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INTERNATIONAL ENFORCEMENT OF AIR SECURITY — UNITED STATES INITIATIVES

CHARLES N. BROWER†

ONE DOES NOT have to recite at length the events of recent years — the Olympic Village attack at Munich, acts of aircraft sabotage, letter bombs, sniper activity, the kidnapping of diplomats — to become conscious that in an increasing number of situations individuals and groups are resorting to the relatively simple expedient of violence as they pursue their goals. Aerial hijacking is a prime weapon for those who adhere to the technique of violence because civil aviation is uniquely vulnerable. One is hard-pressed to think of a situation in which so many persons can become hostages to the demands of others as quickly as can a group of passengers on board an aircraft flying at 35,000 feet.

International aviation law has developed remarkably in response to the hijacking alarm. A first step was taken in 1963 with the adoption of the Tokyo Convention, a convention primarily devoted to establishing the rights and obligations of the aircraft commander to maintain good order on board the aircraft, and to clarifying the rules of jurisdiction for crimes committed on board.1 In preparatory meetings leading to the plenipotentiary conference at Tokyo, the United States proposed an article dealing with hijacked passengers, crew, cargo, and the aircraft itself. The proposal, as ultimately adopted, obliged the state in which the aircraft landed to "permit its passengers and crew to continue their journey as soon as practicable, and . . . return the aircraft and its cargo to the persons lawfully entitled to possession." The United States did not press for rules dealing with treatment of the hijackers themselves nor with the question


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of noncomplying states. There was little hope for sympathetic consideration of such proposals at that time because hijacking was considered by others to be a uniquely American problem rather than a generalized threat to all civil aviation. The American proposal became article II of the Tokyo Convention, which entered into force in 1969.2

A second step was taken in 1968, when preparatory work began in the International Civil Aviation Organization (ICAO) on a convention concerning treatment of hijackers. This work culminated in the adoption of the Hague Convention in 1970.3 The key provisions of this convention are articles 4, 6, 7, and 8. Article 4 imposes a mandatory obligation on parties to establish their criminal jurisdiction over the offense, without regard to the state of registration of the hijacked aircraft or the place where the act occurred.4 Article 6 requires contracting states to take offenders into custody whenever found in their territory5 and article 8 establishes a basis for extradition


1. When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.

2. In the cases contemplated in the preceding paragraph, the Contracting State in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.

Tokyo Convention, supra note 1.

The United States has taken the position that this rule is analogous to the rule applicable to mariners in distress, and, therefore, reflects a general principle of international law binding on all states. See Rhinelander, The International Law of Aerial Piracy — New Proposals for the New Dimension, in AERIAL PIRACY AND INTERNATIONAL LAW 59, 64 (E. McWhinney ed. 1971); McWhinney, International Legal Problem-Solving and the Practical Dilemma of Hijacking, in AERIAL PIRACY AND INTERNATIONAL LAW 15, 21-22 (E. McWhinney ed. 1971); cf. note 10 infra.


4. Article 4 provides in part:

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offense in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

Id.

5. Article 6 provides in pertinent part:

1. Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is present, shall take him into custody or take other measures to ensure his presence . . .

Id.
among parties. Article 7 sets out one of the most sweeping obligations known to international criminal law:  

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of that State.

The net effect of these four articles should be to eliminate all sanctuaries for hijackers when the convention is widely ratified. The convention's extradite-or-prosecute obligation admits of no exception. The decision to prosecute must be made "in the same manner as in the case of any ordinary offense of a serious nature," a clear indication by the Hague conferees that the political nature of an act cannot justify avoidance of prosecution.

The Hague Conference also strengthened the Tokyo rule with respect to hijacked passengers and crew by requiring states to facilitate the continuation of their journey rather than merely to permit continuation, thereby converting a passive obligation into an affirmative duty to aid.

6. Article 8 provides:
1. The offense shall be deemed to be included as an extraditable offense in any extradition treaty existing between Contracting States. Contracting States undertake to include the offense as an extraditable offense in every extradition treaty to be concluded between them.
2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offense. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offense as an extraditable offense between themselves subject to the conditions provided by the law of the requested State.

