JURISDICTION OVER HIJACKING AND OTHER CRIMES ON BOARD AIRCRAFT

Dissertation submitted to the Jawaharlal Nehru University
in partial fulfilment of the requirements for the
award of the Degree of
MASTER OF PHILOSOPHY

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1984

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CERTIFICATE

This is to certify that the dissertation entitled "Jurisdiction Over Hijacking and Other Crimes on Board Aircraft" submitted by Sakesh Kumar in fulfilment of nine credits out of the total requirements of twenty-four credits for the Degree of Master of Philosophy (M.Phil.) of this University, is his original work and may be placed before the examiners for evaluation. This dissertation has not been submitted for the award of any other degree of this University or of any other University.

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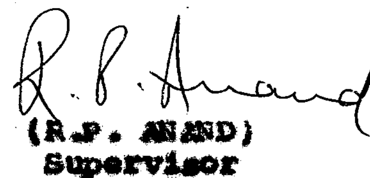

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ACKNOWLEDGEMENTS

In completing this work I have received help and support from many quarters. Throughout this period Professor R.P. Anand, my teacher and supervisor was a constant source of inspiration for my research project for bringing it to a definite and purposeful shape. In spite of his other pressing preoccupations as the Dean of School of International Studies, he has always been available to me for his comments, suggestions and guidance in making my work orderly, clear and precise. My gratitude is also due to Dr. Rahmatullah Khan, Professor of International Law in my Centre for his precious teachings and guidance. I am also grateful to Mr. H.P. Rajan, Assistant Professor in the Centre and Dr. S. Bhatt, Director, Regulations and Information, Directorate of Civil Aviation, New Delhi, for their valuable help and encouragements.

Over the years, I have accumulated many debts to my friend Mr. Satish K. Agnihotri, Advocate, who encouraged me to pursue this study venture at Jawaharlal Nehru University, New Delhi. I must also thank my colleagues Mr. Mahendra Singh Sisodia and Mr. Prahalad Bairwa for their active support in culminating this work. I am so greatly overwhelmed by the precious and priceless sympathies shown to me by Mr. Abhay Gupta and Mr. R.P. Singh that I find no words to express it.

I am also thankful to the Library staff of our own library at Jawaharlal Nehru University, the Indian Council of World Affairs Library and the American Centre Library.

(SAKESH KUMAR)

New Delhi

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Chapter I

INTRODUCTION

The paramount importance of international civil aviation, a vital and indispensable link among nations in an increasingly interdependent world can hardly be exaggerated. Unfortunately, in recent years it has faced and is facing risks from international acts of terrorism in the form of unlawful seizure or the exercise of control over an aircraft, or from the acts of sabotage (e.g. placing of bomb on board the aircraft, the runway or airport etc.). There is hardly any doubt that "the crime of hijacking not only endangers the safety of the plane and the lives of the crew but also the civil aviation generally".[1] The subject of hijacking or illegal diversion, of aircraft as it is popularly called, and the development of effective measures to prevent it, is of immense importance and interest today not only to members of "special legal community of the air" (airline companies, air crew or ground staff and air line passengers, etc.), but also to all those who are concerned with the broader problem of control of terrorism.[2]

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1. Alona E. Evans, "Aircraft Hijacking: Its Causes and Cure", American Journal of International Law, Vol. 63, 1969, p. 695.

2. Edward McWhinney, The Illegal Diversion of Aircraft and International Law (Leyden, 1975), p. 1.

Aerial hijacking has become an international problem ever since the hijacking of a Cuban plane in 1961 and continuing with the hijackings of two Indian airlines planes to Lahore[3] and Dubai[4] on July 5, 1984 and August 24, 1984 respectively. Although the first reported incidence occurred in 1930 when a group of Peruvian revolutionaries seized a Peruvian aircraft and tried to shower their country with propaganda leaflets advocating their cause[5], but the first reported hijacking, forming a political pattern (in the wake of east-west conflict), occurred in late 1940's and 50's when individuals from Eastern European countries attempted to flee to the West in quest of political freedom. This pattern was reversed in the late 1960's and 70's when most of the reported hijackings originated in the West with Cuba and the Arabian countries as the desired destinations.[6]

The offence of hijacking has certain special characteristics as compared to other national and international crimes.[7] Civil air transport is based on the confidence

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3. See, Times of India (New Delhi), 6 July 1984.

4. Ibid., 25 August 1984.

5. J. Arey, The Sky Pirates (1972), Appendix A, pp. 315-54.

6. Abraham Abromovsky, "Multilateral Conventions for the suppression of unlawful seizure and interference with Aircraft, Part I: The Hague Convention", Colombia Journal of Transnational Law, Vol. 13, no. 3, 1974, p. 381.

7. S.K. Agrawala, Aircraft Hijacking and International Law (Bombay, 1972), pp. 18-21.

of the peoples of the world and it works for the promotion and preservation of friendly relations among states.[8] Hijacking increases the risk of mid-air crashes jeopardising the safety of aircraft operations in the same air-spell and lives of those on board.[9] Apart from navigational difficulties which necessarily follow with changes of course, landing and take off, there are other hazards. Aircrafts flying overland routes are not necessarily equipped for emergency landing at sea. Diverting the aircraft beyond the range of its fuel capacity, or to an airport without navigational aids or sufficient runways are the most natural hazards of aerial hijacking.[10] Hijacking undermines the confidence of people and therefore its suppression is of deep concern to all. The frequency with which the offence has been increasing during recent years is alarming and calls for a vigorous action both at national and international level. There are reports that

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8. See, General Assembly Resolution on Aerial Hijacking or interference civil air travel (Resolution 2645 (XXV), November 30, 1970), Preamble.

