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Recommended Citation

Jacob W. Sundberg, *Piracy: Air and Sea*, 20 DePaul L. Rev. 337 (1971)

Available at: <https://via.library.depaul.edu/law-review/vol20/iss2/2>

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PIRACY: AIR AND SEA*

JACOB W.F. SUNDBERG**

INTRODUCTION

THE STIGMA OF THE TERM

MANY contemporary problems arise from the belief that words generally, and legal terms particularly, must have an inner meaning, just like children must have parents. The truth is the opposite. Legal terms have no meaning except in relation to their practical context. The understanding of a legal term means only that one realizes how to use it in communication with others.

The terms "pirate" and "piracy" are the topic of the present investigation. Today, they carry with them a stigma ready to be exploited in a divided world characterized by agitation, propaganda and psychological deep-motivation. They are indeed invaluable assets in the game of name-calling. But do they mean anything in the legal world?

Certainly, they did not have the same stigma from the start. The Greek word "peirates" simply meant an adventurer. Adventurers are often no angels and, indeed, such a famous adventurer as Ulysses did, in perfect innocence, many things which today seem criminal.¹ Even if associated with Ulysses' most horrid deeds, however, the words are still very far away from the almost universal neg-

* This article was prepared for publication in BASSIOUNI AND NANDA (EDS.), *A TREATISE ON INTERNATIONAL CRIMINAL LAW* (in print, 1972) and is published herein with the kind permission of the author and the editors.

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1. See HOMER, *THE ODYSSEY*, Book IX, 40 (A.T. Murry ed. —).

ativism which is today coupled with them. Having developed through the years into names for exceptionally horrible people and acts, the terms have acquired such a negative emotional appeal that one is apt to question why.

Much of this appeal, presumably, comes from such books as Marryat, *The Pirate and the Three Cutters* (1830's), chapter nine of which describes in frightful detail the practices of the pirates of Captain Marryat's active days at sea. Some of the appeal, probably, has another source as well. One should not disregard the handing down through the generations of the traditions of antiquity, even if the pertinent texts of the Roman law-books only deal with the pirates' position as outlaws, depriving them of the position of the lawful enemy—*justus hostis*—who made the vanquished his slaves.² There is no special text in the Corpus Juris for the punishment of piracy. However, Cicero once said "pirata non est ex perduellium numero definitus, sed communis hostis omnium."³ This maxim, normally phrased "pirata est hostis generis humani," has definitely done much to sway judges and lawyers generally against the accused, although more lucid minds have suggested that the assertion was made "not in a way to suggest so much a constituent element of the offence as an epithet of opprobrium which the offence deserves."⁴ "Hostis humani generis," observed Tindall 1693, "is neither a definition, or as much a description of a pirate, but a rhetorical invective to show the odiousness of that crime."⁵ Stiel calls it outright nonsense: "nicht mehr als ein Flosk."⁶ Finally, one must, of course, consider the likelihood of an intense feed-back on human consciousness of the adoption and implementation by the courts of various pieces of national legislation against piracy, however defined.

WHERE IS PIRACY TO BE FOUND?

Starting with the *international agreements*, the most important

2. DIGEST 49.15.19.2; 49.15.24; 50.16.118.

3. CICERO, DE OFFICIIS, lib. III, 29 (Sabbadini ed. —).

4. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 351 (1925) [citing COKE, INST. III, c. 49; 1 WYNNE, LIFE OF JENKINS, 86; MOLLOY, DE JURE MARITIMO, Book I, c. 4, § 1 (6th ed.); 1 KENT, COMM. 171-172].

5. 12 How. St. Tr. 1269, at 1271 n. (1693).

6. DER TATBESTAND DER PIRATERIE NACH GELTENDEM VÖLKERRECHT, STAATS—UND VÖLKERRECHTLICHE ABHANDLUNGEN bd. IV heft 4 (Leipzig, 1905) 42.

place in which the term "piracy" is found today is the Convention on the High Seas, entered into on April 27, 1958 in Geneva.⁷ Article 14-22 of that Convention set a general framework for the attempts to suppress piracy. Mr. M. R. Simonnet, Vice President at the Conference, called these articles a "sorte de petite convention sur la piraterie insérée dans la convention sur la haute mer" and in his view the articles have been allowed a "place disproportionnée avec l'importance du sujet."⁸ The Geneva Convention crowned a number of efforts to arrive at an international conventional regulation of piracy which had been initiated during the days of the League of Nations. Besides these, however, use has also been made of the term "piracy" in less ambitious international agreements. The so-called "anti-piracy agreements" which were entered into in Nyon in 1937 are examples.⁹ These accords denounce as "piratical" the acts of submarines, aircraft and surface vessels in violation of the rules of naval warfare laid down in the London Naval Treaty of 1930 and the Protocol of November 6, 1936,¹⁰ setting forth the rules as to the actions of submarines with regard to merchant ships in time of war. When comparing with the instruments to which reference was made, it should be noted that the term "piracy" was added in 1937 and that the explanations for this addition varied. Lauterpacht felt that the use of the term reflected "the existing law of piracy in relation to an unprecedented situation,"¹¹ while Professor David Johnson observes that "the Nyon Conference felt compelled to introduce the word 'piracy' somehow in view of its popular use and appeal."¹² The term "piracy" was also used in a previous, though unratified treaty—the so-called Root Treaty of 1922, sometimes also referred to as the

7. 450 U.N. T.S. 11.

8. LA CONVENTION SUR LA HAUTE MER, 151 (Paris, 1966).

9. International Agreement for Collective Measures Against Piratical Attacks in the Mediterranean by Submarines, signed Sept. 14, 1937, 181 L.N.T.S. 135; and International Agreement for Collective Measures Against Piratical Attacks in the Mediterranean by Surface Vessels and Aircraft, signed Sept. 17, 1937, 181 L.N.T.S. 149.

10. Protocol concerning Rules of Submarine Warfare, 173 L.N.T.S. 353.

11. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW, 310 n. (Cambridge, 1947).

12. *Piracy in Modern International Law*, 43 TRANS. GROTIUS SOC. 63, at 84 (1957).

Washington Rules.¹³ Article III denounced certain areas of attack upon and the seizure and destruction of merchant ships and sought to provide for their punishment "as if for an act of piracy." It has been noted that "piracy" in these rules did not mean the same thing as in the Nyon Agreements 15 years later.¹⁴

The preoccupation with the term "piracy" in these international agreements must, of course, be seen in the context of the British struggle for naval power as well as in the older context of the efforts to make European powers accept having their ships visited and searched on the high seas. In the struggle for naval power, Great Britain had slipped considerably¹⁵ by accepting international law obligations through the Paris Declaration of 1856¹⁶ and the London Declaration of 1909.¹⁷ Attempting to free herself from the fetters thus cast upon her, she had no interest in allowing her enemies to make efficient use of the submarine which had turned out to be a commerce destroyer even more dangerous than the privateer once was and the suppression of privateering was part of the *quid pro quo* which England had gained in hammering out the Paris Declaration. The absence of a right to visit and search vessels of other nations was much regretted by the British when they wanted to implement the recommendation of the Vienna Peace Congress of 1815 that the slave trade be suppressed.¹⁸ As no similar obstacles were raised in relation to the suppression of piracy because the pirate of old was classed as an outlaw, it was realized that whatever could be classed as "piracy" meant rights of visit and search for British men of war, hence, the assimilations of slave trading to piracy during the 19th century. To use the notion of "piracy" to achieve results which had nothing to do with classical piracy at all became an established international practice.

13. Treaty on the Use of Submarines and Noxious Gases in Warfare, signed Feb. 6, 1922 in Washington, 1 *Papers Relating to Foreign Relations of the U.S.* 267 (1922). The denomination first mentioned is derived from the American initiator and delegate, Mr. Elihu Root. The treaty never came into force since the French refused to ratify.

14. *Supra* note 12.

15. See generally MAHAN, *Naval Warfare* in SELECTIONS FROM THE WRITINGS OF REAR ADMIRAL ALFRED T. MAHAN 328-41 (A. Westcott ed. 1919).

16. 15 *Nouveau Recueil Général* 791.

17. 7 *Nouveau Recueil Général*, 3me Série 39.

18. — v. —, 165 Eng. Rep. 1464 (1817).

Turning next to *national legislation*, Professor Bingham's excellent research team has collected, in the course of the Harvard Research in international law, English translations of most of the piracy laws of the various countries as they stood in 1932.¹⁹ Moreover, a compilation of penal provisions specifically relating to acts of unlawful seizure of aircraft was prepared for the 17th session of the Legal Committee of the International Civil Aviation Organization (ICAO) in 1970.²⁰ For such reasons it is only necessary to mention a few of the most important piracy laws in the present context.

The *British* offence of piracy at common law was never defined by statute and there was no attempt in this direction in the first relevant statute, the Offences at Sea Act of 1536.²¹ Commentators simply described the crime as the commission of those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to a felony.²² An expansion of the notion of piracy into the area of *unlawful privateering* started with the 1698 statute known as An Act For the More Effectual Suppression of Piracy.²³ Aiming at commissions (*i.e.*, letters of marque) granted by the then deposed English King, James II, the act extended piracy to cover acts of privateering by Britishers (natives or denizens) under foreign commissions against British subjects. The essence of what the Act attempted to do, however, had been done by the Lords of the Council and the Admiralty a few years before in the 1693 case involving John Golding. Golding and his men were tried as pirates, condemned, and some of them executed, for acting under James II's commission.²⁴ Another extension achieved by the 1698 Act was to convert certain acts of *mutiny* into piracy. The next extension came with the Piracy Act of 1721,²⁵ which sought to associate the black market of the pirate with his crime. It declared that persons who traded with or outfitted pirates to be themselves guilty

19. 26 Am. J. Int'l L. Supplement Part V. (1932).

20. See Working Draft No. 744-1, 17/11/69, prepared for the session.

21. 28 Hen. 8, c. 15.

22. See citations in 26 Am. J. Int'l L. Supplement Part V, 910 n.4 (1932).

23. 11 & 12 Will. 3, c.7.

24. *Supra* note 11, at 302.

25. 8 Geo. 1, c. 24.

of piracy. The Piracy Act of 1744²⁶ added little to the 1698 Act: it was mainly aimed at increasing the British war effort in the struggle with France and Spain. The Piracy Act of 1837 simply made changes as to punishments²⁷ and the Piracy Act of 1850²⁸ mainly concerned itself with rewards for those who fought pirates. A recent addition to the British legislation is the Tokyo Convention Act of 1963. It sets out to insure that British courts will not disclaim jurisdiction over "piracy committed by or against an aircraft where-ever that piracy is committed." Furthermore it contains a declaration, "for the avoidance of doubt," that the Geneva Convention provisions on piracy constitute part of the law of nations.²⁹ The British inclination to use the term piracy for achieving, indirectly, desired results in other matters will account for the reference to piracy in the Slave Trade Act of 1824³⁰ and the Treaties of Washington Act, in effect between 1922 and 1930.³¹

The *French* offence of piracy was defined in the Ordonnance de la Marine, 1681, in terms which show an intense preoccupation with *privateering*. The Ordinance attempted to enforce discipline in these matters upon French subjects and to prevent them from accepting foreign commissions. A later decree of 1798 reflected the same attitude as did a decree of 1803. The old legislation was superseded, in 1825, by the Law for the Safety of Navigation and Maritime Commerce.³² Therein, piracy was defined to include—apart from some offences connected with privateering—first in terms aimed at facilitating the policing of the seas (art. 1) and then in terms of *mutiny* (art. 4): "shall be prosecuted and condemned as pirates: 1. Every individual belonging to the crew of a French ship or vessel, who, by fraud or violence against the captain or commander, takes possession of the said vessel."

26. 18 Geo. 2, c. 30.

27. 7 Will. 4 & 1 Vict., c. 88.

28. 13 & 14 Vict., c. 26.

29. 15 Eliz. 2, c. 52, § 4.

30. 5 Geo. 4, c. 113, *see* § 9; amended by the Statute Law Revision (No. 2) Act, 51 & 52 Vict., c. 57 (1888).

31. 12 & 13 Geo. 5, c. 21, § 4; and 20 & 21 Geo. 5, c. 48.

32. J.O. 3-1 (1825), D.P. III (1825). Insofar as they refer to pirates, the provisions in this statute are believed to be still in effect, *see* du Pontavice, *La piraterie aérienne: notions et effets*, REV. GÉN. AIR 289 (1969).

The *Italian* offence of piracy was created, prior to the Union of Italy, by laws enacted from time to time by various Italian states. When the union was formed, uniform regulations for the suppression of piracy were provided in the Mercantile Marine Code of 1865 which was replaced by a new such code in 1877. Later, some articles on piracy were introduced in the successor legislation, the Code of Navigation of 1943.³³ It is noteworthy that the articles which use the term "piracy" only relate to ships, not aircraft, although the Code is drawn to cover both types of transportation. Thus, in Article 1135, the crime of piracy is defined as acts of depredation by the master or the officer of a ship to the damage of a national or foreign ship or cargo, or the commission of violence for the purpose of depredation against a person embarked on a ship. Article 1136 specifies a crime closely resembling the one defined in article 1 of the French Act of 1825 but does not call it piracy. A recent addition to the Italian legislation is the Act of December 8, 1961, No. 1658, by which Article 1135 of the Code of Navigation was adopted to the Convention on the High Seas.

The *Spanish* offence of piracy may, perhaps, be traced to the years of the Spanish and Portuguese colonial expansion in the 15th and 16th centuries. A decree by John II (1481-1495) ordered that foreign ships found in the Portuguese zone of interest should be captured and the crews drowned. Spain's exclusive rights were similarly rigorously enforced.³⁴ The union of 1582 between Portugal and Spain resulted in the consolidation of the Iberian possessions in Spanish hands. As a consequence, it seems safe to ascribe to Spain the globe's most extensive experience of fighting piracy. In modern terms, however, the Spanish offence of piracy should be traced back to the Ordinance of the Royal Spanish Navy of 1748, which provided that pirates should be punished with death as common enemies of the human race. It also provided "that vessels found navigating without legitimate letters from a sovereign or state having authority to grant the same, should be seized as lawful prize;" however, in case the

33. For a translation into English, see PLINIO MANCA, *THE ITALIAN CODE OF NAVIGATION—TRANSLATION AND COMMENTARY* (Milano, 1958). Also see Romanelli, *Sulla c.d. pirateria aerea*, *IL DIRITTO AEREO* 33-34 (1970). The Tokyo Convention was ratified pursuant to an Act of June 11, 1967, No. 468.

34. FULTON, *THE SOVEREIGNTY OF THE SEA*, 106 (Edinburgh & London, 1911).

vessel was armed for war, their masters and officers should be held as pirates.³⁵ The Spanish Criminal Code of 1848 contained extensive articles dealing with piracy (articles 156-159). Among their features one may note that black market people were to be punished as accomplices of the pirates, but that piracy committed against nations at war with Spain was not a punishable offence. The 1848 Code was replaced by a new Penal Code of 1870 which said nothing about the black market, but which extended the crime of piracy to also cover those cases when the acts were perpetrated against subjects of nations at war with Spain, provided that they were noncombatants.³⁶ Incidentally, this code remained in force in Cuba and the Phillipine Islands when they were separated from Spain.³⁷ The Spanish-American War in 1898 brought some legislation which by way of the crime of piracy, sought to restrict American privateering warfare.³⁸ When the 1870 Code, in Spain proper, was superseded by the Penal Code of 1928, the change brought an important extension of the notion of piracy. Article 252 of that Code made the articles on piracy apply also to cases when "aircraft are used as the means" of committing the crimes, "or the crimes are committed against aircraft."³⁹

In so far as the *Scandinavian* countries are concerned, it is interesting to note that while piracy was accepted as a special crime in the penal codes dating from the middle of the nineteenth century⁴⁰ it disappeared from the statute books during the twentieth century.⁴¹ While the piratical acts were still punishable, they were not regarded as piracy but as cases of robbery on navigable waters.⁴²

35. *Supra* note 19, at 1006. These provisions were reenacted in an Ordinance of 1801.

36. *Supra* note 19.

37. For an application by the supreme court of the Phillipine Islands in 1922, see *People v. Lol-Lo and Saraw*, [1919] Ann. Dig. 164.

38. Decree of April 24, 1898, Art. 7; see 1898 REV. GÉN. DR. INT., 762.

39. *Supra* note 19, at 1008.

40. In the Swedish Penal Code of 1864, piracy was mentioned as a special crime in c. 21, § 7 (for text, see *supra* note 19, at 1010). The same was true for the Danish Penal Code of 1866, § 244 (for text, see *supra* note 19, at 957).

41. Piracy as a special crime was done away with already in the Norwegian Penal Code of 1902, and the new Danish Penal Code of 1930 followed suit. The Swedish provision disappeared during the law revision which took place in 1942.

42. *Cf.* the Finnish Criminal Code, c. 31, art. 2, § 2.

In the *United States of America* the Constitution which accompanied the creation of the new nation empowered Congress to define and punish piracies⁴³—a departure from the common law approach in England. Congress set about to do so in the Crimes Act of 1790. The sections of this act were largely modeled upon the then contemporary British statutes on piracy. It may be noted that the act defined as piracy not only the normal acts arising in connection with *privateering* but also *mutiny*—the acts by which “any seaman should lay violent hands upon his commander, thereby to hinder his fighting in defence of his ship or goods committed to his trust, or should make a revolt in the ship.”⁴⁴ This assimilation of mutiny to piracy lasted until 1835 when the term piracy was taken away.⁴⁵ Otherwise, during the nineteenth century, American legislation, although sometimes overlapping (*e.g.*, the Acts of 1790 and 1820), largely paralleled that of other maritime nations.

Like the British, however, the Americans were inclined to use the term “piracy” for rather odd forms of criminal behaviours. By an Act of 1847,⁴⁶ it became possible to prosecute, in the United States, people for piracy in conformity with its treaties which declared their acts to be “piracy.” This feature should be seen in the context of the fight against the slave trade.

The federal statutes were revised in 1874 and were, also at that time, all reenacted, although there were changes in arrangement. Between that date and the enactment of the Criminal Code of 1909,⁴⁷ the only changes which took place concerned punishment. The 1909 legislation, however, only retained one provision on piracy: section 290 directed against “whoever, on the high seas, commits the crime of piracy as defined by the law of nations.” In the United States Code, no material changes were made as to piracy.⁴⁸ In 1961, however, a new subsection titled “Aircraft Piracy” was added to § 902 of the Federal Aviation Act of 1958. In this subsection the term “piracy” was defined to mean “any seizure or exercise of con-

43. U.S. CONST. art. IX, § 8.

44. 1 Stat. 114.

45. 4 Stat. 775.

46. 9 Stat. 175.

47. 35 Stat. 1088.

48. 18 U.S.C. § 481, *as amended*, 18 U.S.C. § 1651.

trol, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce."⁴⁹

A brief summary may be useful at this point. Looking at the use of the term "piracy" which has been made in the treaties and pieces of national legislation now accounted for, it may be seen that the practice of privateering has dominated the scene—unlawful privateering has been the mainstay of piracy. But it also strikes the eye that there are few inherent restrictions on the use of the term. Mutiny was as easily included as excluded and whenever a nation hoped to gain extra advantage it never hesitated except by the formula "as if" to apply the term to such bizarre things as slave trading or submarine warfare. There is nothing inherent in the term which restricts the notion to the sea; it serves several nations equally well in the skies.

WHERE ARE THE PIRATES?

One would, perhaps, believe that piracy today is an obsolete crime. That, however, is not quite true. During the last one hundred years many areas of the world have experienced the type of violence which is associated with piracy and, lately, such violence has taken on new forms which make it anything but obsolete.

The *Chinese Sea* is such an area. For a long time it was so infested with pirates that the legitimate Chinese imperial authorities were completely incapable of suppressing it. For this purpose they cooperated extensively during the mid-nineteenth century with European powers. This explains why in Bingham's collection we find special instructions, issued in 1877 by the then recently formed German Empire, for the commanders of German warships in regard to the suppression of piracy in Chinese waters.⁵⁰ Due to the chaotic state of China, however, the cooperation policy was only partly successful.⁵¹ As late as in the 1920's, Japan displayed concern over the cases of piracy in the Chinese Sea (some sixteen cases in 1926

49. 75 Stat. 466.

50. *Supra* note 19, at 969.

51. It appears to have been the European participation in this fight against Chinese pirates which inspired Paul Stiel to write his excellent little volume on the notion of piracy: *DER TATBESTAND DER PIRATERIE NACH GELTENDEM VÖLKERRECHT* (1905) (a work which still remains the best available in the field).

and fourteen in 1927).⁵² This may explain why a Japanese Professor, M. Matsuda, on January 26, 1926, signed for the League of Nations Committee of Experts a "Projet de dispositions pour la répression de la piraterie"—a draft convention with eight articles and a weighty commentary thereto.⁵³ By 1951, the situation had not grown much better. It was estimated that in that year, 42 Japanese vessels had been attacked by pirates with 267 deaths resulting.⁵⁴

In the wake of the Bolshevik Revolution in Russia, the *Black Sea* was also credited with a flare-up of piracy, as Fauchille in his treatise drew attention to some cases of attacks on French and Bulgarian ships in 1920 and 1921.⁵⁵ They were sufficient to inspire very active Roumanian participation in the League of Nations work on the codification of the law on piracy.⁵⁶

The American Prohibition of the 1920's resulted in an armada of rum ships waiting outside the three mile limit for the purpose of retailing their liquor over the rail. But it also brought forth the "hijackers" as they were known by their contemporaries—another array of ships preying upon the cashboxes of the rumships.⁵⁷ This practice was sufficiently frequent and successful as to prompt Professor Dickinson to make a deep inquiry into the problem of how the law of piracy applied to "those who engage in so-called 'hijacking' upon the seas."⁵⁸

As of late, new aerial variants of the old game have grown popular. During the last decades it has been generally realized that aircraft are almost helpless when a determined person wants to take over the command of the craft and divert it to some new destination of his own choice. Sometimes, this realization has inspired a classical robbery within a new setting. A recent flight on November 6, 1968, may be a proper illustration. The crew of the *Fokker Friendship*, en route over the Philippines and approaching the destination of

52. Pella, *La répression de la piraterie*, 15 REC. DES COURS 163 (1926).

53. LEAGUE OF NATIONS, Doc. C/196/M.70. at 119 (1927).

54. *Supra* note 8.

55. 1 FAUCHILLE, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* 93 (Paris, 1922).

56. Roumanian Draft, 1926: L.N. Doc. C/196/M.70. at 220 (1927).

57. Possibly the word "hijack" has something to do with sailors' way to hail the rum-ship: "Hi Jack!"—the origin, however, remains obscure.

58. Dickinson, *supra* note 4, at 335.

Manila International Airport, was overpowered by some passengers who turned out to be Mario Rabuya y Calleto and his gang. They robbed the passengers of some 123,109 pesos and jewelry, seriously wounded a plain-clothes policeman who attempted armed resistance, killed another passenger in the affray, and forced the pilot to taxi, after landing at the destination, to a remote corner of the airfield where the robbers escaped over the fence taking their loot with them as well as hostages selected from amongst the crew.⁵⁹ What has really brought the boom to aerial "hijacking," however, is the present state of hostility fostered by the "hot" and "cold" wars. This hostility, fostered on both sides of the Iron Curtain, put a premium on everybody who succeeded to secure his escape over the Curtain from his own camp into the other camp. From time to time, somebody escaped from Communist Europe into Austria, Switzerland or West Germany by overpowering the pilot in a flight and forcing him to reroute over the Iron Curtain. One important example thereof, was the escape of pilot Ivo Kavic and his accomplice in an airliner on October 17, 1951, diverting it from its route—Ljubljana to Belgrade—taking it to Zürich instead.⁶⁰ In the 1960's, however, a sharp increase in frequency took place, spurred on by the downfall of the Battista regime in Cuba and the creation of a new one which—as it got more and more entrenched in the Communist world camp—came to introduce European conditions in the Western hemisphere. When Fidel Castro had firmly established himself in Cuba, his supporters turned against American aviation. A sequence of four hijackings in 1961 prompted the United States Congress to amend the Federal Aviation Act of 1958 to include a provision against "aircraft piracy." Perhaps, the most spectacular of these four cases involved Pan American flight 501, a DC-8 en route between Mexico City and Guatemala City, carrying Colombia's Foreign Minister and eighty-one other passengers. This flight was hijacked by Frenchman Albert Charles Cadon in revenge for Washington's interference in the Algerian War, and brought to Cuba on August 9, 1961.

59. Rabuya was later caught by the police, tried before the criminal court, found guilty of robbery with homicide and serious physical injuries, and sentenced to death on March 6, 1970.

60. — v. —, — I.L.R. 371 (— 1952).

Another of these hijackings ended in criminal court. On August 3, 1961, one Leon Bearden and his son hijacked a Continental Airlines Boeing 707 in flight between Phoenix and El Paso in the United States and tried to force the pilot to reroute the plane to Cuba, but the pilot outsmarted him and the hijackers were eventually overpowered by the crew and a security agent on board.⁶¹

Now the strong and the violent really woke up to the new opportunities prevailing over the *Caribbean Sea*. While Judge Hutcheson in the Bearden trial had stated that "the facts of the case are bizarre," it soon grew impossible to repeat such language. All through the 1960's American airlines were from time to time diverted to Cuba to deliver some hijackers; at times even some Cuban airliners were hijacked by people desiring to go to Miami.

