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## A PROPOSED METHOD OF CONTROL

ALONA E. EVANS\*

*The author demonstrates the type of foreign and domestic interests that may be infringed by hijacking but concludes that, given the nature of the offense and even assuming cooperation among all states to reduce the incidence using such methods as registration, search, publication and extradition, it is still unlikely that the problem can be completely solved. The article examines the problem in terms of attempts to provide controls by varying degrees of international recognition of the seriousness of the offense and subsequent cooperation among the state to accomplish a cure.*

### I. THE EMERGENCE OF THE INTERNATIONAL OFFENSE

THE upsurge in crime rates during the past decade and a half in both the United States<sup>1</sup> and other countries has encompassed international aviation in different ways.<sup>2</sup> Of all the crimes involving aircraft and related facilities, however, perhaps the most common during the past three years has been hijacking—the illegal diversion of a commercial aircraft from its scheduled destination.<sup>3</sup> Although one instance of aircraft hijacking probably occurred before the Second World War,<sup>4</sup> the act became conspicuous in the late 1940s when individuals began to flee from authoritarian states by diverting aircraft as well as other modes of transportation. The number of successful instances of hijacking be-

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<sup>1</sup> For United States figures, see UNITED STATES DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 1969 (1970).

<sup>2</sup> See, e.g., *Graham v. Colorado*, 302 P.2d 757 (Colo. 1956) (murder). See also the terrorist attack upon the El Al passenger terminal in Athens, N.Y. Times, Nov. 28, 1969, § 1, at 1, col. 6 [city edition will be used unless otherwise noted]; Extortion of \$560,000 from Qantas in return for information about the location of a bomb on board an airline which proved to be a hoax. *Id.* May 27, 1971, at 1, col. 5.

<sup>3</sup> "Aircraft hijacking," as used in this paper, covers only the illegal diversion of a commercial aircraft to a destination outside the country of origin of the flight, and the statistics used will be limited to such incidents. Terminologically, "hijacking" is more descriptive of this contemporary offense than "piracy" which is a term of art in international law. See Evans, *Aircraft Hijacking: Its Cause and Cure*, 63 AM. J. INT'L L. 695, 696-97 (1969).

<sup>4</sup> *Hearings on Aircraft Hijackings Before the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess., 168 (1970).

tween 1948 and 1971,<sup>5</sup> however, does not satisfactorily explain the pattern of development of this international offense. Account must be taken, for example, of the fact that the United States, the victim of almost fifty per cent of the hijackings during the past decade, has the greatest amount of foreign and domestic air traffic of any country;<sup>6</sup> consequently, the opportunity for hijacking has been greater here than elsewhere. Yet political motives have been incidental to or nonexistent in a substantial number of the eighty-three successful hijackings here and abroad of aircraft of United States registration.

The motives for hijacking can be classified conveniently, if not precisely, into two categories: (1) furtherance of personal or "private" objectives, including political ends; and (2) furtherance of "public" objectives, including both foreign policy aims and insurrectionary activities.<sup>7</sup>

In the "private" category, it is not surprising that fugitives from civil or military justice should take to the air. There have been a number of instances of persons involved in domestic difficulties making dramatic exits from their estranged spouses, sometimes accompanied by minor children for good measure. Furthermore, the combination of hijacking and extortion has become popular in the past two years.<sup>8</sup> Mental derangement is another obvious explanation for many hijackings and has barred prosecution or provided a defense in some cases.<sup>9</sup>

Despite incomplete data on many instances of hijacking, it would appear that political motives, including dissatisfaction with an authoritarian regime or fear of persecution for political opinion, race or religion, have been the primary aim in the bulk of the hijackings occurring outside the United States. The sporadic nature of these hijackings can

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<sup>5</sup> From January 1, 1948, to July 1, 1971, there have been 204 successful hijackings, 89 originating in the United States and 115 originating in other countries. See Appendix, Table II *infra* at 231. The bulk of these hijackings took place between January 1, 1968, and December 31, 1970. *Id.*

<sup>6</sup> Approximately 12,000 flights originate in the United States daily. See *Hearings on H.R. 14,465 Before the Subcomm. on Avi. of the Senate Commerce Comm.*, 91st Cong., 1st and 2d Sess. (1969-70).

