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International Counterterrorism Cooperation: The Summit Seven and Air Terrorism

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International Counterterrorism Cooperation: The Summit Seven and Air Terrorism

*Geoffrey Levitt**

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I. INTRODUCTION: THE IMPORTANCE OF INTERNATIONAL COOPERATION AGAINST TERRORISM

One of the key pieces of conventional wisdom that have grown up around the issue of international terrorism is the need for international cooperation in combatting it. Particularly in the context of the intensified United States Government focus on terrorism since the Reagan Administration came to power in 1981, international cooperation has been almost a fixation of officials concerned with terrorism in both the executive and legislative branches. In a press conference during the first month of the new administration, Secretary of State Haig set the tone:

International terrorism will take the place of human rights, our concern, because it is the ultimate abuse of human rights. And it's time that it be addressed with greater clarity and greater effectiveness by Western na-

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tions and the United States as well.¹

A statement later in 1981 before the Senate Foreign Relations Committee fleshed out the executive branch's thinking:

As to international cooperation, it is clear that combatting international terrorism is not a task for the United States alone. The problem is too complex and universal to be dealt with by any one nation. We are committed to working with other nations to establish a peaceful and stable world order, in which we may be free from the threat of political violence [T]his administration has given a high priority to this task.²

United States Government spokesmen, from the President³ on down,⁴ have continued to sound this theme up to the present time. Furthermore, legislative statements have echoed and indeed amplified this idea, particularly in the Ninety-ninth Congress. The International Security and Development Cooperation Act of 1985 contained a section calling on the President "to seek the establishment of an . . . International Anti-Terrorism Committee, consisting of representatives of the member countries of the North Atlantic Treaty Organization, Japan, and such other countries as may be invited and may choose to participate."⁵ The International Anti-Terrorism Committee's stated purpose was "to focus the attention and secure the cooperation of the governments and the public of the participating countries and of other countries on the problems and responses to international terrorism."⁶ The Omnibus Diplomatic Secur-

1. Transcript of a Press Conference with the Secretary of State (Haig), January 28, 1981, *reprinted in* U.S. DEP'T OF STATE, AMERICAN FOREIGN POLICY CURRENT DOCUMENTS 1981, at 395 (1984) [hereinafter CURRENT DOCUMENTS 1981].

2. Statement by the Under Secretary of State for Management (Kennedy) Before the Senate Foreign Relations Committee (June 10, 1981), *reprinted in* CURRENT DOCUMENTS 1981, *supra* note 1, at 395, 398.

3. *See, e.g.*, Statement by President Reagan (Kansas City, Missouri, Oct. 21, 1984) (discussion of foreign policy issues during the campaign debate with Walter Mondale) *reprinted in* U.S. DEP'T OF STATE, AMERICAN FOREIGN POLICY CURRENT DOCUMENTS 1984, at 308 (1986) [hereinafter CURRENT DOCUMENTS 1984] ("[I]t's going to take all the nations together [to deal with this terrorist problem], just as when we banded together we pretty much resolved the whole problem of skyjackings sometime ago.").

4. *See, e.g.*, Address by John C. Whitehead, Deputy Secretary of State, before the Brookings Institution Conference on Terrorism 3-4 (Washington, D.C., Dec. 10, 1986) ("[W]e must persist in our campaign to build a broad coalition, at home and abroad, willing to stand up against terrorism We encourage international cooperation in isolating terrorist states to make it clear that costs will be imposed on those states that support or facilitate the use of terror.").

5. International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 506, 99 Stat. 190, at 222 (1985).

6. *Id.*

ity and Antiterrorism Act of 1986 went further, containing an entire title on "Multilateral Cooperation to Combat International Terrorism," a section of which turned the previous year's exhortation to the President regarding the formation of an "International Antiterrorism Committee" into a directive based on findings that:

- (1) international terrorism is and remains a serious threat to the peace and security of free, democratic nations;
- (2) the challenge of terrorism can only be met effectively by concerted action on the part of all responsible nations⁷

Yet behind all the rhetoric, the actual record of attempts to give substance to the ideal of international cooperation against terrorism is, as even a casual observer will readily apprehend, rather dismal. It is a record not without its share of heroic efforts and notable achievements. In the final analysis, however, after many years of international activity aimed at creating some kind of effective response to terrorism, those governments that harbor terrorists or actively employ terrorism as an instrument of policy face today little prospect of a meaningful collective response from affected states.

This Article aims to contribute to an understanding of the reality and the potential of international cooperation to combat terrorism by examining one of the most important channels through which governments have attempted to achieve such cooperation: the Economic Summit Seven (the Seven or the Group). Focusing in particular on the Group's work in the area of terrorism against international civil aviation, this Article will discuss how and why the Group became involved in counterterrorism; review the Group's declarations on terrorism and their context; outline the international background to those declarations; describe the most important single action the Group has taken to implement the declarations: the sanctions announced against Ariana Afghan Airlines in 1981; and offer a legal analysis of the Group's activities.

II. THE SUMMIT SEVEN DECLARATIONS

A. *The Summit Seven and International Terrorism*

As terrorism literally burst onto the international scene at the beginning of the 1970s,⁸ those states that felt themselves most threatened by

7. Omnibus Diplomatic Security Act of 1986, Pub. L. No. 99-399, § 701, 99 Stat. 853, at 877 (1986).

8. See E. MICKOLUS, *TRANSNATIONAL TERRORISM: A CHRONOLOGY OF EVENTS, 1968-1979*, at 153 *et seq.* (1980).

it—including the United States—began to look for ways to secure the international cooperation perceived to be necessary to defeat this new menace. Quite naturally, the United Nations structure provided the starting point for this search. This structure did in fact yield some notable achievements in the first years of the new antiterrorism effort, in particular the conventions aimed at suppressing unlawful interference with international civil aviation.⁹

In 1972, however, it became apparent that from the perspective of the Western governments, the role of the United Nations in international counterterrorism cooperation would be, at best, severely limited. In that year, responding to the upsurge in terrorist incidents, and particularly the massacre of Israeli athletes at the Munich Olympics, Secretary-General Waldheim undertook a special initiative to bring the issue of international terrorism before the General Assembly.¹⁰ The United States played a very active role in this United Nations effort; Secretary of State Rogers gave special attention to the problem in his speech before the twenty-seventh General Assembly in September, stating:

In short, the issue is whether the vulnerable lines of international communication . . . can continue, without disruption, to bring nations and peoples together. All who have a stake in this have a stake in decisive action to suppress these demented acts of terrorism.¹¹

At the same time, the United States circulated a draft entitled "Convention for the Prevention and Punishment of Certain Acts of International Terrorism," which was an attempt to establish an international regime for the legal suppression of the most serious acts of terrorist violence.¹²

But the General Assembly Resolution that emerged from that session was unsatisfactory to the United States and many of its allies. Heavily slanted towards justifying the legitimacy of the armed struggle of the "national liberation movements" and condemning the "colonial, racist and alien regimes" against which these movements were fighting, Resolution 3034 was adopted by 76 votes to 35, with 17 abstentions. The United States and most of its allies voted against the resolution.¹³ The

9. See *infra* Part IIC.

10. N. GAL-OR, INTERNATIONAL COOPERATION TO SUPPRESS TERRORISM 83 (1985).

11. 67 DEP'T ST. BULL. No. 1378, at 425, 429 (1972), quoted in Bennett, *U.S. Initiatives in the United Nations to Combat International Terrorism*, 7 INT'L LAW. 752, 753 (1973).

