

# Aircraft Piracy: The Hague Hijacking Convention†

## I. Introduction

The last decade has dramatically witnessed the emergence of the "air pirate"—as dangerous and destructive as his prototype, the sea pirate. Hackworth has described pirates as "enemies of the human race" who "place themselves outside the law of peaceful people," choosing "as the scene of their acts of sea-robbery a place common to all men" and attacking "all nations indiscriminately."<sup>1</sup>

The increasing frequency of the hijacker's criminal act has brought forth an awareness that what was at first regarded by some as perhaps semi-pleasant excitement, is in reality, a "crime of chilling potential for disaster."<sup>2</sup> The world community found itself inadequately prepared to cope with the hijacker, much less to deter him from his act. This article will discuss some of the legal means established by the world community to help solve the problems of deterrence and prosecution.

A convenient point of beginning is the "Convention For the Suppression of Unlawful Seizure of Aircraft."<sup>3</sup> The objective of the convention, as set forth in its preamble, is to deter acts of seizure by providing "appropriate measures for punishment of offenders." In order to determine whether or not this objective has been met, however, it will be necessary to discuss the status of the law prior to the ratification of the convention, the established legal principles which had to be overcome and the extra-legal security measures implementing the law.

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† This article is based upon a paper prepared for an International Law Seminar at St. John's Univ. School of Law.

1. 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 681 (1941).

<sup>2</sup>Loy, *Some International Approaches to Dealing With Hijacking of Aircraft*, 4 *INT'L LAWYER* 444 (1970).

<sup>3</sup>64 *DEP'T STATE BULL.* 50 (1971) Treaty signed Dec. 16, 1970, subject to ratification. 65 *DEP'T STATE BULL.* 371 (1971) Ratification deposited Sept. 14, 1971.

## II. Air Hijacking Distinguished from Sea Piracy

On February 18, 1969, a group of Arab terrorists consisting of three men and one woman, perpetrated an armed attack on an El Al airliner at Zurich airport, which resulted in bodily injury to six persons and the killing of one of the hijackers.<sup>4</sup> As a consequence, the United Nations discussed the question of international action against unlawful interference with aircraft. One of the proposals was that the United Nations declare air piracy to be an international crime, and take appropriate action to secure the adoption of municipal laws by member states, against air piracy and unlawful interference with aircraft.<sup>5</sup>

That an act of piracy is a universal crime, *jure gentium*, is well settled—“. . . persons and vessels engaged in piratical operations on the high seas are entitled to the protection of no nation and may be punished by any nation that may apprehend or capture them.”<sup>6</sup> “Piracy” is defined in Article 15 of the “Convention on the High Seas”<sup>7</sup> as constituting acts perpetrated on the high seas, committed by the crew or passengers of the pirate ship and which are directed against another ship or aircraft. These acts are assumed to have been committed for “private ends.” Although there is a similarity of motive between the pirate and the hijacker, many hijackers possess the additional motivation of asylum in the chosen landing state. A further distinction lies in the situs of the crime—the sea pirate’s arena was the high seas; the hijacker’s includes the State of embarkation, the nationality of the aircraft itself, the subjacent States of the flight and the landing State.

While many legal writers on the subject use the terms “aircraft hijacking” and “air piracy” interchangeably, several find the latter to be a misuse leading to confusion.<sup>8</sup> They point out that the analogy is drawn to place the hijacker within the universal crime designation of sea piracy. Since the laws governing piracy are not applicable to the hijacker, those that are must necessarily be found in the laws governing aircraft, beginning with sovereignty over air space.

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<sup>4</sup>Unpublished compilation provided by the ICAO entitled, *Chronology of Unlawful Interference with Civil Aviation*.

<sup>5</sup>Stephen, “*Going South*”—*Air Piracy and Unlawful Interference with Air Commerce*, 4 INT’L LAWYER 433,441 (1970).

<sup>6</sup>2 HACKWORTH, *op. cit. supra* note 1, at 681.

<sup>7</sup>2 U.S.T. & O.I.A. 2317, T.I.A.S. No. 5200 (1962).

<sup>8</sup>Horlick, *The Developing Law of Air Hijacking*, 12 HARV. INT’L L.J. 33, 64 (1971). See Evans, *Aircraft Hijacking: Its Cause and Cure*, 63 AM. J. INT’L L. 695 (1969). See McKeithen, *Prospects for the Prevention of Aircraft Hijacking Through Law*, 9 COLUM. J. TRANSNAT’L L. 60 (1970).

