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IN-FLIGHT CRIMES, THE TOKYO CONVENTION, AND FEDERAL JUDICIAL JURISDICTION

By Jacob M. Denaro†

I. Introduction

At Tokyo in 1963, a specialized agency of the United Nations drafted a convention directed against offenses committed on board aircraft. The United States is signatory to that convention; but neither that sovereign nor a requisite number of States necessary to effectuate the document have as yet ratified the Tokyo Convention. Whether the Convention should be ratified is a matter seriously being considered by the United States Government. The decision is dependent on two vital factors. First, it depends upon the ability of the Convention to respond to serious deficiencies presently existent in international criminal air law. Second, it depends upon the capacity of federal law to complement the Convention in areas which are intrinsically related to the subject matter of that document but which are, because of their inherently domestic nature, inappropriate areas for a multilateral treaty.

At present, there are several serious inadequacies in international in-flight crime regulation. One major deficiency presents itself when a person commits a crime on board an aircraft in international flight, but circumstances are such that landing authorities cannot make an arrest, nor even detain the perpetrator. Another striking deficiency presents itself when a person commits a crime on board an aircraft in international flight, but circumstances are such that, even though landing authorities may make an arrest, prosecution is at best extremely doubtful. It is feasible, moreover, that if that person is subsequently apprehended in his home country and indicted, either the country of the victim or that of the aircraft’s registry may impugn the exercise of such authority and claim jurisdiction diplomat-ically. Among those several states, jurisdictional confliction is immi-nent.

The need for amelioration in international in-flight crime regulation is illustrated by situations where custody over a penal offender may not be taken or where it may, but either diplomatic conflict follows or pursuability is impossible. Problems emanate not entirely from deficiencies in international law but also from shortcomings in the domestic sphere. Solutions, therefore, must embody a coordination of international and domestic machinery. It is the purpose of this examination to show that,

† B.A., Suma Cum Laude, St. Bernard Seminary, 1964; J.D., Union University, Albany Law School, 1967; LL.M. in International Law, School of Law, University of Miami, 1968; NASA Fellow at Center of Advanced International Studies, University of Miami, 1968-69 (Doctoral Candidate for Ph.D. in International Studies).
the international rules regarding in-flight crime, as they appear in the Tokyo Convention, adequately cope with the problems of custody and conflict and (2) the problem of pursuability to prosecution is remedied when the Convention's provisions on custody are deemed complemented by existing federal statutes with their material definitions interpreted in a more contemporary fashion. In this paper, all those problems aforementioned which may attend an international in-flight crime are examined and their possible solutions proffered.

II. The Problem of Custody

The Tokyo Convention was designed to cope with problems of crime committed on board an aircraft while in flight. Presently, the perpetrator, under the aegis of international law, can avoid prosecution under certain circumstances. This, the Convention attempts to eliminate.

The duties created by the Convention upon a contractee evolve from its major articles. Its provisions have been reviewed by several writers, yet no commentator has synthesized an extrapolation of the precise obligations upon the sovereign parties, nor identified the Convention with workable nomenclature, nor associated its duties with their pursuability to prosecution. Accordingly, no valid appraisal can be made unless these steps are accomplished.

A. Functionality Of The Convention In General

The Tokyo Convention functions when prerequisite circumstances exist. Accordingly, if a person on board an aircraft registered in a contractee State, commits a penal offense or jeopardizes safety or good order on the plane while that aircraft is in flight, on the high seas, or on non-sovereign territory, the Convention becomes operational. Thus, articles concerning jurisdiction and skyjacking become applicable. Also, the chapters governing the powers of the aircraft commander and duties of the landing contractee affect conventional police authority. However, this description is merely an introduction, and is consequently cursory. To project into an in-depth study of the Convention's applicability, the first

3 Tokyo Convention, art. 1, para. 1(a), ICAO Doc. No. 8364. The penal law referred to is actually the penal law of the State in which the aircraft is registered. See p. 178 infra.
4 Tokyo Convention, art. 1, para. 1(a), ICAO Doc. No. 8364.
5 Tokyo Convention, art. 1, para. 2, ICAO Doc. No. 8364.
6 Tokyo Convention, art. 3 & 4, ICAO Doc. No. 8364.
7 Tokyo Convention, art. 11, ICAO Doc. No. 8364. "Skyjacking" is the popular term for the unlawful seizure of an aircraft.
8 Tokyo Convention, art. 5-10, ICAO Doc. No. 8364.
9 Tokyo Convention, art. 12-15, ICAO Doc. No. 8364.
10 If the Convention is conceived as international legislation, the aircraft commander and the contractee States may properly be deemed its executive power.
step must isolate and define the exact activity or activities within which it operates. This first step looks to the determinant(s) of applicability.

B. The Basic Determinant(s) Of Applicability

The flight of an aircraft registered in a contracting state is the basic factor generating applicability of the document and is, consequently, the *conditio sine qua non*. From the moment when power is applied for take-off until the landing run ends, the document applies. Other unusual factors which rendered the Convention callable are landing on the high seas, or on non-sovereign territory; yet these exigencies are possible attendants to any air transit and should be considered as intermediate elements of flight concomitant to its unusual completion. From practical consideration, therefore, flight is the basic determinative of applicability.

C. Traditional Species Of Commercial Flight And The Tokyo Convention

From the international perspective, aviation recognizes two species of commercial flight. One is modified by domestic contacts; the other is predicated upon some international factor. A domestic flight is one whose take-off and intermediate stops are executed within the State where the aircraft is registered and whose final landing is to be made in that same State. International flight is one whose take-off and intermediate stops are executed in a non-registry State or one whose final landing is to be made in such sovereign. The Tokyo Convention does not limit its total applicability to one type of flight to the exclusion of the other. Article 1, section 2 states that, except as provided in Chapter III, the Convention applies while any aircraft registered in a contracting State is in flight. Since flight as defined by the Convention is not circumscribed to any particular flight pattern; all provisions of the document not subject to the exception in Chapter III respond to domestic flight as well as to international transportation. Thus, it seems that the determinant of applica-

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11 *Tokyo Convention, art. 1, para. 3, ICAO Doc. No. 8364.
12 *Tokyo Convention, art. 1, para. 4, ICAO Doc. No. 8364, states that “[t]his Convention does not apply to aircraft used in military, customs, or police service.” Thus it does apply to aircraft used in private service. The most prominent type of private service is commercial air transit. It is with that type of air activity that this paper is primarily concerned and to which the Convention practically addresses itself. Mendelsohn, supra note 1 tends innumerable examples involving in-flight crimes, each example itself expressing a commercial flight. D. BILLYOU, AIR LAW 186 (2d ed. 1964) states that “the growth of international air transport has led to increasing concern as to the international aspects of the commission of offenses on board aircraft.” When writers discuss the Tokyo Convention, they invariably relate it to commercial flight.

13 This traditional definition may be gleaned from the terms “interstate air commerce” and “interstate air transportation” as defined by the Federal Aviation Act of 1958, § 101(2) (a) & (21) (a), 72 Stat. 737 (1958), as amended, 49 U.S.C. § 1301 (1964). It is further clarified by the negative implication of the term “international transportation” as defined by the Convention for the Unification of Certain Rules Relating to International Transportation by Air [hereinafter cited as the Warsaw Convention], art. 1 (2), 29 Oct. 1934, 49 Stat. 3000, T.S. No. 876 (concluded at Warsaw, Poland, 12 Oct. 1929). See also City of Philadelphia v. CAB, 289 F.2d 770 (D.C. Cir. 1961).

14 This definition may be gleaned from the terms “foreign air commerce” and “foreign air transportation” as defined by Federal Aviation Act of 1958, § 101(20) (c) & (21) (c), 72 Stat. 737 (1958), as amended, 49 U.S.C. § 1301 (1964); and from the term “international transportation” as defined by the Warsaw Convention, art. 1 (2), 49 Stat. 3000, T.S. No. 876. See also Pan Am. Airways, Inc. v. United States, 150 F. Supp. 569 (U.S. Cust. Ct. 1957).

15 *Supra* note 10.
16 *See* p. 172 supra.
bility is quite simple, yet Chapter III radically affects the organic structure of the document, as it causes different articles of the Convention to become contingent upon different species of flight defined by the document. Ultimately dependent on this structure are the particular duties upon a contractee landing State.

Article 5\(^7\) states that the chapter on the powers of an aircraft commander shall not apply to offenses and acts committed on board an aircraft when both the last point of take-off and next point of intended landing are within in the registry State unless that aircraft, subsequent to the offense, traverses the sovereign airspace of a non-registry State with the person still on board.\(^8\) The establishment of this exception to the general provision of Article 1, section 2 creates air movement distinct from that expressed in Article 1, section 2. The Tokyo Convention, as a result, admits two species of flight, both posited as different determinants of applicability for different chapters of the Convention.

D. The Tokyo International Flight

In order to facilitate the examination of the Convention, the terms "international flight" and "Article 1 air transit" will be used to differentiate the two species.\(^9\) The Convention defines an international flight\(^8\) in the light of several factual patterns. It exists when the last point of take-off or the next point of intended landing is within a non-registry State,\(^10\) when the air space of a non-registry sovereign is penetrated while the perpetrator of an offense or act proscribed by the Convention is still on board the airplane,\(^11\) or if the offense or act is committed in non-registry airspace,\(^12\) upon the high seas, or upon non-sovereign territories.\(^13\) By exclusion, and only for

\(^7\) Tokyo Convention, art. 5, para. 1, ICAO Doc. No. 8364. This is the key article in Chapter III of the Tokyo Convention.

\(^8\) Tokyo Convention, art. 5, ICAO Doc. No. 8364, states:

1. The provisions of this Chapter [power of aircraft commander] shall not apply to offences and acts committed or about to be committed by a person on board an aircraft in flight in the airspace of the State of registration or over the high seas or any other area outside the territory of any State unless the last point of take-off or the next point of intended landing is situated in a State other than that of registration, or the aircraft subsequently flies in the airspace of a State other than that of registration with such person still on board.

As will be seen, the impact of this article has tremendous effect upon the applicability of the draft.

\(^9\) The term "international flight" is chosen because it most appropriately characterizes that type of air movement (flight patterns) which is made condition to the effectualization of the Tokyo Convention, art. 5, ICAO Doc. No. 8364, i.e., a flight not entirely confined to domestic (flag) contacts. The term "Article 1 air transit" is substituted for the word flight as used in the Tokyo Convention, art. 1, para. 2, ICAO Doc. No. 8364. It is believed that the substitution eliminates the possibility of confusion that may result from the word flight due to its susceptibility to many popular interpretations which are not necessarily co-terminous with the idea expressed in art. 1.

\(^10\) From Tokyo Convention, art. 1, para. 2, and art. 5, para. 2, ICAO Doc. No. 8364, it is obvious that the Tokyo Convention is defining its essential ideas in terms of itself. It does not incorporate by reference the definitions of international flight or domestic flight as found in other protocols and conventions.

\(^11\) Tokyo Convention, art. 5, para. 1, ICAO Doc. No. 8364.

\(^12\) Id.

\(^13\) Tokyo Convention, art. 1, para. 2, ICAO Doc. No. 8364. Since art. 5, para. 1, only refers to offenses or acts committed on board an aircraft in flight in the airspace of the flag State, offenses or acts committed in non-registry airspace are not subject to the provisions of that article, but are subject to the provision relating to the general applicability of the Convention.