<sup>7</sup> Compare *Regina v. Governor of Brixton Prison, Ex parte Schtraks* [1962] 3 All E. R. 529 (H.L.) with *Regina v. Governor of Brixton Prison, Ex parte Kolczynski*, [1955] 1 Q.B. 540 (1954). *Schtraks* reverts to the rule of *In re Castioni*, 1891 Q.B. 149 (1890).

<sup>8</sup> *E.g.*, the attempt to hijack a TWA aircraft and \$75,000 from Chicago to North Vietnam, N.Y. Times, June 13, 1971, at 1, col. 5, and the successful hijacking of an Eastern Air Lines aircraft to Nassau and subsequent unsuccessful demand for \$500,000 ransom. The hijacker was promptly deported to the United States as an "undesirable alien." N.Y. Times, May 30, 1971, at 1, col. 1.

<sup>9</sup> Robert M. Helme was acquitted by a jury in Savannah, Georgia, on a plea of temporary insanity. N.Y. Times, Nov. 22, 1969, at 66, col. 5. Robert Labadie, returned by Cuba to the United States in September 1970, was found mentally incapable of standing trial in December. N.Y. Times, Dec. 29, 1970, at 6, col. 1.

be explained by the relative inaccessibility of air travel in the countries involved and the relative unavailability of friendly destinations.<sup>10</sup>

Although hijacking is a serious enough act in itself,<sup>11</sup> hijacking for "public" motives introduces another dimension of danger—the potentially explosive factor of international politics. An aircraft may be forcibly diverted for the purpose of political retaliation.<sup>12</sup> Hijacking may serve opportunist objectives in foreign relations<sup>13</sup> as where insurrectionary groups use this method to dramatize their causes.<sup>14</sup> However, the flagrant exhibitions of terrorism by the Palestine Liberation Front between July and September 1970 seems to have led even those states which had appeared to take a detached view of the offense to move more vigorously toward adoption of measures of control, in particular the conclusion of the 1970 Hague Convention.<sup>15</sup>

Aircraft hijacking has had interesting "spin-offs" at the domestic and foreign policy levels. Liability for losses sustained by passengers and carriers is becoming an issue. Diversion of an aircraft is a costly matter for the carrier.<sup>16</sup> Destruction of an aircraft such as Pan American's Boeing 747 in Cairo last September involves cost factors of both replacement and recoupment of investment. Whether Pan American's losses in this instance are to be met by all-risk insurance covered by two United States insurance pools or by war-risk insurance covered jointly by Lloyds of London and the United States Government is an issue

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<sup>10</sup> Cuba's willingness to serve as a hijack haven, until recently, undoubtedly encouraged the perpetration of this offense in the United States and other Western Hemisphere countries.

<sup>11</sup> If for no other reasons than because the aircraft, its passengers, and crew are endangered.

<sup>12</sup> Political retaliation was evident in June 1967, for example, when a KLM aircraft carrying the Guinean Foreign Minister and the Guinean Permanent Representative to the United Nations back to Guinea from a special session of the General Assembly was diverted to the Ivory Coast. The passengers, one of whom was presumably vested with diplomatic immunity, were held for almost three months, apparently in response to Guinea's interference with certain Ivory Coast nationals. 13 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 129-31 (1968). See also *Chicago Tribune*, July 25, 1971, at 1, col. 8 (diversion of a BOAC aircraft to Libya and removal of two Sudanese political figures). Israel bombarded the Beirut airport in retaliation for an attack by members of the Palestine Liberation Front on an El Al aircraft in Athens. *N.Y. Times*, Dec. 29, 1968, at 1, col. 8.

<sup>13</sup> E.g., Algerian detention of the crew of an El Al plane for six weeks in the summer of 1968, *N.Y. Times*, July 24, 1968, at 1, col. 7; Sept. 2, 1968, at 14, col. 6. Pakistani condonation of the destruction of an Indian Air Lines aircraft by members of a Kashmiri political group, *Christian Science Monitor*, Feb. 17, 1971, at 3, col. 1.

<sup>14</sup> Five aircraft were seized by members of the Palestine Liberation Front between July and September 1970; the lives of some six hundred passengers and crew were endangered and four of the aircraft were destroyed.

