

The Effects of Unlawful Interference with Civil Aviation on World Peace and the Social Order

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TABLE OF CONTENTS

I. Introduction.....	450
II. Unlawful Interference.....	453
A. Elements of the Offence	455
B. International Responses to the Offence	456
C. Nature of the Offence.....	458
III. Acts of International Terrorism	462
A. General Considerations	462
1. Acts of Defense	463
2. Nonviolent Acts.....	464
3. Random Acts of Violence	465
4. Acts Which Aid and Abet National Terrorism.....	465

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5. Problems of Deterrence	467
6. The Solution	468
7. Practical Measures	470
8. Legal Measures	471
B. Hijacking	473
1. Hijacking Defined	473
2. International Conventions	474
C. Acts of Sabotage	480
D. Surface-to-Air Missile Attacks	481
E. Armed Attacks Against Airports and Persons	482
F. Narco-Terrorism	482
G. A Common Thread	485
IV. International Regulatory Measures	486
A. The Chicago Convention	486
B. International Conventions	487
C. Emerging Trends	489
D. Some Recommended Practical Measures	491
E. Relevant Legal Issues to Be Examined	491
V. Conclusion	493

I. INTRODUCTION

Recent attempts made towards attaining peace in such areas as the Arab-Israeli conflict and the Northern Ireland issue have been thwarted by the proliferation of incendiary acts against the world at large, thus amply demonstrating the inherent difficulties attendant upon such peace processes. In the context, unlawful interference with international civil aviation has become a principal area of concern to the world community both as a recognised threat to world peace and security and as a grave social malady which needs a fast cure. The bombing of a PAN AM aircraft over the Atlantic in December, 1988 and the mortar attacks on London Heathrow Airport in March, 1994 are two events which occurred over a period of six years, graphically illustrating the effects of terrorism on international civil aviation and world peace. While the former incident caused diplomatic and legal ripples between Libya and the United States, leading to adjudication in the International Court of Justice, the latter caused a further widening of the gap between the British Government and the Irish Republican Army (IRA). This paper, while identifying the offence of unlawful interference in its many forms, will discuss international regulatory measures that have so far been taken against the offence and suggest effective measures that may be taken to dissuade terrorism against international civil aviation.

The maintenance of international peace and security is an important

objective of the United Nations,¹ which recognizes one of its purposes as being *inter alia*:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.²

It is clear that the United Nations has recognized the application of the principles of international law as an integral part of maintaining international peace and security and of avoiding situations which may lead to a breach of the peace.³ The first task of this paper is to examine the meaning and significance of the words “unlawful interference” in the context of civil aviation. “Unlawful interference” is clearly a generic term of the expression “[A]cts of aggression or other breaches of the peace” used in the United Nations Charter.⁴ The Chicago Convention of 1944⁵ — the seminal document which sets out the principles of international civil aviation — recognizes that the abuse of international civil aviation can lead to

1. U.N CHARTER art. 1 ¶ 1.

2. *Id.*

3. See G.A. Res. 44/23, U.N. GAOR, 44th Sess., Supp. No. 49, at 31 U.N. Doc. A/44/49 (1989). On November 17, 1989 the United Nations General Assembly adopted Resolution 44/23 which declared that the period 1990-1999 be designated as the United Nations Decade of International Law (the full text of Resolution 44/23 is annexed as Appendix 1 at the end of the text of this thesis). The main purposes of the decade have been identified *inter alia* as:

- a) To promote acceptance of and respect for the principles of international law;
- b) To promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice;
- c) To encourage the progressive development of international law and its codification;
- d) To encourage the teaching, study, dissemination and wider appreciation of international law.

The four tasks of the Resolution have been predicated upon the fact that the purpose of the United Nations is to maintain peace and security.

See also R.I.R. Abeyratne, *The United Nations Decade of International Law*, 5 INT'L J. POL. CULTURE & SOC'Y 511 (1992) (for detailed discussion of Resolution 44/23).

4. U.N CHARTER art. 1, ¶ 1. See Convention for the Regulation of Aerial Navigation, Oct. 13, 1919, ch. VI arts. 26, 28, 11 L.N.T.S. 173, 185 [hereinafter Paris Convention] (prohibited the transportation of certain articles as a measure of public safety); Convention on Public International Law Adopted by the Sixth International American Conference, Convention on Commercial Aviation, Feb. 15, 1928, arts 15, 17, 129 L.N.T.S. 223, 233-35 [hereinafter Habana Convention] (including the cited portions of the Paris Convention in its provisions). Both of the aforementioned conventions are earlier instances of the consideration of public safety within the context of international aviation. See also KENNETH W. COLGROVE, INTERNATIONAL CONTROL OF AVIATION 173 (1930) (citing to the Habana Convention).

5. Convention on International Civil Aviation, Dec. 7, 1944 art. 7, ICAO Doc. 7300/6, 6605 (1980) [hereinafter Chicago Convention] (replacing the Paris Convention which is no longer in force).

“[A] threat to the general security”⁶ and that international civil aviation may be developed in a safe and orderly manner.⁷

The Provisional International Civil Aviation Organization (PICAO), was formed as a consequence of the Chicago Conference of November 1944, later resulting in the Chicago Convention, and its interim agreement which was concluded so that PICAO could commence operations pending a permanent Convention being summoned.⁸ PICAO records the first official international response to aviation security. In preparation for the PICAO Assembly, the Council inserted an agenda item which called for “[C]onsideration of the action taken and to be taken by the Organization and Member States with respect to safety in the air.”⁹

At its 7th Session in 1947, mention was also made of safety of life in the air.¹⁰ By then, the Operational Studies Section of PICAO had already been charged with the task of studying *inter alia*, factors conducive to the provision of safe, regular and efficient air services.¹¹ Although there is no direct reference to aviation security in the annals of PICAO meetings, it is reasonable to impute to the PICAO Council concern with the overall safety of human life in the air, whether it be ensured through mechanical efficiency of aircraft or the prevention of adverse human conduct. This intent was more clearly brought out in 1977 by the ICAO Council when, at its 92nd Session, the ICAO Council referred to UN General Assembly Resolution 32/8 on Safety of International Civil Aviation¹² and referred *in contextu* to “Strengthening of measures to Suppress Acts of Unlawful Interference with Civil Aviation.”¹³ The interaction between “safety,” “security,” and “unlawful interference with civil aviation” is now clearly established. The consolidated statement of continuing

6. See Chicago Convention, *supra* note 5, at preamble:

WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and

WHEREAS it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;

THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically. . . .

7. *Id.*

8. WHAT IS PICAO? Provisional International Civil Aviation Organization, April 1946, Montreal, Canada, at 9.

9. PICAO, 7th Sess., 7th Mtg., Agenda Item 17, at 3, Doc. 2783/ C324 (Feb. 14, 1947).

10. PICAO, 7th Sess., 8th Mtg., Nos. 12, 13, at 5 Doc. 2824 C/330 (Feb. 21, 1947).

11. See 1 PICAO J. 74 (1945)(for a Functional Organization Chart of PICAO).

12. See app. 2.

13. See ICAO Doc. C-WP/6635, at 1 (Nov. 8, 1977). See also Assembly Res. in Force, ICAO Doc. 9509, at V11-2 (Nov. 10, 1986)(incorporating Assembly Resolution 26-7 which consolidated ICAO Assembly Resolutions A22-16 and A22-17). See also app. 3 (for Assembly Resolution 26-7).

ICAO policies related to the safeguarding of international civil aviation against acts of unlawful interference, appearing in ICAO Resolution A 26-7 now in force, resolves:

[T]he unlawful seizure of aircraft and other unlawful acts against the safety of civil aviation, particularly the threat of terrorist acts, have a serious adverse effect on the safety, efficiency and regularity of international air transport and undermine the confidence of the peoples of the world in the safety of international civil aviation;

Acts of unlawful interference with civil aviation continue to have an adverse effect on the safety and efficiency of international air transport and endanger the lives of aircraft passengers and crews engaged in air transport . . . ¹⁴

The concern of the international community would therefore lie in the fact that unlawful interference with international civil aviation erodes the safety and security of international civil aviation.

II. UNLAWFUL INTERFERENCE

Under general legal principles, unlawful interference of civil aviation can be regarded as a crime. A crime has been identified as: "a wrong which affects the security or well being of the public generally so that the public has an interest in its suppression."¹⁵

The word "wrong" in this definition could be considered as presupposing an act that is perpetrated as being against the law. Since interference with civil aviation is in itself a wrong, and therefore definitively against the law, the question arises as to whether the word "unlawful" is tautologous. Tautology in the phrase "unlawful interference" was judicially discussed in England in 1981 in a case which involved indecent assault on a mental patient. Hodgson, J. observed that "[I]t does not seem to me that the element of unlawfulness can properly be regarded as part of the definitional elements of the offence. In defining a criminal offence, the word "unlawful" is surely tautologous and can add nothing to its essential ingredients."¹⁶ Lord Justice Lawton LJ., in a later case, analyzed Justice Hodgson's reasoning and observed:

We have found difficulty in agreeing with this reasoning, even though the judge seems to be accepting that belief in consent does entitle a defendant to an acquittal on a charge of assault. We cannot accept that the word 'unlawful' when used in a definition of an offence is to be regarded as 'tautologous.' In our judgment the word 'unlawful' does import an essential element into the offence. If it were not there, social life would be unbearable . . . ¹⁷

14. See app. 3.

15. 11(1) HALSBURY'S LAWS OF ENGLAND 16 (4th ed. reissue 1990).

16. *Albert v. Lavin*, 1 All E.R. 628, 639 (1981).

17. *R. v. Kimber*, 3 All E.R. 316, 320 (1983).

Lord Lane C.J., in the 1987 case of *R. v. Williams*,¹⁸ citing with approval Lord Justice Lawton's analysis went on to say: "[t]he mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element can be substantiated by simply showing an intent to apply force and no more".¹⁹

Lord Lane C.J. seems to impute to the defendant a knowledge of going against applicable law, making the word "unlawful" *sui generis* and mutually exclusive from the term "interference."

This line of cases seems to suggest by analogy that "unlawful interference" constitutes an act whereby the perpetrator knows that his interference with an activity is clearly contrary to the law. Unlawful interference with civil aviation forms no conceivable exception to this logic.

Another significant rule emerged from the judgment of Lord Lane C.J. when His Lordship said:

What then is the situation if the defendant is labouring under a mistake of fact as to the circumstances? What if he believes, but believes mistakenly, that the victim is consenting, or that it is necessary to defend himself, or that a crime is being committed which he intends to prevent? He must then be judged against the mistaken facts as he believes them to be. If judged against those facts or circumstances the prosecution fail to establish his guilt, then he is entitled to be acquitted.²⁰

By analogy therefore, if a person interferes with civil aviation, but does not believe he is contravening the law, he is not guilty of an offence. The mental element in the offence becomes as important as the physical element of the offence of unlawful interference with civil aviation. The criminal element²¹ that is thus infused into the offence of unlawful interference makes the offence, like any other, hinge on the criminal policy that is created in the jurisdiction to which it applies. In other words, an act of interference would be considered unlawful and thereby an offence only in jurisdictions whose criminal policies determine such acts to be unlawful. Although crime has so far not been coherently defined by any writer,²² the characteristics of a crime, i.e., the *actus reus* (physical act

18. *R. v. Williams*, 3 All E.R. 411 (1987).

19. *Id.* at 414. See also *R. v. Abraham*, 3 All E.R. 694, 696 (1973) (for further discussion of the term unlawful).

20. *R. v. Williams*, 3 All E.R. at 414.

21. See HALSBURY'S LAWS OF ENGLAND, *supra* note 15 17-21.

22. C.K. ALLEN, LEGAL DUTIES 230 (1931) See KENNY'S OUTLINES OF CRIMINAL LAW § 1 (J.W. Cecil Turner ed. 18th ed. 1962) See also PROPRIETARY ARTICLES TRADE ASSOCIATION V. CANADA (A.G.) [1931] A.C. 31 (P.C) where it was held that the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes. A general definition of a crime is that it is "a violation or neglect of legal duty of so much public importance that the law, either common or statute, takes notice of and

forbidden by law) and the *mens rea* (the intention to commit the act and understanding the reasonable and natural consequences of the act), have been identified.²³ The identification of these elements has given rise to the maxim *Actus non facit reum (hominem) nisi mens sit rea*,²⁴ meaning that whatever deed a man may have done, it cannot make him criminally punishable unless his doing of it was activated by a legally blameworthy attitude of mind. Usually, each prohibited deed is legally specified and defined, and the legal definition identifies the essential facts which must be present to constitute the forbidden deed. As will be discussed later, the offence of unlawful interference with international civil aviation forms no exception to this practice.

A. ELEMENTS OF THE OFFENCE

The offence of the unlawful interference with international civil aviation broadly comprises: hijacking of aircraft; aviation sabotage such as causing explosions in aircraft on the ground and in flight; missile attacks against aircraft; armed attacks on airports, passengers and other aviation related property; and the illegal carriage of narcotics by air, and its criminal ramifications.

