

**THE INTERNATIONAL CIVIL AVIATION  
ORGANIZATION ON AVIATION SECURITY: THE  
KENYAN CASE**

**BY**

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## DECLARATION

### Student

I, Kiriungi Joy Muthoni, do declare that this dissertation is my original work and that it has not been submitted, nor is it being submitted for a degree in any other university or institution.

Signature



Date

### Supervisor

I confirm that the work presented in this dissertation has been carried out by the student and has been submitted with my approval as the University supervisor.

Name: Professor F.D.P Situma

Signature

Date

## DEDICATION

I want to dedicate this research paper to the Kenya Civil Aviation Authority in Kenya. I hope they find it useful in their course of work. I also dedicate this work to my family and friends for their help as I did this research.

## ACKNOWLEDGEMENTS

I thank God for giving me the ability and the strength to do this research. This far I have come, it is the Lord God.

I express my deepest appreciation to my supervisor, Professor Francis D. P. Situma, for his guidance and the valuable time he took to help me meticulously correct and re-correct my work.

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## LIST OF STATUTES

1. The Kenya Civil Aviation Act, Cap No. 21, 2013
2. Kenya Airports Authority Act, Cap. No. 394, 1991

## LIST OF TREATIES

1. Convention Relating to the Regulation of Aerial Navigation 1919 (Paris); 11 L.N.T.S. 173.
2. Convention for the Unification of Certain Rules Relating to International Carriage by Air; 137 LNTS 11.
3. Convention for the Prevention and Punishment of Terrorism 1937 (Geneva) (Never entered into force).
4. Hague Protocol to Amend the Convention for the Unification of Certain rules Relating to International Carriage by Air, Signed at Warsaw; 478 UNTS 371.
5. Convention for the Suppression of Unlawful Seizure of Aircraft (Hague, 1970); 860 U.N.T.S 105.
5. 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; 974 U.N.T.S 177.
6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal 1988) ICAO; Doc. 9518.

7. Beijing Convention On The Suppression Of Unlawful Acts Relating To International Civil Aviation And The Protocol Supplementary To The Convention For The Suppression Of Unlawful Seizure Of Aircraft 2010; 50 ILM 144.

# CHAPTER 1

## INTRODUCTION TO AVIATION SECURITY LAW

### 1.1 Background

Air law is that part of international law that relates to civil aviation and the international institutions concerned with air law.<sup>1</sup>

Aviation security is described in the Kenya Civil Aviation Act<sup>2</sup> as a combination of measures, human and material resources intended to safeguard civil aviation against acts of unlawful interference.<sup>3</sup>

The history of criminal acts against aviation have for a long time coincided with the history of international civil aviation. Most of these unlawful acts had not been foreseen during the time when the civil aviation was fledged and international instruments such as the Chicago Convention were drafted. The main concern at this point was safety of flight and air navigation.<sup>4</sup> Aviation security is safety of the airspace from acts of terrorism, seeking to protect the aircraft and the protection of life in civil aviation.

Great strides have been made by the international community in setting up the legal framework and institutions that will enhance aviation security.

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<sup>1</sup> Bin Cheng, Air Law, in R. Bernhardt, A-D Encyclopaedia of Public International Law, Vol 1 (1992)

<sup>2</sup> The Civil Aviation Act No.21 of 2013.

<sup>3</sup> The Civil Aviation Act No.21 of 2013)

<sup>4</sup> Jung, Sang Yool, A Legal Analysis of Aviation Security under the International Legal Regime, unpublished Masters of Laws (LL.M) Dissertation, McGill University, Canada (2005)

Today, the safety and security of the civil aviation industry globally is endangered, not only by acts of terrorism, but also unlawful acts committed by persons with varying motivations. As a result, the law has had to play catch up by establishing various instruments of preventing such heinous atrocities perpetrated by individuals which endanger and often result in fatalities of those on board.

The development of security programmes globally has been as a result of compromises of what needed to be done and what could be done.<sup>5</sup>

Between 1900 -1914, there was a debate as to the legal status of the airspace. However, after 1914, with the onset of the First World War, it was evident that it will be to all states' contentment that nothing less than complete sovereignty over their air space was expected. Any other rule would be unacceptable on security grounds.<sup>6</sup>

In 1944, the first world legal instrument governing the civil aviation industry, the Chicago Convention on International Civil Aviation was adopted affirming this position. The first incident of modern day seizure was in May 1930, when the Peruvian revolutionaries took control of a civil aircraft an F-7 plane, using it to drop propaganda booklets all over the country, no specific instrument was

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<sup>5</sup> Ibid.

<sup>6</sup> Peter Malankczuk, Modern Introduction to International Law, 7<sup>th</sup> ed. (Routledge Publishers 1997)

drafted dealing with aviation security.<sup>7</sup> Action was taken by the League of Nations which made cohesive efforts to create an International Criminal Court to deal with acts of international terrorism by drafting the 1937 Geneva Convention for the Prevention and Punishment of Terrorism. However, this Convention never entered into force largely owing to the outbreak of World War 2 in 1939 though certain provisions of the Convention were directly relevant to criminal acts against civil aviation especially Article 2 which states:

'...willful destruction of, or damage to, public property or property devoted to a public purpose belong to or subject to the authority of another High Contracting Party...'<sup>8</sup>

Could be interpreted to include the protection of aircrafts and airports of the contracting states.

The International Civil Aviation Organisation was established under Article 43 of the 1944 Chicago Convention. Under the auspices of the ICAO, several multilateral conventions and security agreements have been adopted. These legal instruments have focused on getting rid of the safe havens for unlawful actors and prescribing a way in which these perpetrators could face the law.

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<sup>7</sup> Narinder Aggarwala "Political Aspects of Hijacking" in *Air Hijacking: An International Perspective*. (New York: Carnegie Endowment for International Peace, November 1971, No.585) at 8.

<sup>8</sup> Convention for the Protection and punishment of Terrorism (Geneva 1937) in 'International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest' (Vol. VII, 1935-1937) edited by Manley O. Hudson (Washington DC: Carnegie Endowment for International Peace, Division of International Law, 1941) (Never entered into force) at 862.

For purposes of civil aviation, the ICAO has a council which serves as the legislative body that sets out both binding and non-binding rules and regulations to its member states.

Kenya is a party to the Chicago Convention and a member of the ICAO. It was also recently elected to sit at the ICAO Council to represent the developing countries. The Kenya Civil Aviation Act, 2013, is modelled as per the provisions of the ICAO. The Statute provides Regulations 60 which consists of the aviation security guidelines.<sup>9</sup>

## 1.2 Statement of the Problem

Kenya, as a state, has the capacity to enter into treaties on behalf of its citizens which are binding to it as a State. It has the international responsibility to draft its laws and ensure that its internal law are in harmony with the provisions of the international law.

Article 2(6), of the Constitution of Kenya provides that all treaties ratified by Kenya are to be incorporated in Kenya as Kenyan law.

How far has Kenya gone in establishing the rules, regulations and institutions required as provided in the treaties orchestrated by the ICAO? What are the steps taken by Kenya to facilitate the requirements of the various treaties?

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<sup>9</sup> The Civil Aviation Act, No.21 of 2013, Legal Notice 60, of 2013.

Are the instances of aviation security a problem of the legal and institutional frameworks or a problem of the institutions in place not carrying out their mandate as required?

### 1.3 Justification of the Study

Aviation law is generally of international character. There is great need for international collaboration, coordination and standardization of domestic air laws.<sup>10</sup>

Over the past few months, Kenya has been at the centre of terror attacks. This is greatly attributed to the 1976 scene when Kenya briefly served as a refuelling stage for the Israeli C-130 Hercules transport planes on their way back to Israel after the Entebbe raid. The Arab terrorists perceived this as a Western interest and support for the Israeli, causing anger from Israeli extremists.<sup>11</sup>

On 28<sup>th</sup> November 2002, in Kikambala, Kenya, simultaneous terrorist attacks on Israeli tourists left eleven people dead and another eighty wounded. The Paradise Hotel staff reported that they had seen a light plane circling over the hotel at the time of the explosion. Three packages, which staff said were bombs, had been dropped from the hotel, one landing on the hotel roof, the other in the hotel pool and the last one in the ocean. Meanwhile, two missiles were streaked to a jetliner owned by the Arkia Charter Company as it left the Mombasa airport

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<sup>10</sup> Bin Cheng, Air Law, in R. Bernhardt, A-D Encyclopaedia of Public International Law, Vol 1 (1992)

<sup>11</sup> <http://jewishvirtuallibrary.org> last accesses on 27<sup>th</sup> January 2014

bound for Tel Aviv. The authorities claimed that it was a coordinated attack.<sup>12</sup>

No reports are to be found on the outcome of the case.

This situation was worsened by the August 7<sup>th</sup>, 2013, fire at Kenya's largest international airport, Jomo Kenyatta International Airport, which went on for four straight hours before it could be contained. This raises major concerns as to the safety and security measures in place in our country's airports.<sup>13</sup>

The most recent scenario was the explosion at the Jomo Kenyatta International Airport on 22<sup>nd</sup> December 2013 that occurred when a small improvised explosive device exploded at a popular restaurant at the airport. The explosion damaged a metal trash can and the ceiling but caused no bodily injuries.<sup>14</sup>

A diplomatic conference on the aviation security was held in Beijing from 30<sup>th</sup> August to 10<sup>th</sup> September 2010, and adopted the Beijing Convention On The Suppression Of Unlawful Acts Relating To International Civil Aviation And The Protocol Supplementary To The Convention For The Suppression Of Unlawful Seizure Of Aircraft 2010. The Convention modernized the 1972 Montreal Convention and its 1988 Supplementary Protocol,<sup>15</sup> by criminalizing the act of using a civil aircraft as a weapon and the act of using dangerous materials to attack aircraft. It also criminalizes the unlawful transport of biological, chemical

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<sup>12</sup> [http://www.earthmountainview.com/terrorism\\_2002.html](http://www.earthmountainview.com/terrorism_2002.html) last accessed on 27<sup>th</sup> January 2014

<sup>13</sup> Cyrus Ombati, <http://www.standardmedia.co.ke/?article ID=20000&35> last accessed 27<sup>th</sup> January 2

<sup>14</sup> Tom Odula, <http://www.ajc.com/news/ap/transport> last accessed 27th January 2014.

