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SHOULD THE TOKYO CONVENTION OF 1963 BE RATIFIED?

BY JUAN J. LOPEZ GUTIERREZ†

I. INTRODUCTION

THE Tokyo Convention1 was signed by fifty States2 on September the 14th, 1963. Sixty-one governments were represented at the Confer-
ence. The Convention will come into force as soon as twelve of the signa-
tory States have deposited their instruments of ratification.3

At first glance the Convention appears harmless. However, its enforce-
ment could eventually affect the present legal status of airspace far beyond
the intent of the drafters. Furthermore, one can foresee serious conse-
quences arising from its ratification. These are the issues upon which this
study is focused.

The final draft of the Convention is rather disappointing when com-
pared with the original intentions of the drafters. "Air lawyers are doing
the possible," apologizes Dr. Fitzgerald, "the impossible they will do
later."4 One can detect a certain frustration in this comment of the Senior
Legal Officer of the International Civil Aviation Organization.

The task of the drafters was certainly difficult. Because of the issues in-
volved, they “had to take into account not only the problems of interna-
tional aviation but also the principles of general law, civil law, criminal
law and like matters.”5 The Convention’s contents had been a matter of
discussion for more than fifty years. ICAO’s Legal Committee had debated
the drafts since 1958.6

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1 “Constitution on Offenses and Certain Other Acts Committed on Board Aircraft,” signed at
Tokyo on 14 September 1963, ICAO Doc. 8364 (1963). See Boyle and Pulsifer, The Tokyo Con-
vention on Offenses and Certain Other Acts Committed on Board Aircraft, 30 J. of Air L. and
Com. 305 (1964).

2 Afghanistan, Argentina, Austria, Australia, Belgium, Bolivia, Byelorussian S.S.R., Cana-
da, Ceylon, Chile, Colombia, Congo (Braz.), Costa Rica, Fed. R. of Germany, Finland, France,
Greece, Guatemala, Hungarian P.R., India, Indonesia, Iraq, Italy, Ivory Coast, Japan, Liberia,
Mexico, Netherlands, Nicaragua, Nigeria, Panama, Philippines, Polish P.R., Portugal, R. of China,
R. of Haiti, R. of Korea, R. of Mali, R. of the Upper Volta, Spain, Sweden, Switzerland, Ukrainian
not a member of ICAO.

3 The Tokyo Convention, Art. 21, supra note 1.

4 Fitzgerald, The Development of International Rules Concerning Offenses and Certain Other

5 Comment of the Chairman of the ICAO Legal Committee at the opening of the Rome Session
I (Minutes) and II (Documents)], I, at 1.

6 Meetings had been held at Munich (1959), Montreal (1962) and Rome (1962). There are
other Conferences related to the Tokyo Convention, such as the Conferences for International
Criminal Law. See Premier Congrès International de Droit Penal, "Avant-projet du code de droit
penal," Bruxelles 1926, 617 (Paris 1927), Deuxième Cong. Int. Dr. Penal, Bucarest 1929, 187,
Int. Dr. Penal, Paris 1937, 440 (Paris 1939) and V Cong. Int. Dr. Penal, Genève 1944, 117
(Paris 1952).
II. THE SCOPE OF THE CONVENTION

The Tokyo Convention of 1963 deals with the conflicts of jurisdiction which arise when a crime is committed on board aircraft in international flight as well as with powers and responsibilities of the aircraft commander.

A. Conflicts Of Jurisdiction

The need for international conventions in the air law field need not be proved. A German travelling over Canada to the United States in a British aircraft could be criminally offended by a Polish passenger who bought his ticket in France. Conflicts might then arise between the various laws of Germany, Poland, France, the United Kingdom, the United States of America, and Canada, resulting in confusion in the absence of applicable international rules. Some of today's planes are capable of overflying more than twenty-four countries in less than twenty-four hours. All the overflown States could seek to exert jurisdiction over an act committed during such a flight. On the contrary, if the crime were committed above the High Seas, it could happen that no State would have jurisdiction over such an act.

B. The Aircraft Commander—Powers And Responsibilities

If an aircraft commander sought to restrain the author of an act which jeopardized the safety of an aircraft, or good order and discipline on board, he might expose himself to legal proceedings. The provisions of the Tokyo Convention dealing with his powers and responsibilities will be welcomed "by airlines and crew members as affording the opportunity of controlling with impunity persons on board aircraft who jeopardize safety, good order and discipline."

This originally secondary portion of the Convention eventually became the focal point of the draft due to the failure to achieve agreement with regard to resolution of the problem of jurisdictional conflicts.

III. THE ISSUE OF JURISDICTION: TERRITORIALITY VERSUS NATIONALITY

Article 3 of the Tokyo Convention establishes the principle of the "law of the flag" which enables the State of registration to exercise jurisdiction over events on board its aircraft; but article 4 lays down so many
exceptions" that the territory overflown may be said to be the truly competent State. As will be shown, the general principle of nationality established in article 3 becomes a subsidiary principle when the aircraft concerned is flying over foreign territories. Article 3 establishes exclusive competence of the national law of the flag only when the aircraft is flying over the High Seas or stateless territories.

The problem of determining the most appropriate jurisdiction for events on board aircraft was formerly sought to be solved by applying the principles of nationality, territoriality, place of first landing and others.

A. The Principle Of Nationality

Those who have supported the application of the nationality principle, since Fauchille in 1901, have always accepted the need for exceptions to its enforcement, mainly when the security of another State is endangered. According to this principle, events on board aircraft must be submitted to the jurisdiction of the State to which the aircraft belongs, i.e., the State in whose territory the aircraft is registered. The advantage of this principle is the avoidance of lawlessness on the High Seas, the elimination of changes in jurisdiction with each frontier crossed, its acceptance by many countries, its precedent in maritime law and its distinction as the only jurisdiction under which users may readily know how they will be treated. The main difficulties include the danger of no punishment, its only partial acceptance in common law countries, the transitional relationship between aircraft and passengers and the jealous guarding of the right of sovereignty by the States overflown.

B. The Principle Of Territoriality

This principle determines jurisdiction by reference to the place where the offense is committed. In aviation cases, one could call it the principle

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14 Article 4 reads:

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 offense committed on board except in the following cases:

(a) the offense has effect on the territory of such State;
(b) the offense has been committed by or against a national or permanent resident of such State;
(c) the offense is against the security of such State;
(d) the offense 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 insure the observance of any obligation of such State under a multilateral international agreement.

15 Early supportings of the nationality principle may be found in the Conferences of Verona, 1910 (Congresso Giuridico Internazionale per il Regolamento della Locomozione Aerea), of Paris 1910 (where an "Air Code" was drafted by the "Comité juridique international de l'aviation"), Genève 1912, Frankfurt 1913, Monaco 1921, Prague 1922, Rome 1924, Lyon 1925 and Madrid 1925. [See 13 Bibl. Diritto Aer. 19, 21 (1929)]. Fauchille was the pioneer in such supporting at the very first session held by the "Comité juridique international de l'aviation" in Paris 1911, see 1 Congrés Intern. de Leg. Aer. Paris 1911, 57 (ed. by "Les Editions Internationales," Paris 1933), as well as Von Bar, id. at 56, and Niemeyer, Crimes et Delits Commis a Bord des Aeronefs, 13 Rev. Dr. Aer. 285 (1929). See also Meurer, Luftschifffahrtrecht 33 (1909).