Often, the heart of the offence is dignified with a core of legitimacy on the grounds that the actions of the offender are justified. Some States have acquiesced to this approach by giving the offender a safe haven to conduct his activities and subsequent political refuge. Accordingly, there now exists a dichotomy in some minds that the need for a solution to the problem does not arise in the absence of a problem. Professor Michael Milde addresses this dichotomy and observes current trends: How did the international community respond to these acts? The applause and "hero's welcome" for the perpetrators did not last too long beyond the first bizarre incidents and the international community realised that, in the dangerous game of unlawful seizure of aircraft and the acts of sabotage, there are no winners — the security of civil aviation is an overriding interest because international air transport is an indivisible part of international economy and co-operation which must be protected in the common interest.²⁵

punishes it." See generally JOHN WILDER MAY, *LAW OF CRIMES*, (Harry A. Bigelow, ed., 3d ed. 1905) (noting that 'intent' to commit a crime should appear either expressly or by implication). According to this definition and reasoning, the intent must be unlawful.

23. See generally, RUSSELL ON CRIME 24-36 (J.W. Cecil Turner, ed., 12th ed. 1986).

24. "An act does not make [the doer of it] guilty unless the mind be guilty; that is, unless the intention be criminal. The intent and the act must both concur to constitute the crime." BLACK'S LAW DICTIONARY 36 (6th ed. 1990).

25. MICHAEL MILDE, *LAW AND AVIATION SECURITY, AIR AND SPACE LAW: DE LEGE FERENDA, ESSAYS IN HONOUR OF HENRI A. WASSENBERGH* 93 (1992).

Despite this clear view, in a general sense, confusion has been confounded with the paucity of a clear definition of the offence itself and the lack of recognition of the principles of international law as universally enforceable laws against the offender. The blatant incompatibility between the heinous quality of the offence and the tepid judicial attitudes of some jurisdictions marks an insouciance that needs the urgent attention of the world community.

B. INTERNATIONAL RESPONSES TO THE OFFENCE

In January 1991, the Secretary General of the International Civil Aviation Organization (ICAO)²⁶ addressed a State Letter²⁷ to all ICAO contracting States, wherein he informed them that the ICAO Council had identified the major challenges facing international civil aviation. The subject of unlawful interference had been defined by the 27th Session of the ICAO Assembly as the overriding priority in ICAO's work programme.²⁸ The Secretary General requested that all contracting States provide their comments on the challenges, priorities, and action that they think ought to be taken to meet those challenges.²⁹ The responses of States were consistent in that such measures as the implementation of ICAO policy on unlawful interference, worldwide enhancing of security measures, and the development of aviation security assistance programmes were unanimously acceptable as those most desirable to combat the challenge.³⁰ In this context, one of the more significant decisions taken by the ICAO Council was to proceed, with the highest priority, with the development of a comprehensive and detailed ICAO aviation security training programme for world use.³¹ Accordingly, ICAO has been very active in the field of aviation security in the recent past. The Committee on Unlawful Interference held 17 meetings in 1990, and considered the review of the reports of the *Ad Hoc* Group of Specialists on the Detection of Explosives, the initial development of the

26. ICAO was created in 1944 to promote the safety and orderly development of civil aviation in the world. A specialized agency of the United Nations, it sets international standards and regulations necessary for the safety, security, efficiency and regulation of air transport and serves as the medium of cooperation in all fields of civil aviation among its 180 contracting States.

27. *State Letter*, ICAO Doc. EC 2/65-91/6 (Jan. 16, 1991).

28. *Id.* at 1.

29. The other challenges to civil aviation as identified in the State Letter were: human factors in flight safety; environment; regulatory developments; commercial developments, airport and airspace congestion; legal issues; financial resources; and human resource development. *Id.*

30. ICAO Doc. C-WP/9307 (May 30, 1991).

31. See *Annual Report of the Council*, at VII-96, ICAO Doc. 9568 (1990). ICAO records that while acts of unlawful seizure increased from 8 in 1989 to 20 in 1990, the number of persons killed by violence against civil aviation actually decreased from 279 persons in 1989 to 137 in 1990; the number of acts of sabotage against civil aviation amounted to 1 in 1990 as against 2 in 1989. *Id.* at 97-99.

ICAO Aviation Security (AVSEC) training programme, and *inter alia*, the comprehensive revision of the ICAO Security Manual.³² Aviation security is by no means a recent concern of ICAO. The President of the ICAO Council, Dr. Assad Kotaite, cautioned the world of this danger in 1985 when he said:

The last two decades witnessed the emergence of an alarmingly wide scale of a new type of danger to international civil aviation . . . This new type of danger is man made and is manifested in violent human acts against the safety of civil aviation, use of force or threat of force, unlawful seizure of aircraft and other forms of unlawful interference with civil aviation . . . These violent acts which constitute worldwide problem, are not limited by geographic or political boundaries and no nation and no airline of the world is immune to such acts . . .³³

Professor Michael Milde, Director of ICAO's Legal Bureau (as he then was) focuses attention on the importance attributed by ICAO to the problem of aviation security when he said:

In 1980, the 23rd Session of the ICAO Assembly adopted what is considered to be a "landmark" decision concerning the General Work Programme of the Legal Committee: it decided that only subjects of sufficient magnitude and practical importance requiring urgent international action, should be included in that work programme . . . problems of aviation security have been predominant and have commanded overriding priority for several years, thus reflecting the highest priority accorded, by members of the Organisation, to problems of security against unlawful interference.³⁴

There are however, two major obstacles to the enthusiasm shown so far in taking concerted action in this field:

- 1) The implementation of measures taken relating to the threat against aviation security in the face of the absence of the acceptance of the principles of international law and respect therefor — a concern reflected in a) of UN Resolution 44/23;³⁵ and,
- 2) The subject of aviation security is too vast for one organization to handle on its own.³⁶

32. *Id.* at 96.

33. Assad Kotaite, *ICAO Policy and Programmes in the Field of Aviation Security*, 10 ANNALS AIR & SPACE L. 83 (1985) See also, Assad Kotaite, *Security of International Civil Aviation — Role of ICAO*, 7 ANNALS AIR & SPACE L. 95 (1990).

34. Michael Milde, *Draft Convention on the Marking of Explosives*, XV ANNALS AIR & SPACE L. 155-56 (1990).

35. See U.N. GAOR, 44th Sess., 60th plen. mtg., Supp. No. 49, at 31 (1989) See also R.I.R. Abeyratne, *The United Nations Decade of International Law*, 5(3) INT'L J. POL. CULTURE & SOC'Y 511-523 (1992). This Resolution declared the period 1990-1999 as the United Nations Decade of International Law.

36. E. McWHINNEY, *AERIAL PIRACY AND INTERNATIONAL TERRORISM: THE ILLEGAL DIVERSION OF AIRCRAFT AND INTERNATIONAL LAW* 165 (2d Rev. ed. 1987).

While there have been various practical measures recommended to combat acts of unlawful interference such as the training of personnel to detect a threat beforehand, intensifying security on such susceptible targets as airports, and the surveillance of all persons who are seen in such areas,³⁷ the threat against aviation security can only be effectively curbed if it is recognised *in consensu* by the international community as an offence against humanity. The lack of resources only makes the offence of interference of civil aviation subject to punitive sanctions of diverse municipal laws.³⁸ World consensus on punitive sanctions against the offence and a more cohesive international structure to combat the offence are therefore necessary tools that would obviate this threat.

C. NATURE OF THE OFFENCE

The offence of unlawful interference with civil aviation, whether it be a direct attack on an airline, its passengers and crew or on other related properties, or an act of seizure of an aircraft for the illegal carriage of narcotics by air, is a criminal act and can be broadly identified as an act of terrorism. The term "terrorism" is seemingly of French origin and is believed to have first been used in 1798.³⁹ "Terrorism" gave connotations of criminality to one's conduct and was later explicitly identified with the "reign of terror" of the French Revolution. It is now generally considered a system of coercive intimidation⁴⁰ brought about by the infliction of terror or fear. One interpretation of terrorism given by the courts is that terrorism does not violate international law. Accusations of terrorism are often met, not by a denial of the fact of responsibility, but by a justification of the challenged actions.⁴¹ This judgment clearly shows that there is

37. R.I.R. Abeyratne, *Invasion of the Maldives and International Terrorism - Definitions and Solutions*, THE 1988-89 ANNUAL ON TERRORISM 83, 93 (Y. Alexander & H. Faxmans eds., 1990). See also, *IATA Proposes Five-Point Programme to Combat Terrorism*, IATA CURRENT INFORMATION SUMMARY (CIS) No. 4277, September 20, 1988, where IATA recommended the use of the legal and organizational structure of the United Nations to create:

- 1) an international group to advise airports and countries on security;
- 2) an international group to investigate terrorist incidents after they occur and make recommendations;
- 3) an international military response team to resolve an incident, if need be, with force;
- 4) an international court for trial; and,
- 5) an international detention centre.

38. Daniel G. Partan, *Terrorism, an International Law Offence*, 19 CONN. L. REV. 751 (1987). See also generally Rett R. Ludwikowski, *Political and Legal Instruments in Supporting and Combatting Terrorism: Current Developments*, 11 TERRORISM 197 (1988).

39. Dictionnaire, Supplement 775 (Paris, an VII (1978)).

40. Terrorism is defined as: "Government by intimidation as directed and carried out by the party in power in France during the Revolution of 1789-1794; the system of the 'Terror'." OXFORD ENGLISH DICTIONARY 216 (James A.H. Murray, 1919).

41. Hanoch Tel-Oren v. Libyan Arab Republic cited in LEGISLATIVE RESPONSES TO TERRORISM (Y. Alexander & S. Nanes eds., 1986).

no consensus among the world community that terrorism is an offence against established principles of law. It also infuses to the heart of the offence a core of legitimacy that is often considered incontrovertible, giving rise to the dichotomy that the need for a solution does not arise in the absence of a problem.⁴²

The most frustrating obstacle to the control of unlawful acts against international civil aviation is the paucity of clear definition of the offence itself. Many attempts at defining the offence have often resulted in the offence being shrouded in political or national barriers.

In 1980, the Central Intelligence Agency of the United States adopted a definition of terrorism which read:

Terrorism: The threat or use of violence for political purposes by individuals or groups, whether acting for or in opposition to established governmental authority, when such actions are intended to shock, stun or intimidate a target group wider than the immediate victims. Terrorism has involved groups seeking to overthrow specific regimes, to rectify perceived national or group grievances, or to undermine international order as an end in itself.⁴³

This all embracing definition underscores the misapprehension that certain groups which are etched in history, such as the French Resistance of Nazi occupied France during World War II and the Contras in Nicaragua, would fall within the definitive parameters of terrorism. In fact, this formula labels every act of violence as being "terrorist," engulfing in its broad spectrum such diverse groups as the Seikigunha of Japan and the Mujahedeen of Afghanistan, although their aims, *modus operandi* and ideologies are different. James Adams prefers a narrower definition which reads: "[a] terrorist is an individual or member of a group that wishes to achieve political ends using violent means, often at the cost of casualties to innocent civilians and with the support of only a minority of the people they claim to represent."⁴⁴

Even this definition, although narrower than the 1980 definition cited above, is not sufficiently comprehensive to cover the terrorist who hijacks an airplane for his own personal gain.⁴⁵ The difficulty in defining the term seems to lie in its association with political goals as demonstrated by the definition that terrorism is really "terror-inspiring violence, containing an international element that is committed by individuals or

42. R.I.R. Abeyratne, *The Invasion of the Maldives and International Terrorism - Definitions and Solutions*, THE 1988-89 ANNUAL ON TERRORISM 83 (Y. Alexander & H. Faxman eds., 1990).

43. JAMES ADAMS, THE FINANCING OF TERROR 6 (1989).

44. *Id.* at 10.

45. See R.I.R. Abeyratne, *Skyjacker gets Life Imprisonment in Sri Lanka*, 2 LLOYDS AVIATION LAW NO. 24, Dec. 15, 1983, at 4. See also R.I.R. Abeyratne, *The Ekanayake Hijacking Appeal in Sri Lanka - A Critical Appraisal*, 14 AIR LAW 58-68 (1989).

groups against non-combatants, civilians, states, or internationally protected persons or entities in order to achieve political ends."⁴⁶

The offence of terrorism has also been defined as one caused by:

any serious act of violence or threat thereof by an individual, whether acting alone or in association with other persons, which is directed against internationally protected persons, organizations, places, transportation or communication systems, or against members of the general public, for the purpose of intimidating such persons, causing injury to or the death of such persons, disrupting the activities of such international organizations, causing loss, detriment or damage to such places or property, or of interfering with such transportation and communications systems in order to undermine friendly relations among States or among the nationals of different States, or to extort concessions from States.⁴⁷

It is time that terrorism is recognized as an offence that is *sui generis*, and one that is not always international in nature and motivated by the political aims of the perpetrator. If terrorism is regarded as the use of fear, subjugation and intimidation to disrupt the normal operations of humanity. However, once more analysis is carried out on the subject a more specific and accurate definition could be sought. One must always be mindful, however, that without a proper and universally acceptable definition, international cooperation in combatting terrorism will be impossible.⁴⁸

A terrorist act is one which is *mala in se* or evil by nature,⁴⁹ and has been associated with the political repression of the French Revolution era

46. H.L. Silets, *Something Special in the Air and on the Ground: The Potential for Unlimited Liability of International Air Carriers for Terrorist Attacks Under the Warsaw Convention and its Revisions*, 53 J. AIR L. & COM. 321, 358 (1987).

47. Serge Nechayev, *Revolutionary Catechism*, cited in DAVID C. RAPOPORT, ASSASSINATION AND TERRORISM, 79 (1971). See also Conference of the International Law Association in Belgrade, 1980 which states:

The definition of "international terrorist offence" presented here is more comprehensive than the definitions which appear in the multilateral convention concluded in the past two decades and relating to the control of international terrorism. The term comprehends serious criminal acts, such as murder, assault, arson, kidnapping, extortion, sabotage and the use of explosives devices directed towards selected targets. These targets include internationally protected persons, places, and international civil aircraft which are already protected under the conventional or customary international law.