8. Hague Convention, supra note 3, art. 7.
9. Id. (emphasis added).
10. The conferees also added the words "without delay," in a further strengthening of the Tokyo rule. Article 9 reads in part:
2. In the cases contemplated by the preceding paragraph, any Contracting State in which the aircraft or its passengers or crew are present shall facilitate the
A third measure to promote air security via the strengthening of international law was proposed by the United States and others in the wake of two acts of sabotage in February 1970, one of which cost 47 lives. That proposal was for a convention, complementary to the Hague Convention, to deal with other acts of violence against civil aviation. Preparatory work began in late 1970 and concluded at Montreal in 1971 with adoption of the Convention on Sabotage and Other Attacks on Aircraft. That convention contained the same key provisions as the Hague Convention — the absolute extradite-or-prosecute obligation and a mandatory rule of universal jurisdiction — for acts of sabotage, other acts of violence against persons on board aircraft, and destruction of aircraft.

The three basic conventions on aviation security were adopted without dissent, and states are rapidly subscribing to them. Forty-two states signed the Tokyo Convention, and 63 are parties as of this date. The Hague Convention, which entered into force 9 months after adoption, was signed by 81 states, and 52 have become parties. The Montreal Convention, completed just a little over 16 months ago, has received 61 signatures and already 21 states have become party to it. It entered into force on January 26, 1973.

I believe the achievements in international law in setting out basic rules of state conduct with respect to hijackings, along with important preventative steps which have been taken on the domestic level, such as the ground security measures outlined by Assistant Secretary Davis,

continuation of the journey of the passengers and crew as soon as practicable, and shall without delay return the aircraft and its cargo to the persons lawfully entitled to possession.

Id., art. 9.

11. The two acts, one involving a Swissair aircraft and the other an Austrian Airlines aircraft, occurred on February 21, 1970. See N.Y. Times, Feb. 22, 1972, at 1, col. 4.

12. The events led to a request by 11 European countries for an Extraordinary Session of the ICAO Assembly to consider the problem of aviation security. In preparatory work for the Assembly, which met in Montreal, June 16–30, 1970, the United States submitted a proposal for a complimentary convention to the proposed Hijacking Convention to cover sabotage and other violent acts directed against international aviation. ICAO Doc. A17–WP, April 30, 1970. The United Kingdom, Israel, and others submitted similar proposals. The Assembly unanimously adopted a resolution directing the ICAO Legal Committee to meet no later than November 1970 to draft the convention, with a view to calling a diplomatic conference not later than the summer of 1971. The schedule was followed. The Legal Committee met in London in September and October 1970 and produced a draft. The Convention on Sabotage was formally adopted and opened for signature at Montreal on September 23, 1971.


have been instrumental in producing a general reduction in the incidence of hijacking; but, at the same time, one must admit a certain sense of frustration at the seemingly irrepressible character of this persistent problem. Many solutions have been offered: (1) more complete passenger searches; (2) increased use of electronic scanning equipment; and (3) prohibition of all carry-on items. I recall one solution put forward not too long ago by a cartoon illustrator in the New Yorker magazine. The cartoon showed a long line of naked passengers boarding an aircraft, and one passenger saying to his wife: "I know it's humiliating, Alice, but you'll have to admit it works."

The defect in complete and singular reliance on a weapons-screening system is that it can never be 100 per cent effective. While we can establish a thorough inspection system at domestic airports, there are inherent limitations to what we can accomplish abroad. Magnetometer cost, manpower shortage, and other factors influence the measures foreign governments will adopt. The vulnerability of aircraft and aircraft passengers provides a continuing incentive for those who choose violent methods to accomplish their goals. In short, it seems likely that some hijackers will find a way to board aircraft.

A second solution is available when a hijacker escapes detection and successfully boards the aircraft. That, simply, is to interrupt the hijacking while in progress. When the hijacking peril peaked for United States carriers, at the time of the Labor Day 1970 hijackings to Cairo and Dawson's Field, Jordan, the United States adopted a strategy of this kind — the sky marshalls program — as a temporary measure that was part of a multi-pronged attack against air piracy. Some countries continue to rely on this approach, as is clear from positions taken by Israel and Ethiopia. The risk — at least the immediate, short term risk for the passengers and crew on board an aircraft being hijacked — can be, of course, extremely high. For example, a stewardess of a Soviet aircraft and a pilot of a Czechoslovak airline have been killed. Recently, an Ethiopian flight narrowly avoided disaster.

