THE AIRCRAFT HIJACKER AND INTERNATIONAL LAW

Francis J. Gist, Jr.
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ABSTRACT

The aircraft hijacker is a serious menace. The 1958 Geneva Convention on the High Seas is the only international convention available to combat him. It has provisions for piracy by aircraft but envisages only attacks by a pirate aircraft against a ship or other aircraft. Aircraft hijacking is not piracy under the Geneva Convention, or law of nations, since the hijacker is aboard and directs his act against the aircraft.

The 1963 Tokyo Convention (not yet in force) provides sanctions against hijackers, safe return of hijacked aircraft, crew and passengers and powers which the aircraft commander can utilize against hijackers without fear of suit. However, it does not create or define a crime of hijacking and each Contracting State must enact domestic legislation concerning hijacking. The Tokyo Convention will aid in deterring and controlling hijackers if it is widely ratified and Contracting States cooperate in enacting and enforcing suitable legislation.
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A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Laws.

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PREFACE

As one who has been deeply interested in all aspects of aviation since an early age, as a former naval officer (now retired), graduate test pilot, naval aviator and air transport commander in the United States Navy, and as a holder of a commercial pilot's license of the United States, I found great satisfaction in preparing this thesis which deals with a very serious and current problem in commercial aviation. It was only with great reluctance that I froze the text between current aircraft hijacking incidents, but, at the rate such incidents are occurring, it was necessary to do so in order to meet my deadline for the submission of this thesis.

I express my sincere appreciation and gratitude to Professor Martin A. Bradley, Institute of Air and Space Law, McGill University, for his patience, encouragement, guidance and counselling as the Director of my research; to Dr. Gerald F. FitzGerald, Senior Legal Officer, International Civil Aviation Organization, Montreal, for his personal time expended in explaining certain technical and historical aspects of the Tokyo Convention to me and for his constructive criticism after reading the first draft of my thesis; to Miss Joan A. Mitchell, Institute of Air and Space Law, McGill University, for her competent assistance in typing this thesis and
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CHAPTER I

INTRODUCTION

"Grenade wielder hijacks jet."¹ The newspaper reader shook his head in disbelief. Less than a week before, on July 11, 1968, he had read where the State Department of the United States of America had announced that it will permit Cuban exiles wishing to return home to ride free to Havana aboard the United States "Freedom Airlift" planes which carry Cuban refugees daily from Havana to Miami. The announcement added that it was hoped that this step would remove some of the incentive that may have led to the hijacking of United States commercial airliners by Cuban exiles seeking to return to their native land. The announcement noted that, in 1968, five American and two Venezuelan airliners had already been hijacked and their pilots ordered to fly to Cuba.²

In the preceding months, our reader had also read where:

(1) on the same day as the State Department announcement, a twelve-year-old boy attempted unsuccessfully, at gunpoint,

¹. The Montreal Star, July 17, 1968, p. 1, col. 4 (The hijacker's grenade proved to be fake but his gun was real).
to obtain an airplane for the purpose of hijacking it;\(^3\)

(2) on the following day, a Delta Airlines Convair 880
jet airliner enroute from Baltimore, Maryland, to Houston,
Texas, was hijacked and the crew was ordered to fly to Cuba
(However, the hijacker was persuaded to surrender to the
crew possibly because of a lack of fuel to get to Havana.);\(^4\)

(3) on the same day, a hijacker hired an aircraft to fly
him from Key West to Miami, Florida, and after take-off he
forced the pilot, at gunpoint, to fly him to Cuba;\(^5\)

(4) on June 29, 1968, two airliners were hijacked and forced to
land in Cuba and in one of these aircraft, a pilot was held
as being an enemy of the State of Cuba since he was a Cuban
exile\(^6\) [This pilot was not released until July 22, 1968];\(^7\)

and, on the preceding March 12, 1968, a National Airlines
DC-8 jet airliner enroute from Tampa to Miami, Florida, be­
came the third airliner in a three-week period to be hi­
jacked and directed to Cuba.\(^8\) Our newspaper reader was

\(^{6}\) The Montreal Star, July 2, 1968, p. 1, col. 2, p. 4,
col. 3; La Presse, July 2, 1968, p. 43. col. 6.
\(^{8}\) The N.Y. Times, March 13, 1968, p. 1, col. 7; The
Montreal Gazette, March 13, 1968, p. 1, col. 1; The Montreal
Star, March 13, 1968, p. 6, col. 1. On March 22, 1968,
another airliner (Venezuelan) was hijacked and diverted to
La Presse, March 21, 1968, p. 61, col. 1.
understandably bewildered. How could this be? Why doesn't someone do something before a tragedy occurs?

These hijacking incidents, and the State Department offer, indicate the rapidly increasing score of aircraft hijackings. While the 1968 hijackings have involved aircraft of the United States and Venezuela, other nations have had their aircraft hijacked in previous years. For example, on June 30, 1967, a chartered British-owned and piloted Hawker-Siddeley passenger aircraft was hijacked over the Mediterranean Sea and was forced to land in Algeria. The ostensible purpose was to kidnap Moise Tshombe, the former Congolese Prime Minister, who was being sought by the Congolese Government for execution for treason and other charges. The pilots were not released until

9. He was even more bewildered six days later when he read that an Israeli jet airliner was hijacked by a gang of men armed with guns and grenades on a flight between Rome and Tel Aviv and was forced to land in Algiers. The Montreal Star, July 23, 1968, p. 1, cols. 4-8. Although most of the passengers were released, 22 Israeli passengers were detained by the Algerian government possibly at the behest of the Palestinian hijackers who demanded that the Israelis be held as hostages in exchange for the return of Palestinian Commandos being detained by Israel. There is no immediate indication that the Algerian government had prior knowledge of the hijackers' plans although it has been formally at war with Israel since the "six-day" Middle East war of 1967. Because of the political and "act of war" aspects of this incident, it may be possible that neither the Geneva Convention, infra, nor the Tokyo Convention (even if ratified) would apply.

September 22, 1967, and the various passengers on the plane were detained and released periodically following the arrival of the aircraft at Algiers. The aircraft was not released by the Algerian Government until April 18, 1968. The aircraft hijackers involved have been called "aerial pirates".

While the hijacking incidents noted above have concerned aircraft, surface vessels have not escaped the hijackers. On January 22, 1961, the Portuguese ship SS Santa Maria was seized by a number of armed men. The hijackers called themselves revolutionaries but the government of Portugal and the world press called them "pirates". These hijackers were granted political asylum by Brazil which re-


turned the ship to Portugal. 15

Venezuela has not only suffered at the hands of aircraft hijackers but also, on February 14, 1963, its merchant vessel SS Anzoategui was hijacked by an extremest group of Venezuelans on the high seas. 16 Venezuela labeled the vessel a pirate vessel. As in the case of the SS Santa Maria, the hijackers sailed the ship into Brazil and were given political asylum by Brazil which returned the ship to Venezuela. In both of these ship hijacking incidents, the flag States involved labeled the hijackers as pirates but, as will be seen, infra, the labels attached to such incidents by the governments involved do not necessarily have the force of law which requires action by other States. 17

This paper will explore various aspects of maritime law and air law including the law applicable to both mari-

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15. On the subject of asylum for political crimes, see Colombos, id. at 256; cf. Art. 2, Tokyo Convention.

16. 4 Digest of International Law, op. cit. supra note 14 at 666.

17. 4 Digest of International Law, id. at 666-67; 1 Oppenheim, International Law 610 n.2 (8th ed. Lauterpacht 1955); Colombos, id. at 404; Black's Law Dictionary (4th ed. 1951) defines "hi-jacker" as another name for robber. It defines a "robber" as one who steals with force or open violence. The same dictionary defines "piracy" as a robbery or forceable depredation on the high seas, without lawful authority, done animo furandi, in the spirit and intention of universal hostility. This dictionary also notes that there is a distinction between the offense of piracy, as known to the Law of Nations, which is justiciable anywhere, and offenses created by statutes of particular nations, cognizable only before the municipal tribunals of such nations.
time and aerial piracy and aircraft hijacking. Brief surveys of some of the more important conventions and draft conventions and other proposals which are current or which have influenced current law will be included. Analogies between ships and aircraft will be drawn and legislation of both the United States and Canada will be examined as examples of what nations have done to deal with the menace of aerial piracy and aircraft hijacking. Because of the recent wave of aircraft hijackings, with their potential for tragedy and actual and potential adverse effects on the ever-increasing importance of civil air transportation, an effort will be made to determine if aircraft hijacking can be considered to be piracy under international law and subject to its sanctions. Finally, the Tokyo Convention, infra, will be examined for its efficacy as a deterrent to aircraft hijackers and to ensure prosecution of actual hijackers.
CHAPTER II

PIRACY AND MARITIME LAW

A. FREEDOM OF THE HIGH SEAS

By the beginning of the nineteenth century, the principle of freedom on the high seas had been well estab­lished. This meant that every State had a right to navigate upon and exploit the high seas and that there are no prefer­ences for adjacent States. The jurisdiction of each State on the high seas is limited to its own vessels and nationals with the following two exceptions: (1) "piracy," where the protection of the national flag is forfeited; and (2) "hot pursuit," where a foreign vessel which has breached a law of a coastal State has been chased in hot pursuit onto the high seas. The only other right a State has on the high seas over foreign vessels in peacetime is to approach them for the purpose of verifying their identity.

B. PIRACY JURE GENTIUM

Oppenheim defines piracy jure gentium (by the law of nations) as "...every unauthorized act of violence against

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persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel." He declares that piracy is a crime against the safety of traffic in the open sea and cannot be committed in territorial coastal waters where such acts are mere robberies subject to national law. Any attacks in territorial waters which would constitute piratical attacks if done on the high seas is subject to repression only by the State in whose territory or territorial waters the attack takes place.

Under the ancient rules of maritime law, pirates are considered as offenders against the law of nations,

gives the freedom of flight over the high seas while the Geneva Convention does so specifically. See Art. 2, infra, ch. 2, § H (8).

20. 1 Oppenheim, op. cit. supra note 16, § 272; but see discussion of piracy at municipal law, infra, ch. 2 § C.

21. 1 Oppenheim, id, § 277; accord 4 Digest of International Law, op. cit. supra note 14 at 665; Colombos, op. cit. supra note 14 at 403; Bishop, International Law 466 (2nd ed. 1962); The Law of Nations, op. cit. supra note 13 at 390; compare, In 1958, Guatemalan fighter aircraft attacked five Mexican fishing boats, none of which was flying a flag to identify its nationality, within Guatemalan territorial waters. Guatemala labeled the boats as "pirate fishing vessels." Mexico protested both the attack and use of the word "pirate" as unjustified under international law. 4 Digest of International Law, op. cit. supra note 14 at 663; cf. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Art. 1, ICAO Doc. 8364, (1963), [hereinafter cited as Tokyo Convention] which provides that the Convention shall apply in respect of offenses committed or acts done almost anywhere.

22. 4 Digest of International Law, id. at 659.
hostis humani generis,\(^{23}\) who may be arrested on the high seas by the warships of any State and who can be brought into port and tried. This right of arrest for piracy on the high seas is limited to acts which are piracy by the law of nations (jure gentium).\(^{24}\)

A piratical act is committed if one stops a ship to appropriate the cargo, kidnap a passenger or murder a person on board even though he may free the ship, cargo, passengers and/or crew.\(^{25}\) Piratical acts are also committed if the captain of a ship is forced to change course for the purpose of converting the ship and cargo to private use or if a ship coerces another ship into surrendering cargo or persons on board.\(^{26}\) Attempts at piracy, such as an unsuccessful chase, are considered to be piratical acts.\(^{27}\) Attempts have been made to assimilate the con-

\(^{23}\) Bishop, \textit{op. cit. supra} note 21 at 266, 467; Colombos, \textit{op. cit. supra} note 14 at 264, 402; \textit{The Law of Nations}, \textit{op. cit. supra} note 18 at 329, 390.


\(^{25}\) 1 Oppenheim, \textit{op. cit. supra} note 16, § 275.

\(^{26}\) \textit{Id.} § 276; Colombos, \textit{op. cit. supra} note 14 at 404.

\(^{27}\) 1 Oppenheim, \textit{op. cit. supra} note 12, § 276; Colombos, \textit{id.} at 403; \textit{The Law of Nations}, \textit{op. cit. supra} note 18 at 390; Bishop, \textit{op. cit. supra} note 21 at 467 n.31; \textit{In re Piracy Jure Gentium}, A.C. 586 (1934).
veying of slaves on the high seas to piracy.\textsuperscript{28}

While piracy can normally only be committed by pirate vessels, if the crew of a warship or other public vessel revolts and uses the ship for private purposes, then its acts of violence are considered piratical acts.\textsuperscript{29} If a State ship under the orders of its government commits unjustified acts of violence, the ship is not normally considered a pirate ship but the State of her flag is liable for any damages inflicted.\textsuperscript{30} Further, if a ship is unjustly seized on the ground of piracy, the seizing ship is liable for any loss or damage caused by the seizure.\textsuperscript{31}

There have been cases where vessels under the orders of their governments have committed acts which have been considered to be such criminal disregard for human life that the acts were considered to be piratical.\textsuperscript{32} Enemy ships cannot normally commit acts of piracy on each other since these are mere acts of hostility.


\textsuperscript{29} 1 Oppenheim, \textit{op. cit. supra} note 16, § 273; \textit{cf.} Geneva Convention, Arts. 16, 17, \textit{infra}, ch. 2 § H (8).

\textsuperscript{30} 1 Oppenheim, \textit{id.} § 273a; 4 Digest of International Law, \textit{op. cit. supra} note 14 at 658.

\textsuperscript{31} 4 Digest of International Law, \textit{ibid.}

\textsuperscript{32} \textit{E.g.} The Nyon Arrangements, \textit{infra}, ch. 2, § H (6) were initiated to stop the sinking of neutral ships by submarines during the Spanish Civil War.

\textsuperscript{33} Castel, \textit{op. cit. supra} note 23 at 653; Colombos, \textit{op. cit. supra} note 14 at 404.
There are differing views as to whether piracy is an international crime. Oppenheim states that "piracy is a so-called 'international crime'; the pirate is considered the enemy of every State and can be brought to justice anywhere." He further states that piracy as an international crime can be committed only on the open sea and, as noted, supra, that piracy in territorial waters has as little to do with international law as other robberies within the territory of a State.

In his Report to the League of Nations Committee of Experts, Matsuda agreed with Oppenheim. However, Professor Bingham, Reporter, in his comments to the Harvard Research Draft on Piracy, disagreed and stated that in international law, piracy is only the basis of an extraordinary jurisdiction in every State to prosecute and punish persons, and to seize and dispose of property, for the factual offenses which are committed outside the territorial and the ordinary jurisdiction of the prosecuting State.

34. The Law of Nations, op. cit. supra note 18 at 390; Bishop, op. cit. supra note 21 at 266.
35. 1 Oppenheim, op. cit. supra note 16, § 272; accord, Colombos, op. cit. supra note 14 at 264, 402.
36. 1 Oppenheim, id. § 277; The Law of Nations, op. cit. supra note 18 at 390.
37. See ch. 2, § H(3), infra.
C. PIRACY AT MUNICIPAL LAW

Piracy *jure gentium* is normally distinguished from piracy at municipal law since some States consider certain acts as piratical which are not so classified under international law. A State can only enforce its municipal laws on the high seas against its own ships and nationals and cannot treat foreigners on the open seas as pirates unless they are pirates *jure gentium*. The common law recognizes and punishes piracy as an offense against the law of nations (which is part of the common law) not as a violation of municipal law.

Acts of violence aboard a ship may or may not be considered piracy. While Oppenhein declares, "If the crew, or passengers, revolt on the open sea and convert the vessel and her goods to their own use, they commit piracy, whether the vessel is public or private," he admits that this statement is controversial. The Commentary to Article 39

41. Castel, *op. cit.* supra note 23 at 652; Colombos, *op. cit.* supra note 14 at 406; The Law of Nations, *op. cit.* supra note 18 at 389; Digest of International Law *op. cit.* supra note 14 at 651; see note 17, *supra*.


43. Bishop, *op. cit.* supra note 21 at 266, 467.

44. 1 Oppenheim, *op. cit.* supra note 16, § 274.
[Article 15, Geneva Convention] of the Draft of the International Law Commission on the Law of the Sea (1956) stated that in the opinion of most writers, 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, cannot be regarded as acts of piracy even when the purpose of mutineers is to seize the ship. It would thus appear that Oppenheim's view represents the minority position on this point. All writers agree that murder and robbery aboard ship are not necessarily piracy in international law and are normally punished under the law of the flag.

Insurgents who seize ships of their governments during a civil war and direct them against the forces of the legitimate government are normally not treated as pirates if they do not interfere with foreign vessels. Thus, it is not considered piracy jure gentium where such seizures are for political reasons, although the insurgents are

45. See Appendix B.

46. 1 Oppenheim, ibid.; Colombos, op. cit. supra note 14 at 403-04; Castel, op. cit. supra note 23 at 653; 4 Digest of International Law, op. cit. supra note 14 at 651, 659.

47. Castel, id. at 652; Colombos, id. at 404; 1 Oppenheim, id. § 273a; 4 Digest of International Law, id. at 652-53, 666; Colombos, id. at 404, 408-09.
subject to any criminal liability which may exist under the law of their flag State. 48

D. SANCTIONS FOR ENGAGING IN PIRACY

Pirates and their vessels lose various rights and protections. Some writers argue that both the pirate and his vessel lose the protection of their flag State and their national character. 49 Maritime States may, by customary rules of the Law of Nations, punish pirates. Any vessel, warship or private, can capture pirates on the open seas and bring them home for trial and punishment by the courts of the capturing State. Pirates may be sentenced to death but the court trying the pirate may order less

48. Brierly, op. cit. supra note 19 at 311-14; see the Santa Maria and Anzoategui ship hijacking incidents noted, supra, ch. 1; cf. Art. 2, Convention on Offenses and Certain Other Acts Committed on Board Aircraft, ICAO Doc. 8364 (1963) where it is provided that no provision of this Convention shall be interpreted as authorizing or requiring any action in respect to offenses against penal laws of a political nature or those based on racial or religious discrimination.

49. Colombos, op. cit. supra note 14 at 405; Oppenheim, op. cit. supra note 16, § 278; cf. 4 Digest of International Law, op. cit. supra note 14 at 650, 660 and Geneva Convention, Art. 18, infra, ch. 2, § H(8).

50. Colombos, id. at 264; 4 Digest of International Law, op. cit. supra note 14 at 660; The Law of Nations, op. cit. supra note 18 at 389; Bishop, op. cit. supra note 21 at 466; cf. Geneva Convention, Arts. 19, 21, infra ch. 2, § H(8). If a chase starts in the open sea and the pirate flees into territorial waters, the pursuers can follow and capture the
severe punishment if so provided by its municipal law. 51

Oppenheim argues that pirates can be executed on the spot when they cannot be brought safely into port for trial unless the captor's municipal law prohibits such execution. 52

Normally, a captured pirate vessel and its cargo are restored to their rightful owners. If real ownership cannot be ascertained, the captor may retain that which is not claimed. Some courts grant the captor a percentage of the goods retaken. 53 Both the pirate ship and the pirates retain their nationality and a State may exercise

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51. 1 Oppenheim, id. § 278; Colombos, id. at 405.

52. Provisions for execution on the spot are not included in the Geneva Convention, infra, ch. 2, § H(8), the Tokyo Convention, infra, ch. 4, the Harvard Draft Convention on Piracy, infra, ch. 2, § H(5), or in the International Law Commission Draft, infra, ch. 2 § H(7).

53. Colombos, op. cit. supra note 14 at 405; 1 Oppenheim, op. cit. supra note 16, § 279; of. the Geneva Convention, infra, ch. 2, § H(8) and the Tokyo Convention, infra, ch. 4.
exercise its jurisdiction over both.\textsuperscript{54} Pirate ships are considered as pirate ships as long as they are under the control of the pirates.\textsuperscript{55}

E. VISIT AND SEARCH AND PRIVATEERING

Belligerents have a right of visit and search of any merchant ship, including neutral merchant ships but not neutral warships during war. This right includes the capture of enemy goods and articles which are contraband of war. The justification given is the duty of self-preservation.\textsuperscript{56} Insurgents who are not recognized as belligerents cannot exercise this right against foreign ships without the danger of being treated as pirates.\textsuperscript{57}

Privateering was abolished by the Declaration of Paris, 1856. The United States did not adhere to this Convention.\textsuperscript{58}

\textsuperscript{54} Cf. Colombos, \textit{id.}; Oppenheim, \textit{id.} \S 278; 4 Digest of International Law, \textit{op. cit. supra} note 14 at 650, 660.

\textsuperscript{55} 4 Digest of International Law, \textit{id.} at 660.