16 See Fauchille, Le Domain Arien et le Regime Juridique des Aérostats (1901).

17 Nationality by registration is a rule widely accepted in international air law. Article 17 of the Chicago Convention of 1944 reads as follows: "Aircraft have the nationality of the State in which they are registered."

18 It has been supported as the main general rule in criminal law, both in doctrine and in written law. See case of the S.S. "Lotus," P.C.I.J. ser. A, No. 10 (1927). Hudson, World Court Reports, II, 1927-1932, 23 (1935). The Permanent Court of International Justice stated: "In all systems of law the principle of the territorial character of criminal law is fundamental."
of nationality of the first policeman who succeeds in apprehending the criminal. In support of its application it is argued that this principle is in accord with the concept of sovereignty, pleases political interests and avoids extradition problems. Its disadvantages are the possible concurrent competence of several States, the possible discovery of the crime in a different State from that in the airspace of which it really took place and the difficulty of precisely identifying the State over which an act has been committed. Its widest application has been in the criminal law field.

C. The Principle Of First Landing

This principle has been defended for practical, rather than doctrinal reasons. Under this rule the State of landing is exclusively competent. The advantages are discouragement of criminality (since the offender will be seized immediately upon landing), avoidance of debarking undesirable people in non-competent States and the establishment of a very clear and definitive jurisdictional competence. The practical problem argued against its application is the possible reluctance of the landing State to try a person of foreign nationality who committed an act unpunished by its own law on board a foreign aircraft while flying over a foreign State.

D. Additional Principles

Other principles, such as the State of last departure, have been discussed at length, but appear now to be refuted. The principle of universality applies to a few crimes, such as piracy, slave traffic and counterfeiting. Its universal acceptance is justified on the ground that such crimes violate the essential standards of our present civilization. In these cases the locus in quo and nationality of the offender are not relevant at all. The principle of passive and/or active personality applies the national law of the victim and/or the offender respectively and is adopted in most of the civil law codes. The principle of protection recognizes the competence of any State whose security is endangered. Finally, the principle of multiple competences admits several competences at the same time. The Tokyo Convention establishes this latter system.

E. Nationality And Territoriality In Scholarly Writings And National Laws

Simply stated, a line may be drawn between the common law and civil

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20 First scholarly writing in support of the application of this principle, is found in 1928. See Morpurgo, Conflits internationaux de juridiction en matière penal aeronautique, R.J.I.L.A. 399 (1928); also Lortsch, Statut juridique du passager d'aeronof, R.D.A. 7 (1929). See also Pholien, Des crimes et delits commis a bord d'aeronefs en vol, Rapport a la seance du 3 juillet 1929 de la section belge du Comite Juridique International de l'Aviation, R.D.A. 289 (1929).
21 See Lemoine, Traite de Droit Aerien, § 1225 (1947); also Riese et Lacour, Precis de droit aerien international et suisse § 397 (1951).
22 Lemoine, op. cit. supra note 21, § 1225. See also Litvine, Precis Elementaires de Droit Aerien 98 (1953).
23 Several competent jurisdictions has been considered the only feasible settlement since 1910 by Lyklama, Air Sovereignty 62-63 (1910); Hazeltine, The Law of the Air 135 (1911); Lapradelle, Danilovics and Szondy before the "Comité juridique international de l'Aviation" at Budapest in 1930, see Rev. Dr. Aer. 40 (1930); De Wisscher in the Congress of the Institute of International Law in 1937, see R.F. Dr. Aer. 329 (1937); The Harvard Draft Convention on Jurisdiction With Respect to Crime, article 4, 29 Am. J. Int'l L., Supp. 1, 439 (1935).
law countries.\textsuperscript{24} Whereas the former emphasize the application of the principle of territoriality,\textsuperscript{25} the latter prefer acceptance of the nationality principle.\textsuperscript{26} There are few exceptions to this general assertion.\textsuperscript{27}

A new group of progressive writers dare ask for a universal criminal code,\textsuperscript{28} presumably by arguing that the criminal character of an act is not affected by the fact that it is committed on board aircraft.

Danilovics and Szondy wrote an amazingly prophetic work thirty years before the Tokyo Convention was signed.\textsuperscript{29} In 1930 they identified the essential issues as follows:

1. The maritime “law of the flag” ought to be accepted in air law.
2. The overflown States must also be granted competence to exercise jurisdiction.
3. Both competences should be concurrent.

This is, in fact, the anticipated effect of the Tokyo Convention.

As for national legislations,\textsuperscript{30} a brief survey of Western States confirms that the problem is reduced to a struggle between the principles of territoriality and nationality. The “law of the flag” is accepted as the rule in France,\textsuperscript{31} Italy,\textsuperscript{32} Germany\textsuperscript{33} and Spain.\textsuperscript{34} The applicable United Kingdom and United States of America legislation uphold the territorial principle.\textsuperscript{35}

\textsuperscript{24}Recent writings on the subject include: Bin Cheng, Crime on Board Aircraft, 12 Current Legal Problems 177 (1959); de Juglare, Les Infractions Commises a Board des Aeronefs dans la Doctrine Internationale, 14 R.F. Dr. Aer. 123, 227 (1960); Mankiewicz, Aspects et Problemes du Droit Penal de l’Aviation Internationale, 4 Annuaire Franc. de Dr. Intern. 112 (1958); Tapia Salinas, Legislacion aplicable a los actos ocurridos y hechos realizados a bordo de una aeronave en vuelo internacional, 10 Rev. del Inst. de Derecho Aeron. 13 (1958); Veira, Elementos de Direito Penal Internacional aeronautico 4 Rev. de Faculdade de Direito de Pelotas 19 (1960).

\textsuperscript{25}McNair, The Law of the Air 127 (1953): “If the non-criminality of an act by the foreign law were admitted as a factor to be considered, it would be equally logical to take into account the fact that an act, although criminal, may be subject to a lesser penalty by the foreign law than by English law, or may be subject to a penalty which an English court has no power to inflict. Such consequences can hardly have been intended by the draftsmen of the Act (of 1949).”

\textsuperscript{26}For instance, Le Goff, who supports the “law of the flag” principle relying on maritime law, Traite juridique et pratique de droit aerien 773 (1934).

\textsuperscript{27}See Lemoine, op. cit. supra note 21 at § 1231.

\textsuperscript{28}Il s’agit des delits et des crimes de lese humanite,” says Mateesco, Droit Aerien Aeronautique 292, 296 (1954), endorsing the opinion of Fenston, Crimes on Board Aircraft, paper submitted to the IASL 41 (1951), 1 McGill L.J. 66 (1952). See also Donnedieu de Vabres, “Droit Penal International” 462 (1922) and “Principes Modernes du Droit Penal International” 135 (1928).

\textsuperscript{29}Danilovics and Szondy, Les infractions a la loi penale commises a bord des aeronefs, Rev. Dr. Aer. 40 (1930).

\textsuperscript{30}See ICAO Docs. vol. II at 21-73 where comments from several governments are collected, New Zealand, Pakistan and Finland being the most explicit ones.

\textsuperscript{31}Article 8 of the Air Code, 1955, recognizes the law of the flag as well as the French State’s competence when a Frenchman is involved as offender or as a victim, which emphasizes European countries’ fondness toward the nationality principle as it is explained infra at 7. The principle of territoriality is not accepted whereas the first landing principle does apply whenever the aircraft lands in France.