### III. Sovereignty over Air Space

The earliest discussions of sovereignty over air space utilized an old English municipal law maxim—*cujus est solum ejus est usque ad coelum* (Whose is the soil, his it is up to the sky); however, the first codification occurred after World War I with the signing of the “International Convention for the Regulation of Aerial Navigation” (The Paris Convention). It provided that each State had exclusive sovereignty over the air space above its territories and possessions.<sup>9</sup>

The convention utilized the text adopted by the Institute of International Law providing for the regulation of aircraft in time of peace and war. As to sovereignty, the text reads: “International aerial circulation is free, saving the right of subjacent states to take certain measures, to be determined, to ensure their own security and that of the persons and property of their inhabitants.”<sup>10</sup> The text also provides that the aircraft are to be distinguished as public or private, must have the nationality of the country of registration, and must bear marks of identification.

The governing modern treaty resulted from the International Civil Aviation Conference held in Chicago. The “Convention on International Civil Aviation”<sup>11</sup> provides that “every State has complete and exclusive sovereignty over the air space above its territory” (Article 1) which includes “the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.” (Article 2) Article 3 limits the scope of the convention to civil aircraft which have the nationality of the State of registration (Article 17).

The principles set forth in the Chicago Convention relative to sovereignty are universally upheld, not limited to those States which are parties to it. The United States, a party, has codified its position in the Federal Aviation Act of 1958, § 1108 (a):<sup>12</sup>

The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction . . .

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<sup>9</sup> WHITEMAN, *DIGEST OF INT. L.* 310 (1968); 4 HACKWORTH, *DIGEST OF INT. L.* 359 (1942).

<sup>10</sup>*Id.*, at 309, 358.

<sup>11</sup>T.I.A.S. No. 1591, 61 Stat. 1180 (1944).

<sup>12</sup>49 U.S.C. § 1508 (1958), 72 Stat. 798. Originally promulgated in the Air Commerce Act of 1926 and reaffirmed in the Civil Aeronautics Act of 1938.

Similarly, the Union of Soviet Socialist Republics, not a party to the convention, states its position in the Air Code of the U.S.S.R.:<sup>13</sup>

The U.S.S.R. shall have complete and exclusive sovereignty over (its) . . . airspace . . . deemed to be . . . above . . . (its) . . . land and water territory . . . and above such area of the coastal waters as determined by . . . (its) laws . . .

Thus, it is clear that there is no international question on the sovereignty of air space. However, the hijacker commits his crime in the aircraft itself which bears the nationality of the State of registration. Since it is well established that offenses committed within the territory of a particular State are amenable to that Sovereign's criminal law, the question to be resolved is that of who has primary jurisdiction over the hijacker.

#### IV. Jurisdiction

The Common Law countries favor the concept that if a crime is committed in the territory of a State, that State has jurisdiction to prosecute the offender. Civil Law countries, on the other hand, favor the maritime law principle that events on board a ship fall within the jurisdiction of the sovereign to which it is subject.<sup>14</sup> Jurists have expressed the opinion that ". . . the state of nationality should enjoy concurrent jurisdiction with the subjacent sovereign, the former having primacy unless the offense threatened the public safety of the latter,"<sup>15</sup> and also that the proposition that jurisdiction should only be in the State wherein the airplane lands (*lex loci devolentis*).<sup>16</sup> The controversy continued to rage until the "Convention on Offenses and Certain Other Acts Committed on Board Aircraft" done at Tokyo, September 14, 1963,<sup>17</sup> attempted to eliminate the confusion:

##### Article 3

1. The State of Registration of the aircraft is competent to exercise jurisdiction over offenses and acts committed on board.
2. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration.

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<sup>13</sup>Air Code of the U.S.S.R. of August 7, 1935 No. 14/1713 Air Laws and Treaties of the World prepared for H.R. Comm. on Science and Astronautics, 87th Cong., 1st Sess. 1305 (1961).

<sup>14</sup>Denaro, *In-Flight Crimes, The Tokyo Convention and Federal Judicial Jurisdiction*, 35 J. AIR L. & COM. 171,183 (1969).

<sup>15</sup>*Id.*, at 183.

<sup>16</sup>*Id.*, at 184.