\(^14\) Tokyo Convention, art. 1, para. 2, ICAO Doc. No. 8364. The offense or act was not performed in registry airspace. Art. 5, para. 1 is not applicable.
purposes of the Convention, any other flight must be considered non-
international, and hence domestic. Domestic flight exists when the last
point of take-off and the next point of intended landing are within the
registry State, provided that the aircraft, subsequent to the offense or
act, does not penetrate the air space of a non-registry State with the
perpetrator still on board. The domesticity of the flight is not disturbed
by the fact that the aeroplane may have traversed non-registry air space
before the offense was committed; nor is it affected by the fact that the
aircraft may have flown over the high seas, over non-sovereign territory
during its course, or landed on the high seas or on non-sovereign territory
subsequent to the commission of the act.

E. Article I Air Transit

Article 1 air transit flows from the general determinant of the Conven-
tion's applicability, that of flight. It embraces any type of commercial
air transportation, and accordingly, it refers equally to either interna-
tional or domestic flight as defined by the Convention's articles . It is
flight unmodified and pervasive, notwithstanding that it includes inter-
national flight. Its functional value comes from the domestic side of its
spectrum. Therefore, the salient pattern should be a flag flight unless
otherwise noted.

F. The Effect Of A Domestic Flight

Determination of which provisions of the Convention are operative
depends upon the species of flight involved. The articles on jurisdiction and
unlawful seizure of an aircraft are always applicable in an Article 1 air
transit. Consequently, they function when the flight is domestic and
their language becomes municipal law of the registry State. This conclu-
sion, however, has meagre significance in that when a flight is domestic,
the registry State, under the principle of territoriality, asserts sovereign
authority over acts through its jurisdictional and criminal statutes. The
Convention's chapter on jurisdiction merely reaffirms this sovereignty.

Its chapter on skyjacking creates duties which are but the normal course

25 This is the obvious meaning of Tokyo Convention, art 5, para. 1, ICAO Doc. No. 8364.
26 Tokyo Convention, art. 5, para. 1, ICAO Doc. No. 8364.
27 Tokyo Convention, art. 5, para. 1, ICAO Doc. No. 8364, states that the airplane must tra-
verse non-registry airspace subsequent to the commission of the offense or act if the aircraft com-
mander is to have authority under the Convention for offenses and acts committed in registry
airspace.
28 Tokyo Convention, art. 1, para. 1, ICAO Doc. No. 8364.
29 In such a case, the offense or act was committed in registry airspace. Landing on the high
sea or on non-sovereign territories is not an exception to the general provisions of Tokyo Con-
vention, art. 5, para. 1, ICAO Doc. No. 8364.
30 Tokyo Convention, art. 1, para. 2, ICAO Doc. No. 8364, states that the Convention applies
while the aircraft is "in flight." That term is not circumscribed by any delimiting adjectives.
31 Tokyo Convention, art. 1, para. 3, ICAO Doc. No. 8364; see p. 172 supra.
32 Tokyo Convention, art 3 & 4, ICAO Doc. No. 8364, regarding jurisdiction, and art. 11, re-
garding skyjacking are not subject to art. 5, para. 1, but are operative through art. 1, para. 2.
33 Tokyo Convention, art. 3, para. 1, ICAO Doc. No. 8364 states:
1. The State of registration of the aircraft is competent to exercise jurisdiction over
offenses and acts committed on board.
of action for the registry State in seizures of its aircraft. Aligning these considerations with the fact that those same chapters are the only features of the Convention applicable to a domestic flight, the Tokyo Convention was clearly designed to govern neither the authority that pervades a flag flight nor the flight itself. This is consonant with the general policy of international thought: purely intrastate matters should be left to municipal law. With the domestic flight excluded, international flight emerges as the only meaningful determinant of the document’s applicability.

Since all sections of the convention are operative in an international flight, a term within the Article I air transit, the chapters on jurisdiction and skyjacking are applicable. As the term is the catalyst for the powers of the aircraft commander, the chapter relevant to that subject is also applicable. The extension by which the chapter on States’ duties is operative upon international flight will be subsequently discussed.

G. The Convention’s Police Powers

International flight as conceived from Article 5 invests the aircraft commander with international police power, an authority commencing when all external doors are closed following embarkation and ceasing when any door is opened for disembarkation. It is not disrupted when there is a forced landing for during that time the commander is the internal executive authority of the Convention. An international flight also invests the contractee States with international police power beginning when there is an unlawful seizure of an aircraft and ending when control is restored. The chapter concerning skyjacking is operative upon Article 1 air transit as that term embraces international flight. As a result, the contractee States become the external executive authority of the Convention when on-board police power has been unlawfully usurped in international flight.

Before these respective police powers are explored, their specific target-areas should be clearly circumscribed. The Tokyo draft-convention is directed against three particular types of activity that may occur on-board the registered aircraft of a contractee State: it attacks (1) the unlawful seizure of an aircraft when perpetrated in Article I air transit; (2) any act impairing the safety or good order of the aeroplane when

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34 Tokyo Convention, art. 11, para. 2, ICAO Doc. No. 8364, states that contractee States must take all appropriate measures to restore control of the aircraft and to permit its passengers and crew to continue their journey as soon as practicable.
35 It has already been remarked that the articles referring to the powers of the aircraft commander are restricted to international flight. It will be explained infra that the sections regarding the duties of contractee States, with but one exception, are dependent for their operation upon the execution of the commander’s authority.
36 U.N. Charter art. 21, para. 3, 59 Stat. 1031, T.S. No. 993 (1945) states: Nothing herein shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.
37 Tokyo Convention, art. 5, para. 1, ICAO Doc. No. 8364.
38 Id.
39 Id.
40 Id.
41 Id.
42 Id.
committed in international flight; and, (3) any offense against penal law when committed in international flight. The Convention pretends to have application against those latter two activities notwithstanding the type of flight; but as mentioned previously, the Convention has no practical effect on a domestic flight as the municipal police power of the flag State is adequate to cope with any act or violation committed on board the plane. Also, the Convention at no point attempts to usurp the valid exercise of sovereign jurisdiction. The most cogent argument, however, that the Convention only governs acts and offenses in international flight is the fact that the police powers of the aircraft commander, entirely directed against those activities, are not executable in a domestic flight. Thus, the Convention cannot apply to an act for which it has no countervailing provision.

To effectively cope with the three activities proscribed, the Convention delegates executive authority to the aircraft commander and the several contractee States. The operativeness of their respective police powers depends upon the activity involved.

When a plane has been skyjacked in Article 1 air transit (emphasis on its international side), the contractee States are given jurisdiction to take mandatory measures to restore control of the aircraft.

This fact becomes clear when the conventional duties of those States are considered. The police power endowed upon the contracting States is uncomplicated, but not the authority given the aircraft commander. During an international flight, he possesses three powers.

First, where the commander has reasonable grounds to believe any person on board the aircraft has committed or is about to commit an offense or act contemplated by the Convention, he may impose upon that person reasonable measures including restraint. Second, to protect the safety of the aircraft or of persons or property therein, or to maintain good order and discipline on board, he is given authority to disembark in any landing State any person who he has reasonable grounds to believe has committed or is about to commit an act which jeopardizes safety or good order on board the aircraft. His power of disembarkation is predicated solely upon an act proscribed by the Convention and does not exist when a penal offense is committed unless that offense is also a safety or disciplinary hazard.

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43 Id.
44 Tokyo Convention, art. 1, para. 1(b), ICAO Doc. No. 8364.
45 Tokyo Convention, art. 1, para. 2, ICAO Doc. No. 8364 declares the general applicability of the Convention upon the activity of “flight.” See also pp. 173-74 supra.
46 See p. 173 supra.
47 Tokyo Convention, art. 3, para. 3, ICAO Doc. No. 8364 states that “the Convention does not exclude any criminal jurisdiction exercised in accordance with national law.”
48 Tokyo Convention, art. 5, para. 1, ICAO Doc. No. 8364.
49 Tokyo Convention, art. 11, para. 1, ICAO Doc. No. 8364 states that “Contracting States shall take all appropriate measures...”
50 Tokyo Convention, art. 11, para. 1, ICAO Doc. No. 8364.
51 Tokyo Convention, art. 6, para. 1, ICAO Doc. No. 8364.
52 Tokyo Convention, art. 8, para. 1, ICAO Doc. No. 8364 referring to art. 6, para. 1 (a)(b).
53 Tokyo Convention, art. 8, para. 1, ICAO Doc. No. 8364.
54 Tokyo Convention, art. 8, para. 1, ICAO Doc. No. 8364 does not refer to art. 1, para. 1 (b).
55 Tokyo Convention, art. 8, para. 1, ICAO Doc. No. 8364 does not refer to art. 1, para. 1 (a).
Third, when the commander has reasonable grounds to believe a person on board the aircraft has committed a serious offense according to the penal law of the registry State, he is empowered to deliver that person to the competent authorities of any contractee landing State. His power of delivery is predicted solely upon a criminal statute of the flag State. The power does not exist when an act hazardous to safety or good order is performed unless that act is also a penal offense. As a result, the power of disembarkation and the power of delivery are separate and distinct, requiring different activities to actuate them.

In regard to the latter two powers, the aircraft commander may impose reasonable measures including restraint to execute them. Also, he may disembark to any sovereign; but he may only deliver to a contractee State. Last and most important, his discretion alone determines the execution.

Three activities on board a registered aircraft in international commercial flight are proscribed: Skyjacking, hazardous acts, and penal offenses of the flag State. To cope with these activities, the Convention has instituted an international police power. The mandatory implementation of external executive authority falls upon the contractee States in skyjacking. The discretionary exercise of internal executive authority resides in the aircraft commander. He may disembark for hazardous acts; he may deliver for penal offenses, both powers being executable through restraint. However, once the international police system has been implemented by either of those conventional authorities, the provisions on States' duties become relevant.

The duties incumbent upon a contractee landing State are intrinsically dependent upon the exercise of the international police power provided for in the Convention.

If an aircraft commander exercises his power to disembark, the contractee landing State has the correlative duty to accept the person disembarked. When an aircraft commander exercises his power to deliver, the contractee landing State has the correlative duty to accept the person delivered and to take custody if the circumstances so warrant. And finally, when any contractee State executes its power to force down a seized craft, the landing contractee has the duty to take custody of the skyjacker. Thus, these three obligations are entirely intertwined with the exercise of the international police power of the Convention. They are subsequent to it and do not exist apart from it. No duty of acceptance obtains to a contractee unless the commander first implements his discrete.

50 Tokyo Convention, art. 9, para. 1, ICAO Doc. No. 8364.
51 Tokyo Convention, art. 6, para. 1 (c), ICAO Doc. No. 8364.
52 Tokyo Convention, art. 8, para. 1, ICAO Doc. No. 8364 states "The aircraft commander may . . . disembark . . . [Emphasis added.]; Tokyo Convention, art. 9, para. 1, ICAO Doc. No. 8364 states "The aircraft commander may deliver . . . [Emphasis added.]."
53 Tokyo Convention, art. 12-15, ICAO Doc. No. 8364. The obligations that devolve upon the contracting States are only operative when those States are landing sovereigns.
54 Tokyo Convention, art. 13, para. 1, ICAO Doc. No. 8364.
55 Tokyo Convention, art. 13, para. 2, ICAO Doc. No. 8364.
56 Id.
tionary powers, and no duty of custody in cases of seizure devolves upon a landing State until a contractee implements its conventional executive power so as to force down the craft into the territory of that landing sovereign. Even in the situation where the aircraft is voluntarily put down by the skyjacking, the landing State, as a contractee, must execute its police power to restore control. The duty of custody in such case, though not dependent for its existence on that exercise, is a natural concomitant to the power of restoration.

