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FROM PIRACY ON THE HIGH SEAS
TO PIRACY IN THE HIGH SKIES:
A STUDY OF AIRCRAFT HIJACKING

PETER M. JACOBSON*

The spate of aircraft hijackings during the past decade has prompted discussion about the analogy between modern-day aerial seizures and the piracies on the high seas which were so common centuries ago.¹ This comparison is not only of academic, but also practical interest. If aircraft hijacking were universally held to be piracy *jure gentium*, then every state in the world community would be authorized to take quick, effective action to capture and prosecute hijackers, and the international law would thus contain a significant provision to deter this menace.

The purpose of this article is to examine the development of the law of piracy *jure gentium* and to analyze its present application to the hijacking problem. In order to determine the extent to which the customary law of piracy offers a possible solution to the modern problem, the relationship between conventions attempting to codify this customary law and conventions enacted for the purpose of reducing the number of hijackings will also be explored.²

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1. See, e.g., Shubber, *Is Hijacking of Aircraft Piracy in International Law?* 43 BRIT. Y.B. OF INT'L L. 193 (1968-69).

2. An analysis of the provisions of the most recent convention on the subjects, the Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Dec. 16, 1970, 10 INT'L LEG. MAT. 133 (1971), 64 DEP'T OF STATE BULL. 60 (1971), will show that it has established a special kind of statutory piracy in respect to aircraft hijacking.

I.

PIRACY JURE GENTIUM

A. *The Customary Law Modernized*

In 1932, a research project under the auspices of the Harvard Law School, as part of an attempted codification of international law, made an exhaustive research of the authorities on piracy.³ The rapporteur of the project even then predicted that "with rapid advance in the arts of flying . . . it may not be long before bands of malefactors . . . will find it profitable to engage in depredations . . . in . . . the air."⁴ He therefore concluded that any attempted codification of the law of piracy should cover "depredations . . . in or from the air. . . ."⁵

The Harvard Research is still the best comprehensive evidence of the law of piracy available, because in spite of recent conventions,⁶ customary law has remained controlling on the subject. It is significant that under its provisions the commission of piracy jure gentium is a basis for the exercise of a universal jurisdiction under which any state which captures a pirate may prosecute and punish him.⁷ The draft convention prepared after the completion of the Harvard project was based on the view that this

. . . common jurisdiction . . . rests on tradition and expediency. It is expediency that should be the chief guide in the formulation of a convention. The use of traditional ideas of the nature of piracy . . . should be tempered and con-

3. Harvard Research in International Law, *Draft Convention on Piracy, with Comment*, 26 AM. J. INT'L LAW 740 (Supp. 1932) [hereinafter cited as Harvard Research on Piracy].

The task of codification was a difficult one because of "the paucity of pertinent cases and of evidence of modern state practice on most of the important moot points in the law of piracy." *Id.* at 764. See also Johnson, *Piracy in Modern International Law*, 43 TRANSACTIONS OF THE GROTIUS SOCIETY 63, 71 (1957).

4. Harvard Research on Piracy, *supra* note 3, at 309.

5. *Id.* at 786.

6. Convention on the High Sea, *opened for signature* April 29, 1958, [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter cited as Geneva Convention]; Convention on Offenses and Certain Other Acts Committed on Board Aircraft, *opened for signature* Sept. 14, 1963, [1969] 3 U.S.T. 2941, T.I.A.S. No. 6768 [hereinafter cited as Tokyo Convention]; Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Dec. 16, 1970, 10 INT'L LEG. MAT. 133 (1971), 64 DEP'T STATE BULL. 50 (1971) [hereinafter cited as Hague Convention].

7. Harvard Research on Piracy, *supra* note 3, at 786. This provision clearly facilitates the application of legal procedures for the prosecution and punishment of pirates.

trolled by the realization of the great changes that have occurred through the centuries in the conditions of commerce and travel. . . .⁸

At the outset, the rapporteur observed that there is a distinction between international law piracy, which is committed outside all territorial jurisdiction, and acts which are considered statutory piracy under municipal law and which may include offenses which occur entirely within the territory of one state.⁹

"The theory of [the] . . . draft convention . . . is that piracy is not a crime by the law of nations. It is the basis of an extraordinary jurisdiction in every state to seize and to prosecute and punish persons. . . . The purpose of the convention is to define this extraordinary jurisdiction."¹⁰ Thus the approach taken by the Harvard Research was to formulate a definition of the facts that constitute piracy and then leave it to the states of the world community to implement that jurisdiction by appropriate legislation. Within these limits the extent of the jurisdiction therefore depends on municipal law.¹¹

The Harvard Research was aware of the "chaos of expert opinion as to what the law of nations includes, or should include, in piracy"¹² but offered the following definition:

Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:

Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends and without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.¹³

Four salient questions arise if this definition is to cover hijacking of an aircraft: What is the effect of the requirement that the act take place outside the territorial jurisdiction of any state? Are the delineated acts of piracy sufficient to include an aircraft hijacking? What is the

8. Harvard Research on Piracy, *supra* note 3, at 787. The approach taken by the Harvard Research to codification appears to be acceptable. See M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEAN* 809 (1962).

9. Harvard Research on Piracy, *supra* note 3, at 749; Johnson, *supra* note 3, at 68-69.

10. Harvard Research on Piracy, *supra* note 3, at 760; See also Johnson, *supra* note 3, at 69. But see M. McDUGAL & W. BURKE, *supra* note 8, at 808.

11. Harvard Research on Piracy, *supra* note 3, at 760. It should be noted that international law confers no obligation on states to exercise the jurisdiction.

12. *Id.* at 769.

13. *Id.* at 768-9.

effect of the "private ends" requirement? Can the act of hijacking be considered piracy when it occurs aboard a single aircraft of any flag country?

1. Territorial Jurisdiction

Certainly the Harvard Research thought that in order to give rise to common jurisdiction, the act should take place outside all territorial jurisdiction.¹⁴ More recently, this requirement has been called "the principal feature and indeed the *raison d'être* of the traditional law of piracy"¹⁵ as there is no justification for a grant of common jurisdiction in respect of acts taking place within national territory.¹⁶

If this principle is applied to aircraft it meets with the international law rule that the territory of a state includes the airspace above it.¹⁷ Thus a hijacking which takes place in the airspace above any state could not be piracy *jure gentium* unless some assistance can be obtained from the decision of Dr. Lushington in *The Magellan Pirates*.¹⁸

That case concerned an insurrection in Chile during which a rebel officer murdered the governor of Punta Arenas. He and his men then seized two vessels, the "Eliza Cornish" and the "Florida," which were anchored in port and, in so doing, murdered several people. Both vessels were later recaptured and an application for bounty was made in England under the Piracy Act, 1850.¹⁹ Dr. Lushington found this to be a case of piracy and in giving his decision said:

The "Eliza Cornish" and the "Florida" were seized in port, and the murders committed in port or committed on land, on the persons taken out of the vessels. . . . In this case, however, the ships were carried away and navigated by the same persons who originally seized them. Now, I consider the possession at sea to have been a piratical possession; to have been a continuation of the murder and robbery; and the carrying away of the ships on the high seas to have been piratical acts quite independently of the original seizure²⁰

14. *Id.* at 749, 760, 781-82, 788. Of course this definition of piracy does not preclude a state from defining as municipal law piracy acts which take place within its own territorial waters.