\textsuperscript{56} Colombos, \textit{op. cit. supra} note 14 at 716; The Law of Nations, \textit{op. cit. supra} note 18 at 359.

\textsuperscript{57} Colombos, \textit{id.} at 712.

\textsuperscript{58} Id. at 472; See the Chesapeake, a case involving privateering, \textit{infra}, ch. 3, \S D(1).
F. JURISDICTION

Generally, criminal jurisdiction\(^{59}\) is normally asserted on the basis of one or more of the following principles: territorial principle; active nationality principle; passive personality principle; universal principle; or protective principle.\(^{60}\) In addition, States may exercise concurrent jurisdiction as, for example, in the case of ships in foreign territorial waters. In this case, the custom is for the territorial State to abstain from the exercise of jurisdiction except in the case of particularly serious crimes.\(^{61}\)

\(^{59}\) Brierly, \textit{op. cit. supra} note 19 at 304-16.

\(^{60}\) The principles which are internationally recognized in various degrees are: (1) The territorial principle-- a State can punish crimes committed by either nationals or foreigners on its own territory; (2) The active nationality principle-- a State can punish crimes committed anywhere by its own nationals; (3) The passive personality principle-- a State arrogates to itself the right to punish crimes, wherever committed, of which their nationals are victims; (4) The universal principle-- any State is authorized to punish crimes of a heinous nature which threaten the international community as a whole. (This would include the crime of piracy); (5) The protective principle-- a State may punish crimes, wherever committed which directly threaten their own security. Johnson, Rights in Airspace 75 (1965); See also Brierly, \textit{id.} at 316. Other principles are also utilized as noted in McDougal, Lasswell and Vlasic, \textit{op. cit. supra} note 19 at 695-700.

\(^{61}\) Johnson, \textit{id.} at 76; In United States v. Flores, 289 U.S. 137, 159 (1937), an American killed another American aboard an American ship anchored in Congo waters. The United States court said that in such cases, the United States could define and punish such offenses where the local sovereign has not asserted its jurisdiction and, in the
As noted, except for piracy and hot pursuit, jurisdiction for ships on the high seas belongs exclusively to the flag State and some States assimilate ships to territory.

Another basic jurisdictional principle is that a State cannot be compelled to exercise jurisdiction where it lacks power to do so under its national law.

Countries differ as to whether the law of the flag or that of the littoral State applies in the case of torts committed on board a ship lying at anchor in or passing through the territorial waters of a country other than the flag State. British courts allow a recovery in the flag State only if recovery could have been had in the littoral State. American courts distinguish between a case where the tortious act is confined within the ship and one where a tortious act affects others outside the ship including absence of any controlling treaty provisions, it was the duty of the courts of the United States to apply its own statutes, interpreted in light of recognized principles of international law, to such offenses; cf. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) where the court said "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."

62. Supra, ch. 2, § A.


64. United States v. Cordova, 89 F. Supp. 289 (1950); The Queen v. Keyan, 2 Ex. D. 63 (1878); cf. Tokyo Convention, Art 3, infra, ch. 4, which provides that a Contracting State shall take measures to establish its jurisdiction but doesn't require that a State must prosecute after it establishes its jurisdiction.
the littoral State. In the former case, flag State law is applicable and in the latter case, littoral State law controls. 65

G. THE ELEMENTS OF MARITIME PIRACY 66

The motive and purpose of acts of violence constituting piracy do not alter their piratical nature since an intent to plunder is not required. 67

To be considered piracy, it is necessary that a revolt be directed both against the captain and the vessel for the purpose of converting the vessel and her goods to private ends. 68

There must be an act of violence or depredation committed with intent to rob, rape, wound, enslave, imprison


66. The elements of piracy may be drawn from the common law. See United States v. Smith, 5 Wheat 153, 160 (1820).

67. An example of piracy is the sinking during war by a private neutral vessel of a belligerent's vessel out of hatred with no intent to plunder, Oppenheim, op. cit. supra note 16 at 612; In re Piracy Jure Gentium, A.C. 586 (1934); The Law of Nations, op. cit. supra note 18 at 390; Colombos, op. cit. supra note 14 at 403.

or kill a person, or with intent to steal or destroy property, for private ends without a bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. 69

In the commentaries to Article 39 of the Draft of the International Law Commission, the Commission stated that it had to consider certain controversial features of piracy and concluded that:

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

"(ii) The acts must be committed for private ends;

"(iii) Save in the case provided for in Article 40,70 piracy can be committed only by private ships and not by warships or other government ships;

"(iv) Piracy can be committed only on the high seas in a place situated outside the territorial jurisdiction of any State, and cannot be committed within the territory of a State or in its territorial sea; 72

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70. Art. 40 concerns piratical acts of a government ship or aircraft whose crew has mutinied and taken control.

71. Cf. note 145, infra.

72. Cf. 49 U.S.C. 1472 (i)(2), infra, ch. 3, § D(2), which defines aircraft piracy as any seizure or exercise of control by force or violence or threat of force or violence of an aircraft in flight in air commerce. Thus, in the United States, the hijacking of an aircraft over United States territory or its territorial seas is "aircraft piracy".
Acts of piracy can be committed not only by ships on the high seas, but also by aircraft, if such acts are directed against ships on the high seas;

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

Under Oppenheim's definition of piracy, the elements piracy are:

(1) The commission of an unauthorized act of violence against persons or goods;

(2) The unauthorized act must be committed by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel;

(3) The unauthorized act must be committed on the open sea.

The elements of piracy under the Geneva Convention are:

(1) The commission of illegal acts of violence, detention or any act of depredation;

(2) The illegal acts must be committed for private ends;

(3) The illegal acts must be committed by the crew or the passengers of a private ship or a private aircraft;

(4) The illegal acts must be directed against another ship or aircraft or against persons or property on board such ship or aircraft;

73. Oppenheim, op. cit. supra note 68.

74. Ibid.
(5) The illegal acts must be committed on the high seas or in a place outside the jurisdiction of any State: 75 in addition, both the participation in the operation of a ship or of an aircraft or a voluntary act with knowledge of facts making it a pirate ship or aircraft and inciting or intentionally facilitating any act included above are piracy.

The Geneva Convention probably represents current international law of piracy including the proposition that mutiny, per se, is not piracy.

H. CODIFICATION OF THE MARITIME LAW OF PIRACY

(1) General

Various attempts have been made to codify maritime law including the law of piracy. The following, while not exhaustive, is an indication of what has been attempted and accomplished in the field of maritime law to control piracy in its various aspects. Included are references to successful codification. Each draft, convention, treaty and agreement had some impact on the development of current maritime law including maritime piracy.

(2) The Washington Agreement of 1922

Following World War I, the United States, the British Empire, France, Italy and Japan signed this Agreement at

75. Cf. note 72.
the Washington Naval Conference. The purpose of the Agreement was to prevent the sinking of merchant ships by submarines. The Agreement provides that if a submarine is unable to capture a merchant vessel in accordance with the rules of the Agreement, the existing law of nations requires it to desist from attack and seizure.

The Agreement also provides that any person, even one who is under orders of his government, who violates the rules of the Agreement is liable for trial and punishment as if for an act of piracy. This latter provision extended piracy jure gentium to acts by persons of any war vessel even though under government orders. The Agreement never became effective since it was not ratified by France.

(3) League of Nations Committee of Experts for the Progressive Codification of International Law (1927)

In 1927, this Committee considered, for codification, piracy as an international crime. A subcommittee which

76. 1 Oppenheim, op. cit. supra note 68, § 273a; Colòmbos, The International Law of the Sea 405, 470 (1962); Bishop, op. cit. supra note 21 at 808; The Law of Nations, op. cit. supra note 59 at 391; Johnson, op. cit. supra note 60 at 39 notes that the Washington Conference of 1922 dealt with both submarine and gas warfare.

77. Art. 1.

78. Art. 3.

79. 2 Hackworth, International Law 690 (1941).

was assigned the problem defined piracy and limited its scope to the high seas. The Subcommittee prepared draft provisions for the suppression of piracy. 

This appears to be the first attempt to codify an international crime of piracy, however, piracy by aircraft was not included in the Subcommittee's report.

(4) London Naval Treaty (1930)

This Treaty was adhered to by a large number of States including the United States, United Kingdom, Germany

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81. Bishop, id. at 466.

82. Ibid.

83. Bishop, id. at 808.
and the Soviet Union. In its provisions concerning submarines, the Treaty provided that submarines are subject to the same rules of international law as surface vessels.

Under the Treaty, neither submarines nor surface vessels were permitted to sink or incapacitate a merchant vessel, except in the case of refusal to stop or resistance to visit or search, unless the passengers, crew and ship's papers were first placed in a place of safety. 84


In 1932, Harvard Law School undertook detailed research 85 in the field of piracy in international law. 86 Article 3 of the Draft defined piracy as any of certain acts committed outside the territorial jurisdiction of any State. 87 J. W. Bingham, Reporter, commented on this Article to the effect that he believed that with the rapid advances being anticipated in aircraft and flying, piracy by air was a real possibility. 88 Article 1 of the Draft

84. Hackworth, op. cit. supra note 79 at 690-95.

85. Harvard Research on International Law, "Draft Convention on Piracy" 26 Am. J. Int'l L. Supp. 739 (1932) [hereinafter cited as the Harvard Draft]; Bishop, op. cit. supra note 80 at 266, 467; The Law of Nations, op. cit. supra note 69 at 390; Castel, International Law 656 (1965); the Harvard Draft provisions applicable to piracy are included in Appendix A.

86. Harvard Draft, id. at 786.

87. See Appendix A.

88. Harvard Draft, op. cit. supra note 85 at 809.
defined a ship as "...any water craft or aircraft of whatever size." This, of course, brought aircraft as well as ships within the provisions of the Draft. The piratical acts of Article 3 of the Draft included aerial attacks.

This Draft has been widely proclaimed as a valuable treatise on the subject of piracy. It contains nearly all of the relevant statutes, cases and opinions concerning piracy.

(6) 

Nyon Arrangements (1937)

To protect ships which did not belong to either of the conflicting parties during the Spanish Civil War in 1937, the Nyon Arrangements were signed by Bulgaria, Egypt, France, Greece, Rumania, Turkey, the U.S.S.R., the United Kingdom and Yugoslavia. These States agreed to take collective measures against submarine attacks on their merchant vessels and treat such attacks as "acts of piracy." The two agreements signed were "An International Agreement for

89. See Appendix A.


91. Bishop, op. cit. supra note 80 at 809; 1 Oppenheimer, op. cit. supra note 68, § 273a.
Collective Measures Against Piratical Attacks by Submarine" and "An International Agreement for Collective Measures Against Piratical Attacks in the Mediterranean by Surface Vessels and Aircraft."92

As noted, acts which have a public or political purpose are normally not considered as piratical acts, even though a violation of international law, which are normally attributable only to acts for private ends.94


In 1956, the International Law Commission included in its Draft on the Law of the Sea certain provisions on

92. The Commentary to Art. 39 of the 1956 Draft of the International Law Commission, discussed infra, ch. 2 § H(7) states: "The Commission is aware that there are treaties such as the Nyon Arrangements of Sept. 14, 1937, which brand the sinking of merchant ships by submarines, against the dictates of humanity, as piratical acts... But it is of the opinion that such treaties do not invalidate the principle that piracy can only be committed by private ships. Hence the Commission feels that to assimilate unlawful acts committed by warships to acts of piracy would be prejudicial to the international community." See Int'l L. Com. Draft, Appendix B.

93. Supra, ch 2, § C.


95. II Yearbook of the International Law Commission (1956) [hereinafter cited as The International Law Commission Draft]; See Appendix B for Arts. 38-45; For Canada's contribution to this Conference, see Canadian Jurisprudence, The Civil Law and Common Law in Canada 351 (McWhinney, 1958).
the subject of piracy which were later to be included, substantially as they had emerged from the Commission, in the Geneva Convention on the High Seas. 96

Articles 38 through 45 were later adopted, with minor exceptions, as Articles 14 through 21 of the Geneva Convention. Thus, the specific references to aircraft piracy in the Geneva Convention originated from the International Law Commission Draft. 97

The Commission utilized the Harvard Draft Convention on Piracy prepared in 1932 and, in general, was able to endorse the findings of the Harvard research. 98


This Convention, 99 which was concluded at Geneva in the United Nations Conference on the Law of the Sea, represents the most recent attempt to update the law of the high seas and the first attempt to formulate authoritative

96. See Appendix C.

97. Colombos, op. cit. supra note 76 at 407.

98. Supra, note 83.

statements of the law concerning piracy and hot pursuit. The drafters of these provisions explicitly denied that they were codifying existing law, however, where the Convention differs from traditional law, it would nevertheless be binding in those States which ratify it.

The Convention provides, inter alia, that freedom of the high seas comprises freedom of navigation, fishing, to lay submarine cables and pipelines and to fly over the high seas.

The Convention is particularly important in a consideration of piracy by aircraft in that aircraft are specifically provided for, instead of merely including them in the word "ship" as was done in the Harvard Research Draft, and an authoritative definition of piracy

100. Brierly, The Law of Nations 311 (6th ed. 1963); Colombos, id.; Bishop, op. cit. supra note 80 at 466; For an interesting dispute concerning the assertion of an alleged right of hot pursuit commencing when the pursued ship was 10.5 miles off the coast of the United States, but within one hour's sailing distance from shore, see The I'm Alone (Canada v. United States) Hackworth, op. cit. supra note 79 at 703-08.


102. Brierly, op. cit. supra note 100 at 309; cf. Chicago Convention, Art. 12 and Tokyo Convention, Art. 3.


104. Bishop, op. cit. supra note 80 at 466.
is given which was accepted by the eighty-six signatory States.

This Convention, which will be more extensively discussed,\textsuperscript{105} considered in conjunction with the still not in force Tokyo Convention,\textsuperscript{106} provides much important air law.\textsuperscript{107}

\begin{itemize}
\item \textsuperscript{105} See ch. 3, § E.
\item \textsuperscript{106} See ch. 4.
\item \textsuperscript{107} See Tokyo Convention Act 1967 [yet to be proclaimed] Appendix E, which purports to give effect to certain provisions of the Geneva Convention relating to piracy as well as to the Tokyo Convention.
\end{itemize}
CHAPTER III

AERIAL PIRACY, AIRCRAFT HIJACKING AND AIR LAW

A. GENERAL

In comparison to maritime history and law, aviation history and law are of comparatively recent vintage. Because of the limited availability of authoritative international writings, statutory provisions and case law concerning aerial piracy, it is convenient, instructive, and interesting to utilize analogies between aircraft and ships in all fields of law including aerial piracy. Further, the Geneva Convention, the most important current Convention concerning piracy, has extended maritime law to aerial piracy.

Various conventions, draft conventions and conferences will be briefly surveyed to illustrate the development of sovereignty of all States in the air space above their territory and territorial waters for purposes of jurisdiction and control. As with maritime law, States exercise no control over the airspace above the high seas with limited exceptions such as air defense identification zones (ADIZ) and danger areas which are justified on the bases of

security and safety because of the peculiar characteristics of modern aircraft. Some of these conventions illustrate the extent to which States have accepted the principle of complete and exclusive sovereignty of each State over its airspace\(^{109}\) and the principle that flight in a State's airspace by foreign aircraft is a privilege and not a right.

B. ANALOGIES BETWEEN SHIPS AND AIRCRAFT

For purposes of jurisdiction and choice of law, McNair argues that the analogy of the ship has no general application to aircraft as a matter of common law, maritime law or of existing legislation.\(^{110}\) However, it is convenient to apply to aircraft, by treaty and legislation, rules which have been found convenient in the case of ships.\(^{111}\)

\(^{109}\) See ch. 3, § C.

\(^{110}\) McNair, *op. cit.* supra note 80 at 307; *cf.* Dicey & Morris, *op. cit.* supra note 65 at 958 where it is suggested that an aircraft is more analogous to an automobile in certain cases. For example, a tort committed in a private automobile in a foreign country and a tort committed in a private aircraft flying over a foreign country would both be subject to the law of the foreign country. For torts committed over the open seas, English common law or the general maritime law would apply.

\(^{111}\) McNair, *id.* at 307.
An aircraft, like a ship, must have a nationality which is that of the State in which the aircraft is registered. In the United Kingdom, British registered aircraft and ships can only be owned by British persons or businesses incorporated in the Commonwealth. Like ships, aircraft are to some extent invested with a legal quasi-nationality and for the purposes of international law, although some authorities disagree, they are regarded as entities in themselves. For both, the State to which they belong is responsible for their conduct.

There are considerable differences between ships and aircraft in the law of liens and charges including mortgages, possessory liens at common law, equitable liens, maritime liens, rights of arrest and proceedings in rem for goods and materials supplied, and the law of wreck and


113. McNair, op. cit. supra note 80 at 309.


115. McNair, op. cit. supra note 80 at 309.

116. Cooper, The Legal Status of Aircraft, Study prepared for the International Law Association 37 (Sept. 1949); cf. McNair, id. at 300 where it is stated that English courts would probably use the analogy to a vessel upon the high seas in any action involving a contract made aboard an aircraft flying over the high seas.
salvage. McNair states that here the legal analogy of the aircraft with the ship is less strong than in the law of nationality and registration. As for chattel law, he argues that there is no analogy between ships and aircraft.

Ships have a right of innocent passage through territorial waters under customary international law. The corresponding right under the Chicago Convention gives non-scheduled aircraft the right in any Contracting State to make flights into or in transit non-stop across any Contracting State's territory or to make stops in such States for non-traffic purposes. McNair notes that these rights are not strictly analogous since customary international law governs innocent passage for ships and the corresponding rights for aircraft are governed by specific

117. While not provided for in the Chicago Convention, both the Paris Convention and the Havana Convention provide that maritime law principles apply to the salvage of aircraft wrecked at sea in the absence of an agreement to the contrary. These Conventions are discussed in the next section.

118. See McNair, op. cit. supra note 80 at 310-35 for a comparison of ship and aircraft liens and charges.

119. McNair, id. at 343-45; see Colombos, op. cit. supra note 76 at 264 where it is stated that a ship is a chattel but is governed by special laws.

120. 1 Oppenheim, op. cit. supra note 68, § 188.

121. Art. 5.
Convention and applies only to the parties to that Convention. 122

Both the pilots and crews of aircraft and the officers of merchant ships must normally have certificates of competency and valid licenses. A ship must have ships papers and the corresponding documents are required for aircraft. 123

In maritime law, cabotage means only sea trade between points which are in the same political and geographical unit, is restricted to journeys along the same physical coast line and is an exception to the normal principle of freedom of the seas. 124 In air law, cabotage is subject to national sovereignty and extends to the entire national territory of a State including its colonies. 125

International law relating to prize applies to aircraft as well as to ships. 126 The Geneva Convention provides that piratical acts committed by government ships or whose crew has mutinied and taken control are assimilated to piratical acts committed by private ships. 127

122. McNair, op. cit. supra note 80 at 336.
123. McNair, id. at 337.
124. McNair, id. at 337-338
125. Id.
126. Id. at 339.
127. Art. 16.
Under the international law of the sea, except for some offenses such as piracy, jurisdiction over a ship on the high seas belongs exclusively to the flag State and many writers contend that this assimilates ships to territory in the exercise of criminal jurisdiction. While these are strong arguments for using the law of the flag for aircraft, others agree that aircraft differ from ships in their legal, physical and operational characteristics to such an extent that use of the law of the flag is impractical in international law. Article 2 of the Geneva Convention provides that freedom of the high seas includes freedom to fly over the high seas. Because aircraft spend more time than ships in the territories of other States and since times enroute on trips by aircraft are much shorter than by ship, the jurisdiction of subjacent States must be considered as well as that of the flag State. The Tokyo

128. See ch. 2, § F, supra.


130. Moore & Palaez, Admiralty Jurisdiction--The Sky's The Limit, 33 J. Air L. & Com., 34 (1967); Professor Cooper claimed that the airspace over the high seas is free for use by all. Proceedings of the American Society of International Law 85, 88-89 (1956); cf. Tokyo Convention, Art. 3.

Convention provides basically for the jurisdiction of flag States over offenses committed on board aircraft, nevertheless, it perceives jurisdiction according to the territorial, active personality, passive personality, protective or universal principles; Mendelsohn asserts that this "mixed basis theory" provided the compromise formula for the jurisdictional chapter of the Convention.

McNair notes that because of the problems involved when aircraft are flying over the high seas or other territory which is not subject to the sovereignty of any State, the ever-increasing volume of international air traffic and the great speeds and heights flown by aircraft, aircraft should be accorded a law of the flag analogous to ships.

132. Tokyo Convention, Art. 3(1); flags of convenience have caused serious problems in the shipping world; cf. the Geneva Convention, Art. 5, which provides that there must be a genuine link between the flag State and a ship; see also Brierly, op. cit. supra note 100 at 310.

