

Attacks Against Aviation: Beijing Convention and Protocol Now in Force

Cyril-Igor GRIGORIEFF^{*}, Charlotte THIJSSSEN^{**} & Annick SLEECKX^{***}

The fight back against modern threats to civil aviation has now materialized since the entry into force in 2018 of both the 2010 Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation and the 2010 Beijing Protocol Supplementary to the Convention on Unlawful Seizure of Aircraft. These two instruments share the same goal but must be distinguished clearly. The 2010 Protocol supplements the 1970 Hague Convention and was drafted mostly to address hijacking scenarios; whereas the 2010 Convention is a recast of the 1971 Montreal Convention and its 1988 Protocol regarding other forms of violence against aircraft and airport facilities. This article will aim to shed some light on selected key improvements made by these recent instruments.

Nullum crimen, nulla poena sine lege

1 INTRODUCTION

Since the early 1930s, around 7000 lives have been lost by acts of violence against civil aviation worldwide.¹ Initially, acts of violence were committed in order to increase pressure on governments to obtain the release of inmates or ransoms. The movement then shifted in the 1970s towards the aim of maximizing the number of casualties. In response to the attacks, the international community decided to develop its legal arsenal to address these types of threats to the safety of civil aviation. In 1963, the Tokyo Convention on offences and certain other acts committed on board aircraft² was adopted, followed by the 1970 Hague Convention for the suppression of unlawful seizure of aircraft.³ In 1971 the Montreal Convention for the suppression of unlawful

^{*} Member of the Brussels bar. He is the author of various publications in air law. He is a Research Fellow at Paris Sud University (IDEST). Email: ci.grigorieff@gmail.com.

^{**} Member of the Brussels bar and a Senior Associate with Kennedys. She holds an LLM in Advanced Air and Space Law from Leiden University (2012). Email: Charlotte.Thijssen@kennedyslaw.com.

^{***} Holds an LLM in Advanced Air and Space Law from Leiden University (2018). Email: annick.sleeckx.gm@gmail.com.

¹ French Senate, extraordinary session, Rapport, n.856, at 7 (2015–2016).

² ICAO Doc 8364, in force on 4 Dec. 1969.

³ ICAO Doc 8920, in force on 14 Oct. 1971.

acts against the safety of civil aviation⁴ was also adopted under the auspices of the International Civil Aviation Organization ('ICAO'). Several unprecedented events then led to the adoption of Article 3 *bis* in what is generally considered as the civil aviation international constitution, the Chicago Convention,⁵ especially following the KAL 007 Korean Airline disaster in which 269 lives were lost. The impact of the Lockerbie explosion subsequently led to the adoption of the 1991 Montreal Convention on the marking of plastic explosives for the purpose of detection.⁶ The first time aircraft were massively used as weapons of mass destruction was in the 9/11 attacks on the World Trade Center in New York, which led the international aviation community to realize a modernization of the criminal air law instruments was needed.⁷ In only a few years, not less than four new legal instruments were adopted to tackle the challenges of the new threats: the 2014 Montreal Protocol amending the Tokyo Convention⁸; the 2009 Montreal Convention on compensation for damage to third parties resulting from acts of unlawful interference involving aircraft⁹; the 2010 Beijing Convention on the suppression of unlawful acts relating to international civil aviation¹⁰; and the 2010 Beijing Protocol supplementary to the convention for the suppression of unlawful seizure of aircraft.¹¹ The last two are referred to as the Beijing Instruments.

The Beijing Instruments aim at preventing and suppressing unlawful acts against civil aviation that threaten the safety of persons and property; they can be considered as counterterrorism instruments for aviation,¹² and thereby aim to improve the previous international criminal air law instruments. In order to achieve this goal, the Beijing Instruments identify unlawful acts and recommend manners of cooperation between States. The Beijing Instruments are often seen as one single instrument, insofar as they have been adopted during the same diplomatic conference, were negotiated in parallel with coherent definitions across both instruments and are generally ratified simultaneously.¹³ However, they are distinct

⁴ ICAO Doc 8966, in force on 26 Jan. 1973.

⁵ ICAO Doc 9436, incorporated in Doc 7300, in force on 1 Oct. 1998.

⁶ ICAO Doc 9571, in force on 21 June 1998.