<sup>17</sup>20 U.S.T. & O.I.A. 2944, T.I.A.S. No. 6768 (1969).

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

Article 4 of that convention sets forth those instances in which a contracting State, other than the State of registration, may exercise its criminal jurisdiction. These include offenses which have an effect on that State, have been committed against its nationals or residents, are against its security, or involve its obligations under a multilateral international agreement.

There remained a question, however, as to whether or not these provisions resolved the problem of the priority of jurisdiction. Whiteman states: "The States concerned in each case determine among themselves the priority of jurisdiction to be applied in light of the specific facts involved."<sup>18</sup> Another analyst interprets the articles differently: "Notwithstanding the alleged criminal may be held elsewhere, the flag State not only possesses jurisdiction to prosecute but also the sovereign power to claim that jurisdiction vis-à-vis another sovereign claimant."<sup>19</sup>

The jurisdictional provision of the treaty now applicable to hijacking, the recently ratified Hague Hijacking Convention, does not specifically cover the question of priority of jurisdiction. The treaty does, however, create universal jurisdiction to prosecute the offender regardless of where the offense occurred:

#### Article 4

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

(a) when the offense is committed on board an aircraft registered in that State;

(b) when the aircraft on board which the offense is committed lands in its territory with the alleged offender still on board;

(c) when the offense is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence in that State.

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

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

<sup>18</sup> 9 WHITEMAN, *op. cit.* *supra* note 9, at 425.

<sup>19</sup> Denaro, *supra* note 14, at 187.

Whereas the Tokyo Convention gives the power of exercising jurisdiction over the offender to the landing State (Article 13, paragraph 5), it does not create the obligation to do so. The Hague Hijacking Convention, on the other hand, provides that the landing State shall establish its jurisdiction over the offender if it does not extradite him (Article 4, paragraph 2, *supra*). Thus, the hijacker cannot elude prosecution for lack of jurisdiction over him or for the lack of the obligation to exercise that jurisdiction.

Having determined that universal jurisdiction exists to prosecute the hijacker, there are new problems to be considered. A hijacker of X nationality has commandeered an aircraft of Y State registry, and the plane lands in Z State. May State Z take the hijacker into custody? Can State Y require that he be turned over to it? Does the fact that he is a citizen of State X have any relevance on his detainment or extradition?

Prior to the ratification of the Tokyo Convention, it is entirely possible that the wrongdoer could have gone scot-free. Unless the landing State has national laws which would permit it to detain foreign criminals, the criminal would have to have committed his act within the jurisdiction of that State to be held by it. The Tokyo Convention not only gives the power but also the duty to take custody or restrain the alleged offender as per the law of the State "... for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted" (Article 13, paragraphs 1 & 2). A commentator on the Convention states:<sup>20</sup>

... a non-resident alien who commits an offense against a foreign flag state during international flight must be restrained upon delivery . . . He can neither avoid restraint for lack of law nor elude possible prosecution through an absence of pursuability. A definite deficiency in international criminal law is rectified.

Reiterating the Tokyo Convention provision for custody in its Article 6, paragraph 1, the Hague Hijacking Convention goes one step further in requiring that the State wherein the offender is found is obligated, "without exception whatsoever," to prosecute him if it does not extradite him (Article 7).

It is necessary to look to both the Tokyo and the Hague Hijacking Conventions for the rights and duties of the States, and persons involved in a seizure or attempted seizure of an aircraft to obtain custody and establish jurisdiction over the offender. The Tokyo Convention vests the aircraft commander with the power to use reasonable measures, including restraint when necessary, when "he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft an offense. . ."

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<sup>20</sup>*Id.*, at 181.

(Article 6, paragraph 1). He must then notify, as soon as practicable, the State in whose territory he intends to land that he has a person under restraint and the reasons for that restraint (Article 7, paragraph 2).

Upon landing, the aircraft commander may deliver the offender to the competent authorities of the landing State (Article 9, paragraph 1). With this delivery, the Hague Hijacking Convention provides that the State shall take measures to ensure his presence (Article 6, paragraph 1) and shall "immediately make a preliminary enquiry into the facts" (Article 6, paragraph 2). The States of registration of the aircraft and nationality of the offender, as well as any other who might be concerned, must be notified of the detention and the reasons therefor (Article 6, paragraph 4). It is at this time that the landing state will indicate whether it intends to exercise jurisdiction (Article 6, paragraph 4).