I think it is the possibly ominous consequences of reliance upon such a policy which prompted the 24-hour international strike by pilots last June 19. Captain O'Donnell, President of the Air Line Pilots Association, has reinforced this view. Put most simply, aircraft crews see themselves caught in a fusillade of bullets if countries

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17. N.Y. Times, Oct. 16, 1970, at 1, col. 5; id., June 9, 1972, at 1, col. 5.
18. Id., Dec. 9, 1972, at 2, col. 4.
conclude that the only way all hijackings can be stopped is by stopping them while in progress. The crew is directly threatened; the crew is always present; the lives of the crew are always at stake. Given this situation, one can little wonder at their efforts — by strike, threat of strike, and boycott — to urge another policy to stop hijackings.

What pilots and their crews demand is that the basic international rules that have been set out on aviation security be observed by all countries; and they demand sanctions against the states which do not observe them. The Tokyo, Hague, and Montreal Conventions guarantee release of hijacked passengers and crew, return of aircraft and cargo, and punishment of offenders by extradition or prosecution where they are found. The pilots’ point is neither novel nor complex: the laws have been set out and are sufficient, but to be effective they must be enforced.

There is a further point to keep in mind. One factor distinguishes hijacking from almost all other violent acts. In a hijacking the criminal is always known, and can be automatically delivered up to the authorities of the country which is his objective. The usual difficulties in suppressing crime, identifying and apprehending offenders, are not present. Therefore, assured punishment of hijackers — in my mind, the cure for the hijacking problem — escapes us only because states tolerate hijackers. A solution to the hijacking problem does not involve fulfilling an abstract goal of assuring that offenders are prosecuted, but rather involves meeting an entirely attainable objective of assuring the prosecution of offenders who can be prosecuted. The hijacking risk is run because states will not, rather than cannot, enforce the law by prosecution.

I think these points summarize the analysis which led to United States initiatives for an Air Security Enforcement Convention. Our original proposal was made during the period immediately following the 1970 Labor Day incidents. On September 11, 1970, President Nixon announced a seven-point program to deal with air piracy. One of the points was that the United States would seek ways and means for the international community to take “joint action” — specifically, suspension of airline services — against countries which refused to punish or extradite hijackers involved in “international blackmail.” “International blackmail,” as used in this sense, refers to the holding of passengers, crew, and aircraft as hostages to obtain com-

20. Thus the International Federation of Airline Pilots Associations called a worldwide, one-day air stoppage on June 19, 1972, to dramatize the need for sanctions against states which do not punish hijackers. See N.Y. Times, June 17, 1972, at 1, col. 7; id., June 9, 1972, at 1, col. 5.
pliance with hijacker demands. The Secretary of State was requested to ask the President of the Council of ICAO to convene the Council on an emergency basis to consider a United States proposal on "joint action."

On September 18 and 29, 1970, the ICAO Council met to consider resolutions tabled by the United States and Canada. The United States resolution called for ad hoc meetings of ICAO member-states on request of any ICAO member for the purpose of considering "joint action" in cases of "international blackmail" hijackings whenever passengers, crew, or aircraft were detained by a state contrary to the principles of the Tokyo Convention, or whenever a state failed to extradite or prosecute the hijacker contrary to the principles of the Hague Convention on Hijacking. The resolution also requested the Legal Committee of ICAO to begin study immediately on a convention on "joint action.”

The Canadian proposal called for amendment of bilateral air agreements to incorporate a special clause permitting termination of air services by one party when the other fails to implement the obligations set out in the Tokyo Convention and "any other ICAO Conventions in force at the relevant time." On October 1, the United States proposal was adopted by a 14 to 3 vote and the Canadian proposal by an 18 to 0 vote.

The ICAO Legal Committee was then meeting in London and immediately extended its session to consider the October 1 resolutions. The United States introduced a draft convention on "joint action" and the Canadians submitted a working paper on their proposal for a special clause. The draft convention has been fully discussed elsewhere and I will not go into details because subsequent events led, first, to major revisions, and, later, to an entirely new draft which was recently approved by the Legal Committee to be sent to a diplomatic conference. Briefly, the draft convention established a two-step procedure for decisions on "joint action." The first step involved a factfinding procedure for determining whether a state was responsible for the detention of hijacked passengers, crew, or aircraft or had failed to take into custody, and thereafter extradite or prosecute, a person engaged in an "international blackmail" hijacking or who had

22. For texts of the United States draft resolution and the resolution as adopted, see 63 DEP'T STATE BULL. 453 (1970).

23. For the text of the Canadian proposal and discussion relating thereto, see Bissonnett & Clark, Securing the Enforcement of International Legal Obligations Relating to Unlawful Interference with International Civil Aviation: Canadian Initiatives, in AERIAL PIRACY AND INTERNATIONAL LAW, supra note 2, at 72.