⁷ Swiss working document, Message concernant l'approbation de la convention sur la répression des actes illicites dirigés contre l'aviation civile internationale et du protocole additionnel à la convention pour la répression de la capture illicite d'aéronefs, no 13.082, 9 Oct. 2013, at 7655.

⁸ ICAO Doc 10034, not in force; See M. Jennison, *The Montreal Protocol of 2014 is Intended to Modernise the Tokyo Convention of 1963: Can It Succeed?*, *Annals Air & Space L.* 1–37 (2014); R. Abeyratne, *A Protocol to Amend the Tokyo Convention of 1963: Some Unanswered Questions*, *Air & Space L.* 47–58 (2014).

⁹ ICAO Doc 9920, not in force; See M. Jennison, *Report of the Rapporteur on the Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in Case of Unlawful Interference*, *Annals Air & Space L.* 549–70 (2009); R. Abeyratne, *The Unlawful Interference Compensation Convention of 2009 and Principles of State Responsibility*, *Annals Air & Space L.* 177–212 (2009).

¹⁰ ICAO Doc 9960, in force 1 July 2018.

¹¹ ICAO Doc 9959, in force 1 Jan. 2018.

¹² *ICAO Journal*, Vol 66, No. 1 (2011), at 6.

¹³ Swiss working document, *supra* n. 7, at 7657.

instruments covering different situations and can technically be ratified independently.

The Beijing Convention requires States to criminalize certain emerging threats to civil aviation safety, such as the use of the aircraft as a weapon and the unlawful transportation of certain dangerous goods such as explosive or radioactive materials, chemical weapons or even equipment contributing to the creation of such a weapon. In that sense, its objective is to replace the 1971 Montreal Convention. The Beijing Protocol however, aims to supplement the 1970 Hague Convention, thereby broadening the international legal framework against aircraft hijacking.

Both instruments had a large support base as they were adopted by more than eighty states under the auspices of ICAO. However, despite this seemingly large support base, the ratification process was slow as both instruments only became effective in 2018, respectively on 1 January 2018 for the Protocol and on 1 July for the Convention.

This article aims to address some of the key aspects established in the Beijing Instruments, also in light of less traditional emerging threats to civil aviation such as in the field of cybersecurity.

2 THE 1970 HAGUE CONVENTION AS AMENDED BY THE BEIJING PROTOCOL

2.1 PURPOSES OF THE CONVENTION

The 1970 Hague Convention was adopted in the aftermath of several aircraft hijackings.¹⁴ Its main purpose is for States to establish as an offence: any act made by a person, or as an accomplice, who on board an aircraft in flight unlawfully and by force or threat thereof, seizes or attempts to seize an aircraft.¹⁵ However, for this Convention to apply, and without specific regard to the fact that the aircraft is engaged in an international or domestic flight, the place of take off or the place of the actual landing should not in principle be located in the territory of the State of registration of the aircraft.

¹⁴ For in depth analysis of the Convention, see e.g. S. Feller, *Comment on 'Criminal Jurisdiction over Aircraft Hijacking'*, 207 *Isr. L. Rev.* (1972); S. Shubber, *Aircraft Hijacking Under the Hague Convention 1970 – A New Regime?*, *Int'l & Comp. L. Q.* 687 (1973); R. Kolb, *Universal Criminal Jurisdiction in Matters of International Terrorism: Some Reflection on Status and Trends in Contemporary International Law*, 50 *R. H. D. I.* 43 (1997); M. Milde, *International Air Law and ICAO 207* (Eleven International Publishing 2008); P. Dempsey, *Air Law* 241 (Institute and Center for Research in Air and Space Law – McGill University 2008).

¹⁵ See P. Mendes de Leon, *Introduction to Air Law* 496 (Kluwer 2017).

Once the Convention applies, each Contracting State is to make the offence punishable by severe penalties and to establish its jurisdiction over the offence and the related acts of violence against the passenger and crew, when (a) the offence is committed on board an aircraft of that State; (b) the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board; or (c) the offence is committed on board an aircraft dry leased with the lessee having its principal place of business, or permanent residence, in that State.

Contracting States are also to ensure that if the offender is present on its territory, they will take such person into custody (and notify other implicated States) until the institution of criminal or extradition proceedings. This is nothing less than the confirmation of the old principle *aut dedere aut iudicare*. To this extent, the Convention establishes that it can be used as a legal basis for extradition if desired, and set forth that each Contracting State shall afford to the other the greatest measure of assistance with respect to criminal proceedings.