H. The Custodial Duty

The most important obligations are those which relate to custody. The duty of custody is imperative upon a landing contractee in two situations, and then, only if the circumstances so warrant the measure. It is obligatory where a person is accused of unlawfully seizing an aircraft, and where a person is delivered for a violation of the penal law of the flag State. Yet, the Convention's duty of custody has practicable efficacy only where a penal offense of the registry State is committed; and then only, when that offense is committed during international flight. This statement is sound for the following reasons. First, the custodial duty in skyjacking has been rendered superfluous to the United States. The unlawful seizure of an aircraft is a federal crime punishable by death; custody may be secured through federal statute alone. Thus, it is only when there is a flag penal offense that that duty responds to a situation not already attended to by existing legal machinery. Second, the custodial duty either has no functionality or is otherwise only superfluous when there is interference to a domestic flight. Where a flag penal offense is committed in domestic flight, the duty has no functionality; delivery pursuant to the Convention is a power not executable in a flag flight. Where control of the aircraft is illegally seized in domestic flight, the duty is superfluous. Even though authority over skyjacking is operative in Article 1 air transit, a landing State which is also the flag State of a domestic flight has sufficient recourse to its own criminal procedure to cope with the situation. Thus, it is only to an international flight that that duty has practicable effect. When the conventional duty of custody is considered, therefore, an offense against flag penal law perpetrated during international flight should be the background against which that duty is considered.

For the United States and other sovereigns contemplating ratification of the Tokyo Convention, the value of the custodial duty depends upon its ability to stop-gap situations where an in-flight offender avoids lawful restraint upon landing due to a lack of police authority in the landing sovereign.

If a delict is perpetrated on board an American registered aircraft in international flight, the United States has internationally sanctioned power

64 id.
65 id.
66 id.
to take custody of the offender. If the aircraft, on the other hand, is of foreign registry but the offender or the victim is of American nationality, the United States again receives international approbation to take custody. The modern law of nations affords jurisdictional basis for such extra-territorial claims of police power. When these bases are actualized through statute, custody founded on them does not succumb, by that fact alone, to habeas corpus. Whether the United States possesses jurisdiction to prosecute is a matter entirely distinct from its authority to restrain.

These situations devalue the need for the Tokyo Convention. In their perspective its custodial duty is seemingly academic; for federal legislation can accomplish what the treaty intends to proffer. All possibilities, however, have not been exhausted because when a crime against a foreign flag State is committed in international flight but is not modified by any United States contacts except point of landing, there appears to be no obvious and universally acknowledged principle endorsing federal restraint. Concession is made that Congress, under its power over foreign commerce, can nonetheless legislate for such custodial authority. But it has not as yet done so, the obvious reason being that the United States could not pursue this custody in and of itself since its judiciary has no jurisdiction over crimes against foreign law. Notwithstanding this lack of congressional legislation, federal arrest may still be possible, yet this eventuality presupposes an extradition treaty between the United States and the particular flag sovereign involved. If none exists, detention for purposes of deportation remains the final possibility for restraint. In that the crime occurred prior to entry and most probably poses no immigration violation, an arrest upon warrant to commence expulsion proceedings would have no statutory sanction. As a result, the alleged criminal, not being subject to federal restraint, is at liberty to continue his journey, thus evading criminal justice.

If the United States ratified the Tokyo Convention the obligation to restrain any alien who violates the penal law of a foreign flag State during...
international flight would devolve upon it. Such an international duty is tantamount to police power, and emanating from a treaty, it would fill a void in the federal law of detention.

At first glance, such power appears illusory. Without an extradition treaty specifying the crime committed, the perpetrator cannot be extradited, and under present federal deportation law, he cannot be expelled or prosecuted. The custody provided for is apparently unpursuable were it not for an additional provision in the Convention complementing the custodial duty. When a person who is not a national or permanent resident of the landing contractee is delivered in accordance with the Convention, that sovereign may return to the State of which he is a national or permanent resident or to the State in which he began his journey by air.

Thus, the Tokyo Convention in part is a multilateral deportation agreement. Once ratified as a treaty, it augments by nature the federal law on expulsion. Regardless of an absence of substantial American contacts, a non-resident alien who commits an offense against the penal law of a foreign flag State during international flight may be deported. The arrestment power of the Convention becomes pursuable. The discretionary deportation power afforded by the Convention names two sovereigns as the recipients of the deportee. Either may or may not be the flag State. Prosecution, therefore, is not absolutely assured; rather the possibility that either recipient may have an extradition treaty with the flag State or that either may desire to exercise jurisdiction over the offender only serves to lessen an evasion from prosecution. It is this possibility which constitutes the value inuring to international aviation through the Convention's duty of custody and its complementing deportation provisions. Through such machinery, a non-resident alien who commits an offense against a foreign flag State during international flight must be restrained upon delivery and may be subject to prosecution after expulsion. He can neither avoid restraint for lack of law nor elude possible prosecution through an absence of pursuability. A definite deficiency in international criminal law is rectified.

I. The Problem The Convention Does Not Solve

Though the Tokyo Convention adequately copes with a situation involving a non-resident alien, it accomplishes little where a citizen or resident alien is concerned. The United States, as landing contractee, has the duty to take custody of those persons also. It cannot, however, deport them through operation of the Convention. As a result, it is confronted with three possibilities. One, it must extradite if there exists an appropriate

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79 The term "alien" is stressed here. Even though a citizen can also be restrained, the federal government would not necessarily need the Tokyo Convention to do so.
80 Tokyo Convention, art. 14, para. 1, ICAO Doc. No. 8364.
81 Tokyo Convention, art. 14, ICAO Doc. No. 8364 is self-executing. Deportation procedures are already provided for by statute.
82 The duty of custody in Tokyo Convention, art. 13, para. 2, ICAO Doc. No. 8364 does not distinguish between citizen, resident alien, or non-resident alien.
83 Tokyo Convention, art. 14, para. 1, ICAO Doc. No. 8364 does not confer power on the handling contractee to deport its own nationals or resident aliens.
extradition treaty with the flag State; two, it must free the alleged criminal if the custodial duty is deemed unpursuable; or, three, to avoid such release, it may look to itself as the proper authority for a prosecution. This last consideration raises a question most acute to the jurisdiction of the federal judiciary. Its answer in part depends upon the implicit meaning of the Tokyo Convention. Before that answer can be determined, the exact meaning of the Tokyo articles respecting jurisdiction must first be explored; only against the background of those international rules of in-flight jurisdiction can federal judicial jurisdiction over in-flight crimes be adequately discussed, especially when the problem before the federal judiciary is one replete with international factors.

III. JURISDICTIONAL CONFLICT

In evaluating the Tokyo Convention for ratification, the United States will look for provisions which foster its own attitudes in foreign affairs. The United States, however, must also look for the benefits that that document will bestow upon the law of international aviation and crime. The Convention is essentially concerned with offenses committed on board an aircraft in flight. A seemingly insoluble international problem attending those activities is the jurisdictional confliction which arises among sovereign nations peculiarly connected with some aspect of the crime. Depending on the particular case, each may claim jurisdiction to prosecute under the auspices of one of several recognized jurisdictional bases. The Convention impliedly addresses itself to this problem. If it satisfactorily mitigates or entirely eliminates the possibility of inter-sovereign controversy, a much needed concord in the diplomatic field will benefit international criminal law. The solution of that problem will, by its nature, establish an order for the exercise of the respective jurisdictions. And as will be seen this directly bears on the ultimate question concerning federal jurisdiction. Endorsement of the Convention, therefore, depends in part upon a successful approach to the problem.

A. The International Principles Of Territoriality And Nationality

The perpetration of a crime on board an aircraft in international flight engenders a select number of jurisdictional questions. It is fundamental that offenses committed within the territory of a particular State are amenable to that sovereign’s criminal law. The spectrum of territory, however, is not constricted by landed boundaries; it extends to a traditional distance seaward from the coastline and encompasses the airspace above

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44 Tokyo Convention, art. 15, para. 1, ICAO Doc. No. 8364 states: Without prejudice to Article 14, any person who has been . . . delivered . . . and who desires to continue his journey shall be at liberty as soon as practicable to proceed to any destination of his choice unless his presence is required by the law of the State of landing for purpose of extradition or criminal proceedings.

45 Jurisdiction as used in this sentence and in the following section means judicial jurisdiction. Up to this point, only police power has been discussed.


47 Sovereignty of the Sea, 1965 DEP’T STATE GEOGRAPHIC BULL. No. 3.
the terrestrial and littoral domains. Thus a State, subjacent to an international air crime, possesses a cogent jurisdictional basis for the prosecution of a malfactor. If criminal jurisdiction founded on territoriality were unanimously accepted for the law of aviation, further discussion would be superfluous. However, this theory, so highly favored by common law countries, has failed to receive approbation in the civil law system. The reasons for rejection are many. Continental jurists analogize the legal status of an aircraft to that of a sea vessel. Under international law, events on board a ship fall within the jurisdiction of the sovereign to which it is subject; consequently, the law of the flag governs. Since the aeroplane and the ship bear functional resemblance to each other as sole instrumentalities of vast international transit and commerce, it is argued that the same principle of jurisdiction should attach to both. Apart from this maritime analogy, it is further maintained that jurisdiction by nationality rather than by territoriality more fairly appraises the air transient of the law applicable.

Advocates of the nationality doctrine posit the argument that the common law theory is by nature incapable of coping with lawlessness over the High Seas as well as over non-sovereign land masses. For reasons forceful, and practical, jurisdiction over international air crimes resides in the sovereign of the aircraft’s nationality, i.e., the State in whose territory the aeroplane is registered. Thus, the idea of a uniform system of criminal aviation jurisdiction confronts opposing attitudes at the outset. Territorial sovereignty with all its traditional connotations clashes against extra-territorial authority as embodied in the doctrine of the law of the flag. Reason dictates that multiple competences play the catalyst, resolving jurisdictional conflicts through their acceptable coordination.

History shows several ambitious endeavors to solve the jurisdictional problems peculiar to aerocrimes. As early as 1910, the eminent French jurist Fauchille submitted to the Institute of International Law draft articles relating to air offenses. With a rare perspicacity for future exigencies, he proffered a resolution utilizing both common law and civil law principles. In his opinion, the state of nationality should enjoy concurrent jurisdiction with the subjacent sovereign, the former having primacy unless the offense threatened the public safety of the latter. The Comite Juridique International de l’Aviation (CJIA) also generated its energies in this field. At first its members subscribed exclusively to Fauchille’s...
position, though in time, they preferred to modify. The flag State continued to have jurisdiction, yet precedence was given to the subjacent State, itself having primary jurisdiction to decide whether it had jurisdiction on the grounds of public interest. Finally, the CJIA was exposed to a new theory introduced by Pholien: The State wherein the aircraft lands on completion of its flight alone has authority to prosecute the air crime. This proposition was not readily endorsed. Though such a principle would facilitate criminal justice through its simplicity of application, it was argued that the tenuous nexus between the offense and the lex loci devolentis would obtain minimal international acceptance.