24. See Rhinelander, supra note 2. For the text of the draft convention presented by the United States delegation, see AERIAL PIRACY AND INTERNATIONAL LAW, supra note 2, at 183.
caused death or physical injury to a passenger or crew member or damage to an aircraft. The second step, which was conditioned upon a finding against a state in the first stage, set out procedures for taking decisions on joint action against that state. A decision on sanctions, such as a boycott of air services, was to be binding. Decisions were to be taken at a meeting of designated states affected by the hijacking.

The United States proposal limited itself to “blackmail hijackings” and others of the most serious types of unlawful interference with aircraft — those involving death or injury to passengers or crew or damage to aircraft — because we recognized that any formalized procedures for sanctions against states would find acceptance only with the greatest difficulty. The proposal was radically innovative. While we felt it was commensurate with the seriousness of the problem facing international aviation, and fully justified as a matter of policy and law, it could not be denied that issues of the most important political content were posed. The proposal dealt squarely with the issue of state responsibility, and provided a structure in which state action could be examined, disapproved, and punished.

The Legal Committee examined the major issues presented by the draft convention tabled by the United States, and then voted to establish a subcommittee to give it and the Canadian proposal a detailed analysis.

The Legal Subcommittee on the October 1 Resolutions met during the last 2 weeks of April 1971. On the opening day of the meeting, the United States and Canada introduced a co-sponsored draft convention which was similar to the draft which had been tabled by the United States at the previous Legal Committee meeting, and which covered bilateral measures that had been proposed by Canada. The Subcommittee completed study and redrafting of the first three articles of the eight-article draft convention during the April 1971 session and recommended that additional time be provided for it to complete its work. However, in June 1971, the 18th ICAO Assembly, meeting

25. See Aerial Piracy and International Law, supra note 2, at 184-86.
26. Id. at 186.
27. The decision was to be recommendatory with respect to states that were not parties to the convention but were eligible to participate in the decision on “joint action.” Id. at 187.
28. Id. at 186, 188.
in Vienna, rolled back the Council decisions of October 1 and removed
the subject of "joint action" from the active part of the Work Pro-
gramme of the Legal Committee. It was clear that a proposal for
subjecting actions by states to vigorous examination and, possibly,
condemnation, through the implementation of sanctions, was too abrupt
a departure from previous steps taken to deal with hijacking. At the
time it appeared to be too radical a solution for a problem the serious-
ness of which was not yet fully comprehended.

One year later, in June 1972, at the 19th Session of the ICAO
Legal Committee, the United States proposed that the question of
"joint action" be taken up again, and moved that the subject matter
of the October 1 Resolutions be given the highest priority on the Legal
Committee's Work Programme. The proposal was defeated 5 to 19
with 15 abstentions. The prevailing view was that there was no basis
for overruling, in effect, a decision taken by the Assembly only 1 year
earlier. On the same day, the massacre at Lod Airport in Tel Aviv
took place. Twenty-seven persons were killed and more than 80 injured
by terrorists who had concealed machine guns in baggage on an Air
France flight. Shortly thereafter, a United States plane was hijacked
to Algeria with a $300,000 ransom; a hijacking from Czechoslovakia
to West Germany of a Czechoslovak aircraft resulted in the death
of the pilot; and earlier in the spring a Lufthansa aircraft had been
hijacked to Yemen and ransomed for $5 million. Because govern-
ments had failed to deal adequately with such hijacking, the Interna-
tional Federation of Airline Pilots' Associations called for a world-
wide 24-hour shutdown of services by pilots on June 19, 1972, and
demanded that work be completed on the United States-Canadian
draft convention on "joint action."