The rest of Latin America came to witness with increasing frequency the diversion of their airliners to odd and unplanned destinations. With over a dozen hijacked aircraft by September 1969, Colombia was the main victim and the hijackers' chosen destination was in each case, Cuba.

As time went by, even the violent around the *Mediterranean Sea* grew aware of the new opportunity. The abduction of former Congolese Prime Minister Moïse Tschombe, in an air taxi owned by Air Hanson Ltd. of London, over the high seas on June 30, 1967, introduced the game of rerouting aircraft to Arab destinations for political reasons. The Tschombe hijacking was followed by Arab hijackings of Israeli, American and Ethiopian planes and by dissident Greeks hijacking airliners belonging to Olympic Airways, the Greek flag airline.

In late 1968, there was a sudden upsurge in the frequency of hijackings which is hard to explain. During 1968, twenty-seven aircraft were diverted from their scheduled routes by threat or force. During 1969, the number of hijacking incidents reached eighty-nine. The 1968 hijackings involved 1,490 passengers, the 1969 hijackings affected 4,519 people.

61. *United States v. Bearden*, 304 F.2d 532, (— Cir. 1962); *vacated on other grounds*, 372 U.S. 252 (1963); *obstruction of commerce charge affirmed*, 320 F.2d 99 (— Cir. 19); *cert. denied*, 376 U.S. 922 (1964).

PIRACY AND WARFARE IN INTERNATIONAL LAW

A famous pirate named Dionides was caught and brought before Alexander the Great. Alexander asked him why he had arrogated to himself the empire of the seas. Dionides threw the question back: Why do you yourself sack the earth? "I am King," said Alexander, "while you are only a pirate." "What matters the name," replied Dionides. "The business is the same for both of us. Dionides ravages the ships and Alexander the empires. If the Gods had made me Alexander and had made you Dionides, perhaps I would be a better prince than you would be a good pirate."⁶²

This story from antiquity has a message for the modern world—it reveals the razor-thin edge which may separate piracy from other acts of violence. Indeed, as already noted, Homer shows clearly in his *Odyssey* that he found nothing criminal in the fact that seafarers descended on the city of Ismarus, sacked the place, destroyed the males and carried off the women and the plunder. As was pointed out by Stiel in 1905,⁶³ the attitude of the Malayan pirates sentenced to death by the British authorities in Singapore in 1858 differs little from that of King Agron of Illyria in 229 B.C.—piracy was customary and lawful under the laws of both their lands. In a certain state of innocence, there is little difference between piratical behaviour and the feuds between princes and city states.⁶⁴

Dionides, perhaps, knew his *Odyssey* only too well. Even under modern conditions, it is of limited value to approach the problem of piracy only from the side of modern, orthodox criminal law. It may be worthwhile to start from the law of warfare, although more than two thousand years separate us from Alexander and Dionides.

CAPTURE IN NAVAL AND AERIAL WARFARE

Capture of Airlines

In April 1940, when Denmark submitted to German occupation, the British found a Focke Wulff 200 Kondor airliner belonging to the Danish airline, at Shoreham. They put it through a prize pro-

62. As told in SESTIER, *LA PIRATERIE DANS L'ANTIQUITÉ*, 268 (Paris, 1880).

63. *Supra* note 6, at 30 n.1.

64. A fascinating discussion of the notion of war in the late middle ages is

ceeding pursuant to the British Prize Act of 1939,⁶⁵ and condemned it as a good prize.⁶⁶ That was, it would seem, the first case in which the rules of capture of the ancient law of naval warfare were applied to modern civilian airliners. Of course, it was an economically insignificant step in a war in which the British Prize Court in London dealt with captured ships and cargoes worth about 75 million dollars. But in the perspective of law and history it was an audacious thing to apply to the aeroplane the naval remnants of Justinian's rule "ea, quae ex hostibus capimus, iure gentium statim nostra fiunt"⁶⁷—a rule condemned on land since the signing of the Hague Convention on the laws and customs of land warfare of 1907.⁶⁸ It was also daring in view of the fact that the Americans had been most reluctant even to acknowledge that the principle should still be allowed to apply to the seas.⁶⁹ The British action prevailed, however. By adopting the American Prize Act of June 24, 1941, which also extended prize law to aircraft,⁷⁰ the Americans have indicated their complete approval of the step taken by the British.⁷¹

We are reluctant today to compare captures by pirates and the right of capture in international law. It is normal for the modern mind to react forcefully and to point out a believed fundamental dif-

offered by KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* 72, 218 (London & Toronto, 1965).

65. 2 & 3 Geo. 6, c. 63; 1939 U.S. Av. 339.

66. The prize proceeding is mentioned by SPAIGHT, *AIR POWER AND WAR RIGHTS*, 411 (3rd ed. 1947).

67. *INSTITUTES* 2.1.17.

68. 3 *Nouveau Recueil Général*, 3me Série, 461 (Art. 47 of the Rules).

69. Napoleon said in his memoirs: "Il est à désirer qu'un temps vienne où les mêmes idées libérales s'étendent sur la guerre de mer, et que les armées navales de deux puissances puissent se battre, sans donner lieu à la confiscation des navires marchands, et sans faire constituer prisonniers de guerre de simples matelots de commerce ou des passagers non militaires. Le commerce se ferait alors sur mer, entre les antions belligérantes, comme il se fait sur terre, au milieu des batailles que se livrent les armées." (3 *MÉMOIRES DE NAPOLEON*, ch. 6, at 304). A promising development towards the inviolability of private property at sea which got moving in the European wars of the 1860's, was broken in the Franco-Prussian war of 1870-71 and has not recovered since. See SALMON, *LA COURSE DÉPUIS LA DÉCLARATION DE PARIS*, (thèse) 113 (Paris, 1901); Quigley, *The American Attitude Towards Capture at Sea*, 11 *AM. J. INT'L L.* 820 (1917) and Knauth, *Prize Law Reconsidered*, 46 *COL. L. REV.* 69 (1946).

70. 55 Stat. 261, 34 U.S.C. § 1131 (Supp. 1945).

71. For further indications of approval of the principle, see Rowson, *Prize Law during the Second World War*, 24 *BRIT. Y.B. INT'L L.* 160, 212 (1947).

ference—the right of capture can only be exercised by the belligerent state while piracy is a most private business. Let us look into the distinction and see what basis there is for treating private capture as piracy.

Is Warfare Only State Business?

It was indeed one of the remarkable points in European history when Emperor Maximilian I of Hapsburg secured the passage by the Diet of Worms on August 7, 1495, of the act which prescribed “die ewige Landfriede”—the perpetual peace of the land—ending the private wars which, until then had tormented Germany in pursuance of the “Faustrecht” or the feudal right of private war.⁷² Having this as a point of departure, we must turn our attention in two directions: first, how the European view that private warfare was outlawed in international law and later became known as brigandism and; second, why this idea of war as a state exclusive privilege had a different significance in the Muslim world, since it was largely untouched by the European nations of international law.^{72a}

The European fathers of modern international law were strong in condemning the brigands who conducted their private warfare. Since the brigands did not subject themselves to established state warfare (although they might occasionally ally themselves with state forces) and did not themselves form a state, there was no necessity to declare war against them and all means were permissible in operations against them.⁷³ On one point alone the private warfare of medieval times persisted in only slightly changed forms. The daring exploits of

72. On the notion of “Landfrieden” (regional peace-compacts), see VON BAR, *A HISTORY OF CONTINENTAL CRIMINAL LAW* (1968). For some recent comments on the work at the Diet of Worms, see ANGERMEIER, *KÖNIGTUM UND LANDFRIEDE IN DEUTSCHEN SPÄTMITTELALTER* (München, 1966). On private war and the distinction between marquis and feudal war, see the chapter on Letters of Marque and Defiance, in KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* 218-38 (London & Toronto, 1965). The maritime aspects of the same phenomena are treated in the ancient but excellent work by VON MARTENS, *VERSUCH ÜBER CAPER, FEINLICHE NEHMUNGEN UND INSONDERHEIT WIEDERNEHMUNGEN. NACH DEN GESETZEN, VERTRÄGEN UND GEBRÄUCHEN DER EUROPÄISCHEN SEEMÄCHTE* (Göttingen, 1795).

72a. AL GHUNAIMI, *THE MUSLIM CONCEPTION OF INTERNATIONAL LAW AND THE WESTERN APPROACH* (1968).

73. GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, 631, 794 (Carnegie transl. 1925); GENTILI, *DE JURE BELLI LIBRI TRES*, 143-44, 199-200 (Carnegie transl. 1933); Cf. KEEN, *supra* note 72, at 246.

the Vikings certainly brought home the message that under Germanic law, as it originally stood,⁷⁴ it was altogether permissible for enterprising individuals to levy war on the world at large. It was not until the fourteenth century that such private warfare took on the aspect of privateering.⁷⁵ In the form of privateering, however, private warfare on the seas was tolerated by international law down to the Spanish government's decree of April 24, 1898: "maintenant son droit de concéder des patentes de course."⁷⁶ *Le Fur* that year claimed the privateers to be "les francs-tireurs de la mer."⁷⁷ Even after Spain, in 1908, had acceded to the Declaration of Paris of 1856 which outlawed privateering in naval war between parties to the treaty,⁷⁸ the opinion was advanced that it is perfectly possible under general international law to issue letters of marque.⁷⁹ Generally, however, it is conceded that the Seventh Hague Convention relating to the conversion of merchant ships into warships (October 18, 1907) has made the matter moot as far as the sea is concerned. Prussia's instant navy in the Franco-Prussian war of 1870-71—the "freiwillige Seewehr"—showed how to draw military resources from private shipping without violating the Declaration.⁸⁰ Remnants of the private interest in captures at sea continued even later. Prize money, an institution which the British Navy was forced to introduce as a reward to the crews of her men-of-war in order to compete with the privateers in recruiting sailors,⁸¹ worked well in both the World

74. There are provisions against piracy in book XIII, c. 20 ("Utgerbolck, Um Toftebot") in the Norwegian Gulathing Law, but this may be dated about 940 A.D. An interesting attempt to explain the Viking seige of Paris about 860 A.D. and the sacking of Mainz and Cologne by the Vikings during the same period in terms of war between Denmark and the Frankish States was made by Hegewisch, *Ueber die vermeinten seeräuberischen Unternehmungen der sogenannten Nordmänner oder Dänen wider die Franken im neunten und zehnten Jahrhundert*, in 1 HISTORISCHE, PHILOSOPHISCHE UND LITERÄRISCHE SCHRIFTEN, 33, 43 (Hamburg, 1793).

75. VON MARTENS, *supra* note 72, at 31; 1 THE BLACK BOOK OF THE ADMIRALTY, (Sir Travers Twiss ed.), 76, 430 ff (London, 1871).

76. 1898 REV. GÉN. DR. INT. 761, note Art. 4.

77. *Chronique*, 1898 REV. GÉN. DR. INT., 757.

78. 15 Nouveau Recueil Général 791; cf. Malkin, *The Inner History of the Declaration of Paris*, 8 BRIT. Y.B. INT'L 43 (1927).

79. PELLA, *La répression de la piraterie*, 15 REC. DES COURS 190 (1926-V): "la course . . . existe encore comme institution de droit international public."

80. For a full discussion, see Kriege, *Die Umwandlung von Kauffahrteischiffen in Kriegsschiffe*, 26 NIEMEYERSZ 71 (1916).

81. SMITH, THE LAW AND CUSTOM OF THE SEA 102 n.3 (3rd ed. 1959).

Wars. In the Second World War, the British Prize Court in London alone, awarded prize money to the captors of about 40 million dollars.⁸²

The Moslem world, however, was largely untouched by the European ideas of international law and, until very late, it rejected the principle that private warfare was illegal. The *Qur'an*, the sacred book of Mohammedans, was then read as supporting the notion that every Moslem could kill the infidels (other than Christians and Jews, who are the people of the book).⁸³ "Jihad", the holy war, was a duty of the individual to participate in the wars of the state. The piracy practiced by the inhabitants of the Barbary states was nothing but "la forme maritime de la guerre sainte."⁸⁴ Consequently, there could be nothing surprising in the fact that the Beys and Sultans of the time were entitled to one-fifth of the spoils of every expedition.⁸⁵ Furthermore, even if it be conceded that many times the piratical enterprise was conducted more for the sake of plunder than out of religious conviction, it would seem, as sometimes intimated by Continental writers, that much of the English and American indignation over the Barbary corsairs displays more of a lack of inner understanding of the phenomenon than it evidences moral superiority.⁸⁶

The idea that warfare is state business only has a somewhat uncomfortable place in modern international practice. It combines with the ideas of the classic European war, the ideal example of which was the Franco-Prussian War of 1870-71. It is certainly true that most of the modern conventions on warfare reflect the tactics and basic organizational concepts of a European-oriented armed force. The drafters of the Geneva Conventions of 1949 "visualized

82. Knauth, *supra* note 69, at 73; see also COLOMBOS, *INTERNATIONAL LAW OF THE SEA* 820 (6th ed. 1967).

83. THE HOLY QUR'AN c. 9 verse 5; c. 8 verses 38-39 (ed. by M.M. 'Ali, 4th ed. 1951).

84. MONLAU, *LES ETATS BARBARESQUES* 38, 121 (Paris, 1964); MÖSSNER, *DIE VÖLKERRECHTSPERSÖNLICHKEIT UND DIE VÖLKERRECHTSPRAXIS DER BARBARESKENSTAATEN, NEUE KÖLNER RECHTSWISSENSCHAFTLICHE ABHANDLUNGEN HFT 58*, 169 (Berlin, 1968); see also Bassiouni, *Islam: Concept, Law, and World Habeas Corpus*, 2 *RUTGERS · CAMDEN L. REV.* — (1969).

85. Mössner, *supra* note 84, at 169.

86. See, e.g., *supra* note 6, at 40, 70; Mössner, *supra* note 84. It is a relief to read Professor Johnson's remarks on the Barbary pirates. *Supra* note 13, at 78.

a series of relatively stable, interlocking corps fronts; the organization of the forces engaged has been presumed to follow the standardized concept, *e.g.* infantry, artillery, medical corps; the participation of guerilla or partisan bands has been presumed to be a minor adjunct of the major conflict; the civil population as a whole has been assumed to be little more than innocent bystanders."⁸⁷ The natural tendency of the man whose task it is to devise war tactics is, of course, to rely on the letter of the law in all areas where it works to the advantage of his own forces and to stress changing conditions in the areas where the letter of the law places his forces at a disadvantage. The basic assumptions of the rules of warfare here referred to clearly facilitate that type of work; we will find a particularly vicious example of it in the Maoist tactic implied by the maxim of using the people like "the sea through which the fishes swim." The tactic rides roughshod over the distinction between combatants and non-combatants when civilian fighters are ordered on the offensive; and when on the defensive, the same fighters are only termed civilian non-combatants— hence the tacticians cry out about violations of international law. The Western nations have here been caught in a trap which, indeed, they arranged themselves by allowing, since the days of the Second World War, chilly analysis to be replaced with "the generally heroic imagery used to describe anti-Nazi terrorism in German-occupied Europe."⁸⁸ Guerilla warfare which thus has passed the test of usefulness also in an international law context, is very much connected to the private warfare which was once believed suppressed. Hence it also affects the privateer. If the guerilla band can find at least some acceptance of its activity within the framework of the "compagnies franches admises dans les guerres terrestres," why should not the "francs-tireurs de la mer" find an equivalent place in the naval war effort?⁸⁹ And this is the point of entry of the aerial hijackings performed by Arab commandos emanating from the Middle East.

87. Shull, *Counterinsurgency and the Geneva Conventions—Some Practical Considerations*, 3 INTERNATIONAL LAWYER 49, 51 (1968).

88. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415, 423 (1969).

89. *Le Fur Chronique*, 1898 REV. GÉN. DR. INT. 757; *cf.* Saporta, *La guerre de course aérienne* LEMONDE, Feb. 12, 1969, at 7, col. 4-5.

Ever since the creation of the Israeli State on May 15, 1948, and perhaps even earlier the Middle East has swarmed with various military and para-military organizations with no official line of command from the sovereign states in the area. There are several "liberation" groups constituted by Palestinian refugees. The most important group is the Palestine Liberation Organization, presently presided over by Yasser Arafat. Not so important but of major interest to us, is a rival group with a Communist outlook called the Popular Front for the Liberation of Palestine and some offshoot groups from the Front. These groups have earned renown for organizing attacks on civilian airliners either belonging to the Israeli airline El-Al or otherwise connected with Israeli interests.⁹⁰ The attacks range from simple destroy missions carried out on foreign neutral territory to complete captures with solemn messages read to the people on board accompanied by a renaming of the flight or aircraft.⁹¹

It seems profitable to discuss two of these cases more closely: the hijackings of El-Al flight 426 on July 23, 1968 and of TWA flight 840 on August 29, 1969.

During the early hours of July 23, 1968, an Israeli Boeing 707, belonging to El-Al and under the command of Captain O. Abarbanel, was hijacked in flight over Sorrento in Italy by two armed men belonging to the Popular Front. They forced the pilot to abandon the flight to Tel Aviv and go down in Algiers instead. The Algerian authorities seized the plane, the crew and 12 passengers all of whom were of Israeli nationality. It was not until after six weeks of negotiations, involving the International Federation of Airline Pilots Associations (IFALPA), that Algeria gave in, restored control of the

90. *Supra* note 88, at 416 n. 2. The sabotaging of Swissair flight 303 and Austrian Airlines flight 402 on Feb. 21, 1970, is generally linked to The Popular Front (General Command) which split off from the Front in 1968.

91. Among destroy missions of European interest should be mentioned the attacks on El Al ships on the airports of Athens and Zürich-Kloten on Dec. 26, 1968, and Feb. 18, 1969. Among formal captures should be mentioned—apart from TWA flight 840 on Aug. 29, 1969, details of which are given in text—the abortive hijacking of El Al flight 435 on Feb. 10, 1970. In the debris of the Munich airport bus which blew up when bringing the passengers to the aircraft it was found a message to be read to the people on board: "In the name of the Palestine revolution, we are seizing this airplane and renaming it Palestine II." (International Herald Tribune Feb. 13, 1970, at 2 col. 3). Black Panthers in the United States were linked to the same technique in the hijacking of a National Airlines flight 186 on Nov. 4, 1968, the aircraft being renamed "Republic of New Africa."

aircraft to the owners and permitted passengers and crew to continue their journey.

On August 29, 1969, an American Boeing 707, belonging to Trans World Airlines and under the command of Captain D. Carter, was hijacked in flight probably over the Ionian Sea,⁹² en route to Athens by two armed persons—probably females,⁹³ belonging to the Popular Front. They renamed the flight "Popular Front-1" and made the pilot reroute, first towards Tel Aviv, then towards Beirut, and finally towards Damascus where the aircraft eventually landed. After the landing the hijackers planted bombs which blew off the cockpit from the ship and announced that the hijacking was in retaliation for the three-day old American-Israeli deal involving the delivery of American Phantom jets for the Israeli military forces.⁹⁴ The Syrian authorities, however, allowed the American owners to repair the aircraft: a replacement cockpit was brought to Syria, repairs were completed about ten weeks later and the aircraft left Syria for the United States. Most of the passengers were allowed to continue their journey but two of the fourteen Israeli passengers were held by Syria, apparently in view of their importance. After 99 days they were exchanged for a number of Arab prisoners of war in Israel in a complicated three-power move sponsored by the International Red Cross.

These two cases have never been satisfactorily explained, by the popular front nor by the Arab States who are not inclined to elaborate on their roles in this context. Guerilla organizations are probably poorly equipped in the technical knowledge of the rights and duties of belligerents in a legal context.

In making a case for the Arab practice a number of points should be stressed: First, the aircraft captured were enemy aircraft or aircraft linked with unneutral service in the Arab-Israeli struggle. Second, the Israeli aircraft belonged to El-Al which is a governmental corporation and its aircraft may thus be considered

92. The aircraft was reported hijacked 1½ hours after take-off from Rome which would seem to place it somewhere over the Ionian Sea.

93. Names given are Shadia Abu Ghazaal, head of the Front's "Guevara unit," and Leila Khaled.

94. International Herald Tribune, Nov. 13, 1969, at 5, col. 4; see also, e.g., Bassiouni & Fisher, *The Arab-Israeli Conflict*, 44 ST. JOHN'S L. REV. 399 (1970), and Bassiouni, *The "Middle East": The Misunderstood Conflict*, 19 KANSAS L. REV. 373 (1971).

State property. Third, El-Al aircraft are believed to carry war materials; they certainly carry contraband cargoes if the contraband lists of the Second World War are made to apply. Fourth, any Arab state involved in the struggle against Israel should be entitled to declare captured aircraft to be good prize. Indeed, Egypt back in 1949 set up a Prize Court in Alexandria⁹⁵ which has functioned ever since⁹⁶ and which certainly could also perform in relation to aircraft. Fifth, it is possible that the Front itself might be entitled to capture. It is recalled that the Free French forces in the Second World War issued, in 1943, a decree constituting a prize court for the territories under their control. In rendering its decision in the *Liguria*, the court upheld the right of the forces to effect seizures.⁹⁷ Sixth, the decree of the prize court was in any case not material to the right of capture, but only to the title acquired by a neutral purchaser of the captured craft or cargo. Finally, it is an established maritime practice, at least since the days of the Confederate privateers which due to the Union blockade could not hope to bring their prizes to a prize court back home, that prizes which cannot be used—put up for sale or otherwise—are simply destroyed at sea. The blowing up of an enemy airliner under similar conditions should not violate any principle of privateering.

Upon closer scrutiny, however, the position of the Arab commandos cannot satisfy the principles of the orthodox, European-oriented law of war. It fails on two principal counts: belligerency and private warfare.

It is extremely hard to say from U.N. documents whether the Arab states are belligerents, that is to say, are at war with Israel or not. Stalder claims that the Algerian refusal to restore control of the El-Al aircraft to its owners was only an act of war ("ein Kriegsakt") and explains that Algeria officially considered herself at war with Israel.⁹⁸ Professor Paul de LaPradelle takes the opposite view and states that "a aucun moment les autorités algériennes n'ont prétendu en effet

95. Military Proclamation No. 38 of July 9, 1948. For the text of this proclamation, see 5 REV. EGYPT 319 (1949). See further Safwat Bey, *The Egyptian Prize Court: Organization and Procedure*, 5 REV. EGYPT 28-33 (1949).

96. See, e.g., the *Inge Toft*, 31 I.L.R. 251 (1960).

97. Rowson, *supra* note 71, at 164, 173.

98. Stalder, *Die Luftpiraterie in rechtlicher Sicht*, 1969 ZLR 153.

placer l'affaire dans le champs d'application des lois de la guerre."⁹⁹ The cease-fire of June 10, 1967, is crucial. Algeria was never made to sign it and according to Julius Stone it "seems to be claiming a position of active belligerence despite the cease-fire."¹⁰⁰ It has turned out, however, to be impossible to get an official statement on the point.¹⁰¹ Syria, on the other hand, where the Trans World Airlines flight 840 finally landed, signed the cease-fire. But while Algeria did not exist as a sovereign state when Israel achieved statehood, Syria was made a sovereign state a few days ahead of Israel and claims to be engaged in a war of self-defence against Israel since the latter's creation. Besides the grounds which, thus, may exist to doubt that Algeria was a belligerent at all, she probably had other good reasons for not claiming belligerent rights in the El-Al affair. The El-Al flight was, after all, captured over Italian territory and could thus involve Algeria in a violation of the territorial sovereignty of Italy. Furthermore, Algeria's Security Council role as supervisor of the cease-fire between her allies and her enemy was too good to be compromised by ostentatious reminders of her own part in the conflict. Syria was even more cautious than Algeria in her handling of the captured flight. As to the Israeli passengers, it must be noted that once they were in Syria's territorial jurisdiction, it was only normal modern state practice to detain them.¹⁰² Even the Tokyo Convention of 1963¹⁰³ reserves to the territorial state "any criminal jurisdiction exercised in accordance with national law" (article 3, paragraph 3). Even if Syria had been bound by that Convention, she could not have been reproached unless she had turned out to be unable to build some kind of criminal case against the foreign intruders.

99. de la Pradelle, *Les détournements d'aéronefs et le droit international*, REV. GÉN. AIR 250, 258 (1969).

100. NO PEACE—NO WAR IN THE MIDDLE EAST, 6 (Sydney, 1969); cf. Bassiouni, *supra* note 94.

101. The author's personal call upon the Algerian Embassy in Stockholm on Nov. 21, 1969, resulted in much discussion but failed to produce any official statement as to the Algerian position on the war question. Indeed, the writer was formally forbidden to use what had been said or referred to as an official statement that "guerre ouverte" persisted between Algeria and Israel. Some of the reluctance to show colours may perhaps be attributed to the fact that Algeria occupied a seat in the Security Council supervising the cease-fire between the Algerian allies, Syria, Jordan and Egypt, on the one hand, and Israel, Algeria's enemy, on the other hand.

