Attempts at Ensuring Peace and Security in International Aviation

R.I.R. Abeyratne*

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* R.I.R. Abeyratne is an aviation consultant working as Air Transport Officer at the International Civil Aviation Organization (ICAO). He is a law graduate of the University of Colombo, Sri Lanka, and a masters graduate in law of Monash University, Victoria, Australia, where he specialized in international law and air law. Currently, he is a doctoral research scholar at the Institute of Air and Space Law, McGill University, Montreal. After his graduation from Monash in 1982, he joined Air Lanka and worked as the airline's Chief Coordinator and Head of International Relations and Insurance, holding the positions concurrently, until he joined ICAO in 1990.

Mr. Abeyratne has published 3 books on international air law and over 80 articles on international law and aerospace law in leading law journals. He has also published numerous articles on international trade law in contemporary journals. He is a Fellow of the Chartered Institute of Transport and the Royal Aeronautical Society, the British Association of Aviation Consultants, and the International Law Association (Headquarters) of which he is a Member of the International Trade Law Committee and the Space Law Committee.

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I. Introduction

Transportation systems have historically attracted terrorist attacks. As such, the international community has come to terms with the vulnerability of modern aviation, taking sustained steps towards the protection of aviation.

The earliest form of terrorism against international transportation was piracy. Pirates are considered by international law as common enemies of all mankind. The international world has an interest in the punishment of offenders and is justified in adopting international measures for the application of universal rules regarding the control of terrorism. The common understanding between States has been that pirates should be lawfully captured on the high seas by an armed vessel of any particular State, and brought within its territorial jurisdiction for trial and punishment. Lauterpacht recognized that:

> Before international law in the modern sense of the term was in existence, a pirate was already considered an outlaw, a hostis humani generis. According to the Law of Nations, the act of piracy makes the pirate lose the protection of his home State, and thereby his national character. Piracy is a so-called international crime, the pirate is considered enemy of all States and can be brought to justice anywhere.[1]

1. L. Oppenheim, International Law, § 272 at 609 (H. Lauterpacht ed., 8th ed. 1955).

It is worthy to note that under the rules of customary international law the international community had no difficulty in dealing with acts of terrorism which formed the offense of sea piracy. Due to the seriousness of the offense and the serious terrorist acts involved, the offense was met with the most severe punishment available - death. The universal condemnation of the offense is reflected by the statement that "in the former times it was said to be a customary rule of international law that after the seizure, pirates could at once be hanged or drowned by the captor."

The laws dealing with the offense of piracy went through a sustained process of evolution. In 1956, while considering legal matters pertaining to the law of the sea, the International Law Association addressed the offense of piracy and recommended that the subject of piracy at sea be incorporated in the Draft Convention of the Law of the Sea. This was followed by the United Nations General Assembly Resolution (Resolution No. 1105 (XI) in 1957 which called for the convening of a diplomatic conference to further evaluate the Law of the Sea). Accordingly, the Convention of the High Seas was adopted in 1958 and came into force in September 1962.

II. The Geneva Convention on the High Seas (1958)

The Geneva Convention of the High Seas of 1958[2] was the first attempt at an international accord to harmonize the application of rules to both piracy at sea and in air. The Convention adopted authoritative legal statements on civil aviation security, as it touched on piracy over the high seas.[3] Article 5 of the Convention inclusively defines piracy as follows:

> Piracy consists of any of the following acts:
> 1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passenger of a private ship or a private aircraft, and directed:
> a) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> b) against a ship, aircraft, persons, or property in a place outside the jurisdiction of any state;
> 2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
> 3) Any act of inciting or of internationally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

As provided for by Article 14 of the Convention, there is incumbent on all States a general duty to "co-operate" to the fullest extent in the

2. The Geneva Convention was opened for signature at Geneva on 16 November, 1937. *See* Hudson, *International Legislation*, Vol. VII at 862, U.N. Doc. A/C.6/418, Annex 1, at 1.

3. League of Nations, *Official Journal*, 1934, at 1839.

repression of piracy as defined by the Convention. One commentator has observed:

> The International Law Commission in its 1956 report, however, deemed it desirable to enjoin co-operation in the repression of piracy, to define the act to include piracy by aircraft, as set forth in the repressive measures that may justifiably be taken. The United Nations conference on the Law of the Sea in Geneva in 1958 accordingly incorporated these adjustments of the law to modern times in its convention on the High Seas.[4]

Article 14 seemingly makes it a duty incumbent upon every State to take necessary measures to combat piracy by either prosecuting the pirate or extraditing him to the State which might be in a better position to undertake such prosecution. The Convention, in Article 19, gives all States universal jurisdiction under which the person charged with the offense of aerial or sea piracy may be tried and punished by any State into whose jurisdiction he may come. This measure is a proactive one in that it eliminates any boundaries that a State may have which would preclude the extradition or trial of an offender in that State. Universal jurisdiction was also conferred upon the States by the Convention to solve the somewhat complex problem of jurisdiction, which often arose under municipal law where the crime was committed, outside the territorial jurisdiction of the particular State seeking to prosecute an offender. The underlying salutary effects of universal jurisdiction in cases of piracy and hijacking, which were emphasized by the Convention, has been described by one commentator:

> The absence of universal jurisdiction in relation to a given offense, means that, if a particular State has no jurisdiction either on the basis of territoriality or protection, or on the personality principle, whether passive or active, it will not be authorized to put the offender on trial, even if he is to be found within the territorial boundaries of the State.[5]

The inclusion of the offense of piracy in the Convention brings to bear the glaring fact that the crime is international in nature, giving the international community the right to take appropriate measures to combat or at least control the occurrence of the offense. The Convention by its very nature and adoption has demonstrably conveyed the message that piracy is a heinous crime which requires severe punishment. The Convention also calls for solidarity and collectivity on the part of nations in combating the offense in the interests of all nations concerned.[6]

Notwithstanding the above, it is worthy of note that the phenomenon

4. HENRY REIFF, THE UNITED STATES AND THE TREATY LAW OF THE SEA 86-87 (1959).

5. S.Z. Feller, *Comment on Criminal Jurisdiction over Aircraft Hijacking*, 7 ISRAEL L. REV., 207, 207, (1992).

6. *Id.* at 212.

of hijacking as it exists today need not necessarily fall within the definition of piracy as referred in Article 15 of the Convention. Although there exists a marked similarity between the offense of unlawful seizure of an aircraft and the act of piracy directed against ships on the high seas, in that in both cases the mode of transportation is threatened and abused and the safety of the passengers, crew members and the craft itself is endangered by the unlawful use of force or threat, there may still be a subtle difference between the offense as applied to sea transport and to air transport. The legal differences between the acts of piracy against ships and those against aircraft that may must be determined in order to inquire whether aircraft hijacking amounts to piracy as defined by the Convention.

The essential features of the definition of piracy incorporated in the Geneva Convention are as follows: (1) the pirate must be motivated by "private" as opposed to "public" ends; (2) the act of piracy involves an action affecting a ship, an aircraft; (3) the acts of violence, detention, and depredation take place outside the jurisdiction of any State, meaning both territorial jurisdiction and airspace above the State; (4) acts committed on board a ship or aircraft, by the crew or passengers of such ship or aircraft and directed against the ship or aircraft itself, or against persons or property, do not constitute the offense of piracy.

Upon close examination, it appears that the definition of piracy does not apply to the phenomenon of aerial piracy or hijacking. It is a fact that most hijackings are not carried out in pursuance of private ends. INTERPOL reported in 1977 that the percentage of cases in which political motives had impelled the offender was 64.4%.[7] Hijacking of aircraft for political motives would thus not relate to Article 15(1) of the Convention, since acts solely inspired by political motives are excluded from the notion of *piracy jure gentium*. Sami Shubber has observed of the 1958 Convention that its inapplicability to the notion of aerial piracy may lie in the fact that private ends do not necessarily mean that they can affect private groups acting either in pursuance of their political aims or gain. The fact that it is not always possible to distinguish between private ends and public ends in defiance of the political regime of the flag State may be said to be covered by Article 15(1) of the Convention; the reason given by Shubber was that "private ends" do not necessarily equal private gain.[8]

Under the definition of piracy, the act of illegal violence or detention must be directed on the high seas against another ship or aircraft. It is

7. INTERPOL had submitted to the Legal Committee of ICAO in 1977 that out of recorded hijackings up to that year, the percentage of instances of hijackings which were motivated politically was 6.2 at a ratio of 64:4. *See* ICAO Doc 8877-LC/161, at 132.

8. SAMI SHUBBER, JURISDICTION OVER CRIMES ON BOARD AIRCRAFT 226 (1973).

obvious therefore that this interpretation does not apply to hijacking since the offense of hijacking is committed by the offender who travels in the aircraft. It is hard to imagine that an offender could enter an aircraft from outside while the aircraft is in flight. The Convention also excludes acts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, from the scope of piracy,[9] which will also make the definition inconsistent with the exigencies related to the offense of aerial piracy.

Although piracy, according to the Convention, must be committed on the "high seas", instances of hijacking may occur anywhere. Furthermore, piracy under Article 15 of the Convention must involve acts of violence, detention or depredation. Most hijackings, however, have been carried out simply by the use of threats, and may even be carried out through a variety of means other than those involving violence or force.

It is therefore reasonable to conclude that hijacking does not necessarily and absolutely fall within the definition of "aircraft piracy" as defined by the Geneva Convention.[10] The hopes of the international community to control the crime of hijacking through the application of the Geneva Convention on the High Seas may therefore have been frustrated by the exclusivity of the nature of the two offenses of aerial piracy and piracy related to the high seas. The Convention therefore remains to be of mere academic interest for those addressing the issue of aerial piracy.

III. The Tokyo Convention (1963)

Shocked by the rising trend of aircraft hijacking in the early 1960s and the failure of the Geneva Convention on the High Seas to offer rules applicable to the offense of hijacking, the international community considered adopting the Tokyo Convention of 1963, which was adopted under the aegis of the International Civil Aviation Organization (ICAO). This Convention attempted to provide certain rules that would address the offense of hijacking.

Prior to 1960, most of the collective action to combat international terrorism was undertaken by the United Nations or its predecessor, the League of Nations. Although the League of Nations made cohesive efforts to create an international criminal court to deal with, among other things, acts of international terrorism by drafting a Convention to Com-

9. Gary N. Horlick, *The Developing Law of Air Hijacking*, 12 Harv. Int'l L.J. 33, 65 (1971).

10. *See* Haro F. Van Panhuys, *Aircraft Hijacking and International Law*, 9 Colum. J. Transnat'l. L. 1, 13 (1970).

bat International Terrorism in 1937,[11] this Convention was only signed by thirteen States and ratified by one State effectively precluding the Convention from coming in force.