15. M. McDUGAL & W. BURKE, *supra* note 8, at 813.

16. Johnson, *supra* note 3, at 71.

17. Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, art. 1, 61 Stat. 1180 (1947), T.I.A.S. No. 1591, 15 U.N.T.S. 295 [hereinafter cited as Chicago Convention].

18. 164 Eng. Rep. 47 (Adm. 1853).

19. 13 & 14 Vict. c. 26.

20. *The Magellan Pirates*, 164 Eng. Rep. 47, 50 (Adm. 1853).

However, it has been remarked that the case is "not very decisive one way or the other" as the elements of piracy *jure gentium* and statutory piracy required for the award of bounty are "intermingled" in the judgment.²¹

If an act which in every respect resembles piracy takes place in the air, whether in the airspace above a state or otherwise, it is submitted that in modern times expediency and changing conditions of commerce and travel dictate the exercise of something approaching a universal jurisdiction. The Harvard Research's codification forty years ago was based on this type of realistic criteria and it may thus be asked in 1972, in times of rapid air travel, whether it should make a difference in the exercise of common jurisdiction that a piracy is committed in the international airplanes above a country rather than in the same traffic lanes but over the high seas? The picture of the traditional pirate is that of "a professional robber who sails the sea in a pirate ship to attack and plunder other ships . . . such pirates are a menace to the interests of every state which has access to the sea."²² If professional "pirates" carry out their acts in the air, do they not provide an equal menace to every state? Thus, should not airspace, regardless of the territory beneath it, be equated in cases of piracy with the high seas and therefore justify the exercise of universal jurisdiction? If, for example, a British aircraft enroute to Israel is hijacked over France, the connection that France has with the incident is minimal, and there seems no reason for an assertion of French sovereignty.

The rule giving sovereignty over airspace has already been impinged upon to grant jurisdiction to the aircraft flag-state in respect of acts

21. Johnson, *supra* note 3, at 73.

Thus, for example, Dr. Lushington said, ". . . I am not disposed to hold that the doctrine that the port, forming a part of the dominions of [the] state to which it belongs ought in all cases to divest robbery and murder done in such port of the character of piracy . . . I am still more inclined to come to that conclusion . . . because the *statute* expressly contemplates acts done on shore. . . ." *The Magellan Pirates*, 164 Eng. Rep. 47, 50 (Adm. 1853) (emphasis added). However, there is authority in *Regina v. Leslie*, 8 Cox. Crim. Cas. 269 (Ct. Crim. App. 1860), that acts committed in the territory of a state and continuing onto the high seas may be deemed to have been committed on the high seas. The case concerned false imprisonment, not piracy, but it applied a similar principle to that adopted by Dr. Lushington. The imprisonment took place in Chilean waters under duress by authority of the Government of Chile which entered a contract with the defendant, who was the master of an English vessel, to take the plaintiff and others to England. They were conveyed to England against their will and the court held that while the defendant was not liable for the acts committed in Chilean waters, he was liable for the imprisonment on the English ship on the high seas.

22. Harvard Research on Piracy, *supra* note 3, at 769.

committed on board its aircraft in foreign airspace.²³ It is submitted that a realistic appraisal of existing patterns of international commerce and transportation require a further surrender of exclusive jurisdiction over domestic airspace to curtail an international menace.

2. Acts of Piracy

The piratical acts listed by the Harvard Research include acts of violence committed with intent to imprison or kill a person. The use of weapons and threats against the lives of passengers or crew which are made by hijackers to obtain control of an aircraft seem to fall within this definition.

The rapporteur outlined the scope of acts included by stating that the convention generally "covers all serious offenses otherwise like traditional piracy, although the motive of the offender may . . . not [be] an intention to rob or to gain wealth or otherwise."²⁴ The Harvard Research's main concern appears to have been to include those acts which are "a menace to international commerce."²⁵

It seems self-evident that the hijacking of an aircraft constitutes such a menace.

3. Private Ends

The Harvard Research took the view that while there is some authority that unrecognized insurgents (who may be thought to act for political purposes) are pirates, the better theory is that piracy should be confined to actions committed solely for private ends.²⁶ It thus accepted a distinction based on motives which may in a particular instance be difficult to distinguish.

In two mid-nineteenth century cases, *The Magellan Pirates*²⁷ and *The*

23. Tokyo Convention, art. 3 (1), [1969] 3 U.S.T. 2941, T.I.A.S. No. 6768.

24. Harvard Research on Piracy, *supra* note 3, at 790.

25. *Id.* at 794.

26. *Id.* at 798. *But see* H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW, 307-08 (1947) where the author said, "[P]iracy conceived as organized robbery for the purpose of private gain is now largely obsolete . . . [and accordingly] it would not seem improper to describe and treat as piratical such acts of violence on the high seas which by their ruthlessness and disregard of the sanctity of human life invite exemplary punishment and suppression." *See also* L. OPPENHEIM, INTERNATIONAL LAW §272, at 608 (8th ed. Lauterpacht 1955).

27. 164 Eng. Rep. 47 (Adm. 1853).

Serhassan Pirates,²⁸ Dr. Lushington took the opposite view, holding that it was possible for insurgents to be pirates. However, there are doubts about the relevance of these authorities today since in both cases it was impossible to distinguish between the private and political purposes of the offenders.²⁹

More recently it has been argued that the Nyon Arrangement of 1937³⁰ which described as "piracy" the attacks made by submarines that were assumed to be acting for the contending factions in the Spanish Civil War, displaced the rule that piracy is a crime committed exclusively for private ends. However, it seems doubtful that the Nyon Arrangement established a new rule of international law. It was signed by only nine states³¹ and "[i]t certainly seems more reasonable to regard the Nyon Arrangement as an ad hoc arrangement for a kind of collective self-defense in peculiar circumstances."³²

The issue was revived in 1961 when a group of passengers seized the Portuguese liner "Santa Maria" on the high seas.³³ The facts of the seizure revealed that it was made with the intention of sparking political consequences in Portugal and not for the purpose of private gain. After eleven days in control of the ship, the rebels sailed it to Brazil where its captors were given asylum. The vessel was returned to Portugal, making the controversy essentially one of only academic concern.

An editorial by Professor Fenwick seems to conclude that the "Santa Maria" affair was a piracy but he does not elaborate on the reasons for his comments.³⁴ It is implicit that he believed the offense was private rather than political as the head of the rebel group "held no public office before starting his insurgent movement."³⁵ But "this has never been an accepted criterion for distinguishing private from political objectives"³⁶ and generally it was considered that the political purpose of

28. (1845) 2 Wm. Rob. 354, 166 Eng. Rep. 788 (Adm. 1845).

29. Johnson, *supra* note 3, at 78-79.

30. The Nyon Arrangement, Sept. 14, 1937, 181 L.N.T.S. 4184.

31. The United Kingdom, Bulgaria, Egypt, France, Greece, Roumania, Turkey, U.S.S.R., and Yugoslavia.

32. Johnson, *supra* note 3, at 85. *But see* H. LAUTERPACHT, *supra* note 26, at 295, 296-97, 298, 303, 305, 306, 307-08. A broader view is taken of piracy, excluding the private ends requirement, and criticism of the use of the term piracy in the Nyon Arrangement is thus said to be not well-founded.

