AIR HIGHJACKING AS A POLITICAL CRIME— WHO SHOULD JUDGE?

In 1961, a new type of criminal burst upon the international scene; the aircraft highjacker. This type of crime had occurred before, but prior highjackers were either the pilot or someone who was sufficiently skilled to fly a multi-engine aircraft.[1] The new technique of using a real or pretended weapon to subdue the crew and direct the plane's movement greatly enlarged the potential for this type of crime. Indeed, prior to 1962, there was a worldwide total of forty-three highjackings. From 1962 through July 1970, there were 192 incidents of aircraft highjackings.[2]

Action taken to deter aircraft highjacking has not been notably effective. One major international Convention has been ratified[3] and another signed.[4] An intra-continental Convention has also been signed.[5] Many nations have passed internal laws which strictly punish aircraft highjacking.[6] These international Conventions and the internal laws have operated from two basic premises. The first is that highjacking is primarily political. The second is that if the state of registration of the aircraft can be assured of automatic extradition of the highjacker by the state in which the highjacked aircraft lands, the motivation to highjack will be severely curtailed.[7] These premises are not necessarily valid. The only major psychiatric study of aircraft highjackers to date indicates that highjackers are apolitical and commit the crime

1. HUBBARD, THE SKYJACKER 211 (1971).

2. *Id.* at 257. This data was compiled from the records of the Federal Aviation Administration.

3. Convention on Offences and Certain Other Acts Committed on Board Aircraft, ICAO Doc. 8364 (1963), 2 INT'L LEGAL MATERIALS 1042 (1963), [hereinafter Tokyo Convention].

4. Convention For the Suppression of Unlawful Seizure of Aircraft, DEP'T STATE BULL. 50 (Jan. 11, 1971) [hereinafter Hague Convention]. Advice and consent given by the United States Senate on September 8, 1971. Wall Street Journal, Sept. 9, 1971, at 1, col. 3.

5. Draft Convention on Terrorism and Kidnapping For Purposes of Extortion, 9 INT'L LEGAL MATERIALS 1177 (1970).

6. *See, e.g.*, 49 U.S.C. § 1472(i).

7. Statement by President Nixon, Sept. 11, 1970, DEP'T STATE BULL. 341 (Sept. 28, 1970).

in part, because of the heavy penalties rather than in spite of them.[8]

It is customary international law to refuse extradition for offenders accused of political crimes. The thrust of the aforementioned Conventions would be to create an exception to this rule. Assuming, *arguendo*, that the Conventions' premises are correct, this Comment will discuss the judicial history of the political crime exception to extradition and the operative sections of the Tokyo Convention, the Hague Convention and the O.A.S. Draft Convention on Terrorism. Some conclusions will be offered concerning the advisability of creating a general exclusion to the political crime exception.

I. POLITICAL CRIMES AND RELATED OFFENSES

A. The Case Law

Extradition is not made by right, but by request, and is usually governed by treaty.[9] Non-extradition of political offenders is an established principle of international law.[10]

The history of political exceptions to extradition began in France in 1829.[11] This was followed closely by the first recognized statutory exception in Belgium in 1933.[12] In 1855, Belgium adopted what is commonly known as the Belgian *attentat* clause after the country failed to extradite "Jules and Celestin Jacquin, Frenchmen accused of attempting to blow up the train carrying Napoleon III from Lille to Calais."[13] The *attentat* clause, in its basic form, denies the political exception to an attempt to murder a head of State.[14] The *attentat* clause is in widespread use although it has never been accepted by either Switzerland or the United Kingdom.[15]

8. HUBBARD, *supra* note 1, at 80.

9. For example, the United States is a party to eighty-three treaties covering extradition, all of which contain a political exception clause.

10. 1 OPPENHEIM, INTERNATIONAL LAW 702 (8th ed. 1955).

11. Deere, *Political Offenses in the Law and Practice of Extradition*, 27 AM. J. INT'L L. 247, 250 (1933).

12. *Id.* at 251.

13. *Id.* at 252.

14. *See, e.g.*, Article 357 of the Convention on Private International Law (Bustamente Code), *opened for signature* Feb. 20, 1928, 86 L.N.T.S. 111.

15. Deere, *supra* note 11, at 253. Switzerland refuses recognition since, under the predominance theory (discussed *infra*), any crime may have a political character. The United Kingdom defines regicide as treason, hence political.