At the end of 1950, a new crusader against international terrorism, which particularly applied to aerial incidents of terrorism, appeared in the international scene to adopt necessary international measures to combat terrorism against air transport. This new entity was the ICAO. In retrospect, it is noted that although the United Nations was unsuccessful in adopting sufficiently compelling measures of international co-operation to deal with aircraft hijacking, the ICAO has made significant strides in the area of adoption of multilateral conventions. The primary aim of these Conventions has been to adopt measures, through international agreement, to control and arrest terrorist activities which are aimed against international air transport. It has been said of ICAO on its regulatory attempts in this field:

> [T]hese menacing incidents during the last few years have resulted in intense activities aimed at finding possible solutions on the basis of universally accepted international treaty and/or other technical remedies. The beginning of concerted international effort since the formation of ICAO in relation to the so-called problem of hijacking can be traced back to the formulation of certain provisions in the "Convention on Offenses and Certain Other Acts Committed on Board Aircraft Commonly Known as the Tokyo Convention 1963."[12]

The Tokyo Convention was the first substantial effort at dealing with terrorism in the air. It was followed by the Hague and the Montreal Conventions.[13]

In 1950, the Legal Committee of ICAO, upon a proposal from the Mexican Representative on the ICAO Council for the study of the legal status of airports, referred the subject to the *ad hoc* Sub-Committee established by the Legal Committee.[14] After a survey had been made of all the problems relating to the legal status of aircraft, it was decided by the Committee that the best course would be to confine the work to a detailed examination of some particularly important matters, namely crimes and offenses committed on board aircraft, jurisdiction relating to such crimes and the resolution of jurisdictional conflicts. The Sub-Committee

11. This Convention was opened for signature at Geneva on 16 November 1937. *See* 7 MANLEY O. HUDSON, INTERNATIONAL LEGISLATION, 862 (1931).

12. A.K. Sarkar, *International Air Law and Safety of Civil Aviation*, 12 INDIAN J. INT'L. L. 200, 204 (1972).

13. *See Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, 2 INT'L LEGAL MATERIALS 1042 (1963).

14. *See* Robert P. Boyle & Roy Palsifer, *The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, 30 J. AIR L. & COMM. 305 (1964) [hereinafter Tokyo Convention].

thought that resolving these problems was of vital importance for the following reasons:

> (1) One characteristic of aviation is that aircraft fly over the high seas or over seas having no territorial sovereign. While national laws of some States confer jurisdiction on their courts to try offenses committed on aircraft during such flights, this was not the case in others, and there was no internationally agreed system which would co-ordinate the exercise of national jurisdiction in such cases. Further, with (the) high speed of modern aircraft, the great altitudes at which they fly, meteorological conditions, and, the fact that several States may be overflown by aircraft within a small space of time, there could be occasions when it would be impossible to establish the territory in which the aircraft was at the time a crime was committed on board. There was, therefore, the possibility that in such a case, and in the absence of an internationally recognized system with regard to exercise of national jurisdiction, the offender may go unpunished;
> (2) National jurisdictions with respect to criminal acts are based on criteria which are not uniform; for example, on the nationality of the offender, the nationality of the victim, on the locality where the offense was committed, or on the nationality of the aircraft on which the crime occurred. Thus, several States may claim jurisdiction over the same offense committed on board aircraft, in certain cases. Such conflict of jurisdictions could be avoided only by international agreement;[and]
> (3) The possibility that the same offense may be triable in different States might result in the offender being punished more than once for the same offense. This undesirable possibility could be avoided by a suitable provision in the Convention.[15]

After sustained deliberation and contradiction, the Sub-Committee on the Legal Status of Aircraft produced a draft convention which was submitted to the Legal Committee on 9 September 1958.[16] The Legal Committee in turn considered the draft convention at its 12th Session held in Munich in 1959[17], undertaking a substantial revision of the draft. The revised text was subsequently submitted to the ICAO Council, which in turn submitted the draft to Member States and various international organizations for their comments. A new Sub-Committee was formed to examine the Convention of State organization in 1961, in order to examine and prepare a report. This report was studied by the Legal Committee in its 14th Session held in Rome in 1962. A final text of a Convention was drawn up at this meeting and communicated to Member States with a view towards convening a diplomatic conference in Tokyo with the long-term prospect of adopting a Convention on aerial rights. This Convention was signed in Tokyo on 14 September 1963 by the repre-

15. *Id.* at 316-17, *citing* the Report of the Sub-Committee, LC/SC Legal Status, WD No. 23, October 10, 1956.
16. *Id.* at 320.
17. *Id.* at 321.

sentatives of 49 ICAO Member States, and entered into force after six years, on 4 December 1969.[18] This slow process of ratification of the Convention (5 years) was by no means due to the ineptitude of the Convention, as has been claimed,[19] but was due to the fact that the Convention was drafted prior to the series of hijacking in the late sixties and was not implemented with due dispatch by most States. Another reason for the delayed process was the complicated legal and political issues facing many countries at the time of the adoption of the Convention[20]. A significant feature of the Tokyo Convention was that although at first States were slow in acceding to or ratifying the Convention, 80 States ratified the convention within one year (1969-70), presumably in response to the spate of hijackings that occurred during that period.

The main purpose of the Tokyo Convention was to secure the collaboration of States in restraining terrorist activity directed at air transport. It has therefore been said that "[t]he first action taken by the international community to combat hijacking was the Tokyo Convention 1963. This Convention was originally designed to solve the problem of the commission of crimes on board aircraft while in flight where for any number of reasons the criminal might escape punishment."[21]

The objectives of the Tokyo convention may be summarized into four principal areas:

> 1) The Convention makes it clear that the State of registration of the aircraft has the authority to apply its laws. From the standpoint of States such as the United States, this is probably the most important aspect of the Convention, since it accords international recognition to the exercise of extraterritorial jurisdiction under the circumstances contemplated in the Convention;
>
> 2) The Convention provides the aircraft commander with the necessary authority to deal with persons who have committed, or are about to commit, a crime or an act jeopardizing safety on board his aircraft through use of reasonable force when required, and without fear of subsequent retaliation through civil suit or otherwise;
>
> 3) The Convention delineates the duties and responsibilities of the contracting State in which an aircraft lands after the commission of a crime on board, including its authority over, and responsibilities to, any offenders that may be either disembarked within territory of that State or delivered to its authorities;

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18. Robert P. Boyle, *International Action to Combat Aircraft Hijacking*, LAWYERS OF THE AMERICAS, at 463 [hereinafter *International Combat*].

19. *Id.* at 463.

20. *See* Abraham Abramovsky, *Multinational Convention for the Suspension of Unilateral Seizure and Interference with Aircraft Part I: The Hague Convention*, 13 COLUM. J. TRANSNAT'L L. 381, 389 (1974).

21. *International Combat*, *supra* note 18, at 463.

4) The crime of 'hijacking' has been addressed in some degree of depth.[22]

The Convention applies to any act that is an offense under the penal laws of a contracting State, as well as to acts which, whether or not they are offenses, may jeopardize safety, good order and discipline on board an aircraft. The Convention thus does not define the offense at the international level nor does it explicitly explain the nature of the offense. Alona E. Evans has observed that the offense is not made a crime under international law; its definition is to be determined by the municipal laws of the contracting State.[23] Admittedly, there are some limitations placed upon the scope of the application of the Convention. Firstly, the Convention excluded from its operations aircraft used in military, customs or police services. It should be noted that reference is not made in the Convention to "State aircraft" as mentioned in Article 3 of the Chicago Convention, which does not apply to such aircraft. This difference in terminology is explained by the fact that State aircraft provide air transport that is usually provided by civil aircraft and civil transport in some cases.

Secondly, offenses against penal laws of a political nature or those based on racial or religious discrimination are not covered by the Convention, except to the extent that the Convention addressed such acts which jeopardized safety or good order and discipline on board.

> Penal laws forbidding various forms of racial and religious discrimination take many and varied forms, and the views of the Courts of the Contracting States may differ on the issue of whether one or the other is within or without the Convention. Even more divergence of view can be expected in decisions which involve the question of whether a particular offense is of a "political nature."[24]

Although the Convention does not define the offense of hijacking, Article 11 specifies the circumstances that would constitute the offense as "[w]hen a person on board has unlawfully committed by force or threat thereof an act of interference, seizure or other wrongful exercise of control of an aircraft in flight or such an act is bound to be committed."

When the offense of hijacking is committed in the above manner, the State in which the aircraft lands has obligations which it must satisfy according to the terms of the Convention. The first obligation is that the landing State "shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve control of the aircraft and shall return the aircraft and its cargo to the person lawfully entitled to possession."

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22. Tokyo Convention, *supra* note 14, at 328-29.

23. Alona E. Evans, *Aircraft Hijacking: Its Cause and Cure*, 63 AMER. J. INT'L L. 695, 708 (1969).

24. Tokyo Convention, *supra* note 14, at 333.

Robert P. Boyle emphasized the above contention when he stated:

> The obligation assumed by a State under the Tokyo Convention with respect to the disposition of the hijacker. . . is to take all appropriate measures to restore control of the aircraft to its lawful commander and to permit the passengers and crew to continue their journey as soon as practicable and to return the aircraft and cargo to persons lawfully entitled.[25]

A. Powers Given in Order to Combat Hijackings

The Convention gives wide powers to the aircraft commander to control the offense of hijacking. Article 6 enables the aircraft commander to use reasonable measures, including restraint, to protect the safety of the aircraft, and maintain good order and discipline when he has reasonable grounds to believe that a person has committed an offense contemplated in Article I(1), *viz.*:

> a) offenses against penal laws;
> b) acts which, whether or not they are offenses, may jeopardize the safety of the aircraft or of persons or property therein or which jeopardizes good order and discipline on board.

An interesting observation may be made with respect to offenses against penal laws. The aircraft commander will have, according to that paragraph, the power to take measures and restrain a passenger even if his act did not amount to jeopardizing the safety of the aircraft or the person or the property therein. This may lead to absurdity. If, for example, two passengers conspire while on board the aircraft to commit some illegal act upon landing, or upon termination of the flight, according to sub-paragraph (a) above, the commander can restrain them on the suspicion that the act they are conspiring to commit is against penal law of a particular jurisdiction. This seems to be illogical when one recalls that the principal objective of the Convention is to assure the maintenance of safety and good order "on board" the aircraft.

The aircraft commander in discharging his duties, according to the Convention, can require or authorize the assistance of the crew and request the assistance of passengers. Even passengers and crew members are authorized under Article 6(2) to take reasonable preventive measures without any authorization from the aircraft commander whenever they have reasonable grounds to believe that such action is immediately necessary for safety reasons. Although this clause has attempted to give powers to people other than the aircraft commander in order to assist in thwarting acts of unlawful interference against civil aviation, some delegates at the Tokyo Conference attacked this approach on the ground that

25. Tokyo Convention, *supra* note 14, at 331.

passengers normally would not be qualified to determine whether a particular act jeopardized the safety of the aircraft or persons and property therein. For this reason, it was deemed unwise to give this authority to passengers.[26] However, this argument was rejected "on the ground that this provision contemplated an emergency type of situation on which the danger of the aircraft or persons and property on board was clearly present, and in fact no special technical knowledge would be required to recognize the peril."[27]

The powers entrusted to the commander in order to suppress any unlawful act which threatens the safety of the aircraft goes as far as requiring the disembarking of any person who commits any of the acts referred to in Article 1(1) in the territory of any State in which he lands and delivering him to its competent authorities.[28] The State is under an obligation to allow the disembarkation and to take delivery of the person so apprehended by the aircraft commander, but such custody may only be continued for such time as is reasonably necessary to enable the criminal extradition proceedings (if any) to be instituted. The State of landing should make a preliminary inquiry into the facts and notify the State of registration of the aircraft.[29]

In any event, the commander as well as the crew members and passengers are given immunity from suits by the alleged offender against whom they acted. Article 10 expressly provides that "[n]either the aircraft commander, any member of the crew, any passenger, the owner or operator of the aircraft, nor the person on whose behalf the flight is performed shall be held responsible in any proceedings on account of the treatment undergone by the person against whom the actions were taken." This protection was given to the aircraft commander and other persons in order to encourage them to fight the wrongful acts contemplated by the Convention.