102. See text *infra* at —.

103. [—] —U.S.T. —, T.I.A.S. No. 6768.

Even if Algeria and Syria had claimed belligerent rights, however, the private guerilla organizations could not have benefitted therefrom. If the Free French could capture enemy and neutral vessels, it was because they were recognized as belligerents at least by their allies. But this is not at all the case with the Palestine organizations. First of all, the Arab governments have been quite eager to dissociate themselves from the acts of the private warring factions active in their territories; neither Algeria, nor Syria has wanted to benefit from the implied responsibility for, the particular hijacking acts of the Front. Secondly, even if one assumes that the Front and other private warring factions are insurgents which have *de facto* deprived the Arab governments of part of their sovereignty (where they cannot implement their decisions due to the resistance of the guerillas), this is no substitute for the recognition as a belligerent. Failing such a recognition, they cannot exercise the right of capture on, or over, the international sea. Legally speaking, they do so at their peril.

It remains to qualify, legally, the captures of airliners by the Arab commandos. Acts committed in the course of a privateering expedition but in violation of the international law of warfare have long been considered to be acts of piracy. "If any private subject cruise against the enemy without [lawful] . . . commission, they are liable to be treated as pirates," said Croke in the *Curlew* in 1812.¹⁰⁴ The advent of the Paris Declaration, 1856,¹⁰⁵ did not change this situation. The result was simply that from then on *all* acts of privateering could be classed as piracy when performed by somebody bound by the Declaration. When the Turco-Greek war broke out in 1897, and both states had acceded to the Declaration, it was noted by Politis that each could treat the privateers of the other as pirates.¹⁰⁶ The Spanish decree of April 24, 1898, directed in Article 7 that non-American vessels committing acts of war against Spain should be treated as pirates.¹⁰⁷ In the instructions given by the French naval authorities in January 1916, all people serving on board privateer vessels commissioned in violation of the Declaration

104. (1812) STEW. ADM. 312, 326.

105. 15 Nouveau Recueil Général 791.

106. *Chronique*, 1897 REV. GÉN. DR. INT. 695.

107. 1898 REV. GÉN. DR. INT. 762.

were qualified as "passibles des peines prévues pour le crime de piraterie."¹⁰⁸ It is therefore, not surprising that the British definition of piracy remained very broad. The Privy Council, in 1934, defined it as "any armed violence at sea which is not a lawful act of war."¹⁰⁹ In the 1967 edition of the well known British textbook by Colombos, the definition includes "acts of violence done on the high seas, without recognized authority and outside the jurisdiction of any civilized state."¹¹⁰ To this extent, there is evidently ample support for the charge that the Arab commandos are engaging in aerial piracy.

This classification, of course, has been bitterly resented by the Arabs. In 1969 the Jordanian delegate at the United Nations succeeded, when this organization was to debate the problem of hijackings, in getting the word "piracy" stricken from the headline. The matter was renamed "forcible diversion of civil aircraft in flight." He then relied on the definition of piracy given in the Geneva Convention on the High Seas (1958)¹¹¹ which also included aerial piracy. According to this definition, it could not be piracy unless it was "committed for private ends" and he felt entitled to conclude that "piracy is connected with robbery and looting for personal gain." When judging the merits of this contention, it is well, perhaps, first to recall that the Eastern bloc nations bitterly opposed the restrictions introduced by the Geneva Conference relative to the scope of the notion of piracy. The apparent reason was that the Soviets wanted to condemn the naval warfare of the Nationalists on Formosa. These nations even attached declarations to their signatures which amounted to reservations on the point of definition. In the West, it has been contended that such reservations are null and void.¹¹² It does not seem to be contested, however, that the Geneva Convention does not

108. Art. 117. The text is reproduced from Lauterpacht, *Insurrection et piraterie*, 1939 REV. GÉN. DR. INT. 513, 524; however, the text here relates the instructions to the French rather than the American authorities in accordance with Lauterpacht's own correction of the matter as expressed in his RECOGNITION IN INTERNATIONAL LAW, *supra* note 11, at 306.

109. [1934] A.C. 586 ().

110. Colombos, *supra* note 82, at 444.

111. 450 U.N.T.S. 11 (Art. 15). The mistake that the Geneva Convention controls all aspects of piracy is a widespread one. See e.g. Poulantzas, *Hijacking or air piracy*, NEDERLANDS JURISTENBLAD (1970).

112. *Supra* note 8, at 219.

affect claims and actions which rest on the rules of warfare, not even those based on the right of self-defence.¹¹³ This is so in spite of the fact that the Convention lacks the clause, otherwise prevalent, to the effect that it does not affect the rights of belligerents. Consequently, there would seem to be little need for a reservation in order to make unlawful privateering piracy.

Thus, the net effect of the Geneva Convention would seem to be highly inimical to neutrals. They are in difficulty if they want to check abuses of the laws of war directed against their commerce, due to the provisions of the Convention, because the Convention in no way checks the powers of warring factions. Such a state of the law is best described in the formula of Sir Austen Chamberlain: "a trap for the innocent and a sign-post for the guilty."¹¹⁴

*Does its Capture by State Purge it of
Piractical Character?*

Oppenheim used to say that "private vessels only can commit piracy . . . A man-of-war or other public ship, as long as she remains such, is never a pirate. If she commits unjustified acts of violence, redress must be asked from her flag state."¹¹⁵ Similarly W.E. Hall stated: "'Piracy' includes acts differing much from each other in kind and in moral value; but one thing they all have in common: they are done under conditions which render it impossible or unfair to hold any state responsible for their commission."¹¹⁶ And Roxburgh, who edited Oppenheim's treatise after his death, explained that "piracy is a crime which cannot be committed by the authority of any state" because only thereby is it avoided that piracy will "give rise to diplomatic complications."¹¹⁷ There are, in addition, several reasons why this should be so, apart from the argument put forward by Roxburgh.

One is the idea that international law, in general, and war, in par-

113. *Supra* note 8, at 202.

114. House of Commons, Nov. 24, 1927 (relative to the definition of "aggression").

115. 1 OPPENHEIM, *INTERNATIONAL LAW*, 341, § 273 (2d ed. 1912).

116. HALL, *INTERNATIONAL LAW*, 310 § 81 (8th ed. 1924).

117. Roxburgh, *Submarines at the Washington Conference*, 3 BRIT. Y.B. INT'L L. 150, 155 (1923).

particular, are matters between states only. This was the temporarily successful idea of the enlightenment to which, as Talleyrand explained it to Emperor Napoleon I (Bonaparte), "Europe is indebted for the maintenance and increase of its property even amidst the frequent wars that have divided it."¹¹⁸ As furthered by Jean Jacques Rousseau and others¹¹⁹ this was the idea which made the more humane treatment of prisoners of war possible.¹²⁰ Consequently, redress for acts of war should be sought from the belligerent country and not from the individuals, and this principle applied *a fortiori* when violent acts short of war were ordered by one state against another. In this context it is easy to understand the American attitude in the *McLeod* case of the 1840's.

In that case, the American authorities had allowed the gathering, in 1837, on American territory of what later came to be known as a filibuster expedition into Canada which at that time was in a state of rebellion against the British rule. The filibusters planned to enter Canada by means of a tiny steamer called *Caroline* and British forces kept matters under supervision from the Canadian shore. On the night commencing December 29, an expeditionary force under the command of Captain Drew surprised the filibusters on the American side, cut loose the steamer from the dock, set her on fire and sent her over Niagara Falls. The filibusters and their sympathizers grew wildly indignant about this energetic action in violation of the sanctity of American soil and when, in 1840, Alexander McLeod visited New York on business and happened to boast about his participation in the British expedition, he was arrested and indicted for the killing of the two Americans who had lost their lives in the nightly affray. The diplomatic exchange between Great Britain and the United States which resulted from this incident prompted Daniel Webster, the American Secretary of State, to explain the American attitude to be that "after the avowal of the transaction [*i.e.*, Captain

118. *Moniteur Universel*, Dec. 5, 1806, No. 339, at 1462, col. 2 (signed Berlin, Nov. 20, 1806) (as translated by Bartlett, *Liability for Official War Crimes*, 35 *Law Q. Rev.* 178 (1919)).

119. 1 *CONTRAT SOCIAL*, — (— ed. —).

120. It is a peculiar twist of history that today, when war is as total as the government being fought against, and consequently the basis of the privileged treatment of prisoners of war has totally disappeared, the privilege as such is still capable to rally enthusiastic support in countries of the Western, non-Communist type.

Drew's expedition] as a public transaction, authorized and undertaken by the British authorities, individuals concerned in it ought not . . . to be holden personally responsible in the ordinary tribunals for their participation in it."¹²¹

This doctrine that a formal State commission purges the act committed of its criminality under the laws of the state at the receiving end, has found restatement even after the Second World War in treatises¹²² and cases. Among the latter should be noted the case of *Hanswolf von Herder*, decided by the Swedish Supreme Court in 1946.¹²³ Von Herder was a German citizen and was called up for military service during the Second World War. As an ordinary soldier he was assigned to the German "Abwehr" in occupied Norway and was there given military intelligence work directed against Sweden. When Germany lost the war, von Herder took refuge in Sweden, was arrested and tried for espionage. Eventually, he was acquitted but expelled from Sweden. Lotika Sarkar explains the outcome of the case in terms of the court "adhering to the territorial principle," referring thereby to the fact that the intelligence work had been carried out in Norway.¹²⁴ Professor Gihl, however, considers it difficult to find any reason for the acquittal other "than the fact that von Herder was an officer and had carried out the activity in question in the course of his duties." Having this for a point of departure, Gihl indeed considers that it was unlawful for the Russians to convict Francis Powers in September 1960 for espionage consisting of his flying over Russian territory with an American military U-2 plane for the purpose of collecting information.¹²⁵ Powers

121. GIHL, *Who is a Spy?*, LEGAL ESSAYS—A TRIBUTE TO FREDERIK CASTBERG, 230, 235 (OSLO, NORWAY, 1963). For a detailed account of the case, see Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

122. See, e.g., VERDROSS, *VÖLKERRECHT*, 235 (5th ed. Vienna, 1964); Kelsen & Tucker, *PRINCIPLES OF INTERNATIONAL LAW*, 358 (2d ed. 1966).

123. *Von Herder v. Public Prosecutor*, *Nytt Juridiskt Arkiv*, 65 (1946); [1946] Ann. Dig. 95.

124. Sarkar, *The Proper Law of Crime*, 11 INT. & COM. L.Q. 446, 452 (1952); also published in MUELLER & WISE, *INTERNATIONAL CRIMINAL LAW*, 50, 56 (1965).

125. *Supra* note 121, at 234, 235. Before he was charged with the Chair in International Law in Stockholm, Professor Gihl was legal counsel to the Swedish Foreign Office and served in that capacity during the second world war. It is probably a complete mistake to ascribe the outcome of the Herder Case to "the territorial principle" and the reasons will be set out more fully below.

came down in uniform, his aircraft had U.S. markings and the United States officially announced that he had been flying under U.S. orders. Consequently, there was no question about the United States not being responsible for the violation of Soviet territory. But, concludes Professor Gihl: "The United States Government and Powers could not both be responsible at the same time."¹²⁶

A position such as that which Webster took in the *McLeod* case also fits in well with the general expositions of the so-called "act of state" doctrine as stated in the American case *Underhill v. Hernandez*.¹²⁷ The doctrine means that "every sovereign state is bound to respect the independence of every other sovereign, and the courts of one country will not sit in judgment on the acts of another government done within its own territory." Indeed, the national court lacks competence to pronounce upon the legality of an act performed by a foreign state and unless the foreign state consents to such a pronouncement, the act must be taken as a fact.¹²⁸

This attitude toward foreign states, however, has not fared well in the development which has taken place in this century.¹²⁹ Indeed, the general return, to the idea of a *bellum iustum* has dispelled the classic European notion of the *iustus hostis* and the fatefully total victories of the one side in the two world wars have allowed the new doctrine to work unfettered of the restraint which the resources of the opposing nations otherwise normally will impose on the victors. The inclination has been to view the world at large in the light of the law as conceived back home and to inflict upon the individuals revenge for law-breaking which could not be satisfied by dealing with the state. One of the principal instruments in so doing has been the setting aside of the defence of *obedience to superior orders*.^{129a} It is ironic that most countries which have participated in this turning of the tables, are given to proclaim, as a matter of course, that in case

126. *Id.* at 240.

127. 168 U.S. 250 (1897).

128. See generally Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826 (1959); Van Panhuys, *In the Borderland Between the Act of State Doctrine and Questions of Jurisdictional Immunities*, 13 INT. & COMP. L.Q. 1193 (1964).

129. For previous criticism of the idea that an act cannot be piratical if done under state authority, see *Magellan Pirates*, 1 SPINK'S ECCL. & ADM. REP. 81 (1965) (*decided by Lushington*).

129a. See DINSTEN, *OBEDIENCE TO SUPERIOR ORDER* (1965).

of an unavoidable conflict between a rule of the law of nations and the municipal law of the country in question, the courts should defer to the supreme authority from which they derive their own powers¹³⁰ and apply the municipal law. Indignation over enemy warfare and the conviction that the enemy's governmental officials would escape punishment, if it were left to their own governments to try them, have contributed to the opposite conclusion in matters of political conflict: international law as interpreted back home takes precedence over the municipal law and orders of the government which the accused had to obey.

The development in this direction was particularly spurred on by pronouncements by the victors' tribunals after the Second World War and the support which these pronouncements subsequently received from the United Nations, at that time re-organized as a world organization. It may not be profitable, however, to discuss those pronouncements themselves but would rather be more appropriate to discuss subsequent applications of them in a setting without victors and vanquished.

When the Indonesians, in pursuance of the policy to try to change the status of New Guinea, in May 1953, sent a party of Indonesian soldiers with arms and munitions to land on the coast of the Dutch part of the island and build a strong point there, they were made prisoners by Dutch forces and brought to trial according to Dutch criminal law for having attempted to bring Dutch territory under foreign domination. The local Dutch court convicted them of this crime holding that "the prisoners cannot have thought in good faith that an Indonesian commander would be competent to give an order for an assault intended to bring Netherlands New Guinea under Indonesian rule."¹³¹ Accepting that it was a lesser evil to be put in jail by the Dutch after legalistic rites than to be shot by them in battle, the soldiers presumably resigned themselves to this judgment. It must have been a matter of bitter surprise for the Dutch court, however, about a decade later, to read in the resolutions of the Confer-

130. SMITH, *THE LAW AND CUSTOM OF THE SEA*, 209 (3rd ed. 1959). An elaborate study of the enforcement of international law in the courts of Germany, Switzerland, France and Belgium down to the 1930's is offered by MASTER'S, *INTERNATIONAL LAW IN INTERNATIONAL COURTS* (1932).

131. Raad van Justitie March 9, 1955, 3 N.T.I.R. 164 (1956).

ence of Non-Aligned Countries, assembled in Cairo in 1964, that the participants had undertaken to render all necessary support to people struggling against "colonialism and neo-colonialism." Apparently, it was only when the soldiers had been made prisoners by the Dutch that their behaviour was unlawful; under the international law as interpreted by a great number of independent states it was completely lawful.¹³²

It has been asserted that the military U-2 pilot with military orders to fly over the territory of another country could lawfully be tried by that other country for whatever violation of domestic law of the latter country which had taken place.¹³³ Obviously, the Dutch case seriously questions the wisdom of that statement.

As long as we have to face the fact that political conflict will eventually be settled by arms and since the post-war period has experienced about as many armed conflicts as did the mid-war period there is little reason to believe that the prospects of peace have been much furthered by the advent of the "peace-loving" United Nations. And if we are to accept the notion that war may be ended otherwise than by total victory, it would seem that the Act of State doctrine is a much sounder basis for solution than the *bellum iustum* theory.¹³⁴

132. Green, *New States in International Law*, 4 ISRAEL L. REV. 27, 46 (19). Green adds: "The attitude adopted by the African [*i.e.* Arab and Negro states in Africa] States suggests that they regard their belief in 'African' self-government above the obligation imposed upon them by their membership in the United Nations to 'live together in peace with one another as good neighbors . . . to ensure . . . that armed force shall not be used . . . [and to] refrain in their international relations from the threat or use of force against the territorial integrity or independence of any State'."

133. Wright, *Legal Aspects of the U-2 Incident*, 54 AM. J. INT'L L. 836 (1960).

134. Suffice it to point out that the otherwise able discussion of these matters in DINSTEN, *THE DEFENCE OF OBEDIENCE TO SUPERIOR ORDERS IN INTERNATIONAL LAW* (Leyden, 1965), seems to build on a misunderstanding of the interrelationship between armed force and state structure. Certainly it is not true that "the security of the international community is not dependent upon the existence of efficient and disciplined national armies." *Id.* at 21. On the contrary, the existence of the very states which form the international community is in each particular case dependent upon the existence of armed power within each state, normally in the form of the national armed forces. See OLIVECRONA, *RÄTTSDÖRNING. I DÉER OCH FAKTA*, 15, 262 (Lund, 1966): "Military power and police are attributes exclusively belonging to the State. That is their mark of distinction. . . . [T]he whole configuration of the world is dependent upon the existence of a number of different military organizations [T]he monopolization of armed' power is a precondition for organized government, for legislation, adjudication and administration. . . . The monopolization of armed power and by that the powers to exercise violence at a

It does not seem necessary though, for the purposes of this discussion to dwell more on the demise of the Act of State doctrine in the wake of dismissing the plea of obedience to superior orders. It is sufficient to conclude that a broad sector of contemporary legal thinking is perfectly prepared to hold the individual responsible as well as the state. To this extent, there is, therefore, no longer any bar to treating as pirates the agents of displeasing or obnoxious states.

Perhaps it is useful to recall, here, that the idea of *bellum iustum* worked equally to confuse all issues in the case of the *Barbary Corsairs*. While little doubt could be entertained that these (Barbary) areas were more or less independent parts of the Ottoman Empire (except Morocco which was altogether independent and sovereign) most Christian nations felt entitled to look independently upon the question of piracy: "The Barbary Corsair was a pirate, and no one doubted the fact."¹³⁵ Furthermore, "on the whole in the long history of North African piracy the pirates received short shrift whenever the opportunity occurred." There is a ready explanation for this apparent departure from the general idea that "an act cannot be piratical if it is done under the authority of a state,"¹³⁶ and that is the idea of a *bellum iustum*. That the Barbary sailors themselves were waging a holy war on Christianity has already been mentioned, but let it not be forgotten that Christian nations were waging a holy war on the infidels as well.¹³⁷ The Laws of Oleron equalize the lot of pirates and infidels: they are both subject to the extreme rights of war.¹³⁸ Francisco de Vitoria, in the sixteenth century, fa-

greater scale is generally a precondition for organized societal life and for a higher culture. It is an erroneous idea that violence could be abolished and that the law should rule in sovereign majesty. To abolish all violence would be to abolish the military organizations of the State. But this would open the road to anarchy. The setting up of new armed organizations cannot be prevented by mere disuasion." (Author's transl.).

135. de Montmorency, *Piracy and the Barbary Corsairs*, 35 LAW Q. REV. 133, 141 (1919).

136. BRIERLY, *THE LAW OF NATIONS*, 241 (5th ed. 1955). Even Sir Edward Coke conceded that enemies could never commit piracy within the meaning of 28 HEN. 8, c. 15, see *INSTITUTES* 4th Part, 153.

137. An account of the state of war between the Barbary States and the Christian States will be found in Stiel, *supra* note 6, at 39 n.2. de Montmorency gives a superficial account of peace treaties between the contestants mainly based on JEAN DUMONT, *CORPS UNIVERSEL DIPLOMATIQUE DU DROIT DES GENS* (8 vols., Amsterdam, 1726-31), see *supra* note 135.

138. § 45.

voured almost any form of warfare so long as the victims were the infidels, however illegal such acts would be between Christians.¹³⁹ Peace was a rare condition indeed and it seldom troubled the Sovereign Military Order of St. John of Jerusalem—an order of knighthood for 1113 A.D., the members of which since 1120 A.D. made a fourth monastic vow to fight against the infidels. Since 1530 this order sat on the island of Malta “pour . . . qu'ils puissent . . . employer leurs forces et leurs armes contre les perfides ennemis de la sainte foi” as it was put in Emperor Charles V's Instrument of Donation. The interpretation has been advanced that the gift of the island was made in return for a pledge to perpetually fight the Moslems, the Turks and the Pirates.¹⁴⁰ There is, consequently, ample support for the view that the relationship between European nations and the Barbary states was essentially one of warfare, indeed, a warfare unfettered by the intra-European law of nations.¹⁴¹ Consequently, it is believed that the views taken toward treatment of the corsairs of the Barbary States are really of little significance for the law or piracy.

Is Capture by Insurgents Piratical in Character?

Turning now to the case of insurgents we find that theirs is a case of ever growing importance as the likely disorders of the future are not war or military attack between states but subversion, revolution, insurrection and civil war.¹⁴²

139. See, e.g., DE IURE BELLI, 42 (1539) (only massacres on children appear to be excepted, see DE IURE BELLI, 38).

140. As to the state of war generally, see *supra* note 137. On the perpetual war, see HEGEWISCH, Erläuterung der Frage: “Ist es recht, dass wir die Algerier und Tripolitaner Seeräuber nennen?”, HISTORISCHE, PHILOSOPHISCHE UND LITERARISCHE SCHRIFTEN 18, 21 (Hamburg, 1793).

141. Perhaps this statement even may be permitted to cover the final outburst of Barbary piracy in the 1890's, when one of the Moroccan tribes in the Riff area suddenly started to practice it on European vessels. The affairs of the *Anna*, the *Prosper-Corin* and the *Jones-Enrique* appear indeed to be the dying convulsions of the savage era. Cf. *supra* note 106, at 425.

142. The United Nations Charter bars conquest from the outside (Art. 2, para. 4) but—like traditional international law—it does not bar or even address itself to revolution within, whether by constitutional means or by force. See Henkin, *Force, Intervention, and Neutrality in Contemporary International Law*, (1963) PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, 154. It is but natural that tactical and political experts of governments, anticipating a pay-off of lip service to the Charter, will advise force to be applied in furtherance of political aims in the manner not outlawed by the Charter.

There have been few uprisings in the course of which the legitimate government has not attempted to brand the insurgent vessels as pirates. There is not much difference to be seen between the British Parliament declaring, on the outbreak of the American revolution, all ships operating in the service of the rebels to be pirates, and the Spanish legitimate government decreeing on July 27, 1936, the Nationalist cruiser *Almirante Cervera* to be a pirate ship which should be treated according to the international law of piracy.¹⁴³ Indeed, even the tiny little steamer *Caroline*, active in the abortive American filibuster expedition against Canada of 1837, was branded by the British to be of "piratical character."¹⁴⁴

From the point of view of the legitimate government, the situation is normally quite simple, legally speaking. An armed rebel attracts the full weight of the state's penal law. He stands condemned of the most heinous of domestic crimes—treason. As long as the normal apparatus of judicial enforcement is effective, the government will usually also act within the framework of the municipal law rather than enhancing the status of the insurgents by recognizing them as belligerents. Even if the rebels have a measure of success (naturally by methods which are both clandestine and violent and consequently criminal from the governmental point of view, and which strain the judicial and police apparatus), the government is likely to stick to the same approach. However, in the end, if the rebels' success is sufficient, the government will have to switch from the domestic law approach to the law of warfare and perhaps, too, to peaceful recognition of a new state of law. This brings the qualification as piracy to the forefront, for the criminality of the piracy is likely to change in the same way: from crime, to capture under the law of naval warfare, to peaceful requisition at whatever price the rebel leadership finds useful to pay.

A useful example of this development is offered by the American Civil War. When the war broke out practically the whole regular navy was in Union hands. The Confederates, consequently, had to

143. Gaceta de Madrid for July 27, 1936, col. —, —, reproduced in GENET, *DROIT MARITIME POUR LE TEMP DE GUERRE*, 185 n. 270 (1937) (some excerpts translated to English will be found in Genet, *The Charge of Piracy in the Spanish Civil War*, 32 AM. J. INT'L L. 253, 260 (1938).