\textsuperscript{32}On reciprocity bases. The Italian government bitterly commented on the system of concurrent competences laid down by the Convention’s final draft. See ICAO Docs. vol. II at 84.


\textsuperscript{34}It was the Spanish proposal which gave rise to the debates on the issue, see ICAO Docs. vol. II at 54.

\textsuperscript{35}However, that does not prevent the UK from admitting the “law of the flag” for British aircraft in Sec. 62 (1) of the Civil Aviation Act of 1949. As for the United States, see Section 902 (k)-(L) (1) (A) of the Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. §§ 1301-1142 (1918).
The Paris Convention of 1919 embodied an article, which was later deleted,36 dealing with the problem in a moderate way. The removal of the article left room for a full acceptance of the principle of territoriality. International Conventions have implicitly recognized it37 as well as international tribunals.38

F. The Territorial Background Of The Aircraft's Nationality

The Tokyo Convention was drafted by the ICAO Legal Committee as a part of a chapter concerning the legal status of aircraft in the Munich drafts,39 demonstrating the close relation between both issues, aircraft's nationality and the eventual scope of the Tokyo Convention.

Nationality of aircraft was an inadmissible concept before 1919.40 Nevertheless, it was recognized in the Conventions of Paris 1919,41 Madrid 1926,42 Havana 1929,43 Chicago 194444 and Geneva 1958,45 as well as in the Tokyo Convention of 1963.46 Ironically enough, Fauchille supported its acceptance for reasons exactly opposite to those of today: the French scholar tried to establish a legal order in a "free airspace." Half a century later, the present practice is to assign nationality to aircraft to avoid their submission to more than one hundred and twenty sovereign States.

The legal character of aircraft nationality may be studied against three frames of reference; its comparison to citizenship, maritime law precedent, and the problem of extradition.

1. Initially, the relationship between aviation law and maritime experience cannot be denied.

In this regard, the Subcommittee which had met in Montreal in September 1958, had noted "a lack of an international rule concerning 'extraterritorial' jurisdiction of a State in regard to offenses committed on aircraft of its nationality engaged in international navigation." It had, therefore, been the intention of that Subcommittee to set up a rule of international law which corresponded to the law of the flag in the case of ships.47

The effort which air lawyers are making to create an autonomous body of law is strong evidence of the connection between air law and its maritime background.48 The "law of the flag" is universally accepted with

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36 Article 23 of the draft of the Paris Convention, 1919, was removed on the ground that article I was clear enough, as to the principle in force, by recognizing States' sovereignty upon their own airspace, explained the British Air Minister. See McNair, op. cit. supra note 25, at 112.
37 See article 1 of both Conventions, Paris 1919 and Chicago 1944.
38 See Moursi, supra note 19.
39 The Subcommittee had dealt with both issues at the same time since 1956, in Munich in 1959 and in Rome and Montreal in 1962.
40 "An aircraft is a movable thing pure and simple, and strictly analogous to a piano." Pittard, Rev. jur. de la locom. aer. 118 (1912).
41 Articles 1-6. Text of the Conventions of Paris 1919, Madrid 1926 and Havana 1928, may be found in 13 Bibl. Diritto Aer. 46, 126, 40 respectively (1929).
42 Art. 6.
43 Art. VII.
44 Art. 17.
45 Extraterritorial immunity was granted to State-owned ships and aircraft, but not to private aircraft. See ICAO Docs. vol. I at 47.
46 Art. 3.
47 ICAO Docs. vol. I at 5. The text quoted is a statement of the Italian Delegate in the ICAO Legal Committee.
48 That does not mean that there are no differences between ships and aircraft. For instance, a person disturbing passengers can be isolated from the community in the case of ships but not in aircraft. In aviation cases it will be necessary to disembark such a person at the first landing place, even in the case where such a place does not belong to the territory of a contracting State.
regard to military aircraft. Its application to civil aircraft has been achieved through article 3 of the Tokyo Convention. Regardless of distinction between civil and military aircraft, the inside space of an aircraft will simply be considered part of the territory where the aircraft is registered, for jurisdictional purposes.

2. To what extent is it correct to refer to aircraft nationality? Citizenship is a legal status which persons carry resulting in their being governed by their own laws in their personal relations when they are abroad. What happens under the legal fiction of aircraft nationality is something different. Aircraft nationality results from registration to which certain results are attached wherever the aircraft happens to be. The aircraft's national law, however, does not apply exclusively to the aircraft itself as a whole, but also applies to the passengers and events taking place aboard. That application is justified by arguing that people on board are situated within the territory to which the aircraft belongs. The distinction is important. When one speaks of the nationality principle, its real meaning is the application of (1) the national law of State N (2) to a citizen of State N (3) in a foreign state, whereas in air law the principle of nationality has become the application of (1) the territorial law of State X (2) to foreign persons (3) situated in the national territory of State X, since the passengers flying in planes of a States are deemed to be in that State. If this is so, the conclusion must be reached that the inside space of an aircraft is foreign territory with respect to overflown States. It must be noted that the so-called principle of nationality is but a "territorial principle applied in a extraterritorial manner" when it applies to aircraft, as the "law of the flag" in maritime law. The real principle of nationality—national law of the offender or of the victim—is dealt with in aviation in the sense of passive or active personality. Therefore, the conflict in the application of the "law of the flag" and the law of the overflown State is not a clash between the principles of nationality and territoriality, but rather a conflict between two territorial laws, the law of the subjacent State in whose airspace the aircraft moves, on board of which the crime is committed, and the law of the territory where the aircraft is registered.

49 See the Venezuelan Delegate's statements in ICAO Docs. vol. I at 47: "The principle of immunity of warships or military aircraft must be unquestioned. . . . The immunity was covered (in the Geneva Convention of 1958 dealing with High Seas, Contiguous Zone, Territorial Sea and Continental Shelf) by the phrase 'extraterritoriality' which was taken to mean that none of these ships or aircraft could be affected, except by the State of the law of the flag."

50 The fact that civil planes may be used for military purposes has been a matter of concern for some writers since World War II. See Cooper, The Right to Fly (1947).

51 The influence of Article 19 paragraph 1 of the Geneva Convention of 1958 on Article 4 of the Tokyo Convention is evident: "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 with any crime committed on board the ship during its passage, save only in the following cases. . . ." See Article 4 of the Tokyo Convention supra note 14.

52 The development of the "registration" concept has caused deep effects in the civil law, mainly the destruction of the old distinction between "meubles" and "immeubles" goods. Nowadays, the distinction is between "registerable" and "non-registerable" goods, some of the "meubles" goods being registerable. That is the reason why the most movable good, the aircraft, is considered "immeuble" in the sense of "registerable" because of its worth and the need for making clear its legal situation toward third parties. See Article 10 of the French Air Code of 1936. See also Tapia Salinas, Comentarios a la ley española de 21 de julio de 1960 14, 22 (1962).

53 "Spanish aircraft are Spanish territory wherever they happen to be," reads Article 6 of the 1960 Spanish Air Act.

54 ICAO Docs. vol. I at 52.

55 It does not pay to distinguish between choice of law and conflict of jurisdictions in criminal matters, since the court will always apply its national law.
People travelling on board can not be in two different territories at the same time. Therefore, it would be logically inconsistent to maintain that a crime on board is committed in two States at the same time.