B. Jurisdiction to Punish Terrorists

The major problem that States often face in the process of combating terrorism is the issue of jurisdiction. This is most evident in cases of hijacking, where the crime often takes place outside the jurisdiction of the receiving State, although in most, if not all of the cases, it could be argued that the offense is of a continuing nature. Under international law, State jurisdiction to prosecute is founded upon two traditional concepts. First, there must exist a substantial link between the person or the act and the

26. *Id.* at 340.

27. *Id.*

28. *See Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, Sept. 14, 1963, arts. 8-9, 20 U.S.T. 2941, 2946, 704 U.N.T.S. 219, 228 [hereinafter *Aircraft Convention*].

29. *Id.* at arts. 12-13, 20 U.S.T. at 2948, 704 U.N.T.S. at 230.

State claiming sovereign jurisdiction; and second, this theoretical basis must be actualized through a sovereign act, *i.e.* legislation for implementation of this theoretical act. In an act of international nature, such as hijacking, two or more States involved may possess jurisdiction to prosecute. As a result, jurisdictional conflicts are eminent, since two or more of those States can claim the right to prosecute and press claims against each other through diplomatic channels. In order to eliminate these conflicts, the jurisdictional rules incorporated in the Tokyo Convention were preferred. The Tokyo Convention was adopted to grant powers to States to establish jurisdiction which would be uncomplicated by diplomatic claims over criminal acts committed on board aircraft.

Jurisdiction over offenses and acts committed on board appertain primarily to the State of registration of the aircraft (Article 3(1)). The adoption of this rule guarantees to the flights over the High Seas the assured presence of the criminal law. It provides a sound legal basis for extra-territorial exercise of criminal jurisdiction extending even to cases of flight within foreign airspace. A.I. Mendelssohn has observed:

> As a matter of international law, therefore, any crime abroad an international carrier, no matter where, by or against whom it is committed, can be punished by at least one sovereign - the State of registration of the carrier. All doubts are removed on the question whether the flag will henceforth follow the aircraft as it traditionally has followed a vessel.[30]

Article 3(2) of the Convention provides that "[e]ach Contracting State shall take measures as may be necessary to establish its jurisdiction as State of registration over offenses committed on board aircraft registered in such State." It is clear that the fundamental objective of this subparagraph was to make the act of combating hijacking an international issue in which all States must take part when the need arises.

Article 3(3) went on to provide more grounds of jurisdiction in order to eliminate the gravity of the obstacles that hindered the prosecution of hijackers. It provides that the Convention does not exclude criminal jurisdiction exercised in accordance with the national law. Mendelssohn has commented on this sub-paragraph:

> Its objectives are (a) to retain all existing jurisdiction presently asserted by the various States; (b) to enable them to enact further legislation providing for even more extensive jurisdiction; and most important, (c) to require the State of registration to extend at least some of its criminal laws to its aircraft and to provide an internationally accepted basis for the application and enforcement of these laws.[31]

30. Allan I. Mendelsohn, *In Flight Crime.: The International and Domestic Picture under the Tokyo Convention*, 53 VA. L. REV. 509, 515.

31. *Id.* at 518.

The Convention also authorizes a contracting State which is not a State of registration to interfere with an aircraft in flight in which the offense (a) has an effect on the territory of State; (b) has been committed by or against a national or permanent resident of State; (c) is against the security of the State; (d) consists of a breach of any rules or regulations relating to the flight or maneuver of aircraft in force in such State; or (e) that the exercise of such jurisdiction is necessary in order to ensure the observance of any obligation of such State under a multilateral international agreement.

As regards the geographic scope of the Convention for jurisdictional purposes, Article 1 provides that the Convention applies with respect to acts or offenses committed while the aircraft is "in flight" or on the surface of the High Seas or on another area which does not have a territorial sovereign. The term "in flight" is defined in Article 1(3) as "from the moment when the power is applied for the purpose of take-off until the moment when the landing run ends." Hence, hijacking attempts initiated during the time the aircraft is parked or taxiing are not considered to be within the scope of the Convention. As a consequence, the provisions of Tokyo convention fell short of curbing the crime of sabotage of air transport facilities. This shortcoming of the Tokyo Convention, *inter alia*, led to the adoption of the Montreal Convention (1971).

C. Powers and Duties of States

It is a basic obligation of a State to co-operate with other States in order to ensure the safety of international civil aviation. Article 11 of the Tokyo Convention, which is referred to above, provides that contracting states have certain obligations whenever a person on board an aircraft has unlawfully committed by force or threat an act of interference, seizure or other wrongful exercise of control. The question of whether a particular act is lawful or unlawful is to be judged by the law of the State of registration of the aircraft or the law of the State in whose airspace the aircraft may be in flight. Paragraph 1 of Article 11 imposes on all the contracting states the obligation to take appropriate measures to restore or to preserve the aircraft commanders control of the aircraft. The words "appropriate measures" are intended to mean only those things which are feasible for a contracting State to do and also only those which it is lawful for a contracting State to do. Thus, a contracting State, which is situated thousands of miles away from the scene of the hijacking is not under any obligation to take any action, because it would not be feasible for it do so.

Article 12 imposes another obligation on each contracting State. This Article is a corollary to Articles 6 and 8 of the Convention. The latter two Articles authorize the aircraft commander to disembark any person who has committed, or is about to commit, an act of the type

described in Article I of the Convention. Article 12 obliges a contracting State to allow the commander of an aircraft registered in another contracting State to disembark the alleged offender. Article 12 provides "[a]ny Contracting State shall allow the commander of an aircraft registered in another contracting state to disembark any person pursuant to Article 8, paragraph 1." Thus, it is clear that the obligation of a Contracting State to permit disembarkation of a hijacker, at the request of the aircraft commander, is an unqualified obligation.

Article 13 of the Convention deals with the obligation of a contracting State to take delivery of a person from the aircraft commander. This provision should be contrasted with the authority of the aircraft commander to disembark. The obligation of the contracting State under this Article is a corollary to the authority given to the aircraft commander under Articles 6, 7 and 9.

Paragraph 1 of Article 13 states the primary unqualified obligation of each contracting State to "take delivery" of the hijacker. Paragraph 2 addresses the obligation of a contracting State, after having taken delivery, to take custody. It provides that the contracting State is under an obligation to take "custody" only if it is satisfied that the circumstances so warrant such action. Thus, the State is left free to judge for itself whether the act is of such a nature as to warrant such action on its part and whether it would be consistent with its law, since under paragraph 2 any such custody is to be affected only pursuant to the law of the State taking custody. However, such custody may only be continued for that period of time which is reasonably necessary to enable criminal proceedings to be brought by the State taking custody, or for extradition proceedings to be instituted by another interested or affected State. On the other hand, any person taken into custody must be given assistance in communicating immediately with the nearest appropriate representative of the State of which he is a national (Article 13(3)).

D. Extradition

Article 16 of the Convention provides that offenses committed on aircraft registered in a contracting State are to be treated, for the purpose of extradition, as if they had been not only in the place where the offense has occurred, but also in the territory of the State of registration of the aircraft. Without prejudice to this provision it is declared that "nothing in this Convention shall be deemed to create an obligation to grant extradition." One commentator observes:

> The Tokyo Convention does not oblige the Contracting State to punish an alleged offender upon his disembarkation or delivery. Ironically, the landing State must set him free and let him proceed to the destination of his choice as soon as is practicable if it does not wish to extradite or prosecute him. The

> Contracting States are obliged to extradite the offenders, if at all, only under provisions of other treaties between them.[32]

The failure to provide for a process of mandatory extradition if prosecution was not conducted was considered a major set-back of the Tokyo Convention. However, the above loopholes from which the Convention severely suffers are not the only problems:

> Looking for the vantage point today, it is obvious that the Tokyo convention left major gaps in the international legal system in attempting to cope with the scope of aircraft hijacking. There were no undertakings by anyone to make aircraft hijacking a crime under its national law, no undertakings to see to it the crime was one punishable by severe penalties and most important, no undertaking to either submit the case for prosecution or to extradite the offender to a State which would wish to prosecute.[33]

E. Responsibilities of States

As has been mentioned, all States party to the Convention undertake to permit disembarkation of any person when the commander considers that it is necessary to protect the safety of the flight or for the maintenance of good order and discipline on board. States also commit themselves to take delivery of any person the commander reasonably believes has committed a serious offense on board.[34] In this case, when they have taken delivery, concerned States must make an immediate inquiry into the facts of the matter and report the findings to both the State of registration and to the State of which the person is a national.[35] Where the State considers the circumstances warrant such action, it shall take custodial or other measures, in accordance with its laws, to ensure that the person delivered to it remains available while the inquiry is conducted. Such measures may be continued for a reasonable time to permit criminal or extradition proceedings to be instituted when such proceedings follow from the inquiry.[36]

Although the Convention is unequivocal in providing that all contracting States should ensure their legal competence in respect of aircraft on their register, thus addressing jurisdictional issues with regard to crimes on bound aircraft, there are a number of lapses in the Convention which leave it open for criticism. First, the Convention does not apply to "aircraft used in military, customs or police services."[37] This is a topical

32. D.Y. Chung, Some Legal Aspects of Aircraft Hijacking in International Law 150 (1976).

33. *International Combat*, *supra* note 18, at 465.

34. *Aircraft Convention*, *supra* note 28, at art. 13(1), 20 U.S.T. at 2948, 704 U.N.T.S at 230.

35. *Id.* at art. 13(5), 20 U.S.T. at 2948, 704 U.N.T.S. at 230.

36. *Id.* at art. 13(2), 20 U.S.T. at 2948, 704 U.N.T.S at 230.

37. *Id.* at art. 1(4), 20 U.S.T. at 2943, 704 U.N.T.S. at 222.

issue which requires clarity, because in modern exigencies of airlines, there are instances when civilian aircraft are called upon to carry military personnel or supplies, as much as military aircraft are sometimes deployed to execute civilian flights.

Problems concerning registration, particularly when the Convention insists on registration as a pivotal issue, may also change the circumstances, although commanders could be totally ignorant of the laws of the State in which the aircraft they are flying is registered. The commander may be required to determine whether a certain action on his aircraft does in fact constitute a crime and more particularly, a serious crime, since at most, a commander may have some familiarity with the laws of the State of the operator. The United Kingdom, for example, has elected to incorporate the terms of the Convention into its domestic legislation, thereby widening its scope to cover any aircraft controlled by its own nationals.[38]

The Convention could also be improved under its terms of chronology for the offenses in that its applicability extends to the period from "the moment when power is applied for the purpose of take-off until the moment when the landing run ends,"[39] and in relation to the powers of the commander, who has authority for the purposes of the Convention only from the time at which external doors closed following embarkation to the time when doors open for disembarkation.[40]

These parameters are far from satisfactory. In relation to the first, courts have been inconsistent in interpreting similar definitions of flights used in insurance policies. It has been contended that power is first applied "for the purpose of take-off" when the aircraft first begins to move under its own power to the take-off position[41]. In relation to the second, the term "all its external doors" also leaves confusion in that it makes it unclear whether "all its external doors" includes, for example, cargo or baggage hold doors, or doors giving access to such areas as the electronic compartment of the aircraft. It is not difficult to envision circumstances in which these areas could be of significance. The main problem, however, is that the Convention does not provide for the manner in which the

38. Civil Aviation Act, 1982, Section 92 (Eng.).

39. *Aircraft Convention, supra* note 28, at art. 1(3), 20 U.S.T. at 2943, 704 U.N.T.S. at 222.