12. U.N. Doc. A/C.6/L.850 (1972).

13. G.A. Res. 3034, 27 U.N. GAOR C. 6 (2114th mtg.), U.N. Doc. A/8969/L. 696 (1972), reprinted in 12 I.L.M. 218, 220 (1972).

subsequent work of the ad hoc Committee on International Terrorism that Resolution 3034 established was of little more comfort to governments that looked for a strong United Nations antiterrorism stance. The Committee was unable to agree either on the definition of terrorism, its causes, or methods to prevent it; a fortiori, the United States draft Convention did not survive the Committee process.¹⁴

In the wake of this abortive attempt to tackle international terrorism on a global, comprehensive basis, those states that were more interested in achieving workable and effective counterterrorism measures than in listening to national liberation rhetoric realized that they would have to work through more limited fora than the United Nations. The Parliamentary Assembly of the Council of Europe (COE) spoke frankly in October 1972 as the direction of the current at the United Nations was already becoming evident: "It can be concluded, therefore, that although the [terrorism] problem is a universal one, the lack of solidarity at the United Nations level makes it all the more necessary for coordinated action to be taken at the West European level."¹⁵

As this statement indicates, during this period perceptions of the international terrorism problem began to change. The view of terrorism that the aviation conventions of 1970 and 1971 implicitly reflected was that despite its ideological element, terrorism was a common global scourge somehow beyond normal political calculations—a sort of political public health emergency¹⁶ that the international community as a whole needed to combat in a neutral, workmanlike fashion. But as the United Nations discussions on terrorism wore on, a new, more jaded perception was emerging in some Western quarters: terrorism was seen as another in the series of international political issues separating the democracies from their adversaries—indeed, as a weapon that the latter used against the former. The notion that an intractable difference of interest between the Western democracies on the one hand and radical Third World and socialist states on the other existed with regard to the issue of international terrorism (a conclusion difficult to avoid in the face of the experiences of Resolution 3034 and the ad hoc Committee on International Terrorism) was already evident in certain pronouncements by Western authorities as early as 1972 and 1973. The COE Parliamentary Assembly stated: "The resolution (3034) passed by the UN against terrorism

14. N. GAL-OR, *supra* note 10, at 84.

15. Report on International Terrorism, COUNS. EUR. DOC. No. 3201, at 6 (October 18, 1972), *quoted in* GAL-OR, *supra* note 10, at 209, 218-220.

16. Secretary Rogers' characterization of terrorist acts as "demented" reflects this view perfectly. *See supra* note 11 and accompanying text.

. . . was ineffective because more States favored terrorism and frustrated joint international action against it"¹⁷ A United States official directly involved in these United Nations efforts expressed a similar view: "[T]here were some states who did not wish to take any action at all on this problem Some few of those states frankly espoused the employment of terroristic methods as a part of their revolutionary philosophy."¹⁸

The obvious corollary was that the democracies would have to work together to defend themselves against this new method of attack. Indeed, during the 1970s, the major Western political "clubs"—the Council of Europe,¹⁹ the European Economic Communities²⁰ and the North Atlantic Treaty Organization²¹ came to place terrorism on their agendas with varying degrees of seriousness. In this light, it was almost inevitable that the issue of international terrorism would come to the attention of the most exclusive—and in some ways the most powerful and prestigious—Western grouping of all: the Summit Seven.

Unlike the other entities mentioned above, the Summit Seven is not a formal organization. It has no constitutive document, no written rules and no permanent staff. In simplest terms, the leaders of the world's seven largest industrialized democratic states—Canada, the Federal Republic of Germany, France, Italy, Japan, the United Kingdom and the United States—have come to observe a tradition of gathering every year to discuss issues of mutual concern. The tradition originated in 1975, when, upon the initiative of French President Giscard d'Estaing, the leaders of the Seven met at Rambouillet. The perceived need for some form of effective, top level international meeting to address critical financial and economic problems in an informal, discreet setting provided the catalyst for the first meeting.²² The Summit Seven meetings (Summits) rather quickly became regularized, however, with annual rotation of the host government, development of formal agendas, holding of periodic preparatory meetings and issuance of joint concluding statements. By 1977, as one observer has put it, "the 'fireside era' was . . . definitively

17. Report on International Terrorism, *supra* note 15, at 2.

18. Bennett, *supra* note 11, at 758. Ambassador Bennett was a member of the United States Delegation to the 27th United Nations General Assembly and represented the United States on the Legal Committee. *Id.* at 752.

19. See GAL-OR, *supra* note 10, chapters 6-10.

20. See *id.* at 220-21, 327-28.

21. See *id.* at 75.

22. Garavoglia, *From Rambouillet to Williamsburg: A Historical Assessment*, in *ECONOMIC SUMMITS AND WESTERN DECISION-MAKING* 5 (Merlini ed. 1984).

over.”²³

The purely economic agenda of the original Summit Seven concept lasted little longer than its vision of an informal ambience. The 1978 Summit saw the first public foray of the Seven governments into political issues with the Bonn Anti-Hijacking Declaration,²⁴ which initiated Summit Seven counterterrorism cooperation. The Bonn Declaration emerged spontaneously from informal discussions among the leaders themselves during the Summit.²⁵ Despite this almost accidental beginning, every summit since 1978 has addressed sensitive political issues, frequently including international terrorism.²⁶ Four more Group declarations on international terrorism have emerged: at Venice in 1980, Ottawa in 1981, London in 1984, Tokyo in 1986 and again at Venice in 1987.²⁷

B. *The Declarations and Their Context*

The most prominent concern of the Summit Seven governments in their statements on international terrorism has been unlawful interference with international civil aviation: each of the Seven's declarations on terrorism has referred to this problem either centrally or in passing.²⁸

The initial declaration of the Seven on terrorism issued at the Bonn Summit in 1978²⁹ set the pattern. It began by stating the concern of the heads of state and government about “terrorism and the taking of hostages” and declaring their intention to “intensify their joint efforts to combat international terrorism.” The joint effort that the declaration specifically identified was the threatened imposition of an aviation boycott against any country that “refuses extradition or prosecution of those who have hijacked an aircraft and/or do not return such aircraft.”³⁰

23. *Id.* at 16.

24. *See infra* note 29.

25. R. PUTNAM & N. BAYNE, *HANGING TOGETHER: THE SEVEN-POWER SUMMITS* 94 (1984).

26. *See id.* at 23.

27. The 1987 Summit, held in Venice, produced a sixth declaration on terrorism, reaffirming the other five (Bonn, Venice, Ottawa, London, Tokyo) declarations and condemning “all forms of terrorism, including aircraft hijackings and hostage-taking.” *Venice Statements on East-West Relations, Terrorism and Persian Gulf*, N.Y. Times, June 10, 1987, at A10, col. 1.

28. The declarations have also addressed several other terrorism-related themes, including attacks on diplomats, hostage-taking, and abuse of diplomatic privileges and immunities.

29. *International Terrorism*, 78 DEP'T ST. BULL. No. 2018, at 5 (1978) (Joint Statement of the Heads of State and Government on International Terrorism, Bonn Summit Meeting, July 17, 1978) [hereinafter Bonn Declaration].

30. The full text of the Bonn Declaration as reported in DEP'T ST. BULL. No. 2018,

In terms of sheer number, skyjackings had actually peaked eight years before the Bonn Declaration. In 1970 nearly one hundred skyjackings occurred, of which almost one-fifth were terrorist in nature.³¹ Between 1970 and 1978 the annual rate of skyjackings, terrorist and otherwise, had declined by over half. Although the number had risen sharply from 1976 to 1977, the year just prior to the Bonn Declaration, the total number of skyjackings in 1977 was less than forty, of which not more than one-fifth were terrorist.³²

Despite the drop in overall occurrences, however, by the late 1970s, one could hardly say that skyjackings had disappeared from the scene. Between 1973 and 1977, skyjackings occurred at an average rate of almost three per month.³³ Moreover, the airlines of three of the Summit Seven countries—the United States, the United Kingdom and the Federal Republic of Germany—had been among the most frequent victims of skyjackings.³⁴ In addition, two of the most sensational terrorist skyjackings in the months preceding the Bonn Declaration had involved aircraft of two of the summit participants, Japan and the Federal Republic of Germany.³⁵ Thus, it was not surprising that the problem of

supra note 29, is as follows:

The heads of state and government, concerned about terrorism and the taking of hostages, declare that their governments will intensify their joint efforts to combat international terrorism.

To this end, in cases where a country refuses extradition or prosecution of those who have hijacked an aircraft and/or do not return such aircraft, the heads of state and government are jointly resolved that their governments should take immediate action to cease all flights to that country.

At the same time, their governments will initiate action to halt all incoming flights from that country or from any country by the airlines of the country concerned. The heads of state and government urge other governments to join them in this commitment.

31. Office for Combatting Terrorism, U.S. Department of State, *Terrorist Skyjackings* 2 (1982) (hereinafter *Terrorist Skyjackings*), reprinted in R. FRIEDLANDER, *TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL* 324 (1984) [hereinafter R. FRIEDLANDER]. For purposes of these statistics, the government defined a "terrorist" skyjacking as "[t]he seizure of an airplane through the use or threat of violence for political purposes by individuals or groups." *Terrorist Skyjackings, supra*, at i, reprinted in R. FRIEDLANDER, *supra*, at 324.