Two distinctions should be made. The first is between diplomatic and territorial asylum. The former refers to the asylum of a party in the embassy or legation of the requested state which lies within the territory of the requesting state while the latter is asylum of a party within the territory of the requested state.[16] Asylum requested by an aircraft highjacker is necessarily territorial asylum.[17] The discretion allowed a requested state in territorial asylum is absolute while such is not the case in diplomatic asylum.[18]

The second distinction is between "pure" and "related" political offenses. Pure political offenses are those against the political organization or external security of the State.[19] They are generally limited to treason, sedition, and espionage.[20] A "related" or "relative" political offense is a common crime which is either implicit in, or connected with, a political act.[21] Since highjacking is a common crime,[22] highjacking for a political motive would, by definition, be a relative political offense. A common crime implicit in a political act is known as a complex relative political offense. An example is the assassination of a sovereign. A common crime which is connected with a political act is known as a connected relative political offense. An example would be breaking and entering a military installation to commit espionage. Highjacking an aircraft could be either of these. If the plane was highjacked for purposes of international blackmail, the offense would be a complex relative political crime. However, if the plane were highjacked merely to provide a means of escape from an oppressive regime, the offense would be a connected relative political offense.

Professor Garcia-Morá has divided the test for political offenses into three basic types.[23] These are the Swiss "predomi-

16. Asylum Case (Columbia v. Peru), [1950] Ann. Dig. 280 (No. 90) (I.C.J.).

17. It is possible that an offender could highjack a helicopter and land on embassy grounds. While turgid with interesting legal speculation, such an occurrence is beyond the scope of this Comment.

18. [1950] Ann. Dig. at 282.

19. Deere, *supra* note 11, at 248.

20. Garcia-Morá, *The Nature of Political Offenses: A Knotty Problem of International Law,* 48 VA. L. REV. 1226, 1234 (1962).

21. Deere, *supra* note 11.

22. Highjacking is a common crime either by statute or because it contains the elements of other common crimes, *e.g.,* kidnapping, assault, larceny.

23. Garcia-Morá, *supra* note 20. *See also* Garcia-Morá, *The Present Status*

nance" test, the Anglo-American "incidence" test, and the French "political objective" test.[24]

1. The Swiss Test.—The Swiss test is well defined in a 1951 case where the court said,

> [a] relative political offense is one which, while having the characteristics of a common offense, acquires a political character by virtue of the motive inspiring it, or the purpose for which or the circumstances in which it has been committed, in other words, it is in itself a common offence, but has a predominantly political character.[25]

Earlier cases held that to qualify as a relative political offense, the act must form a part of a civil disturbance aimed at overthrowing the government.[26]

This requirement was changed dramatically in 1952 in *In Re Kavic et al.*[27] Three Yugoslav members of the flight crew of an intra-Yugoslavian flight subdued the remainder of the crew and diverted the flight to Switzerland. The Yugoslav government requested their extradition for the constraint to other members of the crew, endangering the safety of public transport, and wrongful appropriation of property. The alleged offenders contended, in part, that the crimes were political in nature and therefore not extraditable. In refusing to grant extradition, the Court said that older cases held the term "political crime"

> applies to the flight of a political opponent from the country only if it is intended to continue the fight for power from abroad. . . . That restrictive interpretation does not, however, bear re-examination: it does not meet the intention of the law, nor take account of recent historical developments, such as the growth of totalitarian States. In such States all political opposition is suppressed and a fight for power is, if not impossible from the start, at least practically without any chance of success. Those who do not wish to submit to the regime have no alternative but to escape it by flight abroad. . . . This more passive attitude for the purpose of escaping political constraint is no less worthy of asylum than active

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of Political Offenses in the Law of Extradition and Asylum, 14 U. PITT. L. REV. 371 (1952-53).

24. Garcia-Morá, *supra* note 20.

25. In Re Ficorille, [1951] Ann. Dig. 345 (No. 110) (Federal Tribunal Switzerland).

26. In re Kapengst, [1929-30] Ann. Dig. 292 (No. 188) (Federal Court Switzerland).

27. [1952] Ann. Dig. 371 (No. 80) (Federal Tribunal Switzerland).

> participation in the fight for political power used to be in what were earlier considered to be normal circumstances.[28]

This opinion has been set out in some detail since it is the only internationally reported opinion to deal with air highjacking as a political crime.[29]

A more recent case succinctly states the Swiss test for relative political offenses.[30] "Political offences include offences which, although constituting acts falling under the ordinary criminal law, have a predominantly political character as a result of the circumstances in which they are committed. . . ."[31] The Swiss motivation and predominance theory is followed by Argentina,[32] Chile,[33] and the German Federal Republic.[34] The German Republic will also not extradite a "politically persecuted person" regardless of the offense charged.[35] While the motivational test is followed in Austria[36] and Belguim,[37] there is also a requirement for a civil disturbance.[38]

2. *The Anglo-American Test.*—The leading common law case on the political exception to extradition is *In Re Castioni.*[39] The Court held that "fugitive criminals are not to be surrendered for

28. *Id.* at 373.