<sup>15</sup> For an analysis of the various provisions of the Convention see Mankiewicz, *infra* at 195-210.

<sup>16</sup> HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, *AIRCRAFT PIRACY*, H.R. REP. NO. 91-33, 91st Cong., 1st Sess. 4 (1969) [hereinafter cited as *AIRCRAFT PIRACY*].

under litigation.<sup>17</sup> A suit for damages has been brought under the terms of the 1966 Montreal Agreement, supplementary to the Warsaw Convention, by a passenger who alleged "bodily injury, wounding, mental pain and anguish in expectation of severe injury and death" as a result of her experience on the Swissair flight which was hijacked to Jordan on September 6, 1970, by the Palestine Liberation Front.<sup>18</sup> If the complaint is successful, carriers with flights originating, stopping or terminating in the United States could be subject to widespread legal action by hijacked passengers, with a consequent impact upon the cost of air travel. On the other hand, the success of the personal injury suit may also lead to a revision of the current theory of limitation of carrier liability in international air transport.<sup>19</sup>

Another spin-off of aircraft hijacking has been the involvement of private organizations in the effort to control the offense. Given the ramifications of hijacking, an argument can be made for resort to any method to alleviate the danger to passengers, crew and aircraft, even submission to extortion. But a bad situation is compounded when private agencies are constrained to exert pressure upon governments which condone hijacking. The International Federation of Air Line Pilots Associations has indicated more than once that while they have little desire to police hijackers, they are not unprepared to enforce boycotts of air transport services to hijack havens.<sup>20</sup> In the face of the upsurge of hijackings during 1968 and 1969, the Air Line Pilots Association and the Air Transport Association of America offered a reward of \$25,000 for information leading to the arrest and conviction of any violator of the United States anti-hijacking law.<sup>21</sup> Pilots of British European Airways were reported to have cancelled service to Israel following the rash of hijackings to the Middle East in the late Summer of 1970.<sup>22</sup> These private reactions add up to exasperation with tardy governmental response to control of the offense of aircraft hijacking. In that respect, they have had a gadfly quality which has contributed to the movement

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<sup>17</sup> Wall Street Journal, March 15, 1971, at 12, col. 1. The issue of insurance liability was resolved in favor of the carrier in *American Fire and Casualty Co. v. Sunny South Aircraft Service Inc.*, 140 So. 2d 78 (Fla. Ct. App. 1962), *aff'd*, 151 So. 2d 276 (Fla. Sup. Ct. 1963).

<sup>18</sup> New York Times, Sept. 22, 1970, § 1, at 14, col. 5.

<sup>19</sup> Letter from Prof. Andreas F. Lowenfeld to the New York Times, Sept. 30, 1970, at 40, col. 6.

<sup>20</sup> N.Y. Times, July 18, 1968, § 4, at 5, col. 3; March 27, 1969, at 1, col. 3; letter from Capt. C. C. Jackson, Executive Secretary IFALPA, to The Times (London), Sept. 11, 1970, § 1, at 11, col. 3. IFALPA is reported to have put pressure on the French government to prosecute two East Germans who hijacked a plane from Warsaw to the French Zone of West Berlin in October 1969. They were tried by court martial and sentenced to two years imprisonment. *Figaro*, Dec. 21, 1969, § 1, at 1, col. 2.

<sup>21</sup> AIRCRAFT PIRACY 6.

<sup>22</sup> N.Y. Times, Sept. 12, 1970, at 10, col. 5.

toward the drafting and conclusion of international conventions designed to control not only hijacking but also hijacking for purposes of extortion and sabotage of both aircraft and related facilities.

One of the most serious effects of aircraft hijacking is its exacerbation of strained relations between states. For example, the hijacking of an Indian Air Lines plane from Srinagar to Lahore on January 30, 1971, its subsequent destruction, and Pakistan's grant of political asylum to the two perpetrators, members of the Kashmiri National Liberation Front, brought prompt response from India in the form of a ban on flights by Pakistani civil and military aircraft across Indian territory until the hijackers had been surrendered and compensation paid for the plane.<sup>23</sup> Pakistan protested the Indian action to the United Nations Security Council and to the International Civil Aviation Organization and has recently reported that a Judicial Inquiry Commission has found that the "hijacking was arranged by Indian Intelligence Services."<sup>24</sup> Yet Pakistan's failure to prevent destruction of the aircraft or to institute proceedings against the hijackers undermines the Pakistani case against India's retaliatory act. Given the continuous pressures upon Indo-Pakistani relations over the past two decades, coupled with the impact of the current civil war in East Pakistan, the hijacking, whatever its motivation, is one more inflammatory incident which, unlike the problem of the massive influx of refugees from East Pakistan into India, could foreseeably have been controlled by Pakistan in the interests of both international relations and the protection of international air transport.