33. The facts of the incident are discussed in Forman, *International Law of Piracy and the Santa Maria Incident*, JAG J., Oct.-Nov. 1961, at 148; Green, *The Santa Maria: Rebels or Pirates*, 37 BRIT. Y.B. INT'L L. 496 (1961); M. McDUGAL & W. BURKE, *supra* note 8, at 821-23.

34. Fenwick, *Piracy in the Caribbean*, 55 AM. J. INT'L L. 426-28 (1961).

35. *Id.* at 428.

36. M. McDUGAL & W. BURKE, *supra* note 8, at 823.

the incident removed it from the customary law category of piracy.³⁷

Contemporary lawyers, therefore, seem to have accepted the distinction drawn by the Harvard Research under which it is necessary to look to the motivation of an offender to determine the nature of his act. However, many aircraft are hijacked by members of revolutionary organizations, or by citizens escaping politically oppressive regimes, or simply by political radicals who seek publicity by flying to Cuba. In such cases, there is almost always a very thin line between motivation for private gain and political purposes.³⁸

While some of the hijackings of United States aircraft to Cuba, and the hijackings from Soviet bloc countries, seem to be more for private purposes than any other, it has been suggested that defense of a political organization is "a sort of public purpose."³⁹ Therefore, it can be argued that "hijackings of aircraft by some political groups, acting either in pursuance of the political aims, or in defiance of the political regime of the flag state" are not committed for private ends.⁴⁰ As such, the hijackings of Israeli aircraft by members of the Palestine Liberation groups and some of the Cuban and Russian hijackings perhaps should not be regarded as piratical.

4. *Single Flag Aircraft?*

The Harvard Research's definition contemplates that unless the attack is made from one vessel to another, all the action must take place on a pirate ship. According to this definition, the "Santa Maria" incident, which took place entirely on one flag vessel, could not be piracy.⁴¹

The rapporteur explained that:

This limitation . . . is designed to exclude offenses committed in a place subject to the ordinary jurisdiction of a state. The limitation follows traditional law. . . . The great weight of professional opinion . . . does not sanction an extension of the common jurisdiction of all states to cover . . . offenses committed entirely on board a ship which by international law is under the exclusive jurisdiction of a state whose flag it flies. Even though a mutiny suc-

37. Foreman, *supra* note 33, at 148; Green, *supra* note 33, at 503; M. McDUGAL & W. BURKE, *supra* note 8, at 822-23; *cf.* 4 M. WHITEMAN, *DIGEST OF INT'L L.* 666 (1965) which states that "[s]ince the ship was taken over by certain of its own passengers [apparently for private ends], and not by another ship . . . it was considered that for this, if for no other reason, . . ." it was not piracy.

38. Shubber, *supra* note 1, at 200.

39. Johnson, *supra* note 3, at 78.

40. Shubber, *supra* note 1, at 200.

41. M. WHITEMAN, *supra* note 37, at 666.

ceeds, the common jurisdiction would not attach. It should attach, however, if the successful mutineers then set out to devote the ship to the accomplishment of further acts of violence or depredation . . . on the high seas. . . .⁴²

This statement is ambiguous in that it is not clear whether mutiny carried out with a mere intention to commit piracies is sufficient to give rise to the common jurisdiction before an attack against another vessel is either launched or attempted. Aside from this ambiguity, the explanation is compatible with the traditional idea of a pirate as a plunderer who sailed the seas attacking other ships and distinguishes that person from a mutineer. However, the statement should be compared with the following passage from Oppenheim:

If the crew, or passengers, revolt on the open sea and convert the vessel and her goods to their use they commit piracy. . . . But a simple act of violence on the part of crew or passengers does not constitute in itself the crime of piracy. . . . They are pirates only if the revolt is directly not merely against the master, but also against the vessel, for the purpose of converting her and her goods to their own use.⁴³

In fact, the Harvard Research did not consider the possibility that a "mutiny" might occur on board aircraft and confined its comments to attacks which commence on board ship.⁴⁴ However, it should be remembered that the articles drafted by the Harvard Research were prepared long before the outbreak of aircraft hijackings.

Thus, while the Harvard Research recognized that mutineers could become pirates if they used (or, *quaere*, intended to use) the ship to carry out further acts of violence, Oppenheim suggested the additional requirement of conversion of the vessel. While true that the aircraft is not used to carry out acts of violence or depredation against other aircraft, the hijackers do use their possession (or control) to carry out such acts against passengers and crew. Therefore, if it is the case that the aircraft is actually converted to the use of the hijackers,⁴⁵ and if Oppenheim is correct on the law, then it can be argued the hijackers have by that act become pirates.

42. Harvard Research on Piracy, *supra* note 3, at 809-10.

43. L. OPPENHEIM, *supra* note 26, §274, at 614. The "one vessel requirement" is even clearer in the statement (§272 at 609) that ". . . if the members of the crew revolt and convert the ship, and the goods thereon, to their own use, they are considered to be pirates, although they have not committed an act of violence against another ship." See also *In Re Piracy Jure Gentium*, (1934) App. Cas. 586 at 598-599 (P.C.).

44. Harvard Research on Piracy, *supra* note 3, at 809-20.

45. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 83-84 (3rd ed. 1964), says that conversion is ". . . an intent to exercise dominion or control over the goods which is in fact inconsistent with the plaintiff's rights . . .," and the problem then is

The question of whether hijacking can be piracy if committed entirely on one aircraft is not satisfactorily answered by the authorities.⁴⁶ As with the other questions, it raises problems arising from "doctrinal controversies of the past."⁴⁷

However, we are now in an age of rapid mass transportation by air in which aircraft are from time to time hijacked from their routes at considerable risk to the lives of passengers and crew. It is evident that there have been great changes in conditions affecting world travel in the forty years since the Harvard Research was undertaken. In accordance with the Research's own precepts, the definition of the offense of piracy required modification to recognize these changes and eliminate the need to stretch aging phrases to fit modern conditions.

B. *The Customary Law Codified*

The Harvard Research's attempt to codify the law of piracy did not result in the adoption of any multilateral treaty. However, a more successful effort did take place under the auspices of the United Nations.

At the first session of the International Law Commission in 1949, J.P.A. François was elected special rapporteur to study the regime of the high seas "with a view to the codification or the progressive development of international maritime law."⁴⁸ In 1955, the Commission adopted a provisional draft including articles on piracy.⁴⁹ The following year, after examining replies from governments about the draft, it drew up a final report.⁵⁰ Subsequently, the definition of piracy formulated by the Commission was adopted as Article 15 (1) of the 1958 Geneva Convention on the High Seas.

whether the interference is of a sufficiently serious nature. CLERK AND LINDELL ON TORTS §900 (12th ed.) states that there need not be an intention to acquire ownership and a ". . . transitory exercise of dominion may . . . amount to conversion."

46. Foreman, *supra* note 33, at 147, refers to the conflict of authority and suggests that "whatever view of the law is taken . . . a conspiracy occurred outside the 'Santa Maria' which set in motion a chain of events during which the conspirators boarded the ship in the guise of passengers." He thus implies that the acts of violence on one ship could be customary law piracy. This argument, though equally applicable to hijacking of aircraft, is, to say the least, formalistic.