29. *See* Note, *Prospects For The Prevention of Aircraft Highjacking Through Law*, 9 COLUM. J. TRANSNAT'L L. 60, 67 (1970).

30. Ktir v. Ministere Public Federal, 34 I.L.R. 143 (Federal Tribunal, Switzerland, 1961).

31. *Id.* at 144. The language of this opinion can be confusing since this court, as some others, divides relative political crimes into two categories, i.e., complex and connected.

32. Re Peyre, [1955] Ann. Dig. 525 (National Special Court Argentina); In Re Bohne, 62 AM. J. INT'L L. 784 (Supreme Court, Argentina, 1966).

33. Re Garcia Zepeda, [1955] Ann. Dig. 528 (Supreme Court, Chile); Re Campora, 24 I.L.R. 518 (Supreme Court, Chile, 1957).

34. Extradition (Ecuadorian National) Case, [1953] Ann. Dig. 370 (Federal Supreme Court, Germany).

35. Extradition of Greek National (Germany) Case, [1955] Ann. Dig. 520 (Federal Supreme Court, Germany); Extradition (Yugoslav Refugee in Germany) Case, 28 I.L.R. 347 (Supreme Constitutional Court, Germany, 1959).

36. Hungarian Deserter (Austria) Case, 28 I.L.R. 343 (Supreme Court, Austria, 1959) at 345 where the Court stated, "The political motive of a criminal offense does not in itself prove that the offense is political. The crime becomes a political offense only where it serves a political purpose, i.e., where the offense is intended to bring about a change of political circumstances. . . ."

37. In Re Barrantini, [1939-40] Ann. Dig. 412 (No. 159) (Court of Appeals, Belgium, 1936).

38. Hungarian Deserter (Austria) Case, *supra* note 36; In re Zouche et al., 31 I.L.R. 386 (Court Cassation, Belgium, 1960).

39. [1891] 1 Q.B. 149 (1890).

extradition crimes, if those crimes were incidental to and formed a part of political disturbances."[40] This case was closely followed by another in 1894 which placed anarchy outside the political crime exception.[41] *In Re Castioni* has led authorities to proscribe an Anglo-American test which requires, (1) a political or civil disturbance in which at least two factions seek control of the government, and (2) that the crime complained of be incidental to the disturbance.[42] This test has been severely diluted by three recent English cases. In 1954, the Queen's Bench decided *Ex Parte Kalcyznski*,[43] popularly known as the Polish Seamen's case. Seven Polish Nationals mutinied aboard a Polish fishing vessel on the high seas and sailed into a British port. Poland requested extradition for the mutiny, damage to the vessel and exposing the vessel to "the danger of calamity at sea and the entire crew to loss of life."[44] Basing its decision on *In Re Castioni,* the Court held that since leaving Poland without permission was treason in accordance with Polish law, the defendants were in danger of prosecution for a political crime and thus entitled to asylum.[45] It should be noted that the facts did not involve a political disturbance.

In *Ex Parte Schtraks*,[46] the House of Lords, in adjudicating a clearly non-political case, took the opportunity to offer an expansion of the *Castioni* doctrine in relation to the same legislation[47] which *Castioni* interpreted. Lord Reid said, "The use of force, or it may be other means to compel a sovereign to change his advisors, or to compel a government to change its policies may be just as political in character as the use of force to achieve a revolution."[48] The most recent comment by an English Court

40. *Id.* at 166.

41. In Re Meunier, [1894] 2 Q.B. 415.

42. Garcia-Morá, *supra* note 20, at 1240; *See also* Garcia-Morá, *supra* note 23, at 378; Evans, *Reflections Upon the Political Offense in International Practice*, 57 AM. J. INT'L L. 13 (1963).

43. 21 I.L.R. 240 (Queen's Bench, England, 1954).

44. *Id.*

45. *Id.* at 243.

46. [1962] 3 W.L.R. 1013 (House of Lords).

