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In August of 1976, the House of Delegates of the American Bar Association rejected a recommendation submitted by the Section of International Law to approve in principle a convention for the establishment of an International Criminal Court. The principal reason for the rejection by the House was that the S.I.L. resolution did not specify or limit the substantive jurisdiction of such a court.

One delegate expressed the fear that such a court might try United States officials for their actions in the Viet Nam War. Another speculated that the court might even try the rescuers at Entebbe instead of the hijackers.

The question of substantive jurisdiction for an International Criminal Court, if and when one is created, is probably the single most important issue to be resolved. There are currently three major draft conventions that have been proposed for the establishment of such a court. Each of them takes a different approach to the question of jurisdiction.

The 1951 Draft Convention proposed by a seventeen-member special committee of the General Assembly of the United Nations gave jurisdiction to the court to try persons accused of crimes under international law "as may be provided in conventions or special agreements among states parties to the present statute."[1]

The 1953 Draft Convention proposed by a second special committee of the General Assembly contains a much broader approach. It gives jurisdiction to the court over "crimes generally recognized under international law."[2] This would leave the matter in the hands of the court itself to define what crimes were generally so recognized.

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[1] U.N. Doc. A/ 2136, General Assembly, Seventh Sess., Supp. 11, Art. 1.

[2] U.N. Doc. A/ 3645, General Assembly, Ninth Sess., Supp. 12, Art. 1.

The 1972 Draft Convention proposed by the jurists and scholars who met at Wingspread, Wisconsin, refers to "crimes under international law";[3] but the Wingspread scholars also proposed a companion convention to establish an International Criminal Code. This proposed Code spelled out the following substantive jurisdictional basis for the International Criminal Court:[4]

1. Crimes against peace, against humanity, and war crimes as defined in the Nuremberg Charter;
2. Genocide;
3. Slavery;
4. Piracy on the high seas;
5. Aircraft hijacking and related offenses;
6. International traffic in drugs;
7. Violation of the Geneva Convention.

A fourth jurisdictional approach is currently under study by the Section of International Law. This approach would limit the jurisdiction of the court in the enabling document itself to the crimes of aircraft hijacking, international terrorism and such other crimes as the parties to the statute might later agree to by separate convention. The definition of hijacking would, under the new recommendation of the S.I.L., be limited to that contained in the "Convention for the Suppression of Unlawful Seizure of Aircraft" signed at The Hague on December 15, 1970. Under the Hague Convention, hijacking is defined as the seizure or exercise of control of certain types of aircraft by force, by threat of force, or by any other form of intimidation.[5] The aircraft involved must be of the non-military type, and the seizure must occur outside the territory of the state of registration and while in flight. Flight is further defined as after the door is locked for embarkation and prior to the door being opened for disembarkation.[6]

International terrorism would, under the new S.I.L. recommendation, be limited to the definition of international terrorism contained in the "Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism" proposed by the United States Department of State in November of 1972.[7] Under that Draft Convention, the crime of international terrorism is defined as unlawful killing, serious bodily harm or kidnapping that (1) takes place outside the territory of the state of the alleged offender; (2) takes place outside the territory of the state against which the act is directed; (3) is not committed against a member of the armed forces of a state in the course of

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[3]Statute for an International Criminal Court, Article 1, Bellagio-Wingspread Draft.
[4]Convention on International Crime, Article 3, Bellagio-Wingspread Draft.
[5]Article 1, Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague, December 15, 1970.
[6]*Ibid.*, Article 3.
[7]Department of State Bulletin, Oct. 16, 1972.

military hostilities; and (4) is intended to damage the interests of or obtain concessions from a state or an international organization.

Aircraft hijacking and international terrorism have, of course, increased tremendously in recent years.[8] Many hijackers and terrorists have successfully evaded prosecution by obtaining asylum in certain countries. The so-called West German initiative in the United Nations would, if adopted by countries, return persons accused of hijacking to the country of the hostages. This is unlikely to occur in practice, since a state whose national committed the offense is likely to be fearful that the defendant will not receive a fair trial if he is transported back to the state of the hostages. The corollary of this is that the state of the victim has reason to fear excessive leniency if the accused persons are tried in a state sympathetic to the defendants.

The answer to the dual problem of the fear of leniency and lack of a fair trial is to establish an International Criminal Court to try persons accused of aircraft hijacking or international terrorism. If after ten or twenty years of experience, such a court succeeds in these limited areas, its authority could then by a separate convention be extended to other international crimes.

[8]*See* E. RICH, FLYING SCARED (1972); and J. A. AVRY, SKY PIRATES (1972).