<sup>15</sup> Beijing Convention On The Suppression Of Unlawful Acts Relating To International Civil Aviation And The Protocol Supplementary To The Convention For The Suppression Of Unlawful Seizure Of Aircraft 2010 50 ILM 144

and other nuclear weapons and other related material by making such offences punishable with severe penalties. Cyber attacks on air navigation facilities will also trigger criminal responsibility.<sup>16</sup>

#### 1.4 Hypotheses

This research work is carried out on the assumption that:

1. The policies, laws and institutions set up in Kenya to ensure aviation security have inherent loopholes that are being exploited for terror attacks.
2. There is weak enforcement of the laws and policies as per the guidelines of the ICAO in regulating aviation security in the country.

#### 1.5 Research Question

What are the challenges faced by Kenya's legal and institutional framework in ensuring aviation security?

#### 1.6 Theoretical Framework

Realism in the context of security studies describes the world order as a system of competing self-interested state actors under anarchy.<sup>17</sup> This understanding of the world order has a direct effect on the definition of security as a system of anarchy.

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<sup>16</sup> High Level Conference on Aviation Security working paper, Promotion of the Beijing Convention and the Beijing Protocol of 2010, (ICAO).

<sup>17</sup> <http://www.e-ir.info/2013/06/14/realism-the-domination-of-security-studies> last accessed 27th January 2014/

The introduction to the first edition of *International security*, in 1976, defined security as factors with a 'direct bearing on the structure of the nation state system and the sovereignty of its members, with a particular emphasis on the use, threat and control of force.'<sup>18</sup> Henry Kissinger, a realist academic and US Secretary of State, argues that 'how realistically we perceive our national interests' is a core of security concern.<sup>19</sup>

This thinking centres security studies on the state as a guarantor of security, the state system as the determinant of state behaviour.<sup>20</sup> States would really give up their obligations to the entire larger region and ensure their own security than risk the security of their citizens as security is closely linked to the economic prosperity. It is also a show of strength and might. A state would rather go against the *jus cogens* principle of *non refoulment* than risk exposing its borders to terrorists.

Furthermore, law generally, is described as a particular collection of instruments, institutions and practices, varies from one country to another. Utilitarian argument is that law must be made to conform to its most socially useful purpose. Consequences are to be considered in the evaluation of a given law. Setting up laws which though not comfortable socially, especially at the airports

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<sup>18</sup> Carnselle, Albert and Nacht Michael(1976) 'Forward' *International Security*, obtained from <http://www.e-ir.info/2013/06/14/realism-the-domination-of-security-studes>.

<sup>19</sup> Kissinger, Henry, Documentation: Foreign Policy and National Security , *International security* (1976)

<sup>20</sup> Ibid

security system is a necessary requirement as it helps save lives which are at risk of terrorist attack.

Furthermore, Hans Kelsen, a renowned legal positivist argues that, 'all legal norms could and should be understood in terms of authorization to an official to impose sanctions.'

Laws should therefore be in place to serve as a compass for the state.

### 1.7 Objectives

The research seeks to,

1. Analyse the situation in the country in terms of institutions, laws and policies that have been set up to ensure aviation security.
2. Identify gaps and challenges experienced by such institutions in carrying out their mandate and come up with recommendations.
3. To make a clear case for the ratification of the Beijing Protocol and Convention of 2010.

### 1.8 Literature Review

Jung, Sang Yool, of McGill University, in a '*A Legal Analysis of Aviation Security Under the International Legal Regime*', brought into light that though there is no perfect legal framework to prevent another intentional catastrophic harm from taking place, there is need for constant adaptation of the legal framework to the new and emerging trends in the aviation industry. This builds the passengers confidence though it causes severe interference on their part. However, this may

cause severe interference on the passenger through rigorous searches made on the passenger before boarding the aircraft.<sup>21</sup>

A report by the Institute of Security Studies on Aviation Security and Safety in Africa<sup>22</sup> states that the major concern and challenge in aviation security in Africa is the lack of compliance with international guidelines

All states have complete and exclusive sovereignty over the airspace above their territory.<sup>23</sup> Perhaps the greatest milestone achieved is the individual criminal liability directly under international law which brought together the elements of traditional international law with more modern approaches to human rights law and allowed the enactment of laws which will target specific individuals and impose sanctions against them.<sup>24</sup>

There is a vacuum in many local authors on the area of aviation security. Unfortunately, this also extends to a small number of published books on the issue of aviation security worldwide. Heavy reliance is on online journals and publications made by authors from other jurisdictions. Theses on this area of law are also available though few.

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<sup>21</sup> Jung, Sang Yool, A Legal Analysis of Aviation Security under the International Legal Regime, unpublished Master of Laws (LL.M) Dissertation, McGill University, Canada (2005).

<sup>22</sup> Institute for Security Studies Situation report, issued on 15<sup>th</sup> July 2008, Mutali K. Se'Kapchangah

<sup>23</sup> The 1944 Chicago Convention on International Civil Aviation U.N.T. S Vol 15

<sup>24</sup> Malcolm N. Shaw, *International Law*, 6<sup>th</sup> ed (Cambridge) 2008.

## 1.9 Research Methodology

This research work relied heavily on desktop research based on publications on this subject matter. This includes both printed and online publication.

The research was also informed by information and resources obtained from interviews with the experts of the aviation legal field including those at the regulatory body of civil aviation in Kenya, and ICAO offices in Nairobi who set out the regulation requirements for the country.

## 1.10 Preliminary Chapter Breakdown

### 1. Chapter 1: Introduction

This chapter adopted the proposal of the research which brings out the reasons for the research work and lays down the theoretical framework relied on for the purposes of this work. It outlines the objectives of the study and brings into focus the lens through which this research work was carried out.

### 2. Chapter 2: The Major Developments made in the Legal Framework on Aviation Security Globally

This chapter shall look at the major historical developments of the aviation security internationally and the responses made by the international community in reacting to these developments.

### 3. Chapter 3: The Kenya Situation on Aviation Security

This chapter shall look into the various laws on aviation security in Kenya, the roles of the institutions set up in the county to ensure aviation security.

#### **4. Chapter 4: Challenges Faced in the Aviation Security Legal Framework in Kenya**

This chapter shall analyze the legal framework in Kenya juxtaposed with the international legal and institutional frameworks.

#### **5. Chapter 5. Conclusion and Recommendations**

This is the conclusion of the research work.

## CHAPTER 2

### THE MAJOR DEVELOPMENTS MADE IN THE LEGAL FRAMEWORK ON AVIATION SECURITY GLOBALLY

#### 2.1 Introduction

The previous chapter introduced the issue of aviation security as an aspect of air law. It presented the development of aviation security through the International Civil Aviation Organization. This chapter focuses on the various developments made by the international community to ensure aviation security globally. This chapter analyzes major incidents that threatened the world's aviation security and the world's response to such in the context of the legal framework.

#### 2.2 Aviation Security Legal Framework before 1944

Common sense dictates that air law, governing the aeronautical uses of the airspace, could not have existed before mankind learned and developed the art of aerial navigation to the point whereby conflict requiring legal regulation arose.<sup>1</sup> Therefore, the first piece of legislation directed specifically at aviation was a decree by the Paris Prefecture of Police, 1784, a year after the Montgolfer brothers successfully demonstrated their invention of the air balloon. The decree forbade the release of balloons without a special permit.<sup>2</sup>

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<sup>111</sup> Peter Malanckzuk, *Modern Introduction to International Law*, (Routledge), 1997 at 198

<sup>22</sup> A-D, Bin Cheng, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume 1 (1992), p. 87

Between 1900 and 1914, different legal scholars drafted different theories as to the legal status of the airspace. As at this time, the legal status of the airspace had not yet been defined. However, during the close of the World War 1, it was evident that nothing less than complete State sovereignty over their airspace was expected by States which was to be unlimited by any right of innocent passage.<sup>3</sup> The World War 1 had demonstrated the military potential of aircrafts for bombing and reconnaissance thus any other rule would have been unacceptable on security grounds. Neutral countries particularly demonstrated their insistence on such a right so as to exclude foreign aircraft from carrying out aerial battles over their territories.<sup>4</sup>

In May, 1910, an international conference on aerial navigation, the *Conférence Internationale de Navigation Aérienne*, was convened in Paris to establish an international air law code. This was an initiative of the French government in a bid to avoid international confrontation by coming up with regulatory procedures for flights into and out of foreign territories. However, no agreement was reached on equal treatment of aircraft, hence the large diplomatic conference finished on an acknowledgement of failure, since no government took action on the ratification of the convention.<sup>5</sup>

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<sup>3</sup> Peter Malanckzuk, *Modern Introduction to International Law*, 7<sup>th</sup> Ed (Routledge), 1997 at 198

<sup>4</sup> Ibid.

<sup>5</sup> [http://legacy.icao.int/icao/en/hist/stamps/1910\\_the\\_paris\\_convention.htm](http://legacy.icao.int/icao/en/hist/stamps/1910_the_paris_convention.htm) (last accessed on 1st March 2014)

In 1913, France and Germany made the first major step toward international collaboration of aviation law by signing a bilateral agreement on international air services.<sup>6</sup>

During the inter war period, a number of bilateral treaties were concluded, including the 1919 *Convention Relating to the Regulation of Aerial Navigation*<sup>7</sup>, also known as the *Paris Convention*. Various countries including the United States, the British Empire, Brazil, France, Greece, Italy, Japan, Poland, and Czechoslovakia had signed the convention.<sup>8</sup> The significant provision of the Convention was Article 1 which provided:

The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory. For the purpose of the present Convention, the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies and the territorial waters adjacent thereto.<sup>9</sup>

1929 saw the coming into force of the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air.<sup>10</sup> It still remains in force today.<sup>11</sup> This is the most important and enduring legacy of the International Technical Committee of Experts in Air Law (CITEJA)<sup>12</sup>. The major feature of the Warsaw Convention was the preamble, stating that the signatories recognized the advantage of regulating, in a uniform manner, the conditions of international transportation by air in respect of the documents

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<sup>6</sup> Supra, note 2

<sup>7</sup> Convention relating to the Regulation of Aerial Navigation (Paris, 1919), L.N.T.S 173

<sup>8</sup> <http://www.duhaime.org/LegalResources/internationallaw/lawarticle-667/convention-on-international-civil-aviation-the-chicago-convention-1944.aspx> (last accessed on 25th February 25, 2014).

