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THE TOKYO CONVENTION ON OFFENSES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT

BY ROBERT P. BOYLE† AND ROY PULSIFER††

I. INTRODUCTION

THE representatives of sixty-one1 governments participated in the drafting and enactment of the Convention on Offenses and Certain Other Acts Committed on Board Aircraft at the International Conference on Air Law convened at Tokyo in August-September 1963 under the auspices of the International Civil Aviation Organization (ICAO), a specialized agency of the United Nations. Sixteen of the States represented, including the United States, caused the Convention to be signed by their delegations at the conclusion of the Conference;2 and it may be anticipated that these governments will press for ratification in accordance with their respective constitutional procedures. Article 21 of the Tokyo Convention provides that it shall come into force and effect upon the deposit of twelve instruments of ratification. It is therefore likely that the Convention will not long remain an inert document, a fate which has befallen other conventions dealing with international air law.

However, whether the Convention can be adjudged successful will depend not on its ratification by merely twelve or even sixteen States but on the extent to which nations with important aviation interests ratify it. Indeed if the countries which are the major providers of air transportation, or which generate or attract large amounts of air traffic, or whose...
geographic location is such that a heavy volume of flights traverse their airspace, do not ratify the Convention, it can have only limited success as an instrument of international legislation, and will join the ranks of the several other aviation treaties which are in force between only a few geographically isolated States.

The primary purpose of any multilateral agreement which, like the Tokyo Convention, may be adhered to by any member State of the United Nations or its specialized agencies, is to achieve world-wide uniformity of law. To obtain the largest number of adherents, the terms of such a treaty 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 relationships among States. The Tokyo Convention as a whole is not fundamentally objectionable to any of the States, including those of the communist bloc 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 magnitude to render the Convention unacceptable. Therefore, the question of whether the Convention will be successful, that is, whether it will be widely ratified by States, particularly by those having important aviation interests, will depend on their assessment of whether the Convention is necessary to international aviation and air law, or whether, if it is not necessary, general foreign relations considerations make ratification desirable.

States which are now examining the usefulness of the Convention as a condition precedent to deciding upon ratification will enquire whether the international uniformity of law achieved by the Convention is necessary. They will undoubtedly ask whether international practice, in the form of bipartite or multipartite ad hoc arrangements, as well as formal bilateral agreements such as extradition treaties, have been capable of resolving international problems of criminal jurisdiction, and the other matters embraced by the Convention. If they conclude that such arrangements and agreements have been sufficient as a practical matter, they will further query whether the Convention offers a more efficient way of obtaining the same result. In undertaking this inquiry such States will probably wish to balance the desirable and positive aspects of the Convention against those features which, while not fundamentally objectionable, are nevertheless not, from their point of view, positively desirable, or which do not mesh well with national practice. This kind of weighing process may very well determine whether several important nations, such as France, will ratify the Convention. This is a difficult and complex process which depends in no small part on the past experience of individual States, and the peculiarities of national jurisprudence, politics and social norms. Thus different countries may reach different conclusions. It is perhaps an irony that the compromises which States must make in order to achieve a multilateral convention of world-wide acceptability may be such that some States will be forced to conclude that its positive value, measured against the status quo, is negligible. But this is the price of international consensus.

The Tokyo Convention had its origin in a 1950 study project of the ICAO Legal Committee. Upon this basic project, which was originally as conceptually broad as its name, "The Legal Status of the Aircraft," were
superimposed parts of a draft convention in being entitled "The Legal Status of the Aircraft Commander." This article will deal with the process by which ICAO formulated the draft convention, and the product resulting from this process, the Tokyo Convention itself. It will, first, examine the genesis and definition of the Legal Committee's work on the "Legal Status of the Aircraft" study project in the period 1950-1956 with emphasis on its evaluation of the need for, and scope of, a convention dealing with the subject matter of the project. Second, with particular reference to the role of the United States, it will trace the development of the main features of the draft convention in the years between 1957 and 1962. Finally, the article will present an analysis of the Tokyo Convention and, in so doing, attempt an assessment of whether it constitutes a necessary and desirable addition to world aviation law from the point of view of both the United States and other nations.

II. GENESIS AND DEFINITION OF THE PROJECT

A. Legal Committee, Montreal, 1950

At the Sixth Session of the Legal Committee of ICAO, held at Montreal during May and June of 1950, the Mexican Representative to the ICAO Council, Dr. E. M. Loaeza, who at that time also represented Mexico on the Legal Committee, proposed to the Legal Committee that its work program include the question of the "legal status of aircraft." Without objection by any representative, the Legal Committee referred this topic to an ad hoc Sub-committee established by it for the purpose of recommending to the full Committee on proposals relating to its work program. The Sub-committee, on June 17, 1950, recommended that a subject entitled "Legal Status of the Aircraft" be added to the work program. It noted that "the addition of this topic has been advocated by Dr. Loaeza and also by (Professor) John C. Cooper, Legal Adviser of IATA" and that such a study is not purely theoretical and presents many problems of considerable importance. The wording of many provisions of the Chicago Convention refers to 'aircraft' and places obligations and rights on 'aircraft.' Dr. Loaeza has drawn the attention of the Air Transport Committee to the interest of such a study in relation to the status and registration of aircraft internationally owned or operated."

No other reasons for the inclusion of the item on the work program were stated. The Sub-committee recommended that a rapporteur be appointed to study the matter in its "various aspects"; and that the rapporteur be furnished with information collected by the ICAO Secretariat and from the International Law Association, including Professor Cooper's comprehensive study entitled, "Study on the Legal Status of Aircraft," which was prepared for the Association.

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8 The United States publicly stated, through its ICAO Representative, that the draft convention as formulated by the ICAO Legal Committee at Rome in 1962, is, as a whole, both "necessary and desirable."
10 The Sub-committee consisted of Messrs. A. Garnault (France), Chairman; and C. Ganna (Brazil), A. Ambrosini (Italy), R. O. Wilberforce (United Kingdom) and R. E. Ewell (United States), members.
The Sub-committee also recommended that the attention of the ICAO Council be called to the fact that it had not instructed the Legal Committee concerning the draft convention on the "Legal Status of the Aircraft Commander" which had been submitted to the Council in 1947 by an ad hoc legal committee of the Provisional International Civil Aviation Organization (PICAO), predecessor of ICAO. This draft convention had originally been placed on the work program of the Legal Committee at its First Session in 1947, but at the Second Session, in 1948, the draft was referred to the ICAO Council for the purpose of obtaining the comments of the technical bodies of ICAO. Noting the receipt of a communication from the International Federation of Airline Pilots' Associations (IFALPA) to the effect that airline pilots should not, in the course of their flying duties, have civil liability in monetary damages in excess of that of the carrier, and that this should be a feature of any convention dealing with the legal status of the aircraft, the Sub-committee recommended that a rapporteur be appointed to consider modifications to the aircraft commander draft convention.

The Sub-committee concluded that both the "Legal Status of the Aircraft" and the "Legal Status of the Aircraft Commander" should be placed on the work program of the Legal Committee, but that these should be considered after topics already on the agenda; namely, Aerial Collisions and revision of the Warsaw Convention. The full Committee thereupon adopted these recommendations and in so doing appointed as rapporteurs Dr. Loaeza (Mexico) for the "Legal Status of the Aircraft," and Mr. A. Garnault (France) for the "Legal Status of the Aircraft Commander."

B. Work Of The Rapporteurs, 1951

The work of the rapporteurs was published in the minutes and documents of the Seventh Session of the ICAO Legal Committee, but the Seventh Session took no action other than to note their submission. In his paper Dr. Loaeza stated that "the definition and delimitation, from a legal point of view, of all the consequences of the juridical existence of an aircraft, are what constitute its legal status." He concluded that of the "many questions relating to this subject, the following may deserve the attention of the Committee for a preliminary study:

a) Need for a clear definition of what is meant by 'legal status of an aircraft';

b) Definition and delimitation, by an international unification of rules, of the several relations of aircraft to:
   (i) the State of registry,
   (ii) other States,
   (iii) parties having rights in the aircraft,
   (iv) parties on board,
   (v) other parties.

Dr. Loaeza suggested that the Legal Committee should decide "the scope of future studies relating to the problem."

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This draft was a revision of one developed by the Comité International Technique d’Experts Juridiques Aériens (CITEJA) at Cairo in 1946. CITEJA had been studying the subject since 1926.

ICAO Doc. 7117-LC/130, May 1951. Quotations are from these reports and hence no individual citations will be given.
Mr. Garnault’s report on the “Legal Status of the Aircraft Commander” reviewed comments received on the PICAO draft convention since 1947. IFALPA favored the enactment of such a convention, while the International Air Transport Association (IATA) concluded that the experience of its members “has not revealed any practical need for the proposed convention.” The report noted that national legislations, taken together, deal with the following subjects: “The necessity (for) an aircraft commander; his appointment and replacement in case he is unable to act; his general responsibilities; his powers as the agent of the owner or operator, including the limitations or the extensions of these powers; the maintenance of the documents carried in the aircraft; births, marriages (and) deaths; customs, sanitary and other regulations; negligence or fault.” The rapporteur’s conclusion was that “most of these matters are capable of international solution, and this would, by facilitating the work of the aircraft commander, have the effect of improving the conditions of air transport. In particular it is essential to define clearly: (1) - the conditions of appointment of an aircraft commander so that his capacity as commander may be recognized by all the Contracting States with the rights and obligations attached to this capacity; and (2) - the rights and obligations to be recognized uniformly by all Contracting States as belonging to an aircraft commander with their limitations and possible extensions.”

Both rapporteurs reviewed previous studies on their respective subjects. “The Legal Status of the Aircraft Commander” had been considered by the Comite International Technique d’Experts Juridiques Aeriens (CITEJA) since 1926; a draft convention was provisionally adopted in 1931 and subsequent revisions were discussed until 1946; in 1947 the ad hoc legal committee of PICAO developed a refined version of the draft convention from the previous work of the CITEJA.

Dr. Loaeza noted that various previous studies relating to the legal status of the aircraft had not treated the problem as a whole. His principal reference was to Professor Cooper’s comprehensive paper, infra. Because this paper was apparently a principal factor in the decision to place the topic on the Legal Committee’s agenda, a brief comment concerning it is in order.

C. The Cooper Paper

Professor Cooper’s stated purpose was to define the status of the aircraft in international air law for the Air Law Committee of the International Law Association with a view to having the Association decide whether it should reaffirm or amend the position it took as to civil and criminal jurisdiction at its Thirty-third Conference at Stockholm in 1924. It was the conclusion of the paper that “aircraft, like vessels, and unlike railway trains and automotive vehicles, now have the quality of legal quasi-personality in public international law (described) as nationality, but that unlike vessels, and like railway trains and automotive vehicles, are not yet considered as having the quality of personal responsibility in private law. The legal status of the aircraft is therefore sui generis and places them in a class apart from other instrumentalities of commerce.” It was submitted that “the acceptance into international air law of nationality of the aircraft” results in the creation of three cognate problems, only one of which required solution
by international legislation." This was "the question as to conflicts in the competence and jurisdiction of the State of the flag of the aircraft and of other States." Noting that "conflicts already exist between the statute laws of certain States," Professor Cooper quoted approvingly from M. Maurice Lemoine's dissertation that "the determination of the law applicable to events occurring and acts performed on board an aircraft is a complex and difficult problem. It is only fragmentarily settled by positive law and the different national systems do not furnish altogether consistent solutions." The text of that portion of the paper dealing with the question of jurisdiction does not further enquire into the need for international legislation on the subject.

The paper contains the text of the International Law Association's 1924 draft convention on civil and criminal jurisdiction. This proposes the grant of exclusive jurisdiction to the State of registry of the aircraft, although it vests concurrent jurisdiction in the State in the airspace of which the aircraft is flying at the time the civil or criminal act occurs under certain circumstances.

Various other proposals concerning the resolution of conflicts of competence and jurisdiction were gathered in the appendix to the paper. Among

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10 The other two relate to "whether the distinction between state and civil aircraft in the Chicago Convention is sufficient"; and the "treatment to be accorded state aircraft when in foreign territory." It was submitted that both problems were adequately dealt with by the Chicago Convention and international practice. Indeed, as to the former, Professor Cooper concluded "that the solution there presented (i.e., the Chicago Convention) should be allowed to stand unless and until international practice indicates that confusion has resulted" (italics supplied). It is interesting to note that Professor Cooper nowhere asserted that conflicts of competence and jurisdiction had in practice resulted in confusion.

11 Harvard Research in International Law, Jurisdiction with Respect to Crime, p. 515.


13 "(a) Civil Jurisdiction

Article 1

"The airship which is above the open sea or such territory as is not under the sovereignty of any State is subject to the laws and civil jurisdiction of the country of which it has the nationality.

Article 2

"A public airship which is above the territory of a foreign State remains under the exclusive jurisdiction of the State of which it has the nationality.

"A private airship which is above the territory of a foreign State is subject to the laws and jurisdiction of such State only in the following cases:

1. With regard to every breach of its laws for the public safety and its military and fiscal laws.
2. In case of a breach of its regulations concerning air navigation.
3. For all acts committed on board the airship and having effect on the territory of the said State.

"In all other respects a private airship follows the laws and jurisdiction of the State of the flag.

"(b) Criminal Jurisdiction

Article 3

"If at the commencement or during the progress of any flight of any aircraft passing over any State or States or their territorial waters or over the high sea without landing, any person on board such aircraft commits any crime or misdemeanor, the person charged shall forthwith be arrested if necessary. Such felony or misdemeanor may be inquired into and the accused tried and punished in accordance with the rules given under Article 2. The State of the place where such aircraft lands shall be bound to arrest the accused if necessary and to extradite him to the State which has jurisdiction over him.