Once again, the United States pressed in the ICAO Council for
rapid action to complete work on a convention which would provide
for sanctions against states that did not punish hijackers. The draft
resolution requested an immediate meeting of the Legal Subcommittee
to complete its work. The resolution was adopted by the Council
on June 19, 1972, by a vote of 17 to 1.34

32. The Assembly decision was taken in a roll-call vote of 28 to 26.
33. See note 22 supra.
34. The Council Resolution reads in pertinent part:
DIRECTS the Legal Committee to convene immediately a Special Subcommittee
to work on the preparation of an international convention to establish appropriate
multilateral procedures within the ICAO framework for determining whether there
is a need for joint action in cases envisaged in the first Resolution adopted by
the Council on 1 October 1970 and for deciding on the nature of joint action
if it is to be taken.
The complete text is reproduced at annex C of the Report of the Special Subcom-
mittee on the Council Resolution of 19 June 1972, ICAO Doc. LC/SC CR - Report,
The Subcommittee met in Washington, D.C., from September 4 to 15, 1972. In consultations during the summer preceding the meeting, the United States sought agreement on provisions of a draft Air Security Enforcement Convention which could receive broad support from the 17 nations composing the membership of the Subcommittee. These consultations revealed the basic agreement of a number of members with a fundamental part of the United States-Canadian draft — the two-step procedure separating a factfinding stage from the stage in which collective action would be considered. For the factfinding stage, it was proposed that an independent commission be established composed of nine members who would serve in a private capacity as experts on air law and not as government representatives. They would be responsible for making determinations as to whether a state had acted consistently with the basic aviation security principles set out in the Tokyo, Hague, and Montreal Conventions. In the second stage, either the ICAO Council or, if it did not act, designated states, would decide whether sanctions should be taken and what their nature should be. At an early stage in the Subcommittee deliberations, the United States introduced major revisions in the original proposal reflecting modifications which resulted from the summer consultations. The Subcommittee ultimately adopted a proposal on stage two which was advanced jointly by Canada, the Netherlands, the United Kingdom, and the United States to be forwarded to the Legal Committee for study. Intensive study of stage one produced 11 articles of a convention text. The Subcommittee recommended that the Legal Committee be convened to consider its work as soon as possible. It did not, however, actually approve any draft articles; its recommendation was only for more study. Again, I only mention these developments since the Subcommittee work was superseded by events in January 1973.

On September 25, 1972, Secretary Rogers addressed the United Nations General Assembly on the subject of terrorism and, in the course of his speech, proposed that a diplomatic conference on air security enforcement be convened without delay. On September 28, 1972, the United States introduced a resolution in the ICAO Council
calling for a diplomatic conference as soon as it could be scheduled. On November 1, 1972, the ICAO Council decided to convene the Legal Committee in January 1973, to review the work of the Subcommittee, and scheduled a diplomatic conference for August 21 to September 11, 1973.40

Let me pause for a moment to explain the primary objections which had been raised to the United States proposal for an Air Security Enforcement Convention.41 A fundamental legal question was posed by the USSR and France; they took the position that, in accordance with article 41 of the United Nations Charter, implementation of sanctions is an exclusive function of the Security Council. Egypt has also argued that boycotts are a form of enforcement action requiring prior authorization of the Security Council in accordance with article 53(1) of the Charter. We have taken the position that article 41 does not endow the Security Council with exclusive powers over collective action of all kinds for all purposes; neither the legislative history nor the plain language of the article justifies such an interpretation. The observer from the United Nations at the Washington Legal Subcommittee meeting, would appear to have taken the same position in a paper submitted to the meeting which described a number of precedents in which states have agreed to certain forms of concerted action.42 As to the argument about article 53, we are of the view that it is simply misapplied with respect to this proposal, and it has not been pursued by others.

Another line of argument has been that the United States proposal, in attempting to enforce principles set out in the Tokyo, Hague, and Montreal Conventions, can only be applied to parties contracting to those conventions; if it is applied to noncontracting states it would violate articles 34, 35, and 36 of the Vienna Convention on the Law of Treaties,43 by, in effect, requiring states to be bound to treaties without their consent. Of course, if the proposed convention does not apply to noncontracting states, one can question whether it is of any utility at all. Current problems in obtaining punishment of hijackers have nothing to do with states which have accepted the Tokyo, Hague, and Montreal obligations, but with those which do not. Thus, as

40. On March 7, 1973, this decision was confirmed by the ICAO Council and a final schedule for the conference, to meet in Rome, was set for Aug. 28 to Sept. 21, 1973.
41. See generally notes 30, 31 & 34 supra.
42. See Report of the Subcommittee, supra note 34, at app. P.
43. The Vienna Convention has been signed by 47 states, and 18 of the required 35 acceptances for entry into force have been deposited. The United States has signed but has not ratified it.
a purely practical matter, there is only one sensible and obvious conclusion to make on this point.