To the benefit of the airlines and their customers, the Hague Convention also provides that appropriate measures to restore control of the aircraft shall be taken by Contracting States, and that they facilitate the continuation of the journey of the passengers, cargo and crew as soon as practicable.

In order to better address the modern threats to the safety of civil aviation, the Beijing Protocol dusted off and improved the 1970 Hague Convention. From the fourteen initial articles, the amended Convention, to be known as ‘The Hague Convention as amended by the Beijing Protocol, 2010’, now counts twenty-five articles which sometimes thoroughly reform former provisions.¹⁶ This contribution will address several changes the authors consider key in the light of the modern threats to the safety of civil aviation.

2.2 EXTENSION OF MATERIAL SCOPE

One of the major improvements of the Convention consists in the expansion and reshaping of the definition of ‘offence’.¹⁷ The Beijing Protocol provides now that ‘any person commits an offence if that person unlawfully and intentionally seizes or exercises control of an aircraft in service by force or threat thereof, or by coercion, or by any other form of intimidation, or by technological means’.¹⁸ This new

¹⁶ See J. Atwell, *Report of the Rapporteur on the Development of the New Legal Instruments for the Suppression of Unlawful Acts Against the Safety of Civil Aviation – Special Sub-Committee on the Preparation of One or More Legal Instruments Addressing New and Emerging Threats*, *Annals of Air & Space L.* 323 (2010).

¹⁷ Which shifts to the plural form in the Protocol.

¹⁸ Cf. with Art. 1 of the 1970 Hague Convention: ‘Any person who on board an aircraft in flight (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act [...] commits an offence’.

definition not only embraces coercion and technological means which were not taken into consideration in 1970, but also provides clarity on the moral element of the offence, as it is now clearly mentioned that such act must be intentional to constitute an offence.

The revised version also departs from the previous requirements that the offence must have been committed ‘on board an aircraft in flight’ while establishing that it must from now on merely be connected to an aircraft ‘in service’ with the consequence that it is no longer necessary for the hijacker to be physically on board of the aircraft. This provision already proved its added value when the 2015 *Metrojet* accident happened. According to the Protocol, an aircraft is in service ‘from the beginning of the pre-flight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing. In the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board’.¹⁹

The Protocol also improves the material scope of the Convention as a credible threat to commit such offence is also treated as one.²⁰ Furthermore, participation in a group with the aim of committing such offence is now also criminalized. Additionally, not only a hijacking act itself, but the mere attempt to hijack is also punishable as well as assisting another person to evade investigation, prosecution or punishment.²¹ Amongst the enhancements in the Protocol, not only a natural person but also a legal entity can today be held liable if foreseen by national administrative, civil or criminal laws.²²

2.3 EXTENSION OF THE POSSIBLE JURISDICTION

Whereas each Party to the Protocol undertakes to make the offences punishable by severe penalties, the situations in which such jurisdiction should be established are

¹⁹ 2010 Beijing Protocol, Art. V.

²⁰ There is however no guidance in the Convention as to how to interpret what a credible threat is; case law that can be taken into account when assessing the actions of a crew pursuant to a ‘credible threat’ can be *Williams v. Trans World Airlines*, 509 F. 2d 942, 948 52d Cir. 1975, in which it is determined that on the spot decisions of the airline crew must have a rational basis in safety. Thus, whether the decision made under the discretionary power of an airline to remove passengers is exercised based upon the circumstances and facts known to the crew at the time and whether the decisions based on these were rational and reasonable and not arbitrary or capricious; nevertheless, as also stated by Dempsey and Mendes de Leon in their *Brief Amicus Curiae to the US Supreme Court* in the matter of *Alaska Airlines v. Azza Eid et. al.*, 28 Feb. 2011, No. 10-962, when assessing the rationality of these decisions, it must be taken into account that they must often be made in a split second on board, also see *Cerquiera v. American Airlines Inc.*, 520 F.3d1 (1st Cir 2008) and *Dasrath v. Continental Airlines*, 467 F. Supp. 2d 841 (S.D. Ohio 2003).

²¹ To that extent, the Protocol provides for a declaration system pursuant to its Art. XXII (b).

