions; and
8) certain States have initiated bilateral and multilateral programs in the interest of harmonizing national rules, to correct costly incompatibility problems, and to facilitate more effective competition in international civil aviation.

Accordingly, the Resolution urges States and groups of States which have not already done so, to take positive action to promote global harmonization of national rules for the application of ICAO standards and to use in their own national regulations, as far as practicable, the precise language of ICAO regulatory standards in their application of ICAO standards, and to seek harmonization of national rules with other States in respect of higher standards they have in force or intend to introduce. The Reso-

lution also urges all States to respond to the ICAO Council's requests for comments and agreement or disagreement on proposed standards of ICAO to prevent decisions being taken on the basis of a small number of responses. Finally, the Resolution requests the ICAO Council to pursue the enhancement of ICAO Standards and to study the feasibility of establishing a multilateral monitoring mechanism.

Resolution A29-3 is inextricably linked to ICAO's SAP, and ties in the compelling need for States to conform with ICAO Standards - clearly a central strategic issue for the achievement of success of the Plan. The question of compliance with, or notification of, differences from international Standards is one which has concerned the Organization for many decades. Since 1950, the Council has regularly addressed the implementation of the Annexes to the Convention in relation to the provisions of Article 38 of the Chicago Convention. Nevertheless, previous efforts to improve the situation have tended to focus on specific aspects of the various problems and the Council has felt that a more fundamental and far-reaching evaluation should be undertaken. Accordingly, the enhancement of ICAO SARPs has now become a critical issue and continues to be subject to sustained discussion in the ICAO Council.

The substantive conclusions from the Council's consideration provide the comprehensive response of the Organization to Resolution A29-3, more specifically regarding the statutory situation of ICAO Standards, the challenges in implementing Standards, and a strategy for improvement of their implementation.

### f) Statutory Status of ICAO SARPs

ICAO mainly promulgates its SARPs through its 18 Annexes to the Chicago Convention. Article 54(l) of the Chicago Convention prescribes the adoption of international Standards and Recommended Practices and their designation in Annexes to the Convention, while notifying all contracting States of the action taken. The fundamental question which has to be addressed *in limine*, in the consideration of the effectiveness of ICAO's SARPs, is whether SARPs are legislative in character. If the answer is in the affirmative, then, at least theoretically, one can insist upon adherence to SARPs by States.

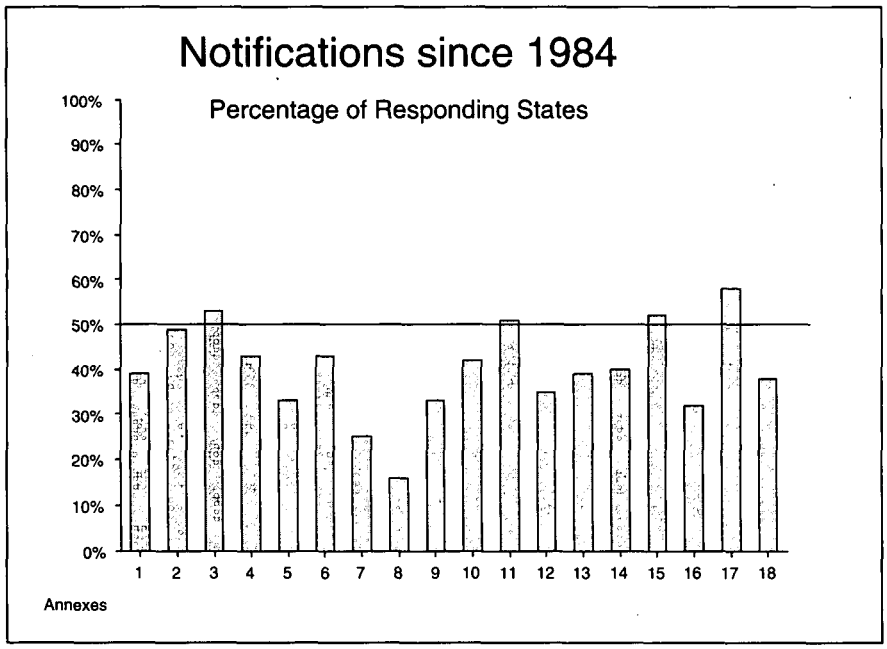
The adoption of SARPS was considered a priority by the ICAO Council in its Second Session (September 2 - December 12, 1947)[19] which attempted to obviate any delays to the adoption of SARPs on air navigation as required by the First Assembly of ICAO. SARPs inevitably take two forms: 1) a negative form that States shall not impose more than certain maximum requirements and 2) a positive form that States shall

19. *Proceedings of the Council*, ICAO Doc. 7248-C/839, 2nd Sess., at 44-45 (1948).

take certain steps as prescribed by the ICAO Annexes.[20]

In practical application, SARPs do not carry the full import that is theoretically expected of them. As illustrated by the figure below[21], the compliance of States with the requirement of Article 38 for the notification of differences from the Standards subsequently adopted is far from adequate and fails to reflect the true position of States in regard to SARPs.

STATES NOTIFYING COMPLIANCE OR DIFFERENCES TO AMENDMENTS OF ANNEXES 1984–1994




The above graphic reflects the position of responses by States with regard to the provisions of each Annex by percentage at the end of 1994. This is based on States' notifications to ICAO of their compliance or differences over the ten-year period 1984-1994. The response level shown varies from 58 percent (Annex 17) to 16 percent (Annex 8). According to ICAO:

> this is using a generous measure, since it includes for example a State which has responded in the case of one Amendment to an Annex but not in the

20. Annex 9 to Chicago Convention, ICAO, Facilitation Foreword, 9th ed. (1990).
21. ICAO Assembly Working Paper, A31-WP/56 EX/19 (1995).