<sup>9</sup> *Convention Relating to the Regulation of Aerial Navigation 1919 (Paris)*, 11 L.N.T.S. 173

<sup>10</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air

<sup>11</sup> Supra note 2

<sup>12</sup> CITEJA is the Comité international technique d'experts juridiques aériens<sup>12</sup>

used for such transportation and of the liability of the carrier.<sup>13</sup> This was critical as carriage by air was growing into importance and great challenges were met due to conflict of laws.<sup>14</sup>

The first incidence of modern day seizure of aircraft was in May, 1930 when Peruvian revolutionaries took control of a recorded civil aircraft and diverted it from the scheduled destination so as to drop propaganda leaflets over the capital, Lima.<sup>15</sup> Such unlawful acts had not been anticipated by then, hence there lacked an actual international legal instrument in the civil aviation security field to suppress such terrorist activities. This, was, however with the exclusion of multilateral treaties that sought to suppress the increasing terrorist activities after World War 1.<sup>16</sup>

Its provisions applied to ever case of carriage by air between the states that were party to the Convention.<sup>17</sup> It defined carriage by air to mean carriage whereby the place of departure and the place of destination provided in the contract of trade are within the territory of two different states which were both parties to the Convention whether or not there was an agreed stopping point in the territory of a third state not party to the Covenant. It, however,

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<sup>13</sup><http://aviation.uslegal.com/international-aviation-law/warsaw-convention/>(last accessed on 25<sup>th</sup> February 2014).

<sup>14</sup>David A. Glass & Chris Cashmere, Introduction to the Law of Carriage of Goods, (Sweet & Maxwell, Lodon, 1989), at 205

<sup>15</sup> Peter St. John, Air Piracy, Airport Security, and International Terrorism: Winning the War Against Hijackers( New York: Quorum Books, 1991) at 5

<sup>16</sup> Supra note 1

<sup>17</sup>Jasper Ridley, The Law of the carriage of Goods by Land, Sea and Air, 5<sup>th</sup>ed (Shaw and Shaw Ltd London, 1978) at 223

excluded its application from carriage by air for experimental purposes.<sup>18</sup> The Convention was amended by the 1955 Hague Protocol to the Warsaw Convention and it still remains in force today.<sup>19</sup> The amendment was received with a lot of uproar from the international community as it sought to increase the limit of the carrier for injury or deaths caused to the passengers as it struck out the provision of 'proof of wilful misconduct of the carrier'. Countries such as USA threatened to pull out from the Warsaw Convention.<sup>20</sup> The 1937 Geneva Convention for the Prevention and Punishment of Terrorism<sup>21</sup> was then adopted following the guidelines from the resolutions of the 17<sup>th</sup> Assembly of the League of Nations.<sup>22</sup> The Convention was opened for signature in November 16, 1937,<sup>23</sup> but never came into force due to the outbreak of World War 2 in September 1939. However, certain provisions were directly relevant to civil aviation with regards to aviation security. Article 2 (2) and (3) stated that,

wilful destruction of, or damage to, public property or property devoted to a public purpose belong to or subject to the authority of another High Contracting Party... any wilful act calculated to endanger the lives of members of the public..', could include the protection of aircrafts and airports serving international civil aviation<sup>24</sup>.

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<sup>18</sup>Convention for the Unification of Certain Rules Relating to International Carriage by Air; 137 LNTS 11

<sup>19</sup>Hague Protocol to Amend the Convention for the Unification of Certain rules Relating to International Carriage by Air, Signed at Warsaw; 478 UNTS 371

<sup>20</sup>Supra, note 14, at 207

<sup>21</sup> Convention for the Prevention and Punishment of Terrorism 1937 (Geneva)

<sup>22</sup> "Record of the 17<sup>th</sup> Assembly of the League of Nations, Plenary Meetings, at 135" in El-Muner El Harudi, supra note 8 at 7

<sup>23</sup> Convention for the Prevention of terrorism (Geneva, 1937) in International Legislation : A Collection of the Texts of Multipartite International Instruments of General Interest" Vol 8 1935-1937 edited by Manley O. Hudson.

<sup>24</sup> Convention for the Protection and punishment of Terrorism (Geneva 1937) in 'International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest'

The Convention also introduced an extradition clause for the High Contracting Parties in Article 10 which provided that any foreigner who has committed an offence abroad and was in the territory that High Contracting Party should be extradited on demand.

...Foreigners who are on the territory of the a High Contracting Party and have committed abroad any of the offences set out in article 2 and 3 shall be prosecuted and punished as though the offence had been committed in the territory of that High Contracting Party, if the following conditions are fulfilled namely: Extradition has been demanded and could not be granted for a reason not connected with the offence itself;<sup>25</sup>

These provisions were later reflected in other international treaties on aviation security.

## 2.3 The Aviation Security Legal Framework after 1944 Chicago Convention

### 2.3.1 The 1944 Chicago Convention on International Civil Aviation

The 1944 Chicago Convention on International Civil Aviation is termed as the overall legal framework for international civil aviation globally. The ‘mother of air law’ and was signed on 7<sup>th</sup> December 1944 by fifty two States.<sup>26</sup>

The preamble to the Convention states that the Convention was entered into with the understanding that the development of aviation law was to foster international cohesion and coordination:

‘whereas the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and people of the world, yet its abuse can become a

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(Vol. VII, 1935-1937) edited by Manley O. Hudson (Washington DC: Carnegie Endowment for International Peace, Division of International Law, 1941) (Never entered into force) at 862.

<sup>25</sup> Convention for the Prevention and Punishment of Terrorism (Geneva) 1937 (Never entered into force)

<sup>26</sup> <http://www.icao.int/publications/Pages/doc7300.aspx> (last accessed on 25th February 25, 2014).

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 have agreed on certain principles and arrangements in order that international civil aviation maybe 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.<sup>27</sup>

The Chicago Convention adopted most of its contents from the 1919 Paris Convention Relating to the Regulation of Aerial Navigation, on issues relating to the sovereignty of the aerospace. Article 1 of the Chicago Convention recognizes that the contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.<sup>28</sup>

However, at the drafting of this Convention, acts of terrorism had not been foreseen as a major concern for the various State Parties to the Chicago Convention. The concern at the particular moment was safety of air navigation rather than aviation security as Article 3 of the Convention makes it clear that the Convention shall apply only to civil aircraft and not state aircraft and goes ahead to describe state aircraft as aircraft used in military, customs and police services.<sup>29</sup>

Therefore, there was no explicit mentioning of aviation security against unlawful acts since many were still unknown at the particular time.

Article 43 of the 1944 Chicago Convention created the International Civil Aviation Organization (ICAO) which was established to develop the

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<sup>27</sup> The 1944 Chicago Convention on International Civil Aviation; 15 U.N.T.S 295; ICAO Doc 7300/8

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

principles and techniques of international air navigation and to foster the planning and development of international air transport. Its mandate as provided in Article 44 (a) of the Convention is to ensure the safety and orderly growth of international civil aviation globally.

Under Article 50 of the Chicago Convention, the Council of ICAO has been constituted as a permanent rule making body consisting of originally 21 members, and currently, 36 member countries. The Council's main role is to adopt International Standards and Recommended Practices for smooth running of international civil aviation.<sup>30</sup>

### 2.3.2. The United Nations Charter

In 1945, world leaders and other delegates convened to draft the 111 article Charter which came into force in October in 1945. The Charter has no direct relation to aviation security.<sup>31</sup> However, in the spirit of 'General Principles of Law', the obligation of the UN is to ensure the protection of innocent civilians and their property from danger. The Charter provides for the basic principles of human rights and fundamental freedoms. Thus, the UN Charter has therefore, been the basic guideline and legal resource to solve aviation security problems.<sup>32</sup> The preamble to the UN Charter provides that 'The peoples of the UN member states will "practice tolerance and live together in peace with one another as good neighbours, and unite our strength to

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<sup>30</sup> The 1944 Chicago Convention on International Civil Aviation 15 U.N.T.S 295, ICAO Doc 7300/8

<sup>31</sup> Supra note 14

<sup>32</sup> *ibid*

maintain international peace and security.<sup>33</sup> This is also used to imply aviation security.

### 2.3.3 The 1963 Tokyo Convention on Offences and Certain Acts Committed On Board an Aircraft

The first real wave of hijackings began around 1958 when individuals hijacked an aircraft as a means to divert them from Cuba to the United States.<sup>34</sup>

The majority of cases resulted from individuals' desire to flee from Cuba so as to escape the Castro rule.<sup>35</sup>

The international community began undertaking concerted efforts to find long-lasting solutions to the new wave of terror that threatened aviation security. The measures were to be undertaken under the auspices of the ICAO in the form of international treaties. The most heated debate at this juncture was the civil or criminal nature of unlawful acts or similar acts committed on board an aircraft and the jurisdiction relating to such crimes and how to resolve such jurisdictional conflicts.<sup>36</sup>

In *U.S v Cordova*,<sup>37</sup> an aircraft was flying over the high seas from San Juan, Puerto Rico, to New York in 1948. Two passengers, Cordova and Santana, began fighting in the rear section of the plane and the other passengers gathered around them as spectators. As a result, the weight of the plane shifted to the rear causing the pilot to have difficulties in controlling the plane. The pilot's attempt to intervene in the fight saw Cordova bite him and

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<sup>33</sup><http://www.un.org/en/documents/charter/chapter1.shtml>, (last accessed on 24<sup>th</sup> February 2014)

<sup>34</sup><http://cns.miis.edu/inventory/pdfs/airterr.pdf> (last accessed on 24th February 2014)

<sup>35</sup>Alona E. Evans, 'Aircraft Hijacking: Its Causes and Cure' (1969) 63 A.J.I.L

<sup>36</sup>Supra note 14

<sup>37</sup>*US v Cordova*, 89 F. Supp 298 (E.D.N.Y 1950).

assault the stewardess. The plane landed at La Guardia and the two, Cordova and Santana, were apprehended. Unfortunately, they were released since the legal proceedings failed on grounds of lack of jurisdiction since: The high seas did not include the airspace above them and the airplane was not a vessel.<sup>38</sup>

This case was decided base on the word of the Court in the famous *SS Lotus Case (France v Turkey) (1927)* whereby the court stated that international law does not permit assertion of jurisdiction solely on the basis of nationality of the victim.<sup>39</sup>The question of jurisdiction to try such offences prevented the goal of justice, hence enabling such criminals to walk away scot free.

