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Jurisdiction Over Crimes On Board Aircraft

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Book Review

JURISDICTION OVER CRIMES ON BOARD AIRCRAFT. By Sami Shubber. The Hague, Netherlands: Martinus Nijhoff. 1973. Pp. 369.

The 1963 Tokyo Convention (Convention)¹ established a legal regime to govern jurisdiction over penal offenses committed aboard aircraft on international flights. In addition the Convention elaborated a set of rules, including a system of limited immunity from subsequent administrative, civil, or criminal action, giving the aircraft commander, crew members, and even passengers, the right to take countermeasures under certain circumstances to restrain the criminal actor.² It was not until 1969 when the peril of hijacking became international in scope, however, that there was sufficient impetus and interest on the part of enough States to ratify the Convention and bring it into force. In the eleven years since its adoption the Convention as a whole has been the subject of serious consideration by only a handful of concerned writers.³ On the other hand, there has been a plethora of comment on aircraft

¹ Convention On Offenses and Certain Other Acts Committed On Board Aircraft, June 30, 1969 [1963], 20 U.S.T. 2941, T.I.A.S. No. 6768.

² The author synthesizes its scope and intent by noting:

[N]ot only crimes, in general, have been subjected to the Convention, but also acts which are not crimes, but endanger the safety of the aircraft, persons, or property on board, or jeopardize good order and discipline.

Since the Tokyo Convention aims, *inter alia*, at maintaining an orderly society in the aircraft, it provides the aircraft commander, his crew and even passengers, with certain rights to intervene, if necessary, and under the conditions laid down in the Convention

S. SHUBBER, JURISDICTION OVER CRIMES ON BOARD AIRCRAFT 18 (1973) [hereinafter cited JOCOPA].

³ See, e.g., Boyle, *Jurisdiction Over Crimes Committed in Flight: An International Convention*, 3 AM. CRIM. L.Q. 68 (1965); Boyle & Pulsifer, *Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, 30 J. AIR L. & COM. 305 (1964); Denaro, *In-Flight Crimes, the Tokyo Convention, and Federal Judicial Jurisdiction*, 35 J. AIR L. & COM. 171 (1969); FitzGerald, *Offenses and Certain Other Acts Committed on Board Aircraft: the Tokyo Convention of 1963*, 2 CAN. YEAR BOOK L. 191 (1964); Gutierrez, *Should the Tokyo Convention of 1963 Be Ratified?*, 31 J. AIR L. & COM. 1 (1965); Samuels, *Crimes Committed on Board Aircraft: Tokyo Convention Act 1967*, 42 BRIT. YEAR BOOK INT'L L. 271 (1967).

hijacking,⁴ a matter dealt with by article 11 of the Convention and now specifically covered by an entirely separate international agreement—the 1970 Hague Convention.⁵ The Hague Convention requires extradition of the hijacker or alternately prosecution by the recipient Contracting State.⁶ The Tokyo Convention does not require extradition, and for this chief weakness it often has been referred to as “the toothless tiger” because air crimes jurisdictionally are proscribed yet the next necessary step, machinery for effectual enforcement, is lacking.⁷

It is against this background that Dr. Shubber analyzes the Convention which despite inherent weaknesses is worthy of study. In fact, in the last paragraph of his work, Dr. Shubber admits:

[T]he Convention is not a perfect instrument in either substance or terminology, but it is a good step in the direction of combating crimes on board aircraft, in an age where one person in the aircraft may, by his conduct, endanger the lives of over 300 persons traveling by air.⁸

The dominant theme and purpose of the Convention, Dr. Shubber points out, “is the maintenance of law and order on board aircraft.”⁹ It was meant to ensure “safety in aircraft, protection of

⁴ See, e.g., *Aircraft Hijacking: Criminal and Civil Aspects*, 22 U. FLA. L. REV. 72 (1969); Evans, *Aircraft Hijacking: Its Cause and Cure*, 63 AM. J. INT'L L. 695 (1969); Evans, *Aircraft Hijacking: What is Being Done*, 67 AM. J. INT'L L. 641 (1973); Loy, *Some International Approaches to Dealing With Hijacking of Aircraft*, 4 INT'L LAW 444 (1970); McClintock, *Skyjacking: Its Domestic Civil and Criminal Ramifications*, 39 J. AIR L. & COM. 29 (1973); *Symposium on Hijacking*, 37 J. AIR L. & COM. vii (1971); *Skyjacking: Problems and Potential Solutions—A Symposium*, 18 VILL. L. REV. 985 (1973); Volpe, *Aircraft Hijacking: Some Domestic and International Responses*, 59 KY. L.J. 273 (1970-71).