> case of several other Amendments to the same Annex. A more accurate measure would be one relating to each individual Amendment, but this is very difficult to obtain at present due to the format in which the responses are recorded. As an indication of current response levels, however, the most recent figures on notification of compliance or differences with the latest (pre-1994) Amendment to each of the eighteen Annexes show that an average of only 25 percent of contracting States have responded.[22]

Therefore, it is impossible at the present time to indicate with any degree of accuracy the state of the implementation of regulatory Annex material. This is because for a considerable time a large number of contracting States have not notified ICAO of their compliance with or differences to the Standards in the Annexes. ICAO observes that it would probably be incorrect to assume that all of the non-responding States have not incorporated the Standards of the relevant Annexes in their national regulations; it would be equally incorrect to assume that the non-responding States have fully implemented the relevant Standards.[23]

### g) Challenges in Implementing ICAO Standards

One of the issues being addressed by ICAO is the need for a formulation by the Organization of a comprehensive response of ICAO to Resolution A29-3, taking into account the related tasks planned or already in hand by the subsidiary bodies. Therefore, one of the main goals of ICAO at present is to find ways to create a greater interest and participation in the formulation of SARPs by States and to strengthen the Organization's capability of monitoring the actual status of differences from or compliance with Standards. The latter element is especially important, as differences filed by States do not always appear to be representative of reality.

ICAO believes there are a number of reasons that prevent States from indicating their compliance, or otherwise, with ICAO SARPs. These may include:

1. Insufficient communication between ICAO and recipient States; loss of documentation by recipients and delays in delivering the documentation to the responsible party beyond the target date for replies; organizational structures of civil aviation authorities which render difficulties in identification of, and routing to, the responsible party;
2. Insufficient resources within States to expeditiously consider and process ICAO documentation and to implement the relevant Standards into their national legislation;
3. Difficulty in comprehending and interpreting Annex material as well as subject matter which is beyond the level of expertise of the recipient administration; and

22. *Id.* at 4.
23. *Id.*

4. Possible lack of understanding about the role of States in the consultation phase of the development of ICAO Standards.[24]

More fundamentally, it is always a possibility that States may have insufficient resources either to implement Standards or to advise ICAO of non-compliance with the relevant Standards. In this context, it should be noted that recent initiatives by States, in an effort to address the concerns raised by the 29th Session of the Assembly and assure the safety of their citizens, have raised fundamental questions about the effectiveness of the multilateral safety assurance afforded by the Chicago Convention.

ICAO feels that the need to remind contracting States on an ongoing basis of their obligation to notify the Organization of any differences to the Standards in the Annexes to the Convention remains a critical factor in its advances towards more State participation in its regulatory process. Furthermore, the level of implementation of those Standards into States' national legislation and procedures has to be improved. These two elements complement each other; if too many States simply notify ICAO of their non-implementation of the safety Standards, States could no longer assume a mutual level of minimum safety Standards and would have to resort to a bilateral or regional approach in order to ensure an acceptable safety oversight between themselves.

Some catalysts for the global implementation of Standards and the harmonization of national rules have been identified as the bilateral and multilateral co-operation of States. Organizations such as the European Civil Aviation Conference, the African and Latin American Civil Aviation Commissions, the Conference of Directors General of Civil Aviation of the Asia and Pacific Regions, the Commonwealth of Independent States, and other groups, including trading blocs, may be considered as effective vehicles for the promulgation and adoption of agreements and understandings in this regard.

Another significant issue is an increasing need for co-operation in the regulatory field for States in a particular geographic setting and with certain common regulatory needs which are dictated by technical, operational and environmental needs and motives. Recent years have witnessed the growing significance of regional organizations that are addressing traditional ICAO activities such as technical harmonization, standardization, and regulatory matters. These activities are likely to intensify in the near future and may well affect the role of ICAO as the principal intergovernmental organization responsible for the regulation and co-ordination of international civil aviation.

ICAO's strategy for the development and implementation of ICAO

24. *Id.* at 5.

SARPs purports to make use of available modern technological tools but at the same time aim at more basic issues, *i.e.* to:

1. ascertain and document the actual status of implementation of ICAO SARPs and the extent of differences to Standards, and improve communication channels among headquarters, regional offices, and States to facilitate this objective;
2. improve the States' awareness of the vital role they play in the multilateral safety assurance provided for in the Chicago Convention, which is founded upon the effective implementation of ICAO SARPs;
3. similarly, create or improve the States' awareness of their role in the development of ICAO SARPs, with a view of encouraging more States to be actively involved in the formulation process;
4. pursue systematic analysis of the reasons for any non-implementation of SARPs and differences to Standards;
5. develop realistic programs, including the ICAO Technical Co-operation programs (and their funding) to assist States in implementing SARPs, where necessary; and
6. establish adequate co-ordination and co-operation with States in a regional context in the field of rule harmonization and the implementation of standards.

ICAO claims that such a strategy can be implemented by applying the following measures:

1. enhancing the role of its regional offices in assisting States with the implementation of Standards, raising awareness of responsible officials at all levels to ensure that the objectives of paragraphs 1, 2, and 3 above are met;

a) implementing measures specifically designed to deal with the development and implementation of SARPs, including the publication of relevant articles in the ICAO Journal and by using slide and video programs to be shown as part of missions and during ICAO familiarization courses;

b) making Annexes more comprehensive and accessible and provide, where necessary, guidance material related to individual Annexes;

c) expanding the Foreword of Annexes to include more basic information, including the interpretation of Article 38 of the Chicago Convention, and on what kind of differences should be published in the Aeronautical Information Publication (AIP); and

d) continuing to make sure that bodies responsible for the development of SARPs formulate SARPs in simple, clear language and in an efficient manner.

Simultaneously, it has been proposed that efforts should be further strengthened to find out the States' reasons for not responding to State letters in general and for not communicating their status of implementation.