32. *Terrorist Skyjackings, supra* note 31, at 2, reprinted in R. FRIEDLANDER, *supra* note 31, at 324.

33. *Id.*

34. *Terrorist Skyjackings, supra* note 31, at 4, reprinted in R. FRIEDLANDER, *supra* note 31, at 325.

35. In September 1977 a Japan Airlines plane was hijacked by Japanese Red Army members in India, and Arab hijackers killed a West German pilot during a Lufthansa

unlawful interference with international civil aviation would be on the minds of the leaders assembled in Bonn.

In a statement issued shortly after the Bonn Summit, the United States Government affirmed its commitment to the Bonn Declaration, calling it "a major advance in our efforts to combat aircraft hijacking" and noting that "[t]he seven summit participants are the major aviation powers of the free world; their airlines carry two-thirds of the free world passengers."³⁶ And in the first public notice of what would become a regular, if discreet, feature of Summit Seven counterterrorism work, the United States stated: "As host government for the summit meeting, the German Government has convened a meeting of experts in Bonn . . . to develop specific procedures under the initiative of the Bonn declaration to deter air hijackings."³⁷ The German statement reporting on the results of this experts' meeting was short, to the point and utterly devoid of detail.³⁸

That the Bonn Declaration itself provided insufficient guidelines for its own implementation was clear on its face, although understandable for a statement that heads of state and government had worked out quickly and informally. Some reduction of its sweeping language to actual operational detail was necessary if the Seven participants were ever to use it in practice. What would constitute "refusal" to extradite or prosecute? What, for that matter, would constitute satisfactory extradition or prosecution? What would the offense of hijacking itself consist of for purposes of the Bonn Declaration? How would the Bonn Declaration relate to the Hague Convention on aircraft hijacking?³⁹ How, operationally speaking, would the Seven make and implement the decision to apply the Declaration to a particular country? The mandate of the experts' group was to provide answers to questions such as these.

Though the records of most of the experts' deliberations remain classified, one important result of their work is not restricted: the *Guidelines for the Application of Bonn Declaration*, agreed to in London on May 9, 1979.⁴⁰ This document set out guidelines for fact-finding, evaluation

hijacking in the Mediterranean in October 1977. *See id.* at 19.

36. Bonn Declaration, *supra* note 29, at 5.

37. *Id.*

38. "[R]epresentatives of the seven Governments that participated in the Bonn Summit met in Bonn on August 1st and 2nd to discuss the practical implementation of the July 17th Bonn Declaration on hijacking. They agreed on a procedure to be followed under the Bonn Declaration in the case of a hijacking." *Quoted in id.*

39. *See infra* notes 112-123 and accompanying text.

40. Guidelines for the Application of Bonn Declaration (May 9, 1979) (a copy is located in Department of State files).

of conduct by the state concerned, determination of default, enforcement and involvement of other states. Though it certainly did not—and one could not expect it to—answer every operational and legal question that the Bonn Declaration engendered,⁴¹ it did at least provide some structure for implementing it, a structure that Summit Seven countries would rely on for action two years later in the application of sanctions against Ariana Afghan Airlines.⁴²

The Seven reviewed the 1978 Bonn statement on a positive note two years later at their Venice meeting. The participants “expressed their satisfaction at the broad support of the international community for the principles set out in the Bonn declaration . . . as well as in the international conventions dealing with unlawful interference with civil aviation,” and noted “the increasing adherence to these conventions and the responsible attitude taken by states with respect to air-hijacking.”⁴³ The statement that “hijacking remains a threat to international civil aviation and that there can be no relaxation of efforts to combat this threat” tempered this optimism.⁴⁴ Statistically, the incidence of skyjackings, terrorist and otherwise, had remained roughly level in the two years since the Bonn Declaration,⁴⁵ although encouraging trends in the numbers of expressions of support by non-Seven countries for the Bonn Declaration itself⁴⁶ as well as of new accessions to the international conventions dealing with unlawful interference with civil aviation had occurred.⁴⁷ And once again, airliners of Summit Seven countries—in this case the United States and Italy—had been the targets of prominent terrorist hijackings

41. See *infra* Part IV.

42. See *infra* Part III.

43. *Summit Statements*, June 22, 1980, 80 DEP'T ST. BULL. No. 2041, at 7 (1980) (statement by the Heads of State and Government on Hijacking, Venice Summit Meeting).

44. *Id.*

45. *Terrorist Skyjackings*, *supra* note 31, at 2, reprinted in R. FRIEDLANDER, *supra* note 31, at 324.

46. In the year following the issuance of the Bonn Declaration, thirty-four other states had expressed support for it; another forty-three had indicated approval of its underlying principle while stopping short of an actual expression of support for the Declaration itself. Information in Department of State files.

47. Between 1978 and 1980, over twenty-five states signed or became parties to the Convention for the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192 [hereinafter Hague Convention]; the same number signed or became parties to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570 [hereinafter Montreal Convention]. For discussion of these two treaties see *infra* Part IIC.

in the months prior to the summit.⁴⁸

The Ottawa declaration that the following year's summit meeting issued took a very different tone. In this statement the Seven indicated "particular concern" over "recent hijacking incidents which threatened the safety of international civil aviation," and noted "several hijackings which have not been resolved by certain states in conformity with their obligations under international law."⁴⁹ The most notorious of the incidents to which this remark referred was the March 1981 hijacking of a Pakistani International Airlines domestic flight to Kabul, Afghanistan by Pakistani dissidents. This hijacking and the manner in which the Afghan authorities had reportedly handled it appeared to the summit participants to be an appropriate occasion for the application of the sanctions envisioned in the Bonn Declaration three years earlier. Thus, at Ottawa the Seven announced their intention "to suspend all flights to and from Afghanistan in implementation of the Bonn Declaration unless Afghanistan immediately takes steps to comply with its obligations."⁵⁰

By 1984 the attitude of the Seven toward the aircraft hijacking threat appeared to have changed once again, judging by the statement that the Seven issued that year at their London summit. In the London declaration, the heads of state and government noted that "hijacking . . . had declined since the Declarations of Bonn (1978), Venice (1980), and Ottawa (1981) as a result of improved security measures." Instead, newer forms of terrorism now merited the urgent attention of the Seven.⁵¹ Indeed, although the overall annual rate of hijackings in 1982 and 1983 remained very close to what it had been for the previous nine years, the number of terrorist⁵² hijackings dropped to a mere two incidents in 1983;⁵³ in the first five months of 1984, the period just prior to the

48. In June 1979, a Serbian nationalist hijacked an American Airlines jet from the United States to Ireland; in September 1979, Lebanese Shiite Muslims attacked an Alitalia plane in the Middle East. See *Terrorist Skyjackings*, *supra* note 31, at 20, reprinted in R. FRIEDLANDER, *supra* note 31, at 342.

49. *Statement on Terrorism*, July 21, 1981, 81 DEP'T ST. BULL. No. 2053, at 16 (1981) (Statement by the Heads of State and Government on Terrorism, Ottawa Summit Meeting) [hereinafter Ottawa Declaration].

50. *Id.* See *infra* Part III for a discussion of this incident.

51. This declaration devoted particular attention to the problems of state sponsored terrorism and abuse of diplomatic privileges and immunities. *Declaration on International Terrorism*, June 9, 1984, 84 DEP'T ST. BULL. No. 2089, at 4 (1984) (Declaration of the Heads of State and Government on International Terrorism, London Summit Meeting).