See Robert F. Delaney, *World Terrorism Today*, 9 CAL. W. INT'L L.J. 450, 454 (1979). See also, The Draft Convention of the International Law Association, Belgrade Conference (Committee on International Terrorism), August 1980, at 9 (for definitions of "terrorism" proposed by the Haitian and French delegations at the Conference).

48. Geoffrey M. Levitt, *Is Terrorism Worth Defining?*, 13 OHIO N.U. L. REV. 97 (1986).

49. See Nicholas N. Kittrie, Comment, *Terrorism and Political Crimes in International Law*, 67 AMER. J. INT'L L. 104 (1973). See also Jordon J. Paust, *Some Thoughts on Preliminary Thoughts on Terrorism*, 68 AM. SOC. INT'L L. 502, 503 (1978).

where, it is said, the word terrorism was coined.⁵⁰ A terrorist is a *hostis humani generis* or common enemy of humanity. Generally, terrorist attacks that are calculated to interfere with civil aviation are five-fold:

- a) Hijacking — which in the late 1960s started an irreversible trend which was dramatized by such incidents as the skyjacking by Shiite terrorists of the TWA flight 847 in June 1985. The skyjacking of Egypt Air flight 648 in November the same year and the skyjacking of a Kuwait Airways Airbus in 1984 are other examples of this offence;
- b) Aviation sabotage — where explosions on the ground or in mid air destroy whole aircraft, their passengers and crew. Recent dramatizations of this type have been the Air India flight 182 over the Irish Sea in June 1985, the PAN AM flight 103 over Lockerbie, Scotland in 1988, and the UTA explosion over Niger in 1989;
- c) Missile attacks — where aircraft are destroyed by surface to air missiles (SAM). The destruction of the two Viscount aircraft of Air Rhodesia in late 1978 and early 1979 are examples of this offence;
- d) Armed attacks on airports and airline passengers where terrorists open fire in congested areas in the airport terminals. Examples of this type of terrorism are: the June 1972 attack by the Seikigunha (Japanese Red Army) at Ben Gurion Airport, Tel Aviv; the August 1973 attack by Arab gunmen on Athens Airport; and the 1985 attacks on Rome and Vienna Airports.) The illegal carriage by air of narcotics and other psychotropic substances and crimes related thereto such as the seizure of, or damage to, aircraft, persons and property.

International terrorism has so far not been defined comprehensively largely due to the fact that owing to its diversity of nature the concept itself has defied precise definition. However, this does not preclude the conclusion that international terrorism involves two factors. They are:

1. The commission of a terrorist act by a terrorist or terrorists: and,
2. The “international” element involved in the act or acts in question i.e., that the motivation for the commission of such act or acts or the eventual goal of the terrorist should inextricably be linked with a country other than that in which the act or acts are committed.

Perhaps the oldest paradigm of international terrorism is piracy which has been recognized as an offense against the law of nations and which is seen commonly today in the offense of aerial piracy or hijacking.⁵¹

Acts of international terrorism that have been committed over the

50. See ROBERT A. FRIEDLANDER, *THE ORIGINS OF INTERNATIONAL TERRORISM, TERRORISM, INTERDISCIPLINARY PERSPECTIVES* 31 (1977).

51. See R.I.R. Abeyratne, *Hijacking and the Teheran Incident — A World in Crisis?* 10 *AIR LAW* 120, 121 (1985). See also R.I.R. Abeyratne, *Aerial Piracy and Extended Jurisdiction in Japan* 33 *INT'L & COMP. L. Q.* 596, 597 (1984); E. McWHINNEY *supra*, note 36; Alona E. Evans, *Aircraft Hijacking, its Cause and Cure*, 63 *AM. J. INT'L L.* 695, 701-3 (1969); Oliver J. Lissitzyn, *Hijacking, International Law and Human Rights*, *AERIAL PIRACY AND INTERNATIONAL LAW* (E. McWhinney ed. 1973); R. CLUTTERBUCK, *LIVING WITH TERRORISM* 143.

past two decades are too numerous to mention. Suffice it to say that the most deleterious effect of the offense is that it exacerbates international relations and endangers international security. From the isolated incidents of the sixties, international terrorism has progressed to becoming a concentrated assault on nations and organizations that are usually susceptible to political conflict. Although, politics is not always the motivation of the international terrorist.

International terrorism has been recognized to engulf acts of aggression by one State on another, as well as by an individual or a group of individuals of one State on another State. The former typifies such acts as invasion, while the latter relates to such individual acts of violence as hijacking and the murder of civilians in isolated instances. In both cases, the duties of the offender State have been emphatically recognized. Such duties are to condemn the acts and take necessary action.

The United Nations gave effect to this principle in 1970 when it proclaimed that:

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.⁵²

The most pragmatic approach to the problem lies in identifying the parameters of the offense of international terrorism and seeking a solution to the various categories of the offense. To obtain a precise definition would be unwise, if not impossible. Once the offense and its parasitic qualities are clearly identified, it would become necessary to discuss briefly its harmful effects on the international community. It is only then that a solution can be discussed which would obviate the fear and apprehension we suffer in the face of this threat.

III. ACTS OF INTERNATIONAL TERRORISM

A. GENERAL CONSIDERATIONS

It is said that terrorism is a selective use of fear, subjugation, and intimidation to disrupt the normal operations of society.⁵³ Beyond this statement, which stands both for national and international terrorism, any attempt at a working definition of the words "international terrorism"

52. U.N.G.A. Res. 2625 (XXV) Part 11 Annex ¶ 1.

53. Irving T. Horowitz, *Transnational Terrorism*, CIV. LIBERTIES & SOC. SCI. 283 (Yonah Alexander, Seymour Fenger eds. 1977).

would entail complications. However, in seeking a solution which would lead to the control of international terrorism, it is imperative that contemporaneous instances of the infliction of terror be identified in order that they may be classified either as acts of international terrorism, or as mere innocuous acts of self-defense. Broadly, acts of international terrorism may be categorized into two distinct groups. The first category may be included acts of oppression, such as the invasion of one state by another. The second category are actions which are deviously claimed to be acts of defense. While the former is self-explanatory, the latter, by far the more prolific in modern society, can be identified in four separate manifestations. They are:

- (a) Acts claimed to be committed in self defense and in pursuance of self-determination to circumvent oppression;
- (b) Nonviolent acts committed internationally which are calculated to sabotage and destroy an established regime;
- (c) Random acts of violence committed internationally by an individual or groups of individuals to pressurize a State or a group of individuals to succumb to the demands of terrorists; and
- (d) Acts committed internationally which aid and abet national terrorism.

With the exception of the first category of invasion, the others are *prima facie* acts of international terrorism which are essentially extensions of national terrorism. That is to say that most acts of international terrorism are a species of the genus national terrorism.

1. *Acts of Defense*

Some States claim that internal oppression, either by foreign invasion or by an internal totalitarian regime, necessitates guerilla warfare for the achievement of freedom. With more emphasis, it has been claimed that one state must not be allowed to exploit and harass another, and that the physical manifestation of a desire to attain freedom should not be construed as terrorism.⁵⁴ Often, such acts of self defense prove to take extreme, violent forms, and manifest themselves overseas, thus giving rise to international terrorism. Acts of defense, as they are called, are common forms of international terrorism and are categorized as political violence. These acts take the form of: acts of disruption, destruction, or injury whose purpose, choice of targets or victims, surrounding circumstances, implementation, and/or effects have political significance⁵⁵

Organized political groups plan strikes and acts of violence internally, while extensions of these groups carry out brutal assassinations, kidnappings and cause severe damage to property overseas. The retaliatory pro-

54. U.N. GAOR 40th Sess., at 15, U.N. Doc. A/40/445 (1985).

55. H.L. NIEBURG, *POLITICAL VIOLENCE: THE BEHAVIORAL PROCESS* 13 (1969).

cess, which commences as a token of self defense, transcends itself to terroristic violence which is totally ruthless and devoid of moral scruples.⁵⁶ Usually, a cause which originates as dedicated to self-defense and self-determination soon focuses toward gaining the support of the people, disarming the military strength of the regime against which it rebels, and above all seeking to strengthen itself in order to attain stability. In this instance, terrorist acts seek to carry out a massive propaganda campaign in the international community, while concentrating on individual instances of terrorism in populated urban areas, which attract more attention than those committed in isolated areas.⁵⁷ Advertising a cause in the international community becomes an integral part of political terrorism of this nature.

Both the international community and the governments concerned should be mindful that acts of defense can be treated as such, only in instances where people defend themselves when they are attacked, not when retaliatory measures are taken in isolation to instill fear in the international community. To that extent, acts of defense can be differentiated from acts of terrorism.

2. *Nonviolent Acts*

There are instances where terrorism extends to destabilizing an established regime or a group of persons by the use of threats, calculated to instill fear in the international community. Typical examples are the spreading of false propaganda and the invocation of threats. Threats tend to unhinge both the nation or a group of persons against whom the threats are carried out and the nations in which such acts are said to be committed. There have been claims that export consumer commodities of a nation, such as food items, have been poisoned, precluding foreign trade between nations. Although such tactics are devoid of actual physical violence, they tend to unhinge the economic stability of a nation, particularly if such nation depends solely on the export of the item in question. In such instances, international terrorism assumes proportions of great complexity,⁵⁸ and succeeds in at least temporarily disrupting the infrastructural equilibrium of the threatened nation. The concerned government is immediately placed on the defensive and attempts counter-propaganda.⁵⁹ In spreading propaganda of this nature, the media is the

56. E. LUTTWAK, *COUP D'ETAT: A PRACTICAL HANDBOOK* 24 (1968). See also H. Eckstein, *On the Etiology of Internal Wars*, 4 *HIST. & THEORY* No. 2 (1965) D. Galula, *Counterinsurgency Warfare, THEORY & PRAC.* 4-5 (1964); T.R. GURR, *WHY MEN REBEL* 11 (1970).

57. See R. MOSS, *URBAN GUERRILLA WARFARE* 210 (1971).

58. U.N. GAOR 40th Sess., at 15 U.N. Doc. A/40/445 (1985).

59. See *Document on Terror, Anon.*, 3 *NEWS FROM BEHIND THE IRON CURTAIN* 43-47 (1952). See also S.M. FINGER, *TERRORISM* 83-106 (L.A. Sobel ed. 1975); J.J. Paust, *Terrorism*

terrorist's best friend. Television and radio are symbolic weapons to instill fear in the public and to cripple the persons or government against whom the attack has been aimed. The effect of publicity on people is truly tangible. Media terrorism creates an emotional state of apprehension and fear in threatened groups. It also draws world attention to the existence of the terrorists and their cause. In both instances, the terrorist succeeds in creating a credibility gap between his target and the rest of the world. Psychological terrorism of this nature is perhaps the most insidious of its kind. It is certainly the most devious.

3. *Random Acts of Violence*

A random act of violence is normally, although not necessary, a corollary to a threat. Often, the international community is shocked by a despicable act of mass murder and destruction of property which takes the world completely by surprise. Responsibility for the act is acknowledged later, though in many instances no responsibility is claimed. When this is the case, the offended nation and the world at large are rendered destitute of an immediate remedy against the offense. Even if motive is imputed to a particular terrorist group, the exercise of sanction becomes difficult as the international community will not condone sanctions without concrete and cogent evidence.

The difficulty lies largely in the fact that any terrorist act is usually carefully planned and executed. Often one observes that the terrorist cautiously retracts his steps obscuring all evidence, unless he seeks publicity. The average terrorist is a militant who employs tactics aimed at instilling fear in the minds of the international community. His acts are calculated to instill fright and paralyse the infrastructure of a state by totally exhausting the strength of his target.

4. *Acts which Aid and Abet National Terrorism*

The fourth facet of international terrorism pertains to activities which promote national terrorism and which are committed outside the State against which the terrorist cause exists. These acts manifest themselves in the maintenance of overseas training camps for terrorists where guerilla warfare, and techniques of assassination, destruction and sabotage are taught to terrorist groups. After sustained training, the terrorists return to their countries and practice what they have learned overseas. Such training camps usually are conducted by revolutionary groups and

and the International Law of War, 64 MIL. L. REV. 1 (1974); F.A. Sayegh, *The Palestinians Response to Zionism: From Resistance to Liberation*, 53 ARAB J. (July 1975), at 684-5; E. Weisband & D. Roguly, *Palestinian Terrorism: Violence, Verbal Strategy, and Legitimacy*, INT'L TERRORISM 258, 278-9 (Y. Alexander ed. 1976).

mercenaries on the request of terrorist organizations. A natural corollary to this trend is the collection of funds overseas for the financing of such training programmes, the purchase of arms, ammunition and explosives and preparation of foreign propaganda.

These indirect acts of international terrorism, indicate clearly that although there is no identifiable definition of the word "terrorism", the word itself can no longer be associated only with violent acts of aggression. In fact, recent studies reflect that any organized campaign of international terrorism involves both direct and indirect acts in equal proportion.⁶⁰

In a broad sense, international terrorism embitters humanity and pits one nation against another and one human being against another. The eventual consequence of the problem is aggression and even war. The main goal of the use of a psychological element by the international terrorist, which is by far the most obnoxious and objectionable ambition, is to polarize people and society. However, its immediate manifestation and future development are not without features sufficient to cause grave concern to the world.