Article 4

"Acts committed on board a private aircraft not in flight in a foreign State shall be subject to the jurisdiction of such State, and any person or persons charged with the commission of such act shall be tried and, if found guilty, punished according to the laws of such State." (The paper gives the following citation for this text: International Laws Association, Report of the 33 Conference, Stockholm, 1924, Sweet and Maxwell, 1925, pp. 117-118.)
these were excerpts from the Draft Convention on Jurisdiction with Respect to Crime of the Harvard Research in International Law which places concurrent exclusive jurisdiction in the State over which the aircraft is flying as to crimes occurring in whole or in part within its airspace; and in the State of nationality of the aircraft, as to a crime committed in whole or part on board the aircraft.

D. Sub-committee On The Legal Status Of The Aircraft, Montreal, 1954

On May 15, 1953, the Council of ICAO decided to place the “Legal Status of Aircraft” agenda item on the current work program of the Legal Committee. By this action the Council in effect directed the Legal Committee to begin active work on the subject. It is to be noted that the Council’s decision was not based on any finding that international legislation was required in any area embraced by the nebulously defined topic; indeed it was still considered as a study project. The Council did not concurrently recommend any action concerning the “Legal Status of the Aircraft Commander” which, therefore, remained on the work program of the Legal Committee as a dormant item.

Thus motivated, the Legal Committee established, at its Ninth Session, in August-September 1953, a Sub-committee on the “Legal Status of Aircraft.” The formation of the Sub-committee may be considered as the initial step in the systematic study of the topic. Its first meetings occurred during the Tenth Session of the Legal Committee in September, 1954. After several exploratory sessions, the Sub-committee determined that it would consider those occurrences or acts which arise most frequently on aircraft “which would raise problems under the legal status of the aircraft.” The Sub-committee decided to give preliminary consideration to the problem of what law does, or should, govern such occurrences or acts.¹⁴

Seven types of acts were to be studied.¹⁵ Of these, two involved acts which were crimes under the law of the State of registry and the State in which the act occurred, or one but not both States; the other five involved various civil matters such as contracts, torts and licensing requirements under both the law of the State in which the aircraft is registered and the territorial or subjacent State. The Sub-committee determined that these acts should be studied in relation to “several sets of physical circumstances in which the aircraft may be at the time of the act in question to determine the effect of such physical circumstances upon the question of what is, or should be, the applicable law.”¹⁶ These circumstances were stated to be the following:

¹⁴ LC/SC “Legal Status”; WD No. 14; April 20, 1956.
¹⁵ There were:
(1) Acts which are crimes under the law of the State of registry of the aircraft and the law of the State in which the act occurred.
(2) Acts which are crimes according to the law of the two States mentioned in (1) above.
(3) Acts for which a license is required by the law of either or both States described in (1), such as sale and service of alcoholic beverages, sale and service of food, carriage of fire arms, carriage and use of various types of drugs and medicines, etc.
(4) Acts which are tortious according to the law of either or both States described in (1) above.
(5) Acts which constitute the formation of contracts according to the law of either or both of the two States described in (1) above.
(6) Acts which constitute the execution, revocation, or modification of wills according to the law of either or both States described in (1).
(7) Acts which affect the status of persons such as birth, death, marriage, etc.
(1) The aircraft is in transit non-stop in the airspace above the geographical boundaries of a State other than the State of registry of the aircraft; 

(2) the aircraft is in the airspace above the geographical boundaries of a State other than the State of registry of the aircraft and a subsequent landing is to be effected in that State; 

(3) the aircraft is in the airspace above the geographical boundaries of a State other than the State of registry of the aircraft but has made a prior landing in such State; 

(4) the aircraft is in the airspace above the geographical boundaries of a State other than the State of registry of the aircraft but the aircraft has made a prior landing in such State and a subsequent landing in such State is intended; 

(5) the aircraft is over the high seas; and 

(6) the aircraft is on the ground at an airport in the State of registry of the aircraft.

Several States volunteered to submit papers analyzing one or more of the seven types of acts in relation to the six sets of circumstances.

The United States undertook to prepare a report on criminal acts; that is, the first two types of acts to be studied by the Sub-committee. This paper became the principal basis of further work on the subject because the various areas involving civil, in contradistinction to criminal, matters and jurisdictional questions related thereto were, as will be subsequently developed, excluded from the scope of the study and the draft convention when the latter came into being.

E. United States Paper

The paper presented by the United States examined in some detail the bases for the exercise of penal jurisdiction and law as to aircraft. It enumerated five bases: First, because of the rule of international law that each State has complete and absolute sovereignty over its airspace, is the principle that the laws and jurisdiction of the State in the territorial airspace of which the criminal act takes place should apply. Second, by analogy to international maritime law, is the principle that the laws and jurisdiction of the State in which the aircraft is registered should be applicable at all times, or in any event when the aircraft is not in sovereign airspace; i.e., when it is over the high seas or lands having no sovereignty. Third is the principle that the jurisdiction and law of the State of which the accused or the victim is a national should be applicable. The fourth basis is that the State of first landing should apply its jurisdiction and law. Fifth is the principle that the State from whence the aircraft last took off should have jurisdiction and should apply its laws. Each of these bases, the paper establishes in considerable detail, have found support from text writers and in national practice. However, only the first two, the territorial or subjacent State and the State of registry, are generally recognized as proper and desirable by the text writers, and have found nearly unanimous acceptance in the practice of States. Each principle is analyzed in accordance with the six factual circumstances, and the advantages and disadvantages of each is weighed in terms of practicality, State and aviation


interests, and the probability of conflict between States adhering to different principles.

The paper then proceeds to discuss concurrent jurisdiction, that is to say, a combination of some or all of the above bases of jurisdiction. Because this paper, and in particular that part dealing with concurrent jurisdiction, constituted the principal basis of further work on the subject of the "Legal Status of Aircraft" within ICAO, the section dealing with concurrent jurisdiction is set forth in full.

"Concurrent Jurisdiction. Most of the previous proposals for concurrent jurisdiction would confer it on only two States: the State of registry of the aircraft and the State in whose airspace the alleged crime took place. One proposal for concurrent jurisdiction, while including the above two States, has gone further advocating presumptive jurisdiction in all States flown over and in the State of landing and take-off. These draft conventions differ in their treatment of concurrent jurisdiction. It is the purpose of this section of the study to consider some of the merits and demerits of such proposals for multiple jurisdiction.

"As early as 1914, M. de Danilovics and M. de Szondy advocated concurrent jurisdiction over crimes on aircraft in foreign airspace. They believed that if such jurisdiction were agreed upon, States must also accept the principle of non bis in idem, that one State will not prosecute a man for a crime for which he has already been tried and punished or found innocent in another State. These two writers provided rules for several different situations. The flag State was to have exclusive jurisdiction with respect to crimes over the high seas and international territory. There was to be concurrent jurisdiction in the subjacent and registry States when the aircraft was over foreign territory. If the act affected another aircraft, both States of the flag were to have jurisdiction. No system of priorities was set out.

"If a concurrent jurisdictional scheme is included in an international convention it would seem fair to incorporate also a provision on non bis in idem. The Harvard study group specifically rejected this course, however, in 1935, being unwilling to require States whose nationals had been legally tried in another country to give up their own right to exercise criminal jurisdiction. In practice, most States do abide by this principle."
"The 1935 Harvard Draft Convention on Criminal Jurisdiction would vest jurisdiction in States over crimes committed within their airspace and on aircraft which have their national character. The Drafters specifically rejected any provision assigning priority to either State.

Art. 3. A State has jurisdiction with respect to any crime committed in whole or in part within its territory.

Art. 4. A State has jurisdiction with respect to any crime committed in whole or in part upon a public or private ship or aircraft which has its national character. 24

"Thus with respect to all crimes on aircraft regardless where they might be, there would be two competent jurisdictions. Again the State with custody would have power to ultimately decide where jurisdiction would be exercised. This is also true of maritime law. Higgins and Colombo state that even today in the maritime field there is no agreement on which State (littoral or registry) should have the right to exercise jurisdiction when a crime is committed on board a ship in a foreign port and both States desire to prosecute. 25 Since we are dealing here with provisions for an international convention which is to settle and regulate jurisdiction and applicable law it would seem wise to provide for a solution to the conflict and not wait for one to grow up by case law. There is little satisfaction in the adoption of a convention leading to conflicts. Dr. Meyer proposed to give first opportunity to the subjacent State, requiring it however to act within a certain time or forfeit its prior right. M. Chauveau would give the first right to the registry State.

"When only two States are interested in prosecuting, the need to establish a priority system is less than under a proposal such as that made by Mr. John Cooper to the 1952 meeting of the International Law Association at Lucerne, in which he advocates giving jurisdiction to the State of registry and presumptive jurisdiction to all States flown over, between and including the State of take-off before the crime and the State of first landing after the commission of the crime. Cooper expressed the belief that as a practical matter the State of first landing would be the State most likely to exercise jurisdiction. A multitude of States are thus given jurisdiction (1) to ensure that the accused will not escape justice, (2) to remedy the situation in which it cannot be determined exactly in which State the crime was committed. Dr. Meyer and M. Chauveau both think such an extension of jurisdiction unnecessary. M. Chauveau raises as the two main objections eventual conflicts between the diverse competent jurisdictions and uncertainty as to the governing law with the possibility that the same act may be legal or illegal depending on the jurisdiction. Dr. Meyer argues further that the registry and subjacent states are the only two states which have any "legal connection" with an act committed on board an aircraft and that all the other states flown over have no connection with such criminal acts. 26

"The difficulties of giving jurisdiction to take-off and landing States have already been discussed but there are objections also to that part of the proposal giving presumptive jurisdiction to all subjacent States. 27

"The method by which a subjacent State would acquire jurisdiction, under Mr. Cooper's theory, even when there is no proof that the alleged crime

27 A possible analogy for this proposal may be found in certain statutes of a few states of the United States which authorize any of the counties in which a crime may have occurred to prosecute, when the locus of the crime within the state having such a statute cannot be ascertained. The state, of course, has jurisdiction over the crime and the legislation deals only with the particular place within the state in which the criminal may be tried. State v. MacDonald, 109 Wis. 106, 85 N.W. 502 (1901) and Watt v. People, 126 Ill. 9, 18 N.E. 340 (1888).
actually took place there, is to "deem" that the commission of the act occurred in the airspace of the prosecuting State. Thus, a prima facie case of territorial jurisdiction is made out to be rebutted only by proof (which would be given by defendant) that the act in fact took place elsewhere. If defendant does produce such evidence, Mr. Cooper suggests there be extradition to the competent State—if, of course, the latter requests such action and the case is covered by the governing extradition treaty. The above procedure would seem to differ in some respects from the usual Anglo-American practice, which places the burden of proof on the prosecution. However, if the defendant can prove the act did not take place in the airspace of the State in which he is standing trial but cannot or will not show where it did in fact occur, should the prosecuting State lose jurisdiction? According to the territoriality principle of jurisdiction, it would. The State of registry still is competent to exercise its jurisdiction if it so desires.

"Second, if Mr. Cooper's proposal were incorporated in a convention covering all crimes, since an act could be criminal in only some or one of the States flown over, if the accused could not prove the occurrence of his act in airspace where it was not criminal, he could be convicted and fined or imprisoned by a State only indirectly affected by his conduct for an act innocent (sic) where it took place. It is arguable that the same injustice could occur if concurrent jurisdiction were limited to the registry State and the subjacent State in which the crime actually took place. For example, an act might not be criminal in French territory where it occurred but might be criminal under the United States law of registry. The State of registry could prosecute the accused. But this is not an abuse of penal justice because the registry State is very vitally affected by events taking place on its aircraft. Certainly a State in whose airspace the crime did not take place is less affected.

"Another possible inequity may result from the varying degrees of punishment which can be meted out by different States for the same act. Again the same problem arises under any type of concurrent jurisdictional scheme; however, if the concurrent jurisdiction is in States directly injured by the act, then the different degrees of punishment may be more justifiable. Each injured State has a right to decide the amount of punishment necessary.

"Third, Mr. Cooper's proposal is subject to a similar objection raised with respect to jurisdiction in the State of first landing, that is, the possible jurisdictions are dependent upon the pilot's actions. This would not appear to be a sound basis for determining criminal jurisdiction.

"Concurrent jurisdiction has been proposed in order to afford an opportunity to any State affected by crimes on aircraft to inflict a penalty for violation of its laws and to ensure that no criminal goes unpunished. Concurrent jurisdiction should be conferred on a sufficient number of States to achieve the above ends but should not be extended to States which have only an indirect interest in prosecuting an offender. Granting of authority to a large number of States will cause confusion as to the applicable law, and such a grant might lead to conflicts over jurisdiction. Care must be exercised in determining whether the State of registry and the subjacent State, chosen

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28 Contrary to the Stockholm proposal, Mr. Cooper does not propose to include a specific obligation to extradite in his draft convention. He believes that extradition should continue to be governed by individual treaties. This suggestion has merit, for the difficulties of securing agreement on the terms of a multilateral extradition treaty have prevented adoption of one in the past and might limit the number of nations adopting a convention on air crimes in which such a treaty were incorporated. However, some provision for rapid arrest, other than through extradition proceedings should probably be made in order that the accused does not escape. It would be helpful were this to be included within the convention itself, with a provision assuring that the legal rights and normal proceedings of extradition will then follow.
by the Harvard Draft, the extensive jurisdiction such as that proposed by Mr. Cooper, or some other solution, will best satisfy the criteria expressed above. In any case, the question of priority among competent States should be considered. Should the jurisdiction of one State be subordinate to the prompt exercise of jurisdiction by another, or should the State with custody (be it the State of registry, the subjacent State, or otherwise) have the final determination?"