### H) ICAO's Statutory Status Relating to SARPs

The United Nations was created during World War II. Although originally the international community questioned whether this war-time union of States could satisfactorily and appropriately be converted into a peacetime organization for international co-operation, the creation within the Economic and Social Council (ECOSOC) of the United Nations of various specialized agencies, ICAO being one, which were brought into relationship with the United Nations resolved many questions.[25] The ECOSOC may enter into agreements with these specialized agencies, coordinate activities of the agencies through consultation, and define terms on which the agency concerned would be brought into relationship with the United Nations.[26]

Conceptually, ICAO shares the same international status as the United Nations, while members of the ICAO Secretariat are international civil servants. The establishment of ICAO as the specialized agency of the United Nations which is responsible for regulation of international civil aviation brings to bear the need to inquire as to why such specialized agencies are created instead of conferring functions which are to be performed by them upon the United Nations itself. One of the reasons adduced is that the general organization of the United Nations, and its personnel, could not take on all of the specialized activities handled by the various specialized agencies. Another reason adduced is that a single organization with greatly increasing administrative personnel would have been too cumbersome a bureaucracy.

Be that as it may, the question as to what status ICAO holds in the international community, which in turn would shed some light as to the status of its regulations, would largely lie in the definition of the word "agency." On the term "Specialized Agency" one commentator has observed:

> [t]hey are Specialized as to subject-matter, of course, but the implications of the second term may not be so clear. These Agencies are in fact, as the general UN is not, examples of international administrative agencies . . . whose chief function is the administrative one, although the conference or representative organs associated with them (or with which they are associated), and the legislative or policy determining activities of the latter, are not to be disregarded . . . .
>
> The relationships to be developed between Specialized Agencies and the UN constitutes a major problem of international statesmanship. As in the case of regional organizations, whatever the value of the special institutions of the situation would be difficult and dangerous unless adequate measures for co-ordination of the various elements could be worked out. This is a

25. U.N. Charter art. 57.
26. U.N. Charter art. 63.

> problem for searching analysis in principle and for careful application in practice. If the Specialized Agencies are created by the UN suitable co-ordination should be possible, but if it be a question of coordinating with the UN an Agency created independently the task is more difficult.[27]

The above comment supports the view that a certain coordination exists between specialized agencies and the United Nations on the basis of their relationship *ipso facto*. Hence, it may be inferred by this argument that the regulations promulgated by a specialized agency should have similar status and leverage as any created by the parent United Nations.

In the present context of international relations, however, the status of a specialized agency and that agency's regulations cannot be dismissed in such a simplistic manner. The answer to the question would inevitably lie in an analysis of State sovereignty, the character of international law, and international government.

### i) State Sovereignty

In 1956, Professor Bin Cheng addressed the principles governing post World War 2 sovereignty over airspace as enunciated in Article 1 of the Chicago Convention[28] and concluded, "[t]he now firmly established rule of international law that each State possesses complete and exclusive sovereignty over the airspace above its territory means that international civil aviation today rests on the tacit acquiescence or express agreement of States flown over."[29] Shawcross and Beaumont define sovereignty in international law as the right to exercise the functions of a State to the exclusion of all other States in regard to a certain area of the world.[30] In international aviation the concept of sovereignty is the fundamental postulate upon which other norms and virtually all air law is based.[31] Post 1944 attitudes towards the concept of sovereignty in airspace, and the philosophy of air law, range between the unlimited public law right of a State to exercise sovereignty over its airspace and the idea of collective international participation by States in matters of commercial aviation. Professor Goedhuis identifies the idea of "free traffic" (as opposed to the exclusivity of the sovereignty principle) as a constructive element of aviation which furthers life and raises it to a higher level.[32] This view is sup-

27. Pitman B. Potter, An Introduction to the Study of International Organization, 273-74 (1935).

28. Convention on International Civil Aviation, Dec. 7, 1994, art. 1, 15 U.N.T.S. 295 (providing that contracted States recognize every State has complete and exclusive sovereignty over the airspace above its territory).

29. Bin Cheng, The Law of International Air Transport 3 (1962).

30. Shawcross and Beaumont, Air Law 15 (1977).

31. *Id.*

32. D. Goedhuis, Idea and Interests in International Aviation 32-33 (1947), *quoted*

ported by the claim that general principles of international law demand that sovereignty of States should be limited by the principle of freedom of peaceful traffic.[33] Be that as it may, a view advocating the free use of airspace of a country by aircraft of foreign nationalities would give rise to a dichotomy: that there should be freedom of aviation with a minimum of restrictions or none at all; or that international air transport should be firmly regulated. Professor Lissitzyn analyzes the concept of sovereignty in its modern development as having three basic principles: 1) that each State has exclusive sovereignty over its airspace; 2) each State has complete discretion as to the admission of any aircraft into its airspace; and 3) that airspace over the high seas and other areas not subject to a State's jurisdiction is *res nullius* and is free to the aircraft of all States.[34]

In the present context, however, one can observe that air law has bloomed from being a series of exclusive rights—first in private law and then in public law—and has also set parameters within which a host of other progressive objectives may be attained. The concept of sovereignty now entails that each State take responsibility of being conscious of its obligations to the international legal community. The sovereignty principle has therefore evolved into a cohesive system of co-existence in the air by States which respect the exclusive sovereignty rights of each State over its airspace. Mutual obligations between States have brought as their corollary a deep respect for the principles of international law and the rights of individual States.

The basic concept of State sovereignty has evolved with the commercial exigencies of international civil aviation. To keep up with the world demand for air transport, airlines now share each others' codes and combine their flights to offer the customer a composite package of air transport that would ensure a smooth air trip. The millions who travel reserve flights on sophisticated computer reservations systems and their information is sent in advance to their destination electronically. Passports are read at airports by machine, and baggage is bar-coded. The passenger's comfort is ensured by worldwide regulation on smoking in aircraft, and the effects of aviation on the environment is studied carefully. These trends show a marked tendency of States welcoming international efforts at regulation.

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*in* Z. Joseph Gertler, *Order in the Air and the Problem of Real and False Options*, 4 ANNALS OF AIR AND SPACE L. 93, 100 (1979).