Acts of international terrorism, whether in the form of violent or non violent acts, have clear and immediate international consequences. They are numerous in nature and warrant a separate study. However, in effect they obtain for the miscreant the same result of creating disharmony and disruption in society. The concept has grown in recent times to portend more serious problems to the international community. Those problems are worthy of comment.

Terrorism has so far not reached the proportions of being an international conspiracy, although one group identifies its objectives and purpose with another. We have not had the misfortune of seeing all terrorist groups band together to work as a composite element. This has not happened for the reason that diverse ideologies and religions have kept each group separate. Nevertheless, there is a strong identity bond between groups and even evidence that one helps the other with training and military aid, even though their causes are quite different. The link between terrorist groups is an important consideration for the world, as close association between groups could strengthen a weak force and nurture it to maturity. In addition, strong and established terrorist organizations, under cover of burgeoning groups, could carry out campaigns which would cover their tracks and make identification difficult. Investigations have revealed that a relatively unknown, small group was responsible for an act or acts, but later it was determined that a much stronger group had masterminded the offences for its own benefit.

60. U.N. GAOR 40th Sess., *supra* note 58, at 11.

Another important aspect of the growing incidence of international terrorism is the advancement of technology in communication, the manufacture of sophisticated weaponry, and the proliferation of nuclear armament. In today's context, terrorism has blown to unmanageable proportions with the use of advanced weapons of destruction. Arms control plays a vital role in the control of aggression. It naturally follows that terrorism benefits from the availability of new modes of aggression. The vulnerability of the international community has been caused by the paucity of adequate security measures to prevent nuclear theft. With the growth of the nuclear power industry, developed nations exposed themselves to the vulnerability of theft by power groups, in whose hands nuclear weapons act as threats of destruction. The most effective counter measure against the threat of nuclear theft is to take precautions necessary to protect the stored items, and to make known to the terrorist the high risk involved in an attempt to steal such material. Ideally, any hope of theft must be obviated. This can be achieved by strengthening governmental security.

5. *Problems of Deterrence*

The only deterrence that would be effective against terrorism of any nature is based on the success of convincing the terrorist that the risk he takes outweighs the benefits which may accrue to his cause. The futility of attempting to wipe out terrorism by the use of military force or the threat of general sanction on an international level is apparent. The terrorist has to be shown that any attempt at terrorist activity would cause him and his cause more harm than good.⁶¹ Deterrence in this context attains fruition when effective punitive sanctions are prescribed and carried out, whilst simultaneously denying the terrorist his demands. In both instances, the measures taken should be imperatively effective. It is not sufficient if such measures are merely entered into the statute books of a State or incorporated into international treaty. The international community has to be convinced that such measures are forceful and can be effectively carried out.

However, deterrence does not stop at the mere imposition of an effective sanction, nor does it complete its task by the denial of terrorist demands. Perhaps the most effective method of countering terrorism is psychological warfare. The terrorist himself depends heavily on psychology. His main task is to polarize the people and the establishment. He

61. See ALEXANDER L. GEORGE & RICHARD SMOKE, *DETERRENCE IN AMERICAN FOREIGN POLICY: THEORY AND PRACTICE*, 48, 59-60. The George Smoke formula, introduced in the United States of America in the early 1970's, argued that if the cost and risk involved in a terrorist operation outweighed the benefit gained by such operation, deterrence could be successfully gained.

wants popular support and a sympathetic ear. He wants a lot of people listening and watching, not a lot of people dead.⁶² Counter measures taken against a terrorist attack, be it a hostage taking, kidnapping, or threat of murder, should essentially include an effective campaign to destroy the terrorist's credibility and sincerity in the eyes of the public. Always, the loyalty of the public should be won over by the target and not by the terrorist. It is only then that the terrorist's risk outweighs the benefits he obtains. To achieve this objective, the terrorist must receive detrimental publicity, showing the public that if the threatened person, group of persons or State comes to harm, the terrorist alone is responsible. Therefore, the most practical measures that could be adopted to deter the spread of terrorism can be accommodated in two chronological stages:

- 1) Measures taken before the commission of an offense such as the effective imposition and carrying out of sanctions and the refusal to readily comply with the demands of the terrorist;
- 2) Measures taken after the commission of the act such as the skilful use of the media to destroy the credibility of the terrorist cause and to convince the people that the responsibility for the act devolves at all stages solely upon the terrorist.

One difficulty in exercising deterrence against general and international terrorism is that often the measures taken are not effective enough to convince the terrorist that in the end, more harm would be caused to him than good. Negotiation with the terrorist in particular has to be done by professionals specially trained for the task. *A fortiori*, the media has to be handled by specialists with experience. Things would be much more difficult for the terrorist if this were done. The greatest problem of deterrence is the pusillanimity of the international community in the face of terrorism, and the feeble response offered by States as a composite body. The reasons for this hesitation on the part of the international community to adopt effective measures against international terrorism is by no means inexplicable. When one state supports a revolutionary cause which is aimed against another, it is quite natural that the terrorist is aware of the support he is capable of obtaining from at least one part of the already polarized world. Therein lies the problem.

6. The Solution

The primary objective of international peace and security is the en-

62. See Brian M. Jenkins, INTERNATIONAL TERRORISM — A NEW MODE OF CONFLICT, Research Paper No. 48, California Seminar on Arms Control and Foreign Policy 3 (1975). See generally, CARLOS MARIGHELLA, *The Minimanual of the Urban Guerilla*, reprinted in URBAN GUERRILLA WARFARE 40 (Robert Moss ed. 1971).

deavour to preserve the right to life and liberty. This right is entrenched in Article 3 of the Universal Declaration of Human Rights of 1948, and is accepted today as constituting an obligation on all member States to recognize the legally and morally binding nature of the Declaration.⁶³ Therefore, the destruction of human life and the restriction of liberty are acts committed against international law and order. International terrorism destroys both life and liberty. Indeed there need be no doubt in our minds that international terrorism is illegal. To begin with, there should be more awareness in the world today that every human being has the inherent right to life⁶⁴ and that the right is protected by law.⁶⁵ Any act of terrorism being illegal, becomes subject to law and its punitive sanctions. However, in this instance, unlike in a simple instance of murder where sanction itself may act as a deterrent, the two forces of law and sanction are not sufficient to curb terrorism. The international community should realize that the solution to terrorism lies rather in its prevention than in its cure. Therefore, the problem has to be approached solely on the basis that the terrorist on the one hand has to be persuaded that his act may not succeed. On the other hand, he has to be convinced that even if he succeeded in committing the act of terrorism, it would not achieve the desired results. The philosophy of warfare against terrorism is therefore based on the single objective of convincing the terrorist that any attempt at committing a terrorist act would be fruitless and would entail unnecessary harm. This simple philosophy should be adopted gradually in stages with the sustained realization that each measure taken is as important as the next. All measures should be adopted as a composite element, not as mutually exclusive.

A potential terrorist can therefore be attacked in two ways:

1. By the adoption of practical measures to discourage the commission of the act;
2. By the adoption of such effective measures as would impose severe punitive sanctions if the act is committed.

In the first instance, measures of self-help are imperative. They should be adopted with careful planning and the terrorist should be made aware that the community at large is afforded the full protection of these measures. They are:

63. See H.G. ESPIELL, *THE EVOLVING CONCEPT OF HUMAN RIGHTS, HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION* 45 (1979).

64. See International Covenant on Civil and Political Rights, Art. 6(1) (1966, *reprinted in* MARC J. BOSSUVT, *GUIDE TO THE "TRAVAUX PREPARATOIRES" OF THE INTERNATIONAL COVENANT ON THE CIVIL AND POLITICAL RIGHTS* 115 (1969).

65. Eur. Conv. on H. R., Art. 2 (1) (1953), *reprinted in* J.E.S. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 28 (1969).

- a) The establishment of a system of intelligence which would inform the state concerned of an impending terrorist attack;⁶⁶
- b) The establishment of counter-terrorism mechanisms which would effectively preclude such catalysts as the collection of arms, ammunition, and weaponry;⁶⁷
- c) The adoption of such practical measures of self-help and counter-attack as are necessary in an instance of an attack;⁶⁸
- d) The existence of the necessary machinery to retain the confidence and sympathy of the public at all times;⁶⁹
- e) The persuasion necessary to convince the public that terrorism of any kind is evil and should not be condoned, whatever its cause is.⁷⁰

The second instance is concerned with measures taken in the event a terrorist act is committed. If strongly enforced with unanimity, measures such as the imposition of laws which bind all nations to view terrorist acts as crimes against humanity can be an effective deterrent. *A fortiori*, sanctions would further discourage the terrorist.

7. Practical Measures

The first step that should be taken to deter terrorism is for states to be equipped with the expertise to detect a potential threat beforehand and to be prepared for an attack. The next is to intensify security in all susceptible areas, particularly in such places as airports, subway terminals, etc. Surveillance of all people in such areas perceived as targets of terrorist acts, is imperative. There should be more awareness of the threat of terrorist activity, particularly in international airports, and bus and train terminals where travel documents should be checked and passengers double-checked.⁷¹ Electronic surveillance of passports and other documents has proved to be an effective method of deterrence in this context. Perhaps the most important facet of surveillance is the use of personnel who do not reveal their identity to the public, but unobtrusively mingle with the crowds. These individuals can easily detect an irregularity without arousing suspicion and without alarming the average person. There should be trained personnel who work with the security forces in such instances. Another significant requirement is the support of the people. The media should be used to the maximize education of the citizen about how to react in an emergency, as well as to be totally distrustful of the terrorist whose acts are calculated to evoke sympathy.

66. See ALONA E. EVANS & JOHN F. MURPHY, LEGAL ASPECTS OF INTERNATIONAL TERRORISM 541 (1978).

67. See *Id.* at 546-47.

68. See *Id.* at 547-48.

69. See *Id.* at 636-37.

70. See *Id.*

71. See *Id.* at 539.

The victims of the terrorist attack should at all times, use the media to convince the public that responsibility for any destruction or harm devolves totally to the terrorist.

8. *Legal Measures*

Terrorism is usually the genus of the species of political discord between nations. The terrorist is well aware of this situation and usually exploits political disharmony among nations. Laws that have been enacted are rendered destitute of effect because they cannot be enforced with uniformity. Political asylum is a product of this anomaly and remains by and large the greatest catalyst to the proliferation of terrorism in the world today.

In the recent past, the United Nations General Assembly has made sustained efforts to adopt collective measures to prevent terrorism. Various recommendations have been placed before the United Nations urging all nations to contribute collectively to the progressive elimination of the causes of terrorism at national and international levels. The United Nations has successfully focused the attention of its member nations on the increasing problems of terrorism and its natural corollaries such as the proliferation of arms and the emergence of mercenaries.

However, the efforts of the international community to enter into treaties have been rendered nugatory due to two reasons, the first being the aura of ambiguity that shrouds the nature and force of an international agreement, and the second being the lack of enthusiasm on the part of most States to label terrorism as an offense against humanity. The latter, if recognized, would immediately entail the mandatory punishment of the terrorist by all States concerned. The question raising much debate has been whether international law upon which international treaties are based has the nature and force of law. Although Nineteenth century Austinian thinking did not consider international law to be endowed with the attributes of law,⁷² there is a strong view to the contrary.⁷³ The theory that international law is not enforceable law was based on the thinking that laws emanate from a sovereign authority which was politically superior to those on whom such law was imposed. International law, it was claimed, did not emanate from such authority. The contrary view, which is persuasive, holds that if international law had mere force of morality, such authorities as precedents and opinions of jurists would not be cited in instances of adjudication.⁷⁴ In addition, certain judicial decisions

72. W.L. MORISON, JOHN AUSTIN 78, (1982).

73. J. G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 18, (9th ed. 1984). See also DENNIS LLOYD, THE IDEA OF THE LAW 37-40, (rev. ed. Penguin 1970).

74. Starke, *supra* note 74, at 18-21.

have expressly recognized the fact that international law is enforceable and has all the attributes of law.⁷⁵

Once it is accepted that international law is enforceable, the question arises whether treaties in general have the necessary obligatory force to demand adherence from their signatories. Although treaties are founded upon the expectancy of the observance of good faith under the principles of the *pacta sunt servanda*, the emergence of competent courts and tribunals and the increasing dependence upon precedent and scholastic opinion in this field are sufficiently compelling factors in support of the enforceability of treaties. Legislative measures, like practical measures, can be effectively adopted. The first step is for all States to recognize that terrorism of any nature is a crime against humanity. The second is for all States to reach agreement either to punish a terrorist or to deport him to a country which has sufficient interest in the offence to punish him. The treatment of the offense by all States should be devoid of political ideology and the tendency to offer political asylum to terrorists. It may not be possible for all States to sign one agreement on this issue. However, States could negotiate bilaterally or in groups and enter into treaties, the provisions of which could accrue to other States as well, on the principle of the most-favoured-nation-treatment clause.⁷⁶ The most important factor is to involve all States one way or another to form a composite force and not to isolate them in the face of terrorism.