40. *Id.* at art. 6(2), 20 U.S.T. at 2945, 704 U.N.T.S. at 226.

41. For a discussion of this issue *see* R.D. MARGO, AVIATION INSURANCE 154 (2d ed. 1989). The editors of the fourth edition of SHAWCROSS AND BEAUMONT, AIR LAW, consider that there is now no doubt that the "meaning, as suggested by the natural and ordinary meaning of the words used", that is, "the period between starting to accelerate down the runway and turning off it after landing is the correct one" (although on many occasions pilots would consider that their landing run had been completed long before taxiing to the turning off point). *See* CHRISTOPHER N. SHAWCROSS & KENNETH M. BEAUMONT, AIR LAW ¶ VIII(2) n.3 (Petermartin et al., eds., 4th ed., 1995).

offender should be dealt with after he has been removed from the aircraft. The somewhat poor and inadequate drafting in Articles 14 and 15 seems to suggest that it is only where the person disembarked or delivered cannot or does not wish to continue his journey, that the State of landing can take action.[42] They do not offer a State any guidance as to questions arising from requests for extradition of an offender or extradition by the state s own initiation.

The Convention also fails to identify the "offenses and certain other acts committed on board" which are its subject matter as extraditable offenses; therefore, all requests for extradition arising out of an offense under the Convention must be dealt with under existing extradition arrangements. Even where those agreements exist between the two States concerned, this could often lead to confusion and delay. Furthermore, in any case, many "jeopardizing" acts are unlikely to be recognized as forming a basis for extradition. A marked omission from the Convention is that while it creates and defines "jeopardizing" acts, it does not require States to treat these as "serious crimes" although the Convention's procedures with respect to delivery and extradition are applicable only to serious crimes.

With respect to extradition, the State of registration of a leased aircraft which is involved in an offense will have little interest in pursuing a matter in which none of its nationals have been involved. A dry lease can further complicate the issue of extradition, since often in these circumstances such a state which is not directly involved in the offense is unlikely to be enthusiastic about incurring the trouble and expense associated with extradition and subsequent trial.

F. An answer?

It was no less a personage than the Roman Emperor, Marcus Aurelius, who concluded sadly that the choice in most human issues was to "educate, or endure."

The international community must take cognizance of the fact that the Tokyo Convention is relatively ineffective if States do not make provisions in their own laws to give legal effect to the concerted action that is required at international law to combat terrorism. They must be persuaded to ensure, for example, that their laws of custody are such as to permit the immediate inquiry prescribed by the Convention to be properly conducted, an essential requirement if the evidence required for a successful prosecution is to be gathered. For this reason there should also be a requirement that an inquiry should follow any disembarkation.

States must also ensure that their laws with respect to extradition are

42. *Aircraft Convention, supra* note 28, at art. 16(2), 20 U.S.T. at 2950, 704 U.N.T.S. at 234.

framed in such a manner as to facilitate the process for the State of registration in taking action against the perpetrators of crime or "jeopardizing" acts on board its aircraft. These laws should also be at least receptive to the idea of the State of the operator exercising a jurisdiction with respect to events on board aircraft controlled by its nationals.

States must also be persuaded of the need to exercise their criminal jurisdiction with respect to their own aircraft in such a manner as to deter potential offenders. States might embark upon a process of education to make their airport immigration and police authorities aware of the existence of the Tokyo Convention and of its provisions for disembarkation and delivery.

The airlines must also embark on a program of education within their own ranks. In general, there is great uncertainty on the part of captains as to the extent and limits of their authority; they are often in total ignorance of the Tokyo Convention. All airlines should use guidance material on the relevant sections of the Convention along with any material of assistance together with a current list of the contracting States for carriage in the cockpit. This material can prove invaluable when a commander is confronted by an official whose first reaction is often to refuse to permit a requested disembarkation or delivery.

Airlines need to inform their pilots on the contents of the Convention and to brief them on how to collect evidence, how to request an investigation and how to file a complete report of the incident. They also need to liaise with their own local authorities to ensure that they are aware of the extent and seriousness of the problem and of the measures which the international community has devised for dealing with it. There is much work to be accomplished by the security, legal and operations departments of the individual airlines. A further incentive is that such a program of benign propaganda may have the collateral effect of persuading immigration authorities of the folly of insisting on putting potentially violent deportees on board our aircraft.

Finally, the airlines themselves can and must do more to deal with the problem themselves. Alcohol is the underlying cause of the majority of incidents. Yet too often, obviously drunk and unruly passengers are boarded - regardless of laws which make it an offense to enter any aircraft when drunk, or to be drunk in an aircraft, as in the United Kingdom,[43] or for a pilot to allow a person obviously under the influence of drink or drugs to be carried in aircraft, as in the U.S.A. The airlines should be careful to include in their contract with their passengers a condition which permits them to refuse carriage for reasons of safety, or, if in the exercise of its reasonable discretion, the carrier determines that ". . .(b)

43. Air Navigation Overseas Territories Order 1989, S.I. 1989 No. 2395.

the conduct, age or mental or physical state of the passenger is such as to . . .(ii) cause discomfort or make himself or herself objectionable to other passengers or (iii) involve any hazard or risk to himself or herself or to other persons or property. . ."[44]

Too often airlines fail to exercise reasonable discretion to avoid potential offenses from being committed. It is all too common an occurrence that, once airborne, cabin crew members, in the absence of clear instructions from their employer, continue to supply alcohol to passengers even when the signs of impending trouble are obvious.

Airlines are often strangely reluctant to impose the very effective sanction available to them of refusing to carry on the return leg a passenger who has been troublesome on the outbound leg of his journey. This is a powerful measure of deterrent and each airline should explore the possibility of using it with their own legal adviser. If potential troublemakers were aware that their disruptive behavior was likely to be followed not only by effective action by the State authorities but also likely to result in their being blacklisted by airlines, it is probable that the aviation community would be advance a considerable distance towards at least preventing the problem of crime and unruliness on our aircraft from spiraling out of control.

IV. The Hague Convention on Hijacking (1970)

The vast increase in the number of aircraft hijackings and the growth of peril to international civil aviation posed by such incidents, together with the inadequacy of Tokyo Convention, led the ICAO Assembly to adopt resolution A16-37 at its 15th Session held in Buenos Aires from 3 to 28 September 1968. This Resolution reads as follows:

> WHEREAS unlawful seizure of civil aircraft has a serious adverse effect, on the safety, efficiency and regularity of air navigation.
> NOTING that Article 11 of the Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft provides certain remedies for the situation envisaged.
> BEING however of the opinion that this Article does not provide a complete remedy.
> THE ASSEMBLY
> (1) URGES all States to become parties as soon as possible to the Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft.
> (2) INVITES States, even before ratification of, or adherence to the Tokyo Convention, to give effect to the principles of Article 11 of that Convention.
> (3) REQUESTS the Council, at the earliest possible date, to institute study of other measures to cope with the problem of unlawful seizure.

44. IATA General Conditions of Carriage/Passenger and Baggage, art. VIII, March 1988.

In connection with Clause (3) above, the Council, by its resolution of 16 December, 1968, decided to refer the question of unlawful seizure to the Legal Committee of ICAO. Thus, the Legal Committee was once again ordered to draft a new Convention on the subject.

The Legal Committee held its first session from 10 to 22 February 1969 in Montreal. It considered that the basic objective in its search for a solution to the problem under study should be to deter persons from committing unlawful seizure of aircraft and, more specifically, to ensure, as far as practicable, the prosecution and punishment of these persons. The most efficient way of attaining this objective would be, in the opinion of the Sub-Committee of the Legal Committee, through an international agreement between States (either a protocol to the Tokyo Convention or an independent convention) which would be capable of ratification or adherence independently of the Tokyo Convention.

On 1 December 1970, the draft Convention was submitted to the ICAO Conference at the Hague, which was attended by 77 States; there, the Convention was adopted on 16 December without any alteration.

The Hague Convention, unlike the Tokyo Convention, makes hijacking a distinct offense and calls for severe punishment of any person found within the territory of a Contracting State who hijacked an aircraft. As one writer succinctly observed "[t]he Hague Convention specifically defined the offense of unlawful seizure of aircraft as a model for individual national legislation, and provides . . . that each Contracting State undertakes to make the offense punishable by severe penalties."[45]

Whereas Article I of the Tokyo Convention applied to acts whether or not they were offenses, the Hague Convention appears to provide the answer to the first of the problems left by Tokyo Convention. That offense, as defined by Hague Convention, reads as follows:

> 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 exercise control of, that aircraft, or attempts to perform any such act; or
> (b) is an accomplice of a person who performs or attempt to perform any such act commit an offense.

Article 2 of the Convention provides that each contracting State should make the offense punishable by severe penalties. However, the Convention does not list the exact penalties to be imposed by the Contracting State, other than describing them as severe penalties.

45. Feller, *supra* note 5, at 215.

A. The Scope of the Convention

There are several limitations placed on the application of the Convention as expressed by the articles of the Convention. Under Article I, the act must be committed by a person on board an aircraft "in flight" and it thereby excludes offenses committed by persons not on board the aircraft, such as saboteurs who remain on the ground. Thus, the Hague Convention seems to suffer in this respect from the same defects which its predecessor, the Tokyo Convention, had suffered from. D.Y. Chung has observed:

> The question of hijacking has been pretty well covered by the Tokyo and Hague Conventions. However, the type of hijacking these two Conventions dealt with is only "on board hijacking", while "non-on board hijacking" is not included. It is possible that someone who is not on board but who has placed a bomb or some destructive device on an airliner, may practice extortion on the airline or divert the plane to another destination. In other words, it is possible to hijack the plane by remote seizure or remote control. Another possibility is that of sabotage. Such a situation is not also covered by the above two Conventions, *i.e.* Hague and Tokyo.[46]

Similarly, according to Article I, the Hague Convention only applies to accomplices who are on board an aircraft in flight, and not to those who may be on the ground aiding and abetting the unlawful act. The Representative of the Netherlands on the ICAO Legal Committee once said in this respect that "it is obviously possible to be an accomplice without being on board an aircraft."[47]

Article 3 of the Convention provides that the aircraft is deemed 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. Hence, any hijacking initiated or attempted before the closing of the doors of aircraft after embarkation or after the opening of the doors for disembarkation is not covered by the Convention. Rene Mankiewicz observes:

> This limitation leaves outside the scope of the Convention any hijacking initiated or attempted before the closing or after the opening of the aircraft doors. As a consequence, such acts are punishable only under the law of the State where committed; the jurisdictional articles of the new Convention do not apply thereto. Furthermore, it follows that such acts are punished merely by the general criminal or air law of the concerned State, unless special legislation is introduced for punishing unlawful seizure committed or attempted on the ground.[48]

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46. Chung, *supra* note 32, at 643.
47. ICAO Doc. 9050 LC/169-2 at 72.
48. R.H. Mankiewicz, *The 1970 Hague Convention*, 37 Air L. & Com. 195, 200 n.2 (1971).

A further limitation expressed by the Convention (Article 3 (2)) is that it shall not apply to aircraft used in military, custom or police service, nor in the cases of joint air "transport" operating organizations or international operating agencies which operate aircrafts subject to joint or international registration (Article 5), if the place of take-off or landing of the aircraft on board which the offense is committed is situated in the state of registration of such aircraft (Article 3 (4)). On the other hand, the Convention would apply if the place of take-off or that of actual landing is situated outside the territory of the state of registration of the aircraft, on the understanding that it is immaterial whether the aircraft is engaged in an international or a domestic flight.