133. Art. 4.


135. McNair, op. cit. supra note 80 at 269-70; cf. Tokyo Convention, Art. 3.
In the case of torts, for both ships and aircraft, where there is a significant connection between a tort and the country in or over which it is committed, the court may apply the system of law which has the closest connection with the tort, i.e., that of the flag State. 136

Acts committed in the air by one aircraft against another aircraft are not normally regarded as acts of piracy but acts committed by a pirate aircraft against a ship on the high seas may be assimilated to acts committed by a pirate ship. 137

Hospital aircraft in neutral territory are assimilated to hospital ships in neutral ports and wounded and sick persons debarked from each are treated alike. Both aircraft and ships used as medical transports are accorded international protection. 138

Aircraft used in a blockade are subject to the same

136. Dicey & Morris, Conflict of Laws 959 (8th ed. 1967); cf. Moore & Pelaez, op. cit. supra note 130 at 38; McNair, id. at 260, 281-82, 289.

137. Commentary to Art. 39 of the Draft of the International Law Commission on the Law of the Sea. See Appendix B. This Draft assimilates aircraft and ships throughout its articles concerning piracy; such acts would constitute piracy under the Geneva Convention, Art. 15.

Neutral aircraft and their cargoes attempting to enter or leave a blockaded area in breach of rules of the blockade are liable to capture and confiscation.\textsuperscript{139}

The principles governing the seizure of merchant ships apply, by analogy, to aircraft. Aircraft are normally unable to make adequate provisions for the safety of the crew and passengers of merchant ships so, as in the case of submarines, they are prohibited from capturing or destroying them. Colombos maintains that the destruction of private aircraft by belligerent military aircraft is illegal unless all persons on the civil aircraft have first been placed in a place of safety and the aircraft's papers are preserved.\textsuperscript{141}

The right of hot pursuit and visit and search by aircraft is recognized as with surface vessels.\textsuperscript{142} However, there are obvious difficulties in the exercise of the right.\textsuperscript{143}

In such cases, if the circumstances would justify the

\begin{enumerate}
\item \textsuperscript{139} Id. at 695.
\item \textsuperscript{140} Id. at 95.
\item \textsuperscript{141} Id. at 747.
\item \textsuperscript{142} Id. at 694.
\end{enumerate}

\textsuperscript{143} As an illustration, a German submarine was attacked and disabled by R.A.F. aircraft in 1941 but the aircraft were required to wait for surface vessels to arrive and seize it. Colombos, \textit{id.} at 715; McDougal, Lasswell & Vlastic, \textit{op. cit. supra} note 103 at 310. These authors
exercise of the right, belligerent military aircraft may order a vessel to proceed under escort as directed. If the aircraft is unable to capture a merchant vessel under these circumstances, it must permit it to proceed unmolested. The Hague Commission of Jurists accepted the principle that belligerent military aircraft can exercise the right of visit and search over non-military public aircraft and private aircraft by ordering them to land at a convenient place for the visit. Neutral non-military public aircraft are only subject to a verification of their papers. McNair asserts that in the United Kingdom an aircraft is not a ship for Admiralty jurisdiction and that English courts have no criminal jurisdiction over acts committed on board an aircraft either on or over the territorial waters of the

contend that while Art. 23 of the Geneva Convention refers only to hot pursuit of a foreign ship by aircraft, it seems reasonable to interpret this right to embrace the hot pursuit of offending aircraft.


145. On June 30, 1968, a United States commercial jet airliner chartered by the United States government to carry troops was forced by fighters of the U.S.S.R. to land on a Soviet-held island in the Pacific Ocean near Japan. The Soviets claimed that the aircraft had violated Soviet airspace. The aircraft was released several days later. The Montreal Star, July 2, 1968, p. 1, col. 1.

146. Colombos, op. cit. supra note 138 at 715-16.
United Kingdom or over the high seas or foreign territory. 147

In summary, aircraft are analogous to ships only where legislation and international customs and conventions have given them certain characteristics applicable to ships. While it is convenient to use such analogies, and thus apply well-established maritime rules, Professor Cooper maintained that aircraft are not ships and should not be treated as such. 148

C. AIR LAW CONFERENCES AND CONVENTIONS

Nearly seven years after the flight at Kitty Hawk, the International Air Navigation Conference was held in Paris in 1910. 149 This was the first diplomatic conference to consider regulation of flight and it produced a Draft Convention which was greatly influenced by the studies of Fauchille and the Institute of International Law. 150

147. McNair, The Law of the Air 272 (3rd ed. Kerr & Evans 1964); The United Kingdom Civil Aviation Act (1949) provides for jurisdiction "...[I]n any place where the offender may for the time being be"; cf. the United Kingdom's Tokyo Convention Act 1967 [not yet proclaimed], included, infra, in Appendix E. This Act will repeal § 62(1) of the Civil Aviation Act 1949.

148. Cooper, op. cit. supra note 116 at 93.


Included in the 1910 Draft were provisions concerning nationality, registration of aircraft, aircraft certificates, aircraft markings indicating nationality and registration numbers, certificates of airworthiness, and pilot and crew certificates. Similar provisions have been included in most international aviation agreements which have been concluded subsequently.152 Further provisions, which ultimately caused the failure of the Conference to reach international agreement, were those which concerned the restrictions each State could apply to the aircraft of other Contracting States when such aircraft were flying in its superjacent airspace.153

Nineteen States were represented at this 1910 Convention but no international agreement was concluded because the British government adhered to the sovereignty principle, which is accepted by all States today, and "was not prepared to give up her insular inaccessibility (splendid isolation)."154 and agree to freedom of the air or even the right of

152. Johnson, op. cit. supra note 131 at 24-25.
153. Cooper, op. cit. supra note 150 at 140.
The Paris Conference of 1910 is important to any study of air law since at that time no plan existed for the international regulation of flight. Of particular importance is the principle, which was generally accepted at the Conference, of State sovereignty over its airspace.\footnote{Cooper, op. cit. supra note 150 at 139-40, where he states that contrary to general understanding, the Convention did not fail because of a fundamental difference between Great Britain on one side and Germany on the other as to freedom of usable airspace. He claims that no State denied its legal right to restrict foreign flights over its territories and that the reason for failure of the Conference was political, not legal.}

In 1919, the International Convention for Aerial Navigation (Paris Convention) was concluded in Paris.\footnote{Cooper, Crimes Aboard American Aircraft: Under What Jurisdiction Are They Punishable?, 37 A.B.A.J. 257 (1951), where he indicates that the United States adopted this principle with the Civil Aeronautics Act of 1938 which provided: "...[T]he United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace above the United States."}

It firmly established the principle that every State has complete and exclusive sovereignty over the airspace above its territory which consists of the mother country, its colonies and its adjacent territorial waters. This principle was to become a hallmark of the Chicago Convention of 1944.\footnote{Billyou, op. cit. supra note 149 at 16-17; the International Convention for Aerial Navigation (Paris, 1919) [hereinafter cited as the Paris Convention].}

\footnote{Billyou, id. at 264.}
World War I demonstrated the importance of aerial navigation and of the associated potential danger to su-
bject States and their inhabitants. National sovereignty
over superjacent airspace is now universally recognized
subject to a mutual, carefully safeguarded and easily deter-
mirable treaty right of free entry and passage for the non-
military aircraft of foreign countries.\textsuperscript{159}

The Paris Convention of 1919 was superseded by the
Chicago Convention of 1944\textsuperscript{160} and it is mentioned here as
a step in the evolution of the principle of national sov-
erignty over airspace; this principle is important in
determining the rights and duties of States in current law
governing aerial piracy and aircraft hijacking.

Other Conventions which recognized that each State
has complete and exclusive sovereignty over the airspace
above its territory\textsuperscript{161} included the Ibero-American Conven-
tion (Madrid, 1926)\textsuperscript{162} and the Pan-American Convention on
Commercial Aviation (Havana, 1928).\textsuperscript{163}

\begin{thebibliography}{163}
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\bibitem{59} McNair, \textit{op. cit. supra} note 147 at 5; Johnson,
\textit{op. cit. supra} note 131 at 33-34.

\bibitem{60} Chicago Convention, Art. 80.

\bibitem{61} McNair, \textit{op. cit. supra} note 147 at 6; 2 Digest of
International Law 1276 (Whiteman, 1963).

\bibitem{62} McNair, \textit{id. at 10}; Matte, \textit{Traité de Droit Aérien-
Aéronautique} 660 (Paris, 1964); Johnson, \textit{op. cit. supra}
note 131 at 36.

\bibitem{63} Hereinafter cited as Havana Convention; Billyou,
\textit{op. cit. supra} note 149 at 18; Hotchkiss, \textit{Havana Convention
on Commercial Aviation--Ratification by the United States},
\end{thebibliography}
The Chicago Conference of 1944 resulted in the Convention on International Civil Aviation. Fifty-two States (no enemy States or the U.S.S.R. were included, although the latter was invited) participated in the Conference. The Convention created the International Civil Aviation Organization (ICAO). Salient features of the Convention for this study are the provisions that each State has complete and exclusive sovereignty over the airspace above its territory and that the Convention

2 Air L. Rev. 254, 256 (1931); cf. Warner, The International Convention for Air Navigation: A Comparative and Critical Analysis, 3 Air L. Rev. 221, 307 (1932), where the author contends that the differences between the Paris Convention and the Havana Convention were too small to justify the complications which would result from their indefinitely continued parallel co-existence. He further contended that the Annexes of the Paris Convention should have been made more flexible so that the United States could have ratified the Paris Convention instead of the Havana Convention.

164. Stat. 1180 (1944); Icao Doc. 7300/3 (3rd ed. 1963) [hereinafter cited as the Chicago Convention]; Bishop, International Law 373 (2nd ed. 1962); Billyou, id. at 12; Johnson, op. cit. supra note 131 at 5; Following the conclusion of this Convention, its parties entered into numerous bilateral agreements granting reciprocal air transit or air transport rights to each other with respect to civil aviation. These agreements constitute an exercise of sovereign rights over airspace as contemplated by the Convention. McNair, op. cit. supra note 147 at 13.

165. Art. 1; Art. 2 of the Geneva Convention on the Territorial Sea and the Contiguous Zone provides that the sovereignty of a coastal State extends to the airspace over the territorial sea as well as to its bed subsoil. This article is identical to Art. 2 of the International Law Commission Draft on the Territorial Sea (1956). Art. 15(1) of the Convention on the Territorial Sea and Contiguous Zone provides:

"The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through
is applicable only to civil aircraft.166

The Chicago Convention does not contain direct references to aerial piracy or aircraft hijacking but is of great importance to international civil aviation. Under Article 12 of the Convention, the ICAO has authority to establish regulations for flights over the high seas. An offender against the air navigation rules and standards of the International Civil Aviation Organization may find himself excluded from the benefits of international air traffic regulation.167

The wide acceptance of the Chicago Convention by most of the States of the world indicate its efficacy as an air law Convention. The success enjoyed by the Chicago Convention is an indication that States will accept such a Convention when it is to their advantage to do so. If the Tokyo

the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

(a) If the consequences of the crime extend to the coastal State; or
(b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
(c) If the assistance of the local authorities has been requested by the captain of the ship or by the Consul of the country whose flag the ship flies; or
(d) If it is necessary for the suppression of illicit traffic in narcotic drugs."

166. Art. 3; cf. Art. 1(4) which provides that the Tokyo Convention shall not apply to aircraft used in military, customs or police services.

Convention were to receive the same almost universal acceptance by all States, aircraft hijacking incidents would be greatly reduced. However, the same sovereignty principle which is a hallmark of the above mentioned Conventions may be a stumbling block to the widespread acceptance of the Tokyo Convention since it will require parties to the Convention to surrender a portion of their coveted exclusive sovereignty.

D. PIRACY AND AIRCRAFT HIJACKING LAW OF CANADA AND THE UNITED STATES

(1) Canadian Legislation

The Canadian Criminal Code provides that piracy is committed when an act is done which is piracy against the law of nations. 168 The Code also provides for punishment of life imprisonment or death for one who commits piracy while in or out of Canada. 169 The Canadian Criminal Code also lists certain piratical acts and provides for a maximum punishment of fourteen years, 170 however, these statutes do not specifically refer to aerial piracy, aircraft hijacking or criminal acts aboard aircraft.


169. Id. § 75(2).

170. Id. § 76.
Another section\textsuperscript{171} has the purposes of giving Canadian courts jurisdiction over indictable offenses committed on board certain aircraft in flight outside of Canada and to fill a gap in the criminal law until a general rule is adopted by international agreement. This section provides that a person who on either a Canadian registered aircraft in flight, or on any aircraft in flight if that flight terminates in Canada, commits an act or omission in or outside of Canada that if committed in Canada would be punishable by indictment shall be deemed to have committed that act of omission in Canada.\textsuperscript{172} This section seems to carry out the reasoning of a British court in \textit{Regina v. Naylor}.\textsuperscript{173} In that case, the defendant was charged with stealing three rings on a British aircraft in flight over the high seas. Seemingly contrary to a previous decision\textsuperscript{174} involving a crime aboard a British aircraft over the high seas, the court said that any act or omission which would constitute an offense if done in England is made an offense if done on a British aircraft unless the offense is one of domestic

\begin{itemize}
\item[\textsuperscript{171}] \textit{Id.} § 5a.
\item[\textsuperscript{172}] \textit{Cf.} Art. 16 Tokyo Convention, for a similar fiction in the context of extradition.
\item[\textsuperscript{173}] Johnson, \textit{op. cit.} supra note 131 at 78.
\item[\textsuperscript{174}] \textit{Regina v. Martin}, 2 Q.B. 272 (1956).
\end{itemize}
Finally, the Canadian Criminal Code provides that every court of criminal jurisdiction has jurisdiction to try any indictable offense except for the offenses of piracy jure gentium and the enumerated piratical acts of the Code.176

In the case of The Chesapeake,177 British passengers aboard the Union ship Chesapeake seized her on behalf of the Confederate States from which they had received a commission to privateer during the American Civil War. A crew member was killed and the cargo was disposed of in another ship. The United States charged the persons involved in the seizure with piracy, robbery and murder on the high seas and a demand for extradition was made to Canada. The defendants' defense was that their act was an act of legitimate warfare (privateering) and, therefore, was not piratical in nature. The court said that subjects of a neutral power, engaging in acts of hostility toward a nation at peace with their own nation and in opposition to the municipal laws

175. The Court cited Regina v. Martin, ibid; cf. United Kingdom Tokyo Convention Act 1967 [not yet proclaimed] included in Appendix E, infra. This Act, when proclaimed, will repeal § 62(1) of the United Kingdom Civil Aviation Act 1949.


177. The Chesapeake, Canada: Vice-Admiralty Court of New Brunswick, 1864, Stockton, 208.
and neutral policy of their own government and in direct
defiance of an express proclamation of their Sovereign, had
to ensure that they were acting under the authority of a
legal commission if they are not to be guilty of piracy.

(2) United States Legislation

The Constitution of the United States of America pro-
vides that the Congress has the power to define and punish
piracies and felonies committed on the high seas and offenses
against the law of nations 178 and the federal judicial power
extends to all cases of admiralty and maritime jurisdiction. 179
The piracy law of the United States is exclusively federal
and is dependent on congressional enactment. 180

The United States Code provides for life imprisonment
for anyone who commits the crime of piracy, as defined by
the law of nations, and is afterward brought into or found
in the United States. 181 It also provides that any citizen
of the United States is a pirate and is subject to life
imprisonment if he commits any murder or robbery or any
act of hostility against the United States, or any citizen

178. U.S. CONST. Art. I, § 8; Bishop, op. cit. supra
note 164 at 266.


180. 4 Digest of International Law 654 (Whiteman 1965).

thereof, under color of any commission from any foreign prince or State or on pretense of authority from any person. 182

Other provisions of the United States Code also provide penalties for piracy related to treaty violations by aliens, 183 assault by a seaman or a commander of a ship to hinder and prevent his fighting in defense of his command, 184 piratically running away with a vessel by its captain or other officer or mariner, 185 attempting to corrupt others into being pirates or furnishing pirates with ammunition or goods of any kind or corresponding with pirates 186 or receiving pirate property. 187

In the case of United States v. Cordova, 188 the defendant was charged with assaulting the pilot, the stewardess and another passenger in a United States aircraft flying over the high seas between Puerto Rico and New York. A federal district court held that there was no federal statute applicable to offenses committed on board aircraft of

188. 89 F. Supp. 298 (1950).
United States registry when in flight over the high seas.\textsuperscript{189} That decision resulted in an extension of the federal statutes in 1952 to include such offenses.\textsuperscript{190} Congress extended the federal statutes in 1956 to cover the wilful damage or destruction of civil aircraft owned, operated or employed in interstate, overseas or foreign air commerce.\textsuperscript{191} This legislation followed an aerial explosion caused by a bomb placed aboard an aircraft.\textsuperscript{192}

In 1961, Congress enacted additional legislation to cope with the aircraft hijacking incidents at that time. Included in this legislation was the creation of a new offense defined as "aircraft piracy".\textsuperscript{193} Punishment of death or

\begin{itemize}
  \item \textsuperscript{189} Billyou, \textit{op. cit. supra} note 149 at 37; Johnson, Rights in Airspace 77 (1965).
  \item \textsuperscript{190} Ibid.
  \item \textsuperscript{191} 18 U.S.C. §§ 31-35 (1958).
  \item \textsuperscript{192} See Graham v. Colorado, 134 Col. 290, 302 P.2d 733 (1956).
  \item \textsuperscript{193} 49 U.S.C. § 1472(i)(2) (1961) defines aircraft piracy as "...'[A]ircraft piracy' means 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"; see Bradford, \textit{The Legal Ramifications of Hijacking Airplanes}, 48 A.B.A.J. 1034, Nov. 1962, where the author discusses the legal ramifications and consequences of aircraft hijacking in the United States as it may affect the victims or, perhaps, even the hijacker. He discusses state legislation, federal legislation, the liability of insurance carriers for injuries resulting from an aircraft being hijacked, the liability of an aircraft owner for injuries during a flight with a hijacker in control, and the question of jurisdiction over crimes and torts.
\end{itemize}
imprisonment of not less than twenty years is provided for anyone who commits or attempts to commit "aircraft piracy." 194

Other new provisions concerned the transportation of explosives or other dangerous articles, 195 interference with flight crew members or flight attendants, 196 punishment for certain crimes committed aboard aircraft in flight, 197 carrying of weapons aboard aircraft 198 and conveying false information concerning attempts or alleged attempts being made or to be made to do any act prohibited by the other new provisions. 199 Following the 1961 legislation, the United States had as complete an armory of laws on the subject of offenses on board aircraft as did any other nation. 200

The FAA adopted certain amendments to the Civil Air Regulations which required that the door separating the passenger cabin from the crew compartment on all scheduled air carrier and commercial aircraft must be kept locked during flights. These amendments were initiated to prevent

potential hijackers from entering the flight crew compartment where they could harm or threaten the pilots. 201

E. AERIAL PIRACY AND AIRCRAFT HIJACKING UNDER EXISTING INTERNATIONAL LAW

The recent wave of international aircraft hijacking incidents 202 has illustrated the need for prompt and effective remedial action to curtail such incidents. Air transportation is becoming increasingly important throughout the world and it is of paramount importance to ensure the safety of the passengers and crews of transport aircraft by removing the threat of aircraft hijacking from the skies. However, there is a lack of international controls for such acts and there is no authoritative international definition of the crime of aircraft hijacking. The United States has created the crime "aircraft piracy"203 which includes aircraft

201. Between the times these Amendments were adopted and became effective, the pilots of a Pacific Air Lines, Inc., F-27 aircraft were shot by a passenger ten minutes after takeoff. The aircraft crashed killing all crew members and passengers. Presumably, the passenger entered the flight deck during the take-off period when the flight deck door was unlocked. There is an exception for certain aircraft, like the F-27, to the locked-door rule where the door leads to an emergency exit. This exception permits the door to be left unlocked during landing and take-off periods for reasons of safety in the event of a crash. Aviation Week & Space Technology p. 78, Jan. 4, 1965.

202. See p. 1, supra, for examples of such incidents.

203. See note 193.
hijacking but it is, of course, only applicable to the United States.

The only current international Convention dealing with aerial piracy is the Geneva Convention. This Convention does not directly apply to acts such as the hijacking of aircraft unless the hijackers use their hijacked aircraft for piratical acts against others. The Convention does not purport to be a codification of the prior international law of the high seas concerning piracy. It enumerates certain acts of piracy applicable under the Convention. For aerial piracy, the Convention applies only to piratical acts by a pirate aircraft "on" the high seas against a ship, other aircraft or persons or property on board such ships or aircraft.