Another question that needed to be dealt with was that of whether international law termed hijacking as a crime against humanity. In *AG of Israel v Eichmann*<sup>40</sup>, the court sought punishment for the accused on war crimes including hijacking by relying on international law that gave jurisdiction to all States and any State could punish such offenders of crimes against humanity. However, was hijacking in the category of such a crimes?

The dimensions of the hijackings changed from a regionally limited issue (US-Cuban Inter American) problem<sup>41</sup> to a global issue. The character and motivation of the offences also began changing.<sup>42</sup> Previously, the acts had

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<sup>38</sup>U.S. v Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950)

<sup>39</sup>Andrew F. Lowenfeld, Aviation Law: Cases and Materials, ( Matthew Bender Publishers, New York, 1972) at IV 96

<sup>40</sup>Israel Dot.CT. Jerusalem 1961 aff'd Supreme Court of Israel 1962 , 36 International Rep 5 277, 287-289

<sup>41</sup>Dempsey Paul, Law and Foreign Policy in International Aviation, to a global issue(Transnational Publishers, New York, 1978)

<sup>42</sup>Alona E. Evans, Aircraft Hijacking: ' What is Being Done' (1973) A.J.I.L

been isolated and usually associated with attempts to escape prosecution or oppression to offering transportation to offenders.<sup>43</sup>

In *Re Kavic, Bljelanovic and Arsenijivic*, 78 ATF, 1952 the three accused, Yugoslavian pilots, had diverted a scheduled flight from Ljubliana to Belgrade by instead flying of Switzerland through the use of threat or force to the passengers in a bid to seek political asylum in Switzerland. The three were indicted under Yugoslav Penal Code, but the three objected to extradition with the court upholding their objection to extradition as they were political offences raising questions such as whether there was a necessity of an extradition treaty or statute and whether extradition treaties are self-executing.<sup>44</sup>

This situation saw the drafting of the commonly referred to Tokyo Convention on Offences and Certain Acts Committed On Board an Aircraft, concluded at Tokyo on 14 September 1963. It entered into force on 4 December 1969, and as of 2013 had been ratified by 185 parties.

#### **a. Scope of Application**

The Convention major feature is that it provides for jurisdiction over offences committed aboard any aircraft registered in a Contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State. This is regardless to whether the offences affect the in-flight safety of persons or property of the passengers or property

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<sup>43</sup>Ibid

<sup>44</sup>Supra, note 43at VII 65-66

on board a civilian aircraft. This is found in Article 1(1) of the Convention which provides that the Convention applies in respect to offences against penal law; acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.<sup>45</sup>

The definition of the offences at an international level was vague. Thus, the application of the Convention could only be to those crimes which are as so described by the penal codes of the various contracting States. This left the interpretation of the term 'offences' to the discretion of the contracting states so as to remove any such doubts as to the definitions by amending their domestic laws to reflect the provisions of the treaty.<sup>46</sup>

#### **b. Jurisdiction**

The Convention provides that the State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.<sup>47</sup> This served as a huge reprieve for the international community as it formed a legal guideline for jurisdictional conflicts. It removes the safe havens of offenders who often go unpunished such as in *U.S.A v Cordova* case.

With this provision, offences or acts committed on board an international aircraft are to be punished by only one State, the state of aircraft registration, and obligates each Contracting State to take such measures as may be

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<sup>45</sup> Convention on Offences and Other Certain Acts Committed on Board an Aircraft 1963 (Tokyo); 704 U.N.T.S 219

<sup>46</sup> *Ibid* at 76

<sup>47</sup> Convention on Offences And Certain Other Acts Committed on Board An Aircraft 1963 (Tokyo) 704 U.N.T.S 219

necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State.

**c. Powers of the Aircraft Commander**

Article 6 of the Convention provides that the aircraft commander may through reasonable force when required, take reasonable measures to restrain such persons without fear of subsequent retaliation through civil suits or otherwise.<sup>48</sup> The same authority has been extended to the cabin crew and other passengers in flight up to when the aircraft lands. The aircraft commander then has the power to disembark the 'suspect' in the territory where the aircraft lands and deliver him to competent authorities.<sup>49</sup>

**d. Duties of States**

Article 12 of the Convention obligates all contracting states to allow a plane, through the aircraft commander, to disembark any person who is reasonably believed to have committed the 'offences' and 'acts' described in the Convention<sup>50</sup> and to take all appropriate measures to ensure the aircraft commander's lawful control of the aircraft including taking custody of the person suspected of the offences provided in the Convention.<sup>51</sup>

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<sup>48</sup> Ibid

<sup>49</sup> Articles 7-9 of Convention on Offences And Certain Other Acts Committed on Board An Aircraft 1963 (Tokyo) 704 U.N.T.S 219

<sup>50</sup> Supra note 38

<sup>51</sup> Supra note, 39

### e. Extradition

For the purpose of extradition, Article 16(1), provides that the offences committed on aircraft registered in a Contracting State shall be treated, as if they had been committed not only in the place in which they have occurred, but also in the territory of the State of registration of the aircraft.<sup>52</sup>

The greatest failure, though, is lack of the Convention to provide a mandatory obligation for extradition which should be obliging to the contracting states. It has thus been left operational only to the states that have bilateral treaties providing for extradition.<sup>53</sup>

In the El Al's flight from Tel Aviv to New York via Amsterdam, hijackers took control of the flight from Amsterdam making an emergency landing in London. Ms. Khaleed, a hijacker, was arrested and an extradition order was delivered for her. Israel, the country of original take off, Netherlands, the country through which the hijacking started, UK, the state of emergency landing and US the state of final aircraft landing, were all parties to the Tokyo Convention. The matter was however solved diplomatically as her extradition request had been honoured by a trade off between the UK government and the Israeli government.

Despite the matter having been solved amicably, questions arose as to what would have happened had the offence been political, or if the states involved

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<sup>52</sup> Article 16 of the Convention on Offences And Certain Other Acts Committed on Board An Aircraft 1963 (Tokyo); 704 U.N.T.S 219.

<sup>53</sup> Supra note 14

were not party to the Covenant or in a dispute where only one State was party to the Convention. This necessitated a new Covenant addressing this critical weakness.<sup>54</sup>

#### 2.3.4 The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft

The Convention was enacted in response to a wave of hijackings that began in 1968. Despite the year recording 35 hijackings globally, only seven hijackers had faced criminal sanctions for their actions.<sup>55</sup> The Covenant was thus an effort to prevent hijackers from finding immunity in any of the contracting states.<sup>56</sup>

The Tokyo Convention of 1963 had failed to cope with the newly changing dimensions of unlawful acts against civil aviation.<sup>57</sup> The character and motivation of the offences also began changing from personal objectives such as fugitives from justice to weapons of persons acting for 'political reasons'.<sup>58</sup>

This situation also saw the insurance market, based on well-founded fears, avoid insuring airline carriers and steeply increasing the insurance rates prompting IATA to organize their own nonprofit airline controlled insurance

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<sup>54</sup>Supra note 43, VII 79

<sup>55</sup>Andrew Lowenfeld, *Aviation Law cases and Materials: Document Supplement* (Matthew Bender Publishers, NY, 1972) at VII 13, C141 Da Nang Air Base.

<sup>56</sup><http://www.britannica.com/EBchecked/topic/251657/Convention-for-the-Suppression-of-Unlawful-Seizure-of-Aircraft> last accessed on 26th February 2014

<sup>57</sup>Supra note 14

<sup>58</sup>Alona E. Evans, *Aircraft Hijacking: What is Being Done?* (1973) A.J.I.L

company so as to pressure the insurers to not go wild due to the hijacking epidemic.<sup>59</sup>

This situation prompted the UN General Assembly to pass a Resolution<sup>60</sup> against hijacking by affirming that international civil aviation plays a key role in safety and friendly relations among states which is a vital role in achieving peace globally. Through this resolution, the Assembly called for states to ratify the Tokyo Convention and equivocally condemned hijacking. It also called for the formulation of a new covenant against hijacking as an expression of the concerted efforts of the States to quell this vice.<sup>61</sup>

#### a. **Scope of Application**

The Convention, in Article 1, describes its scope to include any person who, in an aircraft, any time from when external doors are closed following embarkation till when they are opened for disembarkation, unlawfully, through force or threat or any other form of intimidation, seizes or exercises control over the aircraft or is an accomplice, as committing an offence under the convention.<sup>62</sup>

The offences covered by this Convention include only those that take place when an aircraft is 'in flight.' It therefore excludes offences by saboteurs who

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<sup>59</sup> Supra note 56 at VI 46

<sup>60</sup> UN General Assembly Resolution 3645 (November 25<sup>th</sup> 1970)

<sup>61</sup> Ibid

<sup>62</sup> Convention for the Suppression of Unlawful Seizure of Aircraft (Hague, 1970), 860 U.N.T.S 105

remain on the ground.<sup>63</sup> Thus, it fails to include those who remain on the ground but also serving as an accomplice.