F. Sub-committee On The Legal Status Of The Aircraft, Geneva, 1956

The first substantive work toward the development of a draft convention dealing with the subject matter of the United States paper was accomplished by the Sub-committee at a meeting held independently of the Legal Committee in Geneva in the first half of September, 1956. The Sub-committee met under instructions of the Tenth ICAO Assembly, the Legal Commission of which had determined that "priority ought to be accorded to the question of crimes committed on board aircraft and acts for which a license is required by law." The Sub-committee, in accordance with this directive, limited its study to the subject matter covered by the United States paper, as well as acts for which a license was required insofar as these were related to penal questions. Thus problems of a civil law nature were excluded from the "Legal Status of the Aircraft" agenda item and the purview of the Sub-committee. The Sub-committee also decided to consider that portion of the Legal Committee agenda item entitled the "Legal Status of the Aircraft Commander" insofar as it related to crimes committed on board aircraft. This decision, which would ultimately cause an amalgamation of parts of each of the two topics into one convention, was taken because the Tenth ICAO Assembly had instructed the Legal Committee to give active consideration to the latter item.

The Sub-committee also gave attention to the question of whether international legislation was required in respect to offenses committed on aircraft. As has been demonstrated, no representative body within ICAO had, until now, ever articulated detailed reasons establishing the need for a convention. After due deliberation, the Sub-committee determined, with some members dissenting, that such a convention was desirable for the following reasons:

(1) "One characteristic of aviation is that aircraft fly over the high seas or over areas having no territorial sovereign. While national laws of some States confer jurisdiction on their courts to try offences committed on aircraft during such flights, this was not the case in others, and there was no internationally agreed system which would coordinate the exercise of national jurisdiction in such cases. Further, with (the) high speed of modern aircraft and having regard to the great altitudes at which they fly as well as other factors, such as meteorological conditions and, in certain parts of the world, the fact that several States may be overflown by aircraft within a small space of time, there could be occasions when it would be impossible to establish the territory in which

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29 The following summary of actions by the Sub-committee is taken from its report LC/SC "Legal Status," WD No. 23, October 10, 1956. Quotations are from the report and hence individual citations will not be given.

20 The Sub-committee, at this stage, did not consider that civil law questions would be permanently excluded. However, they were never again substantively considered and the Tokyo Convention does not deal with such matters except insofar as the aircraft commander is held harmless from tortious liability.
the aircraft was at the time a crime was committed on board. There was, therefore, the possibility that in such a case, and in the absence of an internationally recognized system with regard to exercise of national jurisdiction, the offender may go unpunished.

(2) "National jurisdictions in respect of criminal acts are based on criteria which are not uniform; for example, on nationality of the offender, or nationality of the victim, on the locality where the offence was committed, or on nationality of the aircraft on which the crime occurred. Thus, several States may claim jurisdiction over the same offence committed on board aircraft, in certain cases. Such conflict of jurisdictions could be avoided only by international agreement.

(3) "The possibility that the same offence may be triable in different States might result in the offender being punished more than once for the same offence. This undesirable possibility could be avoided by a suitable provision in the Convention."

Regarding the scope of the Convention, the Sub-committee decided that it should "apply to any act or omission by a person on board an aircraft which is punishable under penal law, and that no distinction should be made between serious or minor offences; be limited to aircraft 'in flight', the term to be later defined; be applicable only to persons, who, having committed the offence, were on board at the time the act or omission claimed of occurred; and not apply to State aircraft." Moreover, the Sub-committee generally agreed that "the aim of such a Convention should not be to establish or create jurisdiction; on the contrary, the object of the Convention would be the recognition, by international agreement, of the competence of States to establish jurisdiction of their courts under national laws." The Tokyo Convention, enacted seven years after these decisions were made, adheres to these definitions of the scope of the proposed convention.

A majority of the Sub-committee determined that the draft convention should take account of five bases of jurisdiction, namely, the State in the territory or airspace of which the offense was committed; the State of nationality of the aircraft; the State of first landing after the offense was committed; the State of the nationality of the offender; and the "State against the security, sovereignty or public credit" of which the offense was committed.

It was unable to agree whether the draft convention should establish priorities of jurisdiction. Three distinct positions were presented: (1) that there is no need to resolve conflicts of penal jurisdiction and, therefore, there is no need for a system of priorities; (2) that there should be an absolute and definitive system of priorities (of those advocating priorities there was considerable support for the rule that the State of first landing should have foremost priority); and, (3) the granting of priority only to the State in the airspace of which the act or offense occurred, if known; or, if unknown or not committed in the airspace of any State, then to State of registry of the aircraft. The United States advocated the third position; France, Spain and other civil law countries the second; the United Kingdom, Sweden and numerous others the first. This argument continued apace at all subsequent meetings of the Sub-committee and the full Legal Committee, and even during the diplomatic conference which enacted the Tokyo Convention.

31 "Public credit" refers to counterfeiting and falsification of public seals and the like.
Those Sub-committee members who opposed a system of priorities did so for three reasons: first, that priorities were unnecessary, however theoretically desirable they might be, because the resolution of jurisdictional conflicts between two or more States is not peculiar to aviation, but was a question of general application in the relations of States and, as such, should be resolved, if at all, by a convention of general applicability; second, that normal international processes, such as the use of extradition treaties, can be used to resolve any such conflicts should they arise; and, third, that, if the five bases of jurisdiction are set up as a priority system, a number of States will find the convention unacceptable. Those favoring a system of priority agreed that while conflicts of jurisdiction are not peculiar to aviation, they are more likely to occur in international flight; and that omission of such a system would detract very much from the usefulness of the proposed convention and might, depending on the convention terms, add a conflicting international jurisdiction to already conflicting national jurisdictions.

Four separate systems of priority were studied by the Sub-committee. A common feature of each was that a State does not have any obligation to assume jurisdiction, but only to recognize the priority of jurisdiction accorded to each State. It was generally agreed that in any system of priority, “first priority for the exercise of jurisdiction shall belong to the State against the security or ‘public credit’ of which, or against the person whose sovereign, the offence was committed;” and that minor infractions of “regulations pertaining to the aircraft” by passengers or crew might be jurisdictionally cognizable only in the law of the State of the nationality of the aircraft.

III. Development of the Draft Convention

A. Proposals Of The United States, 1957-58

After six years of work, the 1956 Geneva Sub-committee had, in effect, bogged down over the question of priorities of jurisdiction. Because of this, and because a draft convention had not been produced, the full Legal Committee, at its Tokyo meeting in September, 1957, considered devoting the work of the next Sub-committee to a subject which had progressed beyond the stage of theoretical debate, namely, to a further consideration and refinement of the draft convention on aerial collisions. However, the United States, through its Legal Committee representative, opposed this action and was able to prevail upon a majority of the Legal Committee to decide to schedule another meeting of the Legal Status Sub-committee in 1958. Upon the return to Washington of the United States Legal Committee delegation, it was decided that the United States should prepare a draft convention for use by the 1958 Sub-committee for the purpose of expediting ICAO action toward the development of a convention. The United States draft was submitted to ICAO on August 14, 1958.

22 The United States was particularly concerned that if the State of first landing became the jurisdiction of first priority, there would be circumstances when that State would have to assume extraterritorial jurisdiction without any connection between the act and the prosecuting State. This would have rendered the convention unacceptable to the United States.

23 This decision was taken by the United States Air Coordinating Committee. The Committee was composed of representatives of the Departments of State, Justice, Commerce, Defense, Army, Navy, Air Force, the Civil Aeronautics Board, and the Civil Aeronautics Administration.
TOKYO CONVENTION

prior to the meeting of the Sub-committee. Because the Sub-committee used this draft as the basis for its deliberations and derived its own draft therefrom, the United States draft may be regarded as the precursor of the first ICAO draft.

In presenting its draft the United States noted that the 1956 Sub-committee's decision to give concurrent recognition to five jurisdictions would result in conflicts of jurisdiction which could best be resolved by a system of priorities. To avoid the "troublesome" problem of a system of priorities, the United States proposed, following maritime legal principles, to vest the State of nationality of the aircraft with "extensive" jurisdiction, "by borrowing from the experience gained by the United States and many other nations' members of ICAO in the status of forces arrangements in effect between many such States." Thus, under the status of forces agreements, "where concurrent jurisdiction exists between one or more States, one such State is given the primary right to exercise jurisdiction whenever in view of the circumstances of the offense that State has the paramount interest. Accordingly, in the draft convention a condition of concurrent jurisdiction is created but potential conflict is resolved by providing for one State to have the primary right to exercise jurisdiction when the circumstances are such that the interests of that State are paramount. There is no compulsion on the State having such primary right to exercise jurisdiction, and provision is made for it to waive its jurisdiction in favor of other States having concurrent jurisdiction in appropriate cases." The United States draft convention recognized four bases of concurrent jurisdiction: (1) the territorial or airspace State; (2) the State of registration of the aircraft; (3) the "State whose national security is violated, or against the person of whose sovereign the offense is committed"; and (4) the "State of the suspected offender's nationality." Primary jurisdiction is reserved to the State in the airspace of which the offense was committed only if the suspected offender or victim is a national of that State, or if the offense is directed against the national security or sovereignty of that State. Otherwise, primary jurisdiction is vested in the State in which the aircraft is registered. The draft further provides that "sympathetic consideration" shall be given to any state having concurrent jurisdiction for waiver of primary jurisdiction.

This jurisdictional solution was not accepted by those Sub-committee members advocating a definitive system of priorities, and particularly by those who desired the State of first landing to be the State having first priority. Nor did it find favor with members opposed to any system of priorities.

The United States draft convention was made applicable to civil aircraft "from the moment power is applied for the purpose of actual take-off until the moment when the landing run ends," a formulation, derived from the language contained in annexes to the Chicago Convention, that was to survive all subsequent ICAO drafts. The Tokyo Convention itself applies only to aircraft registered in a contracting State which are not used in military, customs or police services "while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of

44 LC/SC "Legal Status" WD No. 33, August 8, 1958. The paper was developed in the United States Air Coordinating Committee. Quotations are from the paper and hence no individual citations will be given.
any State,” and defines the term “in flight” almost identically to the formulation proposed by the United States. The draft was made applicable to offenses punishable under the penal laws of the four States having jurisdiction. There was a provision against double jeopardy or *ne bis in idem*; this survived in principle until the Tokyo Conference where it was excluded from the final text of the Convention. The articles of the draft relating to the rights and duties of the aircraft commander, evidence, restraint, and delivery and custody of offenders or suspects were retained in principle in all successive ICAO drafts, and in the Tokyo Convention.

B. Sub-committee On The Legal Status Of The Aircraft, Montreal, 1958

The first draft convention on offenses, criminal jurisdiction and the rights and duties of the aircraft commander to be developed within ICAO was produced by the Legal Status of the Aircraft Sub-committee in Montreal between September 9 and 20, 1958.

Prior to developing its draft from that submitted by the United States, the Sub-committee again examined the need for the Convention. Professor Cooper, whose paper it will be recalled sparked the original action on the subject in ICAO in 1950, now stated, in his capacity as IATA observer, that IATA Legal Committee studies, based on the actual experience of scheduled international air transport operators, indicated that the conclusion of an international convention on the subject was not warranted. Nevertheless, IFALPA and the International Law Association continued to support work on such a convention. After due deliberation the Sub-committee stated that such a convention was needed for several reasons, of which the following were articulated: (1) “the lack of an international rule concerning extraterritorial jurisdiction of a State in regard to offenses committed on aircraft of its nationality engaged in international air navigation; (2) problems of conflict of criminal jurisdictions, and the need to define the powers of the aircraft commander to take necessary measures in respect of acts on board endangering the safety of flight and for the preservation of order over the passengers on board.” The Sub-committee rejected a motion to merely formulate a statement of principles to be recommended to States for adoption in the form of national legislation. The draft propounded by the Sub-committee did not incorporate the United States proposals concerning primary and concurrent jurisdiction for the stated reason that such a solution would, on the one hand, require the State assigned primary jurisdiction to exercise it in order to punish the offender, and, on the other hand, require other States to renounce jurisdiction. But the Sub-committee also rejected any system of priorities, even if there were no requirement that States would be obliged to exercise jurisdiction. The disadvantages of such a system were said to be that a “State having a low priority would be obliged, even though it had custody of the offender, to refrain from exercising jurisdiction until all other States having higher priority took decisions not to exercise their jurisdictions, and that there would be consequential delay in finally bringing the offender to trial”; and that “a system of priorities, to be efficiently workable, may need a coordinated network of extradition arrangements amongst all the States concerned.”

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33 The following is derived from the Report of the Sub-committee, LC/SC “Legal Status” No. 63, September 20, 1958. Quotations are from the Report and hence individual citations will not be given.
The Sub-committee therefore developed a third approach in its draft by which the State of registration of the aircraft is declared to be competent to exercise its jurisdiction, such jurisdiction not being, however, exclusive. Indeed, all other bases of jurisdiction as set forth in national laws remain as concurrent, although outside, that is, independent of, the Convention. Nevertheless, the exercise of jurisdiction by States in the airspace of which the offense was committed is limited to four specific cases, namely, if the offense affects the State's territory, if it has been committed by or against a national of such State, if the offense involves a breach of flight rules, and "if the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under an international agreement." The Sub-committee further decided that no State should be obliged to exercise jurisdiction.

In developing draft articles dealing with the powers and duties of the aircraft commander, the Sub-committee stated that it was guided by considerations relating to the safety of the aircraft. It was "considered important that there should be internationally adopted rules which would enable aircraft commanders to maintain order on board, whether in respect to offenses or of any acts endangering safety of the aircraft or persons or goods on board an aircraft engaged in international navigation." It was also decided to protect the aircraft commander from criminal and civil liability when acting pursuant to such rules. Thus was articulated for the first time a theme which would subsequently become dominant: that the Convention should have, as a principal purpose, the enhancement of safety. From this was developed the scope of the Convention, as ultimately signed at Tokyo, that the Convention shall apply to "offenses against penal law" and "acts which, whether or not they are offenses, may or do jeopardize safety . . . ."

Other principles in the draft, subsequently retained in succeeding drafts and ultimately adopted at Tokyo in 1963, relate to the delivery by the aircraft commander of a suspected offender or dangerous person, the obligation of a contracting State to take such a person into custody under certain circumstances, and those relating to the collection of evidence by the aircraft commander.

