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Alec Samuels

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## THE LEGAL PROBLEMS: AN INTRODUCTION

ALEC SAMUELS\*

*Perhaps the most vexing feature of aircraft hijacking is the paucity of unanimity among the affected nations in finding pragmatic methods for its control. The various international conferences have been designed principally to relieve political unrest, the most common element in preventing a cure, but the doctor has caught the disease and the number of hijackings continues to rise. In this article Mr. Samuels introduces the problem by outlining the basic principles and propositions that must either be utilized or overcome for any cooperative effort to be successful.*

THE EVIL of aerial hijacking needs little emphasis; it has a universal effect; international communications are disrupted and endangered, and human rights and lives are threatened.<sup>1</sup> Hijacking is also more likely to involve unpredictable factors such as political motives or an unbalanced mind than other types of crime, thus making national or international control of the offense extremely difficult, if not impossible.<sup>2</sup> More germane to the discussions in this symposium, however, are the narrower political and legal problems presented by hijacking—which are considerable—and call for international cooperation in order to achieve the proper solutions. These problems involve jurisdiction, prosecution, punishment, extradition and related issues. This paper will be confined to observations involving these problems and is intended to provide only an overview for purposes of introduction to the more detailed analyses appearing elsewhere.

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\* Barrister, Reader in Law in the University of Southampton.

<sup>1</sup> For example, on a Chicago-New York flight in June, 1971, Mr. Gregory White of Illinois allegedly hijacked the plane, assaulted the stewardess and killed a passenger who apparently was trying to come to her aid. *The Times* (London), June 14, 1971, at 5, col. 8. Another example is an attempted hijacking of a Colombian aircraft in March 1969, resulting in a gun-battle between the alleged hijacker and local police at a refueling stop and causing the death of both the hijacker and a flight engineer. *Boston Herald Traveler*, March 12, 1969, at 1, col. 2. Other statistics are provided in the appendix to this symposium, *infra* at 229. See generally, Evans, *Aircraft Hijacking: Its Cause and Cure*, 63 AM. J. INT'L L. 695 (1969). cf. *Hearing on Aircraft Piracy Before the House Comm. on Interstate and Foreign Commerce*, H.R. REP. NO. 91-33, 91st Cong., 1st Sess. (1969) [hereinafter cited as *Aircraft Piracy*].

<sup>2</sup> See Evans, *supra* note 1, at 710. The political vis à vis personal motives involved in hijacking are more fully developed by Professor Evans *infra* at 171-81.

## 1. Piracy

The question whether aircraft hijacking constitutes "piracy" is the subject of avid controversy.<sup>3</sup> "Piracy," by customary rule of international law, is a universal crime, *jus gentium*, which implies robbery and pillage at sea and requires attack on a ship from another ship;<sup>4</sup> and the better view is that "hijacking" is not "piracy."<sup>5</sup> The Geneva Convention of 1958<sup>6</sup> is the source of some of the difficulty, as it includes the word "aircraft" in the definition of piracy.<sup>7</sup> Although the Convention arguably applies to attacks from within an aircraft, the provisions plainly were not directed to hijacking. Furthermore, many hijacking incidents have been politically motivated,<sup>8</sup> and customary international law requires that piracy must be for private ends.<sup>9</sup> Thus, aircraft hijacking does not parallel the developed international law regarding piracy at sea, and the proper manner of defining the contemporary crime is the creation of a new, unnamed "offense," accomplished in the 1970 Hague Convention.<sup>10</sup>

## 2. Prevention

The means for deterring the hijacking threat is a combination of psychological, sociological, and technological devices, designed prin-

<sup>3</sup> Compare Federal Aviation Act of 1958, § 902 (i), 49 U.S.C. § 1472 (i) (1970), amending 49 U.S.C. § 1472 (i) (1964) with Wurfel, *Aircraft Piracy—Crime or Fun?*, 10 WM. & MARY L. REV. 820, 840 (1969).

<sup>4</sup> A "pirate" is an outlaw, *hostis humani generis*, and loses both the protection of his home state and his national character. He is subject to summary justice anywhere, by any state, as an enemy of that state. All states tacitly consent to suppress piracy by any means possible. 2 HACKWORTH, INTERNATIONAL LAW 681 (1941); cf. United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1817).

<sup>5</sup> Shubber, *Is Hijacking of Aircraft Piracy in International Law?*, 43 BRIT. Y.B. INT'L L. 193 (1968-69); cf. Johnson, Arthur, & Barham, *Hijacking: Why Governments must Act*, 74 AERONAUTICAL J. 143 (1970).