The projects of the Institute and the CJIA served only to emphasize the international need for a Convention. Within those convocations, jurists had sharply disagreed on the subject of criminal jurisdiction. The call for world uniformity was imperative. At Montreal in 1950 the Legal Committee of the International Civil Aviation Organization, a specialized agency of the United Nations, recommended the commencement of preparatory work for a draft protocol on the legal status of aircraft. The proposal culminated in the 1963 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft. However, after that Montreal recommendation, six years passed before any substantial analysis of the problem came to the fore. In 1956, the United States delegation to ICAO submitted a detailed paper examining the possible jurisdictional bases relevant to aviation crimes. This became the major work upon which further progress relied. The article, after reviewing the merits of five jurisdictional grounds, concluded that some form of concurrent jurisdiction would be the most effective security for the punishment of crime. A combination involving the State of registry and the subjacent State was favored. To insure the proposal’s palatability to the common law countries, it was suggested that sanctions be extended to the doctrine of non bis in idem to safeguard against international double jeopardy. Warning, moreover, was given that a system of multiple competences would serve only to perpetuate the jurisdictional conflicts that presently existed. It was urged that an order of priorities be affixed to the future draft convention. However, the United Kingdom, Sweden, and numerous other countries spurned the suggestion. As a result, the United States in 1958 reconsidered its position, submitting a draft convention avoiding the priorities problem. The subjacent State had primary jurisdiction if the defendant or the victim were its national or if the crime committed was purposed against its national security. In all other cases, jurisdiction in-

Legislation Applicable et de la Jurisdiction Competente en Matiere de Locomotion Aerienne, Chapitre VI (VI Congres, Rome 1924).
92 Rarely used legal term signifying the law of the place where the airplane lands.
94 U.S. DELEGATION TO THE SUBCOMM. OF THE ICAO LEGAL COMM., A STUDY OF THE JURISDICTION AND LAW TO BE APPLIED TO CRIMES ON BOARD AIRCRAFT (April 1956).
95 Boyle & Pulsifer, supra note 1, at 317.
vested the State of registry. France, Spain, and other civil law countries advocating priorities rejected the proposition. Subsequently, a number of ICAO meetings convened, each debating and modifying its procurer’s resolutions. By 1962 a final draft convention appeared which was submitted to the ICAO conference at Tokyo.

B. *The Tokyo Convention*

The Tokyo Convention circumscribes four areas of international aviation: Jurisdiction, police power of the aircraft commander, duties of the custodial State, and aero-hijacking. Subsequent discussion is exclusively concerned with the Convention’s disposal of jurisdictional conflicts concomitant to air crime.

In international law, a State’s jurisdiction to prosecute is founded upon two traditional ideas. First, there must exist a recognized jurisdictional basis upon which to rest a jurisdictional claim which means that a substantial nexus between the person or the act and the claiming sovereign must be present. Secondly, this theoretical basis must be actualized through a sovereign act; this is a *conditio sine qua non*. Legislation is the usual manner for such an implementation: In the case where an Englishman perpetrates a crime against a Spaniard on board a French registered aircraft during flight, it is most probable that the three sovereigns involved possess jurisdiction to prosecute. As a result, jurisdictional conflicts are imminent; for two or more states can claim the authority of prosecution and press those claims as against each other through diplomatic channels. It is to eliminate this confliction that the following interpretation of the Tokyo Convention is proffered.

The power of a State to tender a jurisdictional claim as against another sovereign’s claim is an attribute flowing from sovereignty. This power, consequently, only finds limitation in customary international law or in treaty provisions. It therefore follows that, if nations preclude themselves through treaty from asserting their otherwise legitimate claims as against one particular state, international conflict ceases to exist.

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106 Boyle & Pulsifer, supra note 1, at 319.
107 *Draft Convention on Jurisdiction with Respect to Crime*, supra note 69, at 445:
An analysis of modern national codes of penal law and penal procedure discloses five general principles on which a more or less extensive penal jurisdiction is claimed by states at the present. These five general principles are... the territorial principle... the nationality principle... the protective principle... the universality principle and... the passive personality principle.
108 In respect to this point, the Supreme Court of the United States has held that there are no federal common law crimes and that federal prosecution must rest on an Act of Congress defining the crime. Without such, federal question jurisdiction in criminal proceedings is defeated. *U.S. v. Eaton*, 144 U.S. 677 (1892); *U.S. v. George*, 228 U.S. 14 (1913).
109 *The Convention on Rights and Duties of States*, art. 1 (d), 13 July 1934, 49 Stat. § 3097, T.S. No. 881 (concluded at Montevideo, 26 Dec. 1933) states: "The State as a person of international law should possess... the capacity to enter into relations with other States." Though the above passage more precisely refers to the subject of treaties, it embraces any diplomatic discourse between States in their international affairs.
111 What follows is an analysis of the articles of the Tokyo Convention relevant to the problem of jurisdictional confliction. Though the major thrust of the discussion is on the Convention’s ap-
Article 3, section 1 of the Tokyo Convention enunciates the Convention's basic principle for the resolution of conflicts: The State of registration of the aircraft is declared competent to exercise jurisdiction over offenses and acts committed on board. The endorsement of that rule guarantees to the flights over the High Seas the assured presence of criminal law. It approbates the extention of extra-territoriality to the sovereign airspace for other States. However, the implicit allowance for the discretionary exercise of jurisdiction emasculates the potentiality of the provision. If no other State prosecutes through lack of national interest, crime may go unpunished when the flag State, for a reason peculiar to itself, decides likewise not to indict when it finally obtains physical control over the criminal. Because the Convention purposed against this result, a declaration of jurisdictional competency, unmodified by mandatory execution, detracts from its acceptability. The specious arguments tendered to the prior draft committees by the United States were responsible for its formulation. A State's power to specify particular acts as crimes is inherent; however, the American delegate fallaciously concluded that a sovereign power would be violated by a provision for the mandatory execution of jurisdiction created by the power.\textsuperscript{118} The fact ignored was that criminal jurisdiction succeeds the statutory declaration of an act's criminality. Once it is perceived that sovereignty not only precedes but also creates its own criminal jurisdictional limits, any argument that mandatory execution within those limits violates "creative" sovereignty loses force; for, under the circumstances, impingement is logically impossible.

By failing to adopt obligatory prosecution, Article 3, section 1 simply becomes a restatement of the principle of extra-territoriality, a rule recognized since the end of World War II. However, section 2 of Article 3 evidences an attempt on the part of the Convention's drafters to compensate for the prior section's impotence. It mandates that each State shall take measures necessary to establish jurisdiction over offenses committed on board its registered aircraft. Though the phraseology is ambiguous, its meaning may be gleaned from the Drafting Committee's minutes. There devolves upon each contractee the obligation to implement its flag jurisdiction through the enactment of criminal statutes which specify the conduct prohibited.\textsuperscript{119} This rule is necessary in that the Convention does not include an enumeration of proscribed acts. The referral index, therefore, has to be domestic legislation. However, a sovereign may refuse to enforce its criminal jurisdiction for any reason it sees fit. It has been suggested that this point detracts from the Convention's force. Theoretically it does; practically, it does not. It is rare when a sovereign actually refuses to exercise jurisdiction over an offense against its penal law when the opportunity to prosecute presents itself.

Irrespective of the flag State's discretionary powers to prosecute, one

\textsuperscript{118} ICAO Legal Committee, at 79, ICAO Doc. No. 8302-LC/110 (1962).

\textsuperscript{119} Documentation for Diplomatic Conference, Tokyo, Japan, ICAO Doc. No. SR/9.
point is clear under the Convention. Not only does the flag State possess a jurisdictional basis for prosecution;\textsuperscript{114} it is also under a conventional duty to implement that basis through statute.\textsuperscript{115} It is this statute which is given force under the auspices of Article 3, section 1. Beyond the mandate of Article 3, section 2, nothing more is said about flag jurisdiction. As a result, the sovereign attributes that attend such power are neither expressly or impliedly circumscribed by the Convention. Notwithstanding the alleged criminal may be held elsewhere, the flag State not only possesses jurisdiction to prosecute but also the sovereign power to claim that jurisdiction vis-a-vis another sovereign claimant.\textsuperscript{116}

The third and last section of Article 3 declares that the Convention does not exclude any criminal jurisdiction exercised in accordance with national law. As a result, the jurisdiction of the flag State co-exists and concurs with all other jurisdictions that can be raised on legally acknowledged theories. The State of first landing or that of last departure, the subjacent State, or even the State to which the accused or victim is national, may claim authority to prosecute under their respective domestic law.\textsuperscript{117} In lieu of a satisfactory solution, the Convention effectuates an unwielding jurisdictional concourse, stating as an international rule the basic cause for the antecedent conflicts. This anomaly would exist were Article 3, section 3 not amenable to an interpretation consistent with the implied distinction previously made between jurisdiction itself and the actual claim to that power vis-a-vis another sovereign.\textsuperscript{118}

Chapter II of the Tokyo Convention discusses criminal jurisdiction. In international thought, the criminal jurisdiction of a State embraces several different sovereign attributes. There is first the power of the State to prosecute.\textsuperscript{119} This authority usually arises from a criminal statute implementing a recognized jurisdictional basis. Secondly, there is the ability of the State to claim that jurisdiction as against another sovereign claimant.\textsuperscript{120} This is but a corollary of sovereignty; for, in international law, every sovereign by nature has the prerogative vis-a-vis every other sovereign to claim as its own what it believes is peculiar to itself. Finally, there is the power of the State to exercise jurisdiction\textsuperscript{121} which is only possible when

\textsuperscript{114} \textit{Tokyo Convention}, art. 3, para. 1, ICAO Doc. No. 8364.

\textsuperscript{115} \textit{Tokyo Convention}, art. 1, para. 2, ICAO Doc. No. 8364.

\textsuperscript{116} \textit{The Convention on Rights and Duties of States}, art. 1(d), 13 July 1934, 49 Stat. § 3097, T.S. No. 881 (concluded at Montevideo, 26 Dec. 1933) states: "The State as a person of international law should possess . . . the capacity to enter into relations with other States." Though the above passage more precisely refers to the subject of treaties, it embraces any diplomatic discourse between States in their international affairs.

\textsuperscript{117} \textit{Tokyo Convention}, art. 3, para. 3, ICAO Doc. No. 8364.

\textsuperscript{118} See p. 185 supra.

\textsuperscript{119} \textit{The Convention on Rights and Duties of States}, art. 1(c), 13 July 1934, 49 Stat. § 3097, T.S. No. 881 (concluded at Montevideo, 26 Dec. 1933) states: "A State is not a State unless it has a government. The continuance of government, however, is dependent upon the existence of social order. That order cannot be attained without prosecuting powers in the State.

\textsuperscript{120} \textit{The Convention on Rights and Duties of States}, art. 1(d), 13 July 1934, 49 Stat. § 3097, T.S. No. 881 (concluded at Montevideo, 26 Dec. 1933) states: "The State as a person of international law should possess . . . the capacity to enter into relations with other States." Though the above passage more precisely refers to the subject of treaties, it embraces any diplomatic discourse between States in their international affairs.