144. See 32 AM. J. INT'L L. 82, 85 (1938).

rely on privateering on the high seas and the American Civil War grew into the last outburst of large scale privateering.¹⁴⁵ The Union originally charged the prisoners taken from Confederate privateers with piracy,¹⁴⁶ but soon abandoned this policy when it lead to retaliatory action on the part of the Confederates. By an order of January 31, 1862, all "pirates" were transferred to military prisons for the purpose "of exchanging them as prisoners of war."¹⁴⁷ The charges were no more successful in neutral courts. In the French *Alabama* Case, decided by the Tribunal de commerce de Bordeaux on August 8, 1863, the owners of the cargo of the American vessel *Olive Jane* which had been sunk by the famous Confederate privateer steamer *Alabama* under the command of Captain Semmes, maintained that the *Alabama* was a pirate. The court rejected the claim: "L'Alabama, armé en guerre, portant le pavillon de la Confédération du Sud, faisant uniquement la guerre au profit du pavillon arboré à bord, ne saurait être considérée comme un pirate."¹⁴⁸

The conclusion of this state of affairs is drawn by W.E. Hall: "It is impossible to pretend that acts which are done for the purpose of setting up a legal state of things, and which may in fact have already succeeded in setting it up, are piratical for want of an external recognition of their validity, when the grant of that recognition is properly dependent in the main upon the existence of such a conditions of affairs as can only be produced by the very acts in question."¹⁴⁹

The main point in the case of insurgents, however, is not the treatment prepared for the rebels by their adversary, the legitimate government. It is, rather, the attitude taken by third powers. Third powers may consider their own interests only or they may be ma-

145. The importance of this type of warfare may best be judged by the award of 3,200,000 pounds granted to the United States by the Arbitration Tribunal in Geneva on Sept. 15, 1872, for Confederate privateers having been permitted the use of British neutral waters. See generally 1 MOORE, INTERNATIONAL ARBITRATION 495-682 (1898), and 4 *op. cit.* 4057-4178. SCOTT, CASES ON INTERNATIONAL LAW, 713-20 (1960) (gives the award).

146. Calvo, *Examen des trois règles de droit international proposées dans le traité de Washington*, 1874 REV. DR. INT. LÉG. COMP. 453, 454.

147. SCOTT, *supra* note 145, at 350.

148. *Supra* note 8, at 155.

149. *Supra* note 116, at 310.

nipulated to a greater or lesser extent by the parties to the conflict. If a third power were to recognize the parties as belligerents, that would, under the laws of war, imply that both parties have the right of capture on the high seas and above them *vis-à-vis* the sea and airborne commerce of the recognizing states and can proclaim blockades on the high seas to the detriment of such commerce, not to mention establish war or risk zones on the high seas. Often a state is not willing to do this.¹⁵⁰ It is then more tempting not to recognize belligerency since that confers an illicit character upon naval action against foreign sea or airborne commerce. One main example of this was the attitude of Western nations towards Governmental and Nationalist action in the Spanish Civil War of the 1930's. Some of these nations were happy to outlaw as "piratical" naval action, aimed at preventing the adversary party's importation of contraband.¹⁵¹ A more recent example has been the United States' attitude towards the war between Communists and Nationalists in China. For political reasons, neither the Chinese (Nationalist-legitimate) government, nor the American government, wanted to concede to the Communist insurgents the prestige and status of belligerents. As a consequence, the Nationalists were deprived of the right to interfere with the sea and airborne commerce of the Communists except within the limits of the Chinese territorial waters.¹⁵² The American Civil War offers an example of the opposite attitude. Great Britain and France almost immediately granted recognition to the contestants in the war as belligerents and this, indeed, made possible the Confederate warfare by means of privateers. The Union government made sophisticated moves to have this weapon outlawed. It proposed a convention with the two powers mentioned by which the United States would accept the Declaration of Paris, 1856, as it stood. The Union interest melted away, however, when the British and French gov-

150. For a reasoned view, see Wilson, *Insurgency and International Maritime Law*, 1 AM. J. INT'L L. 46, 60 (1907).

151. Cf. Genet, *The Charge of Piracy in the Spanish Civil War*, *supra* note 143, at 262. It may be added that the action by the nations in question appears to have been most efficient inasmuch as the attacks by unknown submarines and aircraft ceased almost immediately. de la Pradelle, *La piraterie aérienne: notion et effets*, REV. GÉN. AIR 299 (1969).

152. Woolsey, *Closure of Ports by the Chinese Nationalist Government*, 44 AM. J. INT'L L. 350, 354 (1950).

ernments intimated that they would attach to their signatures of the convention a declaration which would prevent the convention from having any effect on the warfare of the Confederates.¹⁵³

If the insurgents have *not* been recognized as belligerents, what is the status of their ships cruising the high seas? During the nineteenth century it became a fairly well settled practice in international law that insurgents who interfered with the shipping of a third nation on the high seas (presumably in the exercise of some right equivalent to the right of angary belonging to a belligerent), if apprehended by the warships of such a nation, could be treated as pirates. Instructions to this effect were given to British naval forces in 1873, to American naval forces in 1876, and to Imperial German naval forces in 1903.¹⁵⁴ Even if Castrén submits that "it seems neither right nor fair to equate insurgents with pirates,"¹⁵⁵ there was little authority until 1958 which seriously challenged this legal qualification of insurgents' naval action against third country shipping.¹⁵⁶ The Harvard Draft (1932) attempted to exclude insurgents' acts from the definition of piracy.¹⁵⁷ This solution, though, would have afforded the insurgents no protection from charges of piracy brought by the affected third country, but only the satisfaction that nonaffected states could not be called upon to hunt them down on the basis of the universal jurisdiction over piracy.¹⁵⁸ When the Convention on the High Seas of 1958 was being prepared, largely on the basis of

153. Malkin, *The Inner History of the Declaration of Paris*, 8 BRIT. Y.B. INT'L L. 1, 42 (1927); Hall, *Should the Declaration of Paris, 1856, be revised?*, in U.S. NAVAL WAR COLLEGE—INTERNATIONAL LAW TOPICS AND DISCUSSIONS 107, 116 (1905).

154. The British directions to the Admiralty of July 24, 1873, are partly reproduced in Stiel, *supra* note 6, at 96 n.1; the United States Navy Regulations of 1876 may be found in 2 MOORE, DIGEST OF INTERNATIONAL LAW 1108 (); and the Imperial German "Bestimmungen für den Dienst an Bord" of Nov. 21, 1903, are partly reproduced in Stiel, *supra* note 6, at 96 n.2.

155. Castrén, *Civil War*, 142 ANNALES ACADEMIAE SCIENTIARUM FENNICAE 2, 131 (Helsinki, 1966).

156. Lauterpacht summarizes the 1947 situation under British and American law as follows: "The preponderant practice of governments, weighty judicial decisions, as well as the majority of writers, seem to favour the view that unrecognized insurgents, if they interfere with the ships of third states or their subjects, may be treated as piratical." RECOGNITION IN INTERNATIONAL LAW, *supra* note 11, at 298.

157. Art. 16; *see supra* note 19, at 857.

158. Cf. McDUGAL & BURKE, THE PUBLIC ORDER OF THE OCEANS, 817 (1962).

the Harvard Draft, the debate did not focus on the unrecognized insurgents. A vote was taken to determine whether the words "for private ends" in what is now Article 15 of the Convention should be retained. The affirmative vote at least brought about the same result as would have followed from the Harvard Draft. At present, then, the situation would seem to be as follows: A state which does *not recognize* the insurgents as belligerents can not, under the general international law of piracy, call upon other states to assist in suppressing the naval action of the insurgents against the sea or airborne commerce of the first state; it will have to do so on its own under general principles of self-defence, and even if "the right of self-defence on the high seas in time of peace has at no time received universal approval"¹⁵⁹ the risk would seem minimal to exercise it against ships not flying the flag of any recognized state.¹⁶⁰ But states which do recognize the insurgents as belligerents, on the other hand, need not apply the principles of the Geneva Convention of 1958 to their deeds. If the insurgents' acts are in excess of the law of naval warfare, their captures can be treated as piracy and the law of piracy can be invoked against them.

A complication which ought not to be left out of sight concerns the lower limit of insurgency. The anarchists raised the issue when they started to appear towards the end of the nineteenth century. They wanted to terrorize society but did not want to govern it. It is presumably with an eye towards this phenomenon that W. E. Hall is unwilling to grant any rights of insurgency to an individual exercising violence upon his neighbour and his neighbour's property, which would raise him above being a pirate, unless he belongs to a group which somehow forms "a politically organized society."¹⁶¹ Lately, this point has been again stressed by Fenwick commenting upon the *Santa Maria* party of Captain Galvao: "The status of insurgency is not one to be conceded to any and every citizen who believes that the government of his country is tyrannical and should be overthrown."¹⁶² Whether malicious killing, wounding or destruction is

159. Brownlie, *The Use of Force in Self-Defence*, 37 BRIT. Y.B. INT'L L. 183, 252 (1961).

160. See text *infra* at —.

161. *Supra* note 116, at 311, 312, 313.

162. Fenwick, "Piracy" in the Caribbean, 55 AM. J. INT'L L. 426, 427 (1961).

done for "private ends" or not, when the activity is rather individual than collective or when it is rather the expression of discontent with life than of a constructive political message, does not seem to have received any authoritative answer in the Geneva Convention.¹⁶³ It is difficult to see that the Convention has added such new elements to the classical problem so that this type of activity must now be privileged. Although in an era characterized more by the absence than by the presence of solidarity between states, the classification is no act of great significance. Obviously this type of activity *can* be piracy under the Geneva Convention.

INTERNATIONAL LAW AND POLICE POWER

POLICING THE INTERNATIONAL SEA

When the high seas were no longer considered to be a part of the territory of any single state but a free space for all to fight on or for all to govern, the eras of landlocked thinking came to an end. We are used to associating the idea of the freedom of the seas, *i.e.*, the idea of the international sea, with the anonymous publication in 1609 of Hugo Grotius' chapter on "Mare liberum." While this work is mainly directed against the terrene view of the sea held by the British, it was in fact only part of the much greater work "De iure praede" written in 1605 at the behest of the Dutch government, or, perhaps, the Dutch East India Company (in which the Dutch provinces appointed members of the Board of Directors) as an attack on the Spanish (and Portuguese) claims under what Grotius calls the *donatio Alexandri*.¹⁶⁴ But, it was the felicitous phrase of Cornelius Bynkershoek in 1702: "Imperium terrae finitur ubi finitur armorum vis" which ended the so-called "hundred-year war of

163. A survey will be found in McDUGAL & BURKE, *supra* note 158, at 810-12.

164. On Grotius' part, see generally NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS, 97 (1950). Grotius' arguments of that day—he was born 1583 and consequently only 22 years old—were perhaps rather cheap: he confused the feudal title of the Spanish with the ownership notion of the Digests and was thereby able to conclude that Alexander Borgia no more than anyone else "plus iuris a alium transferre potest quam ipse habet." See Staedler, *Hugo Grotius über die "donatio Alexandri" von 1493*, 1941 ZEITSCHRIFT FÜR VÖLKERRECHT 258. De iure praede was left unpublished: publication did not take place until 1868, see SCHMITT, DER NOMOS DER ERDE IM VÖLKERRECHT DES JUS PUBLICUM EUROPAEUM 151 (Köln, 1950).

books" (der hundertjährige Bücherkrieg) which was waged around this idea in the wake of Grotius' efforts to satisfy his Dutch masters. Bynkershoek's phrase much better conveys what the new teaching meant—the existence of an immense ocean territory which belonged to nobody and which could be appropriated by no one.

When this idea took form during the seventeenth century there arose also the problem of whether the sea was simply the arena for all to fight in or, somehow, the framework for orderly cooperation and competition.

Privateering havings its heydays in the eighteenth century¹⁶⁵ and needing nothing more than a letter of marque from a belligerent sovereign, the high seas were nearly always affected by whatever war was going on in whatever corner of the earth. Of course, no nation was willing to offer its merchantmen as the prey of the greedy and violent who furthermore, if they exceeded the pattern of lawful privateering were often held to be pirates. The result was that each nation tried to protect his shipping by arms. In these days, as put by Commander Burdick H. Brittin, "all nations employed substantial portions of their naval forces in efforts directed towards this end," that is to say "as the guardians of the freedom of the seas" and having the suppression of piracy as one of their primary concerns.¹⁶⁶

Behaviour on the high seas thus could be considered from two aspects: what to do when a foreign ship approached and how to approach a foreign ship. The former problem was mainly the one of the merchantman, the second, of the man-of-war. But it might well be the other way around as was illustrated by Lieutenant Colonel A.J. Wrangel commanding the Swedish frigate *Fröja* escorting the famous brig *Maria*.¹⁶⁷

THE NATIONAL FLAG

The basic rule of the international law of the sea is that the national flag of a recognized state is a matter of extensive protection by

165. von Martens, *supra* note 72, at 46, concludes from the amount of regulation of privateering in contemporary statutes and treaties that "die 2te Hälfte des 17ten Jahrhunderts die Zeit sey, von welchen der ausgebreiteste und allgemenste Gebrauch der Caper anfängt."

166. BRITTIN, *INTERNATIONAL LAW FOR SEAGOING OFFICERS*, 85 (1956).

167. 1 C. Rob. 340 (1799).

that very state. In times of peace, this general principle forbids any interference with ships of another nationality upon the high seas. In the famous controversy about the Canadian registered rum running ship *I'm Alone* which was sunk on the high seas in the Gulf of Mexico by the American revenue cutter *Dexter* on March 22, 1929, the Commissioners appointed by the United States and Canada jointly held that the sinking of the ship "by officers of the United States Coast Guard was . . . an unlawful act" and recommended that the United States apologize to the Canadian Government and pay a material amend in respect of the wrong.¹⁶⁸ We find the same principle advanced by the United States in the classical case of the *Virginus*. That insurgent vessel, in the face of the Spanish warship *Tornado*, hoisted false colours (in fact the Stars and Stripes) to avoid seizure. When the Spaniards boarded her, nonetheless, the United States felt entitled to lodge a protest with the Spanish government for violation of sovereignty. In the opinion of the Attorney General, Spain had "no jurisdiction whatever over the question as to whether or not such vessel is on the high seas in violation of any law of the United States."¹⁶⁹

Acts of interference, however, may be justified under powers conferred by treaty.¹⁷⁰ Customary law is believed to accept a general exception to the rule, that a warship is entitled to verify the nationality of any merchant ship it meets at sea.¹⁷¹ But many countries make the unlawful use of their flag a criminal offence,¹⁷² and it does not seem to be a well considered solution that foreign warships should have powers to police such a regulation. In the Geneva Convention on the High Seas, (Article 22, paragraph 1(c)), this right applies only if "there is reasonable ground for suspecting . . . that . . . the ship is, in reality, of the same nationality as the warship."¹⁷³

168. 29 AM. J. INT'L L. 329 (1935).

169. Scott, *supra* note 145, at 320.

170. See, e.g., Convention for Regulating the Police of the North Sea Fisheries, 1882, and the Convention Respecting the Liquor Traffic in the North Sea.

171. Smith, *supra* note 130, at 64.

172. Under the British Merchant Shipping Act of 1894, § 64, the illegitimate use of the British flag rendered the ship liable to forfeiture, see Smith, *supra* note 130, at 64.

173. This solution partly supports the position advocated by the American At-

In times of war, every belligerent warship has the right of visit and search. Every ship on the high seas is subject to this right, however small the conflict upon which the right is based. The only case which may be an exception to the general rule concerns the armed convoy. Although the British in the old days were powerful enough to also insist upon visiting neutral merchantmen in a convoy of neutral warships, and the relative weakness of the neutrals barred them from successfully opposing the practice, it does not require much common sense to see in what situations these practices upon the armed neutrals will doubtless be ending.¹⁷⁴

Moving now, for the sake of completeness, to the territorial sea, the basic rule is that the warships and public vessels of the littoral state can interfere as they please with foreign ships. The problem posed thus is the opposite of the one on the high seas—whether there is any right of innocent passage; a right to pass unmolested. These matters are regulated in the Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958.¹⁷⁵ Under Article 14, paragraph 2 “passage” means any navigation which traverses the territorial sea, to and from the high seas, and to and from internal waters. The passage must not be hampered by the littoral state if it is innocent (Article 15), but it ceases to be so (and to be privileged) if it is prejudicial to the peace, good order or security of the coastal state (Article 14, paragraph 4). The privilege also expires if the littoral state wants to exercise its criminal jurisdiction on board the foreign merchantman if the behaviour which is classed as “criminal” by the littoral state “is of a kind to disturb the peace of the country or the good order of the territorial sea” (Article 19, paragraph 1) or if it has consequences which extend to the littoral state (Article 19, paragraph 1(a)).

THE JOLLY ROGER: THE CASE OF THE UNRECOGNIZED FLAG

If we turn to the ships sailing under the famous “Jolly Roger”

torney General in the *Virginus Case*, partly derogates from it inasmuch as a suspicion of identical nationality will permit what the Attorney General considered a violation of the American flag. In the latter respect, indeed, as noted by Simonnet: “ce n'est pas une exception, mais une application de la règle qu'en haute mer les navires ne relèvent que de l'Etat du pavillon.” See *supra* note 8, at 181.

174. Cf. Tucker, *The Law of War and Neutrality at Sea*, U.S. NAVAL WAR COLLEGE—INTERNATIONAL LAW STUDIES, 334 (1955).

175. 516 U.N.T.S. 205.

or under the less well known flags of some unrecognized insurgents, we get into the area of the unregistered ships—ships without nationality. The case of the *Asya* is the celebrated illustration of the principle prevailing.¹⁷⁶ In the days of the British mandate of Palestine, the *Asya* made a trip between La Ciotat Bay in France and a port north of Tel Aviv with 733 immigrants to support the Zionist cause in Palestine. Approached on the high seas by the British destroyer *Chequers* on March 27, 1946, the *Asya* hoisted after first showing false colours, the Zionist flag. *Chequers* sent a boarding party which forced the *Asya* to put into Palestine territorial waters. In the subsequent criminal proceedings against her owners part of the defense to charges of violating a local immigration ordinance was based on the fact that the visit by the *Chequers* was an illegal interference with the freedom of the seas. When the case reached the Privy Council, this defense was brushed aside on the strength of a quote from Oppenheim: “a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a State.”¹⁷⁷

The Geneva Convention on the High Seas, 1958, has interfered slightly with this rule. Under Article 22, paragraph 1(c), of that Convention, a warship is not even entitled to approach an unregistered ship except if there is reasonable ground to suspect that the ship has a nationality which is the same as that of the warship.¹⁷⁸ It is clear, nonetheless that the unregistered ship is at a loss since nobody will press its case against the interfering government. This dilemma has repeatedly been illustrated in the course of government attacks on piratical broadcasting installations in European waters in response to their challenge of governmental radio monopolies. Furthermore, it is easy to perceive a tendency to return, by way of “contiguous zones” and the like, to the terrene view of the sea. That return means, of course, that the notion of the “international sea” loses out proportionately in the process.¹⁷⁹

176. The *Asya*, [1948] Ann. Dig. 115.

177. *Id.* at 124; 1 OPPENHEIM, INTERNATIONAL LAW 546 (5th ed. 1955).

178. *Supra* note 155, at 132.

179. *See, e.g., supra* note 158, at 595 n. 90 with comments on the too respectful attitude to the freedom-of-the-seas notion taken by the Scandinavian countries.

POLICING THE SKIES

Turning now to aircraft, it is clear that the very technical conditions of flight are such that interference *in flight* is a method of very restricted usefulness. The aircraft has been aptly described as "a tin can in the sky"—you cannot force that tin can to open, you cannot even force it to come down against the will of the pilot in command except by shooting it down. The famous *Maydeck Case*¹⁸⁰ arose when a Bulgarian fighter aircraft fired at an El Al airliner which was, by mistake, out of Air Lane Amber 10 between Belgrad and Saloniki (the lane assigned to it under the flight plan) and intruding upon Bulgarian air space: total loss, 58 victims. Sending up fighter aircraft is, therefore, one way to enforce orders to the man in command of the airliner in flight, but it is a kind of brinksmanship. As against a pilot with responsibility for his passengers, it works well. As against a hijacker, it hardly works at all since he rightly assumes that the fighter pilot will be more considerate to the passengers-hostages than the hijacker intends to be. Perhaps it should be added, too, that the Tokyo Convention of 1963 obliges the contracting states to restore control of the hijacked aircraft to the lawful commander and this cannot reasonably be done by destroying the aircraft with its captive commander.¹⁸¹

At this point it may be wise to say a few words on *buzzing* as a means of interfering with aircraft in flight. It is certainly no success. When Trans World Airlines flight 840 was captured by Arab commandos, Israeli fighter aircraft took to the air to buzz it down at Lydda airport (Tel Aviv) and when LOT flight 247 was hijacked by East Germans attempting to escape into West Berlin, two Soviet Migs tried to buzz it down on the Eastern side of the Iron Curtain. In both cases the technique was of absolutely no avail. The prime concern of the airliner pilots was to keep the hijackers happy and the buzzing simply meant extra difficulties in achieving that goal.

It is clear, then, that the type of police interference discussed in relation to the high seas is largely academic in relation to the skies above them. It is, indeed, difficult to find a case which illustrates problems of *such* interference with aircraft. The only case which

180. REV. FR. DR. AÉRIEN 106 (1964); 232 (1965).

181. — U.S. Av. 305 (—1963).

has been disputed in aviation concerns the immunity which a charter-party would confer upon an aircraft flying over the high seas in relation to the state of registry. This point was raised in the famous *Ben Bella Case* in 1956. Here, a French registered airliner was chartered by a Moroccan airline (Morocco at that time being a French protectorate). On October 22, 1956, in flight over the Mediterranean *en route* between Rabat and Tunis with Ben Bella and other important Algerian rebels as passengers, the French pilot received orders from the French authorities in Algiers (at that time part of France) to land in Algiers for control. He complied, and the Algerian rebels were seized by the French. Morocco protested against the seizure of a Moroccan plane over the high seas, and an international commission of inquiry and conciliation was set up in Geneva. However, when Morocco became convinced that she could not win, she withdrew her delegation and the commission efforts broke down.¹⁸²

It does not seem altogether unreasonable that the charter-party should confer some immunity upon the aircraft over the high seas, particularly if a change of colours of the aircraft is involved. A time-chartered plane is often repainted in the colours of the charterer. Lord Wilberforce, explaining the Tokyo Convention Bill to the House of Lords on June 12, 1967, points out that the British criminal jurisdiction under the new legislation extends to "both British registered aircraft and what are known as inter-changed aircraft—that is to say, foreign registered aircraft chartered on demise charter to British operators."¹⁸³ It seems reasonable to allow immunity against foreign interference along similar lines. If registry is different from ownership, it seems perfectly clear that the aircraft should be immune from interference by the state of ownership. This is so because the responsibility for the maintenance of the operating quality of the plane stays, under present treaty regulations, with the state of registry, and here, as always in civil aviation, air safety should be the overriding consideration.

182. de la Pradelle, *L'enlèvement Aérien des Chefs Fellagah*, 1965 REV. GÉN. AIR, 232-38; Anonymous, *L'affaire du F.OABV*, A.F.D.I., 282-95 (1958).

183. 284 PARL. DEB., H.L. (5th Ser.) — (1967). For a discussion of the notion of *demise* in Anglo-American law, see SUNDBERG, AIR CHARTER—A STUDY IN LEGAL DEVELOPMENT, 276-282 (Stockholm, 1961).

What remains to be discussed, then, is simply the right to interfere with the aircraft when it has landed. That problem can be stated in much the same way as its counterpart relative to the territorial sea: To what extent do aircraft have a right to continue the journey without interference from the state of landing?

Recent history is replete with cases showing that under these conditions aircraft enjoy no jurisdictional immunity whatsoever. When an Aeroflot flight on October 31, 1966 made an involuntary stop at Prague, due to technical defects the Czech authorities felt entitled to remove one of the passengers, sought by the Czechs, and to force him to stand trial in Czechoslovakia. When Pan American flight 150 New York-Nairobi made an unannounced refuelling stop at Accra on October 29, 1966, the Ghanaian authorities felt entitled to remove from among the passengers the Guinean foreign minister, Luis Benavogui, and his entourage, in order to hold them as hostages. When Air Hanson's air taxi was hijacked, on June 30, 1967, and taken with its passenger Moïse Tshombe to Algiers, the Algerian authorities felt entitled to put him to trial in order to determine whether he should be extradited to the Congo and to detain him until his death two years later.

The legal basis for this is clear. Whatever privilege there ever was under the Transit Air Services Agreement of 1944 to operate without interference from the state overflown (Article 1, § 1, paragraph 1),¹⁸⁴ was ruthlessly swept aside by the Tokyo Convention, 1963. Under that Convention, the state overflown is entitled to call upon the foreign aircraft to land in order to exercise criminal jurisdiction in relation to behaviour on board the aircraft which is criminal under the law of the overflown state if: (a) the offence has effect on her territory; (b) the offence has been committed by or against a national or permanent resident of the state overflown; (c) the offence is against the security of the state overflown; (d) the offence consists of a breach of a local rule relating to the flight or manoeuvre of aircraft; or (e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of the state overflown under a multilateral international agreement (Article 4).

184. International Air Services Transit Agreement, *signed* Dec. 7, 1944, 84 U.N. T.S. 389.

PIRACY CHARACTERIZED BY THE POLICE POWERS TO REPRESS IT

If the curiosity of an approaching ship could always be averted by flying another flag than she did, pirates might secure immunity merely by means of a ready collection of national flags. For such reasons, piracy always seems to have been an exception to the prohibition against exercising authority over foreign ships on the high seas. As time went by the importance of this feature grew. Partly it was a function of the diminishing importance of the criminal law aspect of the old rules of piracy which held the pirates to be outlaws as "pacificae et juris gentium violatores."¹⁸⁵ But the idea of proscription as a method to deal with criminals had only slender appeal in the nineteenth century and the advent of the legality principle¹⁸⁶ tended to center the criminal law aspects in the penal code rather than in the teachings of international law.