47. EXTRADITION ACT, 1870, 33 & 34 Vict. c. 52, § 3(1).

48. [1962] 3 W.L.R. at 1026. The significance of Lord Reid's remarks for the Western nations is obvious. By this definition, the political exception would include an opponent to United States involvement in the Vietnam war or the United Kingdom's attitude toward South Africa. It demolishes the theory into which democratic regimes have so comfortably fitted themselves that any opposition must come from either the anarchistic left or the totalitarian right and may be summarily dealt with.

was *Re Gross* in 1968.[49] Citing *Castioni, Meunier,*[50] *Kakcyznski,* and *Schtraks,* the Court stated the test as being whether the offender "could claim with any prospect of success political asylum."[51] The English Courts, therefore, seem to be moving from a strict *Castioni* interpretation toward the more tolerant Swiss relative interpretation.[52]

American courts have generally followed the *Castioni* rule as indicated in the most recent American case, *In Re Gonzales.*[53] The Court in *Gonzales* states the *Castioni* test but goes further in stating that "notwithstanding the validity of this general proposition of law, it must be emphasized that the 'political offense' concept is essentially a flexible one."[54] The Court then goes on to discuss *Kalcyznski.*[55] It should be noted that the Court had the benefit of neither *Schtraks* nor *Gross.*[56]

3. The French Test.—The French objective right test goes to the nature of the rights injured rather than the motive of the offender.[57] A political crime is one which "only affects the political organization of the state."[58] Thus, France recognizes only the pure political crime and not the relative political crime.[59] This viewpoint has not been widely accepted.

4. Application of the Tests to Highjacking.—Only the Swiss Courts have actually adjudicated an aircraft highjacking. *In Re Kavic,* on its facts, would apply strictly to a highjacking as an escape mechanism from a totalitarian regime in which no passengers were involved. The highjacking in *Kavic* was a connected relative political offense. If the Swiss Courts were faced with a highjacking as a complex relative political offense or if another common crime (such as murder of a member of the crew) was committed, the predominance test would be applied and the case decided on its facts.

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49. Re Gross et al. [1968] 3 All E.R. 804 (Q.B.D.).
50. In Re Meunier, [1894] 2 Q.B. 415.
51. [1968] 3 All E.R. at 810.
52. *See* Evans, *supra* note 42.
53. 34 I.L.R. 139 (U.S. District Court, New York, 1963).
54. *Id.* at 140 n.3 and accompanying text.
55. *Id.*
56. *See also* Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957) and U.S. v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959).
57. In Re Giovanni Gatti, [1947] Ann. Dig. 145 (No. 70) (Court of Appeals, France).
58. *Id.*
59. Garcia-Morá, *supra* note 20, at 1249.

In an American or English Court, under *Castioni* and succeeding cases, if there were any factual political connection whatsoever, aircraft highjacking would be a political crime.

The French test is, of course, simply applied. Highjacking, *prima facie*, injures rights other than those of the State and assuming applicable treaties, the offenders should be extradited.

B. Multilateral Agreements

The only multilateral agreement related to aircraft highjacking currently in force is the Convention on Offenses and Certain Other Acts Committed on Board Aircraft signed at Tokyo on September 14, 1963.[60] The Convention, having been ratified by twelve states, entered into force on December 9, 1969.[61] The Inter-American Juridical Committee has recommended a draft treaty to the Permanent Council of the Organization of American States.[62] The Permanent Council agreed on November 4, 1970, to refer this draft to the General Committee for study.[63] A new multilateral Convention on aircraft highjacking was signed at a Diplomatic Convention on Air in December, 1970.[64]

1. The Tokyo Convention.—Extradition may be granted by the state in which a highjacked aircraft lands.[65] However, extradition is entirely the prerogative of that state.[66] There are three obstacles to extradition.

The first is the physical application of the Convention. The Convention applies from the moment all the "external doors are closed following embarkation until the moment any such door is opened for disembarkation."[67] It is further indicated that the application of the Convention continues after a door has been opened for disembarkation if the pilot has made a "forced landing" and until competent authorities of the landing state "take over the responsibility for the aircraft and for the persons and property on

60. Tokyo Convention, *supra* note 3.

61. Van Panhuys, *Aircraft Highjacking and International Law*, 9 COLUM. J. TRANSNAT'L L. 1 (1970).

62. O.A.S. Draft, *supra* note 5.

63. *Id.*

64. Hague Convention, *supra* note 4.

65. Tokyo Convention, *supra* note 3, Article 13, ¶ 2.

66. *Id.* at Article 16, ¶ 2.