3. The territorial background of both principles appears also when one considers the question of extradition, since it would not make sense to raise the issue with regard to crimes committed on board aircraft if the overflown States did not recognize the territorial nature of the aircraft's interior space. However, the problem arose and the question was dealt with in several meetings.

The Montreal Subcommittee in 1962 proposed the inclusion of an article as follows: "Nothing in this Convention shall be deemed to create (a right to request extradition of any person or) an obligation to grant extradition." But the Committee in Rome considered that in order to make the Convention more effective, the Draft Convention should contain provisions concerning extradition; otherwise it might prove impossible to bring to justice a person who has committed an offense on board aircraft. Certain extradition treaties provide for extradition only in respect of offenses committed in the territory of the State requesting extradition. After consideration the Committee decided to include in the Draft Convention the following provision: "Offenses committed on aircraft registered in a Contracting State shall be treated, for the purpose of extradition treaties, as if they had been committed also in the territory of the State of registration." (Italics added).

The Committee considered, but did not accept, a proposal to limit this provision to offenses committed over the High Seas. The relationship between the legal status of aircraft and the problem of extradition illuminates the aircraft's territorial character. The drafters, however, behaved cautiously in conceding complete national status to civil aircraft for the first time in the history of air law.

Recapitulating, this problem of jurisdictional choice has been restricted to two principles, nationality and territoriality, found in scholarly writing and national legislation, within articles 3 and 4 of the Tokyo Convention as well as in all debates during the drafting discussions. It has been submitted that both principles rely on a territorial basis.

G. Application Of The Principle Of Territoriality In Articles 3 And 4

The relationship between the aircraft and the overflown State is clear. Aircraft are subjected to the subjacent State's sovereignty, so that the principle of territoriality is applicable without debate. Aircraft, as such, are subjected to the air navigation rules and municipal laws of the overflown States. It is simply a sovereignty issue. The reader will understand that this problem is considered within the scope of the Chicago Convention and the Air Transit Agreement.

The relationship between passengers and aircraft is the one focused

58 That in parenthesis is what the Committee decided not to include in the final draft convention because it considered that any State may request another State to extradite a person.
55 ICAO Docs. vol. I at xxxi. See also Art. 16 para. 2 of the Tokyo Convention, supra note 1.
56 See ICAO Docs. vol. I 3-118.
59 See Articles 1, 5, 6, 7, and 12 which read: "... every aircraft shall comply with the rules and regulations relating to the flight and maneuver of aircraft ... ."
upon in article 3 of the Tokyo Convention. In the case of ships, which sail the High Seas, no problem arises; whereas in the case of aircraft, passengers could erroneously be said to be flying in two foreign territories at the same time. However, the air passengers’ liaison with aircraft is stronger than with the subjacent State. That is why the “law of the flag” is applicable instead of the principle of territoriality. Passengers, if foreigners, are as foreign to the aircraft as the aircraft is foreign to the overflown State.

The real problem is the relationship between passengers and the overflown State, with which article 4 is concerned. There is no direct relationship because of the aircraft’s interposition between them. The most common cases will take place in the two previous relationships, (a) and (b), but article 4 lays down this new relation, perhaps on the ground that the actions of passengers, though committed on board, are also committed within the overflown territory. This argument is fallacious; and its ambiguity appears when one realizes that, if the national laws of passengers yield to the territorial law of the aircraft once they are on board, it is the national law of the aircraft which yields in turn to the laws of the overflown State. There is no bridge for a third relationship between passengers and subjacent States unless one considers the matter in a completely arbitrary manner. For the distinction exists between the aircraft, as a foreign vehicle within the subjacent State’s airspace, and the aircraft’s interior space, where passengers are foreigners. The uncommendable result is the overlapping of two conventions of quite different scope, Chicago and Tokyo, with the deplorable outcome of further restrictions to the right of innocent passage, a consequence serious enough to justify complaint. Not only is no advantage gained by adhering to the Convention, but also it is foreseeable that should it be enforced, the States will have to choose between destroying the Convention or jeopardizing the right of innocent passage.

If these observations are correct, rejection of article 4 is inevitable. For example, the first exception to article 3 is as follows:61

2. A Contracting State62 which is not the State of registration may interfere with an aircraft in flight in order to exercise its criminal jurisdiction

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61 The IATA’s representative warned of the danger. See ICAO Docs. vol. I at 58.
62 Art. 4 (a) supra note 14.
63 The interpretation of article 4 gives rise to an additional problem. “A Contracting State may interfere . . . to exercise its own criminal jurisdiction . . . .” Any Contracting State? Only the Contracting State flown over? The overflown Contracting State even though the aircraft has entered the airspace of another State? Fitzgerald says (op. cit. supra, note 4, at 238): “The Munich draft in 1958 provided that the overflown State would be competent in certain cases, being such a provision greatly extended in the Rome draft by providing that ‘a Contracting State’ could be competent in such cases.” Yet, it is submitted here that it would be only the actually overflown State for as long as overflown, for the following reasons:
a) The general rule is established in article 3 and that must be strengthened as much as possible to get the maximum uniformity in the possible conflicts of jurisdictions.
b) In criminal matters, jurisdiction ends where frontiers end. The nature of a crime is not affected by the fact that it has been committed in a certain place.
c) Article 4’s contents are exceptions to article 3 and exceptions must be interpreted in a restrictive manner.
d) Other interpretation would be unreasonably broad and practically unworkable. How could a State not flown over manage to interfere with an aircraft flying in another State’s airspace? Should we admit the “right to pursuit” just because a passenger, not the aircraft, committed a crime?

In any case the law of the flag remains as the subsidiarily competent one. The overflown States may interfere, but they are not so obliged.
over an offense committed on board when the offense has effect on the
territory of such State (emphasis added).

It is hard to justify this exception once article 3 has been accepted. If an
overflown State's laws are violated by a passenger's actions, that
State is affected. Moreover, whenever it pleases a State to typify\(^64\) new
offenses in its domestic legislation, that overflown State can consider itself
affected when a related crime is committed on board. Article 4's first
exception can be lawfully applied by overflown States in the most arbi-
trary manner. As a matter of fact, all States are entitled to enforce the
rights granted by this Convention, whether or not the Convention is
ratified, by merely enforcing domestic legislation. The very drafters made
their resignation in the task of settling conflicts of jurisdictions by
admitting: “This Convention does not exclude any criminal jurisdiction
exercised in accordance with national law.”\(^65\) Strangely enough, the greater
number of ratifying States the less will be the degree of uniformity
accomplished.

Article 4(b) lays down another exception to article 3: “... when the
offense has been committed by or against a national or permanent resident
of a state...” The application of active and passive personality—the real
nationality principle—takes place only because it accidently coincides with
the territorial principle in this case. Again, article 4 is based on the er-
roneous assumption of the passenger’s ubiquity.

Exception (c) of article 4 considers offenses that endanger security of
overflown states. Drafters here accomplished a perfect fulfillment of
their legal drafting duties. The foreseeable abuse in applying criminal laws
to political crimes provoked article 2: “No provision shall be interpreted
as authorizing or requiring any action in respect of offenses against penal
laws of a political nature.” The apparent contradiction of articles 2 and
4(c) is solved by adding to article 2: “... without prejudice to the pro-
visions of article 4.” Consequently, article 2 becomes relegated to the
superfluous status of article 3.