## V. Extradition

If one of the interested States should assert its jurisdictional prerogatives, the landing State must apply the existing laws of extradition to its request. It is this area of the law that has presented the greatest obstacle to effectively dealing with the hijacker.

Generally, extradition is granted of persons charged with, or convicted of, extraditable offenses. "Extraditable offenses are those criminal acts designated extraditable crimes by the local (or as it is sometimes called the municipal law) of the State, or by a treaty to which the State is a party or both."<sup>21</sup> Some States grant extradition as a matter of comity without an extradition treaty, but others, such as the United States, the U.S.S.R., and Great Britain will only grant extradition pursuant to a treaty. In the United States, the leading case demonstrating that extradition must be pursuant to a treaty and that the treaty will be strictly construed, is *Factor v. Laubenheimer*.<sup>22</sup> The Supreme Court, in an opinion by Chief Justice Stone, stated: "The principles of international law recognize no right to extradition apart from treaty . . . the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty."

### A. Crime in Both States

If the extradition treaty does not include the crime for which the requesting State wishes to prosecute the criminal, a similar principle applies:

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<sup>21</sup>6 WHITEMAN, DIGEST OF INT. L. 771 (1968).

<sup>22</sup>290 U.S. 276,287 (1933).

... it may be said that if the offense for which an individual's return is desired is not one of those enumerated in the treaty between the two countries concerned, the requested country would be under no obligation to surrender in extradition an individual charged with that offense and the requesting country would be unable to invoke the provisions of the treaty to obtain his surrender.<sup>23</sup>

Another common requirement for extradition is that the acts which form the basis for the extradition request constitute a crime under the laws of both the requesting and the requested States. This requirement exists whether the request is made under a treaty or apart from a treaty, and whether a list of offenses or a minimum-penalty provision is involved.<sup>24</sup>

Obviously, then, it is difficult to meet these requirements where air piracy is concerned. First, most States do not have municipal laws prohibiting the hijacking of aircraft and second, there are few extradition treaties naming piracy an extraditable offense.

The United States amended the Federal Aviation Act in 1964<sup>25</sup> to include the crime of "aircraft piracy" which is defined as "any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce." The punishment to be imposed upon a convicted hijacker is a maximum penalty of death and a minimum penalty of twenty years' imprisonment.

One of the few States having a municipal law providing for the punishment of the air pirate is the Netherlands. It amended its "Wetboek van Strafrecht" (Penal Code) in 1970, providing for the imposition of a maximum penalty of nine years' imprisonment for an air pirate. If there is more than one person involved in the hijacking, or if a kidnapping is involved, then the sentence is from ten to twelve years. The greatest penalty handed down is fifteen years upon a death occurring as a result of the hijacking.<sup>26</sup>

The United States and the Netherlands entered into an extradition treaty on June 21, 1889,<sup>27</sup> which contains the usual extraditable offenses, such as murder, rape, bigamy, abortion and mutiny. As one might well imagine, however, the treaty does not cover air piracy. Therefore, even though the crime is punishable in both countries, there could be no extradition of a hijacker of an American aircraft landing in Holland.

### *B. Death Penalty*

If this treaty were to be amended to include the crime of air piracy, the

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<sup>23</sup>*Id.*, at 733

<sup>24</sup>*Id.*, at 773.

<sup>25</sup>49 U.S.C. § 1472 (i) (1964).

<sup>26</sup>Author's translation.

<sup>27</sup>T.S. No. 256, Stat. 1481, II Malloy 1266 (1889).



fact that the United States imposes the death penalty while the Dutch maximum penalty is fifteen years' imprisonment, would prove a further obstacle to extradition. The United States has an extradition treaty with Brazil which includes the crime of air piracy (Article 2, paragraph 9), but which also includes the special provision to deny extradition under the following circumstance:<sup>28</sup>

Article 6

When the commission of the crime or offense for which the extradition of the person sought is punishable by death under the laws of the requesting State and the laws of the requested State do not permit this punishment, the requested State shall not be obligated to grant the extradition unless the requesting State provides assurances satisfactory to the requested State that the death penalty will not be imposed on such person.