\textsuperscript{121} This is an obvious concomitant to the power to prosecute.
the alleged criminal is within the physical control of the prosecuting State. The concept of criminal jurisdiction, therefore, encompasses three distinct, correlative powers.

Article 3, section 3 specifically states that the Convention does not exclude any criminal jurisdiction exercised in accordance with national law. Such language does not speak in terms of criminal jurisdiction generally so that the three attributes aforementioned are affected. Rather it speaks restrictively in terms of one attributive power, namely, that of jurisdictional execution. This power must presuppose another attribute of jurisdiction, specifically, the power to prosecute; for without that primary authority, there would be nothing to execute. However, presupposition ends here. Article 3, section 3 is phrased in terms of negative inclusion; it only refers, therefore, to what it does not exclude. It does not state that criminal jurisdiction is not precluded per se, rather it says the exercise of that jurisdiction is not excluded, i.e., only one particular attribute of that jurisdiction. The obvious intent of such language is the exclusion of all other aspects of criminal jurisdiction which are not intrinsically associated with jurisdictional execution. Article 3, section 3, therefore, must be read as excluding from the Convention's approbation any diplomatic jurisdictional claim made by any State whose claim is based on domestic law. Its endorsement constitutes an international waiver of such sovereign power.

Article 3, section 3 literally refers to all contractee States. However, it has no practical effect upon the flag State. A sovereign claims jurisdiction vis-à-vis another sovereign in accordance with the Convention, and not in accordance with its domestic law. As against the State which has custody, therefore, the flag State does not waive its sovereign power to claim. Article 3, section 3, in addition, effects no waiver on the landing State. Having physical control over the alleged criminal, that sovereign has no need to raise a diplomatic claim. It may simply exercise jurisdiction in accordance with its municipal law. All other States, however, are affected by Article 3, section 3. Since they are not the landing State, the exercise of their respective jurisdictions must wait until the alleged criminal is within their physical control; and since they are not the flag State, the diplomatic claim of their respective jurisdictions is not based upon the Convention, but upon their domestic laws. The power to raise such a claim has been waived; thus the net effect of Article 3, section 3 is the elimination of substantial jurisdictional conflicts. When a registered aircraft lands, only the flag State can claim against any criminal jurisdiction asserted by the landing State. Rather than preserve the problem of conflicts, Article 3, section 3 adequately mitigates it.

120 Tokyo Convention, art. 3, para. 1 & 2, ICAO Doc. No. 8364 lays the foundation for the flag State's jurisdiction. Their expression does not impinge upon that State's sovereign power to raise a diplomatic claim vis-à-vis the landing State. Tokyo Convention, art. 3, para. 3, ICAO Doc. No. 8364 refers to domestically founded jurisdiction. As has been pointed out, the implicit effect of that section results in the waiver of the sovereign power diplomatically to claim jurisdiction so founded.

121 Tokyo Convention, art. 3, para. 3, ICAO Doc. No. 8364.
Modeled after Article 19, paragraph 1, of the 1958 Geneva Convention on the Territorial Sea, Article 4 partially defines the exercise of criminal jurisdiction by States other than the flag State. A contracting sovereign which is not the State of registration is denied the right to intervene with an aircraft in flight in order to exercise its criminal jurisdiction over an offense committed on board. There are five exceptions: (1) Where the offense effects that State's territory; (2) where it is committed by or against one of the State's nationals; (3) where it is against that State's security; (4) where the offense constitutes a breach of the flight regulations in force in that State; and (5) where the exercise of jurisdiction is that State's obligation under a multilateral international agreement.

Upon analysis, it appears that Article 4 does not disrupt the purported effect of Article 3. That latter provision operates to make the flag State's jurisdiction concurrent with all other jurisdictions that can be raised on feasible grounds. Jurisdictional conflicts are substantially dispelled. Diplomatic claims of jurisdiction are waived. Article 4, on the other hand, is not concerned with the sovereign power of a State to raise a claim. To the contrary, it is directed at another attribute of criminal jurisdiction. It simply addresses itself to the in-flight exercise of recognized jurisdictions foreign to the aircraft's nationality, and thereby it expressly relegates their attempted enforcement to five possibilities when the aeroplane is in flight. Where the crime effects a State's territory or its aeronautical regulations, the State may intercept the flight. The Convention thus takes cognizance of the principle of territoriality as modified by the attendant consideration, national interest. Yet because traditional international law conforms the exercise of jurisdiction to sovereign territory, interference may not occur within the airspace of another State. When a crime is committed by or against a national of a State, that sovereign may interfere thus giving effect to the principle of active and passive personality. International law restricts this interference to sovereign airspace and when the exercise of jurisdiction is mandated by multilateral treaty, the State under Article 4 may intercept. Also where national security dictates action, the principle of protection is underscored. However international law limits interference to the State's territory. This cursory review reflects that the document drafted at Tokyo excepts to the jurisdiction of the flag State under several jurisdictional bases. Each basis is subservient to the extinctions of sovereignty as delineated by international law. Regardless of the jurisdictional ground a State asserts under Article 4, the execution of an interception must take place within its airspace. There is one exception. Since the international rule relevant to flight interference only forbids trespass within sovereign air territory, a State which intercepts a

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127 Niemeyer, supra note 98.
129 Gutierrez, supra note 1.
130 Id.
flight over the High Seas may do so under the auspices of the Convention. Thus, the power of any non-flag State to exert its criminal jurisdiction in the air is narrowed by Article 4 to specific exceptions that are solely call-
able when the aircraft is in flight, over the State's aerial confines or those of the High Seas.

In essence, Article 4 limits the power of a subjacent, non-flag State to exercise its criminal jurisdiction within its own territory. Affording jurisdiction under many legal theories, it restrains the exercise of that authority through stringently fixed conditions. The State subjacent to the aircraft is restricted to flight interception, and then only when a certain state of prescribed facts exists and appertains to the underlying sovereign. Because of this and the fact that the landing proceeds knowledge of the offense, the power left to the subjacent, non-flag State is hardly executable. Article 4, in addition, implicitly effects a result more significant than that coming from its express provisions; it engenders reaffirmance of the conventional waiver respecting diplomatic jurisdictional claims. The interceptive exercise of criminal jurisdiction is the only subject matter that Article 4 discus-
ses, therefore, it is not concerned with the "conventional" exercise of that power.\(^{120}\) Even though a plane leaves the subjacent State's airspace before an interception occurs, that sovereign's power to exercise jurisdiction does not terminate. Since Article 4 only governs the act of interception, a subsequent execution of jurisdiction is pursuable under the authority of Article 3, section 3. Relegation to this section, however, has two effects. The non-flag, subjacent State must wait until it has physical control over the alleged criminals before it can exercise jurisdiction.\(^{121}\) That State automatically waives its sovereign power to claim jurisdiction vis-a-vis the custodial State. Article 4, resultingly, does not impinge upon the effect of Article 3, section 3. Rather, it incorporates it by inference.

Article 3, section 3 suppresses the diplomatic claims of all States having jurisdiction to prosecute except those raised by the flag State.\(^{122}\) The article by itself, therefore, does not fully eliminate jurisdictional conflicts. After scheduled landing, interception, or forced landing, the landing State may decide to exercise criminal jurisdiction in accordance with its domestic law.\(^{123}\) Against this purported exercise, the flag State can diplomatically claim.\(^{124}\) An actual conflict arises which the Convention solves impliedly.

\(^{120}\) Conventional exercise in this respect means the normal manner in which the jurisdiction of a sovereign is exercised. The normal manner is arrest upon warrant once the alleged criminal comes within the territorial confines of the State.

\(^{121}\) One State cannot exercise its judicial jurisdiction within the territory of another State even though it is said to have extra-territorial jurisdiction over the act or the person. Such action would violate the sovereignty of the latter State. Case of the S.S. "Lotus," [1927] P.C.I.J., ser. A, No. 9.

\(^{122}\) Tokyo Convention, art. 3, para. 1 & 2, ICAO Doc. No. 8364 lays the foundation for the flag State's jurisdiction. Their expression does not impinge upon that State's sovereign power to raise a diplomatic claim vis-a-vis the landing State. Tokyo Convention, art. 3, para. 3, ICAO Doc. No. 8364 refers to domestically founded jurisdiction. As has been pointed out, the implicit effect of that section results in the waiver of the sovereign power diplomatically to claim jurisdiction so founded.

\(^{123}\) Tokyo Convention, art. 3, para. 3, ICAO Doc. No. 8364.

\(^{124}\) Tokyo Convention, art. 3, para. 1 & 2, ICAO Doc. No. 8364 lays the foundation for the flag State's jurisdiction. Their expression does not impinge upon that State's sovereign power to raise a diplomatic claim vis-a-vis the landing State. Tokyo Convention, art. 3, para. 3, ICAO Doc. No. 8364 refers to domestically founded jurisdiction. As has been pointed out, the implicit
Without further resort to waiver, it proffers a solution not intended by the drafters of the Tokyo Convention. The provisions of the document, when co-ordinated, establish an implicit system of priorities.\textsuperscript{136}

During the flight, the State of registry possesses jurisdiction, over onboard crimes, concurrent with all others that can be raised on feasible grounds by non-flag sovereigns.\textsuperscript{136} The non-execution of a legitimate interception, moreover, does not divest any non-registry State of its respective concurrent powers.\textsuperscript{137} After a scheduled or forced landing, however, only two sovereigns are directly involved in the immediate jurisdictional question even though other States may possess the power to prosecute. The landing State may exercise jurisdiction pursuant to Article 3, section 3.\textsuperscript{138} The flag State may claim against this purported power pursuant to Article 3, section 1 and section 2.\textsuperscript{139} As for all other States involved, Article 3, section 3 waives their sovereign power to raise diplomatic claims vis-a-vis the landing State.\textsuperscript{140} Even if those sovereigns have extradition treaties with the landing State, these documents are inoperative to the situation because the Tokyo Convention deems the crime to be committed in the territory of the registry State.\textsuperscript{141}

Jurisdictional conflict between the flag State and the landing State arises once the former sovereign tenders its claim through diplomatic channels. If there exists an extradition treaty between those sovereigns which specifies as an extraditable offense the crime committed, the conflict is ended. When no appropriate treaty can be found, however, diplomatic discord results unless the landing State extradites through comity.\textsuperscript{142} To avoid any conflict the Tokyo Convention advances its formula: Article 13, section 4 and section 5, impose upon the landing State the duty to conduct a preliminary hearing and the obligation to determine whether it will take jurisdiction \textit{vel non}.\textsuperscript{143} The conclusion is clear that the landing State is

effect of that section results in the waiver of the sovereign power diplomatically to claim jurisdiction so founded.

\textsuperscript{136}Boyle \& Pulsifer, \textit{supra} note 1, at 327. The majority of drafters were opposed to a system of priorities.

\textsuperscript{137}Tokyo Convention, art. 3, para. 2, ICAO Doc. No. 8364 establishes flag jurisdiction through mandate. Art. 3, para. 3, sanctions the exercise of jurisdiction by any State in accordance with its domestic law. There can be no exercise unless jurisdiction is first established by domestic law. As a result, art. 3 \textit{in toto} fosters multiple competences.

\textsuperscript{138}They may subsequently exercise their respective jurisdictions pursuant to Tokyo Convention, art. 3, para. 3, ICAO Doc. No. 8364.