<sup>6</sup> Convention on the High Seas, opened for signature April 29, 1958, [1962] 13 U.S.T. 2312, T.I.A.S. No. 5200, Art. 15-17.

<sup>7</sup> Article 15 (1)(a) defines piracy as:

[A]ny illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed on the high seas, against another ship or aircraft or against persons or property on board such ship or aircraft.

For a criticism of the applicability of this treaty to contemporary aircraft hijacking, see Wurfel, *supra* note 3.

<sup>8</sup> See e.g., DEP'T OF STATE, FOREIGN POLICY BRIEFS, Vol. 18, No. 14 (Dec. 30, 1968).

<sup>9</sup> HACKWORTH, *supra* note 4, at 681.

<sup>10</sup> Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature December 16, 1970, I.C.A.O. Doc. 8920, art. 1 [hereinafter cited as Convention]. See generally White, *The Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, 6 INT'L COMM'N JURISTS REV. 38 (April-June 1971); Evans, *supra* note 1, at 703-10.

For purposes of defining the legal status of aircraft hijacking, it should be noted that article 11 of the Tokyo Convention provides for the restitution of an aircraft to its commander and resumption of the flight, but it is not designed to deal with hijacking nor does it provide for arrest and punishment of the alleged offender. See Convention on Offenses and Certain Other Acts Committed on Board Aircraft, opened for signature Sept. 14, 1963, [1969] 20 U.S.T. 2941, T.I.A.S. 6768, art. 11. See generally

cipally for determining the persons who demonstrate a higher statistical probability for committing the offense than the general population.<sup>11</sup> These devices include careful checking of passenger lists, the magnetometer to detect weapons,<sup>12</sup> armed guards, armed flight crews, depressurization, non-access to the flight deck, dogs, and even a concealed trap-door on the threshold of the crew door over which the hijacker might be maneuvered.<sup>13</sup> The use of these measures has limitations, however. As a practical matter, there is no guarantee that any one device will be effective—the potential hijacker may appear to be respectable and have his documents in order; the magnetometer often detects inoffensive items, causing embarrassment and delay to the passengers; most pilots dislike the idea of being armed; depressurization is potentially dangerous and affects all passengers on board the aircraft; inaccessibility to the flight deck does not protect the stewardess who can be made a hostage; dogs usually are easily dealt with by the professional criminal; and the trap-door accidentally may open at the wrong time and for the wrong person. On the other hand, even if the procedures instituted to detect hijackers are functionally workable, they nevertheless become unacceptable when abused. Excessive or unnecessary force may not be used, even against the hijacker, in a civilized society; nor can summary justice be tolerated. Moreover, the criminal law of any state only prosecutes illegal acts. States cannot, consistent with fundamental notions of justice, condemn persons merely because they represent potential danger. Nevertheless, security consciousness does have a part to play and has contributed to the failure of a number of attempted hijackings.<sup>14</sup> So long as states are

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Samuels, *Crimes Committed on Board Aircraft: Tokyo Convention Act 1967*, 42 BRIT. Y.B. INT'L L. 271 (1967); Lester, *Crimes on Aircraft*, 117 NEW L.J. 497 (1967).

<sup>11</sup> Cf. Comment, *Aircraft Hijacking: Criminal and Civil Aspects*, 22 U. FLA. L. REV. 72 (1969).

<sup>12</sup> Basically, the magnetometer depends upon magnetic field detectors which are distorted when they pass through metal thus creating a signal that can be amplified and calibrated to detect magnetic disturbances. See Marshall, *An Analytic Model for the Fluxgate Magnetometer*, 3 IEEE TRANSACTIONS ON MAGNETICS 1 (1967). Cf. Toothman, *Legal Problems of Skyjacking*, [1969] ABA SECT. INS. N. & C.L. 251, 257. The magnetometer, as well as several other devices used in an "anti-hijacking system" employed at John F. Kennedy Airport, was recently held constitutional by a New York federal district court in *United States v. Lopez*, 11 AV. CAS. ¶ 18,141 (E.D.N.Y. May 7, 1971).

<sup>13</sup> See Evans, *supra* note 1, at 704.