⁵ Convention for the Suppression of Unlawful Seizure of Aircraft, Oct. 14, 1971 [], — U.S.T. —, T.I.A.S. No. 7192. See generally Shubber, *Aircraft Hijacking Under the Hague Convention 1970—A New Regime?*, 22 INT'L & COMP. L.Q. 687 (1973); Thomas & Kirby, *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 22 INT'L & COMP. L.Q. 163 (1973). The author touches on the 1970 Hague Convention in a few places. See JOCOBA at 71, 144, 171-76, 183.

⁶ 1970 HAGUE CONVENTION arts. 7 & 8.

⁷ Dr. Shubber observes, but really fails to emphasize, this basic structural weakness of the Convention. JOCOBA at 74, 170. Even in the introduction, he says: “The problem posed by crimes committed in aircraft is, basically, one of conflict or lack of jurisdiction.” JOCOBA at 1.

⁸ JOCOBA at 329.

⁹ *Id.* at 31. Dr. Shubber earlier had said:

It is submitted that the Tokyo Convention aims at the creation of an orderly and disciplined atmosphere on board aircraft in flight, by

life and property on board, and generally [promote] the security of civil aviation."¹⁰

The Convention is highly technical; yet it is analyzed in a skillful and understandable manner. Dr. Shubber writes well, something always helpful to the reader. His research is thorough and includes elections from foreign writers and periodicals which is of particular value to students of air law in this country. The organizational technique used is admirable and well could serve as a model for anyone writing an interpretative history of an international convention. In fact this commentator would like to see the author, or someone else of equal skill and ability, do a similar study of the 1970 Hague Convention. Organizationally, Dr. Shubber moves from overview yet purposeful statements about the various provisions of the Convention, into specific and concrete problem areas. In order to resolve the numerous ambiguities of the Convention, Dr. Shubber brings to bear all the resources of the good researcher—preparatory work of sub-committees as well as reports and drafts done by pre-convention meetings, all of which are accompanied by select comments of the international decision-makers as to phraseology and meaning; other existent sources of international law are applied, *e.g.*, air law principles from the Chicago Convention and sea law principles from the Convention on the Territorial Sea and the Contiguous Zone; and even extracts from I.C.J. cases are included. Dr. Shubber uses all these sources in a workmanlike manner in conjunction with the traditional and accepted interpretative techniques of the lawyer-diplomat. Provisions, phrases, and single words, are construed first, *inter se* within the four corners of the Convention; second, in light of its overall purpose; third, the internal order and sequence of provisions is considered; fourth, the body of legislative history is consulted; and fifth, logic is applied. Last, but not least, Dr. Shubber uses plain common sense to resolve conflicts in order to achieve meaningful interpretation.

Jurisdiction Over Crimes On Board Aircraft is a study in itself of the convention-making process. Hence the book can be recom-

granting extensive rights to the persons mentioned above. This becomes meaningful in view of the fact that an aircraft in flight constitutes a closed universe which is out of the reach of external influences. *Id.* at 30.

¹⁰ *Id.* at 19.

mended, on this basis alone, to the student of international law. It shows how nation-State decision makers, by the exhausting and time-consuming processes of draft proposal, evaluation, re-draft, counterproposal, discussion, argument, and compromise, create new international law out of existing models to meet contemporary problems. Additionally, the book contains several excellent vignettes on customary international law; *e.g.*, a study of the traditional rules regarding jurisdiction over the person—territorial principle, the principles of extra-territorial and concurrent jurisdiction, the security and universality principles.¹¹ There also is a good review of how a convention comes into effect; *i.e.* the rules concerning signature, ratification, accession, and denunciation.¹²

Importantly, the Convention unifies the conflicting rules on criminal jurisdiction. Dr. Shubber notes that “[a]rticle 3(1) has created a regime under which the national law of the State of registration of the aircraft apply extra-territorially.”¹³ In short, the penal laws of the State of aircraft registration, *i.e.* flag law, apply to crimes aboard aircraft. This was a highly significant and innovative contribution to international air law in particular, and to international law in general. Dr. Shubber, however, astutely points out that this achievement was not without its drawbacks “since registration and nationality are ascribed to States only.”¹⁴ Consequently, jurisdictional questions remained unresolved regarding crimes aboard aircraft owned and operated by international organizations, joint operating organizations, international operating agencies, flags of convenience, charter as well as interchange aircraft. Dr. Shubber, after applying the rule that registration is the test of nationality in air law, concluded:

[T]his test . . . debars international organizations, such as the U.N., from owning and registering aircraft. Therefore, these organizations are outside the scope of the Tokyo Convention, through inability to be States of registration. . . . A new law is necessary for treating this topic.