33. *Id.*

34. OLIVER JAMES LISSITZYN, INTERNATIONAL AIR TRANSPORT AND NATIONAL POLICY 365 (1983).

### j) International Law

The Permanent International Court of Justice (the predecessor to the International Court of Justice) decided in the famous *Lotus* case of 1927:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[35]

The aftermath of World War II saw the advent of the United Nations and the United Nations Charter, the latter of which proclaims that the United Nations is based on the sovereign equality of all members. The Charter also provides that less powerful nations recognize the pre-eminence of the Great Powers as guardians of international peace and security.[36] With the exception of this predominant innovation of post World War II accord, the rest of the Charter seems to accord complacently with the basic framework of international law which existed under the Peace of Westphalia. The International Court of Justice (ICJ) in 1949 gave judicial recognition of the United Nations as a subject of international law in the *Reparation for Injuries Case*,[37] where the ICJ pronounced the end of the old orthodoxy that States are the only subjects of international law. The ICJ advised that the United Nations, though not a State, had the capacity to bring certain kinds of claims directly against a State under the rubric of international law.

Ever since the United Nations General Assembly convened its first session in 1946 the many contributions of the United Nations to the development of international law have been both significant and sustained. The General Assembly has been prolific in adopting numerous resolutions, declarations and conventions through diplomatic conferences. Guided by Article 13 of the United Nations Charter which places an obligation on the General Assembly to initiate studies and make recommendations for encouraging the progressive development of international law

35. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 9, at 18.

36. U.N. Charter art. 24, para 1 (providing that members of the United Nations give primary responsibility to the Security Council for the maintenance of international peace and security and recognizing that the Security Council would act on behalf of all member States of the United Nations); U.N. Charter art. 23 (providing that the Security Council shall consist of fifteen members of the United Nations); U.N. Charter art. 25 (providing that members of the United Nations agree and accept to carry out the decisions of the Security Council in accordance with Charter provisions).

37. 1949 I.C.J. 174.

and its codification,[38] the Assembly established the International Law Commission in 1947. The Commission's members were entrusted with the formulation of principles of international law. One of the first tasks of the Commission was to write a Draft Code of Offenses Against Peace and Security of Mankind, which the Commission completed in 1954. The Draft Code provided that any act of aggression, including the employment of armed forces by one State against another State for any purpose other than national or collective self defense or in pursuance of a decision or recommendation of a competent organ of the United Nations, was an offense against the peace and security of mankind. The code also stipulated that any resort to an act of aggression by one State against another State was a similar offense.[39]

The sense of international responsibility that the United Nations ascribed had reached a heady stage at this point, where the role of international law in international human conduct was perceived to be primary and above the authority of States. In its Report to the General Assembly, the International Law Commission recommended a draft provision which required "[e]very State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law."[40] This principle forms a cornerstone of international conduct by States, and provides the basis for strengthening international comity and regulating the conduct of States both internally (within their territories) and externally towards other States. This principle effectively precludes States from pursuing their own interests with disregard to the principles established by international law.

### K) INTERNATIONAL GOVERNMENT

The roles performed by each of the players in international discourse and regulation have a compelling effect on the specialized agencies of the United Nations. While it is not disputed that the international community comprises a number of separate States which forms a community of nations, and that the existence of these independent States is essential to the existence of an international organization, the multiplication of States makes the task of international co-operation more complicated and more difficult. Often, States tend to pursue their national interests and legislation relentlessly, purely on the ground that State sovereignty requires States to hold their own in international fora. This attitude may fre-

38. *See* U.N. CHARTER art. 13.1.a.

39. *Draft Code of Offenses Against Peace and Security of Mankind*, U.N. GAOR Int'l Law Comm. art. 2, at 64-65.

40. *Report of the International Law Commission to the General Assembly on the Work of the 1st Session*, U.N. GAOR Int'l Law Comm., U.N. Doc. A/CN.4/13 at 21 (1949).

quently tend to obfuscate the need to take collective international measures when an issue that requires a certain degree of homogeneity in the international community arises. Potter observes:

> It is a familiar observation of political science that a moderate amount of homogeneity is indispensable as a basis for law among units of any order. Some common denominators among nations must be found in the intercourse among them. If there are no common interests and standards there can be no legal community. . . . At this point arises the thought that a substantial international spiritual unity or community must precede any effective international organization and the denial that any such thing exists . . . . The two elements—spiritual community and practical organization—interact one upon another moreover to produce results not anticipated by an oversimplified analysis.[41]

The premise that a common denominator between States is essential to coalesce the States into one conceptual group in implementing international regulations is admittedly the starting point. In the final analysis, the effectiveness of regulation would lie only in adherence by States on a collective basis. The challenge is therefore to find a common basis that would add credence to Potter's premise of homogeneity. This basis has been provided by Wasssenbergh who observes:

> To find a solution to conflicts between States with regard to regulation of international civil aviation and notably between a big and small State, one should perhaps approach the problem by bearing in mind that the States are the *locum tenentes* of their nationals in the international sphere, not only representing their citizens as a national group but also, and more importantly, representing each individual as a subject of international society as well as of his State. In other words, a government must consider the interests of its citizens also as members of a society beyond that government's own bounds.[42]

Wassenbergh's proposal imputes to States an ineluctable international responsibility towards their citizens, requiring States to align their local policies to be in consonance with international policy, thereby assuring citizens a certain participation in the international law making process. This argument is consistent with the sense of international responsibility that the United Nations ascribed to itself in recognizing that the role of international law in international human conduct was primary and above the authority of States. It also cleverly binds the role of States, as units of the international order, to the role of international law in the international community of States. According to this premise, the right of a car-

41. PITMAN B. POTTER, AN INTRODUCTION TO THE STUDY OF INTERNATIONAL ORGANIZATION (1935).

42. H.A WASSENBERGH, ASPECTS OF AIR LAW AND CIVIL AIR POLICY IN THE SEVENTIES 5 (1970).

rier to operate air services anywhere in the world and the duty of a State to enforce international regulations on air safety, security, facilitation, and airport planning *inter alia*, may be viewed as internationally recognized and enforceable duties.