67. *Id.* at Article 5, ¶ 2; *See also* Denaro, *Inflight Crimes, The Tokyo Convention and Federal Jurisdiction*, 35 J. AIR L. & COM. 171, 173 (1969).

board."[68] The Chief Delegate of the United States to the Convention has interpreted this article to mean that the provisions continue to apply until landing State authorities arrive at the scene of the landing.[69] This interpretation would avoid problems of application when the highjacker retains control of the aircraft for a time period after landing and the opening of a door. This raises problems, however, concerning application during intermediate stops (refueling, etc.) which are beyond the scope of this comment.

The second obstacle is the jurisdiction of any state other than the state of landing to try the offender. The Convention extends jurisdiction of the aircraft's state of registration to offenses and acts committed on board but does not exclude any criminal jurisdiction exercised in accordance with national law.[70] Jurisdiction, therefore, may be exercised by the state of registration, the landing state, or any state through which the aircraft passes while the offense continues.[71] The ICAO Legal Committee discussed priority arrangements of jurisdiction, however none were included in the Convention.[72] The net practical effect is that the landing state has immediate jurisdiction due to physical custody of the highjackers and the requirement under the Convention to make a preliminary inquiry.[73] The State of registration has jurisdiction if the landing state is willing to extradite the alleged offender.[74] Although offenses committed on board are deemed to have occurred both in the state of registration and the state of actual occurance, nothing in the Convention "shall be deemed to create an obligation to grant extradition."[75] In view of the recent United States position, it is interesting to note that United States comment on the ICAO Legal Committee meeting in Munich in 1959, "reiterated the United States position expressed at Munich that the draft convention should contain an article to the effect that (1)

68. *Id.*

69. Boyle and Pulsifer, *The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft,* 30 J. AIR L. & COM. 305, 338 (1964).

70. Tokyo Convention, *supra* note 3, at Article 3.

71. Denaro, *supra* note 67, at 191.

72. Boyle and Pulsifer, *supra* note 69, at 328.

73. Tokyo Convention, *supra* note 3, at Article 13, ¶ 4.

74. Tokyo Convention, *supra* note 3, at Article 3 and Article 13, ¶ 2; Denaro, *supra* note 67, at 191.

75. Tokyo Convention, *supra* note 3, at Article 16, ¶ 2.

nothing in the Convention shall be deemed to create a right to request extradition of any person. . . ."[76]

The third, most serious, and probably overwhelming obstacle is that the Convention specifically does not apply to political offenses. Article 2 states that:

> except when the safety of the aircraft or of persons or property on board so requires, no provision of this Convention shall be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination.

It could be argued that this provision applies only to pure political crimes. However, nations seeking to avoid extradition would doubtless seize upon it, while bolstering their argument with the Swiss case of *In Re Kavic.*[77]

2. *The Hague Convention.*—Some historical perspective is essential to understanding the forces which culminated their efforts in the signing of the Hague Convention in December, 1970. The Tokyo Convention was the product of efforts by the International Civil Aviation Organization (ICAO). It was drafted in 1961 and 1962, before highjacking became popular with non-pilots.[78] The Convention was not intended to specifically deter aircraft highjacking, political or otherwise; and, during the middle and late 1960's, it became apparent that it would not do so.[79]

The response of the community of nations to air highjacking grew steadily more strident. In March, 1969, the situation had deteriorated to the point that the International Federation of Airline Pilot's Associations (IFALPA) at their twenty-fourth Annual Conference resolved that an embargo of all air traffic should be imposed on any State refusing to institute appropriate proceedings against a highjacker.[80] In addition, the Association resolved to coordinate with other organizations to restrict air and surface cargo to and from the offending State and to call a world-wide twelve to twenty-four hour pilot's strike to dramatize the incident.[81] In the only attempt thus far to implement the resolution,

76. Boyle and Pulsifer, *supra* note 69, at 324.

77. *See* note 27 *supra.*

78. HUBBARD, *supra* note 1, at 211.

79. FitzGerald, *Development of International Legal Rules for the Repression of the Unlawful Seizure of Aircraft,* 7 CAN. Y.B. INT'L L. 269, 297 n.99 (1969).