The threat of terrorism can be curbed only if terrorism is collectively recognized as an offense against humanity by the international community. The lack of consensus leads to the situation where acts of terrorism can be prosecuted only if they fall within the purview of municipal law and are categorized as crimes within these laws.⁷⁷ Once consensus is reached, cooperation between individual States could be enforced by treaty. An international institution such as the United Nations should coordinate the liaison between States and initiate the establishment of interest groups, thereby assisting practically any State facing the threat of terrorism. The creation of a powerful and vigilant anti-terrorist squad, and the establishment of a trust fund to finance anti-terrorist campaigns

75. See *Murray v. Schooner The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J., cited Art. VI, para. 2 of the United States Constitution which gives constitutional validity to international law). SEE ALSO *The Paquete Habana*, 175 U.S. 677, 700 (1900) (Gray, J., who stated that international law must be ascertained and administered by the courts of justice of appropriate jurisdiction).

76. First introduced in 1947 by the General Agreement on Tariffs and Trade (GATT), the most-favoured-nation-treatment clause ensures that certain benefits accrue to nations other than the signatory States in instances that apply to those non-signatory States.

77. Daniel G. Partan, *Terrorism: An International Law Offense*, 19 CONN. L. REV. 751 (1987). See generally, Rett R. Ludwikowski, *Political and Legal Instruments in Supporting and Combatting Terrorism: Current Developments*, 11 TERRORISM 197, 197-211.

in less affluent nations are two measures which would be positive steps towards establishing mutual help and understanding in this context. Above all, what is required is a synthesis of practical and legal measures that uniting the world against this crime and discouraging the terrorist.

B. HIJACKING

1. Hijacking Defined

Sixty-two years have lapsed since the first recorded instance of a hijacking in Peru in 1930. Before this incident any idea of crimes pertaining to aircraft was purely imaginary.⁷⁸ Since then, hijacking has become the most significant area of international civil aviation law, causing the greatest concern and producing sustained research on its possible control.⁷⁹

The offence has been identified primarily as the seizure by force or control of an aircraft in flight by a person on board.⁸⁰ It has also been called "aircraft piracy," "aircraft hijacking," and more recently, "skyjacking"⁸¹ or "aerial hijacking," an act of terror-violence.⁸² The offence has been distinguished from the general term "piracy" — the latter being a universal crime and implying *inter alia* the robbery at sea for personal enrichment.⁸³

Although the first effective countermeasures against hijacking were introduced in 1970, it was not until 1973, when airlines introduced passenger and cabin baggage searches, that the incidents of hijacking decreased. Unfortunately, this progressive counter-measure by the airlines succeeded only in spurring the hijacker towards developing more sophisticated methods of smuggling arms and explosives into aircraft. The diligent work of the terrorist was rewarded in 1985, when the world's worst rate of hijackings was recorded. In response to the hijacker's tenac-

78. A. Wilberforce, *Crime in Aircraft*, 67 J.R.A.E.S. 175 (1963). See also Gary N. Horlick, *The Developing Law of Air Hijacking*, 12 HARV. INT'L L.J. 33 (1971).

79. Wilberforce, *supra* note 79. See also, Alona E. Evans, *Aircraft Hijacking, Its Cause and Cure*, 63 AM. J. INT'L L. 695 (1969); A. Lee Bradford, *The Legal Ramifications of Hijacking Airplanes*, 48 A.B.A.J. 1034 (1962). Gerald F. Fitzgerald, *Development of International Legal Rules for the Repression of the Unlawful Seizure of Aircraft*, 7 CANADIAN Y.B. INT'L 269 (1969).

80. SHAWCROSS & BEAUMONT, *AIR LAW*, para. VIII, at 27-28 (4th ed. 1994).

81. M.C. McClintock, *Skyjacking: Its Domestic, Civil and Criminal Ramifications*, 39 J. AIR L. & COMM. 29, 31 (1973).

82. Robert A. Friedlander, *Banishing Fear From the Skies: A Statutory Proposal*, 16 DUQ. L. REV. 283, 286 (1977-78). SEE ALSO, R. J. McGrane, *A Search for an International Solution to the Problem of Aircraft Hijacking*, 2 AUCKLAND U. L. REV. 83 (1975); R.I.R. Abeyratne, *Aerial Piracy and Extended Jurisdiction in Japan*, 33 INT'L & COMP. L. Q. 596, 597-600 (1984).

83. G. HACKWORTH, 2 DIGEST OF INTERNATIONAL LAW 681 (1958). See also, S.C. Chaturvedi, *Hijacking and the Law*, 11 INDIAN J. INT'L L. 89 (1971); BLACK'S LAW DICTIONARY (6th ed. 1990); Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82, art. 15.

ity, the world reacted by tightening aviation security globally. 1986 saw a sharp decrease in the incidents of hijackings.

Infrequently, hijacking has also been recognized as a separate norm, differentiating it from the broad rubric of political terrorism.⁸⁴ Thieves wrote a new chapter in the annals of aviation by hijacking a helicopter on August 11, 1992, attempting to take off from a Corsican airport,⁸⁵ swooping down on a passenger jet and stealing a shipment of currency and passenger baggage that was in the aircraft's cargo hold.

An internationally acceptable definition of terrorism and hijacking can be achieved only if all nations unanimously agree to prosecute any act of undue influence which takes advantage of and affects the integrity and interests of any nation. Such an act has to be universally recognized as punishable and free from the restrictions imposed by national laws and other jurisdictional fetters. A universal definition of terrorism is not meant to create a universal political ideology. Nor is it realistic to expect such an eventuality. States can, however, effectively control instances of terrorism such as hijacking if it is made known that the offence would be treated on the same basis, with the same punitive measures attached to it throughout the world. To attain this objective, the subjectivity and hypocrisy with which the concept of terrorism is viewed should be totally eschewed. Furthermore, the meaning, purpose and function of international law should also be seriously reviewed.

2. International Conventions

The Tokyo Convention of 1963 on Offenses and Certain Other Acts Committed Onboard Aircraft,⁸⁶ referred to any offence committed or act done by a person on board any aircraft registered in a contracting State, while the aircraft is in flight or on the surface of the high seas or of any

84. M.M. Whiteman, *Jus Cogens in International Law, With a Projected List*, 7 GA. J. INT'L & COMP. L. 609, 625 (1977). See also, M.J. Fenello, *Technical Prevention of Air Piracy*, 585 INT'L AVIATION 28, 30-31 (Nov. 1971) (airline employees are taught to recognize the psychological characteristics of hijackers). They were:

- 1) the disgruntled national who unlawfully seizes the aircraft and expresses his defiance by directing its flight to a country whose political ideology he shares and admires;
- 2) the "flying commando" who has taken his *casus belli* to the air. This type of person is particularly dangerous, as he is liable to cause death or injury to his hostages and destruction of the aircraft and other property so as to focus attention upon his cause;
- 3) the mentally deranged individual who has chosen hijacking either as a device to gain recognition and notoriety or as a mode of escape from intolerable psychological pressures;
- 4) the common criminal, who uses the aircraft as a vehicle of escape from pending prosecution or incarceration; and,
- 5) the extortionist, who uses the hijacking as a gateway to acquiring instant wealth.

85. See INTERAVIA AIR LETTER, No. 12558, 3 (13 Aug. 1992).

86. Convention on Offenses and Certain Acts Committed Onboard Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter Tokyo Convention].

other area outside the territory of such State.⁸⁷ The aircraft is considered to be in flight from the moment power is applied for the purpose of take off, until the moment when the landing run ends.⁸⁸ In addition, the Tokyo Convention mentions acts of interference, seizure of, or other wrongful exercise of control of an aircraft, implying its concern over hijacking.⁸⁹

The Hague Convention of 1970⁹⁰ identifies in Article 1, any person on board an aircraft in flight, who unlawfully by force or threat or by any other form of intimidation, seizes or takes control of such aircraft, or even attempts to perform such an act, as an offender.⁹¹ Anyone who aids such an act is an accomplice, and is included in the category of the former.⁹² It is clear that the Hague Convention, by this provision, has neither deviated from Article 11 of the Tokyo Convention, nor offered a clear definition of the offence of hijacking. It merely sets out the ingredients of the offence as being the unlawful use of force, threat, or any other form of intimidation and taking control of the aircraft. The use of physical force, weapons or firearms or the threat to use such modes of force are imputed to the offence in this provision. The words force, threat or intimidation indicate that the element of fear would be instilled in the victim.

It is an interesting question whether these words would cover a situation where the hijacking was implemented through non-coercive measures such as the drugging of food or beverages taken by the passengers or crew. The Hague Convention does not ostensibly cover such instances. In this context, many recommendations have been made to extend the scope of its Article 1.⁹³ It is also interesting that the Convention does not envisage an instance where the offender is not on board the aircraft but remains on the ground directing operations from there after planting a dangerous object in the aircraft. According to Article 1, the offence has to be devoid of a lawful basis, albeit that the legality or illegality of an act is not clearly defined in the Convention.

It is also a precondition in Article 1 that the offence has to be committed in flight, that is while all external doors of the aircraft are closed after the embarkation of the passengers and crew.⁹⁴ The mobility of the

87. *Id.* at ch. 1, art. 1(2).

88. *Id.* at ch. 1, art. 1(3).

89. *Id.* at ch. 4, art. 11.

90. Hague Convention on the Suppression of Unlawful Seizure of Aircraft, 16 Dec. 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter Hague Convention].

91. *Id.* at art. 1(a).

92. *Id.* at art. 1(b).

93. See S. Shubber, *Aircraft Hijacking Under the Hague Convention 1970 - A New Regime?*, 22 INT'L & COMP. L. Q. 687, 692 (1973). See also, Report to the Legal Committee, ICAO, Doc. 8877-LC/161 page 1, para 4.

94. Hague Convention, *supra* note 91, Art. 3, para 1.

aircraft is immaterial. Furthermore, Article 1 is rendered destitute of effect if an offence is committed while the doors of the aircraft are left open.

The Convention for the Suppression of Unlawful Acts Against The Safety of Civil Aviation signed at Montreal on 23 September 1971,⁹⁵ also fails to define, in specific terms, the offence of hijacking, although it circumvents barriers placed by Article 1 of the Hague Convention.⁹⁶ For instance: it includes instances where an offender need not be physically present in an aircraft; instances where an aircraft is immobile; instances where the doors of the aircraft are open; and even draws into its net any person who disseminates false information which could endanger an aircraft in flight.⁹⁷ None of the three conventions have, however, succeeded in identifying the offence of hijacking or advocating preventive measures against the offence itself.

The failure of all attempts at identifying the offence of hijacking and formulating a cogent system of preventive criteria attains its culmination in political terrorist acts. Such offenses underscore the significant fact that not only is political terrorism treated subjectively under different social and political contexts, but also that so far the only attempts at recognizing the threat of terrorism have been made on an intrinsic approach, which seems more to condemn the offence than to find a cure for the deep seated social and political factors which form the permanent breeding grounds for terrorism. The inevitable continuity of the commission of this offence cannot be stopped if the following are not considered:

- a) the reasons for the perpetration of terrorist acts;
- b) the universal definition of such acts;
- c) the fact that such acts transcend national boundaries and affect the entirety of the civilized world; and,
- d) the fact that every act of terrorism brings a political advantage to certain nations.

The most obvious and the primary stage at which the offence of hijacking can be controlled is at the time of check-in, when a comprehensive search of all passengers and their baggage for concealed weapons would greatly alleviate the problem.⁹⁸ The United States of America has adopted this measure by introducing electronic screening of all passengers by statute in 1973. The results of this measure were almost immediately visible with the sudden drop in the incidents of hijackings in the

95. Montreal Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 Sept. 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 [hereinafter Montreal Convention].

96. *Id.* at art. 1.

97. *Id.*

98. S.B. Rosenfield, *Air Piracy; Is It Time To Relax Our Security?* 9 NEW ENG. L. REV. 81, 81-82 (1973).

United States in 1973.⁹⁹ In addition to these measures, direct criminal sanction on a national level, by each of the States who enter into international agreement on the prevention and control of hijacking has been recommended.¹⁰⁰ It is an enlightened view that:

Violence, terrorism, assassination and undeclared wars all threaten to destroy the restraint and moderation that must become the dominant characteristic of courage. Unless we establish a code of international behaviour in which the resort to violence becomes increasingly irrelevant to the pursuit of national interests, we will crush the world's dream for human development and full flowering of human freedom.¹⁰¹

Based on this thinking, a universal statutory proposal has been recommended.¹⁰² This proposal extends the scope of the three international Conventions only slightly, but does not change their structure radically. For instance, Section 2 of the recommended statute covers acts of violence perpetrated on an aircraft in flight or those which endanger the safety of an aircraft in service.¹⁰³ However, the proposed statute does not envisage all possibilities of hijacking.

On a different note, it is strongly felt that the modern age has left us with the almost irrefutable concept that political offenders need not as a rule be extradited, thus making the element of political asylum almost a mandatory doctrine for most of the international community.¹⁰⁴ In this context, the following observation on the threat of hijacking was made in early as 1973.

Potential criminals, and hijackers in particular, will be discouraged from committing acts only if there is no country in which they can find refuge. This requires international agreement among the States, followed by legislation in each State, providing either for the punishment of persons committing such crimes, or for their extradition to another State where they will be punished.¹⁰⁵

The above view is consistent with the approach that agreement should be reached by as many States as possible, if not all, either to provide for the punishment of a guilty person on a universally agreed basis or to extradite him to a country which has sufficient interest to punish him. In this instance, what is known as the freedom of political expression

99. FED. AVIATION REGULATIONS, sec. 121.533 (Dec. 5, 1972). *See also*, FED. AVIATION Memorandum CC-1 (March 21, 1969).

100. FED. AVIATION ADMIN. INFO. (March 19, 1969).

101. 77 DEP'T ST. BULL. 547 (Oct. 24, 1977).