Under the international law of the sea concerning piracy, as stated by Oppenheim, if the master of a ship

204. Supra, ch. 2, § H(8).
205. Art. 15.
206. Cf. ICAO Doc. 8302-LC/150-2, Legal Committee, Fourteenth Session (Rome, 28 Aug.-15 Sept. 1962) Vol. II, Docs. (1963), p. 70, where, in explaining the need for its proposed hijacking article, the United States proposal noted that the provisions of the Geneva Convention concerning aircraft piracy were unsuitable as applied to aircraft hijacking.
is forced by the crew or passengers to steer another course for the purpose of converting the vessel and/or goods to their own use it is considered to be piracy. The Commentary to Article 39 of the International Law Commission Draft specifically concluded that acts committed on board a ship and directed against the ship itself or against persons or property on the ship cannot be regarded as acts of piracy. Article 39 was substantially adopted as Article 15 of the Geneva Convention.

In typical recent aircraft hijacking incidents, armed hijackers have forced aircraft commanders to alter their courses and land at destinations other than the original destinations. The aircraft crews and remaining passengers were usually permitted to continue their flights after the hijackers had left the aircraft after landing. There is

208. See note 83.

209. In the recent wave of hijackings, reported in ch. 1, supra, where aircraft have been diverted to Cuba, the Cuban government, although the Convention is not in force, has released the aircraft in accordance with the provisions of Art. 11(2). For example, during the three-week period ending March 13, 1968, the three United States commercial airliners diverted to Cuba were promptly released. However, the Cuban government has allegedly threatened to impound such hijacked United States aircraft in the future. The Montreal Star, March 14, 1968, p. 29, col. 8. There has been some recently reported harassment of crew members and passengers by the Cuban government. The Montreal Star, July 18, 1968, p. 33, cols. 2-6; cf. the Tschombe hijacking incident reported in ch. 1, supra, where the Algerian government retained the pilots, aircraft and passengers of the United Kingdom aircraft for a long period of time following the arrival of the hijacked aircraft in Algeria; also, 22
no indication that these aircraft hijackers have been
treated as pirates by the foreign States to which the hi-
jacked aircraft have been directed.

Further, insurgents who hijack their national ships
as political acts are not considered as pirates under inter-
national law\textsuperscript{210} and there apparently is no valid reason why
this should not apply to aircraft under similar circum-
stances.\textsuperscript{211}

Since the usual aircraft hijacker normally has not
sought to convert his hijacked aircraft or its cargo to his
private ends, it would appear that he could not be con-
sidered as a pirate, under Oppenheim's criteria. Also, his
act has been directed toward the aircraft in which he was a
passenger. However, it is arguable that, whatever view of
the law is taken, the hijacker boarded the aircraft in the
guise of a passenger with the intention of hijacking it and

passengers and the aircraft of the hijacked Israeli air-
liner reported in ch. 1, \textit{supra}, are still being detained
by the Algerian government.

\textsuperscript{210} See note 47.

\textsuperscript{211} \textit{Cf.} Convention on Offences and Certain Other Acts
Committed on Board Aircraft, Art. 2, ICAO Doc. 8364 (1963)
[hereinafter cited as Tokyo Convention] where it is provided
that "Without prejudice to the provisions of Art. 4 and
except when the safety of the aircraft or of persons or
property on board so requires, no provision of this Conven-
tion 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."
thus might fall within some vague external–internal rule of international law which might apply.\textsuperscript{212} As is the case with ships hijacked by their passengers, whether an aircraft hijacker has committed an act of "depredation" for "private ends" under the Law of Nations which would constitute a piratical act is highly debatable.\textsuperscript{213}

Although not yet in force, the Tokyo Convention will be briefly noted in this chapter since it should come into force very soon under the impetus provided by the rash of recent hijacking incidents. Because of their importance to a study of aircraft hijacking, its pertinent provisions will be analyzed in Chapter IV. Among its objectives are to ensure: (a) that offenders will always be subject to jurisdiction and prosecution; (b) the safety of an aircraft and its crew and passengers;\textsuperscript{214} (c) the prompt release of a hijacked aircraft and its crew, passengers and cargo; and (d) prompt measures to restore or preserve an aircraft commander's control of his aircraft.\textsuperscript{215} The Convention does not purport to create any crimes\textsuperscript{216} and it has been critically


\textsuperscript{213} Id. at 168.


\textsuperscript{215} Art. 11.

\textsuperscript{216} Cf. Art. 9.
reviewed by competent writers. 217

In summary, the recent aircraft hijacking incidents cannot be characterized as aerial piracy under either the Geneva Convention or other current international law.

CHAPTER IV

CONVENTION ON OFFENSES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT (TOKYO CONVENTION OF 1963)

A. GENERAL

The Tokyo Convention of 1963 was signed by nineteen States at Tokyo on September 14, 1963.\(^{218}\) It has been ratified by Portugal, Philippines, Republic of China, Sweden, Norway and Denmark, but it will not come into force until ratified by twelve of the signatory States.\(^{220}\)

The absence of uniform rules concerning aircraft hijacking gives rise to serious problems. It is possible that

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\(^{218}\) See Appendix D for this Convention.

\(^{219}\) FitzGerald, op. cit. supra note 214 at 191.

\(^{220}\) Art. 21; In view of the intensity of the debates and the numerous compromises made by the delegates to the Conference at Tokyo, perhaps it is not surprising that only six States have ratified the Convention although it was signed almost five years ago; cf. Boyle & Pulsifer, The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, 30 J. Air L. & Com. 306 (1964), where the authors state "To obtain the largest number of adherents, the terms of such a treaty [Tokyo Convention] must not be fundamentally objectionable, and, in addition, each ratifying nation must either consider that the Convention is necessary or at least a positive contribution to international relationship among the States. The Tokyo Convention as a whole is not fundamentally objectionable to any of the States, including those of the communist block countries, which participated in the Tokyo Conference nor do the records of the Conference reveal that any portion of it is considered by any State to contain a fatal flaw of sufficient
no State would have jurisdiction over such an offense or act or that there would be conflicts in jurisdiction. Further, an aircraft commander could be liable to legal proceedings if he wrongly, although in good faith, sought to restrain a suspected hijacker. 221

"The Tokyo Convention is intended to achieve two main objectives: (1) to ensure that in the case of offenses against penal law committed on board aircraft, there will always be a State to take jurisdiction (namely, the State of registration of the aircraft in which the offender may be tried), and (2) to authorize the aircraft commander and other specified persons to take certain steps, including the imposition of measures of restraint, in relation to persons who commit or are about to commit on board the aircraft an offense or act which jeopardizes the safety of the aircraft, or of persons or property therein." 222 The  

magnitude to render the Convention unacceptable."; quotations from the Minutes and Documents of both the Rome Session of 1962 and the Tokyo Conference of 1963 are included in the following text and footnotes to indicate the development, importance and drafting problems of Art. 11 (hijacking article).


222. FitzGerald, op. cit. supra note 214 at 192; The Minister for Foreign Affairs, Japan, addressed the Inaugural Meeting of the Conference as follows: "There are two main problems which will be discussed in this Conference on Air Law during the four weeks to come. One concerns the jurisdiction over offenses committed on board the aircraft,
Tokyo Convention applies to all aircraft except those used in military, customs and police services. 223

Since this study is primarily concerned with aircraft hijacking, the specific provisions of the Convention pertaining to aircraft hijacking will be examined first. 224 Then, the provisions which apply generally to all offenses committed on board aircraft will be examined for their applicability to aircraft hijacking. The specific provisions of the Convention are contained in Article II of Chapter IV (Unlawful Seizure of Aircraft).

and the other relates to the powers of the aircraft commander over acts which jeopardize the safety of the aircraft or persons or property. These are new fields of international law. The problems were first taken up by ICAO ten years ago, and the final draft you now have before you embodies the results of the great efforts which the ICAO Legal Committee and legal experts concerned have expended for many years. In this Conference, therefore, it is our task and aim to crown those efforts with the adoption of the Convention through our earnest deliberation."

223. Art. 1(4); cf. Art. 3, Chicago Convention; see note 145 for an example of a commercial jet airliner chartered to transport troops which was forced to land by fighter aircraft. Presumably, this incident was not covered by the Tokyo Convention since it was chartered to transport military personnel.

B. THE UNITED STATES PROPOSAL

The history of Article 11 (the hijacking article) began when a proposal by the United States of America was considered by the Subcommittee on the Legal Status of the Aircraft at its Montreal meeting in March-April 1962.\(^{225}\)

The United States included the following to explain its provisions and to support the need for its proposed article:

(a) The article will deter aircraft hijackers through its detention and prosecution provisions and by the elimination of any benefits or profits that might accrue to such hijackers or third parties;

(b) The rights and interests of passengers, crew members and aircraft operators will be amply protected;

(c) There is an urgent need to curtail the numerous aircraft hijacking incidents which have occurred;

(d) There is a great disparity in national laws concerning aircraft hijacking and a lack of international law on the subject;

(e) Disaster may eventually result from the distraction or the incapacitation of the operating crew or damage to the aircraft during a hijacking incident;

(f) Disaster may also result because of insufficient fuel or unfamiliarity with flight procedures required to

\(^{225}\) ICAO Doc. 8302-LC/150-2, op. cit. supra note 206 at 69.
reach the destination selected by the hijacker; 226

(g) Hijacking incidents may deter considerable numbers of passengers from traveling by air;

(h) A characteristic of hijacking incidents is that the hijacker intends to remove the aircraft from the jurisdiction of one State to the jurisdiction of another State and such incidents have resulted in flight over the high seas;

(i) The Geneva Convention is limited jurisdictionally to acts of aerial piracy occurring over the high seas and excludes acts of mutiny;

(j) The definition of aerial piracy in the Geneva Convention is of limited efficacy because of the ambiguity inherent in its Article 15;

(k) The proposed article refers to any penal statutes of Contracting States which proscribe seizure of aircraft;

(l) The restriction of jurisdictional scope is still left to determination by national and international law;

226. These dangers are dramatically illustrated by the incidents reported in ch. 1, supra. In one case, the aircraft did not contain sufficient fuel to reach the hijacker's intended destination and the hijacker was induced to surrender to the crew. In the other incident, the aircraft landed safely in Cuba with its load of passengers, including the hijacker, but the Cuban authorities refused to let the airplane take off from the airport with the passengers because they considered it unsafe to do so (possibly for harassment). In the latter case, the aircraft and crew returned to the United States without the passengers who were permitted to return on another flight.
(m) Hijackers will be taken into custody by the Contracting State in which the aircraft lands;

(n) The proposed article is consistent with current extradition arrangements;

(o) Passengers, crew and aircraft will be permitted safe and prompt exit from the place where the hijacked aircraft landed; and,

(p) The safe and free flow of the movement of passengers in international air transportation will be facilitated.

The complete United States proposal is set forth, for reference, in Appendix F.

C. THE ROME SESSION AND THE JOINT UNITED STATES-VENEZUELAN PROPOSAL

In the Introduction to the Minutes of the Legal Committee, Fourteenth Session, Rome, 28 August-15 September 1962, it is indicated that the Legal Committee considered a proposal that the Draft Convention should include provisions dealing with the hijacking of aircraft. It was also noted that the objectives of such a provision would be:

(a) to secure the collaboration of States in order that the

control of a hijacked aircraft would be restored to its lawful commander; (b) ensure that the passengers and crew would be able to continue their journey as soon as possible; and, (c) that the aircraft and cargo would be returned to the persons lawfully entitled to them.

The Introduction also noted that the Committee agreed "...[T]hat a provision should be included in the Convention including the hijacking of aircraft to the effect that whenever, through the use or threat or violence against the aircraft, the aircraft commander lost, or was in danger of losing control over the aircraft, all Contracting States should agree to take appropriate measures to restore control of the aircraft to its lawful commander." Therefore, the Draft Convention to be considered contained draft Article 4 which covered the subject of hijacking [This draft Article 4 later became draft Article 10 and then Article 11 in the Tokyo Convention].

At Rome, the United States and Venezuela joined forces and proposed a new article for the control of hijacking.228

228. ICAO Doc. 8302-LC/150-2, op. cit. supra note 206 at 102; this proposed new Article read as follows:

"New Article

(a) Following the commission of any act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or threat of such interference, seizure, or wrongful exercise of control of an aircraft in flight, Contracting States
During the sixteenth, seventeenth and eighteenth meetings of the Rome Session, the subject of aircraft hijacking was discussed. Mr. R. P. Boyle, the chairman of the United States Delegation, referring to the joint proposal of the United States and Venezuela, emphasized that hijacking incidents had occurred which had resulted in the seizure

shall take all necessary measures to restore control of the aircraft to its lawful commander. The first Contracting State in which the aircraft lands after such act or threat of act shall take custody of the person or persons committing such act or threat. The Contracting State taking custody of a person or persons shall immediately notify the State of registration of the aircraft, and, where applicable, it shall notify also the State over whose territory the alleged act or threat occurred.

(b) In the event the State of registration or the State over whose airspace the alleged act or threat occurred requests delivery of the alleged offender for purposes of prosecution, such request shall be dealt with in accordance with the law of the State having custody, and in accordance with applicable extradition agreements. The State having custody shall also have the right to try the person or persons alleged to have committed acts or threats specified in paragraph (a) in accordance with its own laws.

(c) Each Contracting State undertakes to permit the passengers and crew of any aircraft which has landed under conditions contemplated in paragraph (a) to continue their voyage as soon as possible, and to return the aircraft and its cargo to the persons lawfully entitled to possession."

229. ICAO Doc. 8302-LC/150-1, op. cit. supra note 206 at 149; The following quotations in the text concerning the Joint United States-Venezuela proposal are from the Minutes of the sixteenth meeting of the Legal Committee during the Fourteenth Session, Rome, 28 Aug.-15 Sept. 1962. These
and control of aircraft and that passengers have been taken to unintended destinations. He declared that these acts have jeopardized seriously the lives of those on board.

Mr. Boyle stated that the "...[L]egislation of his country provided for acts of piracy on the high seas, but these acts to which he was referring did not come under the Convention on the High Seas and, consequently, did not constitute piracy within the meaning given to that expression by the law at the present time." He also declared that the first action which he would recommend would be to take necessary measures "...[I]n the Contracting States to restore control of the aircraft to its lawful commander."

Mr. Boyle then proposed that the first Contracting State in which the aircraft landed after an aircraft had been hijacked would be to take custody of the hijacker or hijackers. "If the aircraft commander was returned to his capacity of lawful authority, it was consistent with the rest of the convention that the Contracting State should take custody." Mr. Boyle also proposed that "the Contracting

quotations and references are included in considerable detail as an indication of the bases and reasoning which underlie Art. 11. Individual citations for these quotations will not be given.

230. The Geneva Convention stated concretely that the definition of piracy did not include acts committed on board a ship by the crew or passengers and directed against persons or property aboard the ship. [sic]
State which had taken custody of the hijacker should notify the State of registration and the State on whose territory the crime had been committed, since all these would be interested."

Mr. Boyle explained that, "Paragraph (b) of the United States-Venezuela proposal also provided that if the State of registration or the State in whose airspace an offense had been committed requested delivery of the suspected offender, that request should be dealt with in accordance with the law of the State having the suspected offender in custody. In disposing of the suspected offender, the latter State should be allowed to follow its own internal procedures in accordance with its own national laws and principles, including extradition principles which were, however, not limited to extradition treaties." The United States-Venezuela proposal also assumed that "...[T]he state which had custody also had the right, if its own law so permitted, to try the person or persons concerned."

Mr. Boyle also indicated that under the proposal, passengers and crew of the aircraft would be permitted to continue their voyage as soon as possible and the aircraft and its cargo would be returned to the person lawfully entitled to possession. Finally, he noted that "...[T]he United States of America considered this proposal was necessary to preserve the safety of air transport which was one
of the principle purposes of the International Civil Aviation Organization."

Mr. Carmona, the Venezuelan delegate, stated that the joint proposal "...[A]ttempted to bring about a recognition of the mutual aid which States owed one another in order to preserve air safety, and in view of the fact that some national legislations had not provided for the repression of attempts against the safety of the aircraft. The only assurance on which they could count was that of the adoption of an international Convention which included an article of this kind."

After the joint United States-Venezuela proposal was discussed in the sixteenth, seventeenth and eighteenth meetings of the Rome Session, it was adopted by unanimous vote after it was amended in conformity with certain decisions of the Committee. The most important amendment was the deletion of paragraph (b) of the proposal.

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231. It was thoroughly discussed by the delegates of the Federal Republic of Germany, France, Netherlands, Mexico, Spain, Philippines, Portugal, United Kingdom, Japan, Australia, Switzerland, Sweden and Nigeria.

232. ICAO Doc. 8302-LC/150-1, op. cit. supra note 227 at 160.

233. Id. at 155; This deletion was proposed by the Spanish delegate who had noted that it attempted to establish a new paragraph on jurisdiction and, perhaps, a priority of jurisdiction, while this Convention could not adopt two different systems of jurisdiction. He noted
The joint United States-Venezuela hijacking proposal appeared in the Draft Article for the second reading\(^\text{234}\) as provisional Article 3A\(^\text{235}\). The amended draft Article emerged in the Draft Articles for the third reading substantially unchanged. It was to be numbered as Article 4 in the text of the final Draft Convention to be appended to the Summary that all questions concerning jurisdiction had to be solved by Article 3 [of the Rome Draft] and here there was a question of a conflict of legislations which had to be solved by that Article and not through the establishment of a separate provision which created a jurisdiction which would conflict with the remainder, as happened in the case of ¶ (b) [of the joint proposal].

234. ICAO Doc. 8302-LC/150-2, op. cit. supra note 206 at 110(a).

235. Provisional Art. 3A read as follows:

"**Article 3A**

1. Following the commission by violence of any act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or threat thereof, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft. Any Contracting State in which the aircraft lands after such act or threat shall take custody of the person committing such act or threat in accordance with its own law. The Contracting State taking custody of such person shall immediately notify the State of registration of the aircraft, and, where applicable, also the State over whose territory the said act or threat occurred, of such action.

2. Each Contracting State shall permit the passengers and crew of any aircraft which has landed under conditions contemplated in paragraph 1 of this Article to continue their journey as soon as possible, and shall return the aircraft and its cargo to the persons lawfully entitled to possession."
of the Work of the Legal Committee during its Fourteenth Session.\textsuperscript{236}

D. THE TOKYO CONFERENCE

The Draft Convention on Offenses and Certain Other Acts Committed on Board Aircraft contained Article 4, the hijacking article, substantially in the same form as it emerged from the Fourteenth Session of the Legal Committee.\textsuperscript{237} The report on the Draft Convention of the Tokyo Conference contained the same statement concerning hijacking as contained in the report on the Draft Convention of the Fourteenth Session of the Legal Committee.\textsuperscript{238}

In its History of the Work in ICAO on the Legal Status of the Aircraft [Presented by the Secretariat], it was noted\textsuperscript{239} that there was general agreement that the United States proposal concerning hijacking was important. It was also noted that this proposal would introduce a description [emphasis added] of a particular crime into the draft Convention.

\textsuperscript{236} ICAO Doc. 8302-LC/150-2, \textit{op. cit. supra} note 206 at 118.


\textsuperscript{238} \textit{Id.} at 14 (Doc. No.2); \textit{cf.} ICAO Doc. 8302-LC/150-2, \textit{op. cit. supra} note 206.

\textsuperscript{239} ICAO Doc. 8565-LC/152-2, \textit{op. cit. supra} note 237 (Doc. No5) p. 99.
tion which up till now did not refer specifically to any particular offense. The Subcommittee on The Legal Status of the Aircraft (Montreal, March-April 1962) decided to recommend to the Legal Committee, at the Rome Session, that it consider the United States Proposal in connection with the Munich draft Convention. 240

During the thirteenth meeting of the Tokyo Conference, a Venezuelan Delegate noted 241 that the "Conference must consider itself fortunate to be able to act as a pioneer in establishing air law" and at present there was a "...[G]ap in national legislations concerning offenses and unlawful acts and it was only now that States were filling this gap." He added that "Article 4 sought to fill the gap in respect to the unlawful use of control of aircraft, namely, hijacking." 242 Mr. R. P. Boyle, United States Delegate,

240. Id. at 100.


242. In its written comments submitted to the Conference, Venezuela noted that it would be very useful to add to draft Article 4 of the draft "...[C]ertain extentions which would consist in: (a) broadening the element of intention insofar as concerns the offense and referring in generic form to the concept of 'violence'. Violence is an act of force contrary to the law; therefore, it would be preferable not to have exclusive recourse of this element as a
stated that it was the belief of his delegation that the
Convention was designed, among other things, to enhance the
safety of passengers and that the effort to make it more
difficult for the hijacker and to make things easier for
other persons should be continued. 243

Several Delegations submitted comments concerning draft
Article 4. 244 In considering Article 4, paragraph 1, of the
Rome Draft, the Delegates 245 had lengthy discussions concerning

basis for such offenses; (b) to incorporate the concept
that every act of seizure, interference or wrongful exercise
of control of the aircraft is directly against air safety." The comments added that "...[O]n different occasions Venezue­
la had proposed that the acts to which they had been
referring should in any event, be considered as crimes or
offenses against persons or property and not solely for the
benefit of aviation itself, but also as a means of greater
safety for the passenger, crew and cargo, and in order to
guarantee at all times the attainment of the aims for which
the International Civil Aviation Organization was created." ICAO Doc.
8565-LC/152-2, op. cit. supra note 237 (Doc. No.7)
p. 120-21.