## II. CONTROLLING THE OFFENSE

There can be little doubt that hijacking is a fully developed international offense which can only be controlled by concerted action by states acting both unilaterally and jointly. The evolution of methods of control of the offense, however, has followed an empirical and demonstrably erratic course of belated response to the event. The United States appears to have been the first state to take legislative action against the crime of "air piracy,"<sup>25</sup> following three successful hijackings and one unsuccessful hijacking in the Summer of 1961. A dozen states have followed suit in recent years.<sup>26</sup> But measures of prevention as well as

<sup>23</sup> *The Economist*, Feb. 13, 1971, at 1.

<sup>24</sup> *Pakistan News Digest*, March 15, 1971, at 6, col. 3; at 11, col. 1; *Pakistan Affairs*, April 22, 1971 (special issue).

<sup>25</sup> The Federal Aviation Act of 1958 § 902(i), 49 U.S.C. § 1472(i)(1) (Supp. 1971).

<sup>26</sup> *E.g.*, Crimes (Aircraft), No. 64 of 1963, 1 Acts of the Parliament of Australia 266 (1963); Cuban Hijacking Law, Sept. 16, 1969, 8 INT'L LEGAL MATERIALS 1175 (1969); Brazil, Decree-Law 975, Oct. 20, 1969, 9 INT'L LEGAL MATERIALS 180 (1970); Mexico, Decree of Dec. 19, 1968, amending Art. 170, Penal Code, 9 INT'L LEGAL MATERIALS 185 (1970).

prosecution are necessary to control of the offense. In the United States, the use of guards, including members of the Border Patrol, immigration officers or special flight inspectors, was reported in 1961 and 1962,<sup>27</sup> while after 1964, such precautions as locking cockpit doors during flight were instituted.<sup>28</sup> It was not until September 11, 1970, after the Palestine Liberation Front's terrorist attacks upon international air transport<sup>29</sup> that the United States undertook a "crash" program of training "sky marshals" for duty on board aircraft and in airports. Their usefulness has begun to show, for in the first six months of the current year they have reportedly thwarted four out of five attempted hijackings.<sup>30</sup> Although there were six successful hijackings of American aircraft originating in the United States during this same period, the sky marshal program, together with the use of electronic searches and psychological observation of boarding passengers, is apparently contributing to a decline in the rate of successful hijackings of aircraft from the United States.<sup>31</sup>

Another deterrent factor is the amount of publicity given to the sky marshal and search programs and, to a much lesser extent, to the prosecution of hijackers in the United States. For several years after the 1961 eruption of hijacking, federal authorities seemed to operate on the belief that the less said about the incidence of the offense the better, apparently theorizing that persons disposed to the act would be attracted by any publicity given to it. In the past two years, especially since the spring of 1970, hijacking has been widely publicized and with some deterrent effect.

Publicity is one method of control, prosecution is another. Information continues to be sketchy about the number of prosecutions of successful hijackers who have returned or been returned to the United States as well as unsuccessful hijackers who have been arrested in this country.<sup>32</sup> There have been eleven prosecutions of successful hijackers.

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<sup>27</sup> HOUSE COMM. ON FOREIGN AFFAIRS, SUBCOMM. ON INTER-AMERICAN AFFAIRS, AIR PIRACY IN THE CARIBBEAN AREA, 90th Cong., 2d Sess. 5 (Comm. Print, 1968); N.Y. Times, May 3, 1962, § 1, at 55, col. 5.

<sup>28</sup> ATTY. GEN. ORDER NO. 247-61, 26 Fed. Reg. 7614 (1961); 14 C.F.R. § 91.8 (1970).