#### **b. Jurisdiction**

The Convention makes it mandatory, in Article 4 (2), for the contracting parties to take all necessary measures to establish its jurisdiction over any offence against passengers or crew on board an aircraft registered in that state or when the aircraft has landed in its territory.<sup>64</sup>

This provision strengthened those spelt out in the 1963 Tokyo Convention.

#### **c. Powers and Duties of Contracting States**

The contracting states obligated to codify their national laws, so as to make the offence described punishable by severe penalties<sup>65</sup> though the Convention is silent on the minimum standards.<sup>66</sup> Thus, the punishments are inconsistent among contacting states.<sup>67</sup>

Article 7 imposes the duty of mandatory legal proceedings by the Contracting States in the territory of which the alleged offender is found if the State does not extradite him. This is to be without exception whatsoever on whether or not the offence was committed in its territory. There should be submission of the case to the State's competent authorities for the purpose of prosecution.

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<sup>63</sup> Chung, D.Y. Some Legal Aspects of Aircraft Hijacking in International Law (Unpublished Master of Laws (LL.M) Dissertation, University of Tennessee, USA (1976)

<sup>64</sup> Article 4 of the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague, 1970), 860 U.N.T.S 105

<sup>65</sup> Ibid

<sup>66</sup> Supra note 14

<sup>67</sup> Supra note 14`

Those authorities should take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.<sup>68</sup>

#### d. Extradition

The offence stated in the Convention Article 1, shall be deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States. Contracting States are, therefore, to undertake to include the offence as an extraditable offence in every extradition treaty to be concluded between them.<sup>69</sup>

This was a big reprieve as conditions for extradition were finally laid bare as opposed to the 1963 Tokyo Convention.

#### 2.3.4 The 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation

This was drafted as an emergency response in the field of aviation security as the scope of application of the Hague Convention was limited to only 'unlawful acts committed on board a flight.' However, a large number of acts of violence on airports and air navigation facilities were taking place.<sup>70</sup>

The convention broadened the definition of the offence of hijacking and went ahead to enumerate the offences to include two basic underlying factors,

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<sup>68</sup> UN General Assembly Resolution 3645 (November 25<sup>th</sup> 1970)

<sup>68</sup> Ibid

<sup>68</sup> Convention for the Suppression of Unlawful Seizure of Aircraft (Hague, 1970), 860 U.N.T.S 105

<sup>68</sup> Chung, D.Y. Some Legal Aspects of Aircraft Hijacking in International Law (Unpublished Master of Laws (LL.M) Dissertation, University of Tennessee, USA (1976)

<sup>69</sup> Article 9 of the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague, 1970), 860 U.N.T.S 105

<sup>70</sup> Supra note 14

namely, unlawfulness and intention.<sup>71</sup> Second, it was mandatory for the act to be of a nature likely to endanger the safety of an aircraft in flight regardless of whether it was committed on board or not.<sup>72</sup>

### **a. Scope of Application**

The Convention introduces a new term, 'aircraft in service' which means, an aircraft is considered to be in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing; the period of service shall, in any event, extend for the entire period during which the aircraft is in flight as defined in paragraph (a) of this Article 1 of this Convention."<sup>73</sup>

The term will, therefore, include acts such as bombing of and discharge of weapons against an aircraft on the ground as well as similar acts against an aircraft in flight, whether committed on board the aircraft or not.<sup>74</sup>

### **b. Other Provisions**

Its provisions on jurisdiction are similar to those of the Hague Convention, with the most important new input being that in the Montreal Convention, the offender need not be on board the aircraft.<sup>75</sup> Article 12 is new and obliges

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<sup>71</sup> Supra note 14

<sup>72</sup> Article 2 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 974 U.N.T.S 177

<sup>73</sup> Article 2 (b) of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 974 U.N.T.S 177

<sup>74</sup> Supra note 14

<sup>75</sup> Article 5 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 974 U.N.T.S 177

the contracting States to provide any advance information relating to the offences described in the Convention.<sup>76</sup>

The provisions for prosecution and extradition are also similar to those of the Hague Convention.

The Montreal Convention was then followed by the Montreal Supplementary Protocol of 1988<sup>77</sup> which extended the definition of the term offence to acts of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or acts that destroy or seriously damage the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport, if such an act endangers or is likely to endanger safety at that airport<sup>78</sup>

This new definition, as described in the protocol, marked a significant development in international aviation, law as it effectively extended the provisions of the Montreal Convention to domestic fields such as airports and airport facilities.<sup>79</sup>

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<sup>76</sup> Article 6 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 974 U.N.T.S 177

<sup>77</sup> [http://www.icao.int/secretariat/legal/Administrative%20Packages/via\\_en.pdf](http://www.icao.int/secretariat/legal/Administrative%20Packages/via_en.pdf) last accessed on 25th February 2014

<sup>78</sup> <http://www.mcgill.ca/files/iasl/montreal1988.pdf> (last accessed on 25th February 2014) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal 1988); ICAO Doc. 9518.

<sup>79</sup> 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal 1988); ICAO Doc 9518.

### 2.3.5 Beijing Convention On The Suppression Of Unlawful Acts Relating To International Civil Aviation And The Protocol Supplementary To The Convention For The Suppression Of Unlawful Seizure Of Aircraft 2010

The terrorist attacks of September 11, 2001, in the United States of America, caused a major shakeup in the international community, regarding whether any aspects of the legal framework for international cooperation on terrorist acts should be updated to address issues raised by the attacks.<sup>80</sup> A new form of terror attack had taken place where the terrorist acts were committed by persons piloting aircrafts. The Assembly of the ICAO took a leading role and directed a study of existing international instruments.

Between 2005-2008, ICAO conducted a survey of its member States which revealed that certain threats, such as the use of aircraft as weapons, suicide attacks, electronic and computer-based attacks, chemical, biological and radioactive attacks, were not adequately covered by the existing air law instruments.<sup>81</sup>

ICAO's review of existing law and other international dialogue sparked a negotiating process spanning almost nine years and leading to a successful diplomatic conference in Beijing in September 2010, where two new legal instruments emerged: one, a new and detailed Protocol, amends the Hague Convention; and the other creates a new international instrument to supersede the Montreal Convention and its 1988 Protocol.<sup>82</sup>

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<sup>80</sup><http://www.arnoldporter.com/resources/documents/Two%20New%20Law%20Enforcement%20Cooperation%20Treaties%20Adopted%20at%20International%20Aviation%20Conference%20in%20Beijing.pdf> (last accessed on 26<sup>th</sup> February 2014)

<sup>81</sup><http://www.3skies.eu/AVSEC%20Conventions%20PUBLISHED%20article.pdf> last accessed on (26<sup>th</sup> February 2014)

<sup>82</sup>Supra, note 73.

The Preamble to the Convention states that with the new types of threats against civil aviation there is a requirement for new concerted efforts and policies of cooperation on the part of States.

**a. Scope of Application**

Article 1 provides that the Convention applies to offenders described as those in previous conventions with new inclusions such as responding directly to the September 11, 2001, attacks, the Beijing Convention, criminalizes the use of a civil aircraft to cause death, serious bodily injury, or serious damage to property or to the environment in Article 1(f).<sup>83</sup>

A second new offence is created by Article 1(g) which is the releasing of or the discharging from a civil aircraft any biological, chemical, or nuclear (“BCN”) weapon or explosive, radioactive, or similar substances in a manner that is likely to cause death, serious bodily injury, or serious damage to property or the environment.<sup>84</sup> These types of weapons were not directly implicated in the September 11, 2001, attacks. However, the negotiators of the Beijing Convention argued to the inclusion of these offenses in the new instrument to create a legal framework for international cooperation on this issue.<sup>85</sup>

The new Convention has certain additional innovations that go beyond the structures of most prior terrorism conventions. It criminalizes the transport of

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<sup>83</sup>Beijing Convention On The Suppression Of Unlawful Acts Relating To International Civil Aviation And The Protocol Supplementary To The Convention For The Suppression Of Unlawful Seizure Of Aircraft 2010 50 ILM 144

<sup>84</sup> *ibid*

<sup>85</sup> *Supra* note 73

assistance, as appropriate, with the ratification process if so requested by a Member State.<sup>89</sup>

This is due to the fact that the two instruments are part of the ICAO steps to modernize the legal framework on aviation security.

## 2.4 Conclusion

The history of civil aviation has always coincided with the history of international civil aviation. The rising number of incidents against aviation security has necessitated the need for the law to play catch up with the rising incidents of acts of terror.

Kenya is a signatory to all conventions except the Beijing Convention and Protocol, which is a step by the global community to modernize the legal framework on aviation security.

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<sup>89</sup><http://www.icao.int/Meetings/avsecconf/Documents/WP%2015/PROMOTION%20OF%20THE%20BEIJING%20CONVENTION%20AND%20THE%20BEIJING%20PROTOCOL%20OF%202010.en.pdf> (last accessed on 26<sup>th</sup> February 2014)

## CHAPTER 3

### THE KENYA SITUATION ON AVIATION SECURITY

#### 3.1 Introduction

The previous chapter introduced and presented the development of the international legal framework on aviation security. It highlighted the weaknesses of the various legal instruments and the responses given by the international community, through ICAO, to get rid of these weaknesses. This chapter focuses on aviation security in Kenya by looking into the laws and policies in Kenya that govern aviation security.

#### 3.2 Aviation Law in Kenya

There is a general cast of English legal culture coloring the Kenyan legal system; it is easy from remarks as general as these to conclude that the aviation law of Kenya is basically English law. Claims typically made about English by its apologists are that politically, English law is said to embody fundamental democratic rights; methodologically, the common law is held to express a pragmatic temper that permits it to accommodate changing circumstances and places.<sup>1</sup>

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<sup>1</sup> Okumu Hanington Awuor, the Evolution of Air Law in Kenya and its Current Challenges, for LLM McGill University, (1997).

However, as the legal framework evolved over the years, aviation law in Kenya has also developed reflecting the various developments made in the various international legal instruments governing aviation.