One perplexing question that remains unanswered concerns the fact that States have seemingly regarded ICAO's Annexes to the Chicago Convention, which are all of a technical nature, as non-binding. The Standards contained in the Annexes all carry explicit requirements wherein States "shall" comply with the regulations. Moreover, The Chicago Conference of 1944 (the precursor to the Chicago Convention) explicitly recognized that ICAO would exercise power over States in requiring adherence to its regulations in the technical field. In the words of the delegation of the United States at the Conference:

> It is generally agreed that it is true, in the purely technical field, a considerable measure of power can be exercised by, and indeed must be granted to, a world body. In these matters, there are few international controversies which are not susceptible of ready solution through the counsel of experts. For example, it is essential that the signal arrangements and landing practice at the Chicago Airport for an intercontinental plane shall be similar to the landing practice at Croydon, or LeBourget, or Prague, or Cairo, or Chungking, that a plane arriving at any of these points, whatever its country of origin, will be able to recognize established and uniform signals and to proceed securely according to settled practice . . . . A number of other similar technical fields can thus be covered; and, happily, here we are in a field in which science and technical practice provide common ground for all.[43]

The graphic reflecting the responses of States to the Annexes (which appears elsewhere in this paper) clearly shows this not to be the case. Over the years, some States have not even responded with their differences to the Standards contained in the Annexes.

Annexes are adopted by the Council[44] which is appointed by the ICAO Assembly, the governing body of ICAO. As such, the Annexes emanate from the highest authority in ICAO. Unfortunately, this *status quo* also gives rise to an anomaly where States make their own regulations with regard to international civil aviation and disregard the regulations at the same time (as some States do in disregarding the requirements of Articles 37 and 38 of the Chicago Convention).

In the *North Sea Continental Shelf Case*[45] the International Court of Justice (ICJ) held that legal principles incorporated in Treaties, such as the principle in Article 37 of the Chicago Convention calling for each

43. *Proceedings of the International Civil Aviation Conference* 59, Chicago, Ill.: Nov. 1-Dec. 7 1944, U. S. Gov't Printing Office: Wash. (1948).

44. Chicago Convention, Dec. 7, 1944, art. 54(1), 15 U.N.T.S. 295, 334.

45. 1969 I.C.J. 4, at 41.

State to Collaborate in securing uniformity in ICAO regulations, become customary international law by virtue of Article 38 of the 1969 Vienna Convention on the Law of Treaties. Article 38 recognizes that a rule set forth in a treaty would become binding upon a third State as a customary rule of international law if the rule is generally recognized by the States. Article 37 of the Chicago Convention, which designates ICAO to adopt international Standards and Recommended Practices (for the common good of humanity), arguably becomes a principle of customary international law, or *jus cogens*. Obligations arising from *jus cogens* are considered applicable *erga omnes*, which means that States owe a duty of care to the world at large in adhering to Article 37 of the Convention. The ICJ in the *Barcelona Traction Case* held:

> [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis a vis* another State in the field of diplomatic protection. By their very nature, the former are the concerns of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[46]

The International Law Commission has observed of the ICJ decision, "[i]n the Court's view, there are in fact a number, albeit limited, of international obligations which, by reason of their importance to the international community as a whole, are - unlike others - obligations in respect of which all States have legal interest."[47] The views of the ICJ and the International Law Commission, which have supported the approach taken by the ICJ, give rise to two possible conclusions relating to *jus cogens* and its resultant obligations *erga omnes*:

1. obligations *erga omnes* affect all States and thus cannot be made inapplicable to a State or group of States by an exclusive clause in a treaty or other document reflecting legal obligations without the consent of the international community as a whole; and
2. obligations *erga omnes* preempt other obligations which may be incompatible with them.

If it can be accepted that a principle of *jus cogens* creates obligations *erga omnes*, it becomes an undeniable fact that Article 37 of the Chicago Convention could be considered a peremptory norm of international law.

Therefore, it is appropriate to reconsider the legal position of States in terms of their obligation at international law when it comes to the States' responsibilities towards the Standards of the Annexes. As mentioned, ICAO has proposed numerous practical steps towards achieving

46. Barcelona Traction, Light and Power Company Limited, 1974 I.C.J. 253, at 269-70.

47. *Yearbook of International Law Commission*, 1976 U.N. GAOR Int'l Law Comm., Vol. II, Part One at 29, U.N. Doc. A/CN.4/SER.A (1976).

the enhancement of its Standards in order that a more effective approach towards encouraging States to comply with the requirements of the Chicago Convention be adopted. The ICAO SAP, which addresses current challenges posed by civil aviation, is heavily reliant upon the success of the implementation of these Standards. It is now up to the States themselves to consider how they could contribute to ICAO's efforts in this regard. The importance of the role of States in relation to aviation security cannot be over-emphasized.

## IV. Legal Legitimacy of the ICAO Council

The initial issue that has to be addressed when one considers the legal status of ICAO is whether the Chicago Convention and its Annexes (which give ICAO the regulatory power) contain provisions which admit of law making (legislative) powers of ICAO, and if so, to what extent such law could be promulgated under the Convention. The answer to this question lies in the extent to which the ICAO Assembly mandates the Council to exercise its quasi-legislative functions. The words "legislative power" have been legally defined as "power to prescribe rules of civil conduct,"[48] while identifying law as a "rule of civil conduct." The word "quasi" is essentially a term that resembles another and classifies it. It is suggestive of comparative analogy and is accepted as "the conception to which it serves as an index and its connection with the conception with which the comparison is instituted by strong superficial analogy or resemblance."[49] Therefore, the question *stricto sensu*, according to the above definition, is whether the ICAO Council now has power to prescribe rules of civil conduct (legislative power) or in the least a power that resembles by analogy the ability to prescribe rules of conduct (quasi-legislative power). Since legislative power is usually attributed to a State, it would be prudent to inquire whether the ICAO Council has law making powers in a quasi-legislative sense. Therefore, all references hereafter that may refer to legislative powers would be reflective of the Council's law making powers in a quasi-legislative sense.