Under the impact of such forces there developed a tendency, particularly among German writers, to view the law of piracy as a matter of joint exercise by all seafaring nations of *police powers at sea*: "ein internationales seepolizeilichen Einschreiten gegen die Piraten."¹⁸⁷ Piracy having two principal aspects, the violation of international law and the international law of crime, it was sometimes felt that they should be kept strictly apart.¹⁸⁸ Furthermore, and above all, in the wake of the idea of police powers at sea a re-orientation of the law of piracy set in which sought to *denationalize* the notion of piracy: to divorce it from the connection with existing states and their struggles with one another.¹⁸⁹ This re-orientation meant that there was an international law notion of piracy which could be quite different from the one appearing in the penal code. This divorce facilitated the addition of restrictions onto the international law notion which were unthinkable in the penal code. By 1937, Carl Schmitt

185. LOCCENIUS, *DE JURE MARITIMO ET NAVALI*, C. 1, c. 3 (Holmiae, 1652).

186. Cf. FEUERBACH, *LEHRBUCH DES GEMEINEN IN DEUTSCHLAND GÜLTIGEN PEINLICHEN RECHTS* § 75, at 76 (Giessen 1823).

187. GEBERT, *Die völkerrechtliche Denationalisierung der Piraterie*, 26 *NIE-MEYERSZ* 8, 23 (1916).

188. *Id.* at 20.

189. *Id.*

summarizes these restrictions as follows: Piracy could only exist outside of the territorial jurisdiction of states, on the high seas, it was unthinkable that an act supported or authorized by a state was piracy; piratical acts must be directed against all nations indiscriminately; and the pirate's motive must involve "animus furandi"—he could not have a political motive.¹⁹⁰

The definition of "piracy" in the Geneva Convention on the High Seas must be seen in the light of this tradition. While it may be true that "the pre-occupation with piracy merely as a basis for jurisdiction seems substantially to have disappeared"¹⁹¹ and the excessive application of the denationalization theory has been checked,¹⁹² it is also true that the *Rapporteur* for the International Law Commission based his recommendations "almost completely upon the Harvard draft"¹⁹³ and the Harvard draft rested on the idea that "piracy is not a crime by the law of nations [rather] [i]t is the basis of an extraordinary jurisdiction in every state to seize and to prosecute and punish."¹⁹⁴ This explains three limitations which are set to the notion of piracy in the Geneva Convention and which appear useless unless one recalls the police power aspect: the piratical act must be committed for private ends; it must be committed by the crew or passengers of a private craft against another craft or persons or property on board such craft; and it must be committed in a place outside the jurisdiction of any state.¹⁹⁵

The Geneva definition makes it next to useless in aviation. It calls for an act committed by the crew or passengers of one vehicle against another vehicle. But, as has been explained, interference between two aircraft is next to impossible except at the expense of the destruction of one of them. Consequently, aerial piracy as en-

190. 4 SCHMITT, *DER BEGRIFF DER PIRATERIE, VÖLKERBUND UND VOLKERRECHT* 351 (1937).

191. *Supra* note 158, at 877.

192. *Supra* note 8, at 169. See Article 18, Geneva Convention on the High Seas, signed April 27, 1958, 450 U.N.T.S. 11.

193. *Supra* note 158, at 877.

194. Bingham, *Piracy—Introduction*, 26 *AM. J. INT'L L.* 749, 760 (1932). Cf. Johnson, *Piracy in Modern International Law*, 43 *Trans. Grotius Soc.* 63, 69 (1957).

195. See the definition in Geneva Convention on the High Seas signed April 27, 1958, 450 U.N.T.S. 11, Art. 15.

visaged by the Convention, as a practical matter, only means that aircraft are used to capture vessels at sea. At present, that is no practical problem.

PIRACY AND STATE RESPONSIBILITY

The Convention on the High Seas states boldly that all states shall co-operate to the fullest possible extent in the repression of piracy on *the high seas* or in any other place outside the jurisdiction of any state (Article 14). This is certainly no burdensome obligation to cast upon the seafaring nations, considering that the obligation only covers piracy as defined in the Geneva Convention. After all, that excludes piratical action for political purposes as well as all seizures of airliners. The only place where it would seem to have some practical importance is on and above the seas of the Far East.

Judging from the Far East experience, however, the more important obligation to fight piracy is not the one relating to the high seas, but the one relating to the states' *territorial waters*. To suppress piracy within a state's territorial jurisdiction is considered to be an international law obligation, not based upon the Geneva Convention but on general international customary law. "If a State should fail to do so or should associate itself persistently with piratical ventures, it would certainly violate this rule," says Schwarzenberger. He adds: "It is liable for the commission of an international tort and, in an extreme case, may even forfeit its own international personality and be treated as an international outlaw."¹⁹⁶ It is not difficult to see behind that statement the plight of China in the nineteenth century which was forced by means of treaties with European powers to undertake to fight the pirates in the Chinese waters.¹⁹⁷ From a practical point of view, such destruction of base areas for the pirates may be even more important than hunting them on the high seas. But it would also seem to follow that this obligation cannot extend to forms of piracy other than those defined in the Geneva Convention.

Piracy in forms not covered by the Geneva Convention may be no less interesting from the point of view of state liability. The world

196. Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURR. LEG. PROB. 263, 269 (1950) with further references.

197. For an enumeration of these treaties, see *supra* note 6, at 26 n.7.

has grown accustomed to viewing armed bands, with varying motives, swarming over a state border into the neighbouring state. Sometimes a land border is concerned, sometimes they come over the sea. The maritime expedition often raises the problem, of piracy. Attacks on third country shipping may raise the issue, as may violations of the rules of naval warfare relating to capture. Or it may simply be that the victim country has adopted a definition of piracy which includes such an expedition. Many of the problems raised in this context were illustrated in the course of the expeditions which crisscrossed the Caribbean in the nineteenth century. There was then a succession of lawless expeditions from the Atlantic and Gulf ports of the United States to various Latin American destinations for the purpose of participating in some of their frequent internal disorders. The participants came to be known by the ancient Dutch name for pirates, "Vrijbuiters," which was corrupted by the non-Dutch into "filibusters."¹⁹⁸

The state liability problem can arise here in no less than three different ways. A third country may be considered liable if it bars the advance of the filibusters. The sending country may be considered liable for sending, or permitting the departure of, the filibusters. Finally, the victim country may be considered liable for damage done to foreign lives and foreign property in the course of the disorders resulting from the advent of the filibusters. Let us cope with these problems, one at a time.

Great Britain was originally reluctant to interfere with the filibuster expeditions on behalf of the victim states, for fear that the United States might object to the killing of some American citizen who had chosen to join the filibusters.¹⁹⁹ In the end, however, all the great powers of the day appear to have united in rendering filibustering domestically criminal and in not objecting when their own citizens were tried and executed for such activities: indeed, they lost

198. French: "flibustiers," Spanish: "flibustero," German: "Flibustier." In his Roman history, Theodor Mommsen even uses this word to characterize the language of the pirates of antiquity—"Flibustiersprache", see 3 RÖMISCHE GESCHICHTE, 43 (8th ed. Berlin, 1889). A less corrupted version of the Dutch word has entered the English language in the form of "freebooters."

199. See Lord Palmerston's letter to Clarendon, Jan. 6, 1858, in Van Alstyne, *American Filibustering and the British Navy: A Caribbean Analogue of Mediterranean "Piracy"*, 32 AM. J. INT'L L. 141 (1938).

their right to diplomatic protection. The United States even arrived at the position that other nations also had lost their right to protest American action with respect to filibusters, who were citizens of such nations.²⁰⁰ This solution parallels the one advanced in relation to more orthodox pirates and their acts. "If such acts are unauthorized, the home State of the pirates, or of the pirate ship, if still entitled to sail under its flag, or of the pirate aircraft is estopped by international customary law from exercising the right of protecting its nationals, ships or aircraft against interference by the State which assumes an extraordinary jurisdiction over pirates."²⁰¹

As to the liability of the sending country, let us note the assertion in modern legal scholarship that there is a state practice showing that state complicity in such armed incursions or toleration of such bands operating from national territory is "unlawful," constitutes a breach of the legal duties of a state in its international relations, and justifies a protest and request for preventive measures either by the malefactor or by an international or regional organ for maintaining peace.²⁰² This attitude, however, seems to refer more to the conditions of the days when the British Queen supported, or even sent, the British buccaners to sap the strength of the Spanish Empire,²⁰³ than to today's world of continuous parcellisation. It is, certainly, not now possible to state the law in such broad terms since the assertion fails to take account of the uncertainty introduced within the framework of the United Nations. In regional organizations of members of the United Nations, such as the Organization of African Unity established in Addis Ababa in 1963, one will find resolutions calling for actions in conducting their relations with obnoxious neighbours which obviously include the sending of armed bands. One example is the 1963 resolution of the Heads of State in this organization dealing with the unification of the different rebel movements abroad and the creation for export of rebel armies and volunteer corps within

200. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CALIF. L. REV. 177, 191.

201. SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW*, 94 (5th ed. London, 1967).

202. Brownlie, *International Law and the Activities of Armed Bands*, 7 INT. & COMP. L.Q. 729, 734 (1958).

203. SCHMITT, *supra* note 164, at 145, 153; but see *supra* note 6, at 41 n. 1, and KEEN, *supra* note 72, at 238.

the different states in Africa, and of a nine-power coordinating committee for the organization of direct action for civil war in neighbouring countries.²⁰⁴ It is evident that these states have not accepted any rules against "filibustering" in any sense. Since no objections to this position have been heard from the United Nations establishments, it seems unlikely that the new position when tested at sea or in the air, would result in any state liability.

To what extent, then, is the country of disorder liable for the damage wrought by the filibusters? In the case of the *Magellan Pirates*, Lushington pointed out that one of the consequences of regarding the offenders as pirates would be that no claim would lie against the government of Chile; whereas, if the offenders were not regarded as pirates but only as subjects revolting against the Chilean government, a claim for damages might lie against that government.²⁰⁵ The first part of the observation still holds true. "In case of piracy, individual, and not collective responsibility for violation of international law takes place," says Kelsen.²⁰⁶ The second part, however, may have to be modified. Today, the legitimate government may avoid liability by standing a due diligence test. Indeed, there is a presumption that the government is doing its utmost to put down the rebellion and on the strength of that presumption liability is avoided.²⁰⁷ Should the government fail that test, however, it may still shield itself behind the generally accepted principle that no obligation to pay an indemnity exists when the party injured in an insurrection brings the injury upon himself. Merchantmen moving within the field of actual hostile naval operations thus move at their own peril.²⁰⁸ As against third powers which have recognized the insurgents as belligerents, however, complete immunity arises. Consequently, when Great Britain recognized the Confederates as belligerents in 1861, the Union gov-

204. BOUTROS-GHALI, *The Addis Ababa Charter—A Commentary*, 546 INTERNATIONAL CONCILIATION, 25, 32 (Carnegie Endowment for International Peace) (1964).

205. 1 Spinks' Eccl. & Adm. Rep. 81 (1853).

206. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 205 (Tucker ed. 1966).

207. See generally Silvanie, *Responsibility for Acts of Insurgent Governments*, 33 AM. J. INT'L L. 78, 103 (1939).

208. Wilson, *Insurgency and International Maritime Law*, 1 AM. J. INT'L L. 46, 59 (1907).

ernment found some consolation in the reflection that "at any rate there was one compensation, the act had released the Government . . . from responsibility for any misdeeds of the rebels towards Great Britain."²⁰⁹

It is the Arab warfare against Israel and Ethiopia which today seems most likely to raise the problems discussed in this part. Such contexts also illustrate the difficult medium for legal claims which has been created within the United Nations. The most conspicuous instances so far were perhaps the armed attacks performed by Popular Front agents against passenger-filled El-Al aircraft at foreign airfields. Let us look at two of them: the one performed on December 26, 1968 at Athens airfield and the other performed on February 18, 1969 at Zürich-Kloten airfield. Arab governments were not openly linked to the actual attacks. The fact that the agent traveled to Athens from Beirut on Lebanese travel documents ordinarily provided for stateless persons was the only direct link in the Athens incident. In the Zürich incident, the agents did not even travel directly from any Arab country—those departing from Amman flew into Switzerland via Vienna, those departing from Damascus flew via Beirut-Rome-Paris. The link was at best indirect. It related to the agents' organization, the Popular Front, which provided them with all money and equipment. This Front has been operating openly in Lebanon and Jordan since the June war of 1967 and, consequently, with the knowledge and apparent acquiescence of the governments.²¹⁰ It may be questioned whether the governments are capable of taking action against the guerilla movement. If they are not, this would normally mean that the territory held by the movement may be considered to be under an insurgent *de facto* government. Since, however, the legitimate governments do not want to oppose but rather prefer to side with the guerilla movement, they certainly cannot meet any due diligence test. On the other hand, it is hard to see how Israel could obtain redress in a situation so heavily dominated by the Security Council which, after all, is subject to no judicial or legal review.

209. *Supra* note 11, at 248.

210. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415, 420 (1969).

PIRACY AND CRIMINAL RESPONSIBILITY

THE CLOSED COMMUNITY CONCEPT

If the world were one and monolithic, it would be a closed community. There would be only one will of State. The whole idea of regulating violence between equals—the regime of the duel—would be nonexistent because, in principle, in such a society competing wills do not exist on the armed level. In the closed community, society is regulated throughout. This affects the view taken of piracy, hence a departure from the guiding idea of the preceding sections which was to view piracy in the international law context of violence between the members of the international community.

The classic example of a closed community was the Roman Empire. It fathomed all the known waters of the contemporary civilized world. The seas beyond only washed the shores of the barbarous peoples—those incapable of building states. But the Romans did not arrive at this stage until the wars with Mithridates Eupator (between 88 and 66 B.C.) were won because not until then could they claim the Mediterranean as *mare nostrum*. It was the pirates' interference with the African grain ships which supplied Rome,²¹¹ that gave the piracy problem its importance. When the pirates struck the *cura annonae*²¹² on which the Roman social welfare scheme depended, *lex Gabinia* was passed (67 B.C.) asking Pompey Magnus to sweep them from the sea.²¹³ But in taking their countermeasures against the piratical conditions of the Mediterranean, the Romans acted in no way different from the way they acted against the brigands on land. They saw nothing peculiar about the fact that the undesired activity was committed on the high seas—nothing different, in principle, to distinguish it from action committed on land: piracy, as such, was no special crime, the pirate's road to the cross was paved by the *lex*

211. Some 1.4 million bushels were imported to Rome annually in August's time, see BABLED, *LA CURA ANNONA CHEZ LES ROMAINS*, 29 (Paris, 1892) (thesis).

212. The grain trade was organized under the title of *cura annonae* under a *praefectura annonae* with a transport organization of its own, handled by a separate and privileged guild, and—on the receiving side—with various *leges frumentariae* to control the more or less gratuitous distribution of the grain to the plebs of Rome. See generally BABLED, *supra* note 211, at 11-13, 18-24.

213. On the promotor of the act, Aulus Gabinus, tribune of the plebs; and the legislative history of the enactment, see T. MOMMSEN, *supra* note 198, at 113.

*Julia de vi publica*²¹⁴ and other similar enactments.²¹⁵ Indeed, many piratical adventures consisted of seizing a port town; this is one explanation of the custom of antiquity of placing the great cities at a certain distance from the seashore.

The magnificent empires of the Iberian nations, united more or less by accident in 1582, provide a more recent thought-provoking example of a closed community. They benefited from the papal edict *Inter cetera*²¹⁶ of 1493 which granted to the King of Spain, "sub excommunicationis latae sententiae poena," as a matter held in fee from the pope, *i.e.*, the exclusive right, west of a line 370 leagues west of the Kap Verde Islands, drawn from the Arctic to the Antarctic pole, "ad insulas et terras firmas inventas et inveniendas dectas et detengendas . . . accedere" (lines 110 f., 118). In 1454, the papal edict *Romanus pontifex* had given a corresponding right to the Crown of Portugal.²¹⁷ As a consequence, the Portuguese and the Spaniards appropriated for themselves particular seas, among them the East and West Indian Seas, and any unlicensed ship there was summarily sunk and the crew drowned. Even if the Dutch (for a long time rebels against the Spanish Crown) and the British interpreted this to mean that the Spanish regarded all ships found south of the Tropic of Cancer and west of Greenwich as enemy vessels, I think it is a mistake to confuse the attitude of the Spaniards and the Portuguese with the later general belligerent right of visit and search upon seas unappropriated. Theirs was a criminal law attitude reflecting a *terrene* view which permitted no basic distinction between land and sea territory;²¹⁸ their outlook was one of the closed community.

And, certainly, such was the dominant view in Medieval times.

214. DIGEST 48.6.3.6. For comments, see MOMMSEN, RÖMISCHES STRAFRECHT 128 (Leipzig, 1909).

215. DIGEST 47.8; 48.19.28.10.

216. See Corpus Iuris Canonici 1.9 liber septimus (publ. by P. Matthaeus 1534).

217. On the dispute between Spain and Portugal and the Tordesillas treaty of 1494, which deviated considerably from *Inter cetera* and the confirmation of which, tactfully, was not asked for until Pope Alexander Borgia's successor had taken the tiara. See Staedlerz *Die westindische Raya von 1493 und ihr völkerrechtliches Schicksal*. 1938 ZEITSCHRIFT FÜR VÖLKERRECHT 165; *idem*, *Zur Vorgeschichte der Raya von 1493*, 1941 ZEITSCHRIFT FÜR VÖLKERRECHT 57.

218. SCHMITT, *supra* note 164, at 144-46. Schmitt observes that the "römisch-rechtlichen Begriffsmodellen . . . die rein terrane Denkweise der antiken und mittelalterlichen Binnenmeerskulturen beibehielten."

The English king claimed to be sovereign over the "narrow seas" surrounding England, just like the Danish and Swedish kings claimed to be co-sovereigns over the Baltic Sea, sometimes even referred to as the "streams of Sweden and Denmark."²¹⁹ Such sovereigns considered themselves responsible for order within their territories—land or sea—and took action against any menace to such order—whether robbers on land or pirates at sea. Apparently, cases of piracy decided under such conditions are of limited value in other settings. And it should not be forgotten that England did not desert the *terrene* approach until after the publication, in 1689, of Sir Philip Meadow's *Observations Concerning the Dominion and Sovereignty of the Seas*.²²⁰

THE INTERNATIONAL SEA—THE PROBLEMS OF LAW IN A LAWLESS SPACE

The advent of the idea of the international sea in the seventeenth century has been sketched elsewhere. It is here sufficient to point out what the new thinking meant to the closed community approach. When the high seas were no longer part of the territory of any country, the idea of a limited rather than universal jurisdiction was forced upon the maritime lawyers. If nobody held the maritime territory beyond the three mile limit, how could anybody have jurisdiction there?

The impact of the confrontation with the new state of affairs was aggravated by the simultaneous advance of territoriality. The principle of territoriality, as such, was embedded in the feudal regime and had overrun opposing attempts at creating dual loyalties based on, e.g., the Italian urban notions of *domicilium originis* and *domicilium facti*.²²¹ Territoriality grew into a concept of exclusivity when the notion of the sovereign state took hold. Of essence to this notion, was the equality between the sovereign states; that, in turn, seemed to prevent one state from assuming jurisdiction over what was happening in the territory of another.

219. See generally *supra* note 34. Gihl, *Dominium maris Baltici och Östersjön som mare clausum*, STUDIER I INTERNATIONELL RÄTT, 193 (1955).

220. SCHMITT, *supra* note 164, at 152.

221. DE VABRES, INTRODUCTION À L'ÉTUDE DU DROIT PÉNAL INTERNATIONAL 237 (Paris, 1922).

Sensitivity to the encroachment upon sovereignty which followed from subjection to a foreign jurisdiction was variously developed in various places. Perhaps not unnaturally, states, the sovereignty of which was most open to doubt, were most sensitive on this point: that is to say quasi-states combined into a sovereign federal state. The Anglo-Saxon state-building policy was particularly fertile in creating such bodies: the states of the United States of America, and the self-governing dominions of the British Empire. In the United States, this sensitivity was reflected in the famous Full Faith and Credit Clause of the Constitution, 1787 (article 4, § 1) which requires that the various states of the union respect each other's legislation, public acts, *etc.* These views, prevailing within the Union, also came to mark the outward attitude of the Union. They climaxed in the *Cutting Case* of 1886. In that case, Mexico sought to punish an act which had been committed within the United States by a citizen of the United States. The Secretary of State expressed the American position to be that the United States themselves maintained "due justice to all offenses committed in their respective jurisdictions" and that "they will not permit that this prerogative shall in any degree be usurped by Mexico."²²² The principle of exclusive territorial jurisdiction, apparently, was equally natural to the British. But such a principle could make little allowance for the international sea. If you stuck to the territoriality principle, the high sea was nothing but a huge expanse of lawlessness. Consequently, while the Anglo-Saxon powers, enjoying dominating positions in the manufacture and operation of aircraft after the Second World War, filled the skies above the oceans with their aircraft, they also emptied these skies and the oceans below of their law. Each of these aircraft, when flying over the high seas, became an oasis of lawlessness. The world was shocked to learn from Professor Arnold Knauth, in 1951, that it was "legally safe to commit almost any crime in the calendar while traveling in an American airplane over the ocean."²²³ Some years later, *R. v. Martin*²²⁴ brought attention to the fact that the British

222. *Papers Relating to Foreign Relations of the United States* [1886], Department of State, Wash. D.C. 701 (1887).

223. Knauth, *Crime in the High Air—A Footnote to History*, 25 TUL. L. REV. 446, 447 (1951).

224. [1956] 2 Q.B. 272. For a general review of the British situation in 1959, see Cheng, *Crimes on Board Aircraft*, 12 CURR. LEG. PROB. 177 (1959).

situation was not much different. On the basis of that holding, and assuming that stealing a ride in an aircraft does not amount to the universal crime of theft as conceived by the British, it would seem to follow that the hijacking of Air Hanson's air taxi with Moishe Tschombe over the Mediterranean in 1967 was not criminal under British law.²²⁵

An important cross-current in many places, followed upon the rise of the absolute monarchs. Strong monarchical power tends naturally to include strong legislative power. Ideas about statutory interpretation which rely heavily on the legislator's will come just as naturally. To the extent that the law was divine or founded in natural law, one was hard put to explain why the vague evidence of this universal law which could be found in the law books back home, should be superior to evidence of it found abroad; hence, the surprising tendency to let foreign law materials serve the court just as readily as domestic law materials. But the absolute ruler entering the scene could not accept such influences from abroad. When he had forbidden his courts to apply the customary law, he excluded the foreign law as well. Furthermore, he could see no reason why his commands should stop at his territorial borders if he could enforce respect for them beyond. Since everybody who was personally brought into his courts (or could expect to be brought there) had cause for such respect, there arose a claim to competence to enact legislation which did not need to stop at any border and certainly not at the three-mile limit. This attitude was all the more natural in places where—like the European Continent—national rivalries soared and neighbouring countries were given to harbouring each other's political dissidents who were conspiring to overthrow their national regimes.²²⁶ Why should the sovereign permit an oasis shielded from his power simply because his enemy had found a territorial border?

In Sweden, it has been claimed that the previous exclusive reliance on territoriality came to an end under the aegis of the absolute Caro-

225. The situation has since been remedied, in the United States by Legislation in 1952, and in Great Britain by legislation in 1967, (in effect in 1968). See 66 Stat. 589 (subsection 5 of 18 U.S.C. § 7), and Tokyo Convention Act, 1967 (in force by the Tokyo Convention Act 1967 (Commencement) Order 1968, S.I. 1968 No. 469).

226. Cf. Bassiouni, *International Extradition in American Practice and World Public Order*, 36 TENNESSEE L. REV. 1, 8 (1968).

line monarchy. Some judicial decisions arising out of the termination of the Great Nordic War (1700-1721) brushed aside the idea of any built-in obstacles to a penal law jurisdiction over acts committed abroad, provided that there was a reasonable connection between the act and the state exercising jurisdiction.²²⁷ The customary law, thus evolved, finally entered the statute book in 1864. Criminal law jurisdiction asserted in the Criminal Code of 1864 meant that proceedings could be taken against any foreigner found in the realm, if he was accused of a crime against Sweden or a Swedish person, wherever committed, and, of course, could be taken against any Swedish subject accused of a crime wherever committed.²²⁸ This attitude, which was reflected in the Norwegian criminal law of 1902 as well, could easily embrace acts committed on, or over the high seas.²²⁹ But it was not appreciated by the Anglo-Saxons.

Commenting upon these Scandinavian rules, W.E. Hall observes: Whether . . . they can be enforced adversely to a state which may choose to object to their exercise, appears, to say the least, to be eminently doubtful. It is indeed difficult to see upon what they can be supported. . . . [T]heir theoretical justification, as against an objecting country, if any is alleged at all, must be that the exclusive territorial jurisdiction of a state gives complete control over all foreigners not protected by special immunities, while they remain on its soil. But to assert that this right of jurisdiction covers acts done before the arrival of the foreign subjects in the country is in reality to set up a claim to a concurrent jurisdiction with other

227. Jägerskjöld, *Om krigsfangar, krigsöckupation och jurisdiktionsrätt*, 1964 JURIDISKA FORENINGENS I FINLAND TIDSKRIFT 160, 176.