243. In its written comments submitted to the Conference,
the United States noted that draft Article 4 "...[I]s one
of the most important provisions of the Convention" [and
that] "...[T]he purpose of the Article is identical with
one of the main objectives of the Convention, namely,
the enhancement of safety and good order and discipline on
board the aircraft and, as such, the Article is a most
appropriate addition to the Convention." ICAO Doc.
8565-LC/152-2, id. (Doc. No.9) p. 124.

244. ICAO Doc. 8565-LC/152-2, id.: Finland (Doc. No.7)
p. 119, Venezuela (Doc. No.8) pp. 120-21, United States
(Doc. No.9) p. 124, Japan (Doc. No.10) p. 130, Switzerland

245. France, Yugoslavia, United Kingdom, Belgium, Italy,
Haiti, Congo (Brazzaville), Netherlands, United States and
Spain.
whether or not the English word "attempt" was adequate. The French Delegate found some difficulty converting this word into French.

Concerning Paragraph 2 of draft Article 4, the delegates of Hungary, the United Kingdom and Ceylon discussed the matter of the return of the cargo. The Drafting Committee then renumbered draft Article 4 of the Rome Draft to draft Article 10. It also enumerated the various possibilities which had been argued by the Delegates concerning the meaning of "threat" of violence. During the discussion of the new draft Article 10, the Swedish delegate noted that hijacking by violence was a most typical case.

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247. ICAO Doc. 8565-LC/152-2, op. cit. supra note 237 (Doc. No.74) p. 228; the assignment of different article numbers to the hijacking article, which finally became Art. 11, are included as an aid to a reader who desires to read the various minutes and documents associated with hijacking provisions of the Tokyo Convention.

248. ICAO Doc. 8565-LC/152-1, op. cit. supra note 241 at 324. The Swedish delegate noted that for example, if "...[S]omebody knocked down the pilot or shot him and then conducted the aircraft. There was also the case of a serious threat where someone held up a gun and threatened to kill a person. There was the case of putting a drug into a drink which was given to the pilot so that the command of the aircraft could be taken over. There was the further case where the pilot could be cheated by a person who pretended that he had been sent by the operator to take over the aircraft."
The Australian delegate stated that the Conference was not worried about how the hijacking had been achieved but how to restore control to the commander or lawful authorities. Therefore, he proposed that any reference to the methods of hijacking be omitted and that draft Article 4, Paragraph 1, [the new Article 10, Paragraph 1] begin as follows: "When there has been a wrongful act of interference, seizure or exercise of control of an aircraft in flight..."

A United Kingdom delegate supported the Australian proposal and then proposed "...[T]hat it be made plain that the [draft] article as a whole provided against a seizure committed by a person on board [emphasis added]. It seemed, in fact, impossible to conceive of any case to which this article would apply in which the act would not have been committed by a person on board, although of course, there might be long distance interference with the radar by outside persons."250

Among the various proposals submitted, the representative of Switzerland, "...[P]roposed to delete from Article 10, Paragraph 1 the words 'there are reasonable grounds to believe'. These words were used in several other Articles

249. ICAO Doc. 8565-LC/152-1, id. at 325.

250. Ibid. The point made by the United Kingdom delegate that indicated a hijacker must be on board a hijacked aircraft is important in determining whether aircraft hijacking can be considered aerial piracy under the Geneva Convention.
and had served as a subjective condition to the action of the aircraft commander, that is, in order to set some limits to the exercise of his powers. The present context was quite different and it would be meaningless to include such a limitation."251

The Spanish delegate argued "...[T]hat one could not say that no matter what was the means used, there should be a crime of hijacking."252 Several Delegates engaged in a

251. The Swiss delegate said, "For whom would there have to be reasonable grounds? For the Contracting State? For the aircraft commander? For the crew on board? The Contracting States which had to take appropriate measures had no means of ascertaining that there were reasonable grounds on board the aircraft." The Swiss representative's proposal was seconded by the representatives of the United States, Netherlands, Guatemala and Australia. ICAO Doc. 8565-LC/152-1, id. at 326.

252. He argued, "For hijacking, there must be violence or any other means similar to violence; otherwise, the concept of hijacking would be excessively widened. Secondly, if it were also provided that there should be, in addition to violent means, a wrongful exercise of control, then there would have to be two joint conditions for the act under consideration, namely, the use of violence and a wrongful act. Thus, whenever one of these two circumstances was not present, the Article would not apply. A person might claim that he had some rights over the aircraft, but if such a person were permitted to employ violence in order to take over the aircraft, the Conference would be permitting him too much. Thus the essence of the description of the act was the use of violence or means similar to violence independently of the fact that the desire to seize the aircraft was unlawful." He also differed from the United Kingdom proposal "...[T]o provide that only a person on board the aircraft was involved might also represent an excessive restriction." He noted, "...[T]hat the Conference had defined an aircraft as being in flight from the moment the power was applied. There might be a conspiracy among people who were not on board but on the ground and very near the aircraft." ICAO Doc. 8565-LC/152-1, id.
debate concerning the meanings of the various words in the draft Article, particularly the meaning of "violence". The Conference adopted, after much debate, a proposal to restrict the provision in the first paragraph of Article 10 to "violence or threat thereof". The Conference also decided to include only the concept of an act of a person on board the aircraft and to include the word "unlawful" before the words "act of interference".

During the thirtieth meeting, the Tokyo Conference approved the principle that the Contracting State into whose territory the aircraft lands following the commission of an act of hijacking is under an obligation immediately to make a preliminary investigation.

During the thirty-fourth meeting of the Conference, the Swedish delegate, the Chairman of the Drafting Committee, explained that the Drafting Committee had found that it would help prevent hijacking if the chapter on that subject were dealt with in the same manner as the provisions concerning jurisdiction and extradition. That meant that the provision on hijacking should not be limited geographically.

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253. Guatemala, France, Senegal, Sweden, Netherlands, United Kingdom, Yugoslavia and Venezuela. Id. at 327-29.

254. Id. at 328-29. This on board requirement would definitely seem to distinguish aerial piracy from aircraft hijacking.

255. Id. at 339.

256. Id. at 377. This decision places Art. 11 in line with the other provisions of the Convention concerning jurisdiction and extradition.
By the thirty-sixth meeting of the Conference, the draft hijacking Article 10 had become Article 11. During this meeting, the Netherlands representative noted that "...[T]he scope of Article 11 should be limited in the same way as the scope of Chapter III had been limited." However, the Chairman of the Drafting Committee said "...[T]hat the majority of the Drafting Committee was in favour of including Article 11 in a separate chapter where the Convention was generally applicable. If the hijacking occurred in the case of a domestic flight and nothing happened aboard, then, in practice, no other State would have to deal with the case and the Convention would not be applied. If the aircraft passed out of the airspace of the State of registration to some other State, then the machinery of the Convention would apply."

The text prepared by the Drafting Committee for the third reading at the Conference was substantially identical.

257. He added, "In the case of an unlawful seizure of aircraft which had occurred domestically, that is, within a country, there was no ground for providing for a system of notification and for binding States to apply the Convention. Where the hijacking had an international character, because the aircraft was going to perform an international flight, Article 11 would apply automatically, because the aircraft would then be flying through the airspace of another State. Hence Article 11 should be included in Chapter III". ICAO Doc. 8565-1C/152-1, id. The Conference rejected the Netherlands proposal to include Art. 11 in ch. 3 and thus Art. 11 has its own chapter, i.e., ch. 4. Also, this indicates the final decision that Art. 11 is not applicable to strictly domestic flights.
to the final text of Article II and the Convention which emerged from the Tokyo Conference included a separate chapter on hijacking [labeled Chapter IV - Unlawful Seizure of Aircraft]. The final Article II read as follows:

"Article II

1. When 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 when such an act is about to be committed, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.

2. In the cases contemplated in the preceding paragraph, the Contracting State in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession."

E. THE TOKYO CONVENTION APPLIED TO AIRCRAFT HIJACKERS

The following hypothetical example will be utilized for illustrative purposes. It is assumed that an armed young man is aboard a large jet airliner which has one hundred passengers and a full crew and that the Tokyo Convention is in force. The young man is well-educated and exceptionally intelligent but is socially maladjusted. He feels compelled by his drug-expanded inner personality to hijack an aircraft and divert it to a certain country which he feels will give him a hero's welcome. This young man has done some research and realizes that the Tokyo Convention is in force and that
he could be subject to certain sanctions if he hijacks the aircraft, however, he believes that he is invulnerable to man-made laws. The provisions of the Tokyo Convention will be examined to determine their applicability to our hypothetical hijacker. First, the specific provisions pertaining to aircraft hijacking and then the general provisions of the Convention pertaining to all offenses and acts committed on board aircraft will be examined.

(1) **Article II**

Article II, the hijacking article, extends the scope of the Convention dealing with crimes on board aircraft to include the case of a crime against the aircraft itself. Article II does not describe an international crime or make hijacking a crime under international law.

(2) **Article II (1)**

Only a person on board an aircraft is subject to the Convention. In our example, our hypothetical hijacker

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258. This hypothetical situation is entirely plausible based on personal observations of numerous individuals of this type while the writer was a student at Boalt Hall School of Law, University of California, Berkeley, California.

259. Boyle, Report to Secretary of State, *op. cit. supra* note 224 at 34.


261. See ch. 4 § D, *supra.*
is on board the aircraft. Any confederates who are not on board the aircraft would not be subject to the provisions of the Convention even if there was a conspiracy involved in the hijacking of the aircraft.

Whether or not the hijacker's act could be considered unlawful under the Convention would depend upon the law of the State of registration of the aircraft or the law of the subjacent State over which the aircraft is flying at the time of the hijacking. The provision of Article 11 which provides that a hijacker must have unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of the aircraft is determined by the penal statutes of the applicable Contracting States.

Another requirement of Article 11(1) is that the aircraft must be in flight when the hijacking has been or is about to be committed. Our hypothetical flight is consistent with Article 1(3) and Article 5(2).


263. See ch. 4 § B, supra.
Article 11(1) requires that Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft. Dr. FitzGerald writes that "The Conference considered this text to include the three following possibilities: (1) The seizure of the aircraft had been accomplished (in such case the contracting state concerned would try to restore control of the aircraft to its lawful commander.) (2) There had been, or was being made, an attempt to seize the aircraft. (In that case the aircraft commander would appeal to a contracting state with a view to having the aircraft restored to him or to the preservation of its control by him, as the case may be.) (3) An attempt to seize the aircraft was about to be made. (The aircraft commander would appeal to a contracting state to help him to preserve his control of the aircraft.)."

It has been explained that "The words 'appropriate measures' are intended to mean only those things which it is feasible and lawful for a Contracting State to do. Thus, a Contracting State 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 to do so.

Similarly, a Contracting State would not be expected to pursue with its military aircraft a hijacked aircraft into the territorial airspace of another State without the permission of that State because to do so would be unlawful. 265

(3) Article 11(2)

Article 11(2) requires that the Contracting State in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable and shall return the aircraft and its cargo to the persons lawfully entitled to possession. After our hypothetical hijacker has hijacked the aircraft and forced it to land in a country other than the State of registration, he may be surprised to learn that the State of landing has actually ratified the Tokyo Convention. Of course, being properly indoctrinated, he immediately will insist upon each and every one of his civil liberties.

(4) Article 13

Paragraph 2 of this Article provides that if "the circumstances so warrant, any Contracting State shall take custody or other measures to ensure the presence of any person suspected of an act contemplated in Article 11 Para-

graph 1, and of any person of whom it has taken delivery. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted."

Paragraph 3 of this Article provides that "Any person in custody pursuant to the previous paragraph shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a nationa."

Paragraph 4 of this Article provides that "Any Contracting State... in whose territory an aircraft lands following the commission of an act contemplated in Article 11 Paragraph 1, shall immediately make a preliminary inquiry into the facts."

Paragraph 5 of this Article provides that "When a State... has taken a person into custody, it shall immediately notify the State of registration of the aircraft and the State of nationality of the detained person and, if it considers it advisable, any other interested State of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 4 of this Article [13] shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction."
(5) **Article 14**

This Article provides that "When any person has been disembarked... after committing an act contemplated in Article 11, paragraph 1, and when such person cannot or does not desire to continue his journey and the State of landing refuses to admit him, that State may, if the person in question is not a national or a permanent resident of that State, return him to the territory of the State of which he is a national or permanent resident or to the territory of the State in which he began his journey by air." Paragraph 2 protects the landing State in that it is provided that "Neither disembarkation, nor delivery, nor the taking of custody or other measures contemplated in Article 13, Paragraph 2, nor return of the person concerned, shall be considered as admission to the Contracting State concerned for the purpose of its law relating to entry or admission of persons and nothing in this Convention shall affect the law of a Contracting State relating to expulsion of persons from its territory."

(6) **Article 15**

This Article provides that "Without prejudice to Article 14, any person who has been disembarked... after committing an act contemplated in Article 11, Paragraph 1, and who desires to continue his journey, shall be at liberty
as soon as practicable to proceed to any destination of his choice unless his presence is required by the State of landing for the purpose of extradition or criminal proceedings." Paragraph 2 of this Article provides that "Without prejudice to its law as to entry and admission to, and extradition and expulsion from its territory, a Contracting State in whose territory a person has been disembarked... and is suspected of having committed an act contemplated in Article 11, Paragraph 1, shall accord to such person treatment which is no less favourable for his protection and security than that accorded to nationals of such Contracting State in like circumstances."266

(7) Article 16

Our hypothetical hijacker may also be surprised to discover that he is subject to extradition under the provisions of Article 16 of the Convention. Dr. FitzGerald notes that "Existing extradition arrangements are affected" and that Article 16, Paragraph 1, refers to "extradition treaties" as did the previous Rome draft. He notes that

266. The legal technicalities of the civil liberties provisions of the Convention are competently explained in detail in FitzGerald, *op. cit. supra* note 264 at 200-01 and Boyle & Pulsifer, *id.* at 346-50.
this change was felt necessary because provision for extradition arrangements between some countries takes the form, not of treaties, but of parallel legislation. 267

The extradition provisions of the Convention equate an aircraft to the territory of the flag State of the aircraft and fill in a gap in the law, in the extradition of persons who commit offenses on board aircraft, between those Contracting States to the Convention which have extradition treaties. 268 It is quite clear that nothing in the Convention

267. FitzGerald, id. at 201; also see Boyle & Pulsifer, id. at 351.

268. ICAO Doc. 8565-LC/152-1, op. cit. supra note 241 at 238-46. The Secretary General of the Conference said that "Article 12(1) [extradition provisions] was intended to create a legal fiction. The objective was to state that if an aircraft of State No. 1 were within the airspace of State No. 2, then, in so far [sic] as concerned extradition treaties, the offense would be treated as if it had occurred also on the territory of the State of registration, that is, State No. 1. Therefore, by this provision, it was not intended to create a treaty of extradition as between the State of registration and the third State. If an aircraft of State No. 1 were flying over State No. 2 and there were an extradition treaty between State No. 1 and State No. 3 and State No. 3 wished to have the person extradited, it could not rely on that extradition treaty without the existence of Article 12(1). The extradition treaty would be interpreted as if the aircraft were part of the territory of State No. 1."; therefore, if a hijacked airplane lands in State No. 2 and State No. 1 is the State of registration of the aircraft, the hijacker would be subject to extradition if the extradition treaty between State No. 1 and State No. 2 so provided; for an accounting of the gap which has existed in extradition treaties for the United States, see Mendelsohn, op. cit. supra note 217 at 559.
is deemed to create an obligation to grant extradition.

The legal fiction of equating an aircraft to the territory of the flag State, noted by the Secretary General of the Conference, was considered necessary since certain extradition treaties generally provide for extradition only for offenses committed in the territory of the State requesting extradition. Therefore, it is necessary to consider that offenses committed on aircraft registered in a Contracting State should be treated for the purpose of extradition treaties as if the offenses had been committed also in the territory of the State of registration of the aircraft regardless of the geographical location of the aircraft. 272

269. ICAO Doc. 8565-LC/152-1, id. at 403.

270. Id. at 288.

271. Cf. the Geneva Convention where aerial piracy can only be committed on the high seas or in any other place outside the jurisdiction of any State.

272. FitzGerald, The Development of Rules Concerning Offences and Certain Other Acts Committed on Board Aircraft, 1 Can. Yb. Int'l L. 250 (1963); the difficulties encountered in hijacking incidents when there are no existing extradition treaties or other arrangements between the State of registration of the aircraft and the landing State are dramatically illustrated in the debates in the House of Commons, United Kingdom, on 23 Oct. 1967, concerning the Tschombe hijacking incident, reported in ch. 1, supra. There were additional complications in that there were no diplomatic relations between the United Kingdom and Algeria at that time.
(8) **Additional Salient Considerations**

In our hypothetical example, we assumed that each State would carry out its obligations and assert its jurisdiction under the Tokyo Convention, however, this may not be the case in actual practice as will be seen below. For example, Article 3, Paragraph 2, provides that each Contracting State shall take such measures as may be necessary to establish its jurisdiction as a State of registration over offenses committed on board aircraft registered in each State. This apparently means jurisdiction independent of any other jurisdiction and doesn't necessarily mean that a Contracting State must assert jurisdiction in a particular case even if no other sovereign had a jurisdictional basis in municipal law to try the offender.\(^\text{273}\)

Article 1 provides that the Tokyo Convention applies in respect of offenses against penal law. Therefore, a State must enact legislation to cover the crime of hijacking aboard its aircraft.\(^\text{274}\) It follows that the question

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\(^{273}\) Mendelsohn, *In-Flight Crime: The International and Domestic Picture Under the Tokyo Convention*, 53 Va. L. Rev. 516 (1967); lecture by Dr. G. F. FitzGerald, Senior Legal Officer, ICAO, to the Class of 1967-68, Institute of Air and Space Law, McGill University, Montreal, Quebec, Canada.

\(^{274}\) The difficulties of enacting legislation to cover a State's aircraft is illustrated in Mendelsohn, *id.* at 548-49; a State is not required to enact "hijacking" legislation and might decide to prosecute under other legal theories, e.g. theft of an aircraft.
of whether hijackings are 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 flying. Article 1, Paragraph 4, provides that the Convention shall not apply to aircraft used in military, customs or police services. By implication, all other aircraft would come under the Convention.

At least one writer contends that crimes to be punished should have been enumerated in the Convention and, if enumerated, that such crimes could only be those universally accepted as crimes. The question of the non-assertion of jurisdiction, when a crime against the law of the flag State has been committed, will be discussed below.

Article 2 of the Convention provides that "...[O]ffenses against penal laws of a political nature or those based on racial or religious discrimination" cannot be enforced under

275. Boyle & Pulsifer, The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, 30 J. Air L. & Com. 345 (1964). This article also notes that "By the use of this technique, it is unnecessary for the Convention to attempt by international law to proscribe a particular act as criminal; instead, the Convention relies upon the existing applicable criminal codes of the Contracting States."

276. FitzGerald, op. cit. supra note 264 at 194. Dr. FitzGerald notes that this brings more aircraft under the Convention.

the Convention except to the extent that they are acts that jeopardize the safety and good order and discipline on board. This presents problems of interpretation since penal laws forbidding various forms of racial and religious discrimination are quite varied and the views of the Contracting States may differ on the issue of whether or not certain acts come under the political and racial discrimination provisions of Article 2. 278

One of the principal purposes of the Tokyo Convention is to make it clear that the State of registration of an aircraft has the authority to apply its laws to events occurring on board its aircraft while in flight no matter where they may be. 279 The Convention also provides that a Contracting State must take such measures as may be necessary to establish its jurisdiction as a State of registration

278 Boyle & Pulsifer, op. cit. supra note 275 at 333; compare the Santa Maria and the SS Anzoategui incidents, ch. 1, supra, where it is indicated that the flag States characterized the hijacking of these ships as piratical acts, however, the crews were given asylum in another country and were apparently not considered to be pirates. See also ICAO Doc. 8565-LC/152-1, op. cit. supra note 241 at 367-68.