Another issue arising from the test of nationality is the problem of flags of convenience. But, for all intents and purposes, neither

¹¹ *Id.* at 48 *et seq.*

¹² *Id.* at 301-25.

¹³ *Id.* at 28. *See also* JOCOBA at 2, 22, 63.

¹⁴ *Id.* at 112.

the Chicago Convention, nor the Tokyo Convention, requires a "genuine link" test of nationality. Thus, aircraft operated under such flags are subject to the application of the Convention and the States registering them are in no different position from those whose nationals genuinely own such aircraft.

One important question, has, unfortunately, been left out of the Convention in this connection. This is the question of aircraft charter. Under a charter, an aircraft may be operating for a considerable period of time outside the territory of the flag State, and yet remains subject to the latter's law. Crimes committed under such circumstances may not be punished, because the State of the Charterer may not be able to exercise jurisdiction under the Convention. Furthermore, some problems may be posed to the foreign aircraft commanders who fly these aircraft. They may not know the law of the flag State, and yet under certain circumstances, their actions are governed, and their acts are based, on such laws.¹⁵

Hence, while the Convention closed the gap jurisdictionally in most instances, some situations were left outside its provisions and consequently outside the rule of law. In another place, Dr. Shubber observed that superficially article 2 exempts offenses of a political, racial, and religious nature from the Convention; however, read more closely, article 2 brings these offenses back within the ambit of the Convention, as he stated:

[I]f the safety of aircraft, persons or property on board requires action. . . . If, on the other hand, one of the offenses . . . threatens good order and discipline, it would seem that the Convention would not apply. This is not satisfactory, because the disturbance of order and discipline in the aircraft may cause some danger to the safety of the aircraft.¹⁶

It is this kind of exacting analysis which makes the work so valuable. Continually, Dr. Shubber extrapolates interpretative rules which refine application of the Convention. It would have been most beneficial for the author in an appendix keyed back to the text to have listed under an outline of the various articles and subparagraphs of the Convention these conclusions. This would have made a handy and invaluable reference source for applying the Convention to live situations.

Dr. Shubber stated:

¹⁵ *Id.* at 140.

¹⁶ *Id.* at 196. *See also* JOCOBA at 150, 161, 166.

[T]he Convention *has succeeded* in removing the state of lawlessness which existed before. . . .

Further, the objective of creating a safe and orderly atmosphere, as well as a disciplined society on board aircraft in flight *has been achieved*. . . . *Anybody disturbing law and order will, likewise, be adequately dealt with by the aircraft commander*. . . .¹⁷

These conclusions are overly optimistic. Certainly the Convention has filled the gap and now on paper, at least, there is law to apply. In this sense, the Convention "has succeeded in removing the state of lawlessness." The implication, however, is that the legal regime of the Convention has actually brought about, or impels, "law and order" aboard international flights. Arguably, the Convention has had little effect at all on deterring crimes aboard aircraft. In fact, the peak years for hijacking, for example, occurred in 1969 through 1972.¹⁸

Some of the most crucial provisions of the Convention are in article 6, paragraphs 1 and 2, where the aircraft commander, or crew members following his orders, or passengers acting unilaterally, may for reasonable cause take reasonable countermeasures against the criminal actor.¹⁹ As a practical matter, the Convention regime of law and order is effectuated by one or more persons from these groups. They are deputized by the Convention to bring into restraint and therefore into custody the criminal actor in order to impose and therefore ensure enforcement of the penal law of the flag State. Absent their action, the culprit cannot be brought to justice under flag State law. And of the three groups, the chief conduit for Convention implementation is the aircraft commander. Dr. Shubber states: "Common sense suggests that *a commander of an aircraft will almost certainly take measures against any person who endangers the safety of the aircraft*."²⁰ The converse, however, may well be true. For example, most airlines,

¹⁷ *Id.* at 46-47 (emphasis added).

¹⁸ McClintock, *Skyjacking: Its Domestic Civil and Criminal Ramifications*, 39 J. AIR L. & COM. 29, 78 (1973).

¹⁹ The author, in analyzing these provisions, concludes:

[T]he test of reasonableness is subjective, that is to say, the aircraft commander determines what is a reasonable ground or otherwise, under the circumstances. However, the subjectivity element is ultimately limited by an *objective test*, *i.e.*, there must be some limit to the discretion of the commander. JOCOBA at 202.