<sup>29</sup> N.Y. Times, Sept. 12, 1970, at 11, col. 5; Sept. 22, 1970, at 1, col. 2.

<sup>30</sup> N.Y. Times, June 19, 1971, § 1, at 54, col. 8. The Air Transport Association has reported that electronic detection devices have led to the arrest of 273 persons on charges of hijacking, smuggling, and related offenses, within a sixteen month period. *Id.* This detection device has been held constitutional in *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971).

<sup>31</sup> Christian Science Monitor, June 15, 1971, § B, at 8, col. 4. *See also* The Times (London), May 31, 1971, § 1, at 5, col. 5.

<sup>32</sup> Among the few cases which have been reported are: *United States v. Healy*, 376 U.S. 75 (1964); *United States v. Bearden*, 304 F.2d 532 (5th Cir. 1962), *vacated on other grounds*, 372 U.S. 252 (1963), *obstruction of commerce charge aff'd*, 320 F.2d 99 (5th Cir. 1963), *cert. denied*, 376 U.S. 922 (1964); *United States v. Clark*, 19 WSCMA 82, 41 CMR 82 (1969).

Nine received sentences ranging from two years for interference with air navigation to life imprisonment for air piracy. One hijacker has been acquitted on a plea of temporary insanity; another has been found incompetent to stand trial. Although the penalty for aircraft piracy in the United States ranges from twenty years imprisonment to death,<sup>33</sup> the severity of this penalty can be mitigated by "plea bargaining." In one recent case, for example, charges of air piracy and kidnapping were dropped, and the hijacker received ten years for interference with flight crew members.<sup>34</sup> But plea bargaining can produce inequities, as in one jurisdiction in which the hijacker of a plane with 151 persons aboard received two years for interfering with the flight crew while another person who hijacked a charter flight with only himself and the pilot aboard received twenty years for air piracy.<sup>35</sup> United States courts generally are not kindly disposed toward potential or successful hijackers, including those who put themselves in a position in which they can be suspected of harboring designs against aircraft.<sup>36</sup>

Prosecution of hijackers becomes more complex when the defense of the political offense is invoked by the accused. In the classic case of *In re Kavic*,<sup>37</sup> the Swiss Federal Tribunal took the position in 1952 that the political motivation of the Yugoslav hijackers, given the circumstances of the incident, outweighed any other considerations and recommended denial of extradition. Whether the same decision would be as readily reached today in Switzerland is questionable, for there is a discernible trend toward prosecution of hijackers by the state of first landing for that offense or ancillary offenses while reserving the right to grant political asylum to the offenders upon completion of their prison sentences or to deport them, having regard for the requirements of article 33 of the Convention Relating to the Status of Refugees.<sup>38</sup>

Although rarely used, extradition of the offender to the state of registration of the aircraft or to the state of last departure on a charge of hijacking is an alternative to prosecution in the state of first landing or in a state having jurisdiction over the alleged offender. In 1961, for example, Albert Cadon, a French national, hijacked a Pan American

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<sup>33</sup> 49 U.S.C. 1472(i)(1)(B) (1970).

<sup>34</sup> Paterson Case, Fairbanks (Alaska) Daily Miner, June 12, 1971.

<sup>35</sup> N.Y. Times, June 5, 1970, at 38, col. 2.

<sup>36</sup> See *United States v. Ware*, 315 F. Supp. 1333 (W.D. Okla. 1970) (defendant charged with attempting to board aircraft with unloaded pistol).

<sup>37</sup> 19 INT'L L. REP. 371 (1952).

<sup>38</sup> Convention Relating to the Status of Refugees, done July 28, 1951, 189 U.N.T.S. 150. This pattern has been evident recently in Argentina, Austria, Denmark, France, and West Germany. Sweden's initiation of proceedings against the Greek hijacker, Tsironis, and the Colombian hijacker, Dominguez Fuentes, following the grant of asylum to each, is another phase of the movement toward prosecution by a state which had no immediate connection with the offense.