Article 37 of the Convention mandates each contracting State to collaborate in securing the highest practical degree of uniformity in regulations, standards, procedures, and organization in relation to international civil aviation in all matters in which such uniformity will facilitate and improve air navigation. Article 38 obligates all contracting States to inform ICAO immediately if they are unable to comply with any such international standard or procedure and notify differences between their own

48. Schaake v. Dolly, 118 P. 80, 82 (1911).

49. People v. Bradley, 60 Ill. 390, 402 (1871). *See also*, Bouviers Law Dictionary and Concise Encyclopedia (3d ed., Vol. 11 (1914)).

practices and those prescribed by ICAO. In the case of amendments to international Standards, any State which does not make the appropriate amendment to its own regulations or practices shall give notice to the Council of ICAO within 60 days of the adoption of the said amendment to the international Standard or indicate the action which that State proposes to take.

Article 54(l) of the Chicago Convention prescribes the adoption of international SARPs and their designation in Annexes to the Convention, while notifying all contracting States of the action taken. The adoption of SARPs was considered a priority by the ICAO Council in its Second Session (September 2 - December 12, 1947)[50] which attempted to obviate any delays to the adoption of SARPs on air navigation as required by the First Assembly of ICAO. SARPs inevitably take two forms: 1) a negative form that States shall not impose more than certain maximum requirements; and 2) a positive form that States shall take certain steps as prescribed by the ICAO Annexes.[51]

The element of compulsion that has been infused by the drafters of the Convention is compatible with the "power to prescribe rules of civil conduct" on a *stricto sensu* legal definition of the words "legislative power" as discussed above. There is no room for doubt that the 18 Annexes to the Convention or parts thereof lay down rules of conduct both directly and analogically. In fact, there is a conception based on a foundation of practicality that ICAO's international Standards that are identified by the words "contracting States shall" have a mandatory flavor (reflected by the word "shall"). At the First Session of the ICAO Assembly, the adoption of Assembly Resolution A1-31[52] confirmed the mandatory nature of a Standard with the definition contained therein:

> "Standard" means any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention.

Recommended Practices identified by the words "contracting States may" have only an advisory and recommended connotations (reflected by the word "may"). The same Assembly Resolution adopted the following definition:

> "Recommended Practice" means any specification for physical characteris-

50. *Proceedings of the Council 2nd Session*, Sep. 2 - Dec. 12, 1947, Doc 7248-C/839 at 44-45.
51. Annex 9 to Chicago Convention, ICAO, Facilitation Foreword, 9th ed. (1990).
52. ICAO Doc. 7670 Vol 1.

> tics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation, and to which Contracting States will endeavour to conform in accordance with the Convention.

Although the Assembly Resolution adopted this definition, it is interesting that at least one ICAO document[53] requires States under Article 38 of the Convention to notify ICAO of all significant differences from both Standards and Recommended Practices, thus making all SARPs regulatory in nature.

The above definitions were later confirmed as valid by *Appendix E* to Assembly Resolution A15-6 at the ICAO Assembly's 15th Session held in Montreal in June/July 1965. This Resolution called for a high degree of stability so that Contracting States could achieve the necessary stability in their national regulations relating to international air navigation. Another factor which the Assembly took into account when considering the role of SARPs was that in fixing the dates for their application, the Assembly laid down the requirement that sufficient time should be given for States to complete arrangements that are necessary for the implementation of SARPs and change their national regulations accordingly.

Other measures were taken by the ICAO Assembly at its 15th Session to ensure the implementation of SARPs. These measures addressed the financial and procedural problems that most States faced in the implementation of these provisions. Consequently, the Assembly established principles that were calculated to facilitate the implementation by States of *SARPS*. The States were requested to adapt their procedures accordingly to ensure the implementation of *SARPS*, thereby ensuring secure, safe, and regular air services.[54] Consideration was also given to the possibility that some States would find it difficult to keep their national regulations and operating instructions up to date with the Annexes. The Assembly therefore requested Council to seek measures to facilitate the task of States in instituting ICAO practices and procedures at their operating installations. For this purpose, the Assembly also authorized the Council to deviate from present policies and practices relative to the content, applicability, and amendment of the Annexes if the Council found such deviation unavoidable in order to accomplish the objective.

It is clear that in adopting the Annexes and including in them SARPs, the ICAO Assembly has ensured that the Council follows established customary practice at international law to ensure that SARPs had the effect of legal principles. The ICAO Assembly did so by making in-

53. *Aeronautical Information Services Manual*, ICAO Doc. 8126-0 AN/872/3.
54. ICAO Doc. 8528 A15-P/6.

roads into the laws of States and introducing a uniform regulatory structure within a particular community of States.

Another strong factor that reflects the overall ability and power of the Council to prescribe civil rules of conduct (and therefore legislate) on a strict interpretation of the word is that in Article 22 of the Convention each contracting State agrees to adopt all practical measures through the issuance of special regulations or otherwise to facilitate and expedite air navigation. It is clear that this provision can be regarded as an incontrovertible rule of conduct that responds to the requirement in Article 54(l) of the Convention. Further, the mandatory nature of Article 90 of the Convention, that an Annex or amendment thereto shall become effective within three months after it is submitted by the ICAO Council to contracting States, is yet another endorsement of the power of the Council to prescribe rules of State conduct in matters of international civil aviation. *A fortiori*, it is arguable that the Council is seen not only to possess the attribute of "jurisfaction" (the power to make rules of conduct) but also "jurisaction" (the power to enforce its own rules of conduct). "Jurisca-tion" can be seen where the Convention obtains the undertaking of contracting States not to allow airlines to operate through their air space if the Council decides that the airline concerned has not conformed to a final decision rendered by the Council on a matter that concerns the operation of an international airline.[55] This is particularly applicable when such airline is found not to conform to the provisions of Annex 2 to the Convention that derives its validity from Article 12 of the Convention relating to rules of the air.[56] In fact, it is relevant that Annex 2 (the responsibility for the promulgation of which devolves upon the Council by virtue of Article 54(l)) sets mandatory rules of the air, making the existence of the legislative powers of the Council an unequivocal and irrefutable fact.