52. See *Terrorist Skyjackings*, *supra* note 31, at i, reprinted in R. FRIEDLANDER, *supra* note 31, at 324.

53. U.S. DEP'T OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, OF-

London summit, only eight hijackings occurred in all.⁵⁴ Not only did this represent an annual rate well below that of previous years, but, of these eight, only one appeared to be terrorist. Further, fewer and fewer hijackers were getting away; in each of the eight hijackings between January and May 1984, responsible authorities took all the hijackers into custody immediately after the incident.⁵⁵ Thus, at the time there did appear to be some basis for the guarded optimism expressed in the London Declaration with regard to aviation terrorism.⁵⁶

This relatively favorable situation changed drastically within a short time. The period between the issuance of the London declaration and the May 1986 Tokyo summit saw a series of terrorist skyjacking spectacles, most directed at airlines or nationals of Summit Seven countries or both, and most ending with the hijackers eluding justice: the July 1984 hijacking of an Air France plane to Tehran;⁵⁷ the December 1984 hijacking of a Kuwaiti Airlines jet to Tehran, during which the hijackers murdered two United States nationals;⁵⁸ the June 1985 hijacking of a TWA flight ending in Beirut, in the course of which the hijackers murdered one United States passenger and held thirty-nine passengers and crew hostage in Beirut for seventeen days;⁵⁹ and the hijacking of an Egyptair jetliner to Malta in November 1985, during which the hijackers singled out and shot several American as well as Israeli passengers.⁶⁰

Despite this background, the 1986 Tokyo summit declaration on terrorism referred only briefly to the problem of terrorist attacks on civil aviation. The declaration is noteworthy in this context, however, because it reflects the first sign of expansion of the Seven's attention to aircraft sabotage, though only implicitly: "We agree to make the 1978 Bonn Declaration more effective in dealing with *all forms* of terrorism affecting civil aviation."⁶¹

OFFICE OF CIVIL AVIATION SECURITY, U.S. AND FOREIGN REGISTERED AIRCRAFT HIJACKINGS 98-118 (1985).

54. *Id.* at 118-20.

55. *Id.* at 118-120.

56. See also CURRENT DOCUMENTS 1984, *supra* note 3, at 308 (statement of President Reagan).

57. U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1984, at 26 (1985).

58. *Id.* at 28.

59. U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1985, at 19 (1986) [hereinafter PATTERNS: 1985].

60. *Id.* at 12. This incident came to a tragic close when Egyptian commandos stormed the airplane, killing some sixty people.

61. *Summit Statement on Terrorism*, May 5, 1986, 86 DEP'T ST. BULL. No. 2112, at 5 (1986) (emphasis added) (Statement of the Heads of State and Government on Terrorism, Tokyo Summit Meeting).

Though aircraft sabotage, like hijacking, had been the subject of an international convention in the early 1970's,⁶² the Seven had never paid it any public attention before 1986. Aircraft sabotage was much rarer than hijacking;⁶³ because of the inherently brief duration of the incident itself, it usually received less attention when it did occur and, unlike hijackings, there were no visible perpetrators to deal with at the conclusion of the incident. Nonetheless, a few particularly horrifying sabotage incidents in the months preceding the Tokyo summit evidently helped push this issue onto the summit's terrorism agenda. These incidents include the separate but possibly linked June 23, 1985 bombings of an Air India plane over the North Atlantic that killed all 329 passengers and crew and of a CP Air (Canadian) plane having just landed in Tokyo that resulted in the deaths of two baggage handlers,⁶⁴ as well as the April 1986 explosion aboard a TWA flight over the Mediterranean that killed four United States passengers.⁶⁵

C. *The International Background*

The Seven's statements and actions on unlawful interference with international civil aviation between 1978 and 1986 did not, of course, take place in a vacuum. The international community, both prior to and during the time of the Seven's attention to this issue, had taken several steps aimed at combatting terrorism directed against aircraft, and one can only properly appreciate the Seven's efforts in this wider context.

The stunning outburst of terrorist attacks on civil aviation in the fall of 1970⁶⁶ had brought a swift and substantial legal response from the international community: on December 16, 1970, the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) was concluded at the Hague.⁶⁷ The Hague Convention defined the offense of unlawful seizure of aircraft, obligated parties to establish criminal jurisdiction over the offense when committed under specified jurisdictional

62. See *infra* Part IIC.

63. The government recorded 684 skyjacking attempts between January 1968 and July 1982, *Terrorist Skyjackings*, *supra* note 31, at 1, reprinted in R. FRIEDLANDER, *supra* note 31, at 324. During the same period records show a total of 53 explosions aboard aircraft, not all of which one would classify as sabotage. See *infra* note 82. U.S. DEP'T OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, OFFICE OF CIVIL AVIATION SECURITY, EXPLOSIONS ABOARD AIRCRAFT 4-11 (1985).

64. PATTERNS: 1985, *supra* note 59, at 37.

65. N.Y. Times, Apr. 3, 1986, at 1, col. 6.

66. See Bell, *The U.S. Response to Terrorism Against International Civil Aviation*, 19 ORBIS 1326, 1332 (1975-76).

67. Hague Convention, *supra* note 47.

circumstances⁶⁸ and established with regard to the offense the *aut dedere, aut judicare* requirement⁶⁹ which was to become the foundation of all similar future international legal efforts pertaining to various categories of terrorist offenses.⁷⁰

This tremendous achievement was not written on a blank slate. The preceding year had seen a series of steps in the United Nations and the International Civil Aviation Organization (ICAO), a specialized agency of the United Nations, indicating a drastically heightened international sensitivity to the issue of unlawful interference with civil aviation. In December 1969 the General Assembly had adopted, by 77 to 2 with 17 abstentions, a resolution on "Forcible Diversion of Civil Aircraft in Flight,"⁷¹ that called upon states "to take every appropriate measure to

68. In essence limiting the Convention's application to cases wherein "the place of take-off or the place of actual landing of the aircraft on board which the offense is committed is situated outside the territory of the State of registration of that aircraft[.]" *Id.* art. 3(3).

69. "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of that State." *Id.* art. 7.

70. See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532; International Convention Against the Taking of Hostages, Dec. 4, 1979, 18 I.L.M. 1419 (1979); Convention on the Physical Protection of Nuclear Materials, Oct. 26, 1979, 18 I.L.M. 1419 (1979); and Montreal Convention, *supra* note 47. In the area of skyjacking itself, the earlier Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768 [hereinafter Tokyo Convention], completed in Tokyo was—as the conclusion of the Hague Convention underlined—of limited potential value. Its substantive scope was broad, covering, as its title indicated, all penal offenses and hazardous acts committed on board civil aircraft. Tokyo Convention, *supra*, art. 1(1). Moreover, unlike the Hague Convention it was permissive rather than mandatory, merely authorizing States to exercise jurisdiction over the relevant acts committed on board aircraft outside the territory of any State. Tokyo Convention, *supra*, art. 1(2). See also Bell, *supra* note 66, at 1331. The one provision of the Tokyo Convention that was of direct relevance to skyjacking was article 11, which obligated parties to "take all appropriate measures to restore control of the [hijacked] aircraft to its lawful commander or to preserve his control of the aircraft," to "permit its passengers and crew to continue their journey as soon as practicable," and to "return the aircraft and cargo to the persons lawfully entitled to possession." The Hague Convention incorporated all these requirements in somewhat strengthened form. Hague Convention, *supra* note 47, art. 9.

71. G.A. Res. 2551, 24 U.N. GAOR (1831st plenary mtg.), U.N. Doc. A/RES/2551 (1970).

ensure that their respective national legislations provide an adequate framework for effective legal measures against all kinds of acts of unlawful interference with, seizure of, or other wrongful exercise of control by force or threat thereof over civil aircraft in flight;" urged states "in particular to ensure that persons on board who perpetrate such acts are prosecuted;" and urged "full support" for ICAO efforts toward "the speedy preparation and implementation" of the instrument that would become the Hague Convention. In the summer of 1970 ICAO convened an Extraordinary Assembly which adopted twenty-four resolutions concerning various aspects of aviation security and unlawful interference with aircraft.⁷² One of these resolutions noted the "urgent need for an international convention as a means of dealing more effectively with the unlawful seizure of aircraft" and called upon states attending the ICAO diplomatic conference scheduled for December of that year "to make every reasonable effort . . . to agree on a convention based on the draft convention" that the ICAO Legal Committee had prepared and approved earlier in the year.⁷³ On the eve of the ICAO conference, the United Nations General Assembly adopted, by 105 to 0 with 8 abstentions, a resolution on "Aerial Hijacking or Interference with Civil Air Travel" condemning "without exception whatsoever, all acts of aerial hijacking or other interference with civil air travel . . . through the use or threat of force" and strongly supporting the ongoing ICAO efforts to create legal mechanisms to suppress skyjacking.⁷⁴

Thus, the Hague Convention was the fruit of a series of initiatives in the relevant international bodies that had prepared the way for its conclusion generally as well as specifically. This series of initiatives was not directed exclusively at the adoption of an international convention, but—particularly in the ICAO context—covered several different aspects of civil aviation security, including strengthened airport security and improved security measures aboard aircraft in flight.⁷⁵ One aspect of ICAO's work in the period leading up to the Hague Convention is of particular interest in the context of the current discussion. A resolution that the ICAO Council (Council) adopted on October 1, 1970 called

72. ICAO Resolutions A17-1 through A17-24, June 16-30, 1970, *reprinted in* 9 I.L.M. 1275 (1970).

73. Resolution A17-3, 9 I.L.M. 1276 (1970); Draft Convention on Unlawful Seizure of Aircraft, ICAO Doc. 8865, LC/159, March 16, 1970, *reprinted in* 9 I.L.M. 669 (1970).