Exception (d) of article 4 is the inevitable consequence of mistaking
the aircraft for its passenger load, that is to say, accepting the twofold
location of passengers within two foreign territories at the same time.

The overflown State may interfere with an aircraft in flight in order
to exercise its criminal jurisdiction “when the offense consists of a breach
of any rules or regulations relating to the flight or maneuver of aircraft
in force in such state.” Overlapping with the Chicago Convention\(^66\) is
evident. This exception is as necessary in the Chicago Convention as it is
pointless in the Tokyo Convention. Again the relationship between an
aircraft and overflown States is mistaken for the relationship between the
aircraft’s interior space and passengers themselves as if the former should
determine the scope of the Convention.

In short, this writer is neither rejecting nor supporting the granting of
competence to exercise jurisdiction by applying the “law of the flag.”
But it is submitted that once the law of the flag is established in article 3,
all the exceptions of article 4 defeat the Convention’s “raison d’etre” and

\(^{64}\) The term “typify” is used in this sense as the so-called process in Europe by which an
act becomes identified as criminal in the law of a state. *Tipificar* in Spanish, *Tabestand* in German.

\(^{65}\) Art. 3 para. 3.

\(^{66}\) Article 12 of the Chicago Convention not only allows but even requests the overflown State
to prosecute violations to air navigation rules.
give rise to foreseeable new conflicts with respect to the right of innocent passage.

IV. THE CONVENTION’S GAPS

Nothing was farther from the minds of the drafters than an exhaustive convention. The doctrinal crisis which the concept of sovereignty is suffering today gives rise to transitional agreements. Some important issues were left untouched as being beyond the aims of the Tokyo Convention, such as the contiguous zone of the High Seas, the federated States’ jurisdictions, the Convention’s application to spacecraft, or the determination of the law of the flag in cases of aircraft operated by international agencies.

A. Jurisdiction Over The Contiguous Zone’s Airspace

High Seas no longer will be lawless for the Convention’s ratifiers. Nevertheless a conflict arises regarding the application of articles 3 and 4 to the contiguous zones’ airspace. However, in zones like ADIZ and CADIZ which are part of the High Seas, there is little such conflict. Article 3 applies clearly to the airspace over the High Seas, and article 4 will apply over the territorial waters. The contiguous zone expands the High Seas outward from the territorial waters. There is no room for compromise, so conflicts will certainly arise as to the enforcement of article 4 in such a zone.

In any case this problem should be discussed within the scope of the Chicago 1944 or Geneva 1958 Conventions.

B. Federal State’s Competence

In federal States, “is airspace part of the territory of the respective states overflown, or is it under the exclusive federal jurisdiction?” asks Professor Cooper. The Supreme Court of the United States has held that “the airspace is a public highway.” The Federal Aviation Act of 1958 defines the United States as “several states . . . including the territorial waters and the overflying space thereof.” The power of the Congress to dispose of and regulate the use of this federal airspace is clear under the provisions of article 4, section 3 of the Constitution. Nevertheless, the question still stands with respect to the subjacent states to exercise jurisdiction over crimes committed on board overflying aircraft. Section 903 of the Act of 1958 confirms the application of the territorial principle.

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68 USA’s Air Defense Identification Zone and Canadian Air Defense Identification Zone. They are zones under the control of the North American States reaching out more than two hundred miles for security reasons.
73 Cooper, op. cit. supra note 70.
74 “...Whenever the offense is begun in one jurisdiction and completed in another or committed in more than one jurisdiction, it may be dealt with, inquired, or tried, determined and punished in any jurisdiction in which such offense has begun, continued or completed, in the same manner as if the offense had been actually and wholly committed therein.” 75 Stat. 467, 49 U.S.C. § 1473(a) (Supp. IV, 1961). For an interesting note, see 30 J. Air L. and Com. 292 (1964).
It is submitted, however, that a crime committed over the territorial waters of the United States would be tried under the federal jurisdiction.\(^5\)

C. The Treaty’s Application To Spacecraft

The possible application of the Tokyo Convention to spacecraft is not too speculative a question. Before long spacecraft will carry passengers in competition with supersonic aircraft and jets.\(^8\) As for spacecraft other than those engaged in commercial transportation, article 1 paragraph 2 of the Convention could be said to be applicable to them, but article 5 precludes such broad application.\(^7\) Some ideas for eventual regulation of the problem have already been collected by Leon Lipson and Nicholas Katzenbach.\(^7\)

D. Other Gaps

There are other points that were also left untouched by the Convention as being of minor importance, though they are very related to the jurisdictional issue. Thus, the question whether the offender has to be in the aircraft at the time that the offense is committed (consider the case of a clock-bomb), or whether the commander has the power to refuse the embarkation or disembarkation of a certain person. What about an act on board that should be made criminal which, if performed on the ground within the municipal territory of the State, should not be criminal? What about a person who is obliged by a foreign law to do something which is punished by his national law? How will he avoid punishment? Or should the State where a passenger has been disembarked by the commander pay for the ticket the undesired passenger needs to return to his country?

E. Important Omissions

There are, however, critical gaps at the heart of the Convention. Lack of definition of the term “offense,”\(^5\) silence as to the extradition issue\(^9\) and the principle “ne bis in idem.” One misses articles concerning chartered aircraft and provisions requiring compulsory exercise of jurisdiction by the competent State.\(^6\) The outcome of these important gaps will be studied in part V.


\(^7\) Technicians have already overcome the problems of space transport, theoretically at least. For additional information, see Faneuf, Rocket Transportation, in Uses of Outer Space in Peacetime 90 (Ramos, ed. 1960).

\(^7\) Article 1, paragraph 2, reads as follows: “This convention shall apply in respect of offenses . . . while in flight, or on the surface of the High Seas, or of any other area outside the territory of any State.” However, article 5 restricts the Convention’s application to flights where “the last point of take-off . . . or the next point of intended landing is situated in a State other than that of registration.” The intention to return to the State of departure is obviously inherent to spacecraft in non-commercial activity.


\(^7\) Not even the question whether penal laws embody only delictual actions or whether financial laws, customs, sanitary and administrative rules are also implied, is clear. See Fitzgerald, op. cit. supra note 4, at 236.

\(^7\) Article 16 paragraph 2 is of negative contents: “. . . nothing in this Convention shall be deemed to create an obligation to grant extradition.” See note 55 supra and accompanying text.

\(^7\) Art. 3 para. 2 does not require the States to exercise jurisdiction (see supra note 13) but only to establish the “law of the flag” as the competent jurisdiction, in other words, to render the Convention municipal law after, or by, ratification. See Fitzgerald, op. cit. supra note 4, at 237.
V. The Tokyo Agreement As A Convention

One must distinguish between treaties and conventions. Whereas the former rely on reciprocity the latter look forward to universal acceptance. By universal, we mean not actual acceptance but the intention of so being accepted.