C. Legal Committee, Munich, 1959

At its Twelfth Session at Munich in August 1959, the full Legal Committee undertook a substantive consideration of the agenda item entitled the "Legal Status of the Aircraft," and the draft convention developed by the Legal Status Sub-committee. The Committee reviewed the question of whether an international agreement on the subject of offenses committed on aircraft was necessary or desirable. It concluded that it was in agreement with the views of the Sub-committee on this matter, "taking into account, 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 de-
sirability of unification of certain rules on the subject.” The Committee also agreed with the Sub-committee that the draft convention should “not deal with incidents on aircraft giving rise to problems of civil law, e.g., contracts, torts, marriages, births, and deaths, and that it should deal with the power of the aircraft commander.” The Committee indicated that civil law questions relating to the legal status of the aircraft and other questions relating to the draft convention on the legal status of the aircraft commander could be examined subsequent to the completion of the pending draft convention.

In examining the Sub-committee’s draft, the Committee determined that it would retain the jurisdictional rule that the State in which the aircraft is registered is competent to exercise jurisdiction over offenses committed on board the aircraft, but that such a rule would be “without prejudice to other grounds or bases of jurisdiction; e.g., the jurisdiction of the State in whose territory the aircraft was at the time of the offense, or that of the State of which the offender or the victim was a national, or that of the State whose national security was affected by the offense, and perhaps some others...” The Committee noted that the rule as formulated was a separate question from, and did not affect, “the entitlement of the State of registry to refrain from actually exercising it in any given case.” The Committee was unable to decide whether the State would be obliged to “ensure that its national laws make its authorities” competent to exercise jurisdiction. The Tokyo Convention provides that each contracting State “shall take such measures as may be necessary to establish its jurisdiction as the State of registration.”

The proponents and opponents of a system of priorities of jurisdiction again engaged in extensive debate during the Committee’s deliberations. The proponents asserted that the resolution of conflicts of jurisdiction was the very raison d’être of the draft convention insofar as it dealt with criminal jurisdiction. The opponents, who were in the majority, contended that the Convention should not go beyond recognizing the jurisdiction of the State of registration, and to limiting the jurisdiction of the State in the airspace of which the act occurred to certain limited circumstances. The latter argued that a system of priorities could not be worked out except in combination with “an extensive network of extradition arrangements”; and that problems of conflict beyond that of the State of registration and the airspace State are no way peculiar to aviation and therefore “might well be left to be solved under any general system relating to conflict of criminal jurisdiction that might possibly be evolved in the future.” Meanwhile, because of the formulation decided upon, all other bases of national jurisdiction remained unaffected by, and therefore outside of, the draft convention.

The Committee’s formulation for limiting the jurisdiction of the State overflown is as follows:

“The criminal jurisdiction of a State in whose airspace the offense was committed, if such State is not the State of registration of the aircraft or the State where the aircraft lands, shall not be exercised in connection with any offense committed on an aircraft in flight, except in the following cases:
(a) if the offense has effect on the territory of such State;
(b) if the offense has been committed by or against a national of such State;
(c) if the offense is against the national security of such State;
(d) if the offense consists of a breach of any rules and regulations relating
to the flight and manoeuvre of aircraft in force in such State;
(e) if the exercise of jurisdiction is necessary to ensure the observance of
any obligation of such State under an international agreement.”

It was noted that this limitation on the exercise of jurisdiction “goes
somewhat beyond that contained in Article 19, paragraph 1, of the Con-
vention on the Territorial Sea and the Contiguous Zone formulated at
Geneva on April 29, 1958, concerning the restrictions on the criminal
jurisdiction of the coastal State in relation to offenses on board a foreign
ship passing through the territorial sea of that State.”

The Committee carefully examined the conditions of the applicability
of the draft convention. Its formulation, utilized by the Tokyo Conven-
tion, is that the Convention should apply to “aircraft in flight,” “in flight”
being defined in accordance with the original United States proposal. This
formulation, the Committee noted, does not affect “the territorial juris-
diction of the State . . . in respect of any offense committed on a foreign
aircraft while the aircraft is at rest or is moving on the ground for taxiing
or for any other purpose than for actual take-off.” As well, the draft con-
vention as revised by the Committee would not apply where an offense is
committed on board while the aircraft is “in the airspace of the State of
its registration, except when the last place of departure was outside that
State or its next landing, or a subsequent landing with the offender still
on board, is made at a place outside that State; or over the high seas or
any other area outside the territory of any State unless the last place of
departure or the next landing is outside the State of registration.” These
latter limitations survived, in modified form, all subsequent drafts, but
were not made part of the Tokyo Convention.

Careful attention was given to that part of the draft convention dealing
with the powers and duties of the aircraft commander. Having in mind
that the aircraft commander will not normally have legal training, the
Committee formulated his powers in relation to acts which are “prejudicial
to the safety of the aircraft or persons or property therein or to good order
and discipline on board.” In respect to such acts the aircraft commander
may impose necessary measures of restraint on the actor, and may require
or authorize other members of the crew to do the same. He could similarly
authorize passengers. After landing, the commander is entitled to dis-
embark any person who he has reasonable grounds to believe has com-
mitted on board a “serious offense” or an act prejudicial to safety. No
obligation attaches to the State in which the actor has been disembarked.
In addition, the commander may deliver the actor to the authorities of
the State in which the aircraft first lands after the commission of the act

37 Article 19, paragraph 1, of the Convention on the Territorial Sea and the Contiguous Zone
provides:
“The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship
passing through 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 control 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.”
if he has reason to believe a "serious offense" has been committed. The receiving State is then to deal with the alleged offender in accordance with its laws; the only obligation is to notify certain other States. The draft convention also requires the aircraft commander to hand over all evidence to the receiving State, in the case of delivery, which is lawfully in his possession in accordance with the law of the State of registry. Last, the commander is required to report any action taken pursuant to the Convention, and must notify the State in which the aircraft lands of an apparent offense or act prejudicial to safety. The aircraft commander is fully protected against criminal, civil, and administrative liability if he imposes reasonable restraint or undertakes other reasonable action pursuant to the draft convention. The Committee considered, but was unable to formulate any acceptable rule concerning, the effect of aircraft registered in one State and operated under bare-hull charter by nationals of another State. In reviewing its revision of the draft convention, the Committee stated that further study was required. For this reason it requested ICAO member States and international organizations to submit comments on the provisional draft it had developed.

D. United States Comments On The Munich Draft Convention

In response to the request of ICAO for comments on the draft convention prepared by the 1959 Munich Legal Committee, the United States declared that the "draft convention should be limited to making more definite and certain the application of criminal law to events occurring aboard aircraft which endanger the safety of the aircraft or persons and property on board and ensuring authority in the aircraft commander to deal appropriately with such acts." Specifically, the United States proposed that only offenses which jeopardize safety should be made cognizable under the convention and that therefore it should not refer broadly to "penal offenses."

It was also urged that the draft convention should provide for a system of priority between "the State of registration of the aircraft on which the offense is committed and the State in whose airspace the offense is committed, these being the two States primarily concerned." Such a limited system of priority, the United States contended, would "afford an effective solution" to the most usual type of conflict of jurisdiction; in the absence of such a solution "the rationale of the convention... will be seriously prejudiced." The solution proposed by the Committee at Munich (namely, to limit the jurisdiction of the territorial State under certain circumstances) the United States regarded as "an important curtailment of the traditional jurisdiction of States over crimes committed in their airspace" both in theory and in fact. The comment reiterated the United States position expressed at Munich that the draft convention should contain an article "to the effect that (1) nothing in the Convention shall be deemed to create a right to request extradition of any person and (2) the term 'jurisdiction' in any arrangements respecting extradition between (contracting) States... shall, with respect to an offense to which the Convention applies, be taken to include (the jurisdiction of the State of registration of the aircraft)." These proposals were subsequently adopt-

58 Letter of the United States Representative to ICAO to the Council, dated May 12, 1961. Quotations are taken from that letter and therefore individual citations will not be given.
ed by the Legal Committee and at Tokyo, and may be found in Article 16 of the Tokyo Convention.

E. United States Hijacking Proposal

On March 2, 1962, the United States filed with the Secretary General of ICAO, for consideration by the next session of the Sub-committee on the Legal Status of the Aircraft, a proposal to incorporate in the draft convention an additional article dealing with forceable seizure of aircraft or "hijacking." The paper submitted in support of the proposal states that it was motivated by "the rash of hijacking incidents (which occurred) in quick succession in 1961," and that its purpose is to deter hijacking incidents. It asserts that the draft convention is an appropriate vehicle to enact international legislation dealing with hijacking because such incidents affect the safety of flight and normally involve a criminal act under national law. It was noted that such incidents characteristically involve the removal of an aircraft, by violent seizure or threat thereof, to a jurisdiction other than the State in which it is registered. The paper states that the Convention on the High Seas, signed at Geneva on April 29, 1958, although Article 15 thereof defines "piracy" to include aircraft as well as ships, is of limited value because the acts proscribed must occur on or over the high seas, thus excluding seizure of aircraft in sovereign airspace; and because acts committed by the crew or passenger against persons or property on the same aircraft would appear to be excluded. The United States proposal was subsequently adopted in principle by the Legal Committee at its Rome meeting in 1962, and is contained in Chapter IV of the Tokyo Convention.

F. Sub-committee On The Legal Status Of The Aircraft, Montreal, 1962

The Sub-committee on the Legal Status of the Aircraft met at Montreal in March-April 1962 to review the comments of States on the Munich draft of the Convention and to recommend further revisions to the text, or to formulate questions, for the consideration of the full Legal Committee.

The Sub-committee devoted considerable efforts to analyzing and recommending changes in the articles of the Munich draft dealing with the geographical scope of the draft convention. This problem was solved at the Tokyo Conference by eliminating the complicated categories of geographic application of the Convention altogether. Similarly, a great deal of effort was spent in redrafting the article which makes the draft convention applicable only to civil, and not State, aircraft. A solution to this very difficult and complex drafting problem was achieved in the Tokyo Convention through the device of adopting the substance of the Chicago Convention formulation. While that formulation is not free from ambiguity, it has not presented serious problems in practice.

The Sub-committee asked the Legal Committee to decide whether the draft convention should continue to be limited to offenses and acts committed by persons on board the aircraft or "whether the draft convention

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40 This section is derived from the Report of the Committee, LC/Working Draft No. 662, April 17, 1962. Quotations are taken from the Report and therefore individual citations will not be given.
should be extended to include offenses or acts occurring on board the aircraft while their author was not on board; e.g., a person who sent a package containing a time bomb." These and other similar questions were certified for consideration by the Legal Committee. The Tokyo Convention is limited to offenses and acts committed by a person on board.

The most important work of the Sub-committee related to the jurisdictional articles of the draft convention. It was recommended that Article 2 of the Munich draft be deleted because of the changes recommended in Article 3. Article 2 provided that "Offenses, for the purposes of this Convention, are offenses punishable by the penal laws of a Contracting State competent in accordance with Article 3." The changes recommended to Article 3 are substantially identical to Articles 3 and 4 of the Tokyo Convention. The following comparative text will make the changes clear:

**Text of the Munich draft convention**

**Article 2**

Offences, for the purpose of this Convention, are offences punishable by the penal laws of a Contracting State competent in accordance with Article 3.

**Article 3**

1. Independently of any other applicable jurisdiction, the State of registration of the aircraft is competent to exercise jurisdiction over offences committed on board the aircraft.

2. The criminal jurisdiction of a State in whose airspace the offence was committed, if such State is not the State of registration of the aircraft or the State where the aircraft lands, shall not be exercised in connection with any offence committed on an aircraft in flight, except in the following cases:
   
   (a) if the offence has effect on the territory of such State;
   
   (b) if the offence has been committed by or against a national of such State;
   
   (c) if the offence is against the national security of such State;
   
   (d) if the offence consists of a breach of any rules and regulations relating to the flight and manoeuvre of aircraft in force in such State;
   
   (e) if the exercise of jurisdiction is necessary to ensure the observ-

**Text of redraft proposed by the Subcommittee (Montreal, March-April 1962)**

**Article 2**

Deleted.

**Article 3**

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

2. The State in whose airspace the offence was committed, if such State is not the State of registration of the aircraft, may not compel the aircraft to land in order to exercise its criminal jurisdiction, except in the following cases:

   (a) No change
   
   (b) No change
   
   (c) No change
   
   (d) No change
   
   (e) No change
ance of any obligation of such State under an international agreement.

3. This article does not set aside any basis for criminal jurisdiction which a State might have incorporated into its national laws.

It is self-evident from the foregoing that Article 2 of the Munich draft is unnecessary since it merely refers to Article 3. Similarly, the phrase "independently of any other applicable jurisdiction" in Paragraph 1 of Article 3 of the Munich draft is compensated for, and with freedom from ambiguity, in the newly recommended Paragraph 3 of Article 3. The Sub-committee regarded the Munich formulation as inherently ambiguous for two reasons: (1) "There was the question of whether (the words 'Independently of any other applicable jurisdiction') meant that there was a general concurrence of jurisdiction of the State of registration of the aircraft with the penal jurisdiction of other States imposed for any other reason or under any other legal theory (e.g., nationality of the offender, nationality of the victim, etc.); and (2) there was a possibility that they could be construed as importing into the convention any jurisdiction that might be applicable under national law." Regarding the expression "competent jurisdiction" used in its revision to Paragraph 1 of Article 3, the Sub-committee was unable to agree, and therefore submitted the question to the Legal Committee, on whether "it is optional or obligatory for a State to enact laws giving itself jurisdiction." It did consider, however, that it was not obligatory for a State to try offenders and apply its penal laws to them.

The Sub-committee debated at length whether Article 3 created a system of priority between the State of registration and the territorial State. Noting that the Legal Committee at Munich had decided against any system of priorities at all, the Sub-committee decided to recommend an amendment "to make it clear that this provision dealt solely with the problem of keeping interference with air traffic (by the territorial State) to a minimum and did not establish any act of priority." Thus the phrase "shall not exercise jurisdiction" was deleted; and the phrase "may not compel the aircraft to land in order to exercise jurisdiction" was substituted therefor.