\textsuperscript{139}This, of course, depends upon its municipal law.

\textsuperscript{140}Those sections do not impinge upon the sovereign power to claim diplomatically vis-a-vis another State.

\textsuperscript{141}Tokyo Convention, art. 3, para. 1 \& 2, ICAO Doc. No. 8364 lays the foundation for the flag State's sovereign power to raise a diplomatic claim vis-a-vis the landing State. Tokyo Convention, art. 3, para. 3, ICAO Doc. No. 8364 refers to domestically founded jurisdiction. As has been pointed out, the implicit effect of that section results in the waiver of the sovereign power diplomatically to claim jurisdiction so founded. Any State whose jurisdiction is based upon domestic law and not the Convention itself, waives its sovereign power to claim diplomatically vis-a-vis the landing State.

\textsuperscript{142}Tokyo Convention, art. 16, para. 1, ICAO Doc. No. 8364 states:

1. Offenses committed on aircraft registered in a Contracting State shall be treated, for the purpose of extradition, as if they had been committed not only in the place in which they have occurred but also in the territory of the State of registration of the aircraft.

\textsuperscript{143}Factor \textit{v.} Laubenheimer, 290 U.S. 276 (1933).

\textsuperscript{144}Tokyo Convention, art. 13, para. 5, ICAO Doc. No. 8364. The State which makes the
vested with an exclusive original jurisdiction to decide whether it should exercise its concurrent criminal jurisdiction. This exclusive authority is precedent and also distinct from that sovereign's power to prosecute.\textsuperscript{144} The flag State may still raise its claim of jurisdiction vis-a-vis the landing State's criminal jurisdiction. But the quality of its assertion radically departs from the usual nature of sovereign claim. The flag State, through ratification, becomes a contractee to the Convention. It submits itself, consequently, to the authority of Article 13, thus sanctioning the exclusive jurisdiction mentioned above. As a result, its jurisdictional claim is no longer a diplomatic challenge, as such contention would render the sanction of Article 13 by the flag State meaningless. To the contrary, its claim can only be one of many factors tendered to the landing State to facilitate it in its jurisdictional decision. With this transposition of sovereign claim to the status of considered fact, the flag State's position becomes tantamount to that of any non-registry State under Article 3, section 3.\textsuperscript{145} Jurisdictional conflicts disappear, thus under the Convention the landing State is invested with exclusive original jurisdiction to decide whether it should exercise its criminal jurisdiction. Notwithstanding the possibility that that latter power may be concurrent with others, no diplomatic challenge can be tendered against an affirmative decision. Furthermore, only an extradition treaty with the flag State necessitates mandatory abnegation.\textsuperscript{146} The net effect of this analysis is ordination to a system of priorities. The landing State has primary jurisdiction immediately exercisable after self-confirmation and all other States possess concurrent jurisdiction exercisable only on condition that they subsequently obtain physical control over the alleged criminal.

C. The Remaining Problem

With the establishment of a jurisdictional order uncomplicated by diplomatic claims, the Tokyo Convention proffers to international aviation a lucid and internationally sound method for the administration of criminal law. In the scheme set forth above, however, there appears to be one defect unprovided for. The landing State may decide that it has no internationally sanctioned jurisdictional basis upon which to prosecute. Without extradition, it must either deport the accused\textsuperscript{147} or free him.\textsuperscript{148}

\textsuperscript{144} The exclusive, original jurisdiction of the landing State arises under Tokyo Convention, art. 13, para. 5, ICAO Doc. No. 8364. The criminal jurisdiction of the landing State arises under art. 3, para. 3. The former is determinative of the exercise of the latter.

\textsuperscript{145} This point is most significant in connection with the discussion which will follow in the next section. Though the Convention outwardly favors a flag jurisdiction, it nevertheless implicitly shifts the balance of judicial power to the landing State.

\textsuperscript{146} An extradition treaty is an internationally binding compact between the respective signatories. It creates the right of one independent nation to demand from another the return of an alleged fugitive from justice and the correlative duty to surrender the fugitive to the demanding country. U.S. v. Rauscher, 119 U.S. 407 (1886).

\textsuperscript{147} Tokyo Convention, art. 14, para. 1, ICAO Doc. No. 8364 states:

1. Without prejudice to Article 14, any person who has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, para-
It is submitted that, when the United States is the landing sovereign, it possesses jurisdiction to prosecute, and its courts have jurisdiction to adjudicate.\(^{149}\)

**IV. The Problem of Prosecution**

After a landing contractee takes custody pursuant to the Tokyo Convention, it has several alternatives. Apart from the Convention, it must extradite the accused if there is an appropriate extradition treaty with the flag State. Where none exists, its action is dictated by provisions in the Convention. It may admit the accused into its territory if it so desires;\(^{150}\) however, admission would only subvert the purpose underlying the Convention and question the international integrity of the sovereign. On the other hand, it may deport the accused, but only if he is not a citizen or resident alien.\(^{151}\) Deportation may be to either the State of nationality or the State of flight embarkation.\(^{152}\) If neither State has an appropriate extradition treaty with the flag State or if neither possesses jurisdiction to prosecute, deportation is futile. In some situations, therefore, the non-resident alien is in the same position as the citizen or resident alien in respect to immunity from immediate criminal prosecution. Under Article 15, section 1 of the Convention, the accused must be freed unless his presence is required by the law of the State of landing for extradition or criminal proceedings. Therefore, the assertion by the landing sovereign to exercise criminal jurisdiction remains the final avenue through which those persons may be brought to justice. This presupposes that that sovereign possesses jurisdiction to prosecute.

If the United States were landing sovereign, it would possess criminal jurisdiction over any person who committed an in-flight crime on board an American registered aircraft during international flight.\(^{153}\) Beyond this fact pattern, its jurisdiction to prosecute is not clear. When the aircraft is of foreign registry, it may be argued that the nationality of the offender or the victim constitutes a sufficient basis upon which criminal proceedings may be supported.\(^{154}\) However, when those persons are both non-resident aliens, any type of criminal prosecution seems wholly unsupportable. If federal jurisdiction over the non-resident alien can be validated, then it must embrace the American citizen or resident alien. For example, one non-resident alien murders another non-resident alien on board a foreign aircraft flying from Paris to New York; the crime is perpetrated over the

\(^{149}\) Any qualification to this statement will be explained in the next section.

\(^{150}\) Tokyo Convention, art. 14, para. 1, ICAO Doc. No. 8364.

\(^{151}\) Id.

\(^{152}\) Id.

\(^{153}\) Criminal jurisdiction would be supported under Tokyo Convention, art. 3, para. 1, ICAO Doc. No. 8364.

\(^{154}\) The active and passive personality doctrines of criminal jurisdiction would be raised in argument.
High Seas; no extradition treaty exists between the United States and the flag sovereign. If the United States can constitutionally exercise criminal jurisdiction over the accused in this case, the custodial duty of the Convention will be wholly complemented. All avenues of escape from prosecution will evanesc. Ratification would then be most desirable; federal power would fuse with the international Convention to effectively combat international air crimes.

The Tokyo Convention does not exclude any criminal jurisdiction exercised in accordance with national law; the legitimacy of the exercise depends upon the dictates of that municipal law. In the federal system, the valid exercise of criminal jurisdiction is predicated upon the proper United States district court possessing judicial jurisdiction to hear the controversy. This judicial jurisdiction looks for its validity to three essential factors. First, the accused must be in the custody of the court. Since federal judicial power is limited partially to cases arising under the laws of the United States, the accused must also be charged with a violation of federal penal law. Finally, there must exist a recognized jurisdictional basis upon which jurisdictional exercise can be sanctioned. Without this nexus between the prosecuting sovereign and the alleged criminal, federal courts decline jurisdiction.

When a non-resident alien is delivered to the competent United States authorities pursuant to the Convention, that landing sovereign must take custody of the person if circumstances so warrant. Delivery, however, is made for a violation of the penal laws of the flag State. Since the courts of one country do not enforce the criminal laws of another sovereign, if district courts claim judicial jurisdiction the violation of flag penal law must also be an offense against federal criminal law. Presently, the United States Criminal Code proscribes a number of in-flight crimes, of which

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156 Tokyo Convention, art. 3, para. 1, ICAO Doc. No. 8364.
157 Proper court refers to venue. For air crimes, Federal Aviation Act of 1958, § 903(a), 72 Stat. 786 (1958), as amended, 49 U.S.C. § 1473 (1964), is the applicable section. It states:
   The trial of any offense under this Act shall be in the district in which such offense is committed; or, if the offense is committed out of the jurisdiction of any particular State or district, the trial shall be in the district where the offender is arrested or is first brought.
158 In Re Morgan, 80 F. Supp. 810 (N.D. Iowa, 1948). Arrest of a person on the ground that he is guilty of an offense interdicted by statute is the first step in, and an integral part of, the process of bringing such person before the court of that sovereignty whose statute has been violated, and when an arrest has been made for such object or purpose, the jurisdiction of the particular court is then invoked.
159 U.S. CONST. art. III, § 2; C. WRIGHT, supra note 75, at 59.
ten are but basic offenses outlawed by all civilized countries: assault,\textsuperscript{100} maiming,\textsuperscript{107} larceny,\textsuperscript{168} receiving stolen goods,\textsuperscript{160} murder,\textsuperscript{170} manslaughter,\textsuperscript{171} attempts to commit murder or manslaughter,\textsuperscript{172} rape,\textsuperscript{172} carnal knowledge,\textsuperscript{176} and robbery.\textsuperscript{177} When a non-resident alien is delivered to American authorities for a basic crime under flag penal law his act probably also contravenes the federal criminal code. If so, he can be charged with a violation of the laws of the United States.\textsuperscript{176} Conventional custody can then be converted into judicial custody upon issuing an arrest warrant.\textsuperscript{177} As a result, two of the three elements indispensable to judicial jurisdiction foster no particular problem. With the third, difficulty arises.