Conventions are agreements made with the avowed object of making the rules which they promulgate universal. This objective is sought and made possible by provisions in the agreement for the adhesion of other States. On the contrary, treaties are agreements between several States upon rules which shall apply reciprocally to each.\(^8\)

Uniformity is the primary aim of a convention. It would be intrinsically absurd to enforce a convention which enlarged the conflicts between national laws, as new ratifiers adhere to the agreement. The greater the number of ratifying states, the more uniformity in rules on universal scale should be accomplished. The Tokyo Convention had the chance to accomplish this. But international rules are still a dream in the field of criminal law, except for a few crimes universally recognized.\(^4\) The Tokyo Convention achieved nothing but maintenance of the "status quo." Criminal laws will continue to apply as if there were no Convention. The Italian government commented on the Convention in this way:

[W]e must ask: what are we seeking? to eliminate conflicts of jurisdictions, as would be in the spirit of the Convention, and as is natural in an international law? or simply to add the jurisdictional entitlement of the law of the flag, which in any case has already been established by customary international law? What is the good of convening an international assembly and requiring a convention if the agreement is merely to embody existing disagreement? While our anxiety arises from the fact that national laws differ on the subject, we consider that a convention between several States can only be justified and of value if it is aimed at reducing or eliminating cases of conflict, and at establishing a law which is valid for all Contracting States . . . .

[W]hat has been the result of the efforts made hitherto? Entirely negative . . . . We are just where we were before. And the reason for that is that the drafting committee failed to take into account the true reason for, and the essential purpose of, the convention.\(^4\)

A closer look at the scope of the Convention will bring out the reasons for the Convention's failure.

A. The Convention’s Criminal Scope

The criminal scope of the Convention is shown in article 1.\(^6\) Definition of the term “offense” is not given, and the word gives rise to an indefinite number of problems which could have been avoided.

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\(^{8}\) Shawcross and Beaumont, Air Law 12 (1945).

\(^{83}\) A "Draft Code of Offenses Against the Peace and Security of Mankind" was adopted by the International Law Commission on 28 July 1954. GAOR IX, Supp. 9 (A/2693).

\(^{84}\) ICAO Docs. vol. II at 85.

\(^{6}\) "This Convention shall apply in respect of:
  a) offenses against penal laws;
  b) acts which, whether or not they are offenses, may or do jeopardize the safety of the aircraft . . . ."
In 1959, at the ICAO Legal Committee's Twelfth Session in Munich, a proposal was made by the Polish Delegate, Mrs. Missezwska, to the effect that the scope of the Convention should be reduced so as to exclude the treatment of problems relating to offenses "per se" and to deal only with such acts as were prejudicial to the safety of the aircraft, whether or not they constituted an offense. The Polish proposal was rejected.7

Discovering a definition of the term "offense" is a difficult task. It is not found in the common law literature.7 In civil law countries, offenses are typified in penal codes, but that does not explain the "de lege ferenda" criteria that must be followed for typification.8 Generally speaking, "wrong" is an act which badly affects the social group where its doer is living; "right" will exist if the legal order of the society where the act is committed improves by such an act. Right and wrong are relative concepts; what is right for one social group may be wrong for another, because of their differing culture, education, environment, etc. Criminal law, therefore, is a value judgment of the way of life of the social group which is governed by such a law. Wrong is repugned by society and the apportionment of punishment depends (ought to depend if it is to be just) upon the measure of disfavor the act inspires in the society, rather than upon the discretion of judges or legislators.89 Universal crimes are only universal as long as they are abhorred by a universal society. Only such crimes should be typified in an international criminal code. If certain acts are crimes in one country but not in another, then paragraph (a) of article 1 of the Convention is pointless.

The lack of definition of the term "offense" will be troublesome in practice as well, by provoking considerable confusion about punishability of acts committed on board aircraft. For instance, must it be understood that aircraft commanders ought to be expert in all penal laws in force or only in the national criminal law of the State of registration of the aircraft? What about the case where the commander's nationality differs from that of the aircraft? The Convention limits the aircraft commander's power to "serious offenses."90 What is the legal meaning of that term? What is the appropriate measure of the degree of punishment? Assume a promise of

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7. On the grounds that "there was a need for the establishment on an international basis of rules concerning offenses committed on board aircraft and a need also for the unification of national rules in the subject . . . taking into account in particular the disparity in the provisions of various national laws related to such matters and the lack in several instances of a law equivalent in the case of aircraft to . . . the law of the flag in the case of ships . . . ." ICAO Docs. vol. I at xxv-xxvi, Report of the Committee to the ICAO Council at its 12th Session.

8. Moursi, op. cit. supra note 57, at 81: "No one has yet succeeded in formulating a completely satisfactory definition of crime in common law countries . . . where the criminal law is a conglomerate mass of rules based upon the ancient common law of the respective countries and modified and extended by authoritative decisions of judges in the long passage of time and vastly enlarged by the addition of statutory enactments made from time to time to meet the needs of the moment."

87. The aim of criminal law is "public interest" whereas the civil code is concerned with compensations to individuals for civil wrongs. See Street, The Law of Torts 213 (1919).

88. A Belgian court in 1962 absolved a mother, relatives of hers, and her doctor, who had killed her new-born baby, on the ground that their intention was not to murder a person but to save him from an unfortunate life since the child had monstrous features and no arms. These reasons never have justified the crime of murder in the history of our Christian civilization. The judges considered that the act was actually a crime, but that the actors were to be absolved because they were not dangerous to society. Likewise, political crimes will be just, only so far as they are repelled in the same degree by the social group governed by that criminal code. In this vein it has been asserted by some that political crimes are crimes for progress.

90. Art. 9.
marriage between an Italian girl and a married Muslim on board any aircraft flying over Italy. The bigamy action does not jeopardize good order on board, nor is it penalized by the Muslim's national law. Should Italy be granted competence to interfere with the aircraft and exercise jurisdiction? Answers to such questions are left to the discretion of the commander. He is not responsible for the measures that in his discretion he deems necessary to take against anyone on board. It is clear that failure on the conflicts of jurisdiction problem gave rise to a concentration by the drafters upon the second part of the Convention dealing with powers and responsibilities of the aircraft commander. As Mr. Wilberforce, the British representative noted, this has made the Convention "somewhat unbalanced." The acceptance of the Polish proposal discussed above would have precluded such failure.

Strangely enough, all these questions arose during the drafting discussions. Why, then, was article 1(a) adhered to so stubbornly? A study of the discussions gives the impression that certain persons were taken advantage of. As disagreement started to discourage the delegates, a solution was proposed; agreement could not be achieved on article 1's criminal scope, because it was necessary to know beforehand how the conflict of jurisdictions would be settled. Actually, the debate grew quite warm. The United Kingdom's representative explained that other issues were to be discussed before the debate on article 1(a) could be settled. "The Polish proposal would be quite adequate if there was no article N (which became article 4), no principle 'ne bis in idem' and no provisions concerning extradition." The surprising point is that article 4 in turn was approved because, once all the offenses were within the scope of the Convention, the overflown State was to be competent if it believed itself affected by those offenses. Moreover, as it would turn out, no provision at all in the final draft of the Convention deals with the principle "ne bis in idem" nor with extradition. In other words, article 1(a) (offenses against penal laws) depended on the editing of article 4 which, in turn, was drafted as if all the offenses had already been included within the Convention's scope. This writer is of the opinion that, if we realize how fond States still are of their territorial sovereignty, and if one bears in mind that criminal law is the most fecund field for the principle of territoriality, the corollary is but the need for a criminal scope in the Convention in order to justify the application of the territorial principle. How else can one explain the final agreement readily reached after so difficult a debate. In this way lawyers may feel proud because a formal agreement is achieved; and politicians may be proud, for they kept their national interests materially untouched. They have agreed on establishing a system of concurrent national jurisdictions which could eventually amount to 125.