<sup>14</sup> See, e.g., Wall Street Journal, Dec. 9, 1968, at 1 col. 4. See also *Aircraft Piracy*, *supra* note 1, at 6. In the United States some passengers have sought to establish a cause of action in negligence against the airline for not taking the proper precautions necessary to prevent hijacking. N.Y. Times, Feb. 8, 1969, at 62, col. 6. The Federal Aviation Act of 1958, § 404(a), 49 U.S.C. § 1374(a) (1970) imposes the duty on every air carrier to provide safe and adequate service, equipment and facilities in connection with interstate and overseas air transportation. Domestically, civil suits seeking damages are usually based on negligence for breach of the duty of the highest degree of care to the passenger. See, e.g., *Arrow Aviation, Inc. v. Moore*, 266 F.2d 488 (8th Cir. 1959). With respect to international flights, recovery is sought based on the Warsaw Convention which provides for absolute liability. Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention),

willing to put themselves in a position to ensure the prevention of abuse should it arise, the substantial interest in preserving the safety of air travel by preventing hijacking by utilizing protective devices clearly outweighs any potential misuse of the techniques.<sup>15</sup>

### 3. *The Municipal Offense*

Because of its novelty, hijacking per se is not a municipal offense in many states; accordingly, the offender must be tried in these jurisdictions for a collateral offense, such as assault, intimidation, kidnapping and theft, or not at all.<sup>16</sup> In the United States, for example, until a series of hijackings caused Congress to amend the Federal Aviation Act in 1961,<sup>17</sup> prosecution was maintained primarily for transporting stolen property in interstate commerce,<sup>18</sup> kidnapping,<sup>19</sup> or obstructing commerce by threats or violence.<sup>20</sup> The effect is significant in that, despite various bases of jurisdiction recognized in international law,<sup>21</sup> it is entirely possible that no state would be able under municipal law to assert jurisdiction over the offense. If, for example, it is unknown over which state a hijacking occurred, or if the offense took place over the high seas, the municipal laws of any particular country would not provide a basis for jurisdiction. The crime could well go unpunished.<sup>22</sup>

Article 1 of the 1970 Hague Convention now provides a useful definition which, hopefully, will be universally adopted into the municipal laws. A hijacker is any person who "(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act or (b) is an accomplice of a person who performs or attempts to perform any such act."<sup>23</sup>

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Oct. 29, 1934, 49 Stat. 3000, T.S. No. 876 (concluded at Warsaw, Poland, Oct. 12, 1929). To date, there are no reported decisions applying either theory to a situation involving hijacking.

<sup>15</sup> Article 6 of the 1970 Hague Convention, *supra* note 10, provides for arrest, preliminary investigation, and the right of the arrested person to communicate with a representative of his own state.

<sup>16</sup> For an extended discussion and examples of the problems raised, see Mendelsohn, *In-Flight Crime: The International and Domestic Picture Under the Tokyo Convention*, 53 VA. L. REV. 509 (1967).

<sup>17</sup> 49 U.S.C. § 1472(i)(1) (1970), amending 49 U.S.C. § 1472(i) (1964) (originally enacted as Act of Aug. 23, 1958, Ch. 9 § 902, 72 Stat. 784).

<sup>18</sup> 18 U.S.C. § 2312 (1970).

<sup>19</sup> 18 U.S.C. § 1201 (1966); see *United States v. Healy*, 376 U.S. 75 (1964).

<sup>20</sup> 18 U.S.C. § 1951 (1970); see *United States v. Bearden*, 304 F.2d 532 (5th Cir. 1962), *vacated on other grounds*, 372 U.S. 252 (1963), *aff'd*, 320 F.2d 99 (5th Cir. 1963), *cert. denied*, 376 U.S. 922 (1964).

<sup>21</sup> For a detailed analysis of the historical development and applicability of the various theories in an aviation context, see Fentson & DeSaussure, *Conflict in the Competence and Jurisdiction of Courts of Different States To Deal With Crimes Committed on Board Aircraft and the Persons Involved Therein*, 1 MCGILL L.J. 66 (1952).

<sup>22</sup> See Mendelsohn, *supra* note 16, at 513.

<sup>23</sup> Convention, art. 1.