228. See generally Thornstedt, *Svensk Medborgares Ansvar för Brott Utomlands*, 1966 SvJT 506. The clause "against Sweden" which appears in other contexts as well, is construed to mean "against a Swedish interest." In the identification of a "Swedish interest" surprising results are arrived at. Thornstedt discusses whether the foetus of a Swedish woman is a carrier of a Swedish interest the protection of which calls for extraterritorial application of Swedish penal law and finds it "fully clear" that this is the case—to the detriment of the Swedish girl seeking a legal abortion abroad. *Id.* at 515 n. 31.

229. The Danish penal code of 1930 extends criminal jurisdiction of Danish courts to acts committed by anyone outside the national territory violating such interests "the protection of which in the Danish State implies a special connection with it." (Sec. 8, para. 1, No. 1). This criterion has been used to stamp out from the high seas such activities as are known as "pirate broadcasting," and a leading case has been interpreted to mean "that the public interest in avoiding the corrupting influence of advertising upon the medical and odontologic practices was envisaged. . . . The public interest in maintaining order in the air—of preventing evasion of the delicately balanced system of allocating radio frequencies—is a sufficient basis for exercising jurisdiction even with respect to acts of aliens outside the national territory." See Sorensen, *'Pirate Broadcasting' from the High Seas*, LEGAL ESSAYS—A TRIBUTE TO FREDE CASTBERG 319, 329 (Norway, 1963).

states as to acts done within them, and so to destroy the very principle of exclusive territorial jurisdiction to which the alleged right must appeal for support.²³⁰

It became clear in the *Lotus Case* that this criticism was exaggerated. Stating that "the territoriality of criminal law . . . is not an absolute principle of international law and by no means coincides with territorial sovereignty," the World Court added that international law did not contain any "general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory."²³¹

The *Lotus Case* only crowned a general process towards more extraterritorial application of the criminal law. Even the Anglo-Saxon powers, long shielded by their geographical positions from the rivalries and strains so prevalent on the European Continent, had experienced a need to follow suit. The United States first saw the need to protect its economic structure and competitive system of free enterprise by the extraterritorial application of its antitrust laws.²³² An intent of Congress to encompass acts committed abroad by foreigners was found in the Sherman Act and in § 1546 of the Federal Criminal Code.²³³ Indeed, the claims came to be so extensive that even Swedish lawyers, in turn, felt entitled to protest on the basis of international law.²³⁴ An inclination towards greater restraint has lately made itself felt inasmuch as an anti-Lotus Convention was signed in Brussels in 1952.²³⁵ When this convention turned out to be unsuccessful, article 11 was included in the Convention on the High Seas, (1958) in order to reverse the specific holding of the *Lotus Case*. These developments, however, have not affected the more general significance of the *Lotus* decision.

Considering how the attitudes toward piracy have evolved during

230. *Supra* note 116, at 263.

231. S.S. "Lotus," [1927] P.C.I.J. ser. A, No. 9.

232. *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

233. *United States v. Aluminium Co. of America*, *supra* note 231; *United States v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949); *United States v. Rodriguez*, 182 F. Supp. 479 (S.D. Cal. 1960).

234. *Nordström, Folkkrättsliga aspekter pa kontroll av linjekonferenser*, HANDELSHÖGSKOLAN : GÖTEBORG SKRIFTER 1965:6 p. 19.

235. International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation, signed at Brussels May 10, 1932, 439 U.N.T.S. 233.

the formative nineteenth and early twentieth centuries, this basic divergence of ideas should not be left out of sight. To the British, for example, the chief problem was to overcome the basic void which they faced when venturing outside the British lands or outside the British ships. Their natural response to the challenge was to rely upon the international law for assistance. Others saw it quite differently. The Scandinavians, particularly, had difficulty finding any problem of international law. Their perspective was dominated by a criminal law problem and they saw no reason why this problem should not be mastered in the ways criminal law problems were normally mastered: hence the disappearance of piracy as a special crime.²³⁶ It will not be denied that the split opening up between the criminal law proper and the international law rules relating to state jurisdiction made it possible to hold that, as a corollary to the state's obligation to fight piracy, international law exacted a standard of criminal law.²³⁷ Once this standard was met, however, international law ceased to be relevant in the criminal law context.

Today, the exterritoriality of the international sea commands no excessive respect. Why should it when even in the relations between states nobody claims that they be based on some implied Full Faith and Credit Clause? On the contrary, the scene is dominated by concurrent jurisdictions. The high seas themselves are being turned into an arena for conflicts between concurrent jurisdictions; and as to the national air space of the various states, the 1963 Tokyo Convention has done much to include them in that arena. The conflicts to be faced have indeed brought about much adverse comment on the Convention. Some have the British restraint typified by Professor Johnson's observation: "Whereas in the past there has sometimes been insufficient jurisdiction with regard to crimes committed on board aircraft, there may in the future be too much."²³⁸ Others indicate more pleasure with the aphorism: "Strangely enough, the greater number of ratifying states the less will be the degree of uniformity accomplished."²³⁹ Indeed, after four centuries with Grotius' idea

236. Cf. p. — of text & notes 34, 35, 36 *supra*.

237. Schwarzenberger, *The Problem of an International Criminal Law*, 3 *CURR. LEG. PROB.* 263, 269 (1950).

238. JOHNSON, *RIGHTS IN AIR SPACE* 79 (Manchester, 1965).

239. Gutierrez, *Should the Tokyo Convention of 1963 Be Ratified?*, 31 *J. AIR L. & COM.* 1, 10 (1965).

which tended to blow to pieces the closed community approach, inherited from the Romans, strange results have been arrived at. One may well wonder what those nations which organize their criminal law to be enforced within their narrow state borders but draft it to apply to the world at large are doing. Oblivious to the existence of their neighbours, it appears, each of them lies brooding like a Roman Empire in miniature over its universal rule!

IS THERE A NEED FOR A CRIME OF PIRACY?

The problem, thus defined, may be puzzling. After all, it seems a matter of course that it should be criminal to intentionally kill and rob others on the high seas or in the skies above. The problem will, therefore, have to be restated: Is there reason to have a special crime of piracy besides the special provisions against killing, stealing, etc. which are the cardinal points of most penal codes?

This brings us down into that part of legal science which deals with the establishment of crime notions. Is there any element which sets the totality of piracy apart from the total of its parts?

Two points here require attention. One is the usefulness of the very word "piracy" with its possible socio-psychological appeal. The other is the international element in the crime of piracy as it appears in most texts, national and international. Let us treat them one at a time.

It has already been shown that a stigma attaches to the word "pirate"; and some examples have been given of how various people have tried to take advantage of this stigma. We need only recall here the efforts at the Washington Conference, in 1922, and at the Nyon Conference, in 1937. It is apparent that the stigma which follows from being branded as a "pirate" is useful for propaganda purposes. But is that not enough to secure its use also when municipal law fights crime?

Name-calling performs an important function in structuring society to abide by the law. This function is known in most of the Western world by the title of the "stigma" theory.²⁴⁰ Recently, Dr. Per Edwin Wallén devoted his inaugural lecture as professor of crim-

240. See generally ch. 3, SHOHAM, CRIME AND SOCIAL DEVIATION (1966).

inal law to this phenomenon wherein he showed how it surfaced in the 1940's in Sweden.²⁴¹ In its report of 1940, the Law Reform Committee attempted to give a separate name to each crime listed. The Committee explained in the report that this had been done in order to make the crimes easy to understand and the criminal law more directly addressed to the people. "The general public"—said the Committee—"looks rather more to the name of the crime than to the actual punishment meted out." To the extent that the development tends to substitute for the fixed penalties or sanctions, the contents of which may be varied to a larger or lesser degree, and in particular in the cases where no punishment is even mentioned in the court order but some other treatment of the offender is prescribed, the need for naming the crime will be greater.²⁴² In subsequent Swedish history there are several examples of an important interplay between legislators, public reaction and the judiciary over questions of name-calling.²⁴³ In the context of the Swedish philosophy, apparently, there is a good case for having "piracy" as a separate crime of its own even if it merely duplicates a number of crimes which together constitute piracy, due to the forceful appeal of this term to

241. *Wallén, Har brottsrubriceringen nagon betydelse?*, NORDISK TIDSSKRIFT FOR KRIMINALVIDENSKAB 286 (1967).

242. STATENS OFFENTLIGA UTREDNINGAR 1940:20, 67.

243. Among those may be mentioned the controversy whether the intentional killing of a person should be called manslaughter or murder. The drafters had intended to reserve the name "murder" for particularly grave cases of such killing, but in the comments solicited from various public bodies before the bill was laid before parliament, this terminology had provoked adverse reactions: in their view, manslaughter should be reserved for cases where there were attenuating circumstances. See *supra* note 241, at 289. Another such question was whether the unlawful using of a motor vehicle belonging to another should be named "arbitrary conduct" or "theft." The Committee felt that the actor in these cases was no typical thief and that his conduct certainly was arbitrary but not dishonest. Here the courts disagreed and in a celebrated case of 1954 (HD 8-9 June 1954, NJA 1954, 240) the Swedish Supreme Court subsumed the act under theft. The Committee then changed its mind and explained that to call it "arbitrary conduct" was contrary to what a widespread opinion among the general public felt to be natural and proposed to make the section on theft expressly include this case. See STATENS OFFENTLIGA UTREDNINGAR 1953:14 267. When the Law Council was asked to give its opinion, however, it thought that the two subsumptions discussed had not been "adequate" to the crime and suggested a special name for it: "appropriation of a traffic conveyance." It may be noted in passing that Thorsten Sellin's translation is inadequate on this point. He calls it "vehicle theft" but that does not convey the sense of the dispute which had taken place and which was eventually solved in the way explained.

most people. Similar conclusions have been drawn elsewhere.²⁴⁴

The second point which would seem to set piracy apart from the sum of its parts, is the *international element* which it encompasses. It is a fair guess that the idea which made all nations accept that any one of them could assume the right to visit and punish a pirate ship, when the doctrine of the freedom of the seas was consecrated, was the desire to protect the freedom of navigation to which the pirate constituted a threat. Today's expression of this idea is to be found in Article 14 of the Geneva Convention of 1958, requiring all states to co-operate to suppress piracy. The idea that all states have a vested interest in freedom of navigation turns the creation of the crime of piracy into the protection of an interest other than the ones which are protected by such various mainstay criminal provisions as those relating to killing, robbing, stealing, coercion, etc. To the extent that the crime can be identified by the interest it protects, there exists a case for a separate crime of piracy.

One may wonder, though, if the notion of piracy as defined in the Geneva Convention really coincides with the international element it is believed to protect. Unlike the interest in freedom of navigation on the high seas the interest in civil aviation extends far beyond the activities which take place on the international sea, occasionally overflowed by civilian airliners. If piracy is associated with aviation it is consequently hard to explain why it should be limited to the airspace above the international sea. The people involved certainly experience such a limitation as highly artificial. After all, the speed of modern aircraft is such as to render it almost ridiculous to attach decisive weight to the fact that an incident took place on this or that side of an invisible state border in the air. The flight, as such, is the natural unit: whether the hijackers entered the cockpit while the aircraft was over Sorrento or the Mediterranean; whether the shooting started while the aircraft was still in Spanish air space or outside of it, seems very immaterial to every non-lawyer.

Air safety, not the freedom of navigation, is the interest which

244. Paul de la Pradelle refers to "l'impression que produit sur l'opinion la seule évocation d'un terme chargé de mystère et d'aventures": *Les détournements d'aéronefs et le droit international*, 1969 REV. GÉN. AIR. 249, 254.. The use of the term "aircraft piracy" in the hijacking amendment of 1961 to the American Federal Aviation Act, 1958, testifies to the same type of thinking.

should be protected in civil aviation. How much that interest is threatened by aerial hijackings has been a central point in public discussion lately.²⁴⁵ The risks which go with a hijacking are very real indeed. A recent example is the hijacking, on March 17, 1970, of an Eastern DC-9 in the shuttle service between Newark and Boston. After a cockpit struggle that left the copilot dead and a passenger seriously wounded, the pilot shot in both arms, landed the craft. An even more evil end was put to Cubana Airways flight Miami-Havana on November 3, 1958, at the time when the Batista rule of Cuba was drawing to a close. Fidelistas hijacked the plane and forced the pilot to land on a strip of the beach at Panto Cigarro which resulted in the airliner crashing into the Bay of Nipe. There were seventeen deaths.²⁴⁶

The very manifest risks which go with hijackings (whether considered as piracy or something else) are a matter of international concern. At the present stage of international travel, passengers of any nationality fly with aircraft of any nationality. The multitude of nationalities among the passengers using a modern commercial airliner, whether in international or in domestic aviation, makes every safety hazard a matter of international concern. This concern found early expression in article 12 of the Chicago Convention in 1944.²⁴⁷ This Article calls upon all contracting states to "insure the prosecution of all persons violating the regulations," for example, the rules and regulations relating to the flight and maneuver of the aircraft. Incidentally, this article calls for prosecution of hijackers as well. It is difficult to imagine a hijacker taking command of the aircraft without violating, in the course of his actions, the pilot-in-command's obligation to stick to his prefiled flight plan.²⁴⁸

245. See, e.g., Note by de Juglart & du Pontavice to Trib.gr.inst.Corbeil 12 March 1969, J.C.P. 1969. 16023.

246. TIME MAGAZINE, Nov. 10, 1958, at 28; de Juglart, *Les Infractions Commises à bord des Aéronefs dans la Doctrine Internationale*, 1960 REV. FR. DR. AÉRIEN, 123, 138.

247. Convention on International Civil Aviation, signed in Chicago Dec. 7, 1944, 15 U.N.T.S. 295.

248. Cf. Annex 2 (Rules of the Air) to the Chicago Convention, points 2.3.1; 3.3.1.1.1; and 3.5.2.1. For a discussion whether Article 12 should be read literally and call for prosecution irrespective of where, by whom, and in what aircraft the violation took place, or if some limitations are to be implied, see, e.g., Mankiewicz, *Aspects et Problèmes du droit Pénal de l'Aviation Internationale*, 1958 A.F.D.I. 112, 116.

Two elements have thus been found which set the totality of piracy apart from the total of its parts—a perfect name and an international element. It has also been shown that the regulation of aircraft piracy in the Geneva Convention on the High Seas was much premature. The conclusion is that from the criminal law point of view no reasons seem to exist which should prevent the combining of these two elements into a new notion of air piracy which would effectively combat the extraordinary hijacking fad which the world has experienced lately.

CRIMES COMMITTED IN FOREIGN JURISDICTIONS OR AFFECTING
FOREIGN INTERESTS AND NATIONAL POLICY

The *state of hostility* which marks the present age may not be peculiar to this age alone. One may doubt whether any previous age really was free from it. Still, it appears in retrospect that late nineteenth century, world-dominating Europe was markedly different even in that particular respect.

Those were the days of optimistic and semipacifist liberalism. There was a firm belief in the steady progress of mankind towards some kind of Utopia. To the delegates at the contemporary peace conferences it seemed "that all European governments were fundamentally the same and differed only in details. War, even if it could not be altogether avoided, was in essence a regrettable interruption of the normal order."²⁴⁹ Countries were not regarded as enemy countries when no war was in progress. A citizen was normally free to leave his country and start a fresh life in another. Indeed, the whole emigration to the United States was built upon this assumption. If the conditions of the masses were deplorable, the existence of a superstructure of a European nobility and a European bourgeoisie, spread thin over the nations, secured the uniformity in outlook which was the basis of this peaceful homogeneity.²⁵⁰

249. Smith, *Book Review* 7 I.C.L.Q. 792 (1958).

250. SCHMITT, *supra* note 164, at 208, observes that "liberal economic thinking and global commerce was self-evident in European thinking and current in the general flow of ideas. . . . In the idea of a free world economy lay not only the surmounting of the state-political borders. It included as well, as an essential precondition, a standard for the internal constitution of each member of this international law order; it presupposed that each member introduced at home a minimum

Such a state of things, of course, should be congenial to the ideas of solidarity between states and, in particular, to solidarity in carrying on the universal fight against crime. A foreign crime was an evil just as much as a domestic one: "une collaboration entre Etats pour la réalisation de la justice," was the matter called for.²⁵¹ Universal fight against crime must mean that crime is punished wherever committed and that the parcellisation of jurisdiction is not allowed to disturb the working of the penal law. As a technical matter, it meant some variation of the principle *aut dedere aut punire*.^{251a} And this makes the principle of *political asylum* much of a test case in the evolution. The evolution, however, has been most complicated because simplicity is marred by numerous crosscurrents from other sources.

Solidarity between states was marred already at the outset by minor political differences. The difference between monarchism and republicanism is an example. Republican Switzerland, for instance, was unable to appreciate that the Emperor of France needed particular criminal law protection of his life and, consequently, refused to accept the Belgian *attentat clause*.²⁵² The solidarity between the states was also disturbed by the odd effects of the principle of non-intervention. Nonintervention, of course, means that one state will not organize rebel movements in neighbouring countries. But it also means that one state will not apply, domestically, the legislation of a foreign country. Extradition proceedings invariably involve the expression, even if only indirectly, of an opinion on the internal affairs of the foreign state; an outright application of foreign legislation would of necessity do so even more. The more political the legislation is, the greater the potential risk of such an opinion. It can be

of constitutional order. This minimum consisted in the freedom, *i.e.* the separation of a state-public sphere from the domains of the private individual, in particular in the non-state character of property, commerce and economy."

251. PAPADATOS, *LE DÉLIT POLITIQUE*, 66 (Genève, 1954).

251a. See BASSIOUNI, *International Extradition and World Public Order: A Conceptual Evaluation*, in *Aktuelle Probleme Der Internationalen Strafrecht*, (Oehler and Potz eds. 1970); Bassiouni, *Rapporto di sintesi*, in *PRE-CONGRESSO DI DIRITTO PENALE INTERNAZIONALE DI SIRACUSA* (Siracusano ed. 1969); and Wise, *Some Problems of Extradition*, 3-4 *REVUE INTERNATIONALE DE DROIT PENAL* 518 (1968), reprinted in 15 *WAYNE L. REV.* 709 (1968); Bassiouni, *International Extradition in the American Practice and World Public Order*, 36 *TENN. L. REV.* 1 (1969).

252. *Id.* at 68.

argued that avoiding the expression by suppressing extradition altogether is a tribute to the sovereignty of the foreign state.²⁵³

In the nineteenth century, the right to seek and be granted asylum abroad for political crimes was formulated as a general rule: "ce fut par la Révolution de juillet 1830 en France que l'asile politique trouva pour la première fois sa consécration définitive en Europe."²⁵⁴ In a way, however, the exceptions to this rule reveal the state of solidarity between nations. The Belgian *attentat clause* was considered by Hudson to be one of the expressions of "the common interest of all peoples of the modern world in the administration of criminal justice."²⁵⁵ It arose from the attempt to kill Emperor Napoleon III which was made by Celestin Jacquin in September, 1854. Jacquin escaped to Belgium;²⁵⁶ this led to a treaty between Belgium and France of March 22, 1856, establishing this so-called "clause belge d'attentat." Belgium, born out of the 1830 revolutions and being, not unnaturally, the very first country to give the principle of political asylum statutory form (1833), undertook by that treaty to except from the notion of the political crime the attempt upon the life of a head of state or a member of his family.²⁵⁷ The solidarity between states in this respect, perhaps, reached its summit with the signing, in 1937, of the convention for the prevention and punishment of acts of political terrorism.²⁵⁸ The signatory states were prepared to reject the idea of foreign crime as a national asset *vis-à-vis* a wide spectrum of acts. By that time, however, most of the assumption of a common culture had become untrue.

New forces had been brought to life when democracy spread to the masses and perverted into totalitarianism, a totalitarianism which placed militant faith in its economic system, whatever happened to be its contents. Not all of these systems survived the Second World War.

253. *Id.*

254. *Id.* at 64; *cf. also* 1 OPPENHEIM, INTERNATIONAL LAW 697, (8th ed. Lauterpacht, 1955).

255. Hudson, *The Proposed International Criminal Court*, 32 AM. J. INT'L L. 553 (1938).

256. *See generally* 1 OPPENHEIM, *supra* note 254, at 709.

257. Law concerning extradition, 1 Oct. 1833. On the "attentat clause," *see, e.g.*, H. LAMMASCH, DAS RECHT DER AUSLIEFERUNG WEGEN POLITISCHER VERBRECHEN 74-81 (Vienna, 1884).

258. L.N. Doc./C.546/M.383 (1937).

The one which did reflect profound transformation of the issues at stake. "La loi du régime soviétique"—said an authoritative Soviet textbook on criminal procedure of 1936—"est une directive politique, et le rôle du juge [est] . . . de l'appliquer d'une manière vigoureuse comme l'expression de la politique du parti et du gouvernement."²⁵⁹ In perfect harmony with this view, the Soviet Penal Code contains 105 articles on political crime and only 45 for crimes affecting individuals only.²⁶⁰ Among the crimes peculiar to the Soviet political order are to be found economic crimes,²⁶¹ such as the production of defective goods. Nearly every criminal activity is thus, according to one opinion, political in character. This is coupled with a renaissance of the principle of intervention. It is misleading to attach too much significance to such denunciations of active interventions as were made in the 1930's—the acceptance of the United States (with qualifications) of the principle of nonintervention at the Montevideo Conference in 1933, or the signing of the League of Nations sponsored Convention for the Definition of Aggression in London during the same year.²⁶² Nor should the show put on in the United Nations organization mislead anybody. "Today everyone still persists in asserting that nations must not intervene in the internal affairs of other nations, and governments continue to accept this principle as law, . . . but in regard to the fundamental and dramatic issues of political change, there is no indication that these principles have much relation to the conduct of nations."²⁶³ Not only the super-sovereign powers are apt to intervene in other states' affairs shielded by the power of veto in the Security Council. The semi-sovereign, medium and small powers are also inclined to play the game if only they can avoid the censure of the superpowers. On various grounds, immune against judicial review, it is possible even for a professedly neutral country like Sweden (which furthermore is

259. PAPADATOS, *supra* note 251, at 107.

260. PAPADATOS, *supra* note 251, at 106.

261. By "economic crimes" appears to be meant "toutes les activités pouvant compromettre directement ou indirectement l'ordre économique et la réalisation des plans quinquennaux." PAPADATOS, *supra* note 251, at 117.

262. 147 L.N.T.S. 79, 211. The latter said in an annex to Article 3 that no act of aggression could be justified on the grounds of the internal conditions of a state.

263. Henkin, *Force, Intervention and Neutrality in Contemporary International Law*, 1963, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, 156.

allied with Portugal in the European Free Trade Area) to openly support the formation of rebel movements for warfare in the Portuguese territories in Africa.²⁶⁴ The world has thus grown increasingly "political" in outlook and states are increasingly mutually hostile. Indeed, in reference to the progressive parcellisation of the world, one may say that its hostilities now multiply by division.

In such an atmosphere, it is, misleading to view criminality in general and hijackings in particular only in the context of grave offences which it is the common interest of all nations to suppress. Too often foreign crime is viewed as a national asset to be encouraged rather than suppressed. It is, in particular, considered of benefit to one state to lure defectors from another state and it is logical to offer such defectors asylum. It cannot then be avoided that even the taking of ships or aircraft in the course of such defections is overshadowed by the political context. Indeed, it was a hijacking case which brought the change out into the open.

On October 17, 1951, a Yugoslav airliner was hijacked in flight between Ljubljana and Belgrade by one of its pilots co-operating with one of the passengers. Having forced the radio operator to continue regular traffic and having fired a gun at the mechanic to keep him out of the cockpit, they flew the aircraft to Zurich-Kloten in Switzerland. Yugoslavia demanded their extradition and could hope for a favourable reply under a strict interpretation of the Serbian-Swiss extradition treaty of November 28, 1887.²⁶⁵

Swiss extradition practice is not without international importance. Even the leading British international law textbook admits that "the firm attitude" of Switzerland contributed to the result that the principle of non-extradition of political criminals "conquered the world."²⁶⁶ The nation's importance has not been diminished by the fact that it has remained aloof to the invitation to join the United Nations. The

264. According to a letter of Feb. 6, 1970, received from the Information Unit of the Swedish International Development Authority, the Swedish Government has allotted about \$90,000 to aid the civilian part of the FRELIMO organization during each of the accounting years 1968-69 and 1969-70. According to same letter another rebel movement, PAIGC, in Guinea-Bissay will receive during the latter accounting year support in the form of goods worth about \$200,000.

265. *In re Kavic, Bjelanovic and Arsenijevic* 78(1) BGE 39; I.L.R. *supra* note 254, at 371 (Switzerland, 1952).