That the Netherlands is strongly opposed to the imposition of a death penalty is clear, since it has not executed anyone since 1813, and has abolished capital punishment, by law, since 1870.<sup>29</sup> The United States government, on the other hand, does not propose to eliminate the federal statutory death penalty for air piracy, as it is considered to be a deterrent to potential hijackers. However, the U.S. has proposed to the ICAO that it will waive the death penalty on an *ad hoc* basis, on request of any nation which finds the death penalty offensive. The general counsel for the Air Transport Association asserts that there are basic questions of constitutionality raised by this proposal:<sup>30</sup>

... in lieu of an *ad hoc* determination, the Attorney General might actually promulgate a blanket waiver *in futuro* as to all foreign states known to object to capital punishment. Under this proposal, the statute would plainly have unequal application as between an air pirate who consummated the hijacking to such a country and one who hijacked an aircraft to a non-objecting country, or who were guilty of only attempted piracy.

*C. Crimes of a Political Character*

Both the extradition treaties of Brazil (Article 5) and of the Netherlands (Article 3), as well as most such treaties, provide that extradition will not be granted for a crime which is considered to be of a political character. It is this tenet of international law which defeats any worthwhile legislation toward dealing with the air pirate as a criminal.

The philosophy behind political asylum is that the individual may be fleeing from an "oppressive or tyrannical" government seeking freedom

<sup>28</sup>15 U.S.T. & O.I.A. 2093, 2106, T.I.A.S. No. 5691 (1964).

<sup>29</sup>Information supplied by the Netherlands Information Bureau, New York.

<sup>30</sup>Stephen, *supra* note 5, at 439,440.

and his basic human rights. Such a person, "who is sought by his political opponents, is not likely to receive an impartial hearing."<sup>31</sup>

However, a balance must be reached between the goal sought by the political offender and the means he adopts to achieve it. The question was presented to the Swiss Federal Tribunal in the case of *In re Kavic, Bjelanovic and Arsenijevic*.<sup>32</sup> A Yugoslavian airliner was commandeered by three Yugoslavs and forced to land in Switzerland. The court reasoned that "the offenses against the other members of the crew were not very serious, and . . . the political freedom and even the existence of the accused was at stake, and could only be achieved through the commission of these offenses."

In light of the death and destruction caused by the hijacker, it is doubtful that it could now be said that the ends justify the means—" . . . this exposure of 'innocent bystanders to danger' should not be excused by its political colorings."<sup>33</sup>

In the innumerable hijackings of aircraft from the United States to Cuba, the majority of the hijackers have had political motivations.<sup>34</sup> The political nature of the crime is even more blatant in the hijackings that have occurred in the rest of the world—and, the reluctance to return the hijacker easily discernible. On March 13, 1970, fifteen Japanese youths, members of a Red Army group, seized a Japan Air Lines aircraft in Tokyo and successfully arrived in North Korea.<sup>35</sup> If possible, would North Korea extradite? On June 21, 1970, twelve Jews attempted to commandeer an Aeroflot plane in Leningrad.<sup>36</sup> If they had successfully reached Israel, would they have been treated as criminals or—heros?

Since "hijackers operate almost exclusively where the existence of two antagonistic sides assures them a sympathetic reception from one of them,"<sup>37</sup> it is conceivable that the landing State penalties might be too light and those of the State of registration too severe. An article in the *New York Law Journal* terms the selection of a friendly or lenient landing State by the hijacker as "country shopping."<sup>38</sup> This ability of the hijacker to find a politically sympathetic haven results in "a breakdown of any deterrent,"

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<sup>31</sup>Panhuis, *Aircraft Hijacking and International Law*, 9 COLUM. J. TRANSNAT'L L. 1, 13 (1970).

<sup>32</sup>78(1) R.O. 39, (1952) Ann.Dig. 371 (No. 80).

<sup>33</sup>Horlick, *supra* note 8, at 48.

<sup>34</sup>Loy, *supra* note 2, at 445.

<sup>35</sup>*Supra*, note 4.

<sup>36</sup>*Id.*

<sup>37</sup>Horlick, *Supra* note 8, at 44.

<sup>38</sup>Hirsch and Fuller, *Aircraft Piracy and Extradition*, 165 N.Y.L.J., June 28, 1971, p. 4, col. 3.

and leads to a conclusion that “the plea of political offense should not be allowed in the case of hijacking.”<sup>39</sup>

*D. Extradition Provisions of the Tokyo and Hague Hijacking Conventions*

The Tokyo Convention does not attempt to cope with the established principles relating to extradition. Article 16 provides that the offense will be considered as having occurred not only in the State in which it did, but also in the territory of the State of registration of the aircraft for purposes of extradition. However, it specifically states that the convention does not create an *obligation* to grant extradition. Hence, even if two involved nations were parties to the convention, “. . . it would still be necessary to have an effective extradition treaty between the two nations, plus a political climate which would engender good faith compliance with both the Tokyo Convention and the extradition treaty.”<sup>40</sup>

Perhaps the most important contribution to international law by the ratification of the Hague Hijacking Convention, is its extradition provision – that of Article 8.