Academic and professional opinion also favors the view that in a practical sense, the ICAO Council does have legislative powers. Professor Michael Milde says:

> The Chicago Convention, as any other legal instrument, provides only a general legal framework which is given true life only in the practical implementation of its provisions. Thus, for example, Article 37 of the Convention relating to the adoption of international standards and recommended procedures would be a very hollow and meaningless provision without active involvement of all contracting States, Panels, Regional and Divisional

55. Convention on International Civil Aviation, Dec. 7, 1994, art. 86, 15 U.N.T.S. 295

56. Convention on International Civil Aviation, Dec. 7, 1994, art. 12, 15 U.N.T.S. 295 (stipulating that over the high seas, the rules in force shall be those established under the Convention, and each contracting State undertakes to insure the prosecution of all persons violating the applicable regulations).

> Meetings, deliberations in the Air Navigation Commission and final adoption of the standards by the Council. Similarly, provisions of Article 12 relating to the rules of the air applicable over the high seas, Articles 17 to 20 on the nationality of aircraft, Article 22 on facilitation, Article 26 on the investigation of accidents, etc., would be meaningless without appropriate implementation in the respective Annexes. On the same level is the provision of the last sentence of Article 77 relating to the determination by the Council in what manner the provisions of the Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies.[57]

Professor Milde concludes that ICAO has regulatory and quasi-legislative functions in the technical field and plays a consultative and advisory role in the economic sphere.[58] A similar view had earlier been expressed by Buergenthal who states:

> the manner in which the International Civil Aviation Organization has exercised its regulatory functions in matters relating to the safety of international air navigation and the facilitation of international air transport provides a fascinating example of international law making . . . the Organization has consequently not had to contend with any of the post war ideological differences that have impeded international law making on politically sensitive issues.[59]

Paul Stephen Dempsey endorses in a somewhat conservative manner, the view that ICAO has the ability to make regulations when he states:

> In addition to the comprehensive, but largely dormant adjudicatory and enforcement jurisdiction held by ICAO under Articles 84-88 of the Chicago Convention, the agency also has a solid foundation for enhanced participation in economic regulatory aspects of international aviation in Article 44, as well as the Convention's Preamble.[60]

Another significant attribute of the legislative capabilities of the ICAO Council is the Council's ability to adopt technical standards as Annexes to the Convention without going through a lengthy process of ratification.[61] Eugene Sochor refers to the Council as a powerful and visible body in international aviation.[62] It is interesting, however, that although by definition the ICAO Council has been considered by some as unable

57. Michael Milde, *The Chicago Convention: After Forty Years*, 1X ANNALS AIR AND SPACE LAW 119, 126 (1984). *See also* JACOB SCHENKMAN, INTERNATIONAL CIVIL AVIATION ORGANIZATION 163 (1955).

58. *Id.* at 122.

59. T. BUERGENTHAL, LAW MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION 9 (1969).

60. PAUL STEPHEN DEMPSEY, LAW AND FOREIGN POLICY IN INTERNATIONAL AVIATION 302 (1987).

61. EUGENE SOCHOR, THE POLITICS OF INTERNATIONAL AVIATION 58 (1991).

62. *Id.*

to deal with strictly legal matters since other important matters come within its purview,[63] this does not derogate the compelling facts that reflect the distinct law making abilities of ICAO. Should this not be true, the functions that the Convention assigns to ICAO in Article 44, that ICAO's aims and objectives are "to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport," would be rendered destitute.

The above discussion makes it clear that the Chicago Convention, through the Assembly and Council of ICAO (legitimately and according to customary international law), has created a regulatory framework through its Annexes to legally implement its policy. The measures taken by the Assembly in promulgating the SARPs of ICAO in order that States may not find practical and philosophical difficulties in implementing such, together with the fact that the 18 Annexes ensure the establishment of a uniform regulatory structure in international civil aviation (thus bringing ICAO member States under one regulatory umbrella), is typical of the principles of customary international law. In the face of such compelling evidence, the fact that Article 54(l) of the Chicago Convention provides that the Annexes are named as such for convenience becomes irrelevant.

## V. A Revision of the Concept of Sovereignty

In keeping with emerging trends in civil aviation, a radical look at State sovereignty would have to be taken if other legal measures towards curbing terrorism are to be pursued. As Jennings stated in 1945, during the first decade of aviation:

> there were three principle schools of thought: the first held that this airspace, like the airspace over the open sea, was entirely free; the second held that it was subject to the territorial sovereignty of the subjacent state, the third held that there was a lower zone subject to absolute sovereignty and an upper zone of free airspace.[64]

The second view has held ground over the last 50 years, bringing with it the strong conviction of States that they are masters of their own destiny even in international policy making and issues involving international crimes. Ironically, jurists and courts have not endorsed this deep seated reliance by States on their sovereignty.

63. Alexander Tobolewski, *ICAO's Legal Syndrome...*, 1V Annals Air and Space L. 349, 359 (1979).

64. R.Y. Jennings, *International Civil Aviation and the Law*, Brit. Y.B. of Int'l L. 191, 194.

## VI. An International Criminal Court

An insurmountable problem in international criminal justice is the question "before what court and according to what law should an individual who has committed an international crime be tried?" There are two possibilities:

a) an individual criminal may remain at large and unpunished; and
b) an international criminal may be tried by the court of any State which can bring him physically within its jurisdiction.

The former reflects the present ludicrous state of international criminal law. The latter brings to bear the reversal of established international law, as was seen in the dangerous precedent created in the extradition from Argentina to Israel of war criminal Eichmann and his trial in Israel for international crimes.[65] This would create international "vigilantes."

The inherent defect in the application of municipal law to international crimes lies in the fact that a host of municipal courts, adjudicating on different or separate instances of criminality, may find difficulties in maintaining uniformity in application and interpretation. Uniformity of formulation could only be achieved if States followed an authoritative text when incorporating international criminal law into their municipal systems. Although this may be possible, it would certainly be a tedious and devious process. A more expedient method would be for States to except such a text in the form of an international code or convention, to be administered by one international body on the principle of international citizenship of people, irrespective of their nationality. To achieve this goal, the concept of State sovereignty as it exists today has to be revisited along the lines of the foregoing discussion.