²² 2010 Beijing Protocol, Art. IV.

supplemented to the case when the offence is committed in the territory of the State Party and when the offence is committed by one of its nationals.²³ In addition, each State Party may also establish jurisdiction when the offence is committed against one of its nationals or when the offence is committed by a stateless person who has a habitual residence in its territory.²⁴

2.4 IMPROVEMENT OF COOPERATION BETWEEN PARTIES

As cooperation and exchange of information are key elements in the fight against terrorism, the Protocol provides that any State Party having reason to believe that an offence will be committed will, in accordance with its national laws,²⁵ furnish any relevant information in its possession to the State Parties which it believes would be competent to establish jurisdiction.

2.5 INCLUSION OF HUMAN RIGHTS PROVISIONS

The Protocol adds a new provision with respect to the treatment of a person taken into custody, seeking Contracting States to guarantee this person will be treated fairly and will enjoy all rights in conformity with the laws of the State in the territory of which the person is detained. This includes the respect of applicable provisions of international law and notably 'international human rights law'.²⁶ In parallel, a request for extradition may be denied if the required State has substantial grounds to believe that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to his position for any of these reasons.²⁷

2.6 CLARIFICATION ON EXTRADITION RULES

With respect to extradition, although the *aut dedere aut iudicare* rule has not been modified by the Protocol, the latter however does prescribe that none of the offences are to be regarded as a political offence for extradition purposes. This means that a request for extradition based on the offences established by the

²³ *Ibid.*, Art. VII.

²⁴ *Ibid.*

²⁵ This point translates all the inherent difficulties in the terms of international cooperation.

²⁶ 2010 Beijing Protocol Art. X.

²⁷ *Ibid.*, Art. XIII.

Protocol cannot be refused on the sole ground that it would constitute a political offence.²⁸

Historically, extradition was usually requested precisely where a political offence was involved.²⁹ However, in the nineteenth century, guarantees attached to the freedom of expression expanded. One of the consequences of this new protection was clauses stipulating non-extradition for political offences, the so-called 'Belgian clause'.³⁰ This Belgian clause was soon adopted by other States in their bilateral extradition treaties, and can still be found in the 1963 Tokyo Convention. Article 2 of this Convention states: '[...] no provision of this Convention shall be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination'. When compared to the Beijing Protocol, although race and religion remain protected, offences of a political nature are now considered to be insufficient reason to refuse extradition.

Some explanation of this inclusion in the Protocol can be found at the end of the sixties where the occurrences of hijacking exploded immensely.³¹ The added layer of protection for political offences became untenable for many countries. Many criminals found a safe haven in States which referred to the lack of extradition treaties to refuse to extradite hijackers. The idea behind this provision is therefore to avoid that an offender finds asylum in accommodating States.

3 THE 1971 MONTREAL CONVENTION RECAST BY THE BEIJING CONVENTION

The Beijing Convention adopts the same architecture and quite often the same wording as the 1970 Hague Convention. This includes various provisions relating to the duty to either prosecute locally or to extradite and to organize the cooperation between Contracting States. The aim of the 1971 Montreal Convention was mainly to establish as an offence acts of violence (or attempts) done unlawfully and intentionally against a person on board an aircraft in flight if that act was likely to endanger the safety of that aircraft; and acts which directly or indirectly cause the destruction or severe damage to an aircraft in service or to air navigation facilities.³²

²⁸ *Ibid.*, Art. XII.

²⁹ L. Oppenheim, *International Law: A Treatise* vol. 1, 512 (3d ed., The Lawbook Exchange 2005).

³⁰ B. De Schutter, *Bibliography on International Criminal Law* 123–28 (Sijthoff 1972).

³¹ Shubber, *supra* n. 14, at 688, 716; See e.g. the Hijacking of Delta Air Lines Flight 841 where members of the Black Panthers organisation hijacked a plane originally going from Detroit to Miami and ordered it to fly to Algeria where the Algerian government refused to extradite the hijackers to the US government.

³² For further readings on the 1970 Montreal Convention, see J. Grant, *Beyond the Montreal Convention*, Case W. Res. J. Int'l L. 453–72 (2004).