74. G.A. Res. 2645, 25 U.N. GAOR (1914th plenary mtg.), U.N. Doc. A/RES/2645 (1970).

75. *See, e.g.*, ICAO Resolutions A17-10 through A17-13, A17-17, A17-18, *supra* note 72.

upon member states:

in order to ensure the safety and security of international civil air transport, upon request of a Contracting State to consult together immediately with a view to deciding what joint action should be undertaken, in accordance with international law, *without excluding measures such as the suspension of international civil air transport services to and from any State* which after the unlawful seizure of an aircraft, detains passengers, crew or aircraft contrary to the principles of Article 11 of the Tokyo Convention, for international blackmail purposes, or any State which, contrary to the principle of Articles 7 and 8 of the Draft Convention on Unlawful Seizure of Aircraft, fails to extradite or prosecute persons committing acts of unlawful seizure for international blackmail purposes.⁷⁶

The resolution directed the ICAO Legal Committee (Legal Committee) to consider "an international convention or other international instruments" to "give effect to the purposes" of the paragraph set out above.⁷⁷ Although the Legal Committee's work pursuant to the resolution would ultimately fall short of this goal, the resolution gave official expression to the concept of an international civil aviation boycott against a state that failed to honor its international obligations regarding handling of the aftermath of a skyjacking incident—the concept that would provide, eight years later, the basis for the Bonn Declaration.

Within the ICAO framework itself, however, expressing this concept would prove easier than translating it into practice. The Legal Committee's work in response to the October 1970 Council resolution initially centered around a United States draft proposal for a convention to provide for mandatory joint action against a state that a fact-finding commission determined had failed to extradite a hijacker found within its territory or to submit the case to its competent authorities for the purpose of prosecution. Such joint action could include suspension of all international aviation to and from the defaulting state.⁷⁸ But in its work over the next three years on the United States draft as well as on other proposals to establish international machinery to promote enforcement of obligations concerning skyjacking,⁷⁹ the ICAO Legal Committee was un-

76. ICAO Doc. 8923-C/998, *reprinted in* 9 I.L.M. 1286 (1970) (emphasis added). *See also* Tokyo Convention, *supra* note 70, art. 11; Draft Convention on Unlawful Seizure of Aircraft, *supra* note 73, arts. 7, 8. The article numbers remained the same in the final text of the Hague Convention. Hague Convention, *supra* note 47.

77. ICAO Doc. 8923-C/998, *reprinted in* 9 I.L.M. 1286 (1970).

78. *See* Chamberlain, *Collective Suspension of Air Services With States Which Harbour Hijackers*, 32 INT'L & COMP. L.Q. 616, 618 (1983).

79. These included a joint United Kingdom-Swiss proposal to amend the Convention on International Civil Aviation (Chicago Convention), December 7, 1944, 61 Stat. 1180,

able to agree on any new measures. The ICAO Conference held in Rome in 1973 to consider several of these proposals also ended in failure, plagued by the same sorts of philosophical divisions that had undermined other United Nations efforts to grapple with the issue of terrorism.⁸⁰

Nevertheless, the early 1970s did see one other notable success in ICAO's work against unlawful interference with civil aviation: the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, concluded at Montreal on September 23, 1971.⁸¹ Its *aut dedere, aut judicare* structure was like that of the Hague Convention; instead of unlawful seizure of aircraft, however, the Montreal Convention dealt with various unlawful acts that would endanger the safety of an aircraft in flight.⁸² Like the Hague Convention, the framers of the Montreal Convention were responding to an escalation of the relevant type of terrorist violence, in particular the bombings of Austrian and Swiss airliners the previous year.⁸³

III. IMPLEMENTATION: THE ARIANA SANCTIONS

A. *The PIA Hijacking*

On March 2, 1981, Pakistani political dissidents hijacked to Kabul, Afghanistan a Pakistan International Airlines (PIA) jet on a domestic flight from Karachi to Peshawar.⁸⁴ The hijackers demanded the release of political prisoners held in Pakistani prisons. Negotiations between the

T.I.A.S. No. 1591, to provide the ICAO Council with the power to determine that a Contracting State had violated its obligations concerning the handling of a skyjacking or aircraft sabotage incident and consequently to require all Contracting States to deny access to their airspace to any airline of the defaulting state, and a French proposal to amend the Chicago Convention to incorporate into it the substantive provisions of the Hague Convention without providing any provisions for new enforcement sanctions. See also Chamberlain, *supra* note 78, at 622-23.

80. See *supra* part IIA; Chamberlain, *supra* note 78, at 625-26; Bell, *supra* note 66, at 1337-38.

81. Montreal Convention, *supra* note 47.

82. Including "perform[ing] an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; . . . destroy[ing] an aircraft in service or caus[ing] damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or . . . plac[ing] or caus[ing] to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight" Montreal Convention, *supra* note 47, art. 1(1).

83. See Bell, *supra* note 66, at 1333-34.

84. N.Y. Times, March 3, 1981, at A5, col. 6.

hijackers, holding the seized aircraft with 115 hostages aboard, and authorities on the ground in Kabul (including a Pakistani delegation) were still underway five days later when the hijackers shot and killed a Pakistani diplomat who had been a passenger.⁸⁵ Two days later the three hijackers, with more than 100 hostages aboard, forced the pilot to fly to Damascus, Syria, where negotiations continued.⁸⁶ Finally, on March 12 the hijacking ended peacefully in Damascus, with Pakistan agreeing to free all fifty-five political prisoners as the hijackers demanded and the hijackers freeing all hostages aboard the seized jet.⁸⁷ As part of the deal that ended the hijacking, Syria agreed, at the request of the Pakistani Government, to provide temporary asylum to the hijackers and to receive the prisoners being released from Pakistani prisons.⁸⁸

This hijacking incident spawned bitter accusations, denials and counteraccusations on the part of the two states most directly involved as well as the two superpowers. Five days into the incident, the United States charged that the Soviets had so far made "no apparent effort" to resolve the situation and called upon the Soviets to "use their influence in Kabul to achieve an early release of the passengers and crew and a peaceful end to the incident."⁸⁹ The next day the Soviet Union labelled the United States statement "absurd," defending the actions of the Afghan authorities in handling the hijacking and accusing the Pakistani authorities of "delaying, maneuvering, [and] marking time."⁹⁰ On the same day, the Afghan Government released the contents of a message it had sent to United Nations Secretary-General Waldheim, asserting that "the Democratic Republic of Afghanistan, in conformity with the international civil aviation convention and the responsibilities emanating from it, has made unreserved efforts to maintain the safety and life of the passengers and crews on board the Pakistani hijacked plane at the Kabul international airport and to obtain their release" and declaring that Afghanistan would "hold the government of Pakistan fully responsible for its delaying tactics if the lives of the passengers and the crews on board

85. N.Y. Times, March 7, 1981, at A3, col. 1.

86. N.Y. Times, March 9, 1981, at A1, col. 2.

87. N.Y. Times, March 13, 1981, at A1, col. 1.

88. N.Y. Times, March 15, 1981, at A1, col. 1.

89. N.Y. Times, March 8, 1981, at A3, col. 4. The Soviets, with 85,000 troops in Afghanistan at that time, were generally regarded as the power behind the Afghan Government. *Id.*

90. "Absurd" *U.S. Statement on Responsibility over Hijacked Pakistani Aircraft* (Telegraph Agency of the Soviet Union broadcast, Mar. 8, 1981), reprinted in BBC report at SU/6669/A½ (Mar. 10, 1981) (transcript on file in office of Geoffrey Levitt).