The Sub-committee recommended, as advocated by the United States, that the draft convention contain an article specifically providing that the Convention shall not be deemed to create a right to request extradition. The United States hijacking proposal was referred to the Legal Committee. Because, in the main, the numerous technical and substantive changes recommended to that part of the draft convention dealing with the aircraft commander were incorporated in the Tokyo Convention, a detailed discussion of these articles will be presented in the last part of this paper.

G. Legal Committee, Rome, 1962

The Fourteenth Session of the Legal Committee, which met at Rome in August-September, 1962, had the task of further refining the draft convention with a view to submitting a recommended text to the Tokyo
Few substantive changes were made to the text as recommended by the 1961 Munich Sub-committee. However, the work of the Committee was useful because a number of questions were settled.

The Legal Committee, by a vote of twenty-two to two, defeated a United States proposal to reduce the scope of the draft convention “to exclude the treatment of offenses per se, committed on board, and to deal only with such acts, whether or not they constituted an offense, as were prejudicial to the safety of the aircraft or persons and property thereon or to good order or discipline on board.” In support of this proposal, the United States contended that a convention so limited would correspond more closely with the objectives of ICAO itself; namely, safety in air navigation. The contrary argument was that such a limitation would destroy an important part of the raison d’être of the Convention, and in this connection reference was made to the 1959 Munich Legal Committee’s analysis of the need for such a Convention. Similarly, proposals to create a system of priorities were defeated. A majority of the Committee decided that the article setting forth the rule that “the State of registration of the aircraft is competent to exercise jurisdiction over offenses committed on board the aircraft” required each contracting State to be “bound to take such means as may be necessary to establish its jurisdiction over offenses committed on board aircraft registered in that State,” but that there is no similar obligation to try offenses. Paragraph 1 of Article 3, as proposed by the 1961 Montreal Sub-committee, provided that “the State in whose airspace the offense was committed, if such State is not the State of registration of the aircraft, may not compel the aircraft to land in order to exercise its criminal jurisdiction except (in five cases).” The Legal Committee recast this provision so that it applies not only to the State overflown, but to any contracting State except the State of registration of the aircraft. This change was adopted at Tokyo.

The Committee also included in its revised draft an article dealing with hijacking similar in substance to that proposed by the United States. It was decided that the Convention should not deal with the question of jurisdiction in relation to an aircraft operated under a bare-hull charter by a person, corporate or natural, who is not a national of the State of registration. Any solution of the problem, the Committee determined, should be sought outside the Convention, and the matter was referred to a Sub-committee for subsequent study. The various changes, largely technical in nature, made by the Committee to that part of the draft convention dealing with the powers and duties of the aircraft commander were substantially incorporated in the Tokyo Convention, and therefore will be dealt with in Part IV of this paper.

IV. The Tokyo Convention and the Work of the Conference

A. General

The Convention, as enacted at Tokyo, has four principal purposes. First, it makes it clear that the state of registration of an aircraft has the authority to apply its laws to events occurring on board its air-

4 The following is derived from the Report of the Fourteenth Session of the Legal Committee, Rome, ICAO Doc. 8302-LC/150-L, pp. xx - xxxii. Quotations are taken from the Report and therefore individual citations will not be given.
craft while in flight no matter where it may be. From the standpoint of the United States, this is probably the most important aspect of the Convention, since it accords international recognition to the exercise of extraterritorial jurisdiction under the circumstances contemplated in the Convention. Second, the Convention provides the aircraft commander with the necessary authority to deal with persons who have committed, or are about to commit, a crime or an act jeopardizing safety on board his aircraft through use of reasonable force when required, and without fear of subsequent retaliation through civil suit or otherwise. Third, the Convention delineates the duties and responsibilities of the contracting State in which an aircraft lands after the commission of a crime on board, including its authority over, and responsibilities to, any offenders that may be either disembarked within territory of that State or delivered to its authorities. The fourth major subject dealt with by the Convention is the crime of "hijacking."

Before taking up in detail the text of the Convention there are certain omissions from the text which warrant special mention. First, is the absence from the Convention of any attempt to develop a system of priorities governing the order in which the several possible criminal jurisdictions, including the one given to the State of registry of the aircraft, can be exercised. As earlier described, throughout the development of the Convention there was strong sentiment within the Legal Committee that such a system of priorities was essential. Further, there was considerable support for a system that gave first priority to the State of first landing regardless of where the crime or other act had been committed, even, for example, where it had been committed in the territorial airspace of the State of registration of the aircraft. This was strongly resisted by the United States and by other States. As the Convention evolved, support for a system of priorities gradually weakened and the text ultimately put before the Tokyo Conference by the 1962 Rome Legal Committee contained no such provision, nor does the text adopted at Tokyo.

Second, the text adopted at Tokyo contains no provision dealing with the subject of double jeopardy or ne bis in idem. As we have seen, this provision had been suggested in the United States draft of 1956, and it had been retained in all subsequent drafts. The 1962 Rome Legal Committee had proposed a text for the Convention on this subject, which, while containing a number of still unsolved problems, was basically satisfactory and consistent with United States law. At the Tokyo Conference the deletion of the text was proposed and carried by a surprising majority. On the whole it is probably better to have such an article in the Convention than not, but its absence is not fatal. In other provisions of the Con-

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Article 3

1. Where a final judgment has been rendered by the competent authorities of one Contracting State in respect of a person for an offence, such person shall not be convicted in another Contracting State for the same act if he was acquitted or if, in the case of a conviction, the punishment was remitted or fully carried out, or if the time for the carrying out of the punishment has expired.

2. The provisions of paragraph 1 of this article shall not apply if the person is a national or a permanent resident of the second State or if the act constituted an offence against the national security of such State, and its laws permit further trial.

3. Whenever, pursuant to the preceding paragraphs, a new punishment may be imposed by the competent authorities of another Contracting State, those authorities shall take into account the punishment or part of punishment already carried out in the first State. (Vol. I, Minutes Legal Committee of ICAO, 14th Session, ICAO Doc. 8302-LC/110-1, p. xx - xxl.)
vention, persons who are taken into custody or are subjected to trial or prosecution under the Convention are given all the protections of the laws of the States in which such action occurs (Article 15, para. 2). Thus, in the United States the constitutional prohibitions against double jeopardy will apply. Since the great majority of other States also have similar provisions in their own laws, the same result will follow in most cases. In fact, many States explained their support of the motion to delete the provisions on the ground that the existing law of their country made it unnecessary.32

Third, the Convention is also silent on the question of aircraft under bare-hull charter to a national of a State other than the State of registry. The Legal Committee had appointed a Sub-committee to make a special study of this problem, and the report of that Committee was made directly to the Tokyo Conference.44 The Sub-committee was unable to reach complete agreement on how to deal with the question and in essence put forward three possible solutions, one of which was that no special provision on this subject was necessary. Another suggestion was that there be a provision in the Convention making it clear that a State, whose national was operating under a bare-hull lease an aircraft registered in another State, might apply its laws to events occurring on that aircraft if it so chose, but that the exercise of such jurisdiction should fall entirely outside the scope of the Convention. These two possible solutions were discussed at length in the Conference separately and in association with the problem of how to treat aircraft operated by an airline formed as a consortium of several States, the aircraft of which might have no national registration. Ultimately the Conference decided that no provision on the subject was necessary, for the stated reason that States remained free to apply their laws to such aircraft, if they chose, independently of the Convention.

Bearing in mind the omissions from the text discussed, we will now take up an article-by-article examination of the text adopted by the Tokyo Conference. The Conference, in the course of developing the Convention, decided to divide it into seven chapters in order to facilitate grouping of articles dealing with related subjects. Thus, the discussion of the articles of the Convention which follows begins with a brief description of the content of the chapter, then a quotation of the text of each article of the chapter followed by a commentary on the article.

B. Chapter I—Scope Of The Convention

This Chapter contains all the provisions defining the acts to which the Convention is to apply, the circumstances under which it is to apply, and its geographic scope. It also contains those provisions excluding from the application of the Convention certain types of aircraft and certain types of crimes.

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

44 Documentation for Diplomatic Conference, Tokyo, Japan, ICAO Doc. 6.
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.

In general, the purpose of Article 1 is to establish the scope of the Convention in terms of subject matter and geography. Paragraph 1 defines the nature of the acts to which the Convention applies as including not only acts which are offenses under penal law but also those acts which may or do jeopardize the safety of the aircraft, persons or property therein, or which jeopardize good order and discipline on board regardless of whether they are also offenses. It was argued at the Conference that this broad application was unnecessary and that the principal purpose of the Convention would be served if it brought within its scope only those acts which affected safety and good order and discipline on board, whether or not such acts might also be penal offenses. However, this argument was rejected by a majority, principally on the grounds that another provision of the Convention limited the authority of the aircraft commander to take action in respect to those acts committed on board his aircraft which directly affected the safety of the aircraft and jeopardized good order and discipline on board. Thus, the majority considered that sufficient limitation on the scope of the Convention already existed, and that the jurisdiction of a State as distinguished from the authority of the aircraft commander should not be limited.

Another proposal of limitation put forward to the Conference was the suggestion that Paragraph 1 of Article 1 be limited to the case of "serious" offenses under the penal laws of the State of registration. It was pointed out, that except for the adjective "serious," the language of the draft proposed by the Legal Committee probably would be interpreted to mean serious offenses in any event and that this suggestion was, therefore, intended only for clarification. However, this proposal also failed to find a majority. Nevertheless, during this discussion it became apparent that a number of countries were concerned over the apparently unlimited scope of the jurisdiction conferred upon contracting States to enact laws applying to events occurring on board their aircraft. For this reason, the Conference subsequently amended Article 2 to restrict the scope of this provision.

Paragraph 2 of Article 1 of the Convention deals with the problem of the geographical scope of the Convention. It provides that the Convention applies to offenses committed or acts done by a person who is on board an aircraft, thereby excluding acts or offenses committed by persons not on board the aircraft, such as saboteurs who remain on the ground. This paragraph takes a different approach to the manner by which the geographical scope of the Convention is described than that proposed by the Legal Com-
mittee. The Legal Committee's approach had been to make the primary rule the fact that the aircraft was in flight outside of the territorial airspace of the State of registry. However, as we have seen, this required the enumeration of certain additional situations in which the Convention should not apply. Some members of the Conference found this method of describing the geographical application of the Convention to be confusing. Other members of the Conference were concerned that it might inadvertently leave outside the scope of the Convention some situation with which the Convention should deal. For these reasons the Conference attempted to find a more general and simple method of describing the geographical application of the Convention. Under the formula ultimately adopted in the text quoted above, all that is necessary in order for the Convention to apply is that the aircraft be in flight or be on the surface of the high seas or on the surface of another area which is outside the territory of a State.

One consequence of using this approach is that the Convention purports to apply to an aircraft while the aircraft is operating wholly within its own territorial airspace. Generally speaking, an international convention should not intrude upon purely domestic affairs of the contracting States normally governed only by national legislation. However, in the case of this Convention, this defect is more apparent than real. An aircraft while operating in the airspace of the country of its registry would be subject to the laws of its own country in any event. Thus, this approach in fact is not inconsistent with the application of national laws; and has the desirable attribute of covering completely in a short and simple phrase all cases where application of the Convention is desirable, whether such cases occur wholly or partially outside the territorial airspace of the State of registry.

Paragraph 3 defines “in flight” by considering it to be the period from the moment when power is applied for take-off until the moment the landing run of the aircraft has ended. This language follows the definition used in other international legislation where the same problem exists.

Paragraph 4 defines the class of aircraft to which the Convention applies by excluding aircraft used in military, customs or police services and, in so doing, virtually adopts the Chicago Convention formulation. Thus, even though an aircraft is registered in a contracting State, it is not within the scope of the Convention if used for military, customs or police services. Most military aircraft are not “registered” in a contracting State in the normal sense, and so presumably would not have been included with the provisions of paragraph 2 in any event. However, by specifically providing that the Convention would not apply to aircraft used in military, cus-

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45 This Convention shall apply in respect of: 1) offences against penal laws; 2) acts which, whether or not they are an offence, may or do jeopardize the safety of the aircraft or persons or property therein or which jeopardize good order and discipline on board, when such offences are committed or such acts are done by a person on board any aircraft registered in a Contracting State, while the aircraft is: a) in flight in the airspace of a State other than the State of registration of the aircraft; or b) in flight between two points of which at least one is outside the State of registration of the aircraft; or c) in flight between two points in the territory of the State of registration of the aircraft if a subsequent landing is made in another Contracting State with the said person still on board; or d) on the surface of the high seas or of any other area outside the territory of any State. (Vol. I, Minutes, Legal Committee of ICAO, 14th Session, ICAO Doc. 8302-LC/130-1, p. xix.)

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TOMS or police services, it was made clear that when a registered aircraft is being used in the military, customs or police service that aircraft is not, during the period of such use, subject to this Convention.

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.

As indicated supra in the discussion of Article 1, the provisions of Article 2 limiting the scope of the Convention were inserted by the Conference after the earlier proposal to confine the Convention to offenses affecting safety was rejected. Without this limitation, any offense against any penal law is within the Convention. This would mean, of course, that offenses of a political nature and those based on racial or religious discrimination would have been included. In the opinion of many of the countries present at the Conference this would be undesirable. For this reason, the Conference adopted a formulation which assures that offenses against purely political laws and those based on racial or religious discrimination cannot be enforced under the Convention, except to the extent that they are acts which jeopardize safety or good order and discipline on board. This Article presents some obvious questions of interpretation. Penal laws forbidding various forms of racial and religious discrimination take many and varied forms, and the views of the courts of the contracting States may differ on the issue of whether one or the other is within or without the Convention. Even more divergence of view can be expected in decisions which involve the question of whether a particular offense is of a "political nature."