47. JOHNSON, *supra* note 3, at 85.

48. Int'l L. Comm'n, Report, 10 U.N. GOAR, Supp 9, at 2, U.N. Doc. A/2934 (1955) [hereinafter cited as 1955 Report].

49. *Id.*

50. Int'l L. Comm'n, Report, 11 U.N. GOAR, Supp. 9, at 2, U.N. Doc. A/3159 (1956) [hereinafter cited as 1956 Report].

The work of the International Law Commission was completed before the outbreak of hijackings in the past decade, but if the question had been considered by the Commission, it would probably not have considered aircraft hijacking as piracy. In the Commission's view, ". . . acts committed in the air by one aircraft against another aircraft can hardly be regarded as acts of piracy."⁵¹ Hijackings, therefore, which are usually committed solely on board one aircraft, would also have been excluded from the definition of piracy. However, the Commission's articles were intended only to codify international maritime law and the hijacking of an aircraft has no connection with that branch of international law save for the incidental fact that in some instances acts of hijacking may take place in the airspace above the high seas. The Geneva Convention is therefore inapplicable as a treaty with respect to aircraft hijacking, but as it purported to declare established international law,⁵² its statement of the law of piracy should be considered as persuasive authority on the subject.

The International Law Commission's definition of piracy provided that:

Piracy consists in any of the following acts:

Any illegal acts of violence, detention or any act of depredation committed for private ends by the crew or passengers of a private ship or private aircraft, and directed

(a) on the high seas, against another ship or against persons or property on board such a ship;

(b) against a ship, persons or property in a place outside the jurisdiction of any state.⁵³

51. 1955 Report, *supra* note 48, at 7; 1956 Report *supra* note 50, at 28. The 1955 Report stated that such acts "cannot be regarded as acts of piracy while the 1956 Report stated that such acts *can hardly* be regarded as acts of piracy". (Emphasis added.)

52. Geneva Convention, preamble, [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

53. 1956 Report, *supra* note 50, at 28.

The earlier draft stated that:

"Piracy is any of the following acts:

1. Any illegal act of violence, detention or any act of depredation directed against persons or property and committed for private ends by the crew or the passengers of a private vessel or a private aircraft:

(a) Against a vessel on the high seas other than that on which the act is committed, or
(b) Against vessels, persons or property in territory outside the jurisdiction of any State."

. . . .
1955 Report, *supra* note 48, at 6.

The Commission acknowledged its debt to the Harvard Research of 1932 whose findings on the law of piracy it generally endorsed⁵⁴ and the rapporteur then made the following comments on the article:

(I) The intention to rob (*animus furandi*) is not required. Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain;

(II) The acts must be committed for private ends;

(III) Save in [a special case now provided in Article 16 of the Geneva Convention on the High Seas]⁵⁵ . . . piracy can be committed only on private ships . . . ;

(IV) Piracy can be committed only on the high seas or in a place situated outside the territorial jurisdiction of any state, and cannot be committed within the territory of a state . . . ;

(V) Acts of piracy can be committed not only by ships on the high seas, but also by aircraft, if such acts are directed against ships on the high seas;

(VI) Acts committed on board ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship cannot be regarded as acts of piracy.⁵⁶

The article and comments together enable some further conclusions to be drawn on the issues raised in the four questions which were considered under the Harvard Research's definition of piracy.

1. *Territorial Jurisdiction*

The rapporteur's explanation of the scope of jurisdiction is similar to that of the Harvard Research. By their definition the hijacking of an aircraft which takes place in the airspace above a state cannot be piracy because of the international law rule that the territory of a state includes the airspace above it.⁵⁷

2. *Acts of Piracy*

Under the Harvard Research's definition there had to be an act of violence or depredation carried out with the intention to commit any of the type of crimes which was listed. The Commission's definition added

54. 1955 Report, *supra* note 48, at 6; 1956 Report, *supra* note 50, at 27.

55. The Article provides that acts of piracy committed by the crew of a warship, government ship or government aircraft shall be assimilated to acts of piracy by a private ship.

56. 1956 Report, *supra* note 50, at 28; 1955 Report, *supra* note 48, at 6.

57. Chicago Convention, art. 1, 61 Stat. 1180 (1947), T.I.A.S. No. 1591, 15 U.N.T.S. 295.

the act of detention, but deleted the list of crimes replacing them with the term "illegal." It did not intend that the acts should be criminal by the law of any particular state but "the apparent purpose merely was to include a great range of types of coercive behavior."⁵⁸

Accordingly, the kind of acts which take place during a hijacking seem to fall within such a range.

3. *Private Ends*

The Commission's definition includes the requirement adopted by the Harvard Research that the act of piracy must be committed for private ends.⁵⁹

In the International Law Commission, the members from the U.S.S.R. and Czechoslovakia argued that as a result of the Nyon Arrangement of 1937⁶⁰ it was possible for a warship to commit acts of piracy and therefore, since a warship must be acting for a state, the private ends criterion was no longer valid.⁶¹ This inference was not accepted by the other members of the Commission.⁶²

4. *Single Flag Aircraft*

It might appear from paragraph (b) of the definition that acts of piracy can take place solely on board one aircraft, but the ambiguity is resolved by the rapporteur's fifth and sixth comments above and his statement that:

In considering as 'piracy' acts committed outside the jurisdiction of any state, the Commission had chiefly in mind acts committed by a ship or aircraft on an island constituting terra nullius, or on the shores of an unoccupied territory.⁶³

Paragraph (b) of the definition thus varies from paragraph (a) only in the area of its application.⁶⁴

58. M. McDUGAL & W. BURKE, *supra* note 8, at 812. *But see* Foreman, *supra* note 33, at 168, where the author contends that the interpretation is not clear.

59. Thus the legal effect of the "Santa Maria" incident which occurred after the signing of the Geneva Convention on the High Sea was not altered by that Convention.

60. The Nyon Arrangement, Sept. 14, 1937, 181 L.N.T.S. 4184.

61. 1 Y.B. INT'L L. COMM'N ¶¶ 64-65, 71-72, at 43; ¶¶ 17-18, at 55; ¶ 19, at 56 (1955).

62. 1955 Report, *supra* note 48, at 7; 1956 Report, *supra* note 50, at 28.

63. 2 Y.B. INT'L L. COMM'N 253, 282, U.N. Doc. A/3159 (1956).

64. Shubber, *supra* note 1, at 201.

It is thus clear from the rapporteur's explanation that the Geneva Convention on the High Seas resolved the controversy about the number of vessels required for an act of piracy in favor of a two vessel criterion. Indeed, he noted in debates that the draft was based on the principle that "Acts of piracy were necessarily acts committed by one ship against another ship — which ruled out acts committed on board a single vessel."⁶⁵ The statements from the Harvard Research and Oppenheim, which are cited earlier in this paper, were cited in opposition,⁶⁶ but the rapporteur did not acknowledge the ambiguity in the Harvard Research's statement or the difference between that statement and Oppenheim's view. It is therefore submitted that the International Law Commission's decision on this point was misguided.⁶⁷ The Swedish member did propose a draft which took the opposite viewpoint from the rapporteur but it was rejected⁶⁸ and the rapporteur later commented that:

The view adopted by the Commission . . . tallies with the opinion of most writers. Even where the purpose of the mutineers is to seize the ship, their acts do not constitute acts of piracy.⁶⁹

Both the Harvard Research and the International Law Commission purported to codify the law of piracy before hijacking of aircraft became "fashionable" in the 1960's. The rationale of the Harvard Research, upon which the Commission relied, was that piracy on the high seas was formerly such a menace to international shipping that it required the existence of a universal jurisdiction. It also observed that a codification of the scope of the jurisdiction should find its basis in expediency and be tempered by changing conditions of commerce and travel.