are endangered."⁹¹

The Pakistanis were not sitting passively in the midst of this verbal crossfire. On March 8 the chairman of PIA (who was also the Defense Minister of Pakistan) asserted that the hijackers in Kabul had been provided with "all sorts of facilities from the outside." The PIA chairman remarked pointedly that "this was the first instance in the history of hijacking that the hijackers were still active and energetic both physically and mentally even seven days after a hijacking," and that "it is also amazing that three [hijackers] are managing to keep a constant watch on 115 people without any help."⁹²

Afghanistan responded heatedly to Pakistani allegations of complicity with the hijackers. In a March 8 statement the Afghan Government declared that it "resolutely rejects the allegations that the Kabul authorities have links with the hijackers," and added:

It must be stated decisively that all responsibility concerning the hijacking of the plane rests in every way upon the shoulders of the government of Pakistan and its relevant authorities. These authorities, ignoring the civil aviation regulations, did not take appropriate measures to prevent the hijackers boarding the plane with weapons and explosives.⁹³

But Pakistan reiterated and intensified its accusations following the conclusion of the hijacking. In a television address a few days after the hijacking ended President Mohammed Zia Ul-Haq alleged there was a deep conspiracy between the Kabul regime and Pakistani dissidents, and that the Afghans had provided the hijackers with weapons.⁹⁴ The United States also renewed its complaints about Soviet behavior in connection with the hijacking. A State Department spokesman said: "I don't see how the Soviets can entirely escape responsibility for what took place." The United States also charged that the hijackers had been given the weapons while on the ground in Kabul.⁹⁵ The Soviets rejected the charges, accusing the United States Government of trying to "make

91. *Afghan Foreign Minister's Message to U.N. Secretary General* (Bakhtar news agency broadcast, Mar. 8, 1981), reprinted in BBC report at FE/6668/C/10 (Mar. 9, 1981) (transcript on file in office of Geoffrey Levitt).

92. *Pakistani Spokesmen Repeat Allegations of Kabul's Assistance to Hijackers* (Karachi home service broadcast, Mar. 8, 1981), reprinted in BBC report at FE/6669/C/3 (Mar. 10, 1981) (transcript on file in office of Geoffrey Levitt).

93. *Afghan Government Statement: Pakistani Allegations Rejected* (Kabul home service broadcast, Mar. 8, 1981), reprinted in BBC report at FE/6669/C/6 (Mar. 10, 1981) (transcript on file in office of Geoffrey Levitt).

94. N.Y. Times, March 16, 1981, at A8, col. 6.

95. Wash. Post, March 17, 1981, at A1, col. 1.

propaganda mileage out of this human tragedy."⁹⁶

Late the following month, the *New York Times* reported that the hijackers had gone to Kabul.⁹⁷ Shortly thereafter Pakistan made a formal demand, citing the Hague⁹⁸ and Montreal⁹⁹ Conventions, that Afghanistan "hand over to it immediately and unconditionally the three Pakistani hijackers."¹⁰⁰ Afghanistan did not hand over the hijackers, but a few weeks later, Pakistani authorities announced that they had apprehended one of the three hijackers near the Pakistan-Afghanistan border.¹⁰¹

B. *The Sanctions*

The Summit Seven governments thus had these circumstances before them in considering the application of Bonn Declaration sanctions against the Afghan airline, Ariana, at the Ottawa summit meeting in July 1981: two of the three hijackers of the PIA aircraft still residing in Afghanistan despite a formal Pakistani request for their extradition, with strong lingering overtones of Afghan (and Soviet) abetment of the hijacking itself. Against this backdrop, the Seven issued a statement declaring in relevant part:

The Heads of State and Government are convinced that, in the case of the hijacking of a Pakistan International Airlines aircraft in March, the conduct of the Babrak Karmal government of Afghanistan, both during the incident and subsequently in giving refuge to the hijackers, was and is in flagrant breach of its international obligations under the Hague Convention to which Afghanistan is a party, and constitutes a serious threat to air safety. Consequently the Heads of State and Government propose to suspend all flights to and from Afghanistan in implementation of the Bonn Declaration unless Afghanistan immediately takes steps to comply with its obligations. Furthermore, they call upon all states which share their concern for air safety to take appropriate action to persuade Afghanistan to honor its obligations.¹⁰²

The Seven implemented this threat on November 30 when they issued the following statement:

96. *Id.*

97. *N.Y. Times*, April 26, 1981, sec. 1, at 11, col. 1.

98. Hague Convention, *supra* note 47.

99. Montreal Convention, *supra* note 47.

100. *The Times* (London), May 19, 1981, at 9, col. 6.

101. *PIA Hijacker's Associate Nabbed Near Afghan Border* (Karachi Domestic Service broadcast, June 13, 1981), reprinted in 8 Foreign Broadcast Information report No. BK131023, at F3 (June 16, 1981) (transcript on file in office of Geoffrey Levitt).

102. Ottawa Declaration, *supra* note 49.

The Heads of State and Government of the seven economic Summit countries declared at Ottawa on July 20, 1981 that they proposed to suspend all flights to and from Afghanistan in implementation of the Bonn Declaration unless the Babrak Karmal regime took immediate steps to comply with Afghanistan's international obligations by extraditing or prosecuting under the Hague Convention the hijackers of the PIA aircraft. The statement of the seven was communicated to the Mission of Afghanistan to the United Nations by Canada on behalf of the seven. Since no reply has been received from the Kabul regime, France, the FRG and the UK, which are the only countries among the seven to whose territories Ariana Afghan Airlines fly, have decided in agreement with the other members of the Seven to denounce their air services agreements or arrangements with Afghanistan. Notice to this effect will be given.¹⁰³

The Afghan Government did, however, eventually respond to the Seven at the United Nations. In a note it delivered to the United States Mission¹⁰⁴ on October 28, 1982, the Afghan Mission stated:

The Government, according to the decision of the Council of Ministers of the Democratic Republic of Afghanistan, and in compliance with and honour of its international obligation with regards to hijackers, assures that whenever the hijackers of Pakistan International Airlines enter Afghanistan, they will be arrested and prosecuted.

Therefore, on the basis of the foregoing undertakings, the Democratic Republic of Afghanistan respectfully requests that all sanctions imposed or contemplated against it and its national airline be terminated.¹⁰⁵

This Afghan submission, which incorporated an implicit claim that the hijackers were no longer in Afghanistan and that, consequently, Afghan authorities could not undertake legal action against them, did not cause the Seven to relent; the Seven duly terminated civil aviation links between themselves and Afghanistan in accordance with the November 30, 1981 statement after the notice of termination periods pursuant to the relevant bilateral agreements (of the Seven, three—the Federal Republic of Germany, France and the United Kingdom—had air services agreements with Afghanistan) had elapsed. Shortly before the severance took effect, Ariana approached several other Western European countries in an attempt to obtain alternative traffic rights, but no countries granted

103. Chamberlain, *supra* note 78, at 628.

104. Presumably the missions of the other Summit Seven states received the same note as well, although no record of this is currently available.

105. Department of State Cable No. USUN 3081 (October 28, 1982) (information in Department of State files).

such rights and Ariana flights to Western Europe ceased entirely.¹⁰⁶

In early December 1982 the president of Ariana condemned the boycott, claiming that Afghanistan had respected its international commitments in connection with the PIA hijacking and had so informed the Seven. He expressed the hope that the Seven would review their decision "because Afghanistan is a landlocked country and therefore no international regulations allow the closure of international civil air spaces and their airports to the flights of its aeroplanes," and complained (not without some basis) that many other incidents of hijacking had taken place without the Seven applying ensuing sanctions against any involved countries.¹⁰⁷

In mid-1984 Kabul Radio reported that one of the three PIA hijackers had been executed in Kabul on a conviction of murder unrelated to the PIA hijacking.¹⁰⁸ If true,¹⁰⁹ the report would indicate that only one of the three PIA hijackers remained alive and at large at that time.¹¹⁰ In any event, the Bonn Declaration sanctions remained in effect until 1986, when the Seven, evidently concluding that they had achieved their purpose, quietly ended them.¹¹¹

IV. DISCUSSION

The Hague and Montreal Conventions represented significant advances in international cooperation against air terrorism. They effectively established the main forms of terrorist assault against civil aviation as international crimes and stipulated clear requirements for states in dealing with the perpetrators of such assaults. The two conventions are now among the most widely subscribed treaties in existence; the vast majority of the world's states are parties to both of them.¹¹²

The conventions, however, were in themselves insufficient to make real headway against the threat of unlawful interference. As long as even a few states were willing and able to provide skyjackers and saboteurs sanctuary from justice (and sometimes still more active support), these

106. Chamberlain, *supra* note 78, at 628.

107. *Afghan Airline Chief Condemns Western Boycott of Ariana Flights* (Bakhtar radio broadcast, Dec. 3, 1982), reprinted in BBC report at FE/2000/C/1 (Dec. 4, 1982) (transcript on file in office of Geoffrey Levitt).