80. Note, *Prospects for the Prevention of Aircraft Highjacking Through Law,* 9 COLUM. J. TRANSNAT'L L. 60, 74 (1970).

81. *Id.*

United Nations Secretary-General U Thant interceded in a proposed action against Syria stating that it "would not achieve the desired result" and would "only cause serious inconveniences to airline passengers throughout the world."[82]

In April, 1969, the ICAO Council established a special Committee to draft a proposed convention.[83] Meanwhile, the ICAO Legal Committee began a series of three meetings which ultimately produced the Draft Convention on the Unlawful Seizure of Aircraft.[84] "The draft was received by the ICAO Council and transmitted to Governments as the draft to be considered by a diplomatic conference scheduled for December, 1970."[85]

The Montreal Draft was, for all intents and purposes, a more explicit version of the Tokyo Convention. It outlined the procedure to be followed by a landing State in dealing with alleged offenders.[86] Prosecution must be contemplated but was not required.[87] Extradition was based on the law of the requested State[88] which might or might not exclude political crimes. These decisions were not without opposition as indicated by Senior ICAO Counsel Gerald F. FitzGerald.[89] "The majority view was that the state should have a discretion whether to prosecute or not, and that it should refer the matter to its competent authorities with a

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82. *Id.*

83. Statement by Secretary of Transportation Volpe to ICAO Council, Oct. 1, 1970, DEP'T STATE BULL. 449 (Oct. 19, 1970).

84. Draft Convention on the Unlawful Seizure of Aircraft, ICAO Doc. 8865, LC/159 of March 16, 1970, 9 INT'L LEGAL MATERIALS 669 and footnoted references [hereinafter Montreal Draft].

85. *Id.*

86. Montreal Draft, *supra* note 84, at Articles 6-8.

87. The text of the pertinent sections of the Montreal Draft reads as follows:

Article 6, ¶ 4: "The State which makes the preliminary inquiry . . . shall promptly report its findings . . . and shall indicate whether it intends to exercise jurisdiction."

Article 7: "The Contracting State which has taken measures pursuant to Article 6, paragraph 1 [preliminary inquiry] shall, if it does not extradite the alleged offender, be obliged to submit the case to its competent authorities for their decision whether to prosecute him. These authorities shall take their decision in the same manner as in the case of other offenses."

Article 8, ¶ 2: "The Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offense as an extraditable offense between themselves subject to the conditions established by the law of the State requested to extradite."

88. *Id.*

89. FitzGerald, *supra* note 79, at 290.

view to initiating proceedings." The Committee decided by a nine to three majority (the United States dissenting) that a requested State might refuse extradition when the alleged offender was a national of the requesting State and "was seeking asylum from persecution or acted from political motives."[90] The Committee unanimously decided that the requested state could refuse extradition if it considered the purpose political.[91] At a later meeting in the Fall of 1969, the United States withdrew its objection to the political exception.[92]

Meanwhile, more militant forces in the international community were also voicing their opinions on highjacking as a political crime. At the Bangkok Fourth World Conference on World Peace Through Law, a committee was appointed to draft an appropriate multilateral convention.[93] The document produced did not specifically mention a possible political motivation in highjacking.[94] It did, however, brand as a "pirate" anyone who "commits or attempts to commit aircraft hijacking."[95] This term *a priori* excludes a political motive since piracy by definition is an act taken for private ends.[96] However, Article 7 of the Montreal Draft Convention is substantially reproduced.[97] Under this article, a Contracting State could exercise its own jurisdiction and refuse to prosecute the highjacking as a political crime.[98] It is interesting that this convention requires the landing State to forward the alleged offender "to the State to which the aircraft was destined before the highjacking" which would presumably have neither the interest nor the jurisdiction to prosecute him.[99]

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90. *Id.* at 292.

91. *Id.*

92. *Id.* at 297 n.99(5).

93. Convention to Deter Aircraft Highjacking, Pamphlet Series No. 13, Dec. 1969, World Peace Through Law Center, 75 Rue de Leon, Geneva, Switzerland [hereinafter WPTLC Draft].

94. *Id.*

95. WPTLC Draft, *supra* note 93, at Article 2, ¶ 1.

96. Van Panhuys, *supra* note 61, at 5: "For private ends" is defined not only as acts motivated by *animus furandi*, but also by revenge or hate.

97. WPTLC Draft, *supra* note 93, at Article 9 which states: "The Contracting State which has taken measures pursuant to Article 8, paragraph 1 [restraint of offender pending criminal or extradition proceedings], shall, if it does not extradite the alleged offender, be obliged to submit the case to its competent authorities for their decision whether legal proceedings should be initiated against him. These authorities shall make their decision in the same manner as in the case of other offenses."

98. *See* In Re Kavic, *supra* note 27.