It appears that aircraft hijacking is not considered piracy *jure gentium* simply because the hijacking act takes place on board a single aircraft. While there is disagreement among the authorities on this issue, both customary law and the Geneva Convention on the High Seas seem to

65. 1 Y.B. INT'L L. COMM'N ¶ 32, at 39-40 (1955).

66. *Id.* ¶ 52, at 41-42; ¶ 54, at 42.

67. See Foreman, *supra* note 33, at 168. Commenting on the "two ships requirement" he says that "[t]his element is not critical in considering the facts of the 'Santa Maria' episode" and thereby implies that the Commission's definition was, in this regard, based on a false premise.

68. 1 Y.B. INT'L L. COMM'N ¶ 6, at 51-52; ¶ 21, at 53 (1955).

69. 1955 Report, *supra* note 48, at 7; 1956 Report, *supra* note 50, at 28. *But see* L. OPPENHEIM, *supra* note 26, § 274, at 614.

exclude, at least by analogy, the application of the law of piracy to hijackings on this ground.

In addition, hijackings which take place in the territorial jurisdiction of a state and those "political" hijackings which are not carried out for private ends are not generally considered piracy *jure gentium*.

Nevertheless, in recent years, aircraft hijacking has become such a common occurrence that it is a menace to international aviation. For this reason, the case for granting universal jurisdiction over hijacking is today as compelling as the case for granting similar jurisdiction over piracy on the high seas. However, it seems preferable to grant by convention a limited universal jurisdiction in respect of hijacking rather than to redefine piracy to fit the new crime. In this way the jurisdiction could be clearly delineated and would not be hindered by "doctrinal controversies of the past" which are inherent in the law of piracy.⁷⁰

II.

THE TOKYO CONVENTION ON OFFENSES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT⁷¹

(THE TOKYO CONVENTION)

The Harvard Research and the International Law Commission approached the problem of piracy by defining a factual area in which international law could operate. The Tokyo Convention, on the other hand, deals with hijacking quite differently. As the title suggests, it is not purely a hijacking convention but rather it attacks the broader subject of crimes committed on board aircraft. In so doing, it only attempts to buttress the operation of national laws in this field by trying to overcome international legal problems of jurisdiction and extradition of offenders.

The measures adopted by the Convention in those areas of international law have been the subject of extensive comment.⁷² Therefore the

70. It will be seen in § C *supra* that international law has achieved this objective.

71. Tokyo Convention, [1969] 3 U.S.T. 2941, T.I.A.S. No. 6768.

72. See, e.g., Boyle & Pulsifer, *The Tokyo Convention On Offenses and certain Other Acts Committed On Board Aircraft*, 30 J. AIR L. COMM. 305 (1964); Gutierrez, *Should the Tokyo Convention of 1963 be Ratified*, 31 J. AIR L. COMM. 1 (1965); Boyle, *Jurisdiction over Crimes Committed in Flight: An International Convention*, 3 AM. CRIM. L. Q. 68, (1964-65); Fitzgerald, *The Development of International Rules Concerning Offenses and Certain Other Acts Committed On Board Aircraft*, 1 CAN. Y.B.

Convention will only be discussed in so far as it relates to the law of piracy *jure gentium*.⁷³

It has been suggested by one scholar that, under the Tokyo Convention, hijacking can be regarded as "a special, perhaps a limited, type of piracy."⁷⁴ The crux of this argument is that Article 11, paragraph 1 of the Convention obliges Contracting States to take "all appropriate measures to restore control of the hijacked aircraft to its lawful commander or to preserve his control of the aircraft." Therefore, the commentator notes, "the use of the plural in the provision, in addition to the lack of any geographical limitation on its application, indicates that this right is intended by the drafters to be exercised by every state party to the Convention."⁷⁵

It has been observed earlier that the significance of piracy *jure gentium* is that it recognizes a universal jurisdiction so that any state which captures a pirate may arrest and prosecute him. However, the Tokyo Convention allows only "universal coercive measures" to be taken against hijackers by Contracting States, for Article 11 does not speak at all to the subject of jurisdiction. When a hijacking takes place, the only opportunity that a state is likely to have to take the measures which the Article envisages is when the aircraft actually lands in its territory. If that happens, the state may arrest the offender but the Article does not authorize prosecution by that state unless the jurisdictional provisions of the Convention which are contained in Articles 3 and 4 come into effect.

Moreover, "the approach taken by [Article 11] to the crime of unlawful seizure of aircraft avoids attempting either the description of an international crime or the attempt to make such action a crime under international law."⁷⁶

Accordingly, it is submitted that the Tokyo Convention did not grant any kind of universal jurisdiction in respect of hijacking.

INT'L L. 230 (1963); Fitzgerald, *Development of International Legal Rules for the Repression of Unlawful Seizure of Aircraft*, 7 CAN. Y.B. INT'L L. 269 (1969).

73. The more recent efforts to solve the problems of jurisdiction and extradition are considered in more detail in § C *infra*.

74. Shubber, *supra* note 1, at 202.

75. *Id.* at 203.

76. Boyle & Pulsifer, *supra* note 72, at 345.

III

CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT⁷⁷

(THE HAGUE CONVENTION)

In the years following the Tokyo Convention, the International Civil Aviation Organization (ICAO) realized that the Convention did not "cover adequately" the hijacking problem.⁷⁸ In February 1969, a subcommittee of ICAO met and drew up a draft convention⁷⁹ which was amended at a subsequent meeting in October of that year.⁸⁰ Unlike the Tokyo Convention, it dealt purely with aircraft hijacking rather than the broader subject of crimes aboard aircraft. In February 1970, the ICAO Legal Committee held sessions and prepared a further draft convention⁸¹ based on the earlier work of the Subcommittee.⁸²

The Legal Committee decided to present the text to the states as a final draft⁸³ and it was then agreed that the convention would be debated at a special diplomatic conference at the Hague in December 1970.⁸⁴ The general objective of the draft conventions (and the Conference at the Hague) was "to see that the state in whose territory the hijacked aircraft has landed will . . . either prosecute the hijacker itself or else extradite him for prosecution in some other state having jurisdiction."⁸⁵

The special diplomatic conference was held at the Hague December 1-16, 1970, and approved a Convention for the Suppression of Unlawful Seizure of Aircraft (hereinafter "The Hague Convention").⁸⁶ It entered

77. Hague Convention, 10 INT'L LEG. MAT. 133 (1971), 64 DEP'T STATE BULL. 50 (1971).

78. ICAO Doc. 8838-LC/157, para 1, at 33 (1969).

79. *Id.* at 13.

80. *Id.* at 113.

81. ICAO Doc. 8877-LC/161, at 12 (1970).

82. *Id.* para. 4, at 1.

83. *Id.* para. 26, at 9.