First, for those States requiring that an extradition treaty be in existence for the granting of extradition, the Convention may be considered as the legal basis for extradition, in respect to the seizure of aircraft at the option of the requested State. If the option is exercised, the law of the requested State would govern (paragraph 2). Thus, the United States would be able to request or grant a request for extradition even though no extradition treaty existed with the requested or requesting State.

Second, the Convention provides that the offense will be recognized as extraditable by those States which do not require a treaty for extradition. Again, the request is subject to the laws of the requested State (Paragraph 3).

Third, if an extradition treaty exists between two States which does not include the offense of hijacking, it will be deemed to be included as a result of the convention. Further, it obliges Contracting States to name the convention offense in any future extradition treaty concluded between them. Therefore, in the example of the United States and the Netherlands, the treaty entered into many years ago would permit extradition of an offender without further amendment (Paragraph 1).

Finally, in response to the requirement that the offense must have been

<sup>39</sup>Panhuyts, *supra* note 31, at 19.

<sup>40</sup>Wurfel, *Aircraft Piracy—Crime or Fun?*, 10 *WM. & MARY L. REV.* 820,845 (1969).

committed in the territory of the requesting State for the requested State to grant extradition, the Convention establishes that the offense would be treated as if it had been committed not only in the place in which it actually occurred but also in the territory of any State which has been required to establish its jurisdiction under Article 4 (Paragraph 4).

It is significant to note that there is nothing specifically set forth in the Convention as to whether or not political considerations should be exempted from the duty to extradite. Since the crime of the hijacker most often has a political motivation, the omission could constitute a major weakness in the treaty.

However, if the requested State refuses to extradite the offender for political reasons, it still has the obligation to prosecute the offender under Article 7. The authorities "shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of that State." Thus, the hijacker cannot elude prosecution—he will either be extradited or prosecuted where found.

## **VI. Extra-legal Measures Implementing the Treaties**

The goal of the Hague Hijacking Convention is deterrence of the offense through the punishment of the offender. Consideration should also be given to those measures designed to prevent the offense from occurring in the first instance. Subsequent to the seizure of three aircraft and their passengers and their removal in the Jordanian desert, President Nixon announced his seven point plan to combat hijacking.<sup>41</sup> In addition to a plea to all nations to uphold the provisions of the Tokyo Convention and to support the Conference at the Hague, the President proposed the following:

1. Specially trained, armed U.S. Government personnel will be placed on flights of U.S. commercial airliners.
2. Electronic surveillance equipment and other surveillance techniques will be placed and utilized in appropriate airports in the United States, and, wherever possible, in other countries.
3. Security measures are to be developed by several administrative agencies of the government.
4. Consultations will be instituted with other States to develop new techniques to deter hijacking.

The security aspect of the President's message had been discussed at the 17th Session (Extraordinary) Assembly of the ICAO held in Montreal in June, 1970. The procedures, techniques and equipment to be used in the prevention of armed aggression against civil airline aircraft were presented

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<sup>41</sup>N.Y. Times, Sept. 12, 1970, p. 11, col. 4, 5.

by the IATA to that assembly.<sup>42</sup> Among the devices presently available were mentioned the X-ray fluoroscope to detect weapons and explosive devices; a decompression chamber capable of triggering bomb fuses which are based on pressure altitude; and dogs or explosive "sniffers" to detect explosives by smell.

Other airline security measures include satisfactory identification documents for all persons and vehicles permitted access to the aircraft; physical facilities to prevent unauthorized access to baggage, cargo and fuel areas; locked cockpit doors; and the implementation of systems designed to keep track of passengers between baggage check-in and actual boarding of the aircraft.