102. Friedlander, *supra* note 83, at 288.

103. *Id.* at 290-291.

104. H.F. Van Panhuys, *Aircraft Hijacking and International Law* 9 COLUM. J. TRANSNAT'L L. 1, 13 (1970).

105. Dr. P.P. Helen, 37 *New Zealand and South Pacific Aviation Digest* 6 (1973).

should give way to the blending of international law enforcement and security of the passenger. The crime itself has to be viewed as a common one which erodes all norms of fundamental human rights.¹⁰⁶

With the increasing recurrence of the offence of hijacking, it becomes apparent that more cooperation is needed among nations to review the remedial measures that have been adopted to counteract the threat. Such measures should be viewed under four broad areas. They are:

- a) A wider definition of the offence itself to cover every possible exigency of the safety of aircraft, passengers and goods;
- b) More liberal attitudes towards the extradition of offenders and the total abstinence of States from encouraging the concepts of political asylum and political havens;
- c) More worldwide awareness of the need to strengthen internal security and individual checking of passengers and travel documents;
- d) Total agreement between states that the offence of hijacking, once identified, be viewed on a singular basis devoid of any political differences which would encourage the commission of the offence. Punitive measures should be similar if not identical to preclude a potential offender from choosing his alternatives.

The proliferation of dangerous weapons and the rapidity of scientific advancement, coupled with increasing political discord among nations, show that the offence of hijacking should not be viewed subjectively as a sporadic occurrence any more. It is more a planned inversion of socio-political values and the erosion of human rights.

It can no longer be viewed simply as the illegal diversion of an aircraft to a destination other than that which was envisaged in the original flight plan or more simplistically as the seizure by force of an aircraft in flight.¹⁰⁷ It is even more than the mere seizure or exercise of control by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce.¹⁰⁸ It should be viewed as an extortion-oriented act, committed against the international order and world peace which is calculated to take advantage of the most susceptible human quality of the endeavour to protect human life at any cost. This broad attitude would engulf and cover even the rare instance of a demented offender who perpetrates the offence for no apparent reason. In the ultimate analysis, any attempt at hijacking involves more than one nation, thereby immediately transcending all national boundaries and exposing the sensitivities of the nations involved. The offence, therefore,

106. See *supra* Abeyratne, note 83, at 612-13.

107. SHAWCROSS & BEAUMONT, *supra* note 81, para. 620 at 521.

108. Alona E. Evans, *Aircraft Hijacking, What is Being Done?* 67 AMER. J. INT'L L. 641,653 (1973).

becomes an immediate threat to world peace and should be treated as such. It is needless to say that any nation which views the offence differently encourages universal discord. It is submitted that in the light of the increasing incidence of hijacking, the offence should be defined and accepted by the world as any willful act calculated to endanger the safety of an aircraft or any passenger in service or in flight. The words "in service" in this context should mean any period of time when a serviceable aircraft, which is used for air transportation, is left standing in a hangar. The words "in flight" should cover the period of time when an aircraft is taken out of the hangar until it returns to the hangar. In this event, the offence would not be mere "aerial piracy," but an offence against the safety of air travel.

As for the need for a more flexible approach to the extradition of offenders, the establishment and recognition of a universal offence against the safety of aircraft would almost automatically nurture mutual cooperation between nations. Often, if a hijacker imputes politics to the committed offence, he is granted political asylum by the host nation merely because the latter sympathizes with the alleged motive for the offence as represented by the hijacker. Once this takes place it no longer remains the commission of an offence universally condemned, but becomes an altercation between nations on political beliefs and convictions.¹⁰⁹

International and internal security are also major areas of importance in the prevention and control of hijacking. Quite apart from the growing need for the establishment of a separate international anti-terrorist squad under the auspices of the United Nations, the need is visible on a national basis for an adoption of more stringent security measures against possible offenders. There should be more awareness of the threat at the airport itself, prior to passenger boarding. In this context, investigation could include checks of police records, including details of suspicious passengers who may be previous offenders; the use of magnetic cards on passports; and rigid inspection of all travel documents at the airport. Electronic surveillance, wherever it has been carried out, has proven to be an effective measure of prevention of the offence.

In addition to the need for a cogent definition of the offence, a universal sanction is also needed for the prevention of the offence. It is noteworthy that as far back as 1971, an attempt was made by the United States and Canada to draft a multilateral Convention to establish rigid sanctions for the offence of hijacking on a multilateral basis. This was to have been under the auspices of the International Civil Aviation Organization. The draft recommended powers of arbitration and intervention

109. See generally, McGrane, *supra* note 83, at 91-95.

by ICAO in instances of dispute with regard to extradition. The draft did not attain fruition.

In July 1978, leaders of seven nations¹¹⁰ met in Bonn and adopted what was later to be called the Bonn Declaration. The Declaration, in essence, proclaimed that heads of States and Governments would ensure the cessation of all flights into a country which refuses the extradition or prosecution of a person or persons who perpetrates the offence of hijacking. The Bonn Declaration attempted to achieve two goals: first, to implicitly recognize the fact that States are often accomplices after the fact of hijacking; and second, to develop a universal consensus on and action against the offence of hijacking. The rationale of the Declaration is primarily deterrence, and secondarily, consensus against the offence.¹¹¹

C. ACTS OF SABOTAGE

The most recent major incident involving acts of sabotage against civil aviation was the explosion of PAN AM Flight 103 over Lockerbie, Scotland, on 21 December 1988. The explosion is believed to have been caused by the detonation of a plastic explosive concealed in a portable cassette player/radio. The substance used was Semtex, a plastic explosive having its origin in Semtin, Pardubice, Czechoslovakia. Earlier in 1986, a TWA Boeing 727 aircraft had also been blown up by a plastic explosive just before the aircraft landed in Athens. As Professor Michael Milde stated: "[t]he brutal tragedy of PAN AM 103 focused the attention of ICAO on the need to tighten the preventive security measures in particular in the field of detection of explosive substances."¹¹²

Accordingly, an *ad hoc* group of specialists on the detection of explosives was established by the ICAO Council. This group met in Montreal in March 1989. The United Nations Security Council, in June of the same year, adopted Resolution 635, which, *inter alia*, urged the International Civil Aviation Organization to intensify its work aimed at preventing all acts of terrorism against international civil aviation, and in particular its work on devising an international regime for the marking of plastic sheet

110. Canada, France, the Federal Republic of Germany (as it then was), Italy, Japan, The United Kingdom of Great Britain and Northern Ireland, and the United States of America. See Mark E. Fingerma, *Skyjacking and the Bonn Declaration of 1978: Sanctions Available to Recalcitrant Nations*, 10 CAL. W. INT'L L. J. 123, 139 n.125 (1980).

111. Mark E. Fingerma states:

[T]he Bonn Declaration focuses on sanctions designed to deter nations from encouraging the commission of the offence. In effect, the spirit of the Declaration is a recognition of the fact that States are frequently de facto accomplices to acts of skyjacking. . . The rationale of the Declaration would appear to be the foreclosing of the possibility of a skyjacker finding refuge which reduces the attractiveness of the offence.

See *Id.* at 142-43.

112. Milde, *supra* note 25, at 159.

explosives for the purpose of detection.¹¹³ At the twenty-seventh Session of the ICAO Assembly in September/October 1989, the delegations of Czechoslovakia and the United Kingdom presented to the Executive Committee a paper which contained a Draft Resolution on the marking of sheet explosives for the purpose of detection.¹¹⁴

The international conference on air law held in Montreal under the aegis of ICAO unanimously adopted a Convention on the Marking of Plastic or Sheet Explosives for the Purpose of Detection.¹¹⁵ The Preamble to the Convention extended the scope to other means of transport, and the definition of explosives was enlarged to include explosive products commonly known as "plastic explosives," including explosives in flexible elastic sheet form, as described in the Technical Annex to the Convention.¹¹⁶ Each State Party is obligated to take the necessary measures to prohibit and prevent the movement of unmarked explosives into and out of its territory,¹¹⁷ while exercising strict and efficient control over the possession and transfer of explosives referred to in the Technical Annex to the Convention.¹¹⁸ While it is popularly felt that the Convention is a spectacular and impressive achievement which was very quickly accomplished,¹¹⁹ the new Convention is by no means the only and ultimate solution to the problem of sabotage of civil aviation. It is merely one more step in the long line of legal and practical measures.¹²⁰

D. SURFACE-TO-AIR MISSILE ATTACKS

There have been a few reported incidents of serious damage caused by surface-to-air missiles (SAM) against civil aviation. In early 1979, two Air Rhodesia aircraft were destroyed by SAM missiles. There were heavy casualties. There were reports of the Mujahedeen of Afghanistan obtaining and using SAM equipment on aircraft over Afghanistan.¹²¹

113. See Appendix A, ICAO Doc. LC/27-WP/3, (Jan. 22, 1990).

114. Executive Committee Paper A 27 - WP/115, Ex. 37. See also, Milde *supra* note 113, at 4-9 (for an elaborate discussion on the chronological sequence of activities in this regard).

115. See ICAO Doc. 9571 (1991).

116. *Id.* at art. 1.1.

117. *Id.* at art. 11.

118. *Id.* at art. IV.5.

119. Milde, *supra* note 113, at 178. See also Roderick P. van Dam, *A New Convention on the Marking of Plastic Explosives for the Purpose of Detection*, XVI AIR LAW 176, No. 4/5 (1991).

120. See Milde, *supra* note 25, at 96. Professor Milde observed:

[T]he new convention on the marking of plastic explosives will not be a panacea but only a small addition to the general mosaic of the general legal measures. The Convention will become useful, not when all plastics are properly marked for the purpose of detection, but only when affordable and efficient detection equipment will become available at all international airports and other critical areas of the world.

121. *Aerial Piracy and Aviation Security*, Yonah Alexander and Eugene Sochor ed., Kluwer Academic Publishers, Martinus Nijhoff, the Netherlands, 1990, 38.

There have also been many reports of unsuccessful attacks launched by terrorists against aircraft in flight over Europe, particularly over Rome and Paris.¹²² Unlike other types of terrorism, this particular species of offence can be controlled to a large extent owing to the difficulty of trans-border transport of surface to air missiles.

E. ARMED ATTACKS AGAINST AIRPORTS AND PERSONS

Armed terrorist attacks are a common form of terror in the world of aviation. The first recorded armed attack in an airport was in June 1972, when Japanese Red Army guerillas opened fire with automatic weapons and threw grenades in Tel Aviv's Ben Gurion Airport.¹²³ Since then, there have been incidents in Athens Airport in August 1973, in Rome and Vienna in 1985, and numerous later attacks on airports and aviation-related properties worldwide. Armed terrorist attacks have led to sustained litigation over claims for damages from the airlines, on the basis that passengers in an airport are under the control of the air carrier they are flying with.¹²⁴ In the recent case of *Buonocore v. Trans World Airlines, Inc.*,¹²⁵ where the plaintiffs' son, John Buonocore III, was killed during a terrorist attack on Leonardo da Vinci Airport, Rome, on December 27, 1985. The court held that the plaintiffs could not claim damages from the airline for their son's death, since the airline did not exercise control over the activities of the deceased. Be that as it may, a sustained *cursus curiae* reflects numerous instances where armed terrorist attacks against persons and property at airports, airline offices, and other aviation-related locations have led to litigation in courts and the subsequent award of compensation to the plaintiff.

F. NARCO-TERRORISM

The illegal carriage by air of narcotics and other psychotropic substances and its various corollaries of violence or narco-terrorism as it is popularly known, has become an intractable problem in recent years. Narco-terrorism is considered an offence on two grounds: the fact that the illicit trafficking of drugs is an offence against public health; and the illicit carriage by air of these substances leads to other crimes against international civil aviation, such as the unlawful seizure of aircraft and the infliction of damage on persons and property related to international civil

122. *Id.* at 39.

123. *Id.*

124. *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3rd Cir. 1977); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2nd Cir. 1975) *cert. denied*, 429 U.S. 890 (1976); *Salerno v. Pan American World Airways, Inc.*, 606 F.Supp. 702 (S.D.N.Y. 1972) *aff'd*.

125. *Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8,11 (2d Cir. 1990).

aviation.¹²⁶ The problem has blown into unmanageable proportions owing to the rapid proliferation of air travel. ICAO records that 9350 turbo jet aircraft were active in commercial air transport in 1990;¹²⁷ Boeing's estimation of the world jet fleet was very similar.¹²⁸ It is not difficult, therefore, to figure out the tremendous encouragement given to the drug trafficking trade by the numerous aircraft movements that would be spread out by these aircraft over the 14,488 land airports in the world.¹²⁹ Thus, it is not surprising that there have been numerous instances where aircraft have been seized by governmental authorities owing to the presence of narcotic drugs.¹³⁰

Narco-terrorism in international civil aviation has its genesis in the illicit trafficking of drugs, which has been the focus of attention of the world community in general and the United Nations in particular. Professor Michael Milde, describing the efforts of the United Nations and its specialized agencies to curb the problem of illicit drug trafficking observes that an:

“international campaign against traffic in drugs” was launched as a matter of “highest priority” and contemplated the convening of a specialized international conference dealing specifically with illicit drug trafficking, characterized as an “international criminal activity.” Another resolution directly linked drug abuse and illicit trafficking with “international criminal activities such as the illegal arms trade and terrorist practices,” and considered them to be a “threat to the well being of peoples, the stability of democratic institutions and the sovereignty of States.”¹³¹

Narco-terrorism involves two facets: the transportation of drugs and narcotics by aircraft across national boundaries; and the process of loading and unloading them at aerodromes and airports. The two acts are claimed to be integrally linked to one another. As Antonio Francoz Rigalt observes:

126. Antonio F. Rigalt, *Illegal Transport by Air of Drugs and Psychotropic Substances*, 15 AIR LAW 17,20 (1990).

127. *Civil Aviation Statistics of the World 1990*, ICAO Statistical Yearbook, ICAO Doc. 9180/16 at 12. See also *Civil Aircraft on Register*, 1990 ICAO Digest of Statistics No. 382 at 27.