B. The Preparatory Works—A Clue To The Convention's Failure

Two diametrically opposed teams were formed during the preparatory
works. Belgium, Italy, Portugal, and Spain proposed a system of priority\textsuperscript{86} in which the competent jurisdiction was to be that of the first landing place, secondly that of the overflown state, and both of them applicable before the law of the flag, which would remain as the subsidiary and general competence.\textsuperscript{97} On the other side, Denmark, Netherlands, Sweden, the United Kingdom, the United States and Australia rejected the continental proposal on the ground that it was unworkable, since a perfect system for the extradition of criminals did not exist. This group, in turn, proposed a system of concurrent jurisdictions and eventually won a 20 to 12 vote in the Legal Committee. Centuries of history and a widely divergent approach to international relations underlay the debate—the Continental theoretical logic versus the Anglo-Saxon practical approach.\textsuperscript{98}

The British representative pointed to:

the necessity of avoiding obstacles to ratification. Criminal laws and conflicting demands by states to try offenders had long existed. Nevertheless international police and criminal authorities of the various states managed perfectly well to get along in practice\textsuperscript{99}

The Italian delegate stated:

that if the priority system were rejected, then the Committee would have to give up entirely the idea of finding a solution to the problem of jurisdiction. It would then have to go back to the Polish proposal and deal with the Convention only in so far as the problem of aircraft safety was concerned.\textsuperscript{100}

The United States called for certain moderations:

The Committee should not attempt to resolve all possible conflicts of jurisdiction since this would involve the creation of a hierarchy of possibly six jurisdictions . . . . Conflicts in criminal jurisdiction have existed for hundreds of years in different fields of law and there is no reason why those engaged in aviation should at this time attempt to solve such conflicts.\textsuperscript{101}

At this stage discouragement became frustration:

Many crimes had international aspects. However, very few of these were committed on board aircraft. Why, then, should one try to achieve a system for these few cases when there is no real hope of a system concerning all other crimes of an international nature?\textsuperscript{102}

The German delegate's statement indicated the Committee's failure on this point:

It was not the task of the committee to solve the problem of conflict of jurisdictions.\textsuperscript{103}

\textsuperscript{86} The proposal is found in ICAO Docs. vol. II at 94.

\textsuperscript{97} Id. vol. I at 53: "What articles 3 & 4 of the Convention ought to establish was that, in penal matters, there should always be an applicable law. The law of the flag must be the one which, in the long run, governed abnormal acts or offenses occurring on board an aircraft which there was no need to submit to another law," and at 52: "After all, the law of the flag was a territorial law . . . ."

\textsuperscript{98} The Tokyo Convention was not a mere aeronautical agreement but also a conatus for international criminal regulation. Aircraft is the most manifest symbol of an era of interdependence which encourages international agreements in many fields other than that of air law.

\textsuperscript{99} ICAO Docs. vol. I at 64.

\textsuperscript{100} Id. at 54.

\textsuperscript{101} Id. at 56.

\textsuperscript{102} Id. at 55. Swedish delegate's intervention.

\textsuperscript{103} Id. at 70.
C. The Principle "ne bis in idem"—A Last Minute Solution

The discussion could have desperately shifted to the principle "ne bis in idem" as the last possible remedy for a meaningful convention. This principle should have put an end to the discussion since once a jurisdiction had been exercised the state of registration could not exercise it and, on the other hand, if it had not been exercised there was nothing to stop the state of registration from doing so.

However, this principle, universally accepted within national legislations, seems not to be nationally acceptable in universal conventions. The penal principle prohibits double trial of the same criminal for the same act. Even when several penalties are eligible, the offender is supposed to suffer the lowest one—*in dubio pro reo*. But it is not accepted in the Finnish legislation,104 nor is it fully coincident with the appropriate provision of the Chinese and Polish penal codes.105 Neither Japan106 nor Austria107 considers it acceptable on an international level. A good many other countries, one supposes, would oppose such international practice.108

Consequently, from the first idea "not to be tried twice," the delegates were forced to accept the rule "not to be punished twice,"109 and later only conceded that the first penalty should be considered to "reduce" the second one.110 Finally it was entirely dropped. The same act might constitute an entirely different offense in different countries. As an example, with respect to penalties imposed, how could two years of imprisonment be deducted from a 5,000 dollar fine? For such reasons it was decided by the majority to leave issues as well-managed as before. Even this commendable principle did not survive. One year later (in September 1963), sixteen States would decide to delete it from the Convention and sign the remnants.

VI. Corollaries

International conflicts are the essence of international air transport. New developments create new technical and legal problems. Air lawyers must be leaders in a race where transport speed and the invention of new devices do not allow much time to think. On the other hand, the drafter's task is to find out whether or not common interests are mature enough for written regulation. Law, and above all international law, is a continuous process of compromising opposite interests. The failure of most aeronautical conventions to be universally accepted may be due either

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104 Id. vol. II at 27.
105 Id. at 26.
106 Id. vol. I at 112: "It would be inappropriate to adopt an idea of universal rule which was fundamental for a system of criminal law, in this convention which dealt only with a limited scope" (emphasis added), stated Japan's representative.
107 Id. vol. II at 25.
108 Dr. Fitzgerald's optimism reaches its apogee when commenting on this practice, *op. cit.* supra note 4, at 240: "An argument against including provisions on the principle 'ne bis in idem' in the convention is that many States would in practice observe that principle."
110 Id. art. 3, para. 3.
to the fact that they were imperfect or that they were made long before the States were prepared for their acceptance.

A. A Lesson To Learn

The Tokyo Convention is permeated by a sense of frustration from beginning to end. Certain lessons may be learned here.

1. The purpose of recognizing the law of the flag for civil aircraft was mainly to regulate the lawless High Seas, where criminals' immunity seemed to threaten legal order. As early as 1901, Fauchille proposed its application. After half a century of discussions we at last have a law. Unfortunately, we have just a law. The uniformity intended has not been achieved as article 3 paragraph 3 shows. Of course the High Seas will no longer be lawless. But this is not at all a matter for a convention; it is one which could be solved by enacting appropriate national legislation providing for extraterritoriality of the application of domestic law.

2. A constructive solution has to avoid dealing with the issue of extradition, and one can see this by studying the preparatory works.

3. It does not pay to overemphasize the need for accepting the principle of territoriality in the case of aircraft. Article 4 is both the cause and effect of the Convention's failure, because:

a. to accept the criminal principle "in conflicts of criminal laws, application of law of the territory where the offender is at the time of act or omission is preferred to that one of the territory where the act has effects," in air law would mean that the "law of the flag" is preferred to the law of the subjacent States;

b. the connection between the subjacent States and passengers is transitory and much weaker than that between the passengers and aircraft. To illustrate the point, an aircraft flying throughout the world would change jurisdiction 125 times in relation to the subjacent States, while maintaining only one jurisdiction in relation to its passengers;

c. article 4 looks after safety and security of the subjacent State—which is the purpose of the Chicago Convention—by requiring the aircraft to comply with air navigation rules, etc. This has nothing to do with the Tokyo Convention, the aim of which is safety of the aircraft and preventing of disorder on board. Forcing unscheduled landings would be unlawful unless carried out in accordance with the Chicago Convention and the Air Transit Agreement concerning right of innocent passage;