B. Powers and Duties Imposed Upon States

Beside the obligation to make the offense of hijacking punishable by severe penalties, the Convention imposes upon the Contracting States a series of obligations that are geared towards stamping out hijacking. These obligations include:

> Each State shall take measures as may be necessary to establish - apart from any existing national criminal jurisdiction (Article 4 (3)) - its jurisdiction over the offense and any act of violence against a passenger or crew when (Article 4 (1)):
>
> (a) the offense is committed on board an aircraft registered in that State;
>
> (b) the aircraft on board which the offense is committed lands in the territory with the alleged offender still on board;
>
> (c) the offense is committed on board an aircraft leased without crew to lessee who has his principle place of business or, if he has no such place of business, his permanent residence in that State.

In addition, every contracting State must take necessary measures to establish its jurisdiction over the offense in cases where the alleged offender is present in its territory and it does not extradite him (Article 4(2)). Mankiewicz further observes:

> [T]his provision is necessary in order to increase the effective punishment even if the hijacker is not prosecuted in, or escaped from, the State of landing or is not extradited to the State of registration of the aircraft. Thus, the alleged hijacker can be arrested no matter where the offense took place as long as he is present in a Contracting State. This provision seems to introduce the principle of universal jurisdiction into the Hague Convention.[49]

The jurisdictional powers conferred upon States by paragraph 1(b) of Article 4 above may be considered an important factor in the attempts of the international community to stamp out and deter hijacking, giving con-

49. *Id.*

tracting States a legal instrument which they may otherwise lack; in view of the absence of any link between them and the State of landing, to act in these situations. This is an acceptable situation whereby contracting States can extend the basis of jurisdiction under international law.

On the other hand, according to Article 4(1), three States possess concurrent jurisdiction over an alleged offender: first, the State of registration of the aircraft; second, the State of landing if the offender is on board the aircraft; and third, any Party to the Convention within whose boundaries the alleged offender is present, once that State has chosen not to extradite him to the State of registration of the aircraft, or to the State in which he landed while he is still on board the hijacked aircraft, or to the State described in subdivision 1 (c). In addition, subsection (3) sanctions such bases of jurisdiction as "passive nationality" where the national law so provides. It is interesting to note that the jurisdiction of the State of registration of the aircraft is equal to the other States described in Article 4.

A third instance of concurrent jurisdiction was added to Article 4 of the Hague Convention during the diplomatic Conference at the Hague. Jurisdiction was granted to the State where the carrier, who operates an aircraft but is not the owner of this aircraft, has his principal place of business, or his permanent residence. Article 4(c) of the Convention covers the case of the so-called "bare hull Charter agreements" or "dry leases", *i.e.* when an aircraft is hired without crew to an operator. Thus, when an offense is committed on board an aircraft which is registered in a contracting or non-contracting State, and which is "dry leased" to an operator having his head office or permanent residence in a contracting State, the latter shall take necessary measures to establish its jurisdiction over the offense. This has been a useful improvement of Article 4 of the Convention in view of the great frequency of the leased agreements that the air transport industry is using at present.

Although Article 4 requires the contracting State to assume jurisdiction over the unlawful seizure of aircraft within the limit of Article 3, it does not provide for obligation on the part of any State to actually prosecute the alleged offender. However, a provision which may be of some relevance is found in Article 7, which reads:

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

Thus, Article 7 states that authorities having jurisdiction under Arti-

cle 4 are at liberty not to prosecute the hijacker or his accomplice if it is determined that the offenders would not be prosecuted. Robert P. Boyle has observed that the Diplomatic Conference which discussed the draft of the Hague Convention rejected the contention to apply compulsory prosecution or alternatively extradition because:

> [T]his obligation is only to submit the offender for prosecution. There is no obligation to prosecute. Many careful distinctions have been adduced. One obvious one is that in case of universal jurisdiction, the State having the hijacker may not have available to it proof of the crime since conceivably it was committed in a distant State and thus the witnesses and other necessary evidence to the State having custody of the hijacker.
>
> However, the reason for rejection of adopting compulsory prosecution appears to me to be a political one for some which States do not want any interference in their sovereign right to permit political asylum in some form for whatever purpose, despite the gravity of the offense. It is interesting to note that both U.S.A. and the Soviet Union have urged that States should be compelled to prosecute the alleged offender if extradition was not granted. It is submitted that this lack of either compulsory jurisdiction or extradition is a serious weakness in the Convention, and stands in the way of an effective international solution to hijacking.[50]

Another obligation which is imposed upon contracting States is that each State is required to include the offense referred to in the Convention as an extraditable one in every new extradition treaty; existing treaties are deemed to already include it. The Convention may, in case of a request for extradition and in the absence of an extradition treaty, be given consideration by the States which make extradition conditional on the existence of an extradition treaty, as the necessary legal basis for extradition. For the purpose of extradition, the offense is treated as if it had been committed not in the place in which it occurred but in the territory of the State required to establish their jurisdiction in accordance with Article 4 above. Article 8 of the Convention states:

> 1. The offense shall be deemed to be included as an extraditable offense in any extradition treaty existing between contracting States. Contracting States undertake to include the offense as an extraditable offense 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 as its option consider this Convention as the legal basis for extradition in respect of the offense. 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

50. *International Combat*, *supra* note 18, at 473.

> existence of a treaty shall recognize the offense between themselves subject to the conditions provided by the law of the requested state.
>
> 4. The offense shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred, but also in the territories of the states required to establish their jurisdiction in accordance with Article 4, paragraph 1.

Thus, according to Article 8, if a contracting State receives a request for extradition from a State with which it has no extradition treaty the Convention shall be considered as the legal basis for extradition. The effect of this provision is to enlarge the scope of existing international treaties on extradition to include hijacking. Where a State is usually prohibited by domestic law from extraditing a hijacker in the absence of a treaty, the State must extradite the offender under the provisions of the Convention.

The obligation to extradite an airline hijacker is subject to all other customary and conventional rules of law governing extraditable offenses. As a general rule, extradition is denied where an individual is accused of committing a political offense. Most states recognize the granting of political asylum as a right to be determined by the state from which it is requested. As the laws of a state may preclude extradition of an airline hijacker if the offense is regarded as political, the existence of hijacking in an extradition treaty may not result in mandatory extradition. However, if a state does not extradite the offender, according to Article 7, the case must be submitted to the proper authorities for prosecution. I.D. Johnston has stated the following in relation to Article 8:

> The Convention obliges the parties to include hijacking in extradition treaties to be concluded between them and insert it retrospectively into existing extradition treaties. Parties which have not concluded extradition treaties but which make extradition conditional on a treaty can regard the Convention itself as a legal basis for extradition. These provisions increase the possibility of extradition but by no means make it a certainty. The Russian Proposal, supported by the U.S.A., that hijackers be returned in all cases was rejected at the Conference. Automatic extradition, though probably the best deterrent, was considered too drastic a commitment by most of the negotiating States. What they are prepared to accept however, was the duty to prosecute offenders whom they did not extradite as provided for by Article 7.[51]

There is no indication in the Convention as to what the position is regarding the extradition of nationals. Shubber believes that even though there is no mention of the extradition of the States own nationals according to the Convention or to the term "offender" in Article 8, such extradition is possible:

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51. I.D. Johnston, *Legislation*, 5 NEW ZEALAND L. REV. 307 (1973).

> There is no reason to suppose that hijackers who happened to be nationals of the State requested to extradite him should be excluded from the scope of extradition under the Convention, provided that course of action is compatible with the national law of the State concerned. This interpretation is not incompatible with the intention of the drafters and the purpose for which the Convention has been created.[52]

C. Other Provisions

The Hague Convention imposed further obligations on the contracting State to preserve the security and efficiency of air transport. States are obliged to take reasonable measures to restore control of aircraft to its lawful commander or to preserve his control over it and to facilitate the continuation of the journey of the passenger and the crew. In addition, States are obliged to return the aircraft and its cargo to those entitled without delay (Article 9) and report promptly as possible to the Council of ICAO any relevant information (Article 11). Article 10 imposes an obligation on all contracting States to give one another the greatest measure of assistance in connection with the criminal proceedings.

When comparing the contents of the Hague Convention with that of the Tokyo Convention, one observes that the two Conventions overlap and are even contradictory on some issues and their inter-relation is far from clear. The Hague Convention may be considered as a significant step forward in the endeavor of the international community to suppress the hijacking of aircraft and remove the threat caused by it to international civil aviation. The Convention has enlarged the number of the States competent to exercise jurisdiction over a hijacker and included the introduction of new basis for the exercise of jurisdiction of the State where the charterer of an aircraft has his principal place of business or permanent residence.

Another encouraging fact is that the Hague Convention grants every Contracting State the power to exercise jurisdiction over a hijacker if such States are affected by an offense committed under the Convention, thus making it impossible for a hijacker to escape the normal process of the law.

The Hague Convention, despite its efficiency in some areas, is not without its weaknesses. Mankiewicz comments, the Hague Convention deals only with "unlawful seizure committed on board aircraft" and does not apply to sabotage committed on ground, nor does it cover unlawful interference with air navigation, facilities and services such as airports, air control towers or radio communications. Attempts made further to ex-

52. Sami Shuber, *Aircraft Hijacking Under the Hague Convention*, 22 I.C.L.Q. 725 (1973).

tend the scope of the Convention were unsuccessful. Nevertheless, the Seventeenth Session of the Assembly of ICAO, held in Montreal in June, 1970, adopted a Resolution directing the Council of ICAO to convene the Legal Committee, if possible not later than November, 1970, in order to prepare . . . a draft Convention on Acts of Unlawful Interference Against Civil Aviation with the view to its adoption . . . as soon as practicable. Consequently, the draft Convention was prepared and was opened for signature at Montreal on September 23, 1971.[53]

V. The Montreal Convention (1971)

Since both the Tokyo and the Hague Conventions dealt only with unlawful seizure committed on board aircraft, it did not cover sabotage committed on the ground, nor unlawful interference with air navigation facilities and services. The Montreal Convention was drafted to remedy those lapses. The objectives of the Montreal Convention are best discussed as follows:

> The primary aim of the Montreal Convention was to arrive at a generally acceptable method of dealing with alleged perpetrators of acts of unlawful interference with aircraft. In general, the nations represented at the Montreal Conference agreed that acts of sabotage, or violence and related offenses interfering with the safety and development of international civil aviation constituted a global problem which had to be combated collectively by concerned nations of the international community. A multilateral international convention had to be adopted which extended both the scope and efficacy of national legislation and provided the legal framework for international co-operation in the apprehension, prosecution an punishment of alleged offender.[54]

A. Definition of "In Service"

To achieve the above objectives, the Montreal Convention first sought to expand the scope of the activity covered by the Convention in order to include a new series of offenses which could be committed without the offender being on board the aircraft. The same definition for an aircraft in flight as given in Article 3(1) of the Hague Convention applies but the Montreal Convention introduces a new term, "aircraft in service", which is defined as follows:

> Aircraft is considered to be in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for specific

53. Mankiewicz, *supra* note 48, at 209.

54. Abraham Abramovsky, *Multilateral Conventions for the suppression of Unlawful Seizure and Interference with Aircraft Part II: The Montreal Convention*, 14 Colum J. Transnat'l L. 268, 278 n.2 (1975).