Airways aircraft from Mexico City to Havana.<sup>39</sup> At Mexico's request, Cuban authorities extradited Cadon. He was prosecuted on charges of robbery and illegal possession of firearms and sentenced to eight years and nine months imprisonment.<sup>40</sup> Recently, the Supreme Court of Turkey is reported to have ruled that two Soviet nationals who hijacked an Aeroflot plane to Turkey in October 1970, an incident in which a stewardess was killed and two other members of the crew were injured, were extraditable as the political motive was not a defense in the circumstances.<sup>41</sup> The court observed, however, that extradition is a matter of executive discretion.<sup>42</sup> It may be added that extradition is not the only method of recovering fugitive offenders. Most hijackers who have been returned to the state of departure have been expelled from the asylum state or have voluntarily chosen to leave.<sup>43</sup>

Past efforts to control hijacking have been gradual and fitful, but momentum has developed, as states have come to recognize that no carrier is proof against attack and that the offense is not a peculiar manifestation of Caribbean or Middle Eastern politics. Nevertheless, successful containment of hijacking requires a three-pronged approach. Unilateral action, ranging from provision for airport searches and guards on aircraft to prosecution of offenders is one necessary element, but one of partial value, given the international nature of the offense. Bilateral action in the form of commitment of states to preventive measures regarding international flights as well as willingness to prosecute or extradite hijackers is another necessary element. But even this element is only effective if it is set in the frame of reference of multilateral action, taking the form of a world-wide commitment of states to measures of prevention and control.

The Convention on Offenses and Certain Other Acts Committed on Board Aircraft, signed at Tokyo in 1963 and binding upon thirty-seven states as of January, 1971, charted the course by identifying the offense and establishing the responsibility of member states for facilitation and protection of international air transport.<sup>44</sup> The Convention for Suppres-

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<sup>39</sup> N.Y. Times, Aug. 10, 1961, § 1, at 4, col. 1; Aug. 15, 1961, at 11, col. 1 (late city ed.).

<sup>40</sup> See AIR PIRACY, *supra* note 27, at 26. See also *In re Abarca*, 40 INT'L L. REP. 208 (1970) (extradition from Belgium to Switzerland on a charge of aircraft sabotage).

<sup>41</sup> N.Y. Times, March 9, 1971, § 1, at 15, col. 1.

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., HOUSE COMM. ON FOREIGN AFFAIRS, SUBCOMM. ON INTER-AMERICAN AFFAIRS, AIR PIRACY IN THE CARIBBEAN AREA, 90th Cong., 2d Sess. 11 (Comm. Print, 1968) (Canada). Instances of expulsion also have been reported from Algeria, the Bahamas, Cuba, Curacao, Lebanon, Saudi Arabia, Trinidad, the United States, and Yugoslavia. The hijackers in most of these instances were apparently tried for the hijacking or ancillary offenses in the state to which they were returned. *Id.*

<sup>44</sup> 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. For the ten-

sion of Unlawful Seizure of Aircraft,<sup>45</sup> signed at The Hague by fifty-nine states on December 16, 1970, not only supplements the Tokyo Convention by committing member states to the prosecution of hijackers, but it also makes a highly significant contribution to the development of international criminal law by establishing universal jurisdiction over the offense so that the hijacker must be submitted to prosecution "without exception whatsoever" in the member state in which he is found or, in the alternative, he must be extradited.<sup>46</sup> Loopholes in this provision can be pointed out. States are committed only to submit the hijacker to prosecution. Actual disposition of the case may be affected by a variety of considerations, for example whether the accused is mentally competent to stand trial, the possibility of plea bargaining or the assertion of the political defense. The alternative of extradition is limited by the political defense as well as the policy of some states to refuse surrender of nationals although in the latter situation the state would be required under the Convention to submit a hijacker of its nationality to its own criminal process.<sup>47</sup>

The plea of the political defense when offered by a hijacker is coming under rigorous scrutiny in several states. Article 7 of The Hague Convention reflects this trend by requiring that a member state must "*submit the case* to its competent authorities for the purpose of prosecution."<sup>48</sup> This provision does not bar a grant of political asylum if the territorial state finds that such action is warranted; it recognizes, however, that states now and for sometime to come will, for humanitarian and political reasons, reserve the right to weigh the political defense in any instance of aircraft hijacking.<sup>49</sup> But the Convention implicitly limits a casual resort to the political defense by putting the hijacker on notice that he

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year history of the ICAO efforts leading to the Tokyo Conference, see Boyle & Pulsifer, *The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, 30 J. AIR L. & COMM. 305 (1964).