While the items enumerated are seemingly legally innocuous and could be highly effective, it has been indicated that, at least in the United States, there are serious constitutional questions involved, particularly the search and seizure provision of the Fourth Amendment. If an individual refuses to submit to the scrutiny of the weapons detectors or if he is unaware of the presence of the detectors and they are imposed upon him, can he legally be denied access to the aircraft?<sup>43</sup>

## **VII. A Solution for the Future: The International Court of Justice**

The Tokyo Convention does not address itself to the problem of the prosecution of the hijacker. Article 11, that providing for hijackings, requires that control of the aircraft be restored to the lawful commander (paragraph 1), and that the passengers and crew be permitted to continue their journey with the aircraft and cargo being returned to their owner (paragraph 2). The Hague Hijacking Convention does require prosecution *without exception whatsoever*; but, the punishment meted out by the State not granting extradition might still not be proportionate to the crime if it is sympathetic to the hijacker's cause.

An entirely new concept has been suggested—the establishment of an International Prison and the utilization of the World Court, as the exclusive forum for trying the hijacker. Secretary General U Thant, in a speech at a dinner for the United Nations, proposed that a special international tribunal be created to deal with hijackers.<sup>44</sup> He said that hijack-

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<sup>42</sup>A copy of the IATA presentation entitled, *Security Aspects of the Prevention of Armed Aggression Against Civil Airline Aircraft* was supplied to the author through the courtesy of Eastern Airlines.

<sup>43</sup>Loy, *supra* note 2, at 447.

<sup>44</sup>N.Y. Times, Sept. 15, 1970, p. 17, col. 1.

ings were crimes of a "totally different category" directed against an international service affecting a diversity of nations, men and interests; therefore, hijackers could not be dealt with by national courts defending the interests of one particular people or nation.

At least two other legal writers have amplified U Thant's suggestion by proposing that there is no need to create a new tribunal when there is already one in existence which has not been used to advantage heretofore. One would have the tribunal hear those cases involving a difficulty in extradition which would insure uniform standards in the determination of extradition cases.<sup>45</sup> The court could promulgate suggested sentencing standards with which the signatory powers would be invited to comply and the political character crime exemption would still apply. Since this proposal allows for the political character crime exemption to remain, it would have a rather limited application.

To overcome the obstacle of extradition difficulties due to the imposition of the death penalty by a State, the second writer would have the court impose a penalty up to the maximum of the requested State.<sup>46</sup> This State would appoint a judge to the court who would advise as to the laws and penalties applicable and which the court would be required to follow.

Yet still another writer poses this solution to be the ultimate goal of the international law regarding criminal acts which injure the universal man, not solely the national one:<sup>47</sup>

... will the day ever come when there will be an impartial international criminal court with jurisdiction to punish individuals who have committed international crimes, so that one or a few nations may not legally thwart the rule of law in the international community?

Since a provision exists in both the Tokyo and Hague Hijacking Conventions for the submission of disputes relating to the interpretation and application of the Conventions to arbitration and, subsequently, to the International Court of Justice, it is not inconceivable that the provision could be construed to include disputes as to extradition and penalties.

## VIII. Conclusion

In view of the importance of the airplane to world commerce, any interference with air travel affects the world community as a whole. The

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<sup>45</sup>Hirsch and Fuller, *Aircraft Piracy and Extradition*, 165 N.Y.L.J., June 29, 1971, p. 4, col. 2.

<sup>46</sup>Smith, *The Probable Necessity of an International Prison in Solving Aircraft Hijacking*, 5 INT'L LAWYER 273,274 (1971).

<sup>47</sup>Wurfel, *supra* note 40, at 873.

uniqueness and importance of the aircraft requires that all nations work together as a body to prevent any interference. This necessarily involves establishing new laws and re-evaluating old ones.

The ratification of the "Convention for the Suppression of Unlawful Seizure of Aircraft" demonstrates that international cooperation can result in an effective response to a universal problem. It must be remembered, however, that the treaty has been brought into force by the depositing of ten instruments of ratification. There are sixty-six remaining signatory States which must yet ratify. Obviously, the effectiveness of the Convention will be measured by the number of States accepting it as the law.

Another aspect to be considered, if the objective of deterrence of hijacking is to be achieved, is public awareness of the treaty and its provisions. The publicizing of certain prosecution, of the imposition of severe penalties, of the security measures being utilized by the airlines and of the presence of armed "sky marshalls" aboard international flights, should cause the potential hijacker to think twice about committing his act.

It is hoped that the realization by the air pirate that he can no longer profit by his crime will place him alongside the sea pirate as a spectre of the past.