The federal statute upon which prosecution is founded embraces the non-resident alien traveling on board a foreign aircraft. It states that any person becomes amenable to punishment who commits those crimes aforementioned while on board any aircraft in flight in air commerce.\textsuperscript{178} Though the non-resident alien is made subject to the statute, it is the precise meaning assigned to the words “air commerce” that determines the judicial jurisdiction of federal courts over such persons. Those words are partially defined in terms of foreign air commerce.\textsuperscript{179} In turn, this concept means the carriage for compensation of persons by aircraft in commerce between a place in the United States and any place outside thereof.\textsuperscript{180} Air commerce, resultingly, is a new jurisdictional basis proffered by Congress to invest the federal district courts with judicial jurisdiction over an alien whose federal crime is perpetrated on a foreign aircraft outside the airspace of the United States.\textsuperscript{181} Its postulation is strictly novel as traditionally the rule of criminal law has been that the offense must be committed within the territorial jurisdiction of the sovereign seeking to try the crime in order to give that sovereign jurisdiction.\textsuperscript{182}

The Congress no doubt enacted the legislation pursuant to lawful

\textsuperscript{107} Id. This section incorporates by reference 18 U.S.C. § 114.
\textsuperscript{160} Id. This section incorporates by reference 18 U.S.C. § 1111.
\textsuperscript{168} Id. This section incorporates by reference 18 U.S.C. § 1112.
\textsuperscript{170} Id. This section incorporates by reference 18 U.S.C. § 1113.
\textsuperscript{171} Id. This section incorporates by reference 18 U.S.C. § 2041.
\textsuperscript{172} Id. This section incorporates by reference 18 U.S.C. § 2012.
\textsuperscript{176} Id. This section incorporates by reference 18 U.S.C. § 2111.
\textsuperscript{177} Fed. R. Crim. P. 3.
\textsuperscript{178} Fed. R. Crim. P. 4.
\textsuperscript{182} An example will clarify. If an alien murders another alien on board a French aircraft while the plane is over the high seas on route from Paris to New York, a federal crime will have been committed by any person on board any aircraft flying from a point outside the United States and a point within. For such a case, the federal statute purports to give the district court jurisdiction by the sole fact of the aircraft's route.
\textsuperscript{183} Yenkichi Ito v. U.S., 64 F.2d 73, 75 (9th Cir. 1933); U.S. v. Baker, 136 F. Supp. 546, 547 (S.D.N.Y. 1951).
authority. This fact, however, does not necessitate the conclusion that its applicability is constitutional. A very tenable defense is that the statute, as applied to the present case, violates the Fifth Amendment. The attack embodies the assertion that there is a denial of due process of law to the alien in that the district court has no recourse to a valid jurisdictional basis upon which to try the case. Supporting this contention is the rule that the laws of a nation can not justly extend beyond its own territory except so far as regards its own citizens. Federal courts rarely claim jurisdiction over an offense perpetrated outside the United States by an alien. When they do, they justify their action under the protective principle of criminal jurisdiction. Moreover, no federal court has ever taken jurisdiction over an alien unless there existed between the United States and that person some substantial contact sanctioned under either the territorial or the protective principle. Until the present, valid jurisdictional bases have been predicated upon and equated with those two theories. Today, jurisdiction is founded on air commerce. That jurisdictional basis, complete in itself, does not rely on either one of those principles aforementioned; rather it seeks to establish criminal jurisdiction over an alien through the contact of his air transit from outside the United States to within. In view of prior federal practice, therefore, it would seem that the criminal jurisdiction fostered by air commerce is unconstitutional as violative of due process.

The argument in defense is specious as it assumes that the territorial and the protective principles are exclusive and exhaustive. Congress possesses the delegated power to regulate commerce with foreign nations as well as the implied power necessary and proper to carry into effect that

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183 U.S. Const. art. I, § 8 states that "The Congress shall have power . . . to regulate commerce with foreign nations . . . ."

184 A statute may be valid under one set of facts, but not another; it may be valid as to one class of persons, but not another. Staub v. City of Baxley, 315 U.S. 313 (1945). A law which is constitutional as applied in one manner may violate the Constitution when applied in another. Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945).

185 U.S. Const. amend. V states: "[N]o person shall . . . be deprived of life, liberty, or property, without due process of law."

186 Aliens, as well as citizens, are entitled to the protection of the Fifth Amendment of the Federal Constitution. U.S. v. Pink, 315 U.S. 203, 228 (1942).

187 U.S. v. Dollar, 100 F. Supp. 881, 886 (N.D. Cal. 1951). "Due process requires that a person shall have an opportunity to be heard by a court of competent jurisdiction."

188 The Apollon, 22 U.S. (9 Wheat.) 111 (1824).


190 Rocha v. U.S., 288 F.2d 141, 149 (9th Cir.), cert. denied, 366 U.S. 948 (1961). Also at 148, citing Strasheim v. Daly, 221 U.S. 280 (1911): "'Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.'"


192 Supra note 181.

193 U.S. Const. art. I, § 8: "Congress shall have power . . . to regulate commerce with foreign nations . . . ."
express delegation.\textsuperscript{194} Since power over foreign commerce is a necessary attribute flowing from sovereignty,\textsuperscript{195} Congress also possesses the inherent power to govern that matter irrespective of the affirmative constitutional grant.\textsuperscript{196} Vested with three concentric powers over foreign commercial affairs, Congress may actualize them to their full, legitimate extent and in accomplishing this, it is not restricted to constitutional provisions.\textsuperscript{197} It may simply choose from the corpus of international law whatever recognized principle of international jurisdiction it deems necessary for the execution of those powers.\textsuperscript{198} The fact that, in the past, Congress may not have chosen to embody in its foreign commerce legislation the full scope of its authorized powers is no basis for concluding that those powers can no longer be extended to otherwise legitimate limits.\textsuperscript{199} Disuse of delegated or inherent power offers no conclusion that that power may not subsequently be employed in a new but proper fashion.\textsuperscript{200} As a result, even though the congressional power over foreign commerce in its criminal extensions has been modified solely by the territorial and protective principles,\textsuperscript{201} it is fallacious to state that it is relegated exclusively to those theories. When that power is employed to establish criminal jurisdiction over aliens, Congress may rightfully incorporate into its legislation any other recognized doctrine of international law to legitimately secure federal judicial jurisdiction.\textsuperscript{202} In 1961, Congress, pursuant to its foreign

\textsuperscript{194} U.S. Const. art. I, § 8: "Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . ."

\textsuperscript{195} The Convention on Rights and Duties of States, art. 1(d), 13 July 1934, 49 Stat. § 3097, T.S. No. 881 (concluded at Montevideo, 26 Dec. 1933). The State as a person of international law should possess the capacity to enter into relations with other States.

\textsuperscript{196} "...The powers of the government and the Congress in regard to sovereignty are broader than the powers possessed in relation to internal matters." Rocha v. U.S., 288 F.2d 545, 149 (9th Cir.), cert. denied, 366 U.S. 948 (1961); U.S. v. Curtiss-Wright, 299 U.S. 304, 318 (1936) states: It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.

\textsuperscript{197} Rocha v. U.S., 288 F.2d 545, 549 (9th Cir.), cert. denied, 366 U.S. 948 (1961). The court here sanctioned the utilization of the protective principle without recourse to constitutional authorization. It predicated its conclusion solely on international law, stating that any reliance on the Constitution was unnecessary. This reasoning is consistent with the assertions made in U.S. v. Curtiss-Wright, 299 U.S. 304 (1936). Since the power over foreign commerce is inherent as well as delegated, it would have vested in the federal government regardless of the Constitution. Its implementation, therefore, is predicated on the dictates of international law. This proposition is sound in view of the fact that nowhere in United States organic law is there provision for the territorial principle. But from the beginning of the republic that principle has been employed without hesitancy in criminal matters.


\textsuperscript{199} Id.

\textsuperscript{200} Id. This case cited Draft Convention on Jurisdiction with Respect to Crime, supra note 69, at 556:

The contention advanced by certain Anglo-American writers that jurisdiction over aliens is restricted to those within the territory and to pirates appears to be the result of a tendency to equate the exercise of jurisdiction undertaken in a particular State with competence as determined by international law.

The project points out that the two are not co-terminous or equivalents.


commerce power, legislated in respect to in-flight crimes.\textsuperscript{203} It extended the jurisdiction of the district courts over any person who perpetrated those offenses on board any aircraft. Its basis was air commerce. No disputation is made that federal courts do not possess jurisdiction over aliens who commit federal crimes in foreign territory.\textsuperscript{204} When a court claims that jurisdiction, it does so by evoking the protective principle. In respect to in-flight crimes, however, this principle is neither necessarily nor usually applicable.\textsuperscript{205} Thus, whether those tribunals possess judicial jurisdiction over aliens under the circumstances stated depends on the interpretation given air commerce. If that interpretation can be equated with a recognized jurisdictional basis, the argument emanating from the Fifth Amendment fails, for due process is then afforded.

Air commerce statutorily means the commercial transit of any aircraft between a place outside the United States and a place within.\textsuperscript{206} It is the basis to secure federal judicial jurisdiction over any person who commits an in-flight crime under the Federal Aviation Act.\textsuperscript{207} Theoretically, it may be interpreted to reach aliens who never come in physical contact with the United States during their air transit.\textsuperscript{208} Jurisdiction predicated upon such an interpretation, however, would face high constitutional challenge. Since the cardinal rule of statutory construction is to save and not to destroy,\textsuperscript{209} extremism should be avoided. Air commerce should be construed to afford the most extensive jurisdiction without contravening constitutional limits. An interpretation which complies with this formula is one which equates air commerce for purposes of criminal jurisdiction with place of landing. Such a construction is legitimate; for, the landing of an international flight in the United States terminates transit between a place outside that sovereign and some place within. However, whether it is tantamount to recognize jurisdictional basis so as not to offend the Fifth Amendment is a question dependent on international law.

Five different competences under which crime may be prosecuted are recognized by international law.\textsuperscript{210} Of those jurisdictional bases, the universality principle of criminal jurisdiction is pertinent.\textsuperscript{211} It provides that a State possesses jurisdiction over any crime committed by an alien notwithstanding the fact that the crime was perpetrated in a place subject to the authority of another sovereign.\textsuperscript{212} Certain conditions, however, must be met. The act which constitutes the crime under the law of the prosecuting State must also be an offense under the law of \textit{locus delicti}. Prosecution,
furthermore, must not be barred under that latter law through a lapse of time. Lastly, an offer of extradition must be made and subsequently refused. When these several conditions are met, international law affords criminal jurisdiction by a reference to the sole factor of custody.\(^1\) It is to be noted, though, that the necessity of the last condition is doubtful when the universal principle is referred to international aviation law. If this can be proved, a new species of that principle emerges upon which the exercise of criminal jurisdiction can be justified.

High international authority has long contended that jurisdiction over in-flight crimes is supportable solely on the custody of the landing sovereign. Morpurgo,\(^2\) Lortsch,\(^3\) and Pholien\(^4\) initially advanced the proposition. Nowhere in their arguments was such jurisdiction conditioned upon an offer of extradition under the comity of nations.\(^5\) It was predicated upon the contact of landing as complemented by custody. Contending that the activity of international flight could oftentimes afford an in-flight criminal respite from any prosecution,\(^6\) those jurists evoked the pure form of the universal principle.\(^7\) Recently, Mr. Allan Mendelsohn, a United States delegate to the Tokyo Convention, advanced a well reasoned thesis urging the Congress to amend the Federal Aviation Act.\(^8\) In lieu of the words air commerce, he proposed the adoption of a phrase which essentially means place of landing. This proposition was supported by the Legal Working Group of the I.G.I.A.\(^9\) No mention of an obligation to offer extradition was made. Again, custody of the landing sovereign was tendered as the sole and unconditioned basis upon which federal jurisdiction was sanctioned. Paradoxically, even the legislation which Mendelsohn attacked endorses the contention that the place of landing possesses unfettered jurisdiction over in-flight crimes. Under both its liberal construction\(^10\) and the statutory intent,\(^11\) air commerce, a concept proffered by Congress itself, is legitimately amenable to an interpretation of place of landing. The statute in which it is found, moreover, does not speak in terms of extradition.\(^12\) Another persuasive argument for the competence

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\(^{13}\) Lortsch, *Statut juridique du passager d' aéronet*, 13 Revue de Droit Aérien 7 (1929).

\(^{14}\) Pholien, supra note 99, at 289.

\(^{15}\) 31 A.M. Jur. 2d Extradition § 13 (1967).

\(^{16}\) If the landing State has no extradition treaty with the flag State, the criminal will be set free.