128. *Boeing World Jet Airplane Inventory 1990*, at 31 (where the figure given by Boeing is 8936 aircraft, which is a figure compatible with the ICAO statistics).

129. *Annual Report of the Council*, ICAO, Doc. 9568 at 31.

130. Donald Bunker says:

The trafficking and illicit use of drugs has affected peoples' lives throughout the world, and the aviation industry has not escaped the disease. Leaving aside the problem of drug use by air crews, the problem of drug trafficking is starting to have a worrisome effect on aviation and the financial community which supports it.

Donald H. Bunker, *The Effect of Drug Trafficking on Aircraft Financing*, 3 AIR TRANSPORT MANAGEMENT 4,6 (1990).

131. Michael Milde, *The Role of the ICAO in the Suppression of Drug Abuse and Illicit Trafficking*, 13 ANNALS AIR & SPACE L., 133-34 (1988).

In actual fact, the essential elements of the unlawful act, i.e. 'transport by air' and 'trafficking' are inseparable. Nevertheless, there is a distinction to be made between them. Air transport involves carrying the drugs from one place to another by aircraft, and this may be done either lawfully or unlawfully. It is lawful when carried out for medicinal purposes and with the permission of the appropriate authorities. It is unlawful when these requirements are not fulfilled; and another characteristic here is the element of continuity because the transport, be it by land, sea, or air is carried out with a single criminal intent and a plurality of actions which together violate the same legal rule and which, in addition, may be 'continuous' when it takes some time to complete, involving, as it always does, frequent trips by air.¹³²

Rigalt also points out that the illegal transportation of drugs and narcotics encompass other criminal acts that come within the purview of offenses against public health. He claims further that narco-terrorism could give rise to heinous offenses, such as: the destruction of aircraft, unlawful use of traffic installations, damage to private and public property, theft, and robbery.¹³³

Taking note of the outcome of the United Nations International Conference on Drug Abuse and Illicit Trafficking, held in Vienna from June 17-26, 1987, the ICAO, at the Twenty-seventh Session of its Assembly in September-October 1989, adopted Resolution A 27-12. This resolution recognized the deleterious effects on international civil aviation of the illegal carriage of narcotics and psychotropic substances. Additionally, it urged the ICAO Council to continue its efforts to prevent the illicit transport of narcotic drugs and psychotropic substances by air¹³⁴ and to propose necessary action and measures to combat the threat, including the preparation of guidance material on the problem.¹³⁵ The Assembly, by the same Resolution, called upon contracting States to continue their efforts to prevent the illicit trafficking of drugs by air.¹³⁶

Pursuant to Resolution A 27-12, the ICAO Secretariat issued a State Letter¹³⁷ to the United Nations, to other relevant international organizations¹³⁸ and to contracting States to provide information and seek their views on possible action to be taken. More than half the replies to the State Letter indicated that States were taking necessary action and measures to enact municipal legislation to curb the threat.¹³⁹

132. Rigalt, *supra* note 127, at 18.

133. *Id.* at 20.

134. ICAO Res. A 27-12, U.N. ICAO, 27th Sess., Para. 3 (1989). See *Assembly Resolutions in Force*, U.N. ICAO, ____ Sess., ICAO Doc. 9558 (____) [hereinafter *Assembly Resolutions*].

135. *Assembly Resolutions*, *supra* note 135, at 5.

136. *Id.* at 6.

137. Letter from ICAO Secretariat, to the U.N. and other organizations (Dec. 6, 1989) ICAO Doc. E2/2.7-89/109.

138. ICAO Doc. C-WP/9235, Para. 9 (Feb. 6, 1991).

139. *Id.* at Para. 12.

Earlier, the Tenth Session of the ICAO Facilitation Division, held in September 1988, had recommended numerous amendments to Annex 9 to the Chicago Convention to reflect narcotics control requirements in the Annex. The objective of these amendments was to ensure that a balance is achieved between the interests of facilitation and those of narcotics control.¹⁴⁰

G. A COMMON THREAD

Terrorism is a risk that accompanies air travel¹⁴¹ and may be aimed at achieving several objectives. Acts of terrorism may be aimed at: extracting specific concessions, such as the release of prisoners or payment of ransom; gaining publicity; attracting attention of the international press to the terrorist cause; causing widespread disorder in a society to demoralise and breakdown the existing social order; provoking repression, reprisals, and counter-terrorism; enforcing obedience and cooperation; and punishing the victim of the terrorist attack. Often the terrorist does not discriminate between his actual target and innocent bystanders.¹⁴²

Although as Dr. Bockstiegel once said, there are no perfect solutions, legal or otherwise, for the problems relating to aviation security.¹⁴³ The terrorist is often aided by the lack of supervision and vigilance on the part of the victim. This was found to be so by the committee of inquiry that looked into the security situation relating to the Air India disaster¹⁴⁴ and the more recent PAN AM disaster.¹⁴⁵ *A fortiori*, therefore, the aviation industry is a high-profile, soft target that remains highly susceptible as an easy prey on account of its weakness in security.¹⁴⁶

140. ICAO, Convention on International Civil Aviation Annex 9, 9th ed. at 2, provisions 2.2, 3.2, 3.30, 3.31, 5.14, 6.1 (1990).

141. See *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977). *But see Evangelinos*, 550 F.2d at 159 (Seitz, J. dissenting).

142. For example, the victims of the Lod Airport Massacre in 1972, most of whom were Christians, had used Israeli visas as tourists in Israel and therefore were guilty in the eyes of the terrorists who carried out the massacre.

143. Karl-Heinz Bockstiegel, Concluding Remarks, Aviation Security Conference Proceedings, Hague, International Institute of Air & Space Law 174 (Jan. 22, 1987).

144. International Herald Tribune 15, 1985, cited in IATA Current Information Summary No. 3583 (Nov. 15, 1985) (where it was revealed that baggage on board the Air India flight was not subject to x-ray inspection prior to departure from Toronto).

145. International Herald Tribune (March 2 1990), cited in IATA Current Information Summary No. 4642, Geneva (which revealed serious security lapses by PAN AM security divisions that were in charge of the flight).

146. Taylor, *supra* note 122, introduction at VIII. See Paul Stephen Dempsey, *LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION* 381 (Transnational Publishers, Inc., Dodds Ferry, N.Y. 1987). Paul Stephen Dempsey says:

It is the disease of the militarily weak, the politically frustrated, and the religiously

IV. INTERNATIONAL REGULATORY MEASURES

A. THE CHICAGO CONVENTION

The Convention on International Civil Aviation¹⁴⁷ signed at Chicago on December 7, 1944, serves as the main repository of principles relating to the development of international civil aviation. The Chicago Convention states in its Preamble that the abuse of international civil aviation can become a threat to the general security, and recognizes the desirability of developing international civil aviation in a safe and orderly manner. ICAO derives its legitimacy and legal sustenance from the Chicago Convention which provides that one of ICAO's objectives is to ensure the safe and orderly growth of international civil aviation throughout the world.¹⁴⁸ The Chicago Convention also stipulates two other objectives of ICAO:

- a) That ICAO promotes safety of flight in international aviation;¹⁴⁹ and,
- b) That ICAO, through the development of its Standards and Practices, meets the needs of the peoples of the world for safe, regular, efficient, and economical air transport.¹⁵⁰

The latter aim devolves upon ICAO the responsibility of developing Standards and Recommended Practices to ensure both the safety and efficiency of air transport. The two attributes of safety and efficiency are considered complementary and not mutually exclusive. Accordingly, ICAO has drawn attention to the importance of aviation security in Annex 9 to the Chicago Convention¹⁵¹ while at the same time conversely providing in Annex 17 to the Chicago Convention dealing with aviation security: "each contracting State should whenever possible, arrange for the security measures and procedures to cause a minimum of interference with, or delay to the activities of international civil aviation."¹⁵²

This approach makes both security and facilitation equally important to the development of international civil aviation. Annex 17 to the Chicago Convention impels each contracting State to establish a national civil aviation security programme¹⁵³ whose objective is to ensure the safety, regularity, and efficiency of international civil aviation by providing, through regulations, practices, and procedures, safeguards against

fanatic. . . Each faces a well armed government where aims are antithetical. All suffer from the same malaise which inspires indiscriminate aggression.

Id.

147. Hereafter referred to as the Chicago Convention.

148. Chicago Convention, *supra* note 5, at art. 44(a).

149. *Id.* at art. 44(h).

150. *Id.* at art. 44(d).

151. Annex 9, *supra* note 141, at standard 5.1, note 1.

152. ICAO, Convention on International Civil Aviation Annex 17, 4th ed. at 2.2, (1987).

153. *Id.* at 3.1.1.

acts of unlawful interference.¹⁵⁴ The theme of the Annex is international cooperation in aviation security matters in such areas as the prevention of the usage of dangerous weapons, explosives, or any other dangerous devices within their territory,¹⁵⁵ and the provision of facilities for air services so as to ensure safety of flight of all aircraft.¹⁵⁶

B. INTERNATIONAL CONVENTIONS

The Tokyo Convention was perhaps the first major attempt at curbing the menace of hijacking. Not only did it deal solely with jurisdiction over offenses committed in an aircraft in flight, but it also did not exclude any criminal jurisdiction which would have been exercised according to the provisions of any law.¹⁵⁷ The element of nationality underlines the parochial nature of the treatment of the offence and the obstinate refusal of the international community to infuse a universality to the treatment of the offence. Perhaps, as one commentator observed,¹⁵⁸ the international community was not prepared in 1963 to address this problem on a collective basis.

The subsequent Hague Convention emphasises that each contracting state undertakes to impose severe penalties without defining what these penalties should be.¹⁵⁹ Furthermore, the geographic limitations set out in Article 1 curtails the punitive measures recommended in the Convention significantly. The Convention makes a further serious omission in stating that it applies only if the place of take-off and place of landing is outside the state of registration of the aircraft.¹⁶⁰ This gives rise to a serious anomaly, in that if an aircraft with a destination outside its territory of nationality is seized in mid-air prior to leaving its airspace and is brought back to the place of take off, the Convention would not apply even to scheduled flight.

The Montreal Convention which followed in 1971, although extending the period in which the offence could be committed to a period beginning with pre-flight preparation and ending twenty four hours after landing, does not cover acts of sabotage, destruction, or any damage effected before or after the designated period. The Montreal Convention, however, is the best attempt so far at controlling or curbing the offence of hijacking on an international level. Even so, the three attempts so far at

154. *Id.* at 3.1.2.

155. *Id.* at 4.1.1.

156. *See generally* ch. 5 of Annex 17, *supra* note 153.

157. Tokyo Convention, *supra* note 87, at art. 3(3).

158. A.F. Lowenfeld, *AVIATION LAW, CASES AND MATERIALS* 87 (M. Bender, N. Y., 1972).

159. Hague Convention, *supra* note 91, at art. 2.

160. *Id.* at art. 1(4), 3, 7.

international accord fail to cover certain gaps which still exist in this area of prevention and control of hijacking. For example:

- a) The conventions do not provide for and guarantee the trial of an offender, and do not specify adequate punitive measures;
- b) No obligation is cast on contracting states for the extradition of an offender;
- c) No provision is made for the universal adoption of standards of precaution and safety; and,
- d) The initial attempt, albeit somewhat unsophisticated, of the Tokyo Convention at a remedial approach has been thwarted by the repressive attitude of the two subsequent conventions.

The Bonn Declaration of 1978 was yet another attempt by the international community to combat terrorism related to international civil aviation. The major economic powers such as: Canada, France, Federal Republic of Germany (as it then was), Italy, Japan, the United Kingdom, and the United States—collaborated to intensify efforts to combat terrorism. The seven signatory States pledged to take immediate action to cease all flights to a country which refuses to extradite hijackers or return hijacked aircraft, and to halt all incoming aircraft from that country or from any airlines of that country. The view has, however, been forwarded that under the principles of the Bonn Declaration, retaliatory action in the nature of self preservation by third states against an offending state are subjectively assessed, and that action taken should be commensurate with the gravity of the infringement of the provisions of the Declaration.¹⁶¹ Be that as it may, the Bonn Declaration was a clear demonstration that positive action can be taken against the threat of interference with international civil aviation if there is international cooperation. The signatories to the Bonn Declaration were the largest manufacturers of aircraft, and their airlines covered more than half the world's scheduled passenger kilometres. They obviated the insurmountable difficulty of obtaining all the signatures of the ICAO contracting states, while amply demonstrating that agreements of this nature are effective tools against the terrorist.¹⁶²

At a United Nations Conference in Vienna on November 25, 1988, delegates from 100 States adopted a Convention against illicit trafficking in narcotic Drugs and Psychotropic Substances.¹⁶³ The new convention was intended to supplement the two major international drug control

161. Walter Schwenk, *The Bonn Declaration on Hijacking*, 4 ANNALS AIR AND SPACE L. 307, 321 (1979).

162. Taylor, *supra* note 122, at 36.

163. See United Nations Information Letter, Sept.- Dec. 1988, Nat/Inf. Lett./1988 at 1.

treaties¹⁶⁴ in meeting the challenges posed by the upsurge in illicit drug trafficking and associated organized criminal activities. The Convention provides for: sanctions for offenses relating to drug trafficking; the tracing, freezing, and forfeiture of proceeds derived from drug trafficking; extradition for offenses relating to drug trafficking; mutual legal assistance in the investigation and presentation of drug trafficking offenses; and measures to eradicate illicitly cultivated narcotic plants.