²⁰ *Id.* at 207 (emphasis added).

domestic or international, will fly anyone anywhere in the world rather than risk taking countermeasures against hijackers that might endanger passenger lives.

Further, there is a structural defect in the Convention which actually may inhibit on board enforcement of flag State penal law. Article 10 provides immunity for the aircraft commander, crew member, or passenger, only against subsequent administrative, civil, or criminal by the criminal actor, and then only if the countermeasures taken were reasonable under all the circumstances.²¹ Hence:

[T]he immunity of the persons mentioned in [a]rticle 10 is applicable vis-a-vis the offender alone. That is to say, a passenger, who is injured during a struggle between the aircraft commander and another passenger who has committed an offense, has the right to bring an action against the commander. But, if the offender himself is injured during the struggle, he has no right of action against the commander.²²

The Convention does not provide immunity against innocent third party suits. Dr. Shubber approves of this scheme because:

[I]t would not be a just rule of law to deny an innocent third party the right to remedy the damage he sustained, in a situation for which he is neither responsible, nor has he contributed to its creation. To argue to the contrary would, unjustifiably, extend the immunity under the Convention and prejudice the interests of innocent people who might suffer damages or injury in the aircraft, during the processes involving action on the part of the personnel mentioned in [a]rticle 10.²³

Although this may be true, Dr. Shubber overlooks the effect of limited immunity which is to stifle enforcement of the Convention by its principal actors: Aircraft commander, crew members, or other passengers. Each faces a two-fold threat of personal liability in implementing article 10, if: (i) innocent third party passengers are injured; and (ii) reasonable cause did not exist to justify the countermeasures or if the action taken was itself unreasonable.²⁴

²¹ The same scheme of immunity extends to the owner and operator of the aircraft.

²² JOCOBA at 268-69. Moreover, immunity operates as a defense to an action by the criminal actor, and not as a jurisdictional bar to the action itself. *Id.* at 290, 292-93.

²³ *Id.* at 296-97.

²⁴ *Id.* at 328.

Who is going to risk this multiple exposure to liability under the Convention? This particularly would be true when crimes of violence are committed in flight since such acts create an emotionalized atmosphere charged with uncertainty, confusion, and danger for everyone aboard. Sophisticated decisions as to whether or not acts are within the immunity provisions of article 10 are not easily made under such conditions.

Therefore it is questionable whether the immunity guarantee granted by the Convention "may help to remove any doubt, hesitation or fear in the mind of the person who intends to act in accordance with the Convention. . . ." ²⁵ In order to ensure uninhibited enforcement, blanket and absolute immunity ought to be granted to the persons who implement the Convention—*i.e.* the aircraft commander, crewmembers, and passengers. Moreover, the present Convention construct of limited immunity for the actions of these persons should be retained and applied only in favor of the owner or operator of the aircraft, with the added protection of a Warsaw-type ceiling limitation on liability. ²⁶ This would serve the purpose of assuring enforcement of flag State penal law and at the same time offer compensatory recourse for harm done to innocent passengers or unnecessarily to the alleged criminal offender.

Another blind spot of the author appears to be his predilection to characterize the alcoholic and drunk as the chief provoker of disorder aboard aircraft. ²⁷ Dr. Shubber fails to condemn hijackings by political terrorists which have posed the most serious and dangerous threats to the lives and safety of international air passengers.

This review presumes a basic exposure of the reader to the Convention. One of the real hidden values of the book, however, is that Dr. Shubber provides an excellent overview of the Convention, by way of chapter conclusions and summary statements elsewhere within each chapter, ²⁸ sufficient to familiarize the uninitiated with not only the flavor but also the substance of the Convention.

The Convention provides the international community with a

²⁵ *Id.* at 299.

²⁶ Convention For the Unification of Certain Rules Relating to International Transportation By Air (Warsaw Convention), October 12, 1929 [1934], 49 Stat. 3000, T.S. 876, *as amended by the Guatemala City Protocol*, art. VIII, _____, 1971 [19], T.I.A.S. No. _____.

²⁷ *See, e.g.*, JOCOBA at 13-14, 28.

²⁸ *Id.* at 3, 46, 100, 139, 196, 262, 298, 324, 326.

legal regime to channel and resolve disputes over crimes aboard aircraft. It unifies customary international law into a new set of rules; consequently, the Convention itself becomes a seminal document worthy of study. *Jurisdiction Over Crimes On Board Aircraft* is a must, an indispensable work, and in fact a handbook, for the lawyer, diplomat, air carrier, pilot organization, domestic courts and the I.C.J. alike. The book should and necessarily will be used, because of its excellence over anything else on the subject, whenever a Convention situation or case arises.

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