As Kenya is a signatory to the 1944 Chicago Convention on International Civil Aviation and all other subsequent treaties except for the Beijing Treaty.<sup>2</sup> The ICAO sets out standards, both binding and non-binding which Kenya has a responsibility to adopt them in the national context. The ICAO Charter spells out the rules of the air over the high seas spelt out in Article 12 as binding to all member states.<sup>3</sup> However, the ICAO members merely undertake to 'collaborate in securing the highest practicable degree of uniformity' with respect to standards and practices spelt out in the Convention.<sup>4</sup>

The aviation sector in Kenya is generally governed by the Kenya Civil Aviation Authority that serves as the regulator of the aviation industry<sup>5</sup> and the Kenya Airports Authority (KAA) that provides facilitative infrastructure for aviation and is charged with an umbrella responsibility of providing and managing a coordinated system of airports in the country.<sup>6</sup>

This ambiguity has led to debates as to the binding nature of the Standards and Recommended Practices (SARPs) issued by ICAO. The ICAO Assembly then

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<sup>2</sup> [www.kcaa.or.ke](http://www.kcaa.or.ke) (Last accessed 15<sup>th</sup> October 2014)

<sup>3</sup> Article 12 The 1944 Chicago Convention on International Civil Aviation 15 U.N.T.S 295

<sup>4</sup> Article 37 and 38, 1944 Chicago Convention on International Civil Aviation 15 U.N.T.S 295

<sup>5</sup> <http://www.kcaa.or.ke/> (last accessed on 24<sup>th</sup> April 2014)

<sup>6</sup> <https://www.kaa.go.ke/> (last accessed 29<sup>th</sup> October 2014)

passed a resolution and weighed it on the side of a firm division between obligatory standards which require uniform application as opposed to Recommendations which only require the members to endeavour to conform.<sup>7</sup> However, from practice, the question is open to interpretation.<sup>8</sup>

After the September 9/11 attacks, the ICAO held its 33<sup>rd</sup> Session whereby the ICAO Assembly adopted the Resolution A33-1 that made a declaration on the misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation.<sup>9</sup> This resolution directed the ICAO Council and the Secretary General to consider the establishment of an audit programme relating to airport security arrangements and civil aviation security programmes and also directed the ICAO Council to convene an international High-level, Ministerial Conference on Aviation Security with the objective of strengthening ICAO's role in the adoption of SARPs in the field of aviation security and in the auditing of their implementation.<sup>10</sup> The Conference endorsed a global strategy for strengthening aviation security worldwide. A central element of the strategy was an ICAO Aviation Security Plan of Action, which includes regular, mandatory, systematic and harmonized audits to enable the evaluation of aviation security in all Member States.<sup>11</sup> Consistent with the outcomes of the 33<sup>rd</sup> ICAO Assembly

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<sup>7</sup> August Reinsch, International Organizations Before National Courts, (Cambridge University Press, London) 2000

<sup>8</sup> Jose E. Alvarez, International Organizations as Law-Makers, (Oxford University Press, London) 2005

<sup>9</sup> <http://www.icao.int/Security/USAP/Pages/The-Creation-of-the-USAP.aspx> (last accessed 29th October 2014).

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

and the High-level, Ministerial Conference, the 166th Session of the ICAO Council adopted the Aviation Security Plan of Action in June 2002 which provided for the promotion of global aviation security through auditing of Member States with an objective of promoting global aviation security through the auditing of all ICAO Member States on a regular basis to determine the status of States' implementation of the critical elements of an aviation security oversight system and the security-related ICAO Standards and Recommended Practices (SARPs), associated procedures, guidance material and security-related practices.<sup>12</sup> The implementation of the Programme commenced with the first aviation security audit taking place in November 2002.

Five aviation security audits in African States were conducted under the ICAO Universal Security Audit Programme (USAP) from July 2007 to June 2008. Kenya was one of these countries.<sup>13</sup>

The first-cycle of the USAP audits were designed to determine the degree of compliance of a State in implementing Annex 17 Standards, and the extent to which a State's implementation of its aviation security system is sustainable through the establishment of appropriate legislation, national policies and an appropriate aviation security authority provided with inspection and

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<sup>12</sup> [http://www.aerohabitat.eu/uploads/media/24-03-2007 - USAP ICAO Security Audit 01.pdf](http://www.aerohabitat.eu/uploads/media/24-03-2007_-_USAP_ICAO_Security_Audit_01.pdf) (last accessed 29th October 2014)

<sup>13</sup> <http://www.businessdailyafrica.com/New-aviation-law-paves-way-for-direct-flights-to-the-US/-/539546/1667490/-/oaj109z/-/index.html> (last accessed on 24th April 2014)

enforcement capabilities.<sup>14</sup> Due to the sensitivity of information related to aviation security, the audit report and all audit-related documentation are subject to rigorous physical controls by ICAO and are strictly protected from release to any entity other than the audited State. ICAO, however, keeps Member States informed of the Programme's progress by periodically disseminating audit activity reports offering limited information which includes: the name of the State audited; the identity of the airport visited; and completion date for each audit.<sup>15</sup>

In response to this, and the USAP report, Kenya had to change its legal framework so as to ensure safer, more secure airports and airspace. Conformity to internationally recognised standards could then lead to the possibility of long sought-after direct Kenya - US flights.<sup>16</sup> In 2013, the country then ushered in the new aviation law, the Kenya Civil Aviation Act, which incorporated various amendments as per the guidelines of the ICAO USAP audit. The law provides a legal framework to enhance safety in Kenya's airspace and strengthens the role of the Kenya Civil Aviation Authority (KCAA) in ensuring safer skies.<sup>17</sup> KCAA is the regulator of the aviation industry.<sup>18</sup>

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<sup>14</sup> <http://www.icao.int/Security/USAP/Pages/The-First-Cycle-of-USAP-Audits-and-Follow-up-Visits.aspx> (last accessed 15th October 2014)

<sup>15</sup> Ibid

<sup>16</sup> <http://www.theafricanaviationtribune.com/2013/01/Kenya-new-civil-aviation-law-provides.html> (last accessed on 15<sup>th</sup> August 2014)

<sup>17</sup> <http://www.businessdailyafrica.com/New-aviation-law-paves-way-for-direct-flights-to-the-US/-/539546/1667490/-/oaj109z/-/index.html> (last accessed on 24th April 2014)

The ICAO also solidified cooperation with the United Nations Security Council Counter-Terrorism Committee (CTC) through regular ICAO aviation security involvement in CTC on site visits to assess States' compliance with the provisions of Security Council Resolution 1373 (2001).<sup>19</sup>

### 3.3 The Kenya Civil Aviation Act (KCAA)

This was ushered in response to the USAP report that requires states to provide for national legislation and regulations allowing the appropriate authority to allocate responsibilities and implement programmes to ensure compliance with Annex 17 of the Chicago Convention.<sup>20</sup>

The SARPs provide that any national legislation on aviation security should address issues such as the establishment of a basic legal authority for the conduct of aviation security, establishment of an appropriate authority responsible for the security of aviation among state organizations and possible elements of aviation, provision of the authority to allocate the various responsibilities for security of aviation between the organizations of the state and industry, provision of powers of arrest and detention of offenders by the authority performing law enforcement functions and security authorities, provision of the authority to adopt rules and regulations relating to the application of aviation security by airport

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<sup>18</sup><http://www.kcaa.or.ke/> (last accessed on 24<sup>th</sup> April 2014).

<sup>19</sup> [http://www.un.org/africa/osaa/2008\\_un\\_system/ICAO.pdf](http://www.un.org/africa/osaa/2008_un_system/ICAO.pdf) (last accessed on 15th August 2014)

<sup>20</sup> The 1944 Chicago Convention on International Civil Aviation; 15 U.N.T.S 295.

administrations, aircraft operators, providers of air navigation services and providers of security services, provide legislation defining specific offences relating to aviation security breaches.<sup>21</sup>

### 3.3.1 Provisions of the KCAA 2013, on Aviation Security

Section 4(1) of the Act establishes the Kenya Civil Aviation Authority which is charged with the task of ensuring, the safety, security, economic and technical regulation of civil aviation, dealing with incidents of unlawful interference with aviation security and the establishment, co-ordination and maintenance of state safety security programmes.<sup>22</sup>

The KCCA is also charged with the task of giving effect to the Chicago Convention and other international agreements relating to civil aviation to which Kenya is party. <sup>23</sup> This task includes the discharge of international obligations of the State as set out under article 12 of the Chicago Convention<sup>24</sup>with a view to secure the highest practicable degree of uniformity in regulations, as well as enhancing the KCAA's safety oversight obligations. This provision implies that the KCAA will ensure the State's compliance with the provisions of the Chicago Convention, by integrating the ICAO Standards and Recommended Practices (SARPs) into the national legislation.<sup>25</sup>

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<sup>21</sup> Annex 17, The 1944 Chicago Convention on International Civil Aviation; 15 U.N.T.S 295

<sup>22</sup> The Kenya Civil Aviation Act 2013

<sup>23</sup> Ibid

<sup>24</sup> The Chicago Convention

<sup>25</sup> Section 7 (3), Kenya Civil Aviation Act, 2013

### 3.3.2 The Kenya Civil Aviation Security Guidelines

These were formulated through the powers conferred by section 82 of the Civil Aviation Act, 2013 by the Minister for Transport to safeguard and enhance aviation security against acts of violence or unlawful interference.<sup>26</sup>

The guidelines define acts of unlawful interference to mean<sup>27</sup> acts or attempted acts to jeopardise the safety of civil aviation and air transport, including: unlawful seizure of an aircraft in flight or on the ground, hostage taking on board an aircraft or at an airport, forcible intrusion on board an aircraft at an airport or on the premises of an aeronautical facility, introduction on board an aircraft or at an airport of a weapon or hazardous device or material intended for criminal purposes, unauthorised possession, at an airport, or unauthorised introduction on board an aircraft, of a weapon or hazardous device or material, destroying or damaging air navigation facilities or interfering with their operation, if any such act is likely to endanger the safety of aircraft in flight, violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft, destroying an aircraft in service or causing damage to the aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; communicating information which is known to be false, thereby endangering the safety of an aircraft in flight or on the ground, of