> period until twenty-four hours after the landing. The period of the service shall, in any event, extend for the entire period during which the aircraft is in flight.[55]

This expression was deemed important as it covered a more extended period than that covered by the expression "in flight," as defined in Article 3(1) in the preceding Hague Convention. The term "in service" would cover such acts as the bombing of and discharge of weapons against aircraft on ground, as well as similar acts against aircraft in flight, whether or not the acts were performed by a person on board or outside the aircraft. Another significance of the term "in service" is that it serves to specify the physical position in which the aircraft must be if the offenses covered by the sub-paragraph of Article 2 are to come under the Convention. An extensive definition of the expression could encompass attacks against an aircraft while in the hangar or at a parking area. The States at the Montreal Conference, however, were not willing to go that far. This is because an extensive definition would mean that the States would, under another provision of the Convention, be bound either to extradite the suspected author of such attack, or if it did not extradite him, submit the case to its competent authorities for the purpose of prosecution. States are notoriously reluctant to enter into international arrangements on criminal matters if those arrangements markedly reduce domestic jurisdiction. Yet, too narrow a definition of the expression aircraft in service would compromise the utility of the Convention.[56]

The definition of the term "in service" posed a difficult problem during the deliberation of the Montreal Conference. Although the beginning of the "in service period" afforded few problems, the main difficulty was in the definition of the end of the "in service" period when applied to lengthy stopovers or night stops in a country, awaiting turn around before commencement of the homeward-bound journey. It was decided that the aircraft should be protected by the Convention, that is, it should be deemed to be "in service" when it makes a stopover or night stop in another country. The present wording of the term "in service" attempts to solve the problem by specifying that an aircraft shall be considered in service 24 hours after any landing. The expression "in service" as it stands include the term "in flight" under Article 2(a). Therefore, in the event of a forced landing occasioned by hijacking, the period "in service" is deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.

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55. [Montreal] Convention for the Suspension of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, art. 2(b), 24 U.S.T. 564.

56. Gerald F. Fitzgerald, *Toward Legal Suppression of Acts Against Civil Aviation*, 585 INT'L CONCILIATION 42, 71 (1971).

B. Definition of the Offense

Another approach adopted by the Montreal Convention in its endeavors to curb hostile acts against civil aviation is to define the offense broadly in order to embrace all the possible acts that might occur. The first issue which faced the drafters of the Convention in this respect elated to the provision of substantial coverage of serious offenses and at the same time avoiding the difficulties that may arise in connection with the listing of specific crimes in a convention intended for adoption by a great many States. After much debate and deliberation, this issue was settled and the final conclusion of the meeting is reflected in Article I. G.F. Fitzgerald described the method of enumerating the offenses in the Convention as being "novel": "[a]rticle I is novel in that it describes a number of penal offenses within the framework of a multilateral convention."[57]

Article 1 of the Convention defines and enumerates the offenses of unlawful interference with aircraft as follows:

> 1. Any person commits an offense if he unlawfully and intentionally:
> (a) Performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft in flight, or
> (b) Destroys an aircraft in service or causes damage to such an aircraft in flight if that act is likely to endanger its safety in flight, or
> (c) Places or causes to be placed on board an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight, or
> (d) Destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety or aircraft in flight, or
> (e) Communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.
> 2. Any person also commits an offense if he:
> (a) Attempts to commit any of the offenses mentioned in paragraph 1 of this Article;
> (b) Is an accomplice of a person who commits or attempts to commit any such offense.

It should be noted that while Article 1 delineates several different offenses, the dual requisites of unlawfulness and intent apply to act of the offenses enumerated. Fitzgerald further observes:

> The introductory language of paragraph 1 makes it clear that the dual element of unlawfulness and intention must be present in all of the acts covered by sub-paragraphs (a) to (e); otherwise those acts will not be offenses. The dual element would also apply to attempts and complicity covered by sub-

57. *Id.* at 67.

paragraph 2.[58]

Sub-paragraph (a) of Article 1 is designed to deter and punish acts of violence committed against persons on board aircraft in flight. It should be noted that not all acts of violence come within the scope of the offense; only those likely to endanger the safety of the aircraft are within the scope as well. The notion of an act of violence referred to in this sub-paragraph includes armed attacks, as well as attacks against the lives of persons on board the aircraft by other means, such as, blows, strangling, poisoning or lethal injection. The word "violence" used in sub-paragraph (a) can be interpreted as including not only an armed attack or physical assault, but also administration of poison through, for example, its introduction into the food or drink served on board aircraft.[59]

The manner in which sub-paragraph (a) is worded, when it is read with the opening language of Article 1, would lead one to conclude that the person performing the act of violence does not have to be on board the aircraft in order to come under the Convention. This means that the convention would apply to a person who, being outside the aircraft (for example a low flying and slow-moving helicopter or light aircraft) in flight or who, while on the ground, has poisoned food which is later consumed by a person on board such aircraft.[60]

According to this sub-paragraph, the act of violence is not restricted to those acts which imperil the life of the victim. Any act of violence perpetrated against a person on board and which is likely to interfere with the safety of the aircraft falls within the scope of the offense. Hence, the standard for determining whether the Convention is applicable in a given situation does not hinge on the gravity or the heinousness of the act but rather on its effect on the safety of the aircraft in flight. The same definition as given in Article 3 of the Hague Convention for an "aircraft in flight" applies in Article 2(a) of the Montreal Convention.

The two offenses which can be committed on board an aircraft in service are enclosed in sub-paragraphs (b) and (c) of Article 1 of the Montreal Convention. Sub-paragraph (b) is designed to deter and penalize acts of sabotage perpetrated against the aircraft itself. The sub-paragraph encompasses attacks both from within and without the aircraft. The destruction and damage referred to in the sub-paragraph must occur while the aircraft is "in service," as the particular act, the consequence of which is the destruction of the aircraft, may be performed before the aircraft is "in service." Destruction includes substantial destruction of the aircraft beyond the possibility of rendering it airworthy through repair

58. *Id.*
59. *Id.*
60. *Id.* at 68.

while the concept of "causing damage" is intended to cover "the damaging of a vital but inexpensive piece of wiring, would render the aircraft incapable of flight. It could also cover any damage, whether caused to an aircraft on the ground or in the air, where there is a likelihood that the safety of the aircraft in flight would be endangered."[61]

Sub-paragraph (c) is an attempt by the Convention to encompass, through using the term "by any means whatsoever", all situations in which explosives or other devices are placed on board an aircraft.

> The words "by any means whatsoever" cover the placing of explosives on board an aircraft whether carried on board by the author of the act or any unwitting accomplice, sent on board in air cargo or by mail, or even attached to the outside of the aircraft before it undertakes its journey.[62]

Sub-paragraph (d) is intended to address hostile acts against "air navigation facilities" which may include airports, towers, radio services and meteorological services used in international flights.

Sub-paragraph (e) is concerned with making it an offense for anyone to pass, or cause to pass false information relating to an offense (for example, the presence of an explosive device or would-be hijacker on board the aircraft). Although most national legislatures may have already enacted legislation concerning this subject, it was felt that measures to restrain such acts could especially be included in this Convention, as it was intended to cover a type of offense which very definitely interferes with the orderly conduct of commercial air services. In order for the act to fall within the Convention, the offender who communicates the information must know that the information is false.

Article 1(2) covers the attempt to commit an offense and being an accomplice to commit one of the offenses listed in the sub-paragraphs of the Article. During the debate on the Montreal Convention, there was an attempt to include conspiracy in the definition, but some delegations, including France, were of the view that since conspiracy was not an offense under their national systems of penal law, it should not be included in the convention. After long deliberations, it was decided by a vote that reference to conspiracy would not be made in the Convention.

C. Penalties and the Scope of the Convention

Like the Hague Convention, the Montreal Convention provides for the undertaking by each contracting State to make the offenses covered by the Convention punishable by "severe penalties." Article 3 of the Montreal Convention states that each contracting State undertakes to

61. *Id.*
62. *Id.*

make the offenses mentioned in Article 1 punishable with severe penalties. Unlawful acts against the safety of civil aviation are thus considered to be serious crimes which the Contracting States must punish by severe penalties. The term "severe penalties" is, however, not defined.

The Delegate of France explained at the discussions leading to the adoption of the Hague Convention that with respect to Article 2, the subcommittee and the Committee relating to the Hague deliberations had been faced with the question as to whether or not the severity of the punishment to be imposed upon the offender should be stated. The subcommittee had come to the conclusion that this could not be done, considering the diversity of criminal codes in different countries. A more general wording, *i.e.* "severe penalties", was therefore considered more appropriate. It was not customary for international conventions of this type to stipulate minimum penalties, and a number of States did not have any provisions for them in their national legislation.[63] This omission has been criticized as one of the weaknesses of the convention.[64]

Article 4 of the Convention stipulates which flights are to be covered by the Convention. Paragraph 1 excludes from the operation of the Convention aircraft used in military, customs, or police services. According to Paragraph 2 of Article 4, the scope of the Convention is determined primarily in terms of the international element of aviation. In case of the offenses contemplated in clauses (a), (b), (c) and (e) of Article 1(1), the Convention applies irrespective of whether the aircraft is engaged in an international or domestic flight, only if, as stated in Article 4(2):

> (a) the place of take-off or landing, actual or intended, of the aircraft is situated outside the territory of the State of registration of that aircraft; or
> (b) the offense is committed in the territory of a State other than the State of registration of the aircraft.

The Convention also applies in cases of international flights if the offender or the alleged offender is found in the territory of the State other than the State of registration of the aircraft. Paragraph 5 of Article 4 provided: "[i]n the case contemplated in sub-paragraph (d) of paragraph 1 of Article 1, this convention shall apply only if the air navigation facilities are used in international air navigation."

Hence, the Convention will apply only if the air navigation facilities are used in international air navigation, *i.e.* the sabotage of domestic air navigation facilities is outside the scope of the Convention, notwithstanding the fact that the saboteur of domestic facilities may be found in another State. G.F. Fitzgerald observes, "[i]n case of air navigation facilities mentioned in sub-paragraph (d) of Article 1(1), the Convention applies

63. *Id.*

64. *See* GARY N. HORLICK, INTERNATIONAL RESPONSE, 176.

only if the facilities destroyed, damaged, or interfered with are used in international navigation."[65]

D. Jurisdictional Powers Given to States Under the Montreal Convention (1971)

Article 5 of the Convention, which concerns jurisdiction, provides that each contracting State shall take such measures as may be necessary to establish its jurisdiction over offenses in the same three instances as those contained in the Hague Convention, and a fourth instance, when the offense is committed in the territory of that State. This Convention like its predecessor[66] does not exclude any criminal jurisdiction exercised in accordance with national law. Fitzgerald states,"[a] controversial topic in the Montreal Convention is that of jurisdiction, since, like the Hague Convention, this Convention attempts to establish a form of universal jurisdiction over the alleged offender."[67]

Article 5 of Montreal Convention provides that each contracting State shall take such measures as may be necessary to establish its jurisdiction over the offenders in the following cases:

1. (a) When the offense is committed in the territory of that State.
   (b) When the offense is committed against or on board an aircraft registered in that State;
   (c) When the aircraft on board which the offense is committed lands in its territory with the alleged offender still on board; and,
   (d) When the offense is committed against or 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 offenses mentioned in Article 1, paragraphs 1(a), (b) and (c) and in Article 1, paragraph 2, in so far as that paragraph relates to those offenses, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article, i.e. Article 5.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with the national law.