84. INSTITUT DE DROIT INTERNATIONAL (18TH COMMISSION), HIJACKING OF AIRCRAFT 28 (Provis. Rep. & Draft Res., McWhinney, Rapporteur 1970) [hereinafter cited as McWhinney].

85. *Id.* at 28-29.

86. 10 INT'L LEG. MAT. 133 (1971), 64 DEP'T STATE BULL. 50 (1971). The Convention was signed at the Conference by the following nations: Afghanistan, Argentina, Barbados, Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Canada, China, Columbia, Costa Rica, Czechoslovakia, Denmark, El Salvador, Ethiopia, Finland, France, Gabon, Federal Republic of Germany, Ghana, Greece, Guatemala, Hungary, Indonesia, Iran, Israel, Italy, Jamaica, Japan, Luxembourg, Malaysia, Mexico, Netherlands, Panama, Philippines, Poland, Portugal, Rwanda,

into force on October 14, 1971, 30 days after ratification by the tenth signatory state.⁸⁷

Article 1 of the Hague Convention lays down a definition of the offense of hijacking in the following terms:

Any person who on board an aircraft in flight:⁸⁸

(a) Unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of, that aircraft, or attempts to perform any such act, or

(b) is an accomplice of a person who performs or attempts to perform any such act, commits an offense.

The definition is identical with that accepted by the ICAO Legal Committee⁸⁹ but should be compared with Article 11 of the Tokyo Convention which includes "an act of interference" in the wrongful conduct with respect to which states are to take coercive measures. The Legal Committee rejected a proposal to include a reference to "interference"⁹⁰ and another which would have made illegal the taking on board of firearms and other dangerous weapons.⁹¹ Commenting on the Legal Committee draft, Professor McWhinney said:

The . . . Committee . . . presumably to try to ensure as wide as possible an acceptance . . . by individual states, has therefore resisted attempts to expand the scope of the offense. . . . This generally cautious philosophy is manifest in the legal Committee's unwillingness to accept a concrete proposal . . . to give the offense described in Article 1 a specific name in the Convention.⁹²

Definitions contained in some national laws are also broader and more comprehensive than that adopted by the Hague Convention.⁹³

South Africa, Sweden, Switzerland, Thailand, Trinidad, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom, United States, Venezuela, Yugoslavia. 64 DEP'T STATE BULL. 35 (1971).

87. Hague Convention, art. 13, para. 3. Ratifications by the U.S. and Switzerland on Sept. 14, 1971 made up the required number for the convention to come into force. Instruments of ratification had previously been deposited by Japan, Bulgaria, Sweden, Costa Rica, Gabon, Hungary, Israel and Norway. 65 DEP'T STATE BULL. 371 (1971).

88. Under the Hague Convention, art. 3, para. 1, "(A)n aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation." Cf. Tokyo Convention, art. 3 (1), [1969] 3 U.S.T. 2941, T.I.A.S. No. 6768.

89. ICAO Doc. 8877-LC/161, art. 1, at 2.

90. *Id.* para. 26, at 26.

91. *Id.* para. 8, at 36.

92. McWhinney, *supra* note 84, at 4.

93. *Id.* at 4-7 sets out a list of definitions adopted by the laws of the United States, Cuba, Australia, Argentina and Brazil.

By Article 2, "each contracting state undertakes to make the offense punishable by severe penalties." The acting chief United States delegate, Mr. Rhineland, said of the provision:

We think this is important and in keeping with the grave nature of the act. The Convention throughout recognizes hijacking as a serious crime, an important step forward in the development of conventional international law.⁹⁴

Article 4 of the Convention makes a significant contribution to international principles of jurisdiction over aircraft hijacking. Paragraph 1 goes beyond the Tokyo Convention because it requires Contracting States to establish jurisdiction over hijackings committed not only on board aircraft registered in that state but also in cases in which the hijacked aircraft lands in its territory with the alleged offender still on board, regardless of the state in which the aircraft is registered. There is no geographical limitation on the exercise of the latter jurisdiction except the qualification that the offender must arrive in the state on board the hijacked aircraft.

When the Legal Committee of ICAO discussed the jurisdictional provisions of the draft convention, questions were raised about aircraft registered in one state but operated by a national of another state, or for that matter by a corporation having its head office in another state.⁹⁵ "[T]here was support for the view that the state of which the operator was a national might have a greater interest in securing the prosecution of the alleged offender than the state of registration" of the hijacked aircraft,⁹⁶ but a proposal to give jurisdiction to the state where the operator is "incorporated or established" was defeated.⁹⁷ However, the viewpoint which was rejected in the Legal Committee has been given expression in the Convention because in addition to the above jurisdictional requirements, paragraph 1 of Article 4 requires states to establish jurisdiction over offenses committed aboard leased aircraft where the lessee has his principal place of business or permanent residence in that state.

The jurisdictional provisions of Article 4 (1) are complemented by the provisions for extradition in Article 8. In many instances the state which wishes to prosecute a hijacker will find that the offender has flown the aircraft to the territory of some other state and has either been taken

94. Statement by Mr. Rhineland, 64 DEP'T STATE BULL. 51, 52 (1971).

95. ICAO Doc. 8877-LC/161, para. 11.1, at 5.

96. *Id.* para. 25, at 9.

97. *Id.* para. 11.1, at 5.

into custody or given refuge there. Provision for extradition of offenders is therefore a vital part of a convention on aircraft hijacking. In this regard, Article 8(4) requires that:

The offense shall be treated for the purpose of extradition between Contracting States as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 4, paragraph 1.

The Convention under this paragraph aims at enabling states which establish jurisdiction to obtain extradition of offenders.

However, Article 4(2) which adopts a universal criminal jurisdiction over hijacking "akin to the response of states in prior years to the threat of piracy,"⁹⁸ is not complemented by the extradition provisions of the Convention. This Article is supplementary to the jurisdictional provisions of Article 4(1) and states that:

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

This jurisdiction, unlike Article 4(1), places no qualification on the way in which the hijacker is to have arrived in a state's territory. It therefore covers the possibility that a hijacker might be apprehended in a state other than that in which the hijacked aircraft lands. Therefore, any state which captures the hijacker has jurisdiction to prosecute him. However, since there is no provision entitling a state which bases jurisdiction on Article 4(2) to treat the offense as having occurred in its territory, a state which relies solely on the universal jurisdiction granted by this Article cannot make a request for extradition of an offender in order to prosecute him. Further, if a state has detained the offender based solely on jurisdiction under Article 4(2), it will (subject to the provisions on extradition which will be considered shortly) have to grant a request for extradition if made by a state claiming jurisdiction under Article 4(1).

Article 4(3) repeats Article 3(3) of the Tokyo Convention whereby "any criminal jurisdiction exercised in accordance with national law" is not excluded, but the Hague Convention, like its Tokyo predecessor, does not offer any formula for the order of exercising jurisdiction. How-

98. Statement by Mr. Rhinelander, *supra* note 94, at 52.

ever, that problem is partially resolved by the fact that only those states which are required to establish jurisdiction under Article 4(1) obtain the benefit of the provision for extradition.