The offense appears to be committed regardless of motive. To be hijacked, however, the aircraft must be "in flight."<sup>24</sup> An aircraft is "in flight" so long as its external doors are closed.<sup>25</sup> The Convention does not apply to domestic flights, because no international element is involved; nor does it apply to military, customs or police aircraft.<sup>26</sup>

#### 4. *Jurisdiction*

Jurisdictional problems have been difficult. The hijacking often takes place outside the jurisdiction of the receiving state, although in most, if not all, of the cases presumably it could be argued that the offense is of a "continuing nature."<sup>27</sup> In international law, jurisdiction may be assumed by a state on a number of different bases: the territorial principle, the nationality of the alleged offender, the nationality of the victim, the effectiveness principle, the landing principle and others.<sup>28</sup> The 1970 Convention requires the parties to assume jurisdiction when (a) the offense is committed on board an aircraft registered in that state; (b) the aircraft on which the offense is committed lands in its territory with the alleged offender still on board; and (c) the offense is committed on board an aircraft leased without crew to a lessee who has his principal place of business or his permanent residence in that state.<sup>29</sup> An opportunity for conflicting jurisdiction is clearly present, although in practice primary jurisdiction will be exercised by the state of landing in the first instance under the principle of the presence of the offender. Mere presence of the alleged offender is also sufficient to establish jurisdiction in addition to any existing criminal jurisdiction<sup>30</sup> where, for example, nationality is retained for serious offenses committed anywhere.<sup>31</sup>

#### 5. *The Duty to Prosecute*

Hijacking is a serious offense; it follows that states should be compelled to prosecute the alleged offender. This proposition was urged by the United States and the Soviet Union<sup>32</sup> at the conference at The Hague, but it was not adopted because a number of states such as the United Kingdom grant discretion to prosecuting authorities, who may act inde-

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* art. 3, par. 1.

<sup>26</sup> *Id.* par. 2, 3.

<sup>27</sup> See, e.g., the Leila Khaled incident, N.Y. Times, Sept. 22, 1970, at 14, col. 5, where the British government, representing the receiving state, was faced with a situation in which the attempted hijacking took place in a foreign (Israeli) registered aircraft over the high seas.

<sup>28</sup> See Mendelsohn, *supra* note 16, at 511-13; Fenston & DeSaussure, *supra* note 21.

<sup>29</sup> Convention, art. 4, par. 1.

<sup>30</sup> *Id.* art. 4, par. 2.

<sup>31</sup> *Id.* art. 4, par. 3.

<sup>32</sup> PROTOCOL SUBMITTED TO SUBCOMM. ON UNLAWFUL SEIZURE OF AIRCRAFT OF THE LEGAL COMM. OF ICAO, LCISC.SA. WD. 7 (Jan. 31, 1969).

pendently of the executive. Therefore, article 7 of the Convention requires submission to competent authorities "for the purpose of prosecution," which appears to mean for the purpose of considering whether to bring a prosecution rather than establishing compulsory prosecution. The Convention also requires that the decision whether to prosecute shall be made in the same manner as in the case of an ordinary offense of a serious nature.<sup>33</sup> This is a practical and just requirement. Lack of evidence or humanitarian reasons are examples rendering prosecution either difficult, impracticable, or undesirable.

#### 6. Penalties

Consistency in punishment is notoriously difficult to reach, and the 1970 Convention is content with requiring "severe penalties."<sup>34</sup> Thus, whatever the mitigating factors may be, hijacking at least is to be treated as a serious offense. Many countries reject the concept of a minimum sentence as being too inflexible. Moreover, it would be as difficult to set a suitable maximum sentence since this may well cause the death of an innocent person.<sup>35</sup> However, even if the hijacker is genuinely seeking political asylum, he should attempt to find other means of escape before any question of political asylum is considered, and he should suffer a severe punishment for a hijacking.

#### 7. Extradition

Extraditing the hijacker frequently has not been possible because no extradition treaty exists between the requesting and the requested state, or, if one exists, it does not cover hijacking.<sup>36</sup> This problem is solved by the Convention by the provision that the offense shall be deemed to be included as an extraditable offense in any extradition treaty existing between the contracting parties.<sup>37</sup> In the absence of a treaty, the Convention itself is to be the legal basis for extradition,<sup>38</sup> thus making extradition possible between all ratifying states.

Is there a duty to extradite? Some states, notably the United States and the Soviet Union, took the view at the Conference that a hijacker is a universal enemy of mankind and therefore should, in all cases, be extradited to the requesting state.<sup>39</sup> But the Western European states, ad-

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<sup>33</sup> *Id.* These articles are more fully discussed elsewhere in this symposium. See Mankiewicz *infra* at 195-210.

<sup>34</sup> Convention, art. 2.