99. WPTLC Draft, *supra* note 93, at Article 4, ¶ (b). A recent draft

The rhetoric continued unabated into 1970. In June, an Extraordinary Session of the ICAO Council passed the Montreal Declaration calling upon States to take effective measures to deter highjacking and punish those responsible.[100] In September, the Security Council of the United Nations "unanimously adopted a resolution calling on states to take all possible legal steps to prevent further hijackings or other interferences with international civil air travel."[101]

On September 11, 1970, President Nixon announced the following unilateral action by the United States:[102]

1. Armed United States government personnel would ride United States commercial flights;
2. American flag carriers were to expand their use of surveillance devices while the Federal government would provide enforcement officers;
3. That the United States felt it was "imperative" all countries accept the Montreal draft convention;[103]
4. That the United States proposed an international boycott of countries which "refused to punish or extradite highjackers involved in international blackmail;" and,
5. The United States would hold landing States responsible for protecting the lives and property of United States citizens.

The Secretary of State was directed to request an immediate session of the ICAO Council to consider the boycott suggestion.[104]

One week later on September 18, 1970, United States Secretary of Transportation John Volpe addressed a special meeting of

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treaty submitted to the World Peace Through Center advocates the incarceration in Spandau prison of all persons *accused* of highjacking. The International Court of Justice would have original trial jurisdiction over the accused. The proposed treaty defines highjacking and permits no punishment more severe than that allowed by the laws of the country which originally obtained jurisdiction of the accused. The submitted draft is an example of the French test; in that only the injured rights of the highjacked are considered and not the motives of the highjacker. This blunderbuss approach to highjacking is extraordinarily unrealistic since nations commonly use their sovereignty to protect those whom they consider to be free from evil intent. *See also* Smith, *The Probable Necessity of an International Prison in Solving Aircraft Highjacking*, 5 INT'L LAWYER 269 (1971).

100. DEP'T STATE BULL. 303 (Sept. 14, 1970).
101. *See* note 83 *supra*, at 450.
102. *See* note 7 *supra*.
103. *See* note 84 *supra*.
104. *See* note 7 *supra*, at 342.

the ICAO Council.[105] He stated that the United States felt a "heightened sense of emergency" due to the recent use of highjacking for international blackmail.[106] The U.S. draft resolution called for two actions by the Council.[107] First, that international air transport services be suspended to any nation which indulged in international blackmail and, secondly, that the ICAO Legal Committee be directed to draw up a draft multilateral convention to embody this principle.[108] The adopted resolution, passed on October 1, 1970, called for "Contracting States . . . to consult together immediately with a view to deciding what joint action should be undertaken" not excluding a boycott.[109] The Legal Committee was directed to draw up a draft convention to provide a legal vehicle for such consultations.[110]

A Convention for the Suppression of Unlawful Seizure of Aircraft was signed by forty-nine countries at a Diplomatic Conference on Air Law at The Hague on December 15, 1970, and will come into force when ratified by ten nations.[111]

The Convention provides that jurisdiction over an alleged highjacker may be exercised by any of four countries. These are the state of registration of the aircraft, the state in which a highjacked aircraft lands, the state of domicile of a lessee under a barehull charter, and any state who is a party to the Convention and in whose territory an alleged offender may be found.[112] This last category is especially significant since, at least among party states, it establishes aircraft highjacking as an international crime.

Extradition is not specifically required by the Convention and the term "political crime" is not mentioned. The key article relating to extradition and prosecution is Article 7 which reads:

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not

105. *See* note 83 *supra.*
106. *Id.* at 450.
107. *Id.* at 453.
108. *Id.*
109. *Id.*
110. *Id.*
111. Hague Convention, *supra* note 4, at Article 13, ¶ 3. As of Sept. 27, 1971, the following countries had deposited ratifications: Bulgaria (May 19, 1971, with a reservation), Costa Rica (July 9, 1971), Ecuador (June 14, 1971), Hungary (August 13, 1971, with a reservation), Israel (August 16, 1971), Japan (April 19, 1971), and Sweden (July 7, 1971).
112. Hague Convention, *supra* note 4, at Article 4.