C. 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 offences committed on board aircraft registered in such State.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

During the development of the draft convention in the Legal Committee, and as indicated earlier, the subject matter of paragraph 1 of Article 3 was considered to be the most significant of the entire Convention. Pursuant to this paragraph, contracting States agree to grant international recognition to the extraterritorial exercise of jurisdiction by other contracting States over offenses and acts committed on board aircraft of its registry. In the absence of some provision of international law of this type, the exercise of jurisdiction by a State over any act or offense committed on board its aircraft, particularly when that aircraft is in flight within the territorial airspace of another State, appears open to question. Its adoption by the Conference provides a sound legal basis for the extraterritorial
exercise of criminal jurisdiction extending even to cases of flight within foreign territorial airspace.

In the discussions both in the Legal Committee and during the Conference, different opinions as to the effect of paragraph 1 were expressed by many States. It was always the view of the United States that the effect of this paragraph was only to grant international recognition of the exercise of jurisdiction. On the other hand, some States insisted that the paragraph not only granted international recognition of the exercise of extraterritorial jurisdiction, but it also placed upon contracting States an obligation to implement this jurisdiction. Some States went so far as to take the position that this obligation meant that the existing penal code of a contracting State would automatically apply to acts and offenses occurring on board its aircraft as soon as a State became party to the Convention.

The Minutes of the 1962 Rome Legal Committee contain the following summary of the situation presented by the Chief of the United States Delegation:

Mr. Boyle (United States of America) said that the principal purpose of Article 3 (1), as originally conceived, had been to provide international recognition for the extra-territorial exercise of jurisdiction by one State over an event that might occur in the airspace of another. This was not a commonly accepted principle of international law and, therefore, could not be lightly disposed of on the ground that it was unnecessary to mention it. If contracting States were going to be permitted to exercise extra-territorial jurisdiction, some international document should specifically authorize this. For example, a murder might occur on board an aircraft of State X while that aircraft was in the airspace of State Y and the aircraft might thereupon proceed to State X where the offender would be tried and convicted in accordance with the law of State X. Ordinarily State Y would not favorably regard the exercise of jurisdiction by State X over a murder that had been committed in the territory of State Y. It was to cover this situation that, in the view of his Delegation, an international convention should specifically recognize the authority or competence of a State to exercise its jurisdiction for the purpose indicated on aircraft of its registry. This was what Article 3 (1) had set out to do. The Convention would close the gap so that offenders who might commit crimes in the airspace of one country and then found themselves in the territory of another, whose laws they had not violated, could not escape.

The discussion in the Committee had confused the object of the Convention by talking in terms of whether a State was obliged to exercise its jurisdiction. It seemed that two completely separate thoughts were involved and they should be kept separate.

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47 The report of the Sub-committee on Legal Status of the Aircraft in Vol. II Documents, 14th Session Legal Committee of ICAO, Doc. 8302-LC/150-2, p. 13 contains the following comment: Article 3, paragraph 1 (Second Part).

14. The expression "competent jurisdiction" used in the remaining part of Article 3 (1) raised two questions: (1) Was it obligatory or optional for a State to enact laws giving it jurisdiction? (2) Was it obligatory or optional for a State to try offenders and to apply its penal laws to them?

15. The Sub-committee could not agree on an answer to the first question and calls the attention of the Legal Committee to the necessity of reaching a decision on this question.

16. In regard to the second question, the Sub-committee considered that, while it should be recognized that the State of registration was competent to apply its penal law to offenses occurring on board its aircraft outside its territory, that State would be under no obligation to try offenders and apply its penal laws to them.

48 14th Session, Legal Committee of ICAO, Doc. 8302-LC/150-1, p. 79.
The French proposal dealt only with the second thought and only by implication, if at all, dealt with the primary purpose of Article 3 (1). Therefore, he was opposed to the French proposal.

Many Delegates had enunciated different principles in regard to the question which asked to what extent and in what manner a State was compelled to exercise its jurisdiction.

Some States had said that, by mere ratification of the Convention, their criminal codes would automatically apply on board their aircraft and, therefore, they had no problem. But this was not the case in the United States where a very different thing, in fact, happened. The automatic application of criminal codes to aircraft was an . . . unusual condition, rather than usual. But the States which had the automatic concept or principle seemed to feel that the other States should automatically apply some criminal code to events occurring on board their aircraft when they ratified this Convention. But this gave some difficulty. For example, who would presume to dictate to a State what offences it wished to make crimes on board its aircraft? Yet, inherent in the concept of those Delegates who had spoken for the self-execution of the treaty was that exact concept. There might be acts on board aircraft which should be made criminal which, if performed on the ground within the municipal territory of the State, should not be criminal. Hence, when dealing with the second part of this problem, one must leave this question to the State.

His Delegation would have no objection if a formula could be found to express the fact that contracting States which ratified the Convention must be left the freedom of a sovereign State in determining what kinds of acts would be made crimes on board their aircraft and what kinds of penalties would be applicable to such acts. But what the Committee had done was to discuss only this question which was, at best, secondary and ignore the first question which was what Article 3 (1) had set out to do originally. He suggested that Article 3 (1) be amended so as to make it clearly accomplish only the first purpose and leave the second purpose to be taken care of by another paragraph, if necessary. This could be accomplished by deleting from Article 3 (1) the words "is competent to" and substituting therefor the word "may" so that the text, as thus amended, would read:

"1. The State of registration of the aircraft may exercise jurisdiction over offences committed on board the aircraft."

As this quotation indicates, the United States and others strongly opposed the view that it was obligatory for a contracting State to impose any existing criminal code to acts occurring on board its aircraft, and the language of the Article as drafted by the Conference reflects these views.

The key to the decision of the Conference on this point is contained in a proposal of the United Kingdom adopted as an instruction to the Drafting Committee. This instruction reads as follows:

"That the Drafting Committee examine the three texts of Article 2, paragraph 2, subparagraph (a) and produce a common text as close as possible to the existing texts which will reflect the principles that, while each State is obliged to establish jurisdiction over offences committed on board aircraft registered in that State, each State has power to define the precise offences over which jurisdiction is to be asserted and to decide whether to enforce its jurisdiction."
Pursuant to that instruction, the Drafting Committee produced paragraph 2 of Article 3 which provides that a contracting State is under obligation only to take such measures as may be necessary to establish its jurisdiction. While the language is not completely clear, nevertheless since it is specifically intended to reflect the intent of the Conference contained in the instruction quoted above, any ambiguities in the text can be cured by reference to the instruction.

Article 3 also contains a paragraph (paragraph 3) to the effect that this Convention does not exclude any criminal jurisdiction exercised in accordance with international law. This paragraph is designed to serve several purposes. In the first place, as originally conceived by the Legal Committee, the paragraph was intended to reflect the fact that the jurisdiction over offenses or acts committed on board an aircraft while in flight was an additional concurrent criminal jurisdiction which a State could exercise without prejudice to other criminal jurisdictions that the State might exercise under other legal theories. During the Tokyo Conference, this language was further expanded to make it clear that any form of criminal jurisdiction exercised by a State under its national law would still be available regardless of whether such jurisdiction was exercised under common law, constitutional provision, statutory provision, or as a consequence of treaties or other international agreements.

### 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 resident 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.

The provisions of Article 4 are related to kindred clauses in the Maritime Convention on The Law of the Sea. The Legal Committee incorporated them into the early drafts of the Convention originally for the purpose of describing the occasions on which the State over whose territory a particular offense was committed could exercise its jurisdiction. This particular use of Article 4 was related to the earlier attempts to create a priority system in the Convention and had been abandoned by the Legal Committee before submitting the text of a draft convention to the Tokyo Conference. Instead, the text sent by the Legal Committee to the Tokyo Conference was one which, consistent with the principle that existing criminal jurisdictions were not superseded by this Convention, recognized the application of the jurisdiction of any State in whose airspace a particular offense was committed. With this revision, the purpose served by Article 4 is to prescribe the conditions under which the State in whose

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50 In fact on this issue, it is the exact language of the draft proposed by the Legal Committee at its 14th Session in Rome. See Article 2, paragraphs 1 and 2, page xx, Vol. I, Minutes, ICAO Legal Committee, 14th Session, ICAO Doc. 8502-LC/150-1.
airspace an offense has been committed may interfere with an aircraft while in flight within its airspace for the purpose of exercising its criminal jurisdiction. As so revised, it did not constitute any limitation on the jurisdiction of the State so overflown.

The Tokyo Conference adopted the theory of this Article as developed by the Legal Committee with only one minor exception. The word "delay" was stricken from the Article as proposed by the Legal Committee on the grounds that subsequent portions of the Convention (Article 17) adequately take account of the problems of delay, and all that is necessary in this Article is to prescribe the conditions under which a State other than the State of registry may interfere with an aircraft in flight in order to exercise its criminal jurisdiction.

It is important to note precisely the limitation imposed on the so-called territorial State by this Article. The territorial State is not to interfere with the flight of aircraft in its airspace except under the enumerated conditions "in order to exercise its criminal jurisdiction." Thus, the State overflown may "interfere with an aircraft" for any other purpose which it deems proper. The exclusive sovereignty of the territorial State over the airspace above its territory recognized by the Chicago Convention is not derogated by this provision. The application of the jurisdiction of the territorial State is explicitly recognized in this Article; the State overflown merely agrees not to use a particular measure to vindicate that jurisdiction, and in fact may use that exact measure for other purposes. Indeed, the Legal Committee had in its earlier consideration of this matter specifically rejected a proposal designed to directly limit the jurisdiction of the overflown State.81

D. Chapter III—Powers Of The Aircraft Commander

This Chapter is devoted to those provisions dealing with the authority of the aircraft commander. These Articles describe the acts and offenses to which his authority applies, the period of time during which it exists, its extent, and its limitations. Their terms also impose on the aircraft commander certain specific obligations with which he must comply in order to bring himself within the protection accorded him by the Convention. This portion of the Convention has a high practical value to both the airline operators and their crews, because it grants the aircraft commander and others protection from legal actions brought against them because of the use of force which, without the legal authority granted by the Convention, might subject the aircraft commander and others to legal liability in some national jurisdictions.

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 5 defines the period during which the powers of the aircraft commander exist in a manner different from that used in Article 1 to describe the application of the Convention for jurisdictional purposes. Unlike Article 1, Paragraph 1 of Article 5 states that the powers of the aircraft commander exist while his aircraft is in flight in the airspace of the State of registration only when the last point of take-off or the next point of intended landing is outside of the State of registration, or the aircraft subsequently enters the airspace of a State other than the State of registration. The purpose of this provision is to make it clear that the Convention does not purport to interfere with the domestic law of contracting States by imposing responsibilities on the aircraft commander or to prescribe the limits of his authority, except in the situation in which international flight is involved. Thus, flights between two points within the territory of the State of registration, even though the aircraft operates over the high seas, do not bring the provisions of this Chapter into play.

As indicated in the discussion of Paragraph 2 of Article 1, the entire Convention previously used an approach similar to that expressed in Paragraph 1 of Article 5, but shifted to a more general expression in the interest of simplicity. This was possible in Article 1 because when dealing with the question of jurisdiction, the Conference did not consider it harmful to use language which in its broadest reach in fact applied the Convention to a purely domestic matter. However, in the case of the powers and duties of the aircraft commander, the Conference was of the opinion that there existed a possibility of conflict between the Convention and domestic law which this paragraph avoids.

As indicated, Paragraph 2 of Article 5 constitutes an extension of the scope of the Convention insofar as the authority of the aircraft commander is concerned. It provides that for this purpose the aircraft is to be considered in flight as soon as the external doors are closed following embarkation, and the powers of the aircraft commander are to remain in effect until such time these doors are opened for disembarkation. Thus, for the purposes of this Chapter, the aircraft need not be airborne for the aircraft commander to take necessary measures to preserve the safety of his aircraft and its passengers. His authority exists during the period the aircraft is taxiing on the apron, or while waiting for clearance to enter or depart from the apron area, or awaiting clearance to take-off; in these last three cases, as air travelers are well aware, substantial periods of time may be involved. Additionally, should the aircraft make a forced landing, the authority of the aircraft commander continues with respect to offenses and acts which have been or are committed on board until the competent authorities of a State arrive to take over the responsibility.

**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.

This Article describes the powers of the aircraft commander over persons on board his aircraft who may threaten its safety and prescribes conditions to prevent their abuse. While an aircraft commander may impose restraint upon a person threatening the safety of the aircraft or persons and property on board, he can do so only if he has reasonable grounds to believe that the person in question has committed such an act or is about to commit it. Also, this authority of the aircraft commander is specifically limited to "reasonable measures" which are necessary to accomplish the three specific purposes enumerated in paragraph 1. Thus, he must use only reasonable force and only for the enumerated purposes and not to accomplish any other objective. As an example, under the Convention the aircraft commander is given no authority or responsibility to deal with the case of a known criminal whom he finds on board, and for whom the police authorities of the next point of landing are looking, unless the criminal conducts himself in such a way or the circumstances on board the aircraft become such that the conditions specified in paragraph 1 occur. Thus, the mere presence of a known criminal on board an aircraft creates no authority in the aircraft commander to take any form of police action, nor is he made responsible for such action.

In paragraph 2 the aircraft commander is given authority to secure the assistance of other crew members in the exercise of the authority vested in him by paragraph 1. He may additionally request, but not require, the assistance of passengers in this endeavor. As a separate provision of paragraph 2, crew members and passengers are authorized to take reasonable preventive measures without any authorization from the aircraft commander whenever they have reasonable grounds to believe that such action is immediately necessary for safety reasons. This clause was attacked by some delegates at the Tokyo Conference on the ground that passengers normally would not be qualified to determine whether a particular act jeopardized the safety of the aircraft or persons and property therein. For that reason, it was unwise to give this authority to passengers. This argument was resisted by other delegations on the grounds that the particular provision contemplated emergency type situations in which the danger to the aircraft or persons and property on board was clear and

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44 On the other hand, if the known criminal has committed a criminal act in the State of registration by being absent from a particular place in that jurisdiction, a continuing "offence against the penal law" may have occurred.
present, and in fact no special technical knowledge would be required to recognize the peril. This latter argument prevailed, although some delegations felt very strongly the other way.