<sup>35</sup> *E.g.*, the United States, 49 U.S.C. § 1472 (1970), and the Soviet Union both provide for the death penalty. The effectiveness of the penalty as a deterrent is questionable in the case of most, if not all, of the offenders.

<sup>36</sup> See *infra* at 166.

<sup>37</sup> Convention, art. 8.

<sup>38</sup> *Id.*

<sup>39</sup> Protocol, *supra* note 32 (May 5, 1969).

vancing a long tradition of refusal to extradite in political cases, declined to agree to mandatory extradition. Accordingly, the Convention imposes no duty to extradite, and the matter is left to the traditional discretion of the states.<sup>40</sup> Furthermore, even in the event that extradition is granted, the requested state properly can impose conditions: for example, that the person extradited shall not be tried for any offense other than that stipulated by the requesting state.

The Convention does not specifically embody the principle of *non bis in idem*, that a person should not be tried twice for the same offense; presumably it applies, however, as a generally accepted principle of law recognized by civilized nations.<sup>41</sup>

### 8. Sanctions

Attempts to eliminate hijacking have been frustrated by the attitude of intransigent and irresponsible governments, unwilling to take effective action against and even welcoming hijackers landing in their territory.<sup>42</sup> However, steps can be taken to minimize the effectiveness of such states. For example, an uncooperative state could be expelled from the International Civil Aviation Organization, as well as the International Air Travel Association. In addition, states could refuse to fly to an offending state; nationals of an offending state could be refused air travel facilities, unless they previously consent to a thorough search. In this regard, the air pilots' boycott of Algeria had some success in achieving the release of a detained aircraft, crew, and passengers.<sup>43</sup> However, more extensive boycotts of air pilots have been mooted.

Sanctions are, nevertheless, imperfect weapons. The danger of retaliation in an interdependent world is considerable. The dependence of western countries on eastern countries for oil, for example, renders the western countries quite vulnerable. Further, governments are sometimes powerless to take action against hijackers.<sup>44</sup>

Public opinion also may operate as a restraining influence; the commutation of the death penalty to life imprisonment in the Soviet Jewish hijacking instance probably was brought about by the strength of adverse world opinion.<sup>45</sup>

### 10. An International Tribunal

The hijacker, like the pirate, is peculiarly suitable as a subject for an

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<sup>40</sup> Convention, art. 8.

<sup>41</sup> See H. JACOBINI, *INT'L LAW: A TEXT* (Rev. ed. 1968).

<sup>42</sup> A frequently cited example is Cuba. See, e.g., *N.Y. Times*, July 25, 1961, at 1, col. 7 (late city ed.); 45 DEP'T STATE BULLETIN 334, 407 (1961).

<sup>43</sup> See Evans, *supra* note 1, at 705.

<sup>44</sup> E.g., the Palestine guerrillas operated from Jordan, but were beyond the control of the Jordan government.

<sup>45</sup> *N.Y. Times*, Dec. 31, 1970, at 1, col. 2 (late city ed.).

international criminal tribunal; he commits an offense that potentially has universal impact. The need for the establishment of such a tribunal was demonstrated by the Nürnberg trials and the Eichmann case and has been urged by the Secretary-General of the United Nations.<sup>46</sup> But the difficulties of such a project are immense—a truly international site must be found; independent judges must be appointed; a suitable charter must be drafted. Notwithstanding the danger of delay, the time is simply not yet ripe. The 1970 Convention, based on the principle of mutual cooperation, seems, for the moment at least, more realistic and more likely to produce results.

#### CONCLUSION

Prospects for the future do not appear bright. Unfortunately, the political unrest and division prompting acts of hijacking equally inhibit a universal solution. As long as some intransigent governments continue directly or indirectly to support acts of violence and terrorism against civil aviation, refuse to punish offenders effectively, and refuse to cooperate in international conventions the problem will remain. Hijacking shows no signs of abating. The offense has come to involve not only the diversion of a flight to Cuba to accommodate the dissatisfied left-winger, but also the much more serious seizure of hundreds of innocent people as political hostages. Nevertheless, the 1970 Convention represents the best hope of successful international action. All responsible governments should consider it a matter of imperative and urgent duty to ratify and implement the Convention as soon as possible.

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<sup>46</sup> See, e.g., Address by Secretary-General U Thant, United Nations 25th Anniversary Program New York City, Sept. 14, 1970, Press Release SG/SM/1333, ANV/87. The necessity of an international court is the subject of a paper by Professor R. H. Mankiewicz *infra* at 195-210.