279 Boyle & Pulsifer, id. at 328-29. These authors also state that this is probably the most important aspect of the Convention, from the standpoint of the United States, since it accords international recognition to the exercise of extraterritorial jurisdiction under the circumstances contemplated in the Convention; not only do States have a power under the Convention to define the precise offenses over which jurisdiction is to be asserted but also to decide whether to enforce this jurisdiction. FitzGerald, op. cit. supra note 264 at 195.
over offenses committed on board its aircraft. One important omission from the Tokyo Convention in the view of some writers is the absence of a system of priorities concerning jurisdiction.

A fundamental objective of the Tokyo Convention is to ensure that wrongdoers who commit offenses on board aircraft will be prosecuted by at least one sovereign. A refusal to prosecute hijacking incidents by a Contracting State could lead to a reluctance to prosecute on the part of other Contracting States. In addition, while a State may, allow the difficulty or expense of prosecution to influence its decision not to prosecute in a particular hijacking incident, there may be far-reaching consequences in the damages suffered by others.


282. Mendelsohn, op. cit. supra note 273 at 517. Mendelsohn notes that a refusal to assert jurisdiction could lead to retaliation by certain States. E.g., if a crime is committed aboard an Italian aircraft against a French citizen and Italy refuses to prosecute the wrongdoer, France could retaliate later if an Italian citizen was the subject of a criminal act aboard a French aircraft. In the latter case, France might well use Italy's prior refusal to prosecute as justification not to prosecute in the latter case.

283. E.g., a hijacked aircraft may carry valuable, highly perishable cargo, passengers who will miss important conferences or passengers who are too ill to make the journey to the hijacker's chosen landing spot; also, the hijacking might result in great economic loss to other passengers or to persons not on board.
Since the Tokyo Convention does not apply to strictly domestic flights,\textsuperscript{284} States which operate predominantly domestic flights may be tempted not to ratify the Convention or, if they do, not to enact the necessary legislation to deter hijacking incidents which can occur to its aircraft as easily as it can to those countries which have international carriers.

The aircraft commander can, in effect, select the applicable jurisdiction by determining where he lands his aircraft. For example, if a hijacker makes an unsuccessful attempt to hijack an aircraft, the pilot may desire to land in a country where he is certain that the hijacker will be immediately returned to the flag State for prosecution or in a State which has suffered damage by the attempted hijacking, \textit{e.g.}, in a State whose national was murdered by the hijacker during his hijacking attempt.\textsuperscript{285} Thus, the hijacker may be subject to the law of the landing State even though he may never have intended to place himself within the jurisdiction of that particular State.\textsuperscript{286}

\begin{itemize}
\item \textsuperscript{284} See Art. 5.
\item \textsuperscript{285} \textit{Cf.} Mendelsohn, \textit{op. cit. supra} note 273 at 555.
\item \textsuperscript{286} \textit{Ibid.} While Mendelsohn presents this point in his discussion of United States law it would also apply to the Tokyo Convention.
\end{itemize}
Article 4 of the Convention provides that a Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offense committed on board except in certain specified cases. This would appear to prevent a State which is being overflown by a hijacked aircraft from forcing the aircraft to land unless such act could be justified under one of the exceptions. Thus, a State may not be justified in forcing a hijacked aircraft to land even if it could be done safely. However, it is noted that the subjacent State may "interfere with an aircraft" for any purpose it deems proper.

Certain important powers of the aircraft commander are enumerated in the Convention but they are limited to the period when the aircraft is in flight, to offenses occurring on board where the next point of intended landing

287. Cf. Gutierrez, op. cit. supra note 277 at 10. The author of this article declares that an overflown State can consider itself affected once its laws are violated by a passenger's action on the aircraft. He further states that the Convention permits States to typify new offenses in their domestic legislation and then consider themselves affected when a related crime is committed on board.

288. Boyle & Pulsifer, op. cit. supra note 275 at 337.

289. Lecture by Dr. G. F. FitzGerald to the 1967-68 Class at the Institute of Air and Space Law, McGill University, Montreal, Quebec, Canada.

290. Art. 5(2).
is situated in a State other than that of registration and where the aircraft subsequently flies in the airspace of a State other than that of registration with such persons still on board. 291

The period of flight given in Article 5, Paragraph 2, differs from that given in Article 1, Paragraph 3. This could prove important in a hijacking incident if the hijacker takes control while the aircraft was taxiing out for a take-off since, presumably, the Convention would apply if the aircraft subsequently took off under orders of the hijacker and flew to another State where it landed.

Articles 5 through 10 give the aircraft commander powers which include restraint, 292 to disembark any person who he has reasonable grounds to believe has committed, or is about to commit, on board the aircraft an act contemplated in Article 1, Paragraph 1(b), or to deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands, any person who he has reasonable grounds to believe has committed on board the aircraft an act which, in his opinion, is a serious offense according to the penal law of the State of regis-

291. Art. 5(1).
292. Arts. 6-7.
293. Art. 8.
The aircraft commander's powers have been analyzed by competent writers who are quite familiar with the scope and restrictions of these powers.

The powers of the aircraft commander provided in Articles 5 through 10 seem adequate to control a hijacker on board unless the aircraft commander falls under the control of the hijacker. Further, the aircraft commander, any member of his crew, any passenger, the owner or operator of the aircraft and the person on behalf a flight is performed is not held responsible in any proceeding on account of the treatment undergone by the person against whom action is taken in accordance with the Convention.

The aircraft commander is not protected against actions by third parties who suffer damages on the airplane, e.g., a passenger who has his camera broken as a result of a fight on board the aircraft between the flight crew and a suspected offender would have a cause of action for damages; the aircraft commander and other persons noted in Article 10 are only protected for actions they take, in general, to protect the safety of the aircraft.
When combined with Article 11, Articles 5 through 10 will give Contracting States and aircraft commanders powerful tools against potential and actual hijackers. Articles 12 through 15 provide for the powers and duties of Contracting States. The civil liberties of an accused hijacker are given wide scope in the Convention but there are no provisions for double jeopardy of a hijacker although such provisions were discussed at the Rome Session in 1962.

A possible argument might be made that individual airlines are responsible for screening their passengers before they board their aircraft. However, the practical difficulties of such a procedure are readily apparent and the consequences of an error in refusing to permit a person to board an aircraft, because he looks like a potential hijacker, can be quite serious. Placing the responsibility for screening out potential hijackers on the airlines

298. Arts. 13-15 are directly applicable to Art. 11, the "hijacking" article.

299. Arts. 13, 15.

300. To the chagrin of our hypothetical hijacker who has found his reception in the landing State to be quite hostile.


302. E.g., A hijacker who hijacked one of the aircraft reported in ch. 1, supra, was described as very neat in appearance.

303. E.g., most of us have seen an individual who appeared to be a bearded revolutionary only to discover later that
is too great a burden to place on this vital industry and this burden should be borne by the individual States.

F. THE TOKYO CONVENTION AS A DETERRENT TO AIRCRAFT HIJACKING

It is far more important to deter than to prosecute hijackers. Certain Contracting States to the Tokyo Convention may not desire to make aircraft hijacking a crime under their laws. This, of course, would lessen the deterrent effect of the Convention in that a potential hijacker, aware that the laws of the flag State do not provide sanctions for hijacking its aircraft, would not be deterred.

Even if the laws of a Contracting State provide for aircraft hijacking, if there are inadequate sanctions or if such laws are not enforced, the deterrent effect of the Convention would also be lessened. The total effect may not only be a lessening of the deterrent effect for such a State but also for other States if a pattern of weak sanctions and/or poor enforcement is established among the Contracting States. The need for cooperation among States is dramatically


305. As Confucius (famous Chinese philosopher, 551-478 B.C.) might have said, "Better to avoid bad situation in first place."

306. However, a State may desire to prosecute under other legal theories such as theft of an aircraft.
pointed up by the United States hijacking legislation, reported in Chapter III. This legislation provides heavy penalties but, nevertheless, the United States has had more commercial airliners hijacked than any other State. There are no indications of the actual deterrent effect of the United States hijacking legislation. The important issues here are: (1) The heavy penalties provided by the United States legislation did not deter these hijackers, and, (2) most of these hijackers probably would have been deterred if Cuba had cooperated from the beginning and let it be known that it would return all hijackers to the flag States of the hijacked aircraft.

The provisions of the Convention which provide for restraint, detention, extradition and jurisdiction over hijackers and which eliminate any possible benefit or profit which might accrue to such hijackers or to third parties will prove powerful deterrents if the Convention is widely adopted and strictly enforced. 307

G. SUMMARY OF CHAPTER IV

The Tokyo Convention will not, of itself, eliminate major legal problems pertaining to aircraft hijacking. The Convention does not create or define aircraft hijacking as a crime. Further, each Contracting State will be required to adopt appropriate legislation concerning aircraft hijacking in order to carry out the purposes and provisions of the Convention.

The efficacy and deterrent value of the Convention, in relation to aircraft hijacking, will depend, primarily, upon

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308. Cf. Billyou, Air Law 188 (2nd ed. 1964) where the author states, "In some respects, there is reason to think that one of the major objectives of the [Tokyo] Convention was nothing more than to formalize some of the powers and rights of aircraft commanders. Certainly, the International Federation of Air Line Pilots Associations, headquartered in London, had a great deal to do at various times with the drafting and ultimate signing."

the widespread ratification of the Convention, enactment of suitable legislation and strict enforcement of such legislation by Contracting States and effective cooperation among these States. With these qualifications, the Convention could be a powerful force in decreasing aircraft hijacking incidents, increasing the safety of air travel and protecting the civil rights of accused hijackers.

Unfortunately, some hijackers will not be deterred by any convention regardless of its sanctions. Our hypothetical hijacker was not deterred. To bring our hypothetical aircraft hijacking saga to a conclusion, we will assume that he hijacked the aircraft, \(^{310}\) this hijacking was against penal law of the [Contracting] flag State,\(^ {311}\) he was unable to convince the landing State that this was an offense against a penal law of a political nature or one based on religious discrimination [he claimed he was being discriminated against because he was an atheist],\(^ {312}\) the flag State had taken necessary measures to establish its jurisdiction and it desired to prosecute the hijacker,\(^ {313}\) he has been disembarked from the aircraft since the aircraft commander

\(^{310}\) Tokyo Convention, Art. 11.

\(^{311}\) Id., Art. 1.

\(^{312}\) Id., Art. 2.

\(^{313}\) Id., Art. 3.
considered him a menace, and, besides, the hijacker was threatening to sue him even though the aircraft commander was immune from such suit, the landing State has allowed the aircraft commander to disembark and has taken delivery and custody of the hijacker, however, the hijacker did not desire assistance in communicating with any representative of the State of which he was a national since such State was also the flag State, so, the landing State made a preliminary enquiry and notified the flag State, the landing State desired to return the hijacker to the flag State [and State of which he was a national], as soon as possible, the landing State's law and extradition treaty with the flag State provided that the hijacker be extradited to the flag State immediately, and the landing State has expeditiously permitted the hijacked aircraft, crew and passengers to continue their journey.

Upon being returned to the flag State, our hypothetical hijacker was prosecuted under the laws of the flag State

314. *Id.*, Arts. 8 and 9.
315. *Id.*, Art. 10.
316. *Id.*, Art. 13.
318. *Id.*, Arts. 15 and 16.
319. *Id.*, Arts. 11 and 17.
which provided severe penalties for hijacking its aircraft. While meditating in prison, our hypothetical hijacker had to admit that the Tokyo Convention was effective as applied to him, however, its civil liberties provisions must be grossly inadequate or he would not be in prison.
CHAPTER V

CONCLUSION

Maritime piracy has been considered to be a crime against the Law of Nations. Aircraft have been analogized to ships in many situations, but, whether aircraft hijacking can be denominated as piracy by analogy of aircraft to ships seems doubtful, especially for those States which are parties to the Geneva Convention. While no cases have come to the writer’s attention, it seems entirely plausible that aircraft piracy, as contemplated by the Geneva Convention, will be committed in the future by private aircraft against ships, especially where seaplanes, helicopters and hovercraft could be used to prey on small vessels. "In time, aircraft may become the most efficient means of piratical attack." Further, aircraft piracy in outer space is a distinct possibility.

320. On Nov. 8, 1967, the ICAO Council adopted amendment 2 to Annex 7, of the Chicago Convention, which deleted air cushion and ground effect vehicles from the definition of aircraft under the Convention. This change went into effect on Mar. 8, 1968. It will be interesting to see how international law will be applied if such a vehicle commits a piratical act on (?) or over (?) the high seas.


The Geneva Convention is adequate to cover piratical acts by pirate aircraft against ships, other aircraft and their passengers, crews and cargoes. It is inadequate to cover aircraft hijacking and other crimes by a person aboard an aircraft and directed against that aircraft or its crew, passengers or cargo.

The Tokyo Convention, when in force, can assist in the control of aircraft hijacking incidents but each Contracting State must first enact adequate legislation as contemplated by the Convention. While there will still be gaps in international law concerning the crime of aircraft hijacking after the Tokyo Convention comes into force, States should promptly ratify this Convention and enact effective domestic legislation so as to control the hijacking of aircraft.

323. Cf. Billyou, Air Law 187 (2nd ed. 1964) "Greatly simplified, the Convention's major area of application is toward offenses against penal laws or acts which jeopardize the safety of aircraft of [sic] passengers or property therein (Chapter I)."

324. Because of differing attitudes concerning penal laws, enforcement and prosecution of violators of such laws and toward the importance of civil air transportation.

325. For an example of such legislation, see Appendix E, Tokyo Convention Act 1967, [yet to be proclaimed] for the United Kingdom's domestic legislation which will, when proclaimed, provide for the implementation of the provisions of the Tokyo Convention.
Prompt action on the part of States is vitally necessary for purposes of uniformity, in view of the growing importance of commercial civil air transportation, to prevent serious international incidents, to ensure the vigorous prosecution of aircraft hijackers and to ensure the safety of passengers and crews aboard aircraft engaged in civil air transportation. While the Tokyo Convention meets its main objectives, it does not eliminate all legal problems pertaining to aircraft hijacking and Dr. FitzGerald writes, "True, it cannot be claimed that the Convention will solve all the problems.

326. For discussions of possible retaliatory action considered by the United Kingdom against Algeria which delayed for an unreasonable period in releasing the British aircraft, crew and pilots in the Tshombe aircraft hijacking incident reported in ch. 1, supra, see, The Debates in the House of Lords, July 6, 1967, July 13, 1967, July 18, 1967 and July 27, 1967, and the Debates in the House of Commons, July 27, 1967 and October 23, 1967; IFALPA's position on the detention of the pilots is summarized as "...[T]heir case is considered to represent a grave threat to all the pilots of the world and indeed to anyone carrying out his peaceful pursuits on or over the high seas." Aeroplane, September 13, 1967, p. 34. After the pilots were released IFALPA noted, "Occasionally, of course, a threat from a passenger (which may vary from the case of a drunk to a maniac with a bomb) has to be endured. However, the pilot is entitled not to expect any similar irresponsibilities from a government [Algeria, in this case]..." Aeroplane, Oct. 11, 1967, p. 15; see also Aeroplane, Aug. 30, 1967, p. 34.

327. See p. 61, supra.

328. E.g., the Convention does not contain provisions for the allocation of expenses associated with a hijacking incident and States are not required to declare aircraft hijacking as a crime under their laws.
that could arise within the scope of its subject-matter; but it should go a long way toward solving many of these problems. To paraphrase the popular slogan, [citing *possibilitia nunc; impossibilitia tune*] 'Air lawyers are doing the possible now; the impossible they will do later'.

In summary, the Tokyo Convention offers the best available international solution to the current problem of aircraft hijacking. It alone will provide the aircraft commander and all interested States with the powers necessary to handle aircraft hijackers through the use of restraint, disembarkation, delivery, custody, extradition, and prosecution. Further, Article 11 also provides the aircraft commander, who is faced with a hijacking situation, additional outside assistance, as appropriate, and, in addition, provides that the landing State of a hijacked aircraft will expeditiously release the aircraft and its crew, passengers and cargo. In the interim period, to quote Professor McWhinney, "Until we get a firm international convention, each country should apply its own criminal law to the full and also exert all diplomatic pressures against any countries who harbor or encourage hijackers."


330. Television presentation by Professor Edward McWhinney, Director, Institute of Air and Space Law, McGill University, Montreal, on CBC, channel 6, Montreal, 11:15 p.m., Aug. 1, 1968.
APPENDIXES
This draft contained the following Articles concerning piracy:

Article 1

As the terms are used in this convention:

1. The term "jurisdiction" means the jurisdiction of a state under international law as distinguished from municipal law.

2. The term "territorial jurisdiction" means the jurisdiction of a state under international law over its land, its territorial waters and the air above its land and territorial waters. The term does not include the jurisdiction of a state over its ships outside its territory.

3. The term "territorial sea" means that part of the sea which is included in the territorial waters of a state.

4. The term "high sea" means that part of the sea which is not included in the territorial waters of any state.

5. The term "ship" means any water craft or air craft of whatever size.

Article 2

Every state has jurisdiction to prevent piracy and to seize and punish persons and to seize and dispose of property because of piracy. This jurisdiction is defined and limited by this convention.

Article 3

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

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

2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.

3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.

Article 4

1. A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of paragraph 1 of Article 3, or to the purpose of committing any similar act within the territory of a state by descent from the high sea, provided in either case that the purposes of the persons in dominant control are not definitely limited to committing such acts against ships or territory subject to the jurisdiction of the state to which the ship belongs.

2. A ship does not cease to be a pirate ship after the commission of an act described in paragraph 1 of Article 3, or after the commission of any similar act within the territory of a state by descent from the high sea, as long as it continues under the same control.

Article 5

A ship may retain its national character although it has become a pirate ship. The retention or loss of national character is determined by the law of the state from which it was derived.

Article 6

In a place not within the territorial jurisdiction of another state, a state may seize a pirate ship or a ship taken by piracy and possessed by pirates, and things or persons on board.
Article 7

1. In a place within the territorial jurisdiction of another state, a state may not pursue or seize a pirate ship or a ship taken by piracy and possessed by pirates, except that if pursuit of such a ship is commenced by a state within its own territorial jurisdiction or in a place not within the territorial jurisdiction of any state, the pursuit may be continued into or over the territorial sea of another state and seizure may be made there, unless prohibited by the other state.

2. If a seizure is made within the territorial jurisdiction of another state in accordance with the provisions of paragraph 1 of this Article, the state making the seizure shall give prompt notice to the other state, and shall tender possession of the ship and other things seized and the custody of persons seized.

3. If the tender provided for in paragraph 2 of this article is not accepted, the state making the seizure may proceed as if the seizure had been made on the high sea.

Article 8

If a pursuit is continued or a seizure is made within the territorial jurisdiction of another state in accordance with the provisions of paragraph 1 of Article 7, the state continuing the pursuit or making the seizure is liable to the other state for any damage done by the pursuing ship, other than damage done to the pirate ship or the ship possessed by pirates, or to persons and things on board.

Article 9

If a seizure because of piracy is made by a state in violation of the jurisdiction of another state, the state making the seizure shall, upon the demand of the other state, surrender or release the ship, things and persons seized, and shall make appropriate reparation.

Article 10

If a ship seized on suspicion of piracy outside the territorial jurisdiction of the state making the seizure, is neither a pirate ship nor a ship taken by piracy and possessed by pirates, and if the ship is not subject to seizure on other grounds, the state making the seizure shall be liable to the state to which the ship belongs for any damage caused by the seizure.
Article 11

1. In a place not within the territorial jurisdiction of any state, a foreign ship may be approached and on reasonable suspicion that it is a pirate ship or a ship taken by piracy and possessed by pirates, it may be stopped and questioned to ascertain its character.

2. If the ship is neither a pirate ship or a ship taken by piracy and possessed by pirates, and if it is not subject to such interference on other grounds, the state making the interference shall be liable to the state to which the ship belongs for any damage caused by the interference.

Article 12

A seizure because of piracy may be made only on behalf of a state, and only by a person who has been authorized to act on its behalf.

Article 13

1. A state, in accordance with its law, may dispose of ships and other property lawfully seized because of piracy.

2. The law of the state must conform to the following principles:

(a) The interests of innocent persons are not affected by the piratical possession of use of property, nor by seizure because of such possession or use.

(b) Claimants of any interest in the property are entitled to a reasonable opportunity to prove their claims.

(c) A claimant who establishes the validity of his claim is entitled to receive the property or compensation therefor, subject to a fair charge for salvage and expenses of administration.

Article 14

1. A state which has lawful custody of a person suspected of piracy may prosecute and punish that person.
2. Subject to the provisions of this convention, the law of the state which exercises such jurisdiction defines the crime, governs the procedure and prescribes the penalty.

3. The law of the state must, however, assure protection to accused aliens as follows:

(a) The accused person must be given a fair trial before an impartial tribunal without unreasonable delay.

(b) The accused person must be given humane treatment during his confinement pending trial.

(c) No cruel and unusual punishment may be inflicted.