An analysis of Article 5 would lead to the conclusion that at least four States are specifically empowered to exercise concurrent jurisdiction over an alleged offender. These States are: (1) the State within whose territorial boundaries the offense is committed whether the offense takes

65. Gerald F. Fitzgerald, Address at the *Third Annual Conference of the Canadian Council of International Law International Terrorism and Civil Aviation* (October 2, 1974).

66. Hague Convention of 1970 on The Taking of Evidence Abroad in Civil or Commercial Matters.

67. Gerald F. Fitzgerald, *supra* note 56, at 73 n.311.

place on its territory or within its airspace, thus reaffirming and codifying the traditional basis of territoriality; (2) the State of registration of the aircraft (hence, such State is empowered to exercise its jurisdiction over offenders who commit their crimes on board aircraft registered in those States); (3) the State of landing, if the offender is on board the aircraft; and (4) any party to the convention within whose boundaries the alleged offender is present, if that State refuses to extradite the offender to any of the States having jurisdiction under Article 5(1).

Article 5(2) adopts the interpretation of universal jurisdiction as contained in the Hague Convention. Furthermore, Article 5, paragraph 3, provides that the jurisdictional basis delineated by the Convention does not supersede any criminal jurisdiction that has derived from national laws of the parties to the Convention. Consequently, the jurisdictional relation to nationality may be asserted by the State of nationality of the alleged offender, and the States which are the targets of the offense or whose nationals are threatened, maimed or killed by the offender may invoke the protective principle or the lesser recognized jurisdictional basis of passive nationality. These additional bases of jurisdiction are expected to further increase the possibility of suppressing the offenders. In his concluding remarks, Professor Fitzgerald has observed, "[t]hus, the Montreal Convention breaks new grounds and goes beyond codification in providing for the international legal action to be taken by States in respect of many acts. . ."[68]

By adopting the Montreal convention, concerned States have attempted to provide a framework which would substantially widen the scope and application of national legislation and thereby both penalize and deter unlawful interference with aircraft.

E. Extradition or Prosecution

Article 7 of the Montreal Convention, like its predecessor, embodies the principle of *aut dedere aut judicare*, which is the basis of the whole draft. It reads as follows:

> The State party in whose territory the alleged offender is present shall, if it does not extradite him, submit without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceeding in accordance with the laws of that State.

According to this provision, a contracting State has an obligation either to extradite the alleged offender found in its territory or submit his case to the competent authorities for the purpose of prosecution. It appears from the overall reading of "without exception whatsoever" that

68. *Id.* at 75.

the Convention makes prosecution mandatory. However, a deeper analysis of the Article brings to bear the fact that it does not mandate the actual prosecution of the offender but merely the submission of the case to the competent domestic prosecuting authorities. This contention is supported by the fact that during the Montreal conference the Israeli delegation proposed that the Convention include a mandatory prosecution provision, although this proposal was defeated by vote of 35 to 2, with 6 abstentions.

The failure of the Montreal Convention to provide for an objection to prosecute, when the offender is not extradited, was considered a weakness regarding the system of sanctions *aut dedere aut punire*. One commentator observed:

> The lack of mandatory system of prosecution with respect to aerial terrorism must be emphasized. Despite the repeated efforts of some delegations during the Hague and Montreal Conferences, the existing texts on aerial terrorism do not recognize the system of mandatory prosecution in case of denial of extradition requests. On the contrary, the State authorities in charge of the handling of prosecution may well decide that according to their domestic law, the alleged offender should not be prosecuted at all.[69]

F. Extradition and Other Principles

As far as extradition is concerned, the Montreal Convention repeats *verbatim* the Hague provision regarding extradition. The Convention also repeats the Hague convention provisions, discussed above, relating to: the taking of alleged offender into custody; joint air transport operating organizations or international operating agencies, which operate aircraft that are subject to joint international registration; continuation of the journey of the passengers, crew, and aircraft; assistance between States in connection with criminal proceeding; and, the reporting of the process to the ICAO Council.

Although the Montreal convention was considered a breakthrough in combating terrorism against air transport, it remains, like its predecessors, tenuous and destitute of real effect. It would be a platitude to state that the effectiveness of any convention, however well drafted and universally accepted, would depend on the willingness and ability of States to enforce within their own territory the rule of law.

> Even if it is widely ratified, a small number of States can undermine its (a treaty's) effectiveness by actively supporting or condoning acts of unlawful interference and by providing havens for the perpetrators of such acts. Because of conflicting ideologies and political exegesis, such events have in fact

69. Declan Costello, *International Terrorism and the Development of the Principle Aut Dedere Aut Judicare*, 11 J. Int'l L. & Comm. 488 (1975).

occurred.[70]

Another problem is that although all three Conventions have entered into force, barely half of the world community subscribes to either one or all of these agreements, and therefore their total impact has been less than inhibiting. Thus far, 153 States have ratified the Tokyo Convention, 153 States have ratified the Hague Convention and 155 States have ratified the Montreal Convention of 1971.[71] This low rate of ratification of the Conventions, when compared to the number of 183 member States of ICAO, has drastically reduced their effectiveness:

> Whether the Convention will fulfill its aims is dependent upon the breadth of support it obtains, indicated in part by the number of ramifications it receives. For the Convention to be effective, it must be acceded to by almost all nations.[72]

Some States have not only failed to ratify the conventions, but have also undermined the Conventions' effectiveness by providing sanctuaries to alleged offenders. Motivated by political and economic interests, other States have granted tacit support, and occasionally even active aid, to the perpetrators.

As a direct effect of the failure of the international community to provide an effective machinery for combating terrorism against air transport, threats to international civil aviation have consistently become more alarming and grave. New facets and more spectacular types of offenses have evolved as a result.

In an effort to redress the situation, concerned nations, under the auspices of ICAO, have attempted to formulate and adopt multilateral international accord which would compel recalcitrant States into adherence both of customary and international law and with the provisions of the Tokyo, Hague and Montreal Conventions.

VI. The Bonn Declaration (1978)

At a close of a two-day economic meeting held at Bonn, Germany, July 16-17, 1978, leaders of the Governments of Canada, France, the federal Republic of Germany, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland, and the United States of America agreed to act jointly in common undertaking against countries failing to act swiftly against hijacking. The declaration on co-operative action reads:

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70. Abraham Abramovsky, *Multilateral Convention for the Suppression of Unlawful Seizure and Interference with Aircraft, Part II of the Montreal Convention*, 14 Colum. J. Transnat'l L. 300 (1975).

71. *See* ICAO Doc A31-WP/26, LE/2, 4/7/95, at 11.

72. *Id.*

> The heads of States and governments concerned about terrorism and the taking of hostages, declare that their governments will intensify their joint efforts to combat international terrorism.
> To this end, in cases where a country refuses extradition or prosecution of those who have hijacked an aircraft and/or do not return such aircraft, the heads of States and governments are jointly resolved that their governments should take immediate action to cease all flights to that country.
> At the same time, their governments will initiate action to halt all incoming flights from that country or from any country by the airlines of the country concerned. The heads of States and governments urge other governments to join in this commitment.

It is evident that the declaration was intended to create an international regime for preventing and deterring acts of unlawful interference with civil aviation by the imposition of stringent sanctions that would adversely affect the economic and political interests of a delinquent State. Mark E. Fingerman observes:

> The Declaration focuses on sanctions designed to deter nations from encouraging the commission of the offense. In effect, the spirit of the Declaration is a recognition of the fact that States are frequently *de facto* accomplices to acts of skyjacking . . . The rationale of the Declaration would appear to be the foreclosing of the possibility of a skyjacker finding refuge and thereby reducing the attractiveness of the offense.[73]

The object of the Bonn Declaration as is indicated in its preamble is to intensify the joint effort of States to combat international terrorism. In order to achieve this objective, the Declaration has set out respective obligations on third-party States in the event that a hijacked aircraft landed in the territory of such State. If the third-party State failed to meet the obligations specified in the Declaration, the Declaration envisaged that a definite sanction would be inflicted upon the State as a sort of punishment.

The Declaration refers to an act of hijacking, without actually defining the offense. It can be assumed that the act referred to would be interpreted in accordance with the definition in Article 1 of the Hague Convention. The Declaration seemingly refers to an act that has been completed, which means that the hijackers should have reached their final destination. Thus, a State in whose territory a hijacked aircraft lands only for the purpose of refueling would not act contrary to the Declaration if it allows the landing without taking action against the hijacker.

The Declaration applies in instances where a State refuses to prosecute or extradite the hijackers and/or return the hijacked aircraft. The words "prosecution and extradition" as contained in the Declaration have

73. Mark E. Fingerman, *Skyjacking and the Bonn Declaration of 1978: Sanctions Applicable to Recalcitrant Nations*, 10 CAL. W. INT'L L.J. 142 (1980).

the same meaning as used in Articles 8 and 7 of the Hague and Montreal Conventions respectively. Of course, for this provision to be applicable a State must be in a position to prosecute or extradite, *i.e.* the hijacker must stay in the country and be available for prosecution by the competent authorities. However, once a State is able to take appropriate action but does not act and the hijacker disappears, such omission would be regarded as defaulting according to the spirit of the declaration.

The sanctions imposed by the contracting States include taking immediate action to cease all flights to that country, and initiating suspension of all incoming flights which arrive from the defaulting State or are operated by airlines of a defaulting State. These sanctions are in essence an economic boycott or a "reprisal" in international law and are meant as a deterrent. The Declaration is recognizes that some States may act as *de facto* accomplices to acts of hijacking and may give refuge and safe haven to an offender.

A. The Legal Status of the Bonn Declaration

The suspension of aerial communication as envisaged in the Bonn Declaration has been considered a serious measure in the context of international relations.

> Naturally, the suspension of aerial communications was not an economic step. . . This was a political sanction, because the suspension of aerial communications meant in practice a deterioration in relations between States. It meant stoppage of the carriage of cargo and passengers, it would interfere with diplomatic communications, etc.[74]

Another contentious aspect of the Bonn sanction machinery is that the boycott of a delinquent State would not only affect the interests of the specific State that was violating the obligations specified in the Declaration, but also of those States which applied or agreed to apply such sanctions and third party States.

There is a strong feeling among some jurists that the imposition of sanctions against offending States fall exclusively within the domain of the Security Council of the United Nations, and thus, any independent convention or declaration permitting the use of sanctions by party States themselves would violate the United Nations Charter. In support of this argument, Articles 39 and 41 of the Charter of the United Nations have been cited.

Article 39 of the Charter provides:

> The Security Council shall determine the existence of any threat to peace, breach of peace, or act of aggression and shall make recommendations, or

74. ICAO Doc. 9050-LC/169-1 at 41.

> decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security.

Article 41 provides:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communications and the severance of diplomatic relations.

It is customarily accepted therefore that States cannot take joint sanctions against another State unless such action was authorized by the Security Council of the United Nations.