Moving from the practical to the legal, articles 34-36 of the Vienna Convention are totally misconstrued if tied to the question of an enforcement convention. These articles are concerned with whether treaty provisions can be legally binding on third states, not with whether a group of states can work to encourage certain state conduct by acting in concert. We believe there is a basic obligation on states to take appropriate steps to ensure the safety and security of the international aviation system. Certainly, that cannot be doubted for the 126 parties to the Chicago Convention. To breach that obligation of Chicago is to lose the rights of Chicago. These can be taken away by each party in a unilateral decision, or by all parties in a series of coordinated steps. The Tokyo, Hague, and Montreal Conventions set down basic rules of state conduct necessary to preserve a safe aviation system. The aviation community can act in concert to enforce these rules by, if necessary, excluding a state from the community through an air boycott.

To summarize this point, we do not argue that the Hague Convention provisions are legally binding on third parties because that would contradict the Vienna rules. We simply take the position that states collectively may take any designated action not otherwise prohibited in law in the event another state fails to observe the principles set out in the Hague Convention.

There has also been resistance to the United States initiatives on air security enforcement stemming from reasons of policy as well as legal grounds. A great stumbling block has been our proposal for binding sanctions. Many states cannot agree; they argue that freedom of choice to impose sanctions in each individual case must be preserved. They find the idea that they could be required to impose sanctions in a case in which they voted against sanctions especially abhorrent. Our view has been that it is necessary to give up such freedom in order to make an enforcement convention a more effective tool.

44. This is clear from article 38, which refers to the circumstances in which a third state can become legally bound to a rule set forth in a treaty.

45. See Aerial Piracy and International Law, supra note 2, at 19-20, 25-26, 213.

46. Chicago Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591 (effective April 4, 1947) [hereinafter cited as Chicago Convention]. The Preamble and articles 4, 25, 44(a), (b), (d), and (i) are particularly on point.

47. The Vienna Convention provides for termination and suspension of a treaty as a consequence of its breach. See Vienna Convention, supra note 43, at arts. 60 & 65.

It is argued that an air security enforcement convention can never be effective, because it will never be widely ratified. That makes an assumption that I am unwilling to accept, and prejudges both what is "effective" and what constitutes "wide ratification." To the extent such a convention can focus the pressures of the aviation community against states which do not act to curb air security threats, its salutary effect should not be disparaged ab initio. Nevertheless, as action at the Legal Committee meeting last month indicated, our views have not persuaded sufficient numbers.

Shortly before the January 1973 ICAO session began, France introduced a novel proposal and undertook a major diplomatic initiative to gain support for it.49 The proposal consisted of an amendment to the 1944 Chicago Convention incorporating the obligations of the Hague and Tokyo Conventions but not mentioning the Montreal Convention. The proposal also called for application of article 94(b) of the Chicago Convention so that any member state failing to ratify the amendment within 1 year after the amendment entered into force would automatically be expelled from ICAO. In order to obtain approval of the amendment it is necessary, under the Chicago Convention, to obtain a two-thirds vote of the ICAO Assembly, presently 84 votes. Ultimate entry into force requires at least the same number of ratifications.50 The proposal, therefore, is one which is not likely to be adopted and take effect in the immediate or near future. Whether it would ever enter into force is, at best, dubious.

As the Legal Committee convened, the United Kingdom, later joined by Switzerland, put forth its own proposal to amend the Chicago Convention, which was, in substance, partially stronger than the French proposal.51 In addition, the Federal Republic of Germany advanced its own modification of the proposal for a "joint action" convention.52

49. The French proposal is found in the working documents of the 20th Session (Special) of the Legal Committee, Jan. 9-30, 1972. ICAO Doc. LC/WD 821.
50. Article 94 reads:
(a) Any proposed amendment to this Convention must be approved by a two-thirds vote of the Assembly and shall then come into force in respect of States which have ratified such amendment when ratified by the number of contracting States specified by the Assembly. The number so specified shall not be less than two-thirds of the total number of contracting States.
(b) If in its opinion the amendment is of such a nature as to justify this course, the Assembly in its resolution recommending adoption may provide that any State which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the Convention.