The 1988 Montreal Protocol³³ expands the category of acts considered as an offence to acts against a person at an airport serving international civil aviation and to the destruction of and serious damage to the facilities of such airport or aircraft not in service.³⁴

Different to the 2010 Beijing Protocol, the 2010 Beijing Convention does not – as its name indicates – pursue the objective of supplementing the 1971 Montreal Convention; but rather replaces it amongst its ratifying States.³⁵ The choice of such recast will in practice avoid the difficulties that can emerge when a text has been amended by distinct instruments which have not all been uniformly ratified.³⁶ This recast is hence supposed to offer greater legal certainty and improved consistency.

Without surprise, the 2010 Beijing Convention is largely based on the 1971 and 1988 instruments as it has taken over most of their provisions and notably the definition of an offence. The 2010 Beijing Convention however, increases the number of infractions and modernizes several other provisions of the 1971 and 1988 texts taking into account the new types of threats to civil aviation in the aftermath of the 9/11 attacks.

3.1 SCOPE

Save for a few exceptions, the new Convention only applies where the place of take off or landing, actual or intended, is situated outside the territory of the State of registry of the aircraft; or when the offence is committed in the territory of a State other than the State of registry.³⁷ Following intense discussions,³⁸ it has been decided that the Convention would not apply to the activities of armed forces during an armed conflict.³⁹

In addition, as the Beijing Convention is geared to address suicide attacks by pilots, as justified by the results of the ICAO survey of Members States on the threats against civil aviation,⁴⁰ it is questionable whether the Beijing Convention (or the Beijing Protocol) would be applicable to cases such as the Germanwings catastrophe, as the provisions explicitly ask for intent, and do not seem aimed at protecting the safety of international aviation against internal threats such as pilots

³³ ICAO Doc 9518, in force on 6 Aug. 1989.

³⁴ Milde, *supra* n. 14.

³⁵ 2010 Beijing Convention, Art. 24.

³⁶ The idea is therefore to avoid the emergence of a new « Warsaw System » in criminal air law.

³⁷ 2010 Beijing Convention, Art. 5.

³⁸ Swiss working document, *supra* n. 7, at 7657.

³⁹ 2010 Beijing Convention, Art. 6 (2).

⁴⁰ See X. Gong, *The New Development of International Law on Civil Aviation Security: The Beijing Convention and Beijing Protocol of 2010*, J. E. Asia & Int'l. 232, 232–33 (2011).

suffering from mental health issues. Article 1 of the Beijing Convention provides: ‘Any person commits an offence if that person *unlawfully*⁴¹ and *intentionally*⁴² seizes or exercises control of an aircraft in service by force or threat thereof, or by coercion, or by any other form of intimidation, or by any other technological means’. The words ‘unlawfully’ and ‘intentionally’ therefore further determine which acts constitute an offence under the Beijing Convention and which do not. Unlawful means ‘contrary to or violating a law that exists’.⁴³ This word is partly dispensable in this Article, as it prohibits unlawful acts, while still having to define which acts are an offence under the Convention. The Beijing Instruments seem directed at external threats and therefore suicide cases of pilots are likely to be excluded in most cases.

The Beijing Instruments do not address the phenomenon of unruly passengers. This subject was, according to the Council, of a ‘somewhat different nature’ and was therefore not included into the new Beijing Instruments⁴⁴; but is rather addressed by the new 2014 Montreal Protocol⁴⁵ amending the Tokyo Convention.

3.2 OFFENCE

As already suggested, the main goal of the Convention is to establish as an offence amongst the ratifying States several acts done unlawfully and intentionally against aviation safety and which shall be punished by severe penalties.⁴⁶ It is not possible in the framework of this contribution to list every offence instituted by the Convention insofar as, next to the offences already existing in the 1971 and 1988 texts, the Convention is now equipped to address numerous new offences and definitions.⁴⁷ Amongst the novelties, the Convention provides that not only individuals can be held liable but also, in accordance with ‘national legal principles’, legal entities can be subject to monetary sanctions.⁴⁸ This is a major development in the weaponry against entities funding terrorist groups. The threat of committing an act listed as an offence is also punishable if the threat is deemed ‘credible’.⁴⁹ Additionally, the communication of information which a person

⁴¹ Highlighted by the authors.

⁴² Highlighted by the authors.

⁴³ *Black’s Law Dictionary* (H. Campbell ed., 2nd ed., The Lawbook Exchange 1995).