In connection with the authority of crew members and passengers to take action without prior authorization from the aircraft commander, it is significant to note that they may take only "preventive" measures. Thus, in any case, the independent authority of the crew member or passenger is considerably less than that of the aircraft commander.

**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.

Paragraph 1 of Article 7 takes up the question of the duration of measures of restraint which an aircraft commander may have imposed upon a person on board his aircraft pursuant to the authority vested in him by Article 6. It recognizes that in the normal situation such measures of restraint should not be continued beyond the first point of landing following their imposition. However, the paragraph also recognizes the fact that under certain circumstances measures of restraint may have to be continued beyond the point of first landing. The first condition under which onward carriage under restraint is permitted is the situation that arises when the first landing is in the territory of a non-contracting State, and that State refuses to permit disembarkation. Additionally, onward carriage is permitted when the measure of restraint has been imposed in order to enable the aircraft commander to deliver the individual to competent authorities, as distinguished from mere disembarkation. This latter exception is necessary because a non-contracting State has no obligation to accept delivery. In fact, the aircraft commander has no authority to "deliver" a person to the authorities of a non-contracting State (See Article 9). One reason for this is that the provisions of the Convention designed to safeguard the civil liberties of an individual under restraint would not be binding upon the authorities of such non-contracting State.

Paragraph 1 of Article 7 also recognizes another exception by permitting continuation of restraint in the situation that arises in the event of forced landing. The final exception which permits onward carriage beyond the first point of landing with a person still under restraint is the case in which the person under restraint agrees to such onward carriage. This provision stemmed from suggestions made in the Legal Committee and at the Conference that for any number of reasons a person who had been
placed under restraint by an aircraft commander might wish to be carried onward and agree to continue to submit to restraint in order to do so if the first point of landing (whether in a contracting or non-contracting State) was in a State in which he did not wish to be disembarked or delivered to competent authorities.

Paragraph 2 of Article 7 takes account of the fact that States would normally wish to know that there is a person who has been placed under restraint on board an aircraft which lands in their territory. If practicable, this notification is to be made before landing. It is noteworthy that the obligation on the aircraft commander to give this notice extends to non-contracting States, as well as contracting States. In view of this fact, presumably the aircraft commander would not be entitled to plead, in defense of any action brought against him by a person on whom he had imposed restraint, the existence of his authority under this Convention if he failed to give this notification to a State in whose territory the aircraft landed. Thus, at least in this respect, the notice operates for the protection of the person under restraint, as well as for the purpose of notifying the appropriate authorities of the State in which the aircraft lands of the circumstances.

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.

This Article grants an authority to the aircraft commander which is slightly different from the authority conferred by Article 6. Under this Article, the aircraft commander may 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, one of the offenses or acts to which the Convention applies. His authority to disembark is specifically limited to the case where this action is necessary to protect the safety of the aircraft or persons and property therein or to maintain good order and discipline on board. Thus, as an example, this Convention gives the aircraft commander no authority to disembark a person merely because the aircraft commander discovers that he is a known criminal. Of course, if the aircraft commander has reasonable grounds to believe that the presence on board his aircraft of a known criminal may create such a condition as to require him to take restraintive action in order to protect safety or insure good order and discipline on board, then he is authorized to so act by the Convention. Paragraph 1 of Article 8 authorizes the aircraft commander to disembark a person, under the circumstances just described, in the territory of any State in which the aircraft lands; this authority is not limited to contracting States.

Paragraph 2 of Article 8 merely creates the obligation of the aircraft commander to report to the authorities of the State in which he disembarks any person that fact and the reasons for such action.
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 whom 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.

Paragraph 1 of this Article states the terms and conditions under which an aircraft commander may deliver (as distinguished from disembark) persons on board his aircraft to the competent authorities. In order to assure the individual so delivered of the civil liberty protection provided for in later Articles of the Convention, this authority to deliver is limited to contracting States. It also provides that only those persons whom the aircraft commander has reasonable grounds to believe have committed, on board his aircraft, an act which is a serious offense can be “delivered.” This language excludes from the authority of the aircraft commander the power “to deliver” persons who have committed crimes in places other than on board the aircraft. It also excludes persons whose offense, even if committed on board the aircraft, is not regarded as “serious.” In this latter respect, it provides that in determining whether the offense is “serious,” the aircraft commander is to look only to the penal law of the State of registration of the aircraft; not to the penal laws of the State in which the aircraft may be operating at the time nor to any others that might be applicable under some other legal theory. The aircraft commander in making this judgment is not held to an absolute standard by this paragraph, but rather is permitted to deliver to competent authorities any person who “in his opinion” has committed a serious offense. Thus, the aircraft commander may make an incorrect determination and deliver to competent authorities a person whose act under the law of the State of registration of the aircraft may be only a minor offense; but, if “in his opinion” it was a serious offense, and this subjective judgment had some reasonable basis in fact, and was not arbitrary and capricious, the aircraft commander would be acting within the scope of his authority.

In adopting this text the Conference was following the recommendations made by the 1961 Montreal Sub-committee on the Legal Status of the Aircraft which proposed virtually this same text. Its analysis of the problem and reasons for following this course of action are as follows:

“In connection with Article 6 (2), the Subcommittee considered several problems including the following:

(1) Whether the text of the Munich draft was susceptible of the interpretation that the aircraft commander might hold the person concerned in custody while the aircraft was on the ground in a non-contracting
State in order to deliver him to the competent authorities of the next Contracting State in which the aircraft landed.

(2) Whether the aircraft commander might deliver to the competent authorities of a Contracting State any person on whom he had imposed restraint by virtue of action taken under Article 5.

(3) Whether Article 6 (2) should be confined to the case where the aircraft commander had reason to believe that the person concerned had committed on board an aircraft an act which, in his opinion, was a serious offence under the penal laws of the State of registration.

"Having examined all of the three problems mentioned above, the Subcommittee adopted and recommends the following new text of Article 6 (2):

2. The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person upon whom he has imposed measures of restraint pursuant to Article 5, if he has reasonable grounds to believe that such person has committed on board the aircraft an act which, in his opinion, is a serious offence according to the penal laws of the State of registration of the aircraft."

Paragraph 2 of Article 9 provides for notification to the authorities in the State in which the aircraft commander intends to make "delivery" of a person. As in the case of disembarkation, he is to notify the authorities of his intention and the reason for such action.

Paragraph 3 deals with the problem of what obligation the aircraft commander has to furnish evidence of a suspected crime to the authorities of a State to whom a suspected offender is delivered. This particular clause has always proved troublesome. The Legal Committee, after spending a great deal of time on this question, was never able to reach a very satisfactory solution. In the view of the writers, the Convention, in Paragraph 3 of Article 9, presents a better formulation.

Under this paragraph, the aircraft commander is under obligation to furnish the authorities to whom he delivers a suspected offender evidence and information, which by the law of the State of registration of the aircraft are lawfully in his possession. Under this phraseology, the aircraft commander in examining witnesses is bound by the law of the State of registration. Thus, in the case of United States aircraft, the privilege against self-incrimination would be available to persons being examined; so also would the provisions of law governing search and seizure. Additionally, this provision of the Convention makes it possible for the United States, for example, through its airline operators or otherwise, to instruct its aircraft commanders as to the nature and extent of their obligation to furnish evidence and information, and thus assure that United States law will be adhered to by aircraft commanders of United States aircraft.

In this connection it should be noted that once the aircraft lands in a State its authorities normally would have the right to enter the aircraft for the purpose of collecting evidence. Thus, although the obligation of the aircraft commander to furnish evidence and information is controlled by the law of the State of registration, the extent to which the authorities of a State in which the aircraft lands may go in collecting additional evidence and information is subject to the laws of that State, not the laws of the State of registration.

54 See, for example, Vol. I, Minutes, 14th Session Legal Committee, pp. 120-130.
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.

This is the provision in Chapter III which accords to the aircraft commander and others protection against any legal liability that may arise as a consequence of actions taken against a person pursuant to the authority granted by the Convention. This provision had not presented any great difficulty during the development of the Convention by the Legal Committee; however, at the Tokyo Conference there was extensive debate concerning this Article. One of the issues debated was whether the protection accorded by the Article should extend only to "liability" or whether the Article should be more broadly written so as to encompass possible criminal or administrative proceedings. The United States and other delegations supported a broadly phrased Article, and as ultimately written the protection granted extends to all actions: criminal and administrative, as well as civil.

Another issue debated at the Conference was whether the protection accorded the aircraft commander, passengers, crew members, the airline and others, should be extended to actions brought by or on behalf of any person on board the aircraft or whether it should be limited to actions brought by the person "against whom the actions were taken"; for example, in taking action to restrain a particular passenger the aircraft commander damages a valuable article belonging to another passenger, such as a camera. Should the aircraft commander be entitled to protection against suit brought by the passenger whose camera has been damaged merely because the aircraft commander is acting within the scope of his authority according to this Convention? The answer given by the Tokyo Conference to this question is in the negative; Article 10 limits the protection to actions brought by the offending passenger.

E. Chapter IV—Unlawful Seizure Of Aircraft

As earlier related, this provision was originally proposed by the United States at a meeting of the Sub-committee of the Legal Committee in 1962. It was reiterated by the United States during the meeting of the 1962 Legal Committee, at which time the United States received active support from the Government of Venezuela.

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.

In the draft convention prepared by the Legal Committee this Article
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dealt not only with the problems touched upon in paragraphs 1 and 2, but also included some of the provisions dealing with the responsibilities and authorities of States in which the aircraft subsequently landed. The Tokyo Conference transferred these provisions to the next Chapter.

The approach taken by this Article to the crime of unlawful seizure of aircraft avoids attempting either the description of an international crime or the attempt to make such action a crime under international law. Instead, the Article provides that the contracting States have certain obligations whenever a person on board an aircraft has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control. The question of whether a particular act is lawful or unlawful is to be judged by the law of the State of registration of the aircraft or the law of the State in whose airspace the aircraft may be in flight. 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. While there was considerable debate at the Tokyo Conference over the question of whether the act must not only be unlawful but also must encompass either the use of force or the threat of force, the fact that in the final analysis the unlawfulness is to be measured by the law of either the State of registry or the territorial State seems to make such consideration somewhat academic.

Paragraph 1, in the event of commission of the act of hijacking, imposes on all contracting States the obligation to take appropriate measures to restore or preserve the aircraft commander’s control of the aircraft. The words “appropriate measures” are intended to mean only those things which it is feasible for a contracting State to do and also only those things which it is 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. Of course, once an aircraft lands

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55 The minutes of the Legal Committee include a discussion on this precise point of interpretation as follows: “Mr. Kean (United Kingdom) stated that, besides supporting the Spanish proposal to delete paragraph (b), he had a proposal to make in regard to paragraph (a). This proposal related to the words ‘in or near whose airspace the aircraft is operated’ included by the Delegations of the United States of America and Australia.

“In the first place, it was not known exactly what was meant by ‘near’ and that introduced an element of imprecision into the Convention. Secondly, he wished to draw attention to the fact that there were many States situated near one another and such States would be obliged to send fighter aircraft to the territory of neighbouring States in order to oblige the aircraft to land. His Delegation wished to avoid danger to passengers and other innocent persons in the aircraft which might, in this way, be pursued by military or other classes of aircraft.

“Consequently, the United Kingdom Delegation proposed the deletion of the words ‘in or near whose airspace the aircraft is operated’ and the inclusion of the words ‘after the aircraft has landed’ after the words ‘necessary measures.’

“Mr. Boyle (United States of America) said that he could not agree to the deletion of the words ‘in or near whose airspace the aircraft is operated,’ nor to the inclusion of an additional phrase which stated that these measures would be taken only after the aircraft had landed. He stated that the United States was prepared to give every kind of assistance to the aircraft of other contracting States whether in the air or on the ground.

“Obviously, the United States was not going to violate the airspace of any other country by
within a territory of a contracting State after being hijacked, the measures which a State may take to restore control to the lawful aircraft commander are much more inclusive. Additionally, when this occurs, paragraph 2 imposes upon the contracting State the obligation to permit the passengers and crew to continue as soon as practicable and to see to it that the aircraft and its cargo are returned to the persons lawfully entitled to possession.

F. Chapter V—Powers And Duties Of States

The Conference, by dividing the Convention into chapters, incorporated in this Chapter those Articles which specifically impose upon contracting States particular obligations (to the individual, for example) and also those provisions which give such States special powers. As a consequence, all of the provisions which deal with the powers and obligations of States, including those provisions protecting the civil liberties of individuals, appear in this Chapter.

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.

This Article is the corollary of Articles 6 and 8. Those Articles authorize the aircraft commander to disembark any person who has committed, or is about to commit, an act of the type described in Article 1 of the Convention. It obliges the contracting State to allow the commander of an aircraft, which is registered in another contracting State, to disembark such a person. Later provisions of the Convention deal with the consequences of such disembarkation, but by this Article an unqualified obligation is imposed on a contracting State to permit disembarkation.

The unqualified nature of this obligation was arrived at by the Conference only after long and careful study of the consequences of such an undertaking both at Tokyo and in earlier deliberations of the Legal Committee. For example, the status of a disembarked person raised the question of whether he must be "admitted to the territory" of the State in which he is disembarked. The 1961 Montreal Sub-committee discussed this question in its report:

"Article 10, paragraph 1

31. The Subcommittee decided to call to the attention of the Legal Committee that it appears from the comments of some States that it might be desirable to make it clear that the immigration laws of the State in whose territory a person was disembarked would not be affected by this convention; also that any right of the State of disembarkation, under its national law, to require an airline to carry the unwanted passenger away or to pay for his transportation, would not be affected by the convention."