From a legal standpoint, it would be best to assess the problem fully by collecting data and statistics extensively and reviewing current methodology used in combatting drug trafficking, before establishing an aviation-related legal regime on a conclusive basis. It is also necessary to ensure the implementation of the legal regime that is established, by introducing sustained training programmes in the control of narcotics trafficking, and monitoring trends of abuse. It would therefore be prudent to establish a global legal regime that would ensure full awareness of the problem on the basis of priority.

C. EMERGING TRENDS

Dr. H.A. Wassenbergh points out that there is a protective imperative that governs human life in modern society. "Man's primary concern intellectually speaking, is his safety, then his health and relative position in his society and only then his (relative) freedom in his society, i.e. the wish to be master in his own 'territory'".¹⁶⁵ The primary aim of man is to preserve life and liberty.¹⁶⁶ This right, which is entrenched in Article 3 of the Universal Declaration of Human Rights,¹⁶⁷ makes the destruction of human life and the restriction of liberty, acts committed against law and order. International terrorism destroys both life and liberty and, therefore, is incontrovertibly illegal. There should be more awareness in the world today that every human being has the inherent right to life¹⁶⁸ and that the right is protected by law.¹⁶⁹ Any act of terrorism, being illegal, becomes subject to law and its punitive sanctions, if any exist. In this instance however, unlike in a direct instance of murder where sanction itself may act as a deterrent, the two forces of law and sanction are not

164. Single Convention on Narcotic Drugs 1961 and Convention on Psychotropic Substances 1971.

165. H.A. Wassenbergh, *The "Protectionist" Imperative in International Civil Aviation*, LIBER AMICORUM-NICHOLAS MATEESCO 1989, De Daro Publishers, Canada (1989).

166. UN Papers OPI/146, 4(1963). *See also*, K. Das, PROCEEDINGS OF THE CANADIAN COUNCIL OF INTERNATIONAL LAW 181 (1981).

167. *Id.*

168. *See* International Covenant on Civil and Political Rights, art. 1(6) (1966).

169. EUROPEAN CONVENTION ON HUMAN RIGHTS, Art. 2(1) (1935).

sufficient to curb terrorism. The international community should realize that the solution to terrorism lies rather in its prevention than its cure.

Therefore, the problem has to be approached solely on the basis that the terrorist, on the one hand, has to be persuaded that his act may not succeed. On the other, he has to be convinced that even if he succeeded in committing the act of terrorism, it would not achieve the desired results.

The philosophy of warfare against terrorism is therefore based on one single approach, that of convincing the terrorist that any attempt at committing a terrorist act would be fruitless and would result in unnecessary personal harm. The simple philosophy should be adopted in gradual stages, with the sustained realization that each measure taken is as important as the next, and that all measures should be adopted as a composite element, not as those that are mutually exclusive.

A potential terrorist can therefore be attacked in two ways:

1. By the adoption of practical measures to discourage the commission of the act;
2. By the adoption of such effective measures as would impose severe punitive sanctions if the act is committed.

In the first instance, measures of self-help are imperative. They should be adopted with careful planning, and the terrorist should be made aware that the community at large is afforded the full protection of these measures. They are:

- a) A wider definition of the offence itself to cover every possible exigency of the safety of an aircraft, passengers and goods;
- b) More liberal attitudes towards the extradition of offenders and the total abstinence of States from encouraging the concepts of political asylum and political havens;
- c) More worldwide awareness of the need to strengthen internal security and individual checking of passengers and travel documents;
- d) Total agreement between States that the offence of hijacking, once identified, be viewed on a singular basis devoid of any political differences which would encourage the commission of the offence. Punitive measures should be similar, if not identical, in order that a potential offender be precluded from choosing his alternatives;
- e) The establishment of a system of intelligence that would inform the State concerned of an impending terrorist attack;
- f) The establishment of counter-terrorism mechanisms that would effectively preclude such catalysts as the collection of arms, ammunition and weaponry;
- g) The adoption of such practical measures of self-help and attack as are necessary in the instance of an attack;
- h) The existence of the necessary machinery to retain the confidence and sympathy of the public at all times; and

- i) The persuasion necessary to convince the public that terrorism of any kind is evil and should not be condoned, whatever its cause.

If strongly enforced with unanimity, measures such as the imposition of laws, which bind all nations to view terrorist acts as crimes against humanity can be an effective deterrent. *A fortiori*, sanctions would further discourage the terrorist.

D. SOME RECOMMENDED PRACTICAL MEASURES

The first step that should be taken to deter terrorism is to become equipped with the expertise to detect a potential threat beforehand and to be prepared for an attack. The next is to intensify security in all susceptible areas, particularly airports, and subway terminals. Surveillance of all people who are viewed as potential targets of terrorist attacks, is imperative. There should be more awareness of the threat of terrorist activity, particularly in international airports, and international bus and tram terminals, where travel documents should be checked and passengers double-checked. Electronic surveillance of passports and other travel documents have proven to be effective methods of deterrence in this context.

Perhaps the most important facet of surveillance is the use of trained personnel, who could unobtrusively mingle with the crowds and detect an irregularity without arousing suspicion and, more importantly, without alarming the travellers. It is recommended that these specially trained personnel work together with the armed security forces as necessary.

Another significant requirement is the support of the people. The media should be utilized to educate citizens so they know how to react in an emergency, and are also totally distrustful of the terrorist, whose acts are calculated to evoke sympathy. The State or persons against whom the terrorist attack is launched should, at all times, use the media to convince the public that responsibility for any destruction or harm resulting from a terrorist act devolves totally on the terrorist.

E. RELEVANT LEGAL ISSUES TO BE EXAMINED

Terrorism is usually the genus of the species of political discord within and between nations. The terrorist is well aware of this situation, and usually exploits political disharmony among nations. Any laws that are enacted are rendered ineffective, as they cannot be enforced with uniformity. Political asylum is a product of this anomaly, and remains by and large the greatest encouragement to the proliferation of terrorism in the world today.

In the past, the United Nations General Assembly has made sus-

tained efforts to adopt collective measures to prevent terrorism¹⁷⁰ at national and international levels.¹⁷¹ In its efforts, the United Nations has succeeded in focusing the attention of its member States to the increasing problems of terrorism and its natural corollaries such as the proliferation of arms and the emergence of mercenaries. The efforts of the international community, however, in entering into treaties, have been rendered nugatory due to two reasons: first, the aura of ambiguity that shrouds the nature and force of an international agreement; and second, the lack of enthusiasm on the part of most States to label terrorism as an offence against humanity. The latter, if recognized, would immediately entail the mandatory punishment of the terrorist by all States concerned.

The question of whether international law upon which international treaties are based has the nature and force of law has aroused much debate, and indeed the concern of the United Nations and its members. This concern can be seen in the United Nations Resolution 44/23 which was discussed at the introduction to this thesis. Although 19th Century Austinian thinking¹⁷² did not consider international law to be endowed with the attributes of law, there is a strong view to the contrary.¹⁷³ The theory that international law was not enforceable law was based on the theory that law should emanate from a sovereign authority which was politically superior to those on whom such law was imposed. International law, it was claimed, did not emanate from such authority. The contrary view, which is more persuasive, holds that if international law had mere force of morality, such authorities as precedent and opinion of jurists would not be cited in instances of adjudication.¹⁷⁴ In addition, certain judicial decisions have expressly recognized the fact that international law is enforceable law and has all the attributes of law.¹⁷⁵

Once it is accepted that international law is enforceable law, the second issue is whether treaties in general have the necessary obligatory

170. See U.N. GAOR 40th Sess., U.N. Doc. A/40/1003 *1985). See also U.N. GAOR 40th Sess., at 2-7, U.N. Doc. A/40/979 (1985); U.N. GAOR 40th Sess., at 1, U.N. Doc. A/C.6/40/9 (1985); U.N. GAOR 40th Sess., 9th mtg. at 2-16, U.N. Doc. A/C.6/40/SR.9 (1985); U.N. GAOR 40th Sess., at 1-5, U.N. Doc. A/C.6/40/SR/13 (1985); U.N. GAOR 40th Sess., U.N. Doc. A/C.6/40/SR 17 (1985).

171. U.N. GAOR 40th Sess., at 3, U.N. Doc. A/40/1003 (1985).

172. W. L. Morrison, JOHN AUSTIN 78 (1982).

173. J.G. Starke, INTRODUCTION TO INTERNATIONAL LAW 18 (1984). See also D. Lloyd, THE IDEA OF LAW 40 (1970); Robert Y. Jennings, *An International Lawyer Takes Stock*, 39 INT'L & COMP.

L. Q. 513, 514-16 (1990) Jennings states:

Moreover, modern international law is now, probably to a greater degree than ever before, a universal juridical language.

Id. at 526.

174. J. G. Starke, *supra* note 174, at 18-21.

175. See Murray, *supra* note 76. See also The Paquette Habana, *supra* note 76.

force to demand adherence from their signatories. Although treaties are founded upon the expectancy of the observance of good faith under the principles of the *pacta sunt servanda*,¹⁷⁶ the emergence of competent courts and tribunals and the increasing dependence upon precedent and scholastic opinion in this field are sufficiently compelling factors in support of the enforceability of treaties.¹⁷⁷

There is no doubt that legislative measures, like practical measures, can be effectively adopted. All States must recognize in their legislation that terrorism is a crime against humanity and that they should punish a terrorist or deport him to a country which has sufficient interest in the offence to punish him. The treatment of the offence by all States should be devoid of political ideology and the tendency to offer political asylum to terrorists. States should at least negotiate bilaterally or in groups and enter into treaties, and the provisions of these treaties should apply to third nations as well, on the basis of the most-favoured-nation treatment clause.¹⁷⁸ The most important factor is to involve all States, one way or another, to form a composite force and not to isolate them in the face of terrorism.

Interference with civil aviation should be viewed as an extortion-oriented act committed against the international order and world peace, which is calculated to take advantage of the susceptible human quality of seeking personal security as a priority. The offence is an immediate threat to world peace and should be treated with the utmost care. It is needless to say, that any nation which views the offence differently encourages world discord. Any willful act calculated to endanger the safety of an aircraft, its passengers, or any aviation related property, should be collectively regarded as an offence against the safety of air travel.

As for the need for a more flexible approach to the extradition of offenders, the establishment and recognition of a universal offence against the safety of aircraft would almost automatically nurture mutual cooperation between nations. Often, if an offender imputes politics to the offence committed by him, he is granted political asylum by the host nation merely because the latter sympathises with the alleged motive for the offence as represented by the offender. Once this takes place, the terrorism no longer remains the commission of an offence universally

176. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 26., U.N. Doc. A/CONF. 39/27 (in its Preamble, notes that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized. The *pacta sunt servanda* rule is incorporated in Article 26, of the Vienna Convention on the Law of Treaties, where it is said that "every treaty in force is binding upon the parties to it and must be performed by them in good faith.")

177. See generally James L. Briery, *THE LAW OF NATIONS* 331-345 (6th ed. 1963).

178. First introduced in 1947 by the General Agreement on Tariffs and Trade, the most-favoured-nation treatment clause ensures that certain benefits accrue to nations other than the signatory States in instances that apply to those non-signatory States.

condemned, but becomes an altercation between nations on political beliefs and convictions.

V. CONCLUSION

At the Aviation Security Conference of January 1987 held at the Peace Palace in the Hague, Professor Andreas F. Lowenfeld courageously observed: "I start with a simple, unambiguous statement. The complications and nuances can come later. Terrorism is a violation of international law. It violates the sovereignty of states, and human rights of individuals. A state that supports terrorism is responsible for violation of international law."¹⁷⁹ It is submitted that all acts of terrorism need not necessarily be violations of international law. While acts of international terrorism may violate both international and national laws, acts of national terrorism *per se* would usually violate only national laws. For the offense to be recognized as a violation of international law, the first step is to inquire whether unlawful interference with civil aviation is an international crime. In answer to the question of what constitutes an international offense, it has been said: "An offence is 'international' if national laws punish it irrespective of the place where the criminal act has been committed or if the courts of all States are competent to prosecute the presumed perpetrator of the offence, without regard to the place where the offence was committed."¹⁸⁰ According to this definition, either of the two elements would constitute an international offence. Be that as it may, in Professor Lowenfeld's rather simplistic statement lies considerable wisdom. If terrorism were to be universally accepted as a violation of the principles of international law, and if international law were to be identified as a *jus cogens* or mandatory law, it would not be difficult to identify the legal aspects of the unlawful interference with international civil aviation and develop credible and workable solutions.

179. International Conference, *Aviation and Security: How to Safeguard International Air Transport?*, Proceedings held at the Peace Palace, Hague, Netherlands, Jan. 22-23, 1987, International Institute of Air and Space L., Leyden Netherlands at 120.

180. *Comments and Suggestions of the International Law Association*, at 159, ICAO Doc. 8877-LC/161 March (1970).