⁴⁴ ICAO, *Summary Minutes of the Ninth Meeting* 53 (ICAO C-MIN 180/9 5 Mar. 2008) quoted in A. Piera & M. Gill, *Will the New ICAO-Beijing Instruments Build a Chinese Wall for International Aviation Security?*, *Vand. J. Transnat’l L.* 145, 158 (2014).

⁴⁵ ICAO Doc 10034, not in force, *see supra*.

⁴⁶ 2010 Beijing Convention, Art. 3.

⁴⁷ *See* R. Abeyratne, *The Beijing Convention of 2010: An Important Milestone in the Annals of Aviation Security*, *Air & Space L.* 243–55 (2011).

⁴⁸ 2010 Beijing Convention, Art. 4.

⁴⁹ *Ibid.*, Art. 1 (3).

knows to be false thereby endangering the safety of an aircraft in flight is treated as an offence.⁵⁰ As Abeyratne rightly pointed out, this will exclude economic losses as it does only pertain to direct *safety in flight*.⁵¹ But the true innovation of the Convention is to address for the first time two major recent threats: the use and transportation of biological, chemical and nuclear weapons ('BCN weapons'); and cyberterrorism.

3.2.1 *BCN WEAPONS AND THE TRANSPORTATION OF DANGEROUS GOODS*

As it became clear that aviation was a vulnerable target for terrorism, an increased awareness emerged as to the means terrorists could use to accomplish their goals. Not only suicide attacks by terrorists, but also the threat of biochemical warfare or other weapons of mass destruction came under scrutiny.⁵² Next to the reference of the already existing treaty body with regard to the non-proliferation of nuclear weapons and the prohibition of biological and chemical arms,⁵³ the Beijing Convention introduces detailed prohibitions on use of BCN weapons. It also prohibits the unlawful and intentional transportation of dangerous goods, which include these BCN weapons⁵⁴ or even equipment that would contribute to the creation of such a weapon.⁵⁵

3.2.2 *CYBER-TERRORISM*

The Beijing Convention also covers persons who destroy or damage air navigation facilities or interfere with their operation if such an act is likely to endanger the safety of aircraft in flight.⁵⁶ This exact same provision was already present in the 1971 Montreal Convention, when computers were still virtually non-existent. However, the new Beijing Convention defines an air navigation facility as encompassing the signals, data information or systems necessary for the navigation of the aircraft. Consequently, not only the use of aircraft as a weapon in the classical sense

⁵⁰ *Ibid.*, Art. 1 (1) e.

⁵¹ Abeyratne, *supra* n. 47, at 243, 250.

⁵² See J. Tucker, *The Role of the Chemical Weapons Convention in Countering Chemical Terrorism*, Terrorism & Pol. Violence, 105–19 (2012).

⁵³ Art. 7 of the 2010 Beijing Convention makes reference to the Treaty on the Non-Proliferation of Nuclear Weapons, *signed at London, Moscow and Washington on 1 July 1968*, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their destruction, *signed at London, Moscow and Washington on 10 Apr. 1972* and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *signed at Paris on 13 Jan. 1993*.

⁵⁴ 2010 Beijing Convention, Art. 2.

⁵⁵ *Ibid.*, Art. 1 (1) i.

⁵⁶ *Ibid.*, Art. 1 (1) d.

is prohibited, but now cyber terrorism offences are also covered. Nevertheless, destruction or damage to air navigation facilities or interference with their operation is only considered as an offence under the Convention if it is likely to endanger the safety of an aircraft in flight.⁵⁷ If the result of the cyberattack does not have an effect on an aircraft in flight, the act might fall outside of the scope of the Beijing Convention provided it cannot be considered as such under another provision of the Convention. The Convention is however not the only resource against cyber terrorism in aviation. Other improvements were made at ICAO level to protect civil aviation against cyberattacks in the regular amendments to annex 17 to the Chicago Convention.

3.3 COMPETENCE

Incorporating the jurisdiction requirements of the 1971 Montreal Convention, the 2010 Beijing Convention still provides that each State Party shall take measures to establish its jurisdiction over the offence established by the Convention in the following cases:⁵⁸

- (a) when the offence is committed in the territory of that State;
- (b) when the offence is committed against or on board an aircraft registered in that State;
- (c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
- (d) when the offence is committed against or on board an aircraft leased without crew to a lessee whose principal place of business or, if the lessee has no such place of business, whose permanent residence is in that State;

However, in the 2010 text, this first paragraph is supplemented with a fifth jurisdictional ground:

- (e) when the offence is committed by a national of that State.