266. OPPENHEIM 706 f.

Extradition Act which Switzerland passed in 1892 attempted a new departure in determining whether a common crime was political or not. Article 10 of the act refuses to grant political asylum in case the chief feature of the offense wears more the aspect of an ordinary than of a political crime,²⁶⁷ but abstains from further definition or description and leaves the matter with the Federal Tribunal ("Bundesgericht," the highest Swiss court). In the hammering out of the Swiss attitude, and probably with a keen eye toward the anarchist ways of terrorizing society without wanting to govern it, the Swiss court had arrived at the rather restricted view that the crime, if political, must have been committed in the framework of a struggle for political power and been directed towards the immediate realization of political ends.²⁶⁸ Apparently, the hijackers could not meet such a test. The Court then deviated from the prior case law and emphasized the fact that there were states in which all opposition was so ruthlessly suppressed that there could be no struggle for political power in the sense of the prior case law and that in such states escape for political reasons must be equalized with participation in a political struggle.

This Swiss case set the pattern for subsequent extradition decisions. The escape of seven members of the crew of a Polish trawler, fishing in the North Sea, to Whitby, England, in September, 1954, by means of seizing the vessel, resulted in asylum being granted to the sailors—although it is not easy to identify the exact grounds for the court's refusal to extradite. From this case,²⁶⁹ J.A.C. Guttridge says, "there has emerged an adaptation of the conception of an offense of a political nature to the circumstances of a world in which there exist States where all opposition is so ruthlessly suppressed that there can be no question of two parties in the State in open competition with each other."²⁷⁰ The German Federal Con-

267. *Oppenheim, supra* note 254, at 709.

268. German original: "[D]ass die Handlung in Beziehung zu einer unmittelbar auf die Verwirklichung gewisser politischer Ziele gerichteten allgemeinen Aktion stehe." Cf. *In re Ficorilli*, 59(1) BGE 136, 146 (1933), [1933] ANN. DIG. 369; *In re Ockert*, 77(1) BGE 57, 62 (1951), 7 I.L.R. 345 (Switzerland, 1951).

269. *R. v. Governor of Brixton Prison ex parte Koleczynski*, [1955] 1 All E.R. 31 I.L.R. 240 (1954).

270. J.A.C.G., *The notion of Political Offences and the Law of Extradition*, 31 BRIT. Y.B. INT'L L. 430, 434 (1954).

stitution of 1949 provides (Article 16, paragraph 2) that "the politically persecuted shall enjoy the right of asylum." On February 4, 1959, the German Constitutional Court was called upon to interpret this rule in relation to a Yugoslav seeking to avoid extradition to his home country. (Not without reason since he had, during his sojourn in West Germany, joined a Royalist Serbian organization, and, furthermore, co-operated with Wehrmacht during the war.) The Court found that the protection "is not confined to so-called political offenders . . . [but] applies also to persons who are being persecuted for non-political offences 'where such persons, if extradited, would be liable in their home country to suffer measures of persecution involving danger to life and limb or restrictions of personal liberty for political reasons.'"²⁷¹

In 1961, however, the Swiss Court retreated slightly in the *Ktir Case*²⁷² concerning the extradition of an Algerian rebel who had murdered a supposed adversary ("traitor"). The gravity of the crime was heavily weighted, and the Court, failing to find some positive political interest, held the crime was extraditable. "It had not been shown that the interests of the FNL were so gravely impaired by the alleged treason that to 'suppress' him was the only means to safeguard these interests."

What, then, does the political context, reinforced by the state of hostility now surveyed, mean to the legal hijacking problem? It may be wise at first to estimate the relative importance of the political element. Looking at the nature of hijackings, it is natural to distinguish between classical robbery, guerilla warfare acts, and escape cases. The great majority of cases belong to the last category. Even with due allowance for a great number of mental cases among them, the hijackers' choice of destination infects all these escape cases with a political element. The hijackers always select a political adversary of the state to which the victimized airline belongs. The political element is therefore one of the most important in the whole hijacking problem.^{272a}

271. 9 BVerfG 174, 180; 28 I.L.R. 347, 349-50 (Germany, 1959).

272. *Ktir v. Ministère Public Fédéral*, 1961(1) BGE 134 (1961), 34 I.L.R. 143 (Switzerland, 1961).

272a. Bassiouni, *Ideologically Motivated Offenses and the Political Offense Exception in Tradition—A Proposed Juridical Standard for an Unruly Problem*, 19 DE PAUL L. REV. 217 (1969).

Let us first approach the problem of *unlawfulness*. It is often assumed—*e.g.*, in the Geneva Convention on the High Seas—that there exists a body of law common to all nations: indeed the existence of a world law doctrine of universal application, and that the test of “unlawfulness” is a mere “technicality.”²⁷³ Unfortunately, this assumption by no means always holds true. To take such an abstract view of the requirement of unlawfulness only tends to obscure some very real conflicts in a world where there is no Full Faith and Credit Clause to control the attitude of nations towards one another. In some legal areas the applicable laws are in such direct conflict that there can be no question of common fight against crime: There is no area of overlapping penal provisions and no area of double in-crimination.

This statement calls for examples. An excellent example is provided by the Tschombe hijacking in 1967. For all that we know,²⁷⁴ Tschombe was a murderer and a thief in the eyes of the Algerian Supreme Court. It is an almost universal rule that persons other than officials of criminal justice have the right to make an arrest under certain circumstances. In some places, the gravity of the crime determines a private person's powers of arrest.²⁷⁵ In other places, the existence of a general arrest warrant opens up the opportunity for private enterprise.²⁷⁶ It may be assumed that the Algerian law followed similar principles. But if so, the Algerian authorities had every reason to look favourably upon the hijacker who had upon his own initiative arrested a murderer and a thief and brought him together with some of his presumed accomplices—the British pilots—to jus-

273. Cf. the Greek intervention at the Geneva Conference, 4 Official Records 84, and the criticism by McDUGAL & BURKE, *supra* note 158, at 811. Compare also Simonnet, *supra* note 8, at 159.

274. The extradition proceeding against Tschombe before the Algerian Supreme Court was secret, the decision was never published, and only more or less informed press reports as to the views taken are available. See generally KEESING'S CONTEMPORARY ARCHIVES 1967 at col. 22.187; TIME MAGAZINE July 28, 1967, at 47.

275. Under § 183 of the CODE OF CRIMINAL PROCEDURE OF NEW YORK, a private person is allowed to arrest another when the person arrested has committed a felony. The same rule applies, it would seem, in England. See DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND, 14 (London, 1960).

276. The SWEDISH CODE OF PROCEDURE, c. 24, § 7, provides that if a person is “wanted for an offense” every private person is entitled to apprehend him. Tschombe was sentenced to death *in contumaciam* by a Congolese court and presumably was “wanted” by the Congolese state.

tice. The hijacking would thus be part of a lawful arrest of a criminal.

It has been countered that "a State's powers of law enforcement are part of its territorial sovereignty and, like its territorial sovereignty, they come to an end at the State's frontiers." The argument goes on to say that abductions in aeroplanes "are, in principle, no different from abductions on board ships and are subject to the same legal rules as if they had occurred on foreign territory."²⁷⁷ Since the Tokyo Convention, 1963, has destroyed even the very modest attempt made in the Transit Agreement of 1944, to establish some sort of jurisdictional immunity for aircraft,²⁷⁸ this argument is more of an *avant garde* lawmaking venture than a true rendering of the law as it stands. The argument also suffers from the failure of the English law, as interpreted in the *R. v. Martin Case*, to provide a complete legal regime for aircraft over the high seas. That may have made it difficult even for the British to find the Tschombe hijacking criminal.²⁷⁹

Consequently, in such areas of direct conflict between two legal systems, it is impossible to express any opinion of unlawfulness except in relation to one chosen legal system. This view places a certain premium upon the state which, for political reasons, is willing to promulgate, as an accessory to its criminal law, legislation for the capture of airliners (or people or property in them), outside of the state's territory. Unless one is prepared to accept the international sea and the air space above it as an expanse of lawlessness, it seems hard to deny that this is a theoretical possibility.

Let us now turn to the *area of double (multiple) incrimination*, that is to say, where the legal systems involved are overlapping and all brand the hijacking as criminal conduct. The crime thus created should, of course, be punished wherever committed and the parcellisation of jurisdiction should not be allowed to disturb the working of the penal law. Indeed, this is the area of the universal fight against crime. As a technical matter, however, this fight remains related to the parcellisation of jurisdiction in a system of concurrent juris-

277. 1967 BULLETIN OF THE INTERNATIONAL COMMISSION OF JURISTS No. 32, 24.

278. *Supra* p. — text.

279. *Supra* p. — text.

dictions. The classical and indeed the only practical way to carry it out, is by application of some variant of the principle *aut dedere aut punire*. When the criminal is apprehended, the apprehending government is liable either to extradite him to the country the laws of which he has violated initially, or to punish him within its own jurisdiction.

At this stage it may be useful to consider briefly how political control is exercised over law enforcement. In many countries, if not most, there is something equivalent to the power of the British Attorney General to enter a *nolle prosequi* and it is an accepted principle that the rule is not that the suspected criminal offence should automatically be the subject of prosecution, but that there should be ample room for considerations affecting public policy.²⁸⁰ While Sweden is one of the relatively few countries which adhere to the opposite principle, this adherence is more lip service than hard fact. Prosecution for a crime committed outside of Sweden may—with certain exceptions—be instituted only pursuant to an order from the King or from someone authorized by the King to give such order.²⁸¹ The very purpose of this provision is to allow considerations of general policy to prevail.

Returning to the principle *aut dedere aut punire* it is apparent that within the sphere of application of that principle there is no room for any political control over law enforcement. This is what creates the problem: The state has tied its own hands.

The only system to suppress hijackings which so far has been advanced up to a signed convention, is the one which is found in the Convention for the Prevention and Punishment of Terrorism, 1937 (even though it was never ratified). True, it did not cover all forms of aerial hijackings, only the most vicious among them,²⁸² but it

280. See DEVLIN, *supra* note 275, at 17-20.

281. PENAL CODE c. 2, §§ 2 & 5.

282. This convention was intended to cover terrorist acts which compromised the safety of the air traffic of several contracting states, provided that the enterprise operating the traffic was owned by the state or at least franchised by it. The greatest limitation of the area of application would seem to follow from the requirement of an intent behind the terrorist act to "create a state of terror in the minds of particular persons, or a group of persons or the general public" (Art. 1, para. 2). Outside the area of the guerilla warfare of the Palestinian commandos, it would seem comparatively rare to find acts of hijacking which are covered by this requirement. On the scope of the Convention in respect to franchised air ser-

came to grips, energetically, with the political element in the crime picture. For this reason it will be more profitable to deal with this convention than with the draft conventions on aerial hijackings produced during 1969 and 1970 within the International Civil Aviation Organization framework as the latter avoids the problem of the political element. Under the Terrorism Convention, the terrorist activities, as defined in the Convention, were to be made extraditable crimes between the contracting states, but the state asked to extradite was entitled to add whatever condition or restriction permitted under its statute, law, or simply in its practice (Article 8). Should extradition fail by reason of such condition or restriction, the state concerned undertook to punish the perpetrators of the criminal acts as if they had been committed within the state territory (Articles 9 & 10).

Donnedieu de Vabres has characterized the Convention on Terrorism as "réaliste et transactionnel."²⁸³ He based this judgment on the way in which the political issue was confronted and mastered. It was anticipated that mutually hostile states participating in this joint fight against crime, at times, must be very embarrassed. Such embarrassment could easily follow from the hard choice between, in

vices, see Art. 2, para. 2, and the comments thereto by Donnedieu de Vabres, de Vabres, *La Répression International du Terrorisme*, 1938 REV. DR. INT. LÉG. COMP. 37, 46. The IACO draft convention on hijacking proceeded on the assumption that no absolute obligation to prosecute should be imposed on the contracting states (see Legal Committee minutes from 17th session, ICAO doc. 8877-LC/161 at 69, cf 51 and 52). At the Hague Diplomatic Conference in December 1970, attempts by, in particular, the American Delegation to have an absolute obligation to prosecute substituted for this assumption, finally ended in the compromise 27-nations formula which recurs in Art. 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft (December 16, 1970): "to submit the case to its competent authorities for the purpose of prosecution." This formula is believed to move the possible decision *not* to prosecute to the level of the grand jury in the United States and to the level of the Attorney General in England. The formula seems to entail a less strict obligation to prosecute than the formula in Art. 9 of the Terrorism Convention: "shall be prosecuted and punished in the same manner as if the offence had been committed on that territory." For some information on the International Air Transport Association, see e.g. Sheehan, *The IATA Traffic Conferences*, 7 SW. L.J. 135-84; Guinchard, *International Air Transport Association*, 2 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 606-72 (1956); Rinck, *Interessengemeinschaften und Kartelle im Luftverkehr*, Festschrift für Otto Riese (Karlsruhe, 1964). The Civil Aeronautics Board attitude to the IATA Conference Resolutions is evidenced in 1949 U.S. Av.R. 362 and 1950 U.S. Av.R. 310. For a more general critical view of the organization, see PILLAI, *THE AIR NET: THE CASE AGAINST THE WORLD AVIATION CARTEL* (New York, 1969).

283. de Vabres, *supra* note 282, at 61.

the case of extradition, "soumettre l'inculpé à des juridictions étrangères dont il redoute la partialité," and, in the case of a domestic trial, "s'exposer . . . à l'aléa d'une sentence grosse, peut être, de complications: acquittement scandaleux, condamnation injustement sévère que dictera à des juges populaires une opinion ignorante et surexcitée."²⁸⁴ The solution provided here—the feature which substantiates the characterization just made—was the faculty to refer the whole proceeding to an international penal court, set up under a twin convention.²⁸⁵

Relating this to present day conditions, it may be seen that the problem has two sides—extradition and domestic trial. As to *extradition*, the situation has been surveyed some pages ago, and unless the hijacking has included some especially grave crime with vicious motives, most countries which are likely to get involved in this type of criminality, are inclined to grant asylum. As to *punishment*, following trials in the state's own courts, a recent sequence of European cases displays a rising reaction against aerial hijackings. These cases do not challenge the principle of asylum; they simply set the penalties. Although they do not relate to a special crime of air hijacking, or air piracy, but rather to a combination of other crimes, the sentences in them now uniformly reach the level of two years' imprisonment or more. The Olympic hijackers, Panichi Maurizio and Giovine Umberto, who forced an Olympic plane to return to Orly on November 8, 1968, as part of their fight against the Greek government, were tried by a local French court and found guilty of intentional violence and illegal possession of firearms and were sentenced to five and eight months' imprisonment, respectively. Only one year later, hijackers Peter Klemt and Hans Ulrich von Hof, who forced an aircraft to come down at Tegel airport in the French sector of Berlin on October 19, 1969, were tried by the French military court for the French occupation sector, found guilty of having compromised the security of the working of an air line, of having endangered the lives of the people on board, and of unlawful coercion, and were each sentenced, to two years' imprisonment. Subsequently,

284. de Vabres, *supra* note 282, at 60.

285. Convention for the Creation of an International Criminal Court, 1937, 1938, REV. DR. INT. LÉG. COMP. 68. Cf. Hudson, *The Proposed International Criminal Court*, 32 AM. J. INT'L L. 549 (1938).

Romuald Zolotucho and Wieslaw Szymankiewicz, hijacked an aircraft on November 20, 1969, and forced a landing in Vienna. They were tried by a local Austrian court, found guilty of similar crimes under Austrian law, and sentenced to two years, and two years and three months' imprisonment, respectively.

These cases, however, do not display much of the political element. Only in the first French case (the Olympic hijacking) was there any political agitation in connection with the trial. In an article in *Le Monde* of March 24, 1969, the court was criticised by Jean Paul Sartre and others for collaborating with the Greek "Junta." As this article appeared after the judgment was rendered, it seems unlikely that such agitation influenced the rather light sentences.²⁸⁶ The central problem with which the drafters of the twin conventions on terrorism were concerned, is better revealed by the *Tsironis Case* in Sweden. This case, thus far, has not yet been brought to trial but provides nevertheless excellent illustrations of the problems feared.

On August 16, 1969, *en route* between Athens and Jannina, domestic Olympic DC-3 flight 500/1, under command of Captain George Georgis, was hijacked by passengers: Dr. Tsironis, his wife, and their two boys. Tsironis pointed a gun at the pilots and said: "I am Doctor Tsironis. In the name of freedom and humanity, I have taken this aircraft and from now on you shall obey to my orders and to those of my colleagues with regard to the course we are going to follow." Thereupon Tsironis forced the pilots to land in Albania. Being subsequently allowed to leave Albania, Dr. Tsironis sought entry into Italy and France but was refused. Finally he arrived in Sweden where he received permission to take up residence.

Pursuant to the Swedish Penal Code Chapter 2, § 2, an alien who has committed a criminal act outside of Sweden which was punishable under the law in force at the place of the crime, should be tried according to Swedish law and in a Swedish court, if after having committed the crime he has acquired domicile in Sweden; and even if he is only found in Sweden, provided that in such case the crime is punishable according to Swedish law by imprisonment for more than six months. By the very act of seeking sanctuary in Sweden, Dr. Tsironis had brought the possibility of prosecution for the

286. See Sartre, *Le Monde*, March 24, 1969, at —, col. —.

hijacking upon himself. Although Sweden had nothing to do with the hijacking as such—it was not the state of registry, not the state of landing and not the state within which the crime had taken place—it claimed jurisdiction over the crime committed by way of the hijacking. Inasmuch as jurisdiction is established, the Swedish experience would seem to be instructive *vis-à-vis* other cases in which jurisdiction to prosecute a far away hijacking may be assumed (although pursuant to other rules of jurisdiction and political complications cloud the horizons).

In order to understand the significance of the Swedish case, it is necessary to mention briefly the political facts. The political situation between the victim country in this hijacking, Greece, and Sweden had at the time of Dr. Tsironis' entry for some years been characterized by an open if not armed hostility. The Swedish ambassador to Greece had been withdrawn at the same time as the Swedish government had sought other ways to participate actively in Greek political life. A Greek politician had been invited to take residence in Sweden at the expense of the Swedish government in order to plan and lead from Sweden the struggle of his political organization in Greece. It was reported that this activity on Swedish soil even covered resort to armed force inside Greece. When Dr. Tsironis arrived in Sweden, he referred to his previous (in fact rather modest) position as a politician in Greece and asked for treatment similar to that enjoyed by his predecessor. This request was very favourably received by the Swedish authorities which went to considerable lengths to provide him with an economic basis in Sweden and to shield him from any actions by Greek government agents. It appears that Tsironis during the initial period received about \$2,000 per month in support. When the question was raised whether the hijacking, in view of the Swedish views of the Swedish criminal jurisdiction, could be left unpunished, the Chief State Prosecutor, on November 12, 1959, ordered a preliminary police inquiry.

This police inquiry immediately split into two channels. As to the state of landing, Albania, with which friendly relations were entertained, the inquiry proceeded by means of diplomatic channels. They did not yield more, however, than a cable reproducing the Albanian official news agency's bulletin of the day Tsironis landed in Albania. Relating to Greece, being the state of registry

and the *locus delicti*, with which relations were hostile, it was decided to avoid the diplomatic channel which would involve political embarrassment, as well as the slightly more technical International Civil Aviation Organization channel. Instead, it was decided to rely on the Interpol routine which functioned pursuant to the European Convention on Mutual Assistance in Criminal Matters, signed in Strassbourg on April 20, 1959.²⁸⁷ The local police authority initiated such a request for assistance on November 27, 1969. The request, after five months, had produced no results whatsoever. The only evidence against the hijacker which the Swedish police succeeded in collecting was a translation of the flight report which had been turned in to the Air Traffic Department of Olympic Airways by Captain Georgis, and this piece of evidence was volunteered to the police from private quarters. It is a fair guess that the very slight Greek response to the Swedish police requests was connected with Greek realization of what political embarrassment the situation meant to the Swedish government. The Greeks were in no way inclined to diminish this embarrassment.

The result of the inquiry confronts the Swedish law enforcement agencies with difficult decisions. The Chief State Prosecutor may decide to drop the case in view of the unsatisfactory evidence, or in view of the political agitation which may be expected to surround the trial. If a prosecution is initiated, there is the risk of a scandalous acquittal. The general public finding it "unfair to proceed against men who came to Sweden with official help and were treated by the authorities not as criminals but rather as honoured guests"²⁸⁸ may react with indignation to the trial, and even more trouble may lie ahead if the court bends over backwards and hands down an excessive sentence.

The *Tsironis Case*, however, has even greater significance. In response to general public opinion in Sweden, the Swedish Foreign Office has been pursuing a moralizing foreign policy. This has engendered a state of general hostility between Sweden and nations without Socialist leanings. One result of this state of affairs is that the friends of Sweden's enemies, as conceived by public opinion, are

287. 472 U.N.T.S. 185.

288. Harris, *The Swedes and the Sky-Jackers*, Daily Telegraph, March 10, 1970, at 11, col. —.

sure to find a sanctuary in Sweden. The political conditions of the world being what they are, many, if not most, hijackings are cases of escape from non-Socialist countries to Cuba. For economical and political reasons, however, Cuba is reluctant to harbour all the escaping hijackers. It appears that people in Cuba are now realizing what sanctuary can be offered by Sweden. At least, this is suggested by the *Fuentes Case*.

On February 5, 1969, military policeman, Leonardo Dominguez Fuentes, secured his escape from Colombia to Cuba by hijacking a domestic DC-4 flight of Sociedad Aeronautica Medellin. After three months in camp in Cuba, he was denied immigration entry. With Cuban identity papers he was then sent to seek entry in Switzerland via Prague. Being rejected by the Swiss, he spent the rest of the year in Prague at the expense of the Cuban consulate and a Latin American Student Organization. When he found out that the Czech authorities probably would send him back to Colombia once the Cuban consulate decided to support him no more, he flew to Sweden and asked for asylum on January 18, 1970.

The *Fuentes* case is very similar to the *Tsironis* case, the main difference being that Fuentes does not claim to be a politician and that the Swedish Foreign Policy has not singled out Colombia as a chief enemy comparable to Greece. While *Tsironis'* is an odd case, however, *Fuentes'* is not: There are scores of hijackings in Latin America which have produced closely similar cases. In view of the idolization of Latin American revolutionaries in Sweden (the Guevara cult) the embarrassment of making Fuentes stand trial in Sweden will be the same, if not worse as that which would surround prosecution of Dr. *Tsironis*.

But the embarrassment to be felt in connection with the entry of hijackers is not exclusively a Swedish phenomenon. Other countries may expect to experience it as well. Italy is on its way to that end in the *Minichiello* case. Raphael Minichiello, it will be recalled, was the U.S. Marine who succeeded, on October 31, 1969, in forcing Trans World Airlines flight 85 to take him for a 6,900 mile ride to Rome. Minichiello's deed was immediately exploited locally. Melito Irpino, Minichiello's Italian home town, made his American counsel an honorary citizen and film magnate Carlo Ponti announced that he wanted to make a film out of his deed.

The embarrassment to be expected in such hijacking cases is very much of the same kind as that which was anticipated by the drafters of the twin conventions on terrorism of 1937. The Convention on the Creation of an International Criminal Court was opened to signature on November 16, 1937. It was signed by twelve European powers, among them France and the Soviet Union, and by Cuba.²⁸⁹ This court was to be set up for the trial of persons accused of an offence dealt within the Convention on Terrorism. Instead of punishing these offences in its own courts, or extraditing accused persons, a party to the convention might refer the accused for trial to the court, but it would be under no obligation to do so. The court was to be permanent with its seat at the Hague. The court was to consist of five judges and five deputy judges of different nationality. The judges would be jurists of competence in criminal law, chosen by the World Court from among persons nominated by the parties and the regular term of the judges would be ten years. Only five members of the court would sit in any case. The Registry of the World Court would be asked to serve the new court also. The salaries of the judges, on a fixed scale, would be payable by the states of which they were nationals.

The conflict of laws problems which the court would encounter were, in so far as punishment was concerned, solved by resort to a dual system of law: the *lex loci delicti* and the law of the state which had committed the accused for trial. *In casu*, the penalty was to be controlled by the more lenient of the two systems (Article 21). Otherwise, the court itself was sole master of the conflict of laws questions. If this meant the application of a legal system not represented among the judges on the bench, a consultative assessor specializing in that system could be joined to the court. Arrest and detention of the accused during trial was decided by the court but execution was left to the state in which the court was sitting. Letters rogatory could be sent by the court itself and the court could on its own motion call witnesses and experts. The costs thus incurred were to be met by a common fund. Penalties imposed were to be executed by the state which the court, at its discretion, had selected for this purpose, provided that it assented thereto. The same state could

289. Bouzat, *Propositions pour la Constitution d'une Cour Pénale Européenne*, 1967 REVUE INTERNATIONALE DE DROIT PÉNAL, 179.

pardon the criminal, after consulting with the court. Money received by way of fines could be disposed of by the court in its discretion.