(For Vol. I, Minutes, Legal Committee of ICAO, supra, pp. 155-156.)
"Article 10, paragraph 2

32. The Munich draft does not deal with the question as to what arrangements may be made by the State in whose territory a person is disembarked or delivered by the aircraft commander but the authorities of which State do not wish to detain him. Comments received from certain States indicated the desirability of adding in Article 10 a provision to solve this question. Therefore, the Subcommittee recommends that a provision along the following lines should be included as paragraph 4 in Article 10:

'At the request of the State in whose territory the person is disembarked or delivered, the State of which he is a national, the State of which he is a permanent resident and the State in which he began his journey shall be obliged to admit him into its territory, unless he is a national of, or permanent resident in, the requesting State.'

32.1 While accepting the foregoing, some members wished to expand the principle along the following lines:

(a) that in addition to the States mentioned, the State of destination of the passenger disembarked or delivered should also be obliged to accept him; and

(b) that as amongst the foregoing States, there should be an order of priority established in regard to the obligation to admit such person."

Ultimately, this problem was solved by the Conference in a manner somewhat contrary to that recommended by the Sub-committee. (See Article 14.)

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.

This Article deals with the obligation of contracting States to take "delivery" of a person from the aircraft commander which should be contrasted with the authority of the aircraft commander to "disembark." This obligation is the corollary of the authority given the aircraft com-
mander by Articles 6, 7 and 9. Paragraph 1 states the primary unqualified obligation of each contracting State to "take delivery."

Paragraph 2 discusses the obligation of a contracting State, after having taken delivery, to take "custody." It provides that the contracting State is under obligation to take "custody" only if it is satisfied that the circumstances warrant such action. Thus, the State is left free to judge for itself whether the act is of such a nature as to warrant such action on its part and whether it would be consistent with its laws since under paragraph 2 any such custody is to be effected only pursuant to law of the State taking custody. The Legal Committee in its draft had contemplated "custody" as the only means of holding any person "delivered," but the Tokyo Conference added the possibility of "other measures to ensure the presence" of such a person, presumably referring to bond or other form of penalty or forfeiture. Additionally, the obligation of the contracting States to take custody or otherwise ensure the presence of the person in question is extended beyond the case of the person "delivered" by an aircraft commander and includes the case of a person suspected of aerial hijacking.

Paragraph 2 provides that the custody or other measures are to be those contained in the law of the State taking custody. However, in the case of custody, it may only be continued for that period of time which is reasonably necessary to enable criminal proceedings to be brought by the State taking custody, or for extradition proceedings to be instituted by another interested or affected State.

Paragraph 3 requires any contracting State to assist any person that it has taken into custody in communicating immediately with the nearest appropriate representative of his State. This is an important addition to the Convention which was put forward by the United States for the first time at the Tokyo Conference. An interesting facet of this provision is the fact that while at that time—September 1963—no consular agreement between the United States and the U.S.S.R. had been consummated; nevertheless, neither the U.S.S.R. nor any other of the Soviet bloc countries present objected to the inclusion of this provision in the Convention.

Paragraph 4 imposes on any contracting State taking "delivery" of a person, or having a "hijacked" airplane land in its territory, the obligation to make an immediate preliminary enquiry into the facts. This was the subject of considerable debate at the Tokyo Conference, due primarily to the fact that the exact legal meaning of the phrase "preliminary enquiry" is not the same in all legal systems of the world. A preliminary enquiry in some systems envisages a rather formal proceeding presided over by an officer of the court. In other legal systems it may be a very informal proceeding conducted by a police officer. Although no exact agreement as to the meaning of the phrase as used in the Convention was ever achieved, the provision appears desirable on the theory that some prompt enquiry, formal or informal, into the circumstances is a desirable thing in principle and, since a report of the enquiry is required, in most cases it should operate as a protection to an individual who had been "delivered" to the authorities of a contracting State.

Paragraph 5 imposes on a State that has taken a person into custody the obligation to notify the State of registration of the aircraft of that
fact, and, additionally, where they are different, the State of nationality of the detained person. Other States may be notified, if the State taking custody considers it advisable. The notification must state the fact of custody and the reasons therefor. Again, this provision is designed to protect the individual by calling the situation to the attention of his government. Also, this provision protects the State of registry of the aircraft by advising it of a problem which its aircraft commander has encountered. The paragraph additionally imposes upon the State having custody the obligation to report the findings of its preliminary enquiry together with a statement as to whether it intends to exercise jurisdiction. This latter provision has two purposes: first, to give to the other States more detailed information as to the circumstances surrounding the entire incident; and, second, to alert them to the intentions of the holding State so that they may better form a judgment as to whether they wish to extradite the individual.

**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 act of taking 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.

This Article deals with the status of an individual who has been “disembarked” or “delivered” pursuant to the provisions of the Convention. Paragraph 2 states the general rule that neither such disembarkation or delivery, nor the act of taking custody, is to be considered as “admission to the territory.” (See page 345 supra.) This provision was supported by the United States, among others, both at the Tokyo Conference and earlier in the Legal Committee. The fact that the Convention imposes upon contracting States obligations which enable an individual to be physically present within the confines of the State makes it necessary to specifically provide that these obligations are in no way intended to affect “admission” to the territory of the State in the normal sense of the word.

On the other hand, the United States opposed the inclusion of Paragraph 1 of Article 14. This Article provides that, in the case of a person “disembarked” or “delivered,” if the person cannot or does not desire to continue his journey and the State of landing refuses to admit him to its territory, then that State is given the authority to return such a person if he is not a national or resident to another State. In effect, this is a form of expulsion. It was opposed on the ground that the situation contemplated in the Article was one that quite often arose when persons whom a State did not wish to “admit” arrived in its territory by some form of
transportation. In the case of surface transportation no special international rule existed and there appeared to be no reason why air travel should be treated differently. Moreover, national laws appeared to be sufficient to cope with this problem in the case of surface travel, and there appeared no reason why they could not adequately deal with the problem posed by the Convention with respect to air travel. These arguments, however, were unavailing, and the Conference adopted the provision of paragraph 1 over the objections of the United States and other States.

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.

Article 15 is designed to assure the individuals who may be subjected to "disembarkation" or "delivery" under the Convention additional guarantees as to their civil liberties. Paragraph 1 provides that any person who has been disembarked or delivered is to be set at liberty as soon as practicable in order to proceed to any destination of his choice, except in the case where the law of the State of landing requires him to remain for the purpose of extradition or criminal proceedings. Paragraph 2 provides that any person delivered or disembarked must be accorded by the law of that State treatment which is no less favorable for his protection and security than that accorded to nationals of that State under like circumstances. By this formulation it is intended that persons in any form of custody or otherwise subject to the law of contracting States should be entitled to avail themselves of the provisions of law of that State relating to the protection of nationals. In the United States, for example, this would include the writ of Habeas Corpus, the privilege against self-incrimination, protection against search and seizure, etc. These provisions were introduced and advocated by the United States delegation to the Conference.

G. 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 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.
As previously stated in Part III of this paper, the Legal Committee decided not to formulate any form of priority system between competing jurisdictions, but to provide for concurrency of criminal jurisdictions. In certain cases, extradition treaties can be helpful in avoiding the consequences of conflicts between competing jurisdictions. This, indeed, is normal international practice where an extradition treaty is in force between two competing jurisdictions, or between the State which is holding the alleged offender and other States, all of which claim jurisdiction over him. The Legal Committee considered the use of extradition treaties to be a feasible partial solution to problems of conflict of jurisdictions in the case of crimes committed on aircraft. However, such a solution requires that extradition treaties be made applicable to events which occur on aircraft. Since most extradition treaties refer to crimes committed within the territory of a State, it is necessary to specify that crimes committed on board aircraft are to be treated as though they have been committed within the territory of a State. This relatively simple concept had caused a great deal of difficulty within the Legal Committee either because it was not clearly understood or because of difficulties in expressing it in three different languages. In any event, at the Conference, the formula found in paragraph 1 of Article 16 was suggested by the Conference Drafting Committee and the difficulties were resolved.

Paragraph 2 provides that the Convention itself is not to be considered as creating an obligation to grant extradition, except to the extent that paragraph 1 of Article 16 may be so considered. This provision, as indicated, is a corollary to the fundamental decision in the Legal Committee, as adopted by the Conference, that the Convention itself does not grant any priority of jurisdictions, and for that reason it is not intended to in any way create an independent 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.

This Article is self-explanatory. It imposes upon the contracting States the obligation of utilizing the powers granted by the Convention in such a way as not to jeopardize safety or other interests of air navigation and to avoid unnecessary delay to the aircraft, passengers, crew and cargo. Even though the language of the Article is precatory in nature, it is nevertheless in keeping with the spirit of the Convention and therefore useful.

**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.
This Article deals with a specific problem which the Conference found to be very troublesome. As provided in Article 3, the theory of the Convention is that the State of registration of the aircraft has jurisdiction over offenses and acts committed on board, and under the provisions of Chapter III, the aircraft commander has certain powers derived from the laws of the State of registration. Thus this Article attempts to solve the problem which aircraft of a consortium would present, if such aircraft were not registered in any State or registered in more than one. In the situation thus envisaged it would be difficult to apply the Convention. The Article meets this difficulty by providing that the States forming the consortium should designate the State among them, which, for the purposes of the Convention, is to be considered as the State of registration. Presumably, this could mean any State in the consortium that is a contracting State, even though it might not be one of the States in which the aircraft was registered.

Whether this provision is desirable is open to question. It is probably unnecessary since, as a practicable matter, any aircraft being operated by a consortium of contracting States normally could be registered in one such State. Additionally, this Article appears to be directed to a specific method of forming a consortium; there may be other methods which might present other problems left unsolved by this Article. The provision was strongly supported by a number of the recently independent African States that may be contemplating joint airline operations. While it may not be wholly desirable, its inclusion in the Convention does not appear to present any major difficulty.

H. Chapter VII—Final Clauses

Since the provisions of this Chapter are for the most part formal and contain no substantive provisions relating to the technical problems of aviation law, an article-by-article discussion is unnecessary. Nevertheless, some comment is warranted.

Articles 19 and 22 limit adherence to the Convention to those States which are members of the United Nations or of any of its specialized agencies. This provision was the subject of considerable debate both within the Committee on Final Clauses and in the plenary meetings of the Tokyo Conference. It necessarily excludes from the possibility of signing, ratifying or adhering to the Convention the so-called unrecognized regimes such as the People’s Republic of China. From a political standpoint, this clause is a desirable one for the United States. It was, of course, resisted by the U.S.S.R. and other bloc countries on the ground that it excluded some States from becoming party to the Convention.

Additionally, this Chapter designates the International Civil Aviation Organization as the depository of instruments of ratification and provides that the Convention is to come into effect as soon as twelve of the signatory States have ratified the Convention.

67 Scandinavian Airlines System is a consortium of the nationalized air transport organizations of Denmark, Norway and Sweden; however, each of its aircraft is registered in one of the three States.
V. Conclusion

The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft is, like all legislation not divinely given, imperfect. It is confined to a narrow range of human activity, and, even within this range, its specific terms are the result of compromises among sovereign States. Such compromises were necessary to achieve subsequent ratification by a large number of States with important aviation interests; but, at the same time, the provisions thus developed probably do not constitute an ideal formulation from the point of view of any one State. Beginning as a conceptually grand design to study, and perhaps codify in international law, "the legal status of the aircraft," the project was successively narrowed in scope, and as the draft convention was evolved and its provisions were ever more closely defined, limitations on its scope were necessitated in order to achieve an accommodation of views. Thus, the simple solution of a priority system in which the State of first landing would have primary (and almost exclusive) jurisdiction could not find acceptance among a majority of ICAO Member States. At the opposite pole, the attractive concept of limiting the scope of the Convention to crimes or acts which do or may jeopardize the safety of the aircraft failed of adoption. Nevertheless, a good balance was struck between what could be done and what needed to be done. In this sense, the Tokyo Convention is a desirable and necessary addition to international air law.

As has been indicated, the Convention does not in all respects coincide exactly with the legal system and philosophy of the United States; but because its deviations therefrom are not significant we believe that, on the whole, the document can be said to be in accord with United States legal doctrine. For example, the Convention probably would be better if the jurisdictional articles had been confined to those acts or crimes which, when committed on board aircraft, were of such a nature that they would adversely affect the safety of persons or property on board the aircraft, or the aircraft itself. As we have seen, the Tokyo Conference rejected this concept; however, in so doing, it limited the otherwise unlimited sweep of the jurisdictional articles by adopting Article 2 which removed from the ambit of the Convention those offenses which are of a political, racial, or religious nature.

Those provisions of Chapter V which are designed to protect the civil liberties of persons "disembarked," "delivered," or in custody are primarily the result of Anglo-American legal doctrine. This is not to say that these were resisted by those nations present at the Tokyo Conference whose legal systems are based on different traditions, but to emphasize that it was the Anglo-American legal philosophy which initiated the expression of these protections in the text of the Convention.

There are other important provisions of the Convention which coincide with the political and legal views of the United States. The concept that contracting States are free to decide the extent to which, and manner in which, they will exercise the jurisdiction conferred by the Convention with respect to acts occurring on board their aircraft is, as earlier shown, a theory advanced by the United States. Those provisions of Chapter III which describe the powers and duties of the aircraft commander in such
a way as to minimize his role as a policeman are consistent with the aviation regulatory concepts prevailing in the United States. Articles 11 and 16, dealing respectively with hijacking and extradition, were advocated by the United States.

It is our conclusion that the Tokyo Convention has resolved most major issues in accordance with the political and legal policies and traditions of the United States. At the same time the views of other States have been accommodated. An area of international relations has thus been regulated in a manner not inconsistent with the law and practice of the world community of nations. Early ratification of the Convention by the United States and all of the States which participated in the Tokyo Conference would therefore be in the best interest of international aviation.