> the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.
>
> Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

The language of this article would support the theory that states having custody of an offender may extradite or not, at their pleasure. This is supported by the language of Article 10.[113]

The status of a state's discretion to prosecute is less clear. Article 7 leaves the decision to the state's "competent authorities." However, the same article restricts that decision to considering aircraft highjacking as an "ordinary" offense. If the term "ordinary" really means "common", then political motivation is excluded. In the case of *In Re Kavic*,[114] for example, the Polish Government charged the highjackers with several common or ordinary crimes. The Swiss Court found that the highjackers were motivated by a political desire to escape a totalitarian regime and refused to prosecute. In a similar case, The Hague Convention would allow the state to grant political asylum but would require the competent authorities to prosecute the highjackers. The penalty for such a crime in the United States is death.[115]

3. Draft Convention on Terrorism and Kidnapping of Persons for Purposes of Extortion.—During the late summer and early fall of 1970, the Inter-American Juridical Committee of the Organization of American States met and produced a draft convention on terrorism.[116] This draft is the first multi-national document to specifically denounce air highjacking as a *prima facie* non-political crime.[117] This is done by the circuitous method of branding terrorism as nonpolitical and then defining air highjacking as a form of terrorism.[118] Terrorism is non-political because the Committee's:

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113. *Id.* at Article 10, ¶ 1 which reads: "Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offense and other acts mentioned in Article 4. The law of the State requested shall apply in all cases."

114. *See* note 27 *supra* and accompanying text.

115. *See* note 6 *supra.*

116. *See* note 5 *supra.*

117. O.A.S. Draft, *supra* note 5, at Article 3 which reads: "The acts of terrorism to which this Convention refers . . . do not constitute political offenses or common crimes connected with political offenses."

118. O.A.S. Draft, *supra* note 5, at Article 4 which states: "For the purposes of this convention . . . the following shall be considered to be acts of

> Criterion is based as much on the material results of the terrorist acts as upon the inhuman, irrational and disproportionate means employed to commit them, and this is done without taking into account—since they are not relevant—the motives that impelled those who caused the acts.[119]

The Committee cites the Belgian *attentat*[120] as a previous example of outlawing a political offense.[121] The Committee reasons that this protection to sovereigns should now be extended to all human beings.[122]

The Convention requires extradition and does not allow territorial or diplomatic asylum.[123] If, for any reason, an alleged offender is not extradited, the state which captures him is required to prosecute. This is true in whatever party state the alleged offender may be found.[124]

4. The Conventions in Perspective.—Viewed together, these Conventions indicate two important trends in customary international law. The first trend is the establishment of an *attentat* type exclusion to the political exception to extradition; the Tokyo Convention did not attempt to establish this. The members of the Tokyo Convention discussed the matter and decided the political exception should remain undisturbed. The Hague Convention did not mention the political exception. The inclusion of one equivocal word, "ordinary", in Article 7 gives the extraditing state the option to refuse or to grant extradition based on political motivation. The O.A.S. Draft Convention on Terrorism categorically denies political motivation as a valid exception to extradition.

The second important trend is the classification of aircraft highjacking as an international crime for purposes of jurisdiction. Any party state to The Hague or O.A.S. Draft Conventions may try an offender regardless of where the crime was committed. If this trend continues, aircraft highjackers, like pirates, will be triable anywhere.

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terrorism: . . . the taking over, the violent seizure, or the wrecking of a ship, aircraft, or other means of collective transport."

119. *Inter-American Juridical Committee: Statement of Reasons for the Draft Convention on Terrorism and Kidnapping*, 9 INT'L LEGAL MATERIALS 1250, 1258 (1970).

120. *See* note 13 *supra* and accompanying text.

121. Inter-American Juridical Committee, *supra* note 118.

122. *Id.* at 1261.

123. O.A.S. Draft, *supra* note 5, at Article 5.

124. *Id.* at Article 7.

II. CONCLUSION

An initial objection to Conventions such as these is their unworkability. The Hague Convention was approved by 74 nations but the significance lies in who *did not* sign. The non-signers included Kuwait, Lebanon, Libya, Tunisia and Egypt; in other words, the very Arab states at whom the agreement is aimed. Conventions do not impose duties on non-signers. There must be universal acceptance before there can be universal enforcement.

A second, and more important objection is their overbreadth. The Belgian *attentat* deals only with a complex relative political crime. The murder of a sovereign is not merely incidental to a revolution. Removing the yoke of the sovereign is the revolution. Aircraft highjacking, however, can be either a complex relative political offense or a connected relative political offense. Highjacking for extortion or blackmail is complex. Highjacking to escape is a mere connection. The imposition of an arbitrary rule before the fact does not allow sufficient freedom to determine the equity in a particular case. The Swiss courts have refused to accept the *attentat* clause for precisely that reason.

The O.A.S. Draft Convention on Terrorism and Kidnapping has not yet been signed. Prior to opening for signature, the definition of terrorism should be more narrowly drawn to exclude those who highjack to escape and include those who highjack to extort. In ratifying the Hague Convention all nations, by the use of a reservation, should retain their freedom to fairly decide the fate of those who seek asylum on their shores.

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