The apparent merit of this system of law enforcement lies in the fact that it establishes a *modus vivendi* for a world which is more deeply split than is generally officially acknowledged. It never entered into force, due to the Second World War. After the war, interest has not focused so much on this very practical international criminal court which was to deal with everyday crimes under national law, but rather turned towards rather impractical courts for exceptional crimes of the type with which the multi-national Nuremberg Military Tribunal was confronted. It should be recalled, however, that as late as at the Tenth Congress of International Criminal Law, in 1969, it was resolved to recommend that disputes relating to the extradition aspects of international criminal law should "be referred compulsorily, or at least optionally, to an international criminal court."²⁹⁰ In the context of the upsurge of hijackings with important political elements involved, I view the creation of an international criminal court along the lines delineated in the 1937 conventions as the most promising way to cope with the difficult law enforcement problem here met. The only hesitation I have, relates to the geographical jurisdiction of such a court. It may be very impractical to have only one such court. Even such a worldwide organization as IATA finds it useful to split the aviation world into three regions; I believe that one court for each region is a better model to follow. Once created, of course, an international court of this type could be charged with other types of business as well. I believe that the development of this international court system is the means of effectively dealing with the problems of piracy and hijacking.

290. The idea was presented at the Freiburg Colloquium on Extradition held in 1968 at the Max-Planck Institute for International and Comparative Criminal Law by Professor Bassiouni. See Bassiouni, *International Extradition in the American Practice and World Public*, 36 TENN. L. REV. 1 (1968); Bassiouni, *International Extradition: An American Experience and a Proposed Formula*, 3-4 REVUE INTERNATIONALE DE DROIT PENAL 494 (1968), reprinted in 15 WAYNE L. REV. 733 (1969); Bassiouni, *La Estradizione Internazionale: Riassunto della Prassi Americana Contemporanea, ed. uno schema di porposte per il sinnovanmente dell'istituto*, 10 RIVISTA DEL DIRITTO MATRIMONIALE E DELLO STATO DELLE PERSONE 418 (1968).

APPENDIX A

CONVENTION FOR THE SUPPRESSION
OF UNLAWFUL SEIZURE OF AIRCRAFT

PREAMBLE

THE STATES PARTIES TO THIS CONVENTION

CONSIDERING that unlawful acts of seizure or exercise of control of aircraft in flight jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation;

CONSIDERING that the occurrence of such acts is a matter of grave concern; CONSIDERING that, for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders;

HAVE AGREED AS FOLLOWS:

ARTICLE I

Any person who on board an aircraft in flight:

- (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or
- (b) is an accomplice of a person who performs or attempts to perform any such act

commits an offence (hereinafter referred to as "the offence").

ARTICLE II

Each Contracting State undertakes to make the offence punishable by severe penalties.

ARTICLE III

1. For the purposes of this Convention, an 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. In the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.
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 landing of the aircraft on board which the offence is committed is situated outside the territory of the State of registration of that aircraft; it shall be immaterial whether the aircraft is engaged in an international or domestic flight.
4. In the cases mentioned in Article V, this Convention shall not apply if the place of take-off and the place of actual landing of the aircraft on board which the offence is committed are situated within the territory of the same State where that State is one of those referred to in that Article.
5. Notwithstanding paragraphs 3 and 4 of this Article, Articles VI, VII, VIII, and X shall apply whatever the place of take-off or the place of actual landing of the

aircraft, if the offender or the alleged offender is found in the territory of a State other than the State of registration of that aircraft.

ARTICLE IV

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases:

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

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

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

ARTICLE V

The Contracting States which establish joint air transport operating organizations or international operating agencies, which operate aircraft which are subject to joint or international registration shall, by appropriate means, designate for each aircraft the State among them which shall exercise the jurisdiction and have the attributes of the State of registration for the purpose of this Convention and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States Parties to this Convention.

ARTICLE VI

1. Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary enquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.

4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the State of registration of the aircraft, the State mentioned in Article IV, paragraph 1(c), the State of nationality of the detained person and, if it considers it advisable, any other interested States of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

ARTICLE VII

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 offence 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 offence of a serious nature under the law of that State.

ARTICLE VIII

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

ARTICLE IX

1. When any of the acts mentioned in Article I(a) has occurred or is about to occur, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.
2. In the cases contemplated by the preceding paragraph, any Contracting State in which the aircraft or its passengers or crew are present shall facilitate the continuation of the journey of the passengers and crew as soon as practicable, and shall without delay return the aircraft and its cargo to the persons lawfully entitled to possession.

ARTICLE X

1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offence and other acts mentioned in Article IV. The law of the State requested shall apply in all cases.
2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

ARTICLE XI

Each Contracting State shall in accordance with its national law report to the Council of the International Civil Aviation Organization as promptly as possible any relevant information in its possession concerning:

- (a) the circumstances of the offence;
- (b) the action taken pursuant to Article IX;
- (c) the measures taken in relation to the offender or the alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings.

ARTICLE XII

1. Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation.
3. Any Contracting State having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Depositary Governments.

ARTICLE XIII

1. This Convention shall be open for signature at The Hague on 16 December 1970, by States participating in the International Conference on Air Law held at The Hague from 1 to 16 December 1970 (hereinafter referred to as The Hague Conference). After 31 December 1970, the Convention shall be open to all States for signature in Moscow, London and Washington. Any State which does not sign this Convention before its entry into force in accordance with paragraph 3 of this Article may accede to it at any time.
2. This Convention shall be subject to ratification by the signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, which are hereby designated the Depositary Governments.
3. This Convention shall enter into force thirty days following the date of the deposit of instruments of ratification by ten States signatory to this Convention which participated in The Hague Conference.
4. For other States, this Convention shall enter into force on the date of entry into force of this Convention in accordance with paragraph 3 of this Article, or thirty days following the date of deposit of their instruments of ratification or accession, whichever is later.
5. The Depositary Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession, the date of entry into force of this Convention, and other notices.
6. As soon as this Convention comes into force, it shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations

and pursuant to Article 83 of the Convention on International Civil Aviation (Chicago, 1944).

ARTICLE XIV

1. Any Contracting State may denounce this Convention by written notification to the Depositary Governments.
2. Denunciation shall take effect six months following the date on which notification is received by the Depositary Governments.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorised thereto by their Governments, have signed this Convention.

DONE at The Hague, this sixteenth day of December, one thousand nine hundred and seventy, in three originals, each being drawn up in four authentic texts in the English, French, Russian and Spanish languages.

APPENDIX B

May 12, 1971

M. Cherif Bassiouni
Professor of Law
DePaul University
College of Law
25 East Jackson
Chicago, Illinois

Dear Professor Bassiouni:

I enclose a copy of the joint Canadian-U.S. draft convention on concerted action against states in certain cases of unlawful seizure and unlawful interference with aircraft. I also enclose a copy of the resolution adopted on October 1 by the ICAO Council instructing the Legal Committee to consider the question of joint action. Our original draft, submitted at the 18th Legal Committee, and opening statement introducing that draft, other documentation and report of the 18th Legal Committee on the subject of joint action can be obtained by writing directly to the International Civil Aviation Organization in Montreal. In some respects the proceedings at the 18th Legal Committee are out of date in view of the joint Canadian-U.S. proposal; however, many of the fundamental questions remain the same. I regret we do not have copies of the full set of documents of the 18th Legal Committee to send you.

The Legal Subcommittee report, dated 27 April, can also be obtained by writing to ICAO. It contains a general discussion of the Canadian-U.S. draft as far as the Subcommittee was able to complete its work. Neither we

nor the Canadians submitted any position papers as working documents. Our position is fully set out in the Subcommittee report.

Sincerely yours,

Franklin K. Willis
Attorney
Office of the Legal Adviser

Enclosures:
As stated

APPENDIX C

*First resolution adopted by the Council on 1 October 1970
(LXXI-6)*

THE COUNCIL,

Finding that a heightened threat to the safety and security of international civil air transport exists as a result of acts of unlawful seizure of aircraft involving the detention of passengers, crew and aircraft contrary to the principles of Article 11 of the Tokyo Convention, for international blackmail purposes, and the destruction of such aircraft;

Recognizing that Contracting States to the Convention on International Civil Aviation have obligated themselves to ensure the safe and orderly growth of international civil aviation throughout the world;

Calls upon Contracting 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 principles 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;

Directs the Legal Committee to consider during its Eighteenth Session, if necessary by extension of the session, an international convention or other international instruments:

- i) to give effect to the purposes set out in the preceding paragraph;
- ii) to provide for joint action by States to take such measures as may be appropriate in other cases of unlawful seizure; and
- iii) to provide for amendment of bilateral air transport agreements of contracting parties to remove all doubt concerning the authority to join in taking such action against any State.

APPENDIX D
Canadian/U.S. Draft

The Governments of Canada and the United States of America each presented proposals, based on Canadian and United States resolutions adopted by the ICAO Council on October 1, 1970, to the 18th Session of the Legal Committee of the International Civil Aviation Organization, which met at London in September-October 1970. After preliminary consideration of the two proposals, the Legal Committee decided to establish a Special Legal Subcommittee to study them in detail.

Representatives of Canada and the United States have met for the purpose of combining the two proposals submitted to the ICAO Legal Committee with a view to presenting a single joint proposal to the Special Legal Subcommittee. The combined proposal is in the form of a draft multilateral convention.

The text of the draft Convention reflects the following essential features which have been drawn from the two original Canadian and United States proposals.

The Convention

- (1) deals with the question of concerted action in the most serious types of incidents of aircraft hijacking and unlawful interference with civil aviation involving breaches of fundamental principles of international law as expressed in the Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, and the draft unlawful interference convention prepared by the ICAO Legal Committee;
- (2) provides for a two-step procedure—initially, a finding of default followed by, when appropriate, a separate decision on concerted action;
- (3) establishes simplified machinery for the decision-making process while preserving emergency procedures for urgent circumstances.

In addition, the Convention:

- (a) stipulates that as between parties nothing in existing multilateral and bilateral air transport service agreements shall be considered incompatible with rights and obligations under the Convention;
- (b) provides explicitly that parties shall use their best efforts to amend any existing bilateral air transport service agreements with states not parties that may be incompatible with rights and obligations under the Convention;
- (c) provides explicitly that parties shall not conclude any future multilateral or bilateral air transport agreements incompatible with rights and obligations under the Convention;
- (d) provides that nothing in the Convention shall exclude the right of a party to suspend air services or to take any other action to preserve

and promote the safety and security of international civil aviation exercised in accordance with international law.

The text of this draft Convention is as follows:

Article 1

Determination Relating to Detention

1. Whenever a Contracting State which is an interested State has reason to believe that an unlawful seizure of an aircraft has occurred and that such aircraft, its passengers or crew are being detained within the territory of another State, it may invoke the provisions of this Article in order to obtain a determination that such State is in default of its obligations to facilitate the continuation of the journey of the passengers and crew, and to return the aircraft to the persons lawfully entitled to possession. The State alleging default shall be designated the claimant State.
2. The claimant State shall, prior to requesting the convening of a Commission to determine default, request the State alleged to be in default to facilitate the continuation of the journey of the passengers and crew, and to return the aircraft to the persons lawfully entitled to possession. It shall also notify such State that, in the event of failure to comply with this request within 24 hours, it may request to convene Commission pursuant to this Convention for the purpose of obtaining a determination of default. It shall immediately notify of this request, who shall transmit the notification to all other Contracting States.
3. The claimant State may, not earlier than 24 hours following the request referred to in paragraph 2, request to establish and convene a Commission pursuant to this Convention for the purpose of obtaining a determination of default. The Commission shall meet (at) within 72 hours of receipt by of the claimant State's request.
4. The Commission shall make a determination within (72) hours after it first meets. It shall report its determination and any other findings or conclusions it deems appropriate to , who shall transmit the report to all Contracting States.

Article 2

Determination Relating to Custody, Extradition or Prosecution

1. Whenever a Contracting State which is an interested State has reason to believe that a person has committed

- a) an act of unlawful seizure of an aircraft which has resulted in the detention of such aircraft, its passengers or crew, or
- b) an act of unlawful interference with international civil aviation which has resulted in the destruction of an aircraft, or death or physical injury to a person on board,

and that such person is within the territory of another State and that such State is in default of its obligations to take him into custody or take other measures to ensure his presence and thereafter to extradite him or submit the case to its competent authorities for the purpose of prosecution, it may invoke the provisions of this Article in order to obtain a determination of its allegations that such State is in default of such obligations. The State alleging default shall be designated the claimant State.

2. The claimant State shall, prior to requesting the convening of a Commission to determine default, request the State alleged to be in default to take such person into custody or to take other measures to ensure his presence and thereafter to extradite him or submit the case to its competent authorities for the purpose of prosecution. It shall also notify such State that in the event of failure to comply with this request within (30) days it may request _____ to convene a Commission pursuant to this Convention for the purpose of obtaining a determination of default. It shall immediately notify _____ of this request, who shall transmit the notification to all other Contracting States.

3. The claimant State may, not earlier than (30) days following the request referred to in paragraph 2, request _____ to establish and convene a Commission pursuant to this Convention for the purpose of obtaining a determination of default. The Commission shall meet (at _____) within (7) days of receipt by _____ of the claimant State's request.

4. The Commission shall make a determination within (30) days after it first meets. It shall report its determination and any other findings or conclusion it deems appropriate to _____, who shall transmit the report to all Contracting States.

Article 3

The Commission

1. Each Contracting State shall, at the time of depositing its instrument of ratification, designate two persons with suitable qualifications and experience who shall be available to serve on a Commission which may be established and convened pursuant to Articles 1 or 2. Contracting States may at any time designate such persons as replacements or fill vacancies. The names of persons designated shall be transmitted to _____

2. A Commission shall be composed of seven members drawn from among the persons designated by Contracting States. Each member of the Commission shall be from a different State and no member shall be from either the claimant State or State alleged to be in default. The Commission shall choose its chairman and establish its rules and procedures.

3. A determination shall be made by a majority of the members of the Commission.

Article 4

Concerted Action

1. Any Contracting State which is an interested State may request _____ to convene a meeting of interested and air service States (at _____)

- a) in the event of a determination of default under Article 1, to take place within 72 hours;
- b) in the event of a determination of default under Article 2, to take place within (30) days

to decide upon concerted action with respect to the defaulting State. All interested and air service States shall be entitled to participate in the meeting.

2. Concerted action pursuant to this Article may include

- a) suspension of all international air navigation to and from the defaulting State;
- b) other measures to preserve and promote the safety and security of international civil aviation.

3. Any decision on concerted action shall be taken by a majority of States present and voting, except that any decision involving the suspension of international air services shall also require a majority of air service States present and voting. Decisions shall be binding on all Contracting States entitled to participate in the meeting and recommendatory with respect to non-contracting States entitled to participate in the meeting.

4. The failure of one or more interested or air service States to participate in a decision on concerted action shall not affect the validity of the decision.

Article 5

Modification, Suspension or Termination of Concerted Action

1. Any Contracting State which participated at a meeting at which a decision on concerted action was taken, or the defaulting State, may request _____ to convene a meeting for the purpose of modification, suspension or termination of the concerted action on the grounds that such action is no longer appropriate or necessary.

2. _____ shall convene the meeting as soon as practicable. Participation, voting, and decisions at the meeting shall be as provided in Article 4.

Article 6

General Provisions

1. Copies of notices, determinations, findings, conclusions and decisions made pursuant to this Convention shall be transmitted to all States

Parties to the Convention on International Civil Aviation by -----

2. A State alleged to be in default may submit appropriate documentation and make oral statements before a Commission established pursuant to this Convention. No State determined to be in default shall be entitled to participate in a meeting convened under Articles 4 or 5.

Article 7

Other International Agreements

1. As between Contracting States the provisions of any multilateral or bilateral air transport service agreement to which they are parties shall not be considered incompatible with and shall not affect any determination or decision made pursuant to this Convention.
2. Contracting States undertake to use their best efforts to amend any bilateral air transport service agreement with a non-Contracting State which may be incompatible with the provisions of this Convention.
3. Contracting States undertake not to become parties to any multilateral or bilateral air transport service agreement which is incompatible with the provisions of this Convention.
4. The provisions of this Convention shall not exclude the right of a Contracting State to suspend air services or to take any other action to preserve and promote the safety and security of international civil aviation exercised in accordance with international law.

Article 8

Scope and Definitions

1. For the purposes of this Convention the expression:
 - a) "interested State" means
 - (1) in Articles 1 and 4(1)(a), the State of registration or operation of the aircraft being detained and any State whose nationals are being detained;
 - (2) in Articles 2 and 4(1)(b), the State of registration or operation of the aircraft and
 - (i) in the case of unlawful seizure of the aircraft, any State whose nationals were detained
 - (ii) in the case of unlawful interference with the aircraft, the State within whose territory the unlawful interference took place and any State whose national has suffered death or physical injury as a result of the unlawful interference;
 - b) "air service State" means any State which has an intentional air service with a State determined to be in default under Articles 1 or 2 and any State with which a State determined to be default under Articles 1 or 2 has an international air service; whether or not such a State is a party to this Convention.
2. The State of operation of an aircraft refers to the State in which the

lessee of an aircraft leased without crew has his principal place of business or, if the lessee has no such place of business, his permanent residence.

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

APPENDIX E
UNITED NATIONS SECURITY COUNCIL
RESOLUTION 286 (1970)*
Adopted September 9, 1970

THE SECURITY COUNCIL,

Gravely concerned at the threat to innocent civilian lives from the hijacking of aircraft and any other interference in international travel,

Appeals to all parties concerned for the immediate release of all passengers and crews without exception, held as a result of hijackings and other interference in international travel,

Calls on states to take all possible legal steps to prevent further hijackings or any other interference with international civil air travel.

APPENDIX F
UNITED NATIONS GENERAL ASSEMBLY
RESOLUTION 2645 (XXV)**
Adopted November 25, 1970

AERIAL HIJACKING OR INTERFERENCE WITH CIVIL AIR TRAVEL

The General Assembly,

Recognizing that international civil aviation is a vital link in the promotion and preservation of friendly relations among states and that its safe and orderly functioning is in the interest of all peoples,

Gravely concerned over acts of aerial hijacking or other wrongful interference with civil air travel,

Recognizing that such acts jeopardize the lives and safety of the passengers and crew and constitute a violation of their human rights,

* 63 DEPT. OF STATE BULLETIN 341, at 342 (1970); 9 INT. LEGAL MATERIALS 1291 (1970).

** Doc. A/RES/2645 (XXV); U. N. Press Release GA/4355 (Dec. 17, 1970), Pt. VIII, at 20; 64 DEPT. OF STATE BULLETIN 32 (1971); 9 INT. LEGAL MATERIALS 1288 (1970).

Aware that international civil aviation can only function properly in conditions guaranteeing the safety of its operations and the due exercise of the freedom of air travel,

Endorsing the solemn declaration¹ of the extraordinary session of the Assembly of the International Civil Aviation Organization held at Montreal from 16 to 30 June 1970,

Bearing in mind General Assembly Resolution 2552 (XXIV) of 12 December 1969, and Security Council Resolution 286 (1970) of 9 September 1970² adopted by consensus at the 1552nd meeting of the Council,

1. *Condemns*, without exception whatsoever, all acts of aerial hijacking or other interference with civil air travel, whether originally national or international, through the threat or use of force, and all acts of violence which may be directed against passengers, crew and aircraft engaged in, and air navigation facilities and aeronautical communications used by, civil air transport;

2. *Calls upon* states to take all appropriate measures to deter, prevent or suppress such acts within their jurisdiction, at every stage of the execution of those acts, and to provide for the prosecution and punishment of persons who perpetrate such acts, in a manner commensurate with the gravity of those crimes, or, without prejudice to the rights and obligations of states under existing international instruments relating to the matter, for the extradition of such persons for the purpose of their prosecution and punishment;

3. *Declares* that the exploitation of unlawful seizure of aircraft for the purpose of taking hostages is to be condemned;

4. *Declares further* that the unlawful detention of passengers and crew in transit or otherwise engaged in civil air travel is to be condemned as another form of wrongful interference with free and uninterrupted air travel;

5. *Urges* states to the territory of which a hijacked aircraft is diverted to provide for the care and safety of its passengers and crew and to enable them to continue their journey as soon as practicable and to return the aircraft and its cargo to the persons lawfully entitled to possession;

6. *Invites states* to ratify or accede to the Convention on Offences and Certain Other Acts committed on Board Aircraft signed at Tokyo on 14 September 1963,³ in conformity with the Convention;

7. *Requests* concerted action on the part of states, in accordance with the Charter of the United Nations, towards suppressing all acts which jeopardize the safe and orderly development of international civil air transport;

8. *Calls upon* states to take joint and separate action, in accordance with the Charter, in co-operation with the United Nations and the International Civil Aviation Organization to ensure that passengers, crew and aircraft engaged in civil aviation are not used as a means of extorting advantage of any kind;

1. International Civil Aviation Organization, Resolutions adopted by the Assembly, Seventeenth Session (Extraordinary) (Montreal, 1970), Res. A17-1; reprinted *infra*, at 452.

2. Reprinted *supra*.

3. 704 U. N. TREATY SERIES, No. 10106 (1969); 58 A.J.I.L. 566 (1964).

9. *Urges* full support for the current efforts of the International Civil Aviation Organization towards the development and co-ordination, in accordance with its competence, of effective measures in respect of interference with civil air travel;

10. *Calls upon* states to make every possible effort to achieve a successful result at the diplomatic conference to convene at The Hague in December 1970 for the purpose of the adoption of a convention on the unlawful seizure of aircraft, so that an effective convention may be brought into force at an early date.⁴

The General Assembly, without a vote, took note of the following statement contained in the report of the Sixth Committee:

"It was agreed in the Committee that the adoption of the draft resolution cannot prejudice any international legal rights or duties of states under instruments relating to the status of refugees and stateless persons."

APPENDIX G

INTERNATIONAL CIVIL AVIATION ORGANIZATION

ASSEMBLY DECLARATION*

Adopted June 30, 1970

WHEREAS international civil air transport helps to create and preserve friendship and understanding among the peoples of the world and promotes commerce between nations;

WHEREAS acts of violence directed against international civil air transport and airports and other facilities used by such air transport jeopardize the safety thereof, seriously affect the operation of international air services and undermine the confidence of the peoples of the world in the safety of international civil air transport; and

WHEREAS Contracting States, noting the increasing number of acts of violence against international air transport, are gravely concerned with the safety and security of such air transport;

THE ASSEMBLY:

CONDEMNES all acts of violence which may be directed against aircraft, aircraft crews and passengers engaged in international civil air transport;

CONDEMNES all acts of violence which may be directed against civil aviation personnel, civil airports and other facilities used by international civil air transport;

4. See above, p. 440.

* Res. A17-1, ICAO Assembly, 17th Sess. (Extraordinary), June 16-30, 1970; 63 DEPT. OF STATE BULLETIN 302, at 303 (1970); 9 INT. LEGAL MATERIALS 1275 (1970).

URGENTLY

CALLS UPON states not to have recourse, under any circumstances, to acts of violence directed against international civil air transport and airports and other facilities serving such transport;

URGENTLY

CALLS UPON STATES, pending the coming into force of appropriate international conventions, to take effective measures to deter and prevent such acts and to ensure, in accordance with their national laws, the prosecution of those who commit such acts;

ADOPTS THE FOLLOWING DECLARATION:

The Assembly of the International Civil Aviation Organization,
Meeting in Extraordinary Session to deal with the alarming increase in acts of unlawful seizure and of violence against international civil air transport aircraft, civil airport installations and related facilities,

Mindful of the principles enunciated in the Convention on International Civil Aviation,

Recognizing the urgent need to use all of the Organization's resources to prevent and deter such acts,

SOLEMNLY

- (1) Deplores acts which undermine the confidence placed in air transport by the peoples of the world.
- (2) Expresses regret for the loss of life and injury and damage to important economic resources caused by such acts.
- (3) Condemns all acts of violence which may be directed against aircraft, crews and passengers engaged in, and against civil aviation personnel, civil airports and other facilities used by, international civil air transport.
- (4) Recognizes the urgent need for a consensus among states in order to secure widespread international co-operation in the interests of the safety of international civil air transport.
- (5) Requests concerted action on the part of states towards suppressing all acts which jeopardize the safe and orderly development of international civil air transport.
- (6) Requests application, as soon as possible, of the decisions and recommendations of this Assembly so as to prevent and deter such acts.

COUNCIL RESOLUTION

*Adopted October 1, 1970**

THE COUNCIL

Finding that a heightened threat to the safety and security of interna-

* DEPT. OF STATE BULLETIN 449, at 453 (1970); 9 INT. LEGAL MATERIALS 1286 (1970).

tional civil air transport exists as a result of acts of unlawful seizure of aircraft involving the detention of passengers, crew and aircraft contrary to the principles of Article 11 of the Tokyo Convention, for international blackmail purposes, and the destruction of such aircraft;

Recognizing that Contracting States to the Convention on International Civil Aviation have obligated themselves to ensure the safe and orderly growth of international civil aviation throughout the world;

Calls upon Contracting 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 principles 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;

Directs the Legal Committee to consider during its Eighteenth Session, if necessary by extension of the session, an international convention or other international instruments:

- i) to give effect to the purposes set out in the preceding paragraph;
- ii) to provide for joint action by states to take such measures as may be appropriate in other cases of unlawful seizure; and
- iii) to provide for amendment of bilateral air transport agreements of contracting parties to remove all doubt concerning the authority to join in taking such action against any state.