108. *Hijacker Executed in Kabul*, The Times (London), July 14, 1984, at 4, col. 5.

109. The report was disputed by Afghan exiles in Pakistan. *Kabul Plans to Resume London, Paris, Frankfurt Flights*, Reuters North Eur. Service (Nov. 7, 1986).

110. See *supra* note 101 and accompanying text.

111. Reuters, *supra* note 109.

112. The Hague Convention has 130 parties as of this writing and the Montreal Convention has 131 parties.

terrorists could continue to prey upon international civil aviation with impunity. Only through some effective mechanism to back up the aviation conventions' *aut dedere, aut judicare* requirements with serious sanctions against violating states could the conventions begin to provide real protection against air terrorism. The possibility of prosecution might or might not deter the terrorists; nevertheless, governments inclined to shelter them presumably would care about the threat of having their country's aviation links with the rest of the world cut off.

As recounted above, however, the search for such an enforcement mechanism within ICAO failed. It was into the gap left by this failure that the Summit Seven—together, the predominant aviation powers of the non-communist world, as well as the predominant targets of air terrorism¹¹³—stepped when, in 1978, they issued the Bonn Declaration.¹¹⁴ In doing so, the Seven created the potential for serious sanctions against states that failed to take meaningful law enforcement measures against hijackers. They also created, however, a number of unresolved legal questions that may still haunt their efforts to implement such sanctions.

An initial question pertains to the relationship of the Bonn Declaration to the Hague Convention itself. The defaults to which the Declaration refers ("refuses extradition or prosecution of those who have hijacked an aircraft and/or do¹¹⁵ not return such aircraft") are essentially congruent with the relevant Convention obligations, found in article 7 ("The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged . . . to submit the case to its competent authorities for the purpose of prosecution") and article 9(2) ("any Contracting State in which the [hijacked] aircraft is found . . . shall without delay return the aircraft . . . to the persons lawfully entitled to possession"). The declarants may have had the Convention in mind when framing the Declaration, but the Declaration does not link the defaults that trigger its sanctions to actual violations of the Convention; indeed, it does not mention the Convention at all. Nor does it include jurisdictional limitations like those one finds in the Convention; on its face, therefore, it might apply, unlike the Convention, to hijackings of state aircraft or purely domestic hijackings.¹¹⁶

113. See *supra* Part IIB.

114. See Bonn Declaration, *supra* note 29.

115. The obligation to return a hijacked aircraft goes to the state wherein the aircraft is found, however, not to those who hijack it; thus this word probably should be "does".

116. Hague Convention, *supra* note 47, art. 3, paras. 2, 3, provide as follows:

2. This Convention shall not apply to aircraft used in military, customs or police services.

3. This Convention shall apply only if the place of take-off or the place of actual

From the viewpoint of a strong counterterrorism policy, the independence of the Bonn Declaration from the Hague Convention makes sense. If states could continue to provide sanctuary to hijackers with impunity simply by refraining from joining the Hague Convention, it would leave the structure of international protection against air terrorism with a gaping hole indeed. But perhaps international law requires that such a hole exist: after all, can a state be bound by a treaty obligation that it did not assume? For a justifiable charge of violation of legal obligations against a nonparty to the Hague Convention that failed to extradite or prosecute an alleged hijacker, the *aut dedere, aut judicare* requirement would have to have acquired the status of a customary international legal obligation, or some other treaty source for this requirement would have to exist.

Scholars have been of various opinions as to the obligations of a state under customary international law with regard to alleged hijackers found in its territory. One observer writing in 1980 asserted that providing sanctuary to a skyjacker is not merely a violation of a norm of customary international law, but of *jus cogens*.¹¹⁷ But another analyst writing shortly thereafter stated flatly: "It is not possible to say at this stage in the development of international law that the actions which trigger the [Bonn] Declaration sanctions are prohibited under customary international law."¹¹⁸

Indeed, valid legal considerations that would prevent a state not a party to the Hague Convention from extraditing or prosecuting an alleged offender may exist.¹¹⁹ It would be hard, therefore, to disagree with the second writer quoted above. Accepting this view, however, does not mean admitting that one can never lawfully apply the Bonn Declaration against a nonparty to the Hague Convention. The Declaration is not a

landing of the aircraft on board which the offence is committed is situated outside the territory of the state of registration of that aircraft . . .

For discussion of this point see Busuttil, *The Bonn Declaration on International Terrorism: A Non-Binding International Agreement on Aircraft Hijacking*, 31 INT'L & COMP. L. Q. 474, 476 (1982).

117. Comment, *Skyjacking and the Bonn Declaration of 1978: Sanctions Applicable to Recalcitrant Nations*, 10 CAL. W. INT'L L. J. 123, 146 (1980).

118. Busuttil, *supra* note 116, at 480. See also Schwenk, *The Bonn Declaration on Hijacking*, 4 ANNALS AIR & SPACE L. 307, 312-13 (1979) ("[I]t seems . . . doubtful that the prosecution or extradition of hijackers can be regarded as mandatory under customary international law.").

119. "There may be no relevant extradition treaty to enable the State concerned to accede to a request for extradition, there may be insufficient evidence to justify a prosecution or the State concerned may simply have no jurisdiction over the offence, particularly if the offence took place outside its territory." Chamberlain, *supra* note 78, at 630.

treaty,¹²⁰ and to parse its terms too literally would be inappropriate. Although its operative words refer simply to a refusal to extradite or prosecute as a trigger for the sanctions contemplated, the drafters linked these words to the preceding paragraph of the Declaration which states that the Seven governments "will intensify their joint efforts to combat international terrorism."¹²¹ Thus, the Declaration intends not to impose sanctions mechanically against any state that fails to extradite or prosecute a hijacker, but to establish a basis for joint action against states that provide sanctuary to terrorist skyjackers.¹²² In that light, when assessing the legality of applying the Declaration to states not party to the Hague Convention, it would be more useful to frame the question in terms of whether there is a negative obligation under customary international law to refrain from providing sanctuary to hijackers rather than the narrower focus on a positive obligation to extradite or prosecute. As one writer has usefully posed the issue:

[T]here is a considerable difference between failure to extradite or prosecute on . . . technical grounds and a systematic failure to do so in cases where there is adequate machinery under the municipal law of the State concerned and that State, for reasons which are largely political, refuses to deal with the offenders. In the latter case, it is submitted that that State is in breach of its international obligations.¹²³

Another treaty, the Chicago Convention¹²⁴ provides a second route for imposing on nonparties to the Hague Convention a legal obligation to refrain from providing sanctuary to terrorist hijackers. Though that convention contains no language directly referring to treatment of hijackers or to unlawful interference with civil aviation at all, it does explicitly incorporate the fundamental principle of safety of civil aviation.¹²⁵ As skyjacking clearly threatens that principle, one can argue that a state that abets such behavior by shielding skyjackers from justice is acting in violation of a basic Chicago Convention norm.¹²⁶ The utility of deriving

120. For a discussion of the legal status of the Bonn Declaration see Busuttill, *supra* note 116.

121. Bonn Declaration, *supra* note 29.

122. See Comment, *supra* note 117, at 140-41.

123. Chamberlain, *supra* note 78, at 630.

124. Chicago Convention, *supra* note 79.

125. *Id.* at preamble, art. 44.