The above view had also been voiced in the ICAO Legal Committee where delegates of France and U.S.S.R. expressed the opinion that to apply sanctions against States in the form of interruption of full or partial air services was within the exclusive jurisdiction of the Security Council. The French delegate observed:

> The sanctions approach had been very thoroughly discussed in the Special Sub-Committee and some rather serious objections to it had been raised. The first was whether the machinery for consideration of sanctions was compatible with Article 41 of the United Nations Charter, which empowered the Security Council to decide upon measures in the nature of sanctions, including the complete or partial interruption of air services, and called upon members of the United Nations to apply them.[75]

A similar opinion is voiced by the delegate of Soviet Union who argued that joint action in a form of suspension of flight, if implemented, would be in contradiction with the competence of the Security Council:

> Indeed, according to Article 41 of the United Nations Charter, one of the measures that the Security Council of the United Nations was empowered to apply included the suspension of air communications. The imposition of collective sanctions against States, outside the framework of the United Nations, would be precluded by U.N. Charter.[76]

Another approach which indicates the incompatibility of the measures adopted by the Bonn Declaration with international law is reflected in Article 2(3) and Chapter VII of the United Nations Charter. Under Article 2(3), all members of the United Nations pledge themselves to settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered. Article 33 then enumerates various procedures for the settlement of such dis-

75. ICAO Doc. 9050-LC/169-1 at 10.
76. *Id.* at 41.

putes, notably "negotiation, inquiry, mediation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means (chosen by parties to the dispute)."

It has been observed by Brosche that:

> [E]ven if this list is not considered to be exhaustive, it is quite clear that embargo, boycott, blockade, reprisal or other kinds of economic pressure do not constitute procedures of pacific settlement. They are not peaceful means and not appropriate for the solution of disputes. The use or imposition of such measures would constitute a violation of the obligation to settle international disputes by peaceful means. Due to these facts, it becomes evident that the use of any kind of [economic] pressure is contrary to the [Charter] principles of peaceful settlement of disputes.[77]

It is clear from the above that the aerial boycott adopted by the Bonn Declaration is not permissible according to international law as incorporated in the Charter of the United Nations. It is clear that States will be held responsible for a boycott instituted directly by their governments if such measure is found by the international community to be *ultra vires* the established norms of international law.

Furthermore, it may also be relevant to view the Bonn Declaration by reference to the doctrine of non-intervention, as elaborated in various international instruments in recent years. Thus, paragraph 2 of its Declaration on the Inadmissibility of Intervention in Domestic Affairs of States and the Protection of their Independence and Sovereignty of 21 December, 1965 [(Resolution 2131(XX)], the United Nations Assembly decreed that:

> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it an advantage of any kind.

B. Incompatibility with the Vienna Convention

The Bonn Declaration was designed to be invoked by seven States against an allegedly defaulting State, whether or not the latter was a party to the Declaration. Mark E. Fingerman opines:

> The legal force of the Bonn Declaration upon non-parties is of critical importance; it is against these nations that the Declaration's sanctions were most intended to apply. The Declaration calls for the imposition of its sanctions upon any State that violates its provisions, whether or not the State in question is a party to the Declaration or any civil aviation convention.[78]

77. Hartmut Brosche, *The Arab Oil Embargo and the United States Pressure Against Chile*, 7 Case W. Res. J. Int'l L. 3, 32 (1974).

78. Fingerman, *supra* note 73, at 144 n.327.

Articles 33 and 34 of the Vienna Convention on the Law of Treaties specifically states that Nations which do not become party to a treaty would not be bound by that treaty unless they expressly agree in writing to be bound by it. Only the states which are parties to a treaty (including a declaration) could be considered as being bound by the provisions of that treaty. While it may be conceded that a treaty could create rights for third states which those states could accept, it cannot impose obligations on third states in terms of requiring them to commit acts such as prosecuting or extraditing offenders against civil aviation or returning the aircraft against which such offense is committed. International law does not envision the imposition of obligations on States which are not parties to a treaty. Therefore, the scope of application of the Declaration should be limited to States which are parties to it. The Note presented by the French Government on the Resolution adopted by the Council of ICAO on 19 June, 1972 on the question of joint sanction stated:

> The Convention can establish obligations only for States parties to it and would permit imposing sanctions only on those parties, pursuant to Articles 34 and 35 of the Vienna Convention on the Law of Treaties. Therefore, the Convention could be effective only if it was universally accepted.[79]

Thus, the Declaration will be ineffective as far as it intended to impose an obligation upon third parties to prosecute or extradite the hijacker and to release the aircraft.

C. Incompatibility with the Convention on International Civil Aviation

Another difficulty emerging from the Bonn Declaration was the relationship of the Declaration to other international conventions. The problem of suspension of air transport services as a sanction under the Bonn Declaration becomes particularly relevant in this context. Article 5 of the Chicago Convention confers certain rights upon Contracting States:

> Each Contracting State agrees that all aircraft of the other Contracting States, being aircraft not engaged in scheduled international air services shall have the right subject to the observation of this Convention to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission and subject to the right of the States flown over to require landing.

The Transit Agreement or the so-called "Two Freedoms Agreement" also contains a reciprocal grant among ICAO members relating to their scheduled air services, whereby their carriers could fly across the territory of a State without landing or land in its territory for non-traffic purposes.

79. ICAO Doc. 9050-LC/169-2 at 42.

Therefore, it appears that the imposition of a restriction upon the airline of a defaulting State to fly over or to land in the States subscribing to the Bonn Declaration is incompatible with the provisions of the Chicago Convention and the Transit Agreement. The rights to fly over or land belong to States which are parties to the Chicago Convention, and those rights could not be derogated by a contrary provision in another treaty, such as the Bonn Declaration. The Spanish delegate to the ICAO Legal Committee observed the following about sanctions against air services, "[o]ne of the problems . . . was the compatibility of the air services with the right of the States parties to the Chicago Convention and Air Transit Agreement."[80]

The French Government stated the following in regard to the question of suspension of air services as a sanction, "[d]ecisions on the suspension of air services could not be taken without amending the bilateral agreement which grants traffic rights, and, perhaps, even the Chicago Convention itself."[81]

In negotiating air transport agreements, both parties will endeavor to promote safe commercial operations of the type contemplated by the Chicago Convention and seek the grant of rights for their carriers. Bilateral agreements on air traffic rights are usually not intended to cover the continuation of operation into and from victim States by aircraft of the States which are seen to promote the disruption of safe commercial aviation, in a manner specified in the Declaration. Failure by States to take practicable measures necessary to prevent the disruption of international aviation - which is caused by such acts of detention and seizure of aircraft as specified by the Declaration - would therefore not be consistent with the grant by peace-loving States of rights necessary for the conduct of air traffic by another State. Therefore, it is not logical to say that bilateral air transport agreements can properly be interpreted as granting rights to airlines of States to continue air services to and from a delinquent State if such state detains passengers, crew or aircraft or fails to prosecute or extradite the perpetrators. Walter Schwenk agrees, stating that:

> In interpreting the bilateral, the conclusion may be reached, however, that there seems to be sufficient justification for the suspension of air traffic rights under the bilateral itself without the need to resort to general principles of international law.[82]

The Chicago Convention established principles and arrangements designed to insure that international civil aviation would develop in a safe and orderly manner. It imposes an obligation upon each contracting state

80. ICAO Doc. 8936-LC/164-1 at 216.
81. ICAO Doc. 9050-LC/169-2, loq.cit.
82. WALTER SCHWENK, THE BONN DECLARATION ON HIJACKING OF 1978.

"not to use civil aviation for any purpose inconsistent with" such aims[83] More directly, the Convention specifically requires each contracting State "to adopt all practicable measures . . . to facilitate and expedite navigation by aircraft between the territories of Contracting States, and to prevent unnecessary delays to aircraft crews, passengers and cargo."[84] Refusal by a State to adopt generally agreed upon procedures to eliminate the threat to international civil aviation posed by such acts of detention and unlawful seizure as are specified in the Bonn Declaration, would constitute a failure by that State to carry out its obligation under Articles 2 and/or 44 of the Chicago Convention. Therefore, suspension of flights in the circumstances referred to in the Declaration would not be incompatible with the Chicago Convention or the Transit Agreement, contrary to the views of some scholars.

Moreover, the sanction adopted by the Bonn Declaration involving suspension of air services in no way deprives a State of a fair opportunity to operate an international airline pursuant to Article 44(f). On the contrary, a State found to be in default would not be giving a fair opportunity to other States. The U.S. Representative in the Legal Committee held in Montreal in 1973 stated:

> Defaulting States had no longer had the privilege of Article 44(f) until such time as it provided a fair opportunity to the rest of the community. Article 44(f) would have to be read in context with Articles 44(d) and (h), and with the directive as stated in Article 44(a) that the Organization shall ensure safe and orderly growth of international civil aviation throughout the world.[85]

The U.S. Representative said that the power to suspend air services as a sanction is not only compatible with the Chicago Convention but also with international law.

> If a party to the Chicago Convention committed a material breach of the obligation to ensure the safety of civil aviation, then other parties individually had the right to suspend the operation of the Convention in whole or in part with respect to the defaulting State in accordance with customary international law, as specified in Article 60 of the Vienna Convention on the Law of Treaties.[86]

When nations ratify or adhere to the Chicago Convention, they not only become members of the ICAO, but they also agree to take appropriate steps to ensure the safety and security of international civil aviation. Hence, the harboring of perpetrators by way of failure to prosecute or

83. Convention on International Civil Aviation, *opened for signature* at Chicago on 7 December, 1944. ICAO Doc., 730016, at art. 4 (4 April 1947).

84. *Id.* at art. 22.

85. ICAO Doc. 8936-LC/164-1 at 228.

86. ICAO Doc. 9050-LC/169-1 at 39.

extradite may be said to constitute a violation of the basic rationale of the Chicago Convention. To breach the obligation set forth by the Chicago Convention is to impliedly denounce the Convention. Therefore, the defaulting State in such an instance cannot claim the rights conferred upon it by the Convention.

D. Problem of Prosecution or Extradition

The fourth problem of the Bonn Declaration is the issue of prosecution or extradition. Sanctions under the Declaration are expected to follow the failure of the delinquent State to prosecute, extradite and/or return the aircraft. However, public international law provides no rule which imposes a duty to extradite or prosecute. Hence extradition or prosecution becomes either a matter of comity or treaty between States. Even when a treaty exists, extradition may be refused in certain circumstances. Therefore, surrender of an alleged criminal cannot be demanded as of a right in the absence of a binding treaty between the respective parties. Any attempt to bind States to extradite or prosecute offenders in the absence of a treaty to that effect would definitely be an encroachment on State-sovereignty, making such act a violation of customary international law.

Besides the above problems surfacing from the Bonn Declaration, there also exists also certain gaps with respect to the application of the Declaration:

1. How would the decision to suspend air services be taken by the members of the Declaration, would it be by majority or unanimously?
2. Who will judge that a State is no longer in default, and when will the services be resumed? Should there be disagreement among the seven States parties on these points and should a procedure be needed to be laid down in order to regulate these matters?
3. Did the Declaration take into account the diversity of violations attributable to the defaulting State and that whether there would be the same penalty automatically applicable to every case?

VII. Conclusion

The Bonn Declaration, unlike the three other Conventions discussed above, represents a fragmented attempt on the part of the international community to control terrorism or unlawful interference with international civil aviation. This, however, by no means confirms the fact that the three international conventions were comprehensive attempts by the entirety of the international community. While the conventions lacked a certain compulsion in their requirements, the Bonn Declaration, which seemingly had a punitive flavor, lacked respectable representation by the

international community. It is time to examine both these approaches with a view to coalescing them to form a synthesis of action. The element of sanction as introduced by the Bonn Declaration should be fused with the international flavor of the three conventions. The international community may be able to work out a workable, effective and enforceable instrument on this basis.