(d) No discrimination may be made against nationals of any state.

4. A state may intercede diplomatically to assure this protection to one of its nationals who is accused in another state.

Article 15

A state may not prosecute an alien for an act of piracy for which he has been charged and convicted or acquitted in a prosecution in another state.

Article 16

The provisions of this convention do not diminish a state's right under international law to take measures for the protection of its nationals, its ships and its commerce against interference on or over the high sea, when such measures are not based upon jurisdiction over piracy.

Article 17

1. The provisions of this convention shall supersede any inconsistent provisions relating to piracy in treaties in force among parties to this convention, except that such inconsistent provisions shall not be superseded in so far as they affect only the interests of the parties to that agreement inter se.
2. The provisions of this convention shall not prevent a party from entering into an agreement concerning piracy containing provisions inconsistent with this convention which affect only the interests of the parties to that agreement _inter se._

**Article 18**

The parties to this convention agree to make every expedient use of their powers to prevent piracy, separately and in co-operation.

**Article 19**

1. If there should arise between the High Contracting Parties a dispute of any kind relating to the interpretation or application of the present convention, and if such dispute cannot be satisfactorily settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the parties to the dispute providing for the settlement of international disputes.

2. In case there is no such agreement in force between the parties to the dispute, the dispute shall be referred to arbitration or judicial settlement. In the absence of agreement on the choice of another tribunal, the dispute shall, at the request of any one of the parties to the dispute be referred to the Permanent Court of International Justice, if all the parties to the dispute are parties to the Protocol of December 16, 1920, relating to the Statute of that Court; and if any of the parties to the dispute is not a party to the Protocol of December 16, 1920, to an arbitral tribunal constituted in accordance with the provisions of the Convention for the Pacific Settlement of International Disputes, signed at the Hague, October 18, 1907.
APPENDIX B

DRAFT OF THE INTERNATIONAL LAW COMMISSION
ON THE LAW OF THE SEA (1956)*

This draft contained the following Articles, with commentaries, concerning piracy:

"Piracy"

"Article 38"

"All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

"Commentary"

"(1) In its work on the articles concerning piracy, the Commission was greatly assisted by the research carried out at the Harvard Law School, which culminated in a draft convention of nineteen articles with commentary, prepared in 1932 under the direction of Professor Joseph Bingham. In general, the Commission was able to endorse the findings of that research.

"(2) Any State having an opportunity of taking measures against piracy, and neglecting to do, would be failing in a duty laid upon it by international law. Obviously, the State must be allowed a certain latitude as to the measures it should take to this end and in any individual case.

"Article 39"

"Piracy consists in any of the following acts:

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

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

* II Yearbook of the International Law Commission, 253, 282-83 (1956).
"(b) Against a ship, 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 acts making it a pirate ship or aircraft.

3. Any act of incitement or of intentional facilitation of an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

"Commentary

"(1) The Commission had to consider certain controversial points as to the essential features of piracy. It reached the conclusion that:

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

"(ii) The acts must be committed for private ends;

"(iii) Save in the case provided for in article 40, piracy can be committed only by private ships and not by warships or other government ships;

"(iv) Piracy can be committed only on the high seas or in a place situated outside the territorial jurisdiction of any State, and cannot be committed within the territory of a State or in its territorial sea;

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

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

"(2) With regard to point (iii), the Commission is aware that there are treaties, such as the Nyon Arrangement of 14 September 1937, which brand the sinking of merchant ships by submarines, against the dictates of humanity, as
piratical acts. But it is of the opinion that such treaties do not invalidate the principle that piracy can only be committed by private ships. In view of the immunity from interference by other ships which warships are entitled to claim, the seizure of such ships on suspicion of piracy might involve the gravest consequences. Hence the Commission feels that to assimilate unlawful acts committed by warships to acts of piracy would be prejudicial to the interests of the international community. The Commission was unable to share the view held by some of its members that the principle laid down in the Nyon Arrangement confirmed a new law in process of development. In particular, the questions arising in connection with acts committed by warships in the service of rival Governments engaged in civil war are too complex to make it seem necessary for the safeguarding of order and security on the high seas that all States should have a general right, let alone an obligation, to repress as piracy acts perpetrated by the warships of the parties in question.

"(3) As regards point (iv), the Commission considers, despite certain dissenting opinions, that where the attack takes place within the territory of a State, including its territorial sea, the general rule should be applied that it is a matter for the State affected to take the necessary measures for the repression of the acts committed within its territory. In this the Commission is also following the line taken by most writers on the subject.

"(4) In considering as 'piracy' acts committed in a place outside the jurisdiction of any State, the Commission had chiefly in mind acts committed by a ship or aircraft on an island constituting terra nullius or on the shores of an unoccupied territory. But the Commission did not wish to exclude acts committed by aircraft within a large unoccupied territory, since it wished to prevent such acts committed on ownerless territories from escaping all penal jurisdiction.

"(5) With regard to point (v), the Commission feels that acts committed in the air by one aircraft against another aircraft can hardly be regarded as acts of piracy. In any case such acts are outside the scope of these draft articles. However, acts committed by a pirate aircraft against a ship on the high seas may, in the Commission's view, be assimilated to acts committed by a pirate ship.

"(6) The view adopted by the Commission in regard to point (vi) tallies with the opinion of most writers. Even
where the purpose of the mutineers is to seize the ship, their acts do not constitute acts of piracy.

"Article 40

"The acts of piracy, as defined in article 39, committed by a government ship or a government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private vessel.

"Commentary

"A State ship or State aircraft whose crew has mutinied and taken control of a ship or aircraft must be assimilated to a private ship or aircraft. Acts committed by the crew or passengers of such a ship against another ship can therefore assume the character of acts of piracy. Clearly, the article ceases to apply once the mutiny has been suppressed and lawful authority restored.

"Article 41

"A ship or aircraft is considered a pirate ship or aircraft if it is intented by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 39. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

"Commentary

"The purpose of this article is to define the terms 'pirate ship' and 'pirate aircraft' as used in these articles. The mere fact that a ship sails without a flag is not sufficient to give it the character of a 'pirate' ship. The cases of pirate ships must be distinguished. First, there are ships intended to commit acts of piracy. Secondly, there is the case of ships which have already been guilty of such acts. Such ships can be considered as pirate ships so long as they remain under the control of the persons who have committed those acts.

"Article 42

"A ship or aircraft may retain its national character although it has become a pirate ship or aircraft. The retention or loss of national character is determined by the law of the State from which the national character was originally derived.
"Commentary

"It has been argued that a ship loses its national character by the fact of committing acts of piracy. The Commission does not share this view. Such acts involve the consequences referred to in article 43. Even though the rule under which a ship on the high seas is subject only to the authority of the flag State no longer applies, the ship keeps the nationality of the State in question, and, subject to the provisions of article 43, that State can apply its law to the ship in the same way as to other ships flying its flag. A pirate ship should only be regarded as a ship without nationality where the national laws of the State in question regard piracy as a ground for loss of nationality.

"Article 43

"On the high seas or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

"Commentary

"This article gives any State the right to seize pirate ships (and ships seized by pirates) and to have them adjudicated upon by its courts. This right cannot be exercised at a place under the jurisdiction of another State. The Commission did not think it necessary to go into details concerning the penalties to be imposed and the other measures to be taken by the courts.

"Article 44

"Where the seizure of a ship or aircraft on suspicion of piracy has been affected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft, for any loss or damage caused by the seizure.

"Commentary

"This article penalizes the unjustified seizure of ships on grounds of piracy. The penalty applies to
seizure in the circumstances described in article 43, and to all acts of interference as mentioned in article 46 (see the commentary on article 46), committed on the grounds of suspicion of piracy.

"Article 45

"A seizure on account of piracy may only be carried out by warships or military aircraft.

"Commentary

"(1) State action against ships suspected of engaging in piracy should be exercised with great circumspection, so as to avoid friction between States. Hence it is important that the right to take action should be confined to warships, since the use of other government ships does not provide the same safeguards against abuse.

"(2) Clearly this article does not apply in the case of a merchant ship which has repulsed an attack by a pirate ship and, in exercising its right of self-defence, overpowers the pirate ship and subsequently hands it over to a warship or to the authorities of a coastal State. This is not a 'seizure' within the meaning of this article.
APPENDIX C

GENEVA CONVENTION ON THE HIGH SEAS (1958)*

The 1958 Geneva Convention on the High Seas contains the following Articles concerning piracy:

"Article 14

"All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

"Article 15

"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 passengers of a private ship or 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 intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

"Article 16

"The acts of piracy, as defined in article 15, committed by warships, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

"Article 17

"A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 15. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

"Article 18

"A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

"Article 19

"On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to ships, aircraft or property, subject to the rights of third parties acting in good faith.

"Article 20

"Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft, for any loss or damage caused by the seizure.

"Article 21

"A seizure on account of piracy may only be carried out by warships or military aircraft, or other ships or aircraft on government service authorized to that effect."
The States parties to this Convention have agreed as follows:

Chapter 1 - Scope of the Convention

Article 1

1. This Convention shall apply in respect of:

(a) Offences against penal law;

(b) acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.

2. Except as provided in Chapter III, this Convention shall apply in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State.

3. For the purposes of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.

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

Article 2

Without prejudice to the provisions of Article 4 and 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.

Chapter II - Jurisdiction

Article 3

1. The State of registration of the aircraft is competent to exercise jurisdiction over offences 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 over offenses committed on board aircraft registered in such State.

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

Article 4

A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:

a) the offence has effect on the territory of such State;

b) the offence has been committed by or against a national or permanent residence of such State;

c) the offence is against the security of such State;

d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State;

e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.

Chapter III - Powers of the aircraft commander

Article 5

1. The provisions of this Chapter shall not apply to offences and acts committed or about to be committed by a person on board an aircraft in flight in the airspace of the State of registration or over the high seas or any other
area outside the territory of any State unless the last point of take-off or the next point of intended landing is situated in a State other than that of registration, or the aircraft subsequently flies in the airspace of a State other than that of registration with such person still on board.

2. Notwithstanding the provisions of Article 1, paragraph 3, an aircraft shall for the purposes of this Chapter, be considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the provisions of this Chapter shall continue to apply with respect to offences and acts committed on board until competent authorities of a State take over the responsibility for the aircraft and for the persons and property on board.

Article 6

1. The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1, paragraph 1, impose upon such person reasonable measures including restraint which are necessary:

   a) to protect the safety of the aircraft, or of persons or property therein; or
   b) to maintain good order and discipline on board; or
   c) to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this Chapter.

2. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.
Article 7

1. Measures of restraint imposed upon a person in accordance with Article 6 shall not be continued beyond any point at which the aircraft lands unless:

a) such point is in the territory of a non-Contracting State and its authorities refuse to permit disembarkation of that person or those measures have been imposed in accordance with Article 6, paragraph 1 c) in order to enable his delivery to competent authorities;

b) the aircraft makes a forced landing and the aircraft commander is unable to deliver that person to competent authorities; or

c) that person agrees to onward carriage under restraint.

2. The aircraft commander shall as soon as practicable, and if possible before landing in the territory of a State with a person on board who has been placed under restraint in accordance with the provisions of Article 6, notify the authorities of such State of the fact that a person on board is under restraint and of the reasons for such restraint.

Article 8

1. The aircraft commander may, in so far as it is necessary for the purpose of subparagraph a) or b) of paragraph 1 of article 6, disembark in the territory of any State in which the aircraft lands any person who he has reasonable grounds to believe has committed, or is about to commit, on board the aircraft an act contemplated in Article 1, paragraph 1 b).

2. The aircraft commander shall report to the authorities of the State in which he disembarks any person pursuant to this Article, the fact of, and the reasons for, such disembarkation.

Article 9

1. The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed on board the aircraft an
act which, in his opinion, is a serious offence according to the penal law of the State, of registration of the aircraft.

2. The aircraft commander shall as soon as practicable and if possible before landing in the territory of a Contracting State with a person on board when the aircraft commander intends to deliver in accordance with the preceding paragraph, notify the authorities of such State of his intention to deliver such person and the reasons therefor.

3. The aircraft commander shall furnish the authorities to whom any suspected offender is delivered in accordance with the provisions of this Article with evidence and information which, under the law of the State of registration of the aircraft, are lawfully in his possession.

Article 10

For actions taken in accordance with this Convention neither the aircraft commander, any other member of the crew, any passenger, the owner or operator of the aircraft, nor the person on whose behalf the flight was performed shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken.

Chapter IV - Unlawful Seizure of Aircraft

Article 11

1. When 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 when such an act is about to be committed, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.

2. In the cases contemplated in the preceding paragraph, the Contracting State in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.
Chapter V - Powers and Duties of States

Article 12

Any Contracting State shall allow the commander of an aircraft registered in another Contracting State to disembark any person pursuant to Article 8, paragraph 1.

Article 13

1. Any Contracting State shall take delivery of any person whom the aircraft commander delivers pursuant to Article 9, paragraph 1.

2. Upon being satisfied that the circumstances so warrant, any Contracting State shall take custody or other measures to ensure the presence of any person suspected of an act contemplated in Article 11, paragraph 1 and of any person of whom it has taken delivery. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted.

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

4. Any Contracting State, to which a person is delivered pursuant to Article 9, paragraph 1, or in whose territory an aircraft lands following the commission of an act contemplated in Article 11, paragraph 1, shall immediately make a preliminary enquiry into the facts.

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

Article 14

1. When any person has been disembarked in accordance with Article 8, paragraph 1, or delivered in
accordance with Article 9, paragraph 1, or has disembarked after committing an act contemplated in Article 11, paragraph 1, and when such person cannot or does not desire to continue his journey and the State of landing refuses to admit him, that State may, if the person in question is not a national or permanent resident of that State, return him to the territory of the State of which he is a national or permanent resident or to the territory of the State in which he began his journey by air.

2. Neither disembarkation, nor delivery, nor the taking of custody or other measures contemplated in Article 13, paragraph 2, nor return of the person concerned, shall be considered as admission to the territory of the Contracting State concerned for the purpose of its law relating to entry or admission of persons and nothing in this Convention shall affect the law of a Contracting State relating to the expulsion of persons from its territory.

Article 15

1. Without prejudice to Article 14, any person who has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, or has disembarked after committing an act contemplated in Article 11, paragraph 1, and who desires to continue his journey shall be at liberty as soon as practicable to proceed to any destination of his choice unless his presence is required by the law of the State of landing for the purpose of extradition or criminal proceedings.

2. Without prejudice to its law as to entry and admission to, and extradition and expulsion from its territory, a Contracting State in whose territory a person has been disembarked in accordance with article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1 or has disembarked and is suspected of having committed an act contemplated in Article 11, paragraph 1, shall accord to such person treatment which is no less favourable for his protection and security than that accorded to nationals of such Contracting State in like circumstances.

Chapter VI - Other Provisions

Article 16

1. Offences committed on aircraft registered in a Contracting State shall be treated, for the purpose of
extradition, as if they had been committed not only in the place in which they have occurred but also in the territory of the State of registration of the aircraft.

2. Without prejudice to the provisions of the preceding paragraph, nothing in this Convention shall be deemed to create an obligation to grant extradition.

Article 17

In taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with any offence committed on board an aircraft the Contracting States shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo.

Article 18

If Contracting States establish joint air transport operating organizations or international operating agencies, which operate aircraft not registered in any one State those States shall, according to the circumstances of the case, designate the State among them which, for the purposes of this Convention, shall be considered as the State of registration and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States Parties to this Convention.

Chapter VII - Final Clauses

Article 19

Until the date on which this Convention comes into force in accordance with the provisions of Article 21, it shall remain open for signature on behalf of any State which at that date is a Member of the United Nations or of any of the Specialized Agencies.

Article 20

1. This Convention shall be subject to ratification by the signatory States in accordance with their constitutional procedures.

2. The instruments of ratification shall be deposited with the International Civil Aviation Organization.
Article 21

1. As soon as twelve of the signatory States have deposited their instruments of ratification of this Convention, it shall come into force between them on the ninetieth day after the date of the deposit of the twelfth instrument of ratification. It shall come into force for each State ratifying thereafter on the ninetieth day after the deposit of its instrument of ratification.

2. As soon as this Convention comes into force, it shall be registered with the Secretary-General of the United Nations by the International Civil Aviation Organization.

Article 22

1. This Convention shall, after it has come into force, be open for accession by any State Member of the United Nations or of any of the Specialized Agencies.

2. The accession of a State shall be effected by the deposit of an instrument of accession with the International Civil Aviation Organization and shall take effect on the ninetieth day after the date of such deposit.

Article 23

1. Any Contracting State may denounce this Convention by notification addressed to the International Civil Aviation Organization.

2. Denunciation shall take effect six months after the date of receipt by the International Civil Aviation Organization of the notification of denunciation.

Article 24

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

3. Any Contracting State having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the International Civil Aviation Organization.

Article 25

Except as provided in Article 24 no reservation may be made to this convention.

Article 26

The international Civil Aviation Organization shall give notice to all States Members of the United Nations or of any of the Specialized Agencies:

a) of any signature of this Convention and the date thereof;

b) of the deposit of any instrument of ratification or accession and the date thereof;

c) of the date on which this Convention comes into force in accordance with Article 21, paragraph 1;

d) of the receipt of any notification of denunciation and the date thereof; and

e) of the receipt of any declaration or notification made under Article 21 and the date thereof.

IN WITNESS WHEREOF the undersigned Plenipotentiaries having been duly authorized, have signed this Convention.

DONE at Tokyo on the fourteenth day of September One Thousand Nine Hundred and Sixty-three in three authentic texts drawn up in the English, French and Spanish languages.
This Convention shall be deposited with the International Civil Aviation Organization with which, in accordance with Article 19, it shall remain open for signature and the said Organization shall send certified copies thereof to all States Members of the United Nations or of any Specialized Agency.
APPENDIX E

TOKYO CONVENTION ACT 1967*
[Yet to be proclaimed]

1967 CHAPTER 52

An Act to make provision with a view to the ratification on behalf of the United Kingdom of the Convention on Offences and certain other Acts Committed on board Aircraft, signed in Tokyo on 14th September 1963, and to give effect to certain provisions relating to piracy of the Convention on the High Seas, signed in Geneva on 29th April 1958; and for purposes connected with the matters aforesaid.

[14th July 1967]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. —(1) Any act or omission taking place on board a British-controlled aircraft while in flight elsewhere than in or over the United Kingdom which, if taking place in, or in a part of, the United Kingdom, would constitute an offence under the law in force in, or in that part of, the United Kingdom shall constitute that offence:

Provided that this subsection shall not apply to any act or omission which is expressly or impliedly authorised by or under that law when taking place outside the United Kingdom.

(2) No proceedings for any offence under the law in force in, or in a part of, the United Kingdom committed on board an aircraft while in flight elsewhere than in or over the United Kingdom (other than an offence under, or under any instrument made under, the Civil Aviation Acts 1949 and 1960 or the Civil Aviation (Eurocontrol) Act 1962) shall be instituted—

(a) in England and Wales, except by or with the consent of the Director of Public Prosecutions; or

(b) in Northern Ireland, except by or with the consent of the Attorney General for Northern Ireland;

* United Kingdom (1967).
but the foregoing provisions of this subsection shall not prevent the arrest, or the issue of a warrant for the arrest, of any person in respect of any offence, or the remanding in custody or on bail of any person charged with any offence.

(3) For the purpose of conferring jurisdiction, any offence under the law in force in, or in a part of, the United Kingdom committed on board an aircraft in flight shall be deemed to have been committed in any place in the United Kingdom (or, as the case may be, in that part thereof) where the offender may for the time being be; and section 62(1) of the Civil Aviation Act 1949 is hereby repealed.

2. --(1) For the purposes of the application of the Extradition Act 1870 to crimes committed on board an aircraft in flight, any aircraft registered in a Convention country shall at any time while that aircraft is in flight be deemed to be within the jurisdiction of that country, whether or not it is for the time being also within the jurisdiction of any other country; and paragraphs (1) to (3) of section 16 of that Act (which have effect where a person's surrender is sought in respect of a crime committed on board a vessel on the high seas which comes into any port of the United Kingdom) shall have effect also where a person's surrender is sought in respect of a crime committed on board an aircraft in flight which lands in the United Kingdom, but as if in the said paragraph (3) for references to the place at which the person whose surrender is sought is disembarked.

(2) Sections 17 and 22 of the said Act of 1870 (which relate to the extent of that Act) shall apply to subsection (1) of this section as if that subsection were included in that Act.

3. --(1) The provisions of subsections (2) to (5) of this section shall have effect for the purposes of any proceedings before any court in the United Kingdom.