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<sup>26</sup>Legal Notice No. 21 of 2013, Kenya Civil Aviation Act, 2013

<sup>27</sup>Ibid, Guideline 4

passengers, crew, ground personnel or the general public at an airport or on the premises of a civil aviation facility, unlawfully and intentionally using any device, substance or weapon- to perform an act of violence against a person at an airport serving civil aviation which causes or is likely to cause serious injury or death, to destroy or seriously damage the facilities of an airport serving civil aviation or an aircraft not in service located at the airport or disrupting the services of the airport, if that act endangers or is likely to endanger safety at that airport. This definition reflects the various definitions provided in the various international legal instruments except the definition found in the Beijing Convention 2010 that includes criminalizes the use of a civil aircraft to cause death, serious bodily injury, or serious damage to property or to the environment.<sup>28</sup> It also does not reflect the second new offence created by Article 1(g), which is the releasing of or the discharging from a civil aircraft any biological, chemical, or nuclear (“BCN”) weapon or explosive, radioactive, or similar substances in a manner that is likely to cause death, serious bodily injury, or serious damage to property or the environment.<sup>29</sup>

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<sup>28</sup> Beijing Convention On The Suppression Of Unlawful Acts Relating To International Civil Aviation And The Protocol Supplementary To The Convention For The Suppression Of Unlawful Seizure Of Aircraft 2010 50 ILM 144 (2010)

<sup>29</sup> *ibid*

As per the guidelines, the Authority has the responsibility to<sup>30</sup> regulate aviation security in Kenya, regulate the security operations of airports, aircraft, regulated agents and catering operators, as the case may be, for the purpose of protecting passengers, crew members, airport, and other aviation facilities. It should also prevent the unlawful interference against civil aviation by assuring that appropriate action including legal action is taken when an act of unlawful interference occurs or is likely to occur.

The Authority is also to define and allocate tasks and coordinate activities under the National Civil Aviation Security Programme,<sup>31</sup> between the ministries, departments, agencies, airport, aircraft operators, air traffic services providers and other organisations responsible for the various aspects of aviation security.

In respect to each operator, the Authority shall conduct security surveys to identify security needs at least once a year. It should also share threat information that applies to aviation security interests as per the laws of the land.<sup>32</sup>

The Authority also has free and unobstructed access at all times to an airport, an aircraft operating from or within Kenya, and the premises of an operator within Kenya, for the purpose of inspecting security operations or

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<sup>30</sup> Ibid, Guideline, 5(1)

<sup>31</sup> Ibid, Guideline, 5(3)

<sup>32</sup> Ibid, Guideline, 5(2)

to carry out security inspections and surveys, safety and security audits and testing functions.

Through its leadership, the authority has the mandate to establish a written National Civil Aviation Security Programme and ensure its implementation to safeguard civil aviation against acts of unlawful interference through regulations, practices and procedures which take into account the safety, regularity and efficiency of flights. The NCASP shall have a National Civil Aviation Security Committee for the purpose of advising and coordinating security activities between ministries, departments, agencies and other organisations of Kenya airports and aircraft operators, air traffic service providers and other entities concerned with or responsible for the implementation of various aspects of the National Civil Aviation Security Programme and recommending and reviewing the effectiveness of security measures and procedures.

### **3.4 The Kenya Airports Authority**

The Kenya Airports Authority, established in 1991 under Kenya Airports Authority Act as an autonomous body charged with an umbrella responsibility of providing and managing a coordinated system of airports in the country. This institution plays a key role in aviation security as the provisions of the 1971 Montreal Convention for the Suppression of Unlawful

Acts against the Safety of Civil Aviation to include offences that take place in an airport.

On 28 November it was reported that “al Qaeda” had blown up the Israeli Paradise Hotel at Kikambala Beach near Mombasa, and synchronously launched a missile attack on an Arkia Airlines Boeing 757, taking off from Mombasa Airport en-route for Tel Aviv with 264 Israeli passengers on board.<sup>33</sup> Thought the suspects had been tried in court, nothing much had been done to ensure justice to the victims.

This incidence shows the role the airports play in ensuring aviation security.

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<sup>33</sup><http://allafrica.com/stories/201105050078.html> ( last accessed on 15th August 2014)

## CHAPTER 4

### CHALLENGES FACED IN THE LEGAL FRAMEWORK ON AVIATION SYSTEM IN KENYA

#### 4.1 Introduction

The previous chapter looked into the legal and institutional frameworks on aviation security in Kenya. This chapter analyzes the legal framework in Kenya juxtaposed with the international legal and institutional frameworks.

#### 4.2 Compliance with the provisions of the International Regulations

Since 1948, the aviation industry has developed in leaps and bounds thereby requiring oversight and regulation in the interest of security and safety of the stakeholders. The civil aviation regulations have been consequently developed from time to time in response to emerging new challenges. Over a thirty-year period for instance, the industry has experienced major challenges and changes including technological advancement. Technological advancement has made the industry the fastest and most reliable mode of transport for goods and people to and from other continents.

Criminal activity of international dimension has not spared the industry. It has called for reassessment of security measures by all players beyond national, territorial and regional scope.

Kenya also has not been left behind in terms of updating its legal and institutional framework to reflect the various international realities. It is party to the various international instruments of the ICAO Convention. However, several pertinent international legal instruments have not been ratified, notably the Supplementary Protocol to the 1988 Montreal Convention on Acts of Violence at Airports, and the Convention on Marking Plastic Explosives for the Purpose of Detection. There is also an absence of amendments to the criminal codes that make unlawful interference perpetrated on a state's territory a punishable act. Moreover, there are no airport security programs that include improvements to standard operating procedures, a crisis management plan.

With the nature and scope of the September 11, 2001, attacks in United States, there is a change in the whole perception of the industry whose interest was previously confined to the users or stakeholders to the entire mankind.

ICAO, the specialized United Nations agency charged with the responsibility of safe and orderly development of international civil aviation, responded to the new dimension with a decision to review and adopt the Standards and Recommendations to address the new global challenge. During this period, 2005-2008, ICAO conducted a survey of its member States. The survey revealed that certain threats, such as the use of aircraft as weapons, suicide attacks, electronic

and computer-based attacks, chemical, biological and radioactive attacks, were not adequately covered by the existing air law instruments.<sup>1</sup>

ICAO's review of existing law and other international dialogue sparked a negotiating process spanning almost nine years and led to a successful diplomatic conference in Beijing in September 2010, where two new legal instruments emerged: one, a new and detailed Protocol amending the Hague Convention, and the other, a new international instrument to repeal the Montreal Convention and its 1988 Protocol.<sup>2</sup> These are the Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation and the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft 2010.<sup>3</sup>

As per the requirements of international law, contracting states are required to domesticate the standards and recommendations in national legislation. Importantly, the standards and recommendations call for emphasis beyond the safety regulations, which covered aspects of licensing of aviation personnel, airworthiness and the operation of the aircraft.<sup>4</sup> Whereas safety is limited to the industry stakeholders, security goes beyond and affects the general national and

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<sup>1</sup> <http://www.3skies.eu/AVSEC%20Conventions%20PUBLISHED%20article.pdf> last accessed on (26<sup>th</sup> February 2014)

<sup>2</sup> Supra, note 73.

<sup>3</sup> Beijing Convention On The Suppression Of Unlawful Acts Relating To International Civil Aviation And The Protocol Supplementary To The Convention For The Suppression Of Unlawful Seizure Of Aircraft 2010 50 ILM 144

<sup>4</sup> Annex 17 ICAO Security Standards

regional security beyond the traditional concerns of aviation. Lessons learned from the September eleven attacks show that all ports of entry (land, sea and airports) played a role in the success of that attack.<sup>5</sup> Therefore, it would be prudent to prioritize the implementation of the ICAO convention resolutions by developing the legislation to harmonize border control and the management security and safety in the aviation industry in the region.

The experiences relating to terrorism and organized crime in Kenya indicate that the country is not only vulnerable to terrorism but it also is a major link and player in the global insecurity.<sup>6</sup> Currently, there are the Civil Aviation (Security) Regulations, (KCARS 2013)<sup>7</sup> that define the state's general aviation security policy regarding the distribution of tasks, prevention and response measures, and makes relevant national security information available to interested partners.

#### 4.3 A Case for the Beijing Protocol

Unlawful acts against civil aviation jeopardize the safety and security of persons and properties, seriously affects the operations of air services, airports and air navigation.<sup>8</sup> They also undermine the confidence of people in the use of aviation as a mode of transport. New and emerging threats require new concerted efforts

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<sup>5</sup> Wright L. 2006 *The Looming Tower, the Road to 9/11*. Michigan Gale Group Farmington

<sup>6</sup> Berchenski R.G. 2007 *Africom's Dilemma: The Global War on Terrorism and the future of US Security Policy in Africa* [Online] Available from / <http://www.strategicstudiesinstitute.army.mil> (accessed 12<sup>th</sup> August 2014)

<sup>7</sup> The Civil Aviation Act, No.21 of 2013, Legal Notice 60

<sup>8</sup> Institute for Security Studies Situation Report Date Issued: 15 July 2008 Author: Mutali K. Se' Kapchangah

including the modernization of the aviation security legal framework. Such efforts will strengthen the state's capacity to prevent, prosecute and punish commission of acts and offences which are threats to the civil aviation industry. With the new and emerging threats to aviation security, there is need for new concerted efforts to modernize the aviation security legal framework so as to strengthen not only Kenya's, but the global capacity to prevent, prosecute and punish acts which are threats to civil aviation or emerging as of September 11<sup>th</sup> and after, including certain preparatory acts for these offences.<sup>9</sup>

The Beijing Convention modernizes and consolidates the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971 (Montreal Convention, 1971) and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to Montreal Convention, 1971 done at Montreal on 24 February 1988 (Supplementary Protocol, 1988).<sup>10</sup> It also supplements the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970 (The Hague Convention, 1970).<sup>11</sup> It also expands the scope of the Hague Convention to cover different forms of aircraft hijackings, including through modern technological means.