The Chicago Convention, supra note 46, art. 94.
51. ICAO Doc. LC/WD 829.
52. ICAO Doc. LC/WD 825.
Faced with this variety of proposals, and the aforementioned legal and political objections, the Legal Committee first debated and adopted a series of principles which severely restricted possibilities for a useful independent convention. The following principles were adopted to be applied to any new international instrument the Legal Committee would draw up: (1) there should be no investigation of behavior of a state not party to the new instrument without its consent; (2) there should be no joint action against a nonparty; and (3) there should be no provision for sanctions against parties. The lone positive vote from the American point of view was one agreeing to the principle that “recommendations” can be made to states which are not parties to the new instrument. On the basis of these votes, the Nordic delegations to the Legal Committee eventually sponsored the completion of a draft convention providing for factfinding and recommendations. The draft falls far short of our desires, but we feel it could be a useful instrument.  

Faced with widely varying proposals, none commanding a clear majority of support, the Legal Committee ultimately concluded that the only alternative to a complete failure would be to approve all major proposals which had not been withdrawn or rejected by the votes on principles. The Legal Committee thus recommended to the ICAO Council that it convene an extraordinary session of the ICAO Assembly to discuss the French proposal and the United Kingdom-Swiss proposal, since amendments to the Chicago Convention must be approved by an Assembly rather than by the Council, and to convene a diplomatic conference to consider the Nordic proposal for an independent convention. The diplomatic conference was also asked to consider a long-standing Soviet proposal for an optional protocol to the Hague and Montreal Conventions making extradition of offenders covered by the two conventions mandatory, thus eliminating the alternative of prosecution.  

It is our view that the Nordic proposal must be adopted if there is to be enhanced enforcement of the Tokyo, Hague, and Montreal obligations. The Nordic proposal embraces the general obligations of states with respect to an alleged offender, as set out in the Tokyo, Hague, and Montreal Conventions, and provides that a contracting state may call upon the ICAO Council to consider whether a violation of any of these obligations has occurred. The Council may then appoint a commission of experts to investigate, if the state whose behavior is

53. ICAO Doc. LC/WD 821 (revised).
54. ICAO Doc. LC/WD 826.
involved is a party or has given its consent. The proposal also provides that the ICAO Council may make recommendations to the state whose action is involved. If the Council fails to act or if the state whose action is involved does not comply with the Council’s recommendations, the Secretary-General of ICAO, at the request of a party, may convene a conference, which, in turn, may make recommendations to the state whose action is involved.

At the recent ICAO Legal Committee meeting the United States strongly opposed, and it continues to oppose, any amendment to the Chicago Convention as the exclusive means of ensuring enforcement of existing obligations. Any amendment to Chicago, as already noted, would require such a substantial number of ratifications that it is unlikely to enter into force in the foreseeable future. Moreover, the French proposal has the additional drawback of having expulsion from ICAO as its only sanction: a sanction not necessarily proportional to the conduct of the offending state.

The United States is hopeful that the Nordic proposal can be refined in such a way as to make it an acceptable instrument in our effort to put teeth into existing international law in the area of international civil aviation. It would be our hope that this can be done at the diplomatic conference which is scheduled to commence in August 1973.

It was mentioned earlier that the primary source of the continuing hijacking problem lies in the simple fact that states lack the will to stop it. It has even been in the interest of a very few states, at least under certain circumstances, to tolerate it. Why, one may ask, would there be a will to impose sanctions, if some states are unwilling to take the seemingly less complex step of punishing hijackers?

The question suggests that all states, or a vast majority, must agree to implement a decision to impose sanctions in order for sanctions to be effective. I do not hold this view. Political and economic pressures can be applied to states which fail to take action against hijacking by the concerted action of only a group of concerned states. I do not believe any country has a real governmental interest in becoming a sanctuary state for hijackers. Hijackers have been permitted to go free in the past because the decision has not “cost” anything, or because the general threat to international aviation has appeared too remote. Concerted action by a group of states in a particular case can be highly disruptive for the recalcitrant state and, hopefully, lead to a reassessment of policy as the “cost” of any

55. See note 50 and accompanying text supra.
decision to let hijackers go unpunished rises. To date, the pressures generated against such a state have been haphazard and diluted. An Air Security Enforcement Convention could organize, channel, and direct them.

I think the alternative to strong, organized government action is an invitation to disasters. Perhaps hijacking has been tolerated in some places because a major tragedy has not yet been attributed to it. Failure to take decisive action to eliminate hijacking sanctuaries will be, in my mind, a major abdication of governmental responsibility to the chance of events and private groups, such as the International Air Line Pilots’ Association and the International Federation of Transport Workers, who will seek enforcement of the law through efforts of their own if governments will not.