(2) If the commander of an aircraft in flight, wherever that aircraft may be, has reasonable grounds to believe in respect of any person on board the aircraft-

(a) that the person in question has done or is about to do any act on the aircraft while it is in flight which jeopardises or may jeopardise-
(i) the safety of the aircraft or of persons or property on board the aircraft; or

(ii) good order and discipline on board the aircraft; or

(b) that the person in question has done on the aircraft while in flight any act which in the opinion of the commander is a serious offence under any law in force in the country in which the aircraft is registered, not being a law of a political nature or based on racial or religious discrimination,

then, subject to subsection (4) of this section, the commander may take with respect to that person such reasonable measures, including restraint of his person, as may be necessary—

(i) to protect the safety of the aircraft or of persons or property on board the aircraft; or

(ii) to maintain good order and discipline on board the aircraft; or

(iii) to enable the commander to disembark or deliver that person in accordance with subsection (5) of this section;

and for the purposes of paragraph (b) of this subsection any British-controlled aircraft shall be deemed to be registered in the United Kingdom whether or not it is in fact so registered and whether or not it is in fact registered in some other country.

(3) Any member of the crew of an aircraft and any other person on board the aircraft may, at the request or with the authority of the commander of the aircraft, and any such member shall if so required by that commander, render assistance in restraining any person whom the commander is entitled under subsection (2) of this section to restrain; and at any time when the aircraft is in flight any such member or other person may, without obtaining the authority of the commander, take with respect to any person on board the aircraft any measures such as are mentioned in the said subsection (2) which he has reasonable grounds to believe are immediately necessary to protect the safety of the aircraft or of persons or property on board the aircraft.
(4) Any restraint imposed on any person on board an aircraft under the powers conferred by the foregoing provisions of this section shall not be continued after the time when the aircraft first thereafter ceases to be in flight unless before or as soon as is reasonably practicable after that time the commander of the aircraft causes notification of the fact that a person on board the aircraft is under restraint and of the reasons therefore to be sent to an appropriate authority of the country in which the aircraft so ceases to be in flight, but subject to such notification may be continued after that time—

(a) for any period (including the period of any further flight) between that time and the first occasion thereafter on which the commander is able with any requisite consent of the appropriate authorities to disembark or deliver the person under restraint in accordance with subsection (5) of this section; or

(b) if the person under restraint agrees to continue his journey under restraint on board that aircraft.

(5) The commander of an aircraft—

(a) if in the case of any person on board the aircraft he has reasonable grounds—

(i) to believe as mentioned in subsection (2)(a) of this section; and

(ii) to believe that it is necessary so to do in order to protect the safety of the aircraft or of persons or property on board the aircraft or to maintain good order and discipline on board the aircraft,

may disembark that person in any country in which that aircraft may be; and

(b) if in the case of any person on board the aircraft he has reasonable grounds to believe as mentioned in subsection (2)(b) of this section, may deliver that person—

(i) in the United Kingdom, to a constable or immigration officer; or
(ii) in any other country which is a Convention country, to an officer having functions corresponding to the functions in the United Kingdom either of a constable or of an immigration officer.

(6) The Commander of an aircraft-

(a) if he disembarks any person in pursuance of subsection (5)(a) of this section, in the case of a British-controlled aircraft, in any country or, in the case of any other aircraft, in the United Kingdom, shall report the fact of, and the reasons for, that disembarkation to-

(i) an appropriate authority in the country of disembarkation; and

(ii) the appropriate diplomatic or consular office of the country of nationality of that person;

(b) if he intends to deliver any person in accordance with subsection (5)(b) of this section in the United Kingdom or, in the case of a British-controlled aircraft, in any other country which is a Convention country, shall before or as soon as reasonably practicable after landing give notification of his intention and of the reasons therefor-

(i) where the country in question is the United Kingdom, to a constable or immigration officer; or, in the case of any other country, to an officer having functions corresponding to the functions in the United Kingdom either of a constable or of an immigration officer;

(ii) in either case to the appropriate diplomatic or consular office of the country of nationality of that person;

and any commander of an aircraft who without reasonable cause fails to comply with the requirements of this subsection shall be liable on summary conviction to a fine not exceeding one hundred pounds.
4. For the avoidance of doubt, it is hereby declared that for the purposes of any proceedings before a court in the United Kingdom in respect of piracy, the provisions set out in the Schedule to this Act of the Convention on the High Seas signed at Geneva on 29th April 1958 shall be treated as constituting part of the law of nations; and any such court having jurisdiction in respect of piracy committed on the high seas shall have jurisdiction in respect of piracy committed by or against an aircraft wherever that piracy is committed.

5. --(1) Where in any proceedings before a court in the United Kingdom for an offence committed on board an aircraft the testimony of any person is required and the court is satisfied that the person in question cannot be found in the United Kingdom, there shall be admissible in evidence before that court any deposition relating to the subject matter of those proceedings previously made on oath by that person outside the United Kingdom which was so made-

(a) in the presence of the person charged with the offence; and

(b) before a judge or magistrate of a country such as is mentioned in section 1(3) of the British Nationality Act 1948 as for the time being in force, or which is part of Her Majesty's dominions, or in which Her Majesty for the time being has jurisdiction, or before a consular officer of Her Majesty's Government in the United Kingdom.

(2) Any such deposition shall be authenticated by the signature of the judge, magistrate or consular officer before whom it was made who shall certify that the person charged with the offence was present at the taking of the deposition.

(3) It shall not be necessary in any proceedings to prove the signature or official character of the person appearing so to have authenticated any such deposition or to have given such a certificate, and such a certificate shall, unless the contrary is proved, be sufficient evidence in any proceedings that the person charged with the offence was present at the making of the deposition.

(4) If a complaint is made to such a consular officer as aforesaid that any offence has been committed on a British-controlled aircraft while in flight elsewhere than in or over the United Kingdom, that officer may inquire into the case upon oath.
(5) In this section—

(a) the expression "deposition" includes any affidavit, affirmation or statement made upon oath; and

(b) the expression "oath" includes an affirmation or declaration in the case of persons allowed by law to affirm or declare instead of swearing;

and nothing in this section shall prejudice the admissions as evidence of any deposition which is admissible in evidence apart from this section.

6. --(1) In any legal proceedings—

(a) a document purporting to be certified by such authority or person as may be designated for the purpose by regulations made by the Board of Trade as being, or being a true copy of, or of part of, a document issued or record kept in pursuance of—

(i) an Order in Council made under section 8 of the Civil Aviation Act 1949; or

(ii) the Civil Aviation (Licensing) Act 1960 or this Act,

by, or by the Minister in charge of, a government department, by an official of a government department who is specified for the purpose in any such Order in Council, or by the Air Registration Board or the Air Transport Licensing Board; or

(b) a document printed by Her Majesty's Stationery Office and purporting to be the publication known as the "United Kingdom Air Pilot" or a publication of the series known as "Notam—United Kingdom",

shall be evidence, and in Scotland sufficient evidence, of the matters appearing from that document.

(2) Section 5 of the Civil Aviation (Eurocontrol) Act 1962 (which relates to the use as evidence of certain records of the position of an aircraft of any message or
signal transmitted to or received from an aircraft) shall apply to any legal proceedings; and the authorities or persons to be designated for the purposes of subsection (1) of that section shall, instead of being designated as mentioned in subsection (2) of that section, be designated in all cases by regulations made under this subsection by the Board of Trade; and-

(a) the said subsection (2) is hereby repealed; but

(b) any provision made by regulations or Order in Council by virtue of that subsection and in force immediately before the commencement of this subsection shall continue in force as if contained in regulations made by the Board of Trade under this subsection until varied or revoked by regulations so made.

(3) Any regulations made under this section shall be made by statutory instrument and be subject to annulment in pursuance of a resolution of either House of Parliament.

7. --(1) In this Act, except where the context otherwise requires, the following expressions have the following meanings respectively, that is to say-

"aircraft" means any aircraft, whether or not a British-controlled aircraft, other than-

(a) a military aircraft; or

(b) an aircraft which, not being a military aircraft, belongs to or is exclusively employed in the service of Her Majesty in right of the United Kingdom;

but Her Majesty may by Order in Council, which may be varied or revoked by a subsequent Order in Council, provide that any of the provisions of this Act shall apply with or without modifications to aircraft such as are mentioned in paragraph (b) of this definition;

"British-controlled aircraft" means an aircraft-

(a) which is for the time being registered in the United Kingdom; or

(b) which is not for the time being registered in any country but in the case of which either the operator of the aircraft or each
person entitled as owner to any legal or beneficial interest in it satisfied the following requirements, namely-

(i) that he is a person qualified to be the owner of a legal or beneficial interest in an aircraft registered in the United Kingdom; and

(ii) that he resides or has his principal place of business in the United Kingdom; or

(c) which, being for the time being registered in some other country, is for the time being chartered by demise to a person who, or to persons each of whom, satisfied the requirements aforesaid;

"commander" in relation to an aircraft means the member of the crew designated as commander of that aircraft by the operator thereof, or, failing such a person, the person who is for the time being the pilot in command of the aircraft;

"Convention country" means a country in which the Tokyo Convention is for the time being in force; and Her Majesty may by Order in Council certify that any country specified in the Order is for the time being a Convention country, and any such Order in Council for the time being in force shall be conclusive evidence that the country in question is for the time being a Convention country but may be varied or revoked by a subsequent Order in Council;

"military aircraft" means-

(a) an aircraft of the naval, military or air forces of any country; or

(b) any other aircraft in respect of which there is in force a certificate issued in accordance with any Order in Council in force under the Civil Aviation Act 1949 that the aircraft is to be treated for the purposes of that Order in Council as a military aircraft;

and a certificate of the Secretary of State that any aircraft is or is not a military aircraft for the purposes of this Act shall be conclusive evidence of the fact certified;
"operator" in relation to any aircraft at any time means the person who at that time has the management of that aircraft;

"pilot in command" in relation to an aircraft means a person who for the time being is in charge of the piloting of the aircraft without being under the direction of any other pilot in the aircraft;

"Tokyo Convention" means the Convention on Offences and certain other Acts Committed on board Aircraft signed at Tokyo on 14th September 1963.

(2) For the purposes of this Act, the period during which an aircraft is in flight shall be deemed to include-

(a) any period from the moment when power is applied for the purpose of the aircraft taking off on a flight until the moment when the landing run (if any) at the termination of that flight ends; and

(b) for the purposes of section 3 of this Act-

(i) any further period from the moment when all external doors, if any, of the aircraft are closed following embarkation for a flight until the moment when any such door is opened for disembarkation after that flight; and

(ii) if the aircraft makes a forced landing, any period thereafter until the time when competent authorities of the country in which the forced landing takes place take over the responsibility for the aircraft and for the persons and property on board the aircraft (being, if the forced landing takes place in the United Kingdom, the time when a constable arrives at the place of landing);

and any reference in this Act to an aircraft in flight shall include a reference to an aircraft during any period when it is on the surface of the sea or land but not within the territorial limits of any country.

(3) In this Act, except where the context otherwise requires, any reference to a country or the territorial limits thereof shall be construed as including a reference
to the territorial waters, if any, of that country, and references to a part of the United Kingdom shall be construed as including references to so much of the territorial waters of the United Kingdom as are adjacent to that part.

(4) If the Board of Trade are satisfied that the requirements of Article 18 of the Tokyo Convention have been satisfied (which Article makes provision as to the country which is to be treated as the country of registration of certain aircraft operated by joint air transport organisations or international operating agencies established by two or more Convention countries) the Board may by order provide that for the purposes of this Act such aircraft as may be specified in the order shall be treated as registered in such Convention country as may be so specified; and any such order shall be made by statutory instrument and may be varied or revoked by a subsequent order under this subsection.

(5) For the purposes of section 7 of the Costs in Criminal Cases Act 1952 (which makes provision with respect to England and Wales as to the costs payable out of county or county borough funds) any offence—

(a) which is committed on board an aircraft while in flight, whether in or over or outside the United Kingdom; or

(b) in respect of which jurisdiction is conferred by section 4 of this Act,

shall be treated as having been committed within Admiralty jurisdiction; and subsections (2) and (3) of the said section 7 (which make provision with respect of offences committed within Admiralty jurisdiction including provision for the repayment out of moneys provided by Parliament of costs paid out of any such fund as aforesaid) shall apply accordingly.

(6) The powers conferred on the Board of Trade by section 6 of this Act and subsection (4) of this section shall be exercisable by the President of the Board, any Minister of State with duties concerning the affairs of the Board, any secretary, under-secretary or assistant secretary of the Board, or any person authorised in that behalf by the President.
8. -(1) Her Majesty may by Order in Council direct that such of the provisions of this Act other than section 2 as may be specified in the Order shall extend, with such exceptions, adaptations and modifications as may be so specified, to any of the Channel Islands, to the Isle of Man or to any other territory outside the United Kingdom for the international relations of which Her Majesty's Government in the United Kingdom are responsible.

(2) Any Order in Council made under this section may be varied or revoked by a subsequent Order in Council so made.

9. -(1) This Act may be cited as the Tokyo Convention Act 1967.

(2) This Act, the Civil Aviation Acts 1949 and 1960, and the Civil Aviation (Eurocontrol) Act 1962 may be cited together as the Civil Aviation Acts 1949 to 1967.

(3) This Act shall come into force on such day as Her Majesty may by Order in Council appoint and different days may be appointed for different purposes.
APPENDIX F

UNITED STATES: A HIJACKING PROPOSAL*

INTRODUCTION

1. The United States proposes that the draft Convention on Offenses and Certain Other Acts Occurring on Board Aircraft include provisions dealing with forceable seizure or "hijacking" of aircraft. In general, the United States advocates the incorporation of an additional article that would seek to deter hijacking of aircraft by encouraging the detention and prosecution of persons who commit such acts, and by eliminating any possible benefit or profit that might accrue to such persons or to third parties. Additionally, it is proposed that the rights and interests of passengers, crew members and aircraft operators be protected in the event they are subjected to such acts.

1.1 It may be necessary to amend certain provisions of the draft Convention to take account of the additional Article proposed herein. Any such consequential changes can be dealt with by the Subcommittee at its March meeting in Montreal.

NEED FOR ADDITIONAL ARTICLE

2. The rash of hijacking incidents occurring in quick succession in 1961 are demonstrative of the need for international legislation on this subject; and the present draft Convention is particularly suited to satisfy this need. As noted by the Legal Committee (LC/SC "Legal Status 1962," No. 2), the need for international agreement on the subject of offenses committed on board aircraft consists of, in particular, "the disparity in the provisions of various national laws related to such matters, the lack in several instances of a law equivalent in the case of aircraft to the rule of international law relating to the application of the law of the flag in the case of ships, and the desirability of unification of certain rules on the subject." Fundamental to the Convention is the concept of protecting the safety of flight by eliminating and deterring acts on board aircraft that endanger safety.

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2.1 It is self-evident that persons who attempt to wrest control of transport aircraft by acts of violence or threats of violence are jeopardizing the lives of the passengers and crews of such aircraft. Such seizures of aircraft may involve altercations involving passengers as well as crew members during which the aircraft could cease to be under proper control either by reason of distraction or incapacitation of the operating crew or damage to the aircraft and could thus result in disaster. Moreover, even if the initial seizure were successful, an altered route and destination could also result in disaster because of insufficient fuel or unfamiliarity with appropriate air lanes and airports due to the absence of maps and other necessary flight information. These matters need not be labored. What must be stressed is that in the present age of large transport aircraft, in which it is not uncommon that 100 or more human beings are transported at one time, every effort must be made to deter and prevent by both international and national legislation the crime of aircraft seizure whether it be characterized by the term "hijacking" or by some other term.

2.2 Indirectly such incidents may deter considerable numbers of passengers from travelling because of fear that they may be subjected to the dangers and inconveniences inherent in the forceable seizure of aircraft, thus hindering the free flow of international air commerce.

2.3 Such acts may commence, and have commenced, in national airspace; and such acts may be, and have been, directed against aircraft operated as domestic flights. However, it is a uniform characteristic of hijacking incidents that the intention of the perpetrator is to remove the aircraft from the jurisdiction of one State to the jurisdiction of another State. Such an incident, whether successful or not, may or may not involve flight over the high seas or, if it does involve flight over the high seas, the act may not commence in airspace over the high seas. Indeed, certain of the hijacking incidents of 1961 were commenced in the sovereign airspace of one State, continued over the high seas, and terminated in the sovereign airspace and territory of another State. It is therefore necessary for international legislation on this subject to be of the widest scope: to accomplish the proscription of acts of hijacking whether they may occur by reference to national law; to permit extradition and trial of malefactors where appropriate; and to protect and restore the rights of passengers, crew members, shippers and aircraft operators.
2.4 The Convention on the High Seas, formulated at Geneva on April 29, 1958, defines piracy in Article 15 to include aircraft as well as ships. However, the definition is limited jurisdictionally to acts of piracy occurring on or over the high seas and outside the jurisdiction of States. Moreover, acts of mutiny apparently are excluded. The International Law Commission, which drafted the Article, considered that the definition excluded "acts committed on board a ship by the crew or passengers and directed against persons or property on the ship ...."\(^1\) It is unclear whether persons who conspire to seize an aircraft before boarding but hold passenger tickets or crew licenses can be considered pirates. The ambiguity inherent in Article 15 would appear to make the definition of aircraft piracy in the Convention on the High Seas of very limited efficacy. Thus even a modern formulation of piracy, which is fundamentally a 17th century concept, has little practical application to aircraft seizure. For this reason the draft Convention on Offenses and Certain Other Acts Occurring on Board Aircraft should provide for the application of law more suited to the characteristics of aircraft hijacking.

PROPOSED ARTICLE

3. The United States proposes to meet these objectives by an additional Article in the Draft Convention on Offenses and Certain Other Acts Occurring on Board Aircraft as follows:

**ARTICLE --**

(a) Each Contracting State agrees that following the commission, with respect to an aircraft, of illegal acts of seizure or exercise of control by force or violence or threat of force or violence, the first Contracting State in which that aircraft thereafter lands will take custody of the person or persons committing such acts.

(b) The Contracting State taking custody will immediately notify the State of registry of the aircraft and, if applicable, the State in whose territory the act occurred, of the fact that such

person or persons in accordance with applicable law to the jurisdiction of the State of registration of the aircraft, or to the jurisdiction of the State in whose territory the act occurred. If no such request is received, each Contracting State may try such person or persons under its own law to the extent such acts are by its laws made criminal.

(c) Each Contracting State agrees, as soon as practicable after a landing, under the circumstances contemplated in subparagraph (a) of this Article, to permit the passengers and crew of such aircraft to continue their travel and to release the aircraft to continue their travel and to release the aircraft and the cargo to the operator of the aircraft lawfully in possession at the time of the unlawful seizure and to permit such operator or his agents to move the aircraft and its cargo to such other place or places as such operator may, at his discretion, elect. Regardless of any applicable law of the State that could serve to delay or require the aircraft to remain therein, such aircraft or its crew, passengers, or cargo shall not be detained by reason of any claims that may be asserted against the aircraft, its operator or its crew, passengers, or cargo by any person or interest, private or public, except claims for reasonable compensation for work performed, or material, fuel and the like provided, necessary to render the aircraft airworthy and otherwise ready for continued flight.

COMMENT

4. Paragraph (a). The words "illegal seizure or exercise of control by force or violence or threat of force or violence" are generic in nature and refer to any penal statute of Contracting States which proscribes seizure of aircraft. Thus the specific terms of a Contracting State's penal statute need not be identical to the generic phrase used to describe seizure in the Article. Moreover, this Convention does not attempt to limit the jurisdictional scope of such statutes but leaves such restriction to determination by national and international law. More broadly, the words would also embrace the penal law of any Contracting State, whether in the form of a statute or not, including, but not limited to, common law crimes as well as acts regarded in the law of any Contracting State as crimes under international law.
4.1 Anyone violating the penal law relating to seizure of aircraft of any Contracting State will be taken into custody by the Contracting State in which the seized aircraft lands. Upon such landing paragraphs (b) and (c) became applicable.

4.2 Paragraph (b). This paragraph is largely self-explanatory. It is consistent with extradition arrangements.

4.3 Paragraph (c). This paragraph relates to the protection of rights and interests of passengers, crew, and aircraft operators and seeks to prevent and deter potential hijackers from seizing aircraft by ensuring that no benefits are allowed to accrue to such persons or to third parties by reason of their offenses. Further, in order to facilitate the safe and free flow of the movement of passengers in international air transportation, and in order to protect operators, it is provided that passengers, crew and aircraft will be, as soon as practicable, permitted safe and prompt exit from the place where the hijacked aircraft landed. With a view to encouraging timely departure of such aircraft, an exception protects the rights of those who perform services or provide materials necessary to permit the aircraft to depart the place where the hijacked aircraft landed.

CONCLUSION

5. Adoption of these proposals would serve to enhance the free flow of international air transportation by preventing or deterring persons from perpetrating acts of forceable seizure of aircraft or hijacking.
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