Under Article 6 of the Convention:

Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is present, *shall* take him into custody or take other measures to ensure his presence . . .⁹⁹

The rest of the paragraph and the three further paragraphs of the Article provide certain due process safeguards. The detaining state is also required by Article 6(4) to notify the state of registration of the aircraft and the state of the lessee's principal place of business or residence (but notably not the state where the aircraft may have landed) that it is holding the hijacker and "shall indicate whether it intends to exercise jurisdiction." It is possible that a hijacked aircraft may make a number of landings before the hijacker is captured and the failure to require notification of an intermediary landing state is an implicit recognition of the transient connection of that state with a hijacking incident.

Article 7 contains the key to the Convention:

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. These 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.¹⁰⁰

Thus the universal criminal jurisdiction in respect to hijacking is reinforced by an obligation incurred by the state in whose territory the hijacker is found to submit the case for prosecution. This takes a step beyond the law of piracy, under which the universal jurisdiction is "permissive" rather than obligatory.¹⁰¹

The obligation imposed by Article 7 is couched in stronger terms than in the ICAO Legal Committee's draft¹⁰² since the words "without exception whatsoever" have been added, and in addition, a state is to

99. 10 INT'L LEG. MAT. 133 (1971), 64 DEP'T STATE BULL. 50 (1971) (emphasis added).

100. *Id.* (emphasis added).

101. Harvard Research on Piracy, *supra* note 3, at 760.

102. ICAO Doc. 8877-LC/161, art. 7, at 14. It states that: "The Contracting State . . . shall, if it does not extradite the alleged offender, be obliged to submit the case to its competent authorities for their decision whether to prosecute him. These authorities shall take their decision in the same manner as in the case of other offenses."

submit the case "for the purpose of prosecution" rather than merely for a "decision whether to prosecute." However, the Article remains substantially unchanged, and it has been remarked that in the earlier draft by the Legal Committee that:

this particular objective [was] hardly attained in foolproof fashion: Article 7 throws the initiative back to the Ministry of Justice of the state in which the hijacker has compelled the aircraft to land, and the final decision as to prosecution [turned] upon the effectiveness of the national laws concerned and also upon the degree of interest in obtaining a successful prosecution on the part of the relevant national authorities.¹⁰³

That statement is equally applicable to the new Article because in any provision for national prosecution the effectiveness of national laws and, in particular, the state's interest in prosecuting the case, will always have a considerable bearing on the outcome. But if "prosecute or extradite" is to be the legal solution to hijacking, it is difficult to conceive that it could be framed in stronger terms than Article 7 of the Hague Convention. Nevertheless, with regard to that solution, there are still two important omissions from the Convention.

First, it provides only a partial answer to questions about the way in which extradition of an offender from a detaining state is to be carried out. It has been observed that provision is made for a state which asserts jurisdiction under Article 4 (1) to obtain extradition of an offender and if the detaining state fails to grant a request for extradition from a state claiming jurisdiction under Article 4 (1), it would be in breach of their extradition agreement and, as will be seen shortly, of Article 8 of the Convention. However, the Convention contains no provision governing the detaining state's order of obligations when it receives a request for extradition from more than one state entitled to assert jurisdiction under Article 4 (1). No effect was given to the United States' proposal that states should give first priority to the extradition of hijackers to the state of registration of the hijacked aircraft.¹⁰⁴

Second, in view of the obligations which states incur with regard to prosecution, the Convention should contain a statement of the rule *ne bis in idem* (rule against double jeopardy). A person who has been prosecuted in accordance with the Convention might afterwards be pres-

103. McWhinney, *supra* note 84, at 29.

104. Statement by Mr. Stevenson, 64 DEP'T STATE BULL. 50 (1971). But Article 3 (3) provides that the Convention shall apply only if the place of takeoff or actual landing of hijacked aircraft is outside the territory of the state of registration. It therefore gives implicit recognition to the primacy of the state of registration which is not accorded in the other articles of the Convention.

ent in another state which is interested in prosecuting him a second time, particularly if the first state has found him not guilty of the offense or has given a mitigated punishment. The Convention should thus protect individuals from subsequent criminal proceedings. In the ICAO Legal Committee, a proposal to include a statement of the rule was rejected. This occurred apparently because the principle is not applied in a uniform way in all states and because some states are parties to international agreements on the subject.¹⁰⁵ These reasons are unconvincing in the light of the move taken by the Hague Convention to impose international jurisdictional obligations.

The issue of extradition is dealt with by the Hague Convention in Article 8. Paragraph 1 of that Article ensures that the offense of hijacking, as defined by the Convention, will be included in extradition treaties between Contracting States and therefore imposes an obligation on a state which detains a hijacker to extradite him if an appropriate request is received. Paragraph 2 attempts to overcome the situation where no extradition treaty exists between states by providing that the state receiving an extradition request may "at its option consider this Convention as the legal basis for extradition in respect of the offense." Paragraph 3 provides that Contracting States which carry out extradition other than on the basis of a treaty shall recognize the offense defined by the Convention "as an extraditable offense between themselves." Finally, paragraph 4 of Article 8, as noted earlier, enables states which are required to establish jurisdiction under Article 4(1) to obtain extradition of offenders.

Article 8 thus serves the purpose of a multilateral extradition treaty between Contracting States, and while it may operate to facilitate extradition between them, it does not mention two exceptions usually contained in bilateral extradition treaties, namely nonextradition of nationals and political offenders. It should be observed in this regard that extradition is to be subject to "conditions provided by the law of the requested state,"¹⁰⁶ which is likely to contain provisions preventing the extradition of its own nationals and of political offenders.¹⁰⁷

The answer which some argue the Convention offers to these difficulties is that Article 7 obliges states to prosecute or extradite "without

105. ICAO Doc. 8877-LC/161, para. 23, at 8 (1970).

106. Hague Convention, art. 8, paras. 2, 3, 10 INT'L LEG. MAT. 133 (1971), 64 DEP'T STATE BULL. 50 (1971).

107. These provisions are contained in most extradition treaties. See 6 M. WHITEMAN DIGEST OF INT'L LAW 800, 865 (1968); Harvard Research in International Law, *Draft Convention on Extradition and Comments*, 29 AM. J. INT'L L. 1, 108, 124 (Supp. 1935).

exception whatsoever." However, in the original draft Convention prepared by the ICAO Subcommittee,¹⁰⁸ a majority of members took the view that under Article 8, the terms of which are similar to the adopted provisions of the Hague Convention, a state:

may refuse extradition of the alleged offender in accordance with its national law, for example where the offender was its own national or was seeking asylum from persecution or acted from political motives. . . . The Subcommittee was unanimous that . . . the requested state could refuse extradition if it considered that the request had been made for a political purpose.¹⁰⁹

The Subcommittee's view should be adopted since Article 8 does not alter the terms of existing extradition treaties except with respect to the list of crimes for which extradition is to be granted. The Convention thus does not exclude the usual exceptions of the political refugee and of nonextradition of nationals but, in those cases, leaves it to the state in whose territory the offender is found to prosecute him. Of course, this leaves certain leeway for favorable treatment of such offenders.