\(^{17}\) Jurisdiction based solely on custody, as is the case for the international crime of piracy. *Draft Convention on Jurisdiction with Respect to Crime*, supra note 69, at 563.

\(^{18}\) Mendelsohn, supra note 1.

\(^{19}\) The United States Interagency Group on International Aviation. It usually includes the Departments of State, Defense, and Commerce, the CAB and the FAA. The IGIA Legal Working Group is made up of the legal representatives of the participating IGIA members.

\(^{20}\) See p. 198 supra.

\(^{21}\) *Hearings on H.R. 8384 Before the House Comm. on Interstate and Foreign Commerce*, 87th Cong., 1st Sess. 4 (1961): '[T]he definition of "air commerce" in the Federal Aviation Act of 1958, will operate to make certain of its provisions applicable ... to such acts committed on foreign aircraft in flight in air commerce over foreign countries, but only if such aircraft are engaged in flights originating at or destined to points in the United States.

is that the Convention drafted at Tokyo, though allowing for multiple jurisdictions, makes the landing State the fulcrum of its thrust. Under the Convention, the sovereign has the duty of custody upon delivery,\footnote{Tokyo Convention, art. 13, para. 2, ICAO Doc. No. 8364.} the power to deport on its own discretion,\footnote{Tokyo Convention, art. 14, para. 1, ICAO Doc. No. 8364.} and the authority of decision in respect to the exercise of its own criminal jurisdiction.\footnote{Tokyo Convention, art. 13, para. 5, ICAO Doc. No. 8364.} Notwithstanding that landing jurisdiction per se is not provided for in the Convention,\footnote{Boyle & Pulifer, supra note 1, at 319, 324.} it is not by that fact ruled out.\footnote{Tokyo Convention, art. 13, para. 2, ICAO Doc. No. 8364.} And when it is realized that that State is the most important sovereign under that draft, its status alone practically argues for the jurisdiction suggested. The outstanding deficiency in the Tokyo Convention only serves to re-enforce this point.\footnote{Boyle & Pulifer, supra note 1, at 319, 324.} More important, if such jurisdiction is admitted, then under that Convention, it is predicated solely on custody\footnote{Tokyo Convention, art. 3, para. 3, ICAO Doc. No. 8364.} and is in no way pre-conditioned upon an offer of extradition.\footnote{Tokyo Convention, art. 16, para. 2, ICAO Doc. No. 8364: "[N]othing in this Convention shall be deemed to create an obligation to grant extradition."}

The foregoing considerations strongly indicate that the universal principle is modified when applied to the area of international aviation. Traditionally, criminal jurisdiction founded on it is conditioned on two major factors: Custody of the accused and a rejected offer of extradition.\footnote{Tokyo Convention, art. 16, para. 2, ICAO Doc. No. 8364: "[N]othing in this Convention shall be deemed to create an obligation to grant extradition."} However, when that principle appertains to air crimes committed during international flight,\footnote{International flight is a factor implicit in the whole discussion. It is defined with respect to the Tokyo Convention, pp. 174-75 supra.} cogent authority dispenses with the second requirement. Where the contact is landing, such authority sanctions the perfection of the universal basis through custody alone. Thus, it may be concluded that that principle is qualified when used to support jurisdiction over air offenses. Indeed, the unique criminal problem which may attend an international flight demands this result.\footnote{Where no extradition treaty exists between the landing sovereign and the flag State, the accused must be set free unless the landing sovereign possesses jurisdiction to prosecute and indicates its intention to initiate criminal proceedings.} A new jurisdictional basis arises, special only to in-flight crimes perpetrated during international flight. That basis is but the actual custody of the accused upon the contact of landing.

Though this new and special jurisdictional basis is supported by high authority, the approbation of its validity depends wholly upon international law. According to the landmark case S.S. Lotus, a jurisdictional basis must be neither proscribed by a rule of general international law, nor prohibited under customary international law.\footnote{Case of the S.S. "Lotus," [1927] P.C.I.J., ser. A, No. 9.} In that international sources favor the new basis, there exists no rule of general proscription. Further, in that
the flag State possesses no exclusive jurisdiction over in-flight offenses, there is not a customary prohibition. The special doctrine, therefore, emerges as a permissible basis under international case law. Since it is a corollary to the internationally recognized basis of universality, it partakes, moreover, of that latter principle's status. As a result, it becomes part of the jurisprudential body of international criminal law.

Since custody upon the contact of landing is a valid jurisdictional basis, Congress may adopt it to support federal judicial jurisdiction over in-flight crimes committed by aliens on board foreign aircraft. At present, Congress pretends to bestow such jurisdiction through the nexus of air commerce; but that concept is too vague. Though it can be legitimately interpreted to mean place of landing, it is also susceptible to other constructions which are clearly unconstitutional. The question then presents itself: in what manner is the new and special jurisdictional basis assigned to air commerce to dispel the Fifth Amendment argument?

Federal crimes present federal questions. When district courts exercise federal question jurisdiction, they may resort to federal common law as the rule of decision. Thus, it is significant that the landing basis of criminal jurisdiction is part of international law; for, international law itself is part of the law of the United States. As federal law, therefore, it must by nature be an integral of federal common law. To prevent the demise of a criminal statute on the grounds of vagueness, federal common law is used to define and clarify the terms questioned. International law as federal common law, therefore, is available to eliminate statutory vagueness. More particularly, it may define and clarify the meaning of

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587 Tokyo Convention, art. 3 & 4, ICAO Doc. No. 8364. The Convention allows for concurrent jurisdiction.
588 Where a non-resident alien perpetrates a crime injuring another non-resident alien on board a foreign aircraft flying from New York to Paris, there are no substantial contacts with the United States. Landing and custody take place in France. The elements constituting the new jurisdictional basis occur outside the United States. To support federal jurisdiction, they must occur within.
589 With the above fact pattern in mind, reference is made to the definition of air commerce. Federal Aviation Act of 1958, § 101(4) & (20)(c), 72 Stat. 737 (1958), as amended, 49 U.S.C. § 1301 (1964), define it as commercial air carriage between a place in the United States and any place outside thereof. As a result, air commerce literally embraces the above flight pattern.
590 Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938). Brandeis stated that in federal question jurisdiction, there exists a body of federal common law.
591 Skiriotes v. Florida, 313 U.S. 69, 72 (1940); Kansas v. Colorado, 206 U.S. 46, 97 (1906). "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination," citing The Paquete Habana, 175 U.S. 677, 700 (1899).
592 West Rand Cent. Gold Mine Co. v. Rex (Eng.), 2 KB 391 (1901); "International law . . . forms part of the law of England." "And the greater part of the common law in the United States is derived from the common or unwritten law of England." 15A C.J.S. Common Law, § 3 (1967).
593 In Re Green, 52 F. 104, 111 (Cir. Ct. Ohio 1892): When Congress . . . adopts . . . common law offenses, the courts may properly look to that body of jurisprudence for the true meaning and definition of such crimes, if they are not clearly defined in the act creating them. The importance of the above statement is not just that common law may be used to define offenses in a criminal statute. Even more important than that is the general principle upon which that statement is based. Common law, where it is relevant, may be employed to clarify terms in a criminal statute in order to save it from vagueness. From such a principle, it may then be argued that international law as federal common law may be employed to define terms in a federal criminal statute which terms have international implications. Most certainly, air commerce possesses such implications. See also U.S. v. Turley, 312 U.S. 407 (1917).
air commerce as that term is used in federal criminal legislation. There is but one proviso: Air commerce, as defined by statute, must be susceptible to the importation tendered by international law. Air commerce can legitimately be construed as place of landing. International law admits place of landing as a valid jurisdictional basis. As a result, it eliminates the extreme interpretations postulated on air commerce and clarifies that term to recognized limits. When air commerce is referred to aliens on board foreign aircraft, therefore, its meaning becomes place of landing.\textsuperscript{44} With that term tantamount to a valid basis for criminal jurisdiction, the argument premised on the Fifth Amendment fails. It may be finally stated that, once custody is secured upon the contact of landing, district courts possess judicial jurisdiction to hear cases involving federal crimes committed by aliens on board foreign aircraft during international flight.\textsuperscript{445}

V. Conclusion

This paper has been centered around three problems peculiar to crimes committed during international flight. To exemplify them, constant resort has been made to a particular fact pattern: A non-resident alien committing a crime against another non-resident alien on board a foreign aircraft flying from Paris to New York; the offense being perpetrated over the High Seas; no appropriate extradition treaty existing between the United States and the flag sovereign.

The first problem raised was that of custody. If the offense only violates flag penal law, United States landing authorities are powerless to detain the offender alien. As a solution for the problem, the examination looked to the Tokyo Convention. It first concluded that that Convention's provisions only had practicable effect when an on-board offense is perpetrated during an international flight. It then concluded that the Convention's custodial provisions would not only remedy the problem of arrest but would substantially assure the immediate prosecution because of their complementation by the Convention's deportation article.

The second problem raised was that of jurisdictional conflict among several States peculiarly interested in the in-flight crime. To find a solution, the analysis again had recourse to the Tokyo Convention. It proffered its own unique interpretation of the Convention's articles on jurisdiction by first construing Article 3, section 3 to be a treaty waiver of the sovereign power to raise a diplomatic claim against the landing State by all States except the flag sovereign. Construing Article 15, section 4 and section 5 as an investment of primary jurisdiction in the landing State, was the second basis. It is suggested that the Convention effected an implied system of priorities, thus ending any diplomatic conflict in the field of international in-flight crime.

\textsuperscript{44} It must not be forgotten that the new and special jurisdictional basis is not only predicated upon landing but also custody. If the Tokyo Convention is ratified, custody becomes a conventional duty. Thus the Convention and the federal statute on air commerce complement each other to secure the essential elements needed for the special basis.

\textsuperscript{445} International flight as defined on p. 174 \textit{supra}. 
The last problem raised was that of prosecution. Where no appropriate extradition treaty exists between the United States and the flag State and where the deportation provisions of the Tokyo Convention do not assure prosecution, the in-flight offender eludes immediate prosecution unless the United States as landing sovereign has power to prosecute. The precise issue presenting itself, then, is whether the federal judiciary possesses criminal jurisdiction to hear and adjudicate a case marked by so many foreign and extraterritorial factors. To find a solution, recourse was first had to federal statutes proscribing in-flight crimes; in that district courts have no jurisdiction over foreign penal offenses, it was necessary to point out that the in-flight crime had to violate a federal statute. The next step was that the definition of air commerce—the federal jurisdictional basis over in-flight crimes—embraced the situation under consideration. Lastly and most importantly, a recognized jurisdictional basis in international law was found to which the literal definition of air commerce could be equated. It is suggested a hitherto unadvanced proposition indicates that custody upon the contact of landing could be deemed a jurisdictional basis in international law special only to international in-flight crimes; and as such was accepted by the statutory definition of air commerce. Through such an approach, it is concluded that the federal judiciary does indeed possess jurisdiction to prosecute over the case at hand.

When the examination is viewed as a whole, two things become evident. In the first instance, there is no situation that can be raised within its framework where a person who commits a serious felony during international flight can escape immediate prosecution after landing in the United States; and secondly, that both the unratified Tokyo Convention and federal judicial jurisdiction are the essential factors for such a state of affairs. It is apparently advisable, therefore, that the Tokyo Convention be ratified by the United States Government.