A second paragraph with grounds to establish jurisdiction is also added and sets out that each State Party may also establish its jurisdiction over any such offence in the following cases:

- (a) when the offence is committed against a national of that State;
- (b) when the offence is committed by a stateless person whose habitual residence is in the territory of that State.

This last set of jurisdictions comes in a more discretionary and subsidiary order, as the Convention phrases it as ‘may’, pointing to a possibility, but not an obligation. Whether they will all be useful is doubtful, as not many States would be likely to

⁵⁷ See Abeyratne, *supra* n. 47, at 243, 249.

⁵⁸ 2010 Beijing Convention, Art. 8.

extradite their own nationals to the perhaps prejudiced State of the victim. Some commentators have however underlined that the wording of the Convention with regard to the establishment of jurisdiction may lead some to believe that it is more of a best effort obligation⁵⁹ rather than a mandatory obligation⁶⁰; whereas others would understand the operative verb used – ‘shall’ – as a peremptory obligation.⁶¹

The Beijing Convention also serves as a modernized instrument of the 1971 and 1988 texts insofar as many provisions such as cooperation amongst ratifying States,⁶² extradition rules – confirming the application of the important cornerstone either to extradite or to prosecute⁶³ –, custody,⁶⁴ human rights protection⁶⁵ and rights vis-a-vis airlines⁶⁶ have been improved as within the Protocol. We refer you therefore, *mutatis mutandi*, to our comments *supra* with respect to the 2010 Beijing Protocol.

4 CONCLUSIONS

The Beijing Instruments are clear and expected significant steps in the fight against terrorism from a civil aviation perspective. They both contain positive provisions as to what should be considered as a criminal offence and therefore be severely punished. Some may however regret that cybersecurity threats to civil aviation have not been addressed more explicitly in the Beijing Convention as more and more traditional criminal acts are now replaced by cybercrime. As legislation and actions to prevent security threats to civil aircraft become more onerous and encompassing, persons attempting to interfere with the security of civil aviation become more and more creative as well. Nevertheless, the Beijing Convention does definitely provide for a framework for international cooperation in the case of cybercrime. This is all the more important since interfering with an IT system of an airline from country A or Air Traffic Control from country B can be done remotely from a place on the opposite side of the planet as nowadays presence on site to tamper with an aircraft is intrinsically unnecessary in the case of cybercrime/cyberterrorism. Furthermore, this becomes more paramount as the aviation industry increasingly relies on IT solutions and technology, such as baggage and cargo handling and passenger check-in,⁶⁷ exposing them to more risks in case of interference with their IT systems. Hence, both instruments reinforce cooperation

⁵⁹ Piera & Gill, *supra* n. 44, at 208.

⁶⁰ *Ibid.*; the authors underline that since the phrasing is not ‘The States shall establish jurisdiction’, it is not a mandatory obligation.

⁶¹ Abeyratne, *supra* n. 47, at 254.

⁶² 2010 Beijing Convention, Arts 16, 17 and 18.

⁶³ *Ibid.*, Arts 10, 12 and 13.

⁶⁴ *Ibid.*, Art. 9.

⁶⁵ *Ibid.*, Arts 11 and 14.

⁶⁶ *Ibid.*, Art. 16 (2).

⁶⁷ Including passenger, baggage and cargo screening equipment and systems.

among Contracting States as well and confirm the ancestral principle of *aut dedere aut iudicare*. Difficulties may arise though in cases where several persons are connected to the offence but are not located in the same territory in the absence of effective *lis pendens* provisions.

Practice demonstrates that their insertion into national law generally does not require much effort.⁶⁸ However, as most public air law conventions, there are no sanctions for non-compliance with the treaty provisions. Consequently, the effectiveness of the Beijing Instruments will essentially rely on the enforcement in good faith by each Contracting State.

⁶⁸ French Senate, *supra* n. 1, at 10; P. Dupont, *La ratification de la Convention et du Protocole de Pékin 2010: de nouveaux instruments en matière de contre-terrorisme*, 39 RFDAS (2017); Swiss working document, *supra* n. 7, at 7655.