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111 Fauchille, Le Domain Aérien et le Règime Juridiques Aérostats (1901).
112 See supra note 13.
113 "The law of the flag is a territorial law applied in a extraterritorial manner." ICAO Docs. vol. I at 52. Besides, such national legislation already exists. Those States which have not enacted the extraterritorial law of the flag, may do so at any time. After all, it takes less time to enact such a law than to ratify a convention.
114 See Moursi, op. cit. supra note 57, at 101-106: "Most of [the] criminal laws . . . are not prepared to concede the extradition of their own citizens, refugees at home after having committed a crime abroad." Generally, the clause of "double criminality" is requested—crime must be punished by both penal laws. Diplomatic formalities and need for treaties make its practice embarrassing.
115 Cf. pp. 6-11 supra.
116 Moursi, op. cit. supra note 57, at 119.
117 If this writer's thesis is correct regarding the legal status of aircraft, cf. p. 6 supra.
118 Cf. p. 8 supra. The jealous rights of sovereign States within their own airspace have been the object of hard bargaining since the World War II so that air traffic is rendered possible through more than 300 bilateral treaties in force at present. The right of innocent passage had to be the reason for a separate annex to the Chicago Convention. Fortunately, it is already a
d. a wide criminal scope in the Convention renders it meaningless and unworkable. It is article 1(a) which gives rise to article 4. It has been submitted that such a broad scope was agreed upon in order to justify the application of the principle of territoriality.

B. What Should Have Been Done

1. The Convention was to be restricted to deal with acts which endanger the safety of the aircraft.

2. Once an arguable criminal scope has been inserted into the Convention, it is submitted that its only palliation would be the granting of competence to the first landing State, since neither the principle of nationality nor that of territoriality has proven to be workable. The right of innocent passage would not have been disturbed at all by the Tokyo Convention if the overflown state had been granted the competence only as long as it had been scheduled for a landing.

F. K. Moursi, Egyptian representative on ICAO Legal Committee, objects that if the crime is not punishable in the eyes of the law of the place of landing, there would be no pursuit. The objection is self-contradictory since such a law would be but the Convention itself. M. Lemoine of France doubts that the landing State may be interested in punishing most of the crimes committed on board landing aircraft. Such a reluctance could take place should the Convention not include any provision requiring the compulsory exercise of jurisdiction.

Many wonder about the willingness of courts to try a foreign person with impartiality. No suspicion could be less unfounded. As far as the courts are concerned, judges fortunately do not care very much about citizenship of the accused. Judicial power is free from political pressure and carries out its duties without consideration for factors lying outside the courts' administrative machinery. As for the passengers, Judge M. Tancredo Canonico has an answer:

The judicial magistracy is such in civilized States today (1900) that fear—or partiality—is unfounded. I have been for many years a judge in a criminal court. I do not recall a single case where the quality as foreigner contributed to the severity of penalty. On the contrary, I make bold to say that the opposite tendency exists in the case of most judges who tend to be more lenient toward persons far from their homeland, often without resources, and without any connections with persons who can aid them.

principle accepted in air law since it has been ratified by a majority of countries, sixty-two as of 1961. See ICAO Doc. 8317-A15-P/1, Annual Report of the Council to the Assembly for 1962, 114 (April 1963). A principle achieved at such a cost must not be jeopardized in any way.

Cf. p. 15 supra.

The nationality principle is not yet acceptable, for states are not yet prepared for supra-national concessions and because of the extradition issue. The territoriality principle's acceptance has been the cause of the Convention's failure—it has been so maintained through all these pages. Besides, what is the point of granting competence to the overflown State if the crime is discovered—as usually will happen—after the aircraft has entered the airspace of another State which also is granted the competence to exercise jurisdiction?

Cf. p. 20 infra point 3.

Lemoine, op. cit. supra note 21, at 796.

Compulsory exercise of jurisdiction is not required by article 3 paragraph 2. See supra note 13, and infra point 4, p. 20.

Moursi, op. cit. supra note 57, at 100.
In this way, impartiality, and therefore fairness and better service to justice, is accomplished. Taking the suit to the “interested” States would almost necessarily result in unfairness, since in the latter case trial could be affected by “security” considerations.

In addition, the landing State has the means to exercise jurisdiction properly; for witnesses, the offender and the commander of the aircraft with his reports are in its territory. Lastly, in practice it is the first landing State which is charged with the whole affair, even with a disembarked person, perhaps undesired, without funds and in need of a return ticket.

The first landing State should be given the opportunity of releasing its right and duty to exercise jurisdiction if it shows reasonable cause, i.e., any of those enumerated in the Convention as reasons for reluctance. In such a case, subsidiary competences should be determined, either in a system of priority or in concurrency.

3. The Convention itself, not criminal laws, should have been established as the applicable law. That means that crimes to be punished should have been enumerated in the Convention. It goes without saying that such crimes could only be those universally accepted as crimes. Penalties too would have to be typified, or else one should have to face the problem of choice of law. Procedure, in general, could be followed in accordance with national laws and the balance of crimes should have been left untouched by the Convention. They are subject matter for criminal agreements.

4. Finally, article 3 paragraph 3 should have imposed compulsory exercise of jurisdiction to the State declared competent and the acceptance of the principle “ne bis in idem.” The objection that the State of landing could be disinterested would be unavailing had this provision been included. In addition, it is precisely its situation as a “non-interested” State that supports this writer’s appeal for a grant of competence to fair courts. An international court would decide on appeals.

This provision is debatable, but its inclusion would necessarily be required by inclusion of a criminal scope in the Convention. It might cause trouble to the States at the moment of ratification, but not to the courts at the moment of its application once ratification rendered the Convention a national law.

If the last three points considered—jurisdiction granted to the first landing State, enumeration of crimes, and compulsory exercise of jurisdiction—are too heavy a burden (as it seems that for the time being they are), why was the scope of the Convention not limited to acts that may or do jeopardize the safety of the aircraft, good order and discipline on board? In any case, a criminal scope in the Convention necessarily requires

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126 It has been necessarily taken into account in practically all of the Convention’s articles, either expressly, as in articles 1, 5, 7, 8, 9, 11, 13, 14, 15 (the Convention consists of 18 articles plus the final clauses) or indirectly, as article 17, in spite of the fact that the principle of the place of first landing was not specially dealt with in the drafting discussions.

127 In criminal matters, to settle conflict of jurisdictions does not mean anything if national criminal laws are left untouched, for the issue is what to punish rather than how. The Warsaw Convention is a worthy model as far as its uniform application through different jurisdictions is concerned. The fact that its application does not please the American government because liability is limited at a level with foreign countries’ living standards has not prevented the result that the Convention’s interpretation has been substantially achieved in American courts.

128 “Every prosecuting State will apply its own criminal law. Hence any possibility of choice of law does not enter into the question.” Moursi, op. cit. supra note 57, at 118.
the application of the principle of universality. The solution of the jurisdictional conflict by declaring competent the State of first landing is but a matter of venue.

VII. Conclusion

No advantage would be achieved by ratifying the Tokyo Convention. Article 3 is enforceable by enacting appropriate national legislation. Article 4, likewise, recognizes jurisdictions already existing under present domestic legislation.

Instead, its ratification would give rise to severe troubles, from both a theoretical and a practical point of view:

(1) Theoretically, its ratification would encourage conventions to be badly drafted in order to be acceptable, and would mean acceptance of legal flaws.

(2) Practically, it would impose unreasonable restrictions upon the right of innocent passage already achieved at high cost.