<sup>45</sup> Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* December 16, 1970, ICAO Doc. 8920, [hereinafter cited as Convention].

<sup>46</sup> *Id.*, art. 7.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* (emphasis added). Commenting on the political defense to aircraft hijacking, the Legal Adviser to the Department of State (Stevenson) said: "[T]he convention should serve notice on all hijackers that hijacking, whatever the motivation, is universally considered as a serious common crime and is not a mere political offense." 64 DEP'T STATE BULL. 50 (1971).

<sup>49</sup> See generally *Report of the Subcomm. on Unlawful Seizure of Aircraft*, ICAO Doc. LC/SC SA, §§ 14, 14.1, 15 (1969). In testimony before the House Committee on Interstate and Foreign Commerce, the Deputy Assistant Secretary of State for Transportation and Telecommunications said, with respect to the issue of political asylum: "We do not propose to change in any way our general policy on political asylum; but we think the risks involved in the hijacking of commercial aircraft are great enough so that neither we nor others should treat hijackers—whatever their motivation—as simple political offenders." 60 DEP'T STATE BULL. 212, 213 (1969).

may be prosecuted for hijacking or ancillary crimes whatever disposition may be made thereafter.<sup>50</sup>

The process of developing controls over the international offense of aircraft hijacking is not unlike the construction of a mosaic. Piece by piece, the various processes are assembled and the whole should fit into the larger construction of international criminal law. The next step is to establish a way of dealing with the state which condones the offense, particularly for purposes of international blackmail. A draft convention, now under consideration by the ICAO Legal Committee, provides for measures of concerted action against such a state, including suspension of air services to it.<sup>51</sup> A second step beyond The Hague Convention is action on the draft convention for the suppression of acts of violence directed against aircraft which are not in flight and against ground installations.<sup>52</sup>

What other directions should control of aircraft hijacking take, given the factors of concern for protection of the interests of the genuine politically motivated offender and the tendency of states to subsume the offense to opportunistic foreign policy objectives? A state not wishing to prosecute a hijacker or to extradite him might be willing to enforce the criminal judgment rendered against him in another state. The European Convention on the International Validity of Criminal Judgments, concluded by the Council of Europe on May 28, 1970,<sup>53</sup> suggests this direction and has, moreover, far-reaching implications for the establishment of a common system of criminal law within the European community.

Still another approach places the hijacker under international rather than national jurisdiction. One such project calls for holding a hijacker in "international custody" in Spandau Prison in West Berlin pending trial, preferably before the International Court of Justice, assuming the modification of its present jurisdiction.<sup>54</sup> There has also been a revival of interest in the project of an international criminal court which would take jurisdiction over such international offenses as hijacking, terrorism and kidnapping of foreign diplomatic personnel. The prototype for such a court appears in the 1937 League of Nations Convention on the subject.<sup>55</sup> Prosecution of international crimes having political overtones, such as those mentioned above, before an international criminal court

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<sup>50</sup> Convention, art. 7 (emphasis added).

<sup>51</sup> 65 DEP'T STATE BULL. 84, 88 (1971).

<sup>52</sup> *Id.*

<sup>53</sup> [1970] European T.S. No. 70.

<sup>54</sup> See Smith, *The Probable Necessity of an International Prison in Solving Aircraft Hijacking*, 5 INT'L LAWYER 269 (1971).

<sup>55</sup> League of Nations Document, C. 548. M. 385. 1937. v. See also United Nations Committee on International Criminal Jurisdiction, Draft Statute for an International Criminal Court, U.N. Doc. No. A/AC.48/4 (1951).

or regional courts has considerable merit from the point of view of administration of justice and concern for efforts looking toward increased international cooperation. An international criminal court might well be the catalyst for the emerging international system of criminal law. But a realistic appraisal of international relations at present and the prospects for the near future clearly indicates that the emphasis should be placed upon securing world-wide acceptance of the Tokyo Convention, The Hague Convention and the drafts now under consideration by ICAO, thereby making the concerted effort to control the international offense of aircraft hijacking a prototype for cooperative action looking to the multilateral control of other international offenses, thus building a firm foundation for an international system of criminal law.