Another factor that has to be taken into account in the creation of an international court of criminal justice is that, as a condition precedent, States should form a consensus on definitions relating to critical terminology. For instance, an international crime would have to be clearly defined and universally agreed upon. The word "aggression" would also have to be clearly spelled out.

During the Second World War the idea of an international criminal court gained increasing significance. It is not often realized how much effort was devoted to the practicalities of the creation and organization of such a court. The work of a number of official and unofficial bodies[66] paved the way for the deliberations of the International Conference on

65. *See* L.C. Green, *The Eichman Case*, 23 Mod. L. Rev. 507-09 (1968).

66. Such as the London International Assembly created in 1941 by Viscount Cecil of Chelwood under the auspices of the League of Nations Union; the International Commission for Penal Reconstruction and Development organised at Cambridge in 1941; and the United Nations War Crimes Commission set up in 1943.

Military Trials which resulted in the establishment of the International Military Tribunal at Nuremberg.[67]

Although the International Military Tribunal, *functus officio*, ceased to exist, the question of the creation of an international criminal court was actively pursued by the United Nations. It was raised in connection with the formulation of the Nuremberg principles in 1948[68] and with the genocide Convention.[69] The General Assembly eventually invited the International Law Commission to investigate the desirability and possibility of the creation of a international criminal court.[70] Although this task was successfully completed, the matter went no further. In 1954, the General Assembly resolved that considering the relationship between the question of the definition of aggression, the draft code of offenses against the peace and security of mankind, and the creation of an international criminal court, further discussion of an international criminal court should be deferred until the other two matters had been settled. The General Assembly reaffirmed this view in 1957. This ambivalence on the part of the United Nations reflects that as long as the solution of the problem of defining aggression remains a condition precedent to the creation of an international criminal court, no further progress will be made.

The formation of an international court may based on the simplistic truism that as there are international crimes, so should there be an international court of justice to adjudicate on those crimes. States should, in this context, adopt a more universal attitude that recognizes the following premise: "international law pierces national sovereignty and presupposes that statesmen of the several States have a responsibility for international peace and order as well as their responsibilities to their own States."[71]

The fact that the successful formation of such a court is possible may be attenuated from the existence of the International Court of Justice and the successful conclusion of the Nurembourg trials at the Nurembourg Tribunal. It cannot be denied that at Nurembourg, agreement was reached by lawyers from nations whose legal systems, philosophies, and traditions differed widely. They circumvented technical difficulties at the trials with "a minimum of goodwill and common sense."[72]

The philosophy of the court should be totally flavored with interna-

67. *See* R.H. JACKSON, INTERNATIONAL CONFERENCE ON MILITARY TRIALS, U.S. DEP'T OF STATE, PUB. No. 3080, 18 (1945).

68. *See Historical Survey of the Question of International Criminal Jurisdiction*, U.N. Doc. A/CN.4/7/Rev.1, at 25 et seq.

69. Two draft statutes for courts were produced, *see id.* at 30-46, 120-47.

70. *Id.* at 5-6, 44-46.

71. *See* R.H. JACKSON, INTERNATIONAL CONFERENCE ON MILITARY TRIALS, U.S. DEP'T OF STATE, PUB. No. 3080, Preface at ix (1945).

72. G. SCHWARZENBERGER, INTERNATIONAL LAW AND TOTALITARIAN LAWLESSNESS 76 (1943).

tional interests, as opposed to national interests. Therefore, prosecution should not be relegated to a national entity or authority. Prosecution should be left to an international authority such as the United Nations.

Judges of the court should be selected from jurists worldwide, as in the procedure followed in the election of Judges to the International Court of Justice. A rigid screening system would have to be built into the rules of the court to obviate adjudication of issues which are of a tendentiously political nature. An international convention or code should govern such principles as custody of offenses pending trial, whereby Contracting States would guarantee to arrest criminals and deliver them for trial.

## VII. An International Convention/Code

One of the responsibilities that would devolve upon the international community towards developing an international convention or code would be to revisit the Bonn Declaration, with a view to expanding its scope to cover acts other than hijackings or unlawful seizure or control of aircraft. The Bonn Declaration is the only instrument to date which has infused a reasonable element of compulsion that would effectively deal with the threat of terrorism and unlawful interference with civil aviation in an international perspective.

An international convention should also include elements such as those incorporated in the Tokyo Summit Statement in International Terrorism of May 1986, whereby States' parties agreed:

a) to refuse to export arms to States which sponsor or support terrorism;
b) to enforce stringent limits on activities and size of diplomatic and consular missions and other official bodies overseas of States which engage in or condone criminal activities; and
c) to introduce stringent and improved extradition procedures within the process of law for bringing to trial those who have perpetrated acts of terrorism.

The convention or code should, in addition, enforce the following:

a) introduction and implementation of strict visa and immigration requirements and procedure in respect of materials of States which support, sponsor or condone terrorism;
b) monitoring all persons, including those of the diplomatic corps, who have been expelled or excluded from States on suspicion of involvement in international terrorism and refusing to let them enter those States;
c) establishing multilateral, plurilateral and bilateral liaison and co-operation of police authorities, security and military authorities of States;
d) in the light of the foregoing discussion on ICAO's role in aviation security, strengthening ICAO's regulatory role in the promulgation and disseminating SARPs and requiring States' compliance thereof;

h) providing adequate sanctions against States who fail to comply with SARPs of ICAO related to aviation security; and
i) recognizing the judicial nature of the ICAO Council within the parameters of the Chicago Convention.

## VIII. Conclusion

The offense of unlawful interference with civil aviation should be addressed on the basis that individuals have international duties which transcend the national obligations of obedience imposed by an individual State. By the same token, it must also mean that individual States owe their citizens and the world at large a responsibility for maintaining world security. The philosophy of these two premises has to be vigorously employed in bringing to fruition the above measures. It is only then that a substantial legal contribution could be made to the controlling of this offense.