126. See Schwenk, *supra* note 118, at 314: "Hijacking and its indirect support by a member State of ICAO is such a severe threat to the safety of international civil aviation that it must be considered a breach of the Chicago Convention;" and Chamberlain, *supra* note 78, at 631: "[A]ny State which permits its territory to become a safe haven for hijackers creates a severe threat to the safety of international civil aviation and conse-

such an obligation from the Chicago Convention relates to the fact that a significantly greater number of states are parties to that treaty than to the Hague Convention, notwithstanding the very wide acceptance of the latter instrument.¹²⁷

At this point one might ask: for the purpose of applying Bonn Declaration sanctions to a country that shields hijackers, does it matter whether that country is technically in breach of a legal obligation—whether derived from customary international law, the Chicago Convention, or the Hague Convention itself—in so doing? The answer is that Bonn Declaration sanctions have their own legal consequences, and so must themselves have some independent legal justification. In particular, “initiat[ing] action to halt all incoming flights from [the defaulting] country or from any country by the airlines of the country concerned”¹²⁸ can itself constitute a violation of the Chicago Convention, the related Transit Agreement,¹²⁹ and any bilateral air services agreements insofar as these instruments give the airlines of the defaulting state the right to conduct flights to, through or over the states imposing the sanctions.¹³⁰

To justify taking such action, therefore, the Bonn Declaration states must be prepared to invoke a legal principle that would support the termination or suspension of existing air service rights belonging to the defaulting state. Such a principle must in turn rest on the target state’s violation of a legal norm to which that state is subject—a norm whose source, of course, one must find outside the Bonn Declaration itself, since it has no legal force¹³¹ and, even if it did, could not create any obligations for states that have not explicitly accepted its terms.¹³² Only the imputation of a sufficiently serious violation of a state’s obligation to act in accordance with the norms regarding legal treatment of skyjackers contained in or derived from the Hague Convention, customary international law or the Chicago Convention or both, can give rise to a corresponding right on the part of the states imposing sanctions to suspend or terminate the target state’s existing aviation rights in a manner inconsistent with the otherwise applicable terms of the instruments creating such

quently is in fundamental breach of its obligations under the Chicago Convention.”

127. There are currently 157 parties to the Chicago Convention compared to 130 parties to the Hague Convention.

128. Bonn Declaration, *supra* note 29.

129. International Air Services Transit Agreement, Dec. 7, 1944, 59 Stat. 1693, EAS No. 487.

130. See Chamberlain, *supra* note 78, at 630; Busuttil, *supra* note 116, at 480-81.

131. See *supra* text accompanying note 120.

132. See Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27, art. 34.

rights.¹³³

As the Ariana sanctions case itself shows, however, the international legal community, and perhaps even some of the Summit Seven themselves, have not universally accepted the arguments for application of the Bonn Declaration independent of the Hague Convention. Both the July 1981 Ottawa Declaration announcing imminent sanctions against Ariana and the November 30 statement announcing the actual imposition of the sanctions explicitly linked the Seven's action to Afghan violations of the Hague Convention.¹³⁴ Whatever the theoretical merits of extending the Declaration to apply to states not party to the Convention, in practice the Seven opted to avoid opening up the issue at all. While this may have been prudent in terms of that particular case, it did set a precedent that might hinder any future effort to apply the Bonn Declaration beyond the confines of the Hague Convention.

The Ariana sanctions were legally conservative in another respect as well. The three Summit Seven states that actually had aviation ties with Afghanistan did nothing to violate the terms of their bilateral civil aviation agreements, such as immediately suspending Ariana's landing rights conferred under such agreements. Rather, they duly gave notice of termination as such agreements provided for and then simply refused to renew them once they had terminated. Thus, the question of a legal right to take countermeasures against a state granting sanctuary to terrorist skyjackers, where such countermeasures would otherwise violate the terms of bilateral aviation agreements, did not arise in this case.

When dealing with an instrument as unique as the Bonn Declaration, however, even the most cautious legal approach does not guarantee freedom from problems. The involvement of third states—i.e., states neither members of the Seven nor the target of sanctions—in the implementation of the sanctions is an unavoidable issue. Notwithstanding the predominant position of the Seven in international civil aviation, the participation of other states in any boycott they impose is still very important to ensure optimal effect. The Seven showed their awareness of this from the outset; the Bonn Declaration itself concludes with the heads of state and government “urg[ing] other governments to join them in this commitment.”¹³⁵ Similarly, at the end of the Ottawa Declaration, the Seven “call upon all states which share their concern for air safety to take ap-

133. See Chamberlain, *supra* note 78, at 630-631; Busuttill, *supra* note 116, at 480-81.

134. See *supra* Part IIIB.

135. Bonn Declaration, *supra* note 29.

propriate action to persuade Afghanistan to honor its obligations."¹³⁶ Indeed, in the Ariana case, it appears that other Western European states, at least, honored the boycott.¹³⁷

This does not mean, however, that in cases where—unlike the Ariana situation—relevant third states had preexisting obligations to grant landing rights to a target state pursuant to bilateral agreements with that state, they would be willing to violate those obligations for the sake of solidarity with the Seven. Indeed, the Seven certainly could not ask more of third states in this regard than they were willing to undertake themselves in the Ariana context. A related and at least equally difficult problem would arise if airlines of a third state, pursuant to a bilateral agreement between that third state and a Summit Seven country, were to operate services between that Summit Seven country and the target state—again, not an issue that the Ariana case actually addressed. Pursuant to the Bonn Declaration, such services would also be subject to termination, even though such termination could violate the agreement between the third state and the Summit Seven state even without the justification of responding to an initial violation on the part of the state whose rights were being so infringed.¹³⁸ Undoubtedly the wish to avoid such problems motivated in part the Summit Seven governments' efforts to enlist third states in active support of the Bonn Declaration, efforts that have met with some success.¹³⁹

A separate set of issues are those internal to the Bonn Declaration itself. Its deceptive simplicity masks a number of potentially vexatious questions. Even admitting *arguendo* that the lack of definition of "hijacking" is likely to pose more theoretical than real problems, especially given the availability of the Hague Convention definition¹⁴⁰ for reference, certain other key terms in the Declaration have neither internal nor dependable external referents. In particular, it is not at all clear what a "refusal" to extradite or prosecute a hijacker would encompass. The Ariana case demonstrates that one cannot necessarily confine this term to situations where, despite the existence of legal jurisdiction and sufficient evidence, a government explicitly rejects an extradition request or disavows prosecution—the "terrorist sanctuary and proud of it" paradigm. Indeed, the Afghans' story in the period just before the sanctions went into force was to the effect that they had every intention of apply-

136. *Statement on Terrorism*, *supra* note 49.

137. *See* Chamberlain, *supra* note 78.

138. *See* Schwenk, *supra* note 118, at 319-320.

139. *See supra* notes 46 and 106 and accompanying text.

140. *See supra* notes 67-70 and accompanying text.

ing legal measures to the hijackers, but somehow the latter had vanished from the country.¹⁴¹ Though the Seven and Pakistan found this version unconvincing, the fact remains that the Afghan authorities were not so much refusing to extradite or prosecute as they were, one might say, evading their responsibilities in this regard. While the net result, of course, is the same, a stance such as the one Afghanistan adopted in this case does obscure the matter somewhat. The situation has become even more obscure in light of the mid-1984 report that Afghan authorities had indeed prosecuted (and for that matter, executed) one of the hijackers—but not for the hijacking.¹⁴²

Problems such as these are, of course, inherent in legal processes and the underlying fact situations to which authorities apply those processes. Legal roadblocks can occur—or be conveniently created. Extradition requests can suddenly develop technical flaws that cause countries to delay or reject them. Evidence can be difficult to obtain, particularly if authorities are not looking very hard for it. Criminal defendants can disappear or die. And information that reaches the outside about what is happening in all these areas can be scarce, undependable, and contradictory. In other words, the real world is probably not going to fit very comfortably into the simple model of “refus[ing] extradition or prosecution” envisioned in the words of the Bonn Declaration. This does not mean that the Bonn Declaration cannot be implemented; it does mean that to implement it meaningfully, a decision-making process capable of assessing complex legal and factual variables (and, of course, political factors as well), and acting on them, must exist. Though full analysis of such a process is beyond the scope of this Article, the present discussion demonstrates once again that—particularly when it comes to a problem as sensitive and complex as international counterterrorism cooperation—making declarations is one thing; carrying them out is a far more difficult matter.

141. See *supra* note 105 and accompanying text.

142. See *The Times* (London), *supra* note 108 and accompanying text.