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<sup>9</sup> Ibid

<sup>10</sup> Beijing Convention On The Suppression Of Unlawful Acts Relating To International Civil Aviation And The Protocol Supplementary To The Convention For The Suppression Of Unlawful Seizure Of Aircraft 2010 50 ILM 144

<sup>11</sup> Beijing Convention On The Suppression Of Unlawful Acts Relating To International Civil Aviation And The Protocol Supplementary To The Convention For The Suppression Of Unlawful Seizure Of Aircraft 2010 50 ILM 144

#### 4.3.1 Salient Features of the Beijing Convention and Supplementary Protocol

The Beijing Convention is the first legal instrument to criminalize the acts of using a civil aircraft for the purpose of causing death, serious bodily injury or serious damage.<sup>12</sup> It also criminalizes use of civil aircraft to release or discharge any biological, chemical or nuclear weapon or similar substances to cause death, serious bodily injury or serious damage and the use or transportation of any BCN weapon or similar substances on board or against a civil aircraft. The Convention specifically provides for the criminal liability of directors and organizers of an offence, as well as the liability of those who knowingly assist an offender to evade investigation, prosecution or punishment.<sup>13</sup> Cyber-attacks on air navigation facilities are also included as an offence. The Convention goes further ahead to specifically provide for the criminal liability of those who threaten to commit an offence, directors and organizers of an offence who may be legal entities, as well as the liability of those who knowingly assist an offender to evade investigation, prosecution or punishment.

In matters of jurisdiction of an offence, the Convention expands the grounds of jurisdiction under the earlier instruments by requiring each State Party to establish jurisdiction when the offence is committed by its national, and by enabling each State Party to establish jurisdiction when the victim of the offence

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<sup>12</sup> Ibid at Article 1

<sup>13</sup> Supra note 4

is its nation Moreover, the Convention, in Article<sup>14</sup> that a State cannot refuse to extradite an offender on the sole ground that the offence would be political in nature. The Beijing Protocol supplements the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970 (The Hague Convention, 1970. It also expands the scope of The Hague Convention to cover different forms of aircraft hijackings, including through modern technological means.

#### 4.3.2 Ratification Requirements of the Beijing Convention and Protocol

Both international instruments have not yet entered into force as none has reached the minimum number of ascensions for them to enter into force. Article 22 of the Convention and Article XXIII both state that the instruments shall enter into force on the first day of the second month following date of deposit of the twenty second instrument of ratification, acceptance, approval or accession.<sup>15</sup>

The ICAO Assembly Resolution A37-22, Appendix C, relates to the ratification of instruments which have been developed and adopted under the auspices of the ICAO in a bid to strengthen and broaden the global security regime in light of

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<sup>14</sup> Article 3 Beijing Convention On The Suppression Of Unlawful Acts Relating To International Civil Aviation And The Protocol Supplementary To The Convention For The Suppression Of Unlawful Seizure Of Aircraft 2010 50 ILM 144

<sup>15</sup> Article 22 and Article XXIII, respectively of the Beijing Convention On The Suppression Of Unlawful Acts Relating To International Civil Aviation and The Protocol Supplementary To The Convention For The Suppression Of Unlawful Seizure Of Aircraft 2010; 50 ILM 144.

the emerging threats. The member states were urged to accede to the Suppression of Unlawful Acts Relating to International Civil Aviation (Beijing Convention of 2010) and the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (Beijing Protocol of 2010) as soon as possible.<sup>16</sup>

**Table 1: Signature and Ratification Requirements of the Beijing Convention and Protocol**

	Beijing Convention	Beijing Protocol
Signature/Ratification / Accession	<p>Art 21</p> <ul style="list-style-type: none"> <li>- Open for signature at ICAO HQ in Montréal until it enters into force.</li> <li>- States which have signed may ratify, accept or approve at any time.</li> </ul> <p>States which have not signed may accede at any time.</p>	<p>Art XX</p> <ul style="list-style-type: none"> <li>Open for signature at ICAO HQ in Montréal until it enters into force.</li> <li>- States which have signed may ratify, accept or approve at any time.</li> </ul> <p>States which have not signed may accede to at any time.</p>

<sup>16</sup> <http://www.un.org/en/terrorism/instruments.shtml> (last accessed on 24th July 2014)

## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Introduction

This chapter ties all previous chapters together. It concludes on whether the aviation security legal and institutional frameworks are reflective of the standards set out by the instruments set out by the ICAO. The chapter also goes further to make recommendations to the Kenya Civil Aviation Authority where relevant.

#### 5.2 Conclusion

The research was carried out based on the hypotheses that the laws and policies in the country have inherent loopholes that are being exploited for terror attacks. The research piece proved this hypothesis wrong. Kenya has a great legal framework in regards to aviation security in juxtaposition with the standards set out in the international legal instruments.

The research was able to look into the aspect of air law as a matter requiring international collaboration and coordination due to its international nature. The research looked into the journey of aviation law from the first piece of legislation directed specifically at aviation which was a decree by the Paris Prefecture of Police, 1784, a year after the Montgolfer brothers had successfully demonstrated their invention of the air balloon. The decree forbade the release of balloons without a special permit.

The year 1958, saw the first real wave of hijackings began around 1958, with a majority of cases resulting from individuals desiring to flee from Cuba so as to escape the Castro rule. The international community began undertaking concerted efforts to find long lasting solutions to the new wave of terror that threatened aviation security. The measures were to be undertaken under the auspices of the ICAO in the form of international treaties. The process sparked heated debates as to whether the acts were of civil or criminal nature, the scope of application of the various international instruments, the definitions of the unlawful acts, jurisdiction of states to prosecute the offenders and provisions on extradition of the offenders by the states.

The research went ahead to look into the various legal instruments and institutions governing aviation security in the country. The statutes, Kenya Civil Aviation Act, 2013, and the Kenya Airports Authority Act, 1991, provide a concrete legal framework that ensures a concrete policy framework on aviation security. However, the institutions set up by the various policy documents need to be strengthened in enforcing the rules set out in the policies.

The research work concluded by looking into the Beijing Protocol and the Convention in a bid to make a case for their ratification by the Kenyan State as the country has been in the past few years a victim of terror attacks. The country cannot remain ignorant of the occurrences taking place in the world with an example of the September 11, 2001, terrorist attacks in the USA which evoked

various dimensions of the sensitivity to the concept of air travel and aviation security. Interests and values in the aviation industry have changed since the realisation that the industry had a bearing on regional and international peace and security. In the wake of the September 11, 2001, events measures at national, regional and international level, have been instituted to not only assure air travelers of their security but to protect the industry from premeditated attacks whose implications could be far reaching.

The ICAO and IATA have set safety and requirement standards that have to be met. In addition, the United States Federal Airport Authority and the Transport Security Administration have set minimum standards for engagement with US aviation. Countries such as Kenya and airlines have embarked on upgrading and infrastructural improvement. The implications for non-compliance are far reaching and severe. Given the proximity of Africa as a whole to the Arabian Peninsula, established networks from the Middle East are likely to move to Somalia and East Africa where the Al-Quaeda has established links with terror cells and local Islamic groups. In addition, the terror cells have been present in the region since 1994 when planning for the execution of the 1998 US Embassy bombings in Kenya and Tanzania were put in motion. Presence of the networks in the African states will continue to be isolated in the aviation industry and international power politics will exert pressure on the continent to conform to regulations. The non-compliance with aviation security measures would mean

loss of livelihoods for those dependent on aviation, and this would in turn increase levels of poverty.

With the success of previous terror attacks in the country, intensified recruitment and insurgency in the region will move a notch with militants incorporating such acts like hijacking and attacks on aviation infrastructure.

The use of civil aircraft as weapons of mass destruction and other terrorist acts which are similar to acts of unlawful interference that have been committed against civil aviation are now posing greater challenges to the international community than ever before. There is therefore an urgent need to meet the obligations brought about by unlawful interference in international civil aviation and to take strong measures to counter potential threats. In Kenya, aviation security requires urgent and practical attention starting with ratification of the Beijing Convention 2010.

Goedhuis, one of the renowned jurists in the field of civil aviation, best stated that law serves to control the methods of satisfying the needs of mankind.

Security is a basic human need!

### 5.3 Recommendations

#### 5.3.1 Porous borders

Kenya borders Somalia, widely considered a collapsed state, to the North West. It largely serves as a source of refugees, illegal arms, and safe havens for fugitives and provides sanctuaries to terror groups like Al Qaeda and Al Ithad Al Islamiya that are high risk actors in the aviation industry. It is also said to be the source of the MANPAD missile used in the attempt on Arkia, the Israeli airliner, in Mombasa in November 2002. The terror operatives in both the Paradise Hotel and airport incident were reportedly trained in Somalia and traveled into Kenya using a combination of sea and overland routes.<sup>1</sup>

This situation stems from lack of capacity by authorities, corrupt officials particularly the police and immigration, who allow illegal migrants into the country.

Kenya thus needs to close its borders to regulate the movement of such criminals in and out of the country.

#### 5.3.2 Political Goodwill

Political goodwill is vital in attracting external funding, implementation of stipulated regulations and negotiations for financial support. In Kenya, KCAA and departments have to compete with other sectors of government for relatively scarce resources. Membership to international aviation associations such as the IATA and ICAO are political decisions which is usually backed with payment of

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<sup>1</sup> Supra note 1

proscribed fees. This is attributable more to lack of political goodwill than to lack of funds.<sup>2</sup>

### 5.3.3 Training of security personnel

Training is a vital part of air transportation's fight against acts of unlawful interference and terrorism. The government, airport authority administrations and airline managements have a responsibility to ensure their employees are adequately prepared for the role. The validation and evaluation system for aviation security training should match to international standards.

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<sup>2</sup> 20 The East African Aviator Issue No.1 April 2007

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