In addition, there is a question of interpretation: is the state obliged to prosecute at all? Article 14 of the United Nations' Universal Declaration of Human Rights provides that "everyone has the right to seek and enjoy in other countries asylum from persecution."¹¹⁰ Certainly Article 7 of the Convention allows no exception "whatsoever," but it is arguable that since the "right" of asylum is not specifically abrogated it is therefore not contravened.¹¹¹

The dilemma which the Convention faced on the issue of asylum has been well put by one commentator:

Hijacking . . . is inextricably intertwined with the notion of political offenses and the concept of asylum. . . . Hence, if an international agreement requiring extradition or prosecution is to function in deterring the forcible diversion of aircraft in flight, it must be a compromise between the preservation of the state's right to grant refuge to individuals who flee from persecution and the need to discourage hijackers. The adoption of too liberal a provision on the

108. ICAO Doc. 8838—LC/157 at 15.

109. *Id.* paras. 14, 14.1 at 21. See also Evans, *Aircraft Hijacking: Its Cause and Cure*, 63 AM. J. INT'L L. 695, 709 (1969).

110. U.N. Doc. A/811 at 71 (1948).

111. *But see* Mr. Rhinelanders' statement that "In brief, this convention deprives hijackers of asylum from prosecution. . . . My delegation believes this convention marks an important international reaction to lawless acts which, *regardless of motivation*, must be punished." Statement by Mr. Rhinelanders, *supra* note 94, at 52 (emphasis added).

issue of asylum will fail to solve the problem of hijacking, while too strict a requirement for extradition or prosecution will be unacceptable to many nations.¹¹²

But the method of compromise adopted by the Convention was to avoid specific mention of asylum and the related subject of political offenses thereby leaving unstated the circumstances in which asylum can be granted. The United States proposed "that the convention prohibit refusal of extradition on the ground that the offense of hijacking is itself a political offense"¹¹³ but no such statement was adopted.

The term "political offense" is indeed controversial and somewhat vague, but it is possible to define the type of political purposes which would justify a grant of asylum to aircraft hijackers.

A suggestion adopted from the Convention Relating to the Status of Refugees¹¹⁴ is that the obligation to prosecute or extradite offenders should not prevail when the motivation for a hijacking is "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."¹¹⁵ This formula should be adopted since the politics of the world community demand the existence of a right of states to grant asylum in "deserving" cases. The formula could be applied reciprocally¹¹⁶ by all states and international law would therefore reflect international political realities as well as a meaningful standard of justice.

CONCLUSION

The Hague Convention's embodiment of the legal controls of piracy *jure gentium* with respect to the modern crime of aircraft hijacking is important evidence of its serious attitude toward hijacking. Since the Convention grants jurisdiction to any state which may apprehend hijackers, it enables the world community to act promptly and effectively in punishing them, and should be viewed as a vital step in the development in international air law of a new and universally accepted type of piracy *jure gentium* which, if properly implemented, could sub-

112. McMahon, *Air Hijacking: Extradition as a Deterrent*, 58 *GEO. L.J.* 1135, 1150 (1970).

113. Statement by Mr. Stevenson, *supra* note 104, at 51.

114. Convention Relating to the Status of Refugees, July 28, 1951, 189 *U.N.T.S.* 150. The suggestion is made by McMahon, *supra* note 112, at 1151.

115. Convention Relating to the Status of Refugees, July 28, 1951, 189 *U.N.T.S.* 150.

116. Any standard should be capable of reciprocal application. Reeves, *Political Hijacking: What Law Applied in Peace and War*, 22 *VAND. L. REV.* 1117, 1121 (1969).

stantially deter would-be hijackers.

However, the question must still be asked whether this in itself is a sufficient answer to aircraft hijacking. The comparatively broad acceptance of the Convention ensures that in numerical terms it will be regarded as a success. Nevertheless, some important problems remain. Any international legal convention which attempts to deal with a crime motivated by such a multitude of social and political forces faces enormous obstacles to its effectiveness. Hijackers have included fleeing criminals (many of whom have sought asylum in Cuba),¹¹⁷ military deserters, matrimonial deserters, dissatisfied Cuban refugees returning to Havana, dissatisfied Americans seeking refuge in Cuba, and liberation group members (especially from the Palestine Movement) demanding political and monetary ransom for the safe return of passengers and aircraft.¹¹⁸ In many instances, the hijackers have suffered from mental disturbances.¹¹⁹ The question may well be asked how many individuals within these various groups can be deterred by the threats created by universal liability to prosecution and severe penalties.

The Hague Convention itself has some serious shortcomings. First, it does not attempt to define what shall constitute valid political motives for seeking asylum in another country. As such, the country gaining jurisdiction over an offender at the time when the aircraft touches down on its national soil has broad latitude in determining whether the hijacker shall be subject to extradition, or even punished at all. Presumably, therefore, if the hijacker heads for a country where his political views are readily accepted, he may step from the plane with less than mortal fear of the treatment he is likely to receive as a consequence of his act.

Second, the Convention is certain to operate as a multinational extradition treaty only between states which already have extradition treaties of their own. Unfortunately, the hijackings which have created the greatest international difficulty have involved states which do not have such treaties. These states may at their own option invoke the Convention as a legal basis for extradition,¹²⁰ but the fact that they have not taken steps to handle this problem on their own in the past suggests that they would be unlikely to do so.

117. Cuba, which has provided a haven for so many hijackers did not even participate in the Hague Convention.

118. Evans, *supra* note 109, at 700-701.

119. *Id.* at 701.

120. Hague Convention, art. 8, para. 2, 10 INT'L LEG. MAT. 133 (1971), 64 DEP'T STATE BULL. 50 (1971).

Third, the Convention leaves open the question of what happens if a signatory refuses to comply with its provisions. It neither gives relief to the offended state, which would be a difficult task in any event, nor does it provide sanctions against a state which fails to comply with its provisions. It has been suggested that one means of putting teeth into international hijacking conventions is to make the appropriate convention provisions an annexure to the bilateral agreement which is generally used as the basis for air transportation between two countries. If a state then failed to comply with its obligations under the annexed convention provisions, the other party to the bilateral air agreement would have the right to suspend its air operations to the offending country.¹²¹ This plan seems unlikely to gain wide international acceptance and, moreover, the states involved in a hijacking incident may not even have a bilateral air agreement. The United States, for example, does not conduct service to Cuba, nor do Israeli and Arab civil aircraft fly between each other's territory. Thus as one commentator has put it:

It is one thing to delineate the cause and to speculate about the cure of aircraft hijacking, but quite another to accomplish control of this offense in practical terms. Search of passengers and baggage, prosecution of an offender by the state of landing of a hijacked aircraft or after his extradition to the state of registration of the aircraft, and the publicizing of these controls should help to reduce the incidence of hijackings. Such methods will be effective only if there is concerted international recognition of the seriousness of this offense in the air age and determination to co-operate in its control.¹²²

Finally, it is evident that in order to "accomplish control of this offense in practical terms,"¹²³ the provisions of the Hague Convention would require reinforcement through the establishment of physical impediments in the path of potential hijackers. These measures should emphasize tighter airport security rather than in-flight controls because it is clearly more difficult for passengers to hijack an aircraft if they are prevented from carrying weapons and explosives on board, and since preventive action against an armed hijacker on an aircraft already in flight often creates more dangers than the hijacking itself.

121. Proposal of the Canadian delegation to the ICAO Extraordinary Assembly in June 1970. McWhinney, *supra* note 84, at 52.

122. Evans, *supra* note 109, at 710.

123. *Id.*