9. Gary M. Horlick, "The Developing Law of Air Hijacking", Harvard International Law Journal, Vol. 12, no. 1, 1971, pp. 49-51.

10. In the case of recent hijacking of an Indian Airlines Boeing 737 plane, which was taken to Dubai airport, the U.A.E. authorities refused permission to the plane to land at Dubai and it hovered over the airport. But with the fuel running low the pilot had to land on a darkened runway. This caused increased risk to the lives of passengers and crew. See, Times of India, 26 August 1984.

there were at least 91 completed hijackings between January 1948 to September 1969.[11] There were seventeen instances of hijacking between 1948 and 1950 and another seventeen instances in the period of 1958-1962.[12] The record from January 1, 1961 to 1972 shows that there have been 343 successful and unsuccessful international and domestic hijackings worldwide. If attempted hijackings are added, there have been 396 endangered flights during this period.[13] India has also been involved in seven aerial hijackings.

The increasing danger to the safety of the aircraft, crew and its passengers can be visualized from the fact that according to ICAO reports, there were 12,252 passengers and crew on board in 171 cases of seizures, sabotage and ground attacks in the period between January 1969 to August 1971.[14]

In most of cases friendly international relations are at stake as hijacking involves more than one state. The most important factor which changes the character of the crime of hijacking into a heinous crime is that it is generally done with a political motive. That is why most of the time hijackers escape punishment. According to one

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11. Evans, n. 1, p. 699.

12. Ibid., pp. 697-98.

13. Alona E. Evans, "Aircraft Hijacking: What is Being Done", American Journal of International Law, Vol. 67, 1973, pp. 642-43.

14. Horlick, n. 9, p. 40.

report more than 70% of hijackings till 1970 were done with a political motive.[15] It may be added that whether a crime is political or not is generally a subjective thing. While in most of the cases the state of registration of the aircraft would consider hijacking a purely criminal act, other states may regard the crime as political and give asylum to the offenders. Therefore mere municipal legislation by certain interested states providing for compulsory prosecution and punishment of hijackers landing in its territory or escaping to it cannot be a complete answer to the problem, since the states most willing to punish hijackers are not the ones where the hijackers generally land or escape to.[16] Only the imposition of an international obligation on all states to extradite or to punish the guilty persons could prove fruitful. Jurisdiction of states must be defined precisely to overcome a situation where no state may have jurisdiction to punish the offenders.

In an effort to combat criminal acts which endanger the safety of international civil aviation, three multi-

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15. See, Michel Pourcelet, "Hijacking: The Limitation of Treaty Approach", in McWhinney, ed., Aerial Piracy and International Law, 1971, p. 50.

16. It has been pointed out that inspite of effective laws in U.S.A. and its greatest interest in punishing the hijackers, the record of prosecutions is not impressing. Out of 51 successful hijackings of United States aircrafts from 1961 to 1969 only 5 hijackers have been deported back to USA and prosecuted. See, Evans, n. 1, p. 706.

lateral conventions have been adopted under the auspices of the International Civil Aviation Organisation (ICAO). The Tokyo Convention of 1963[17] attempted to ensure that at least one state possessed the right to exercise its criminal jurisdiction over an offence committed on board an aircraft in flight. In addition, the Convention sought to facilitate the resumption of a hijacked flight. The Hague Convention of 1970[18] sought to combat and penalize acts of unlawful seizure of aircraft. In the Montreal Convention of 1971[19] the parties attempted to resolve the corresponding problem of unlawful interference with aircraft by carefully defining the offence, by extending the authority of states under international law to exercise jurisdiction over offenders, and by providing for the prompt extradition, prosecution and punishment of offenders.

Concept of Hijacking and Other Crimes on Board Aircraft

The term "hijacking" is derived from the shout of "Hi Jack" given by those persons who used to appropriate

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17. The Tokyo Convention of 1963 is officially known as the Tokyo Convention on offences and certain other acts committed on Board Aircraft, American Journal of International Law, Vol. 58, 1964, pp. 566-86.

18. The Hague Convention for the suppression of unlawful seizure of Aircraft, American Journal of International Law, Vol. 65, 1971, pp. 440-66.

19. The Montreal Convention for the suppression of unlawful acts against the safety of Civil Aviation, American Journal of International Law, Vol. 66, 1972, pp. 455-66.

the illicit liquor being carried by boot-leggers in the prohibition time in the United States.[20] Thus it is a term of American slang having no meaning. The offence of "aircraft hijacking" essentially consists of a taking or conversion to private use of an aircraft as a means of transportation and forcibly changing its flight plan to a different destination.[21] Sometimes this is characterised as theft of the aircraft itself and the robbery of passengers and crew.[22]

McWhinney uses a different term for the crime of hijacking. He calls it "aerial piracy". He applied this term for the illegal diversion by force or other means of an aircraft to a destination other than that envisaged in its original flight plan.[23] But it must be mentioned here that "aircraft piracy" is not "piracy" in the classical sense or as defined in the 1958 Geneva Convention on the High Seas.[24] Article 18 of the Convention refers to the piracy as "illegal acts of violence, detention or any act of depradation committed for private ends by the crew or

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20. G.M.E. White, "The Hague Convention for the Suppression of Unlawful seizure of Aircraft", The Review International Commission of Jurists, No. 6, April-June, 1971, p. 39.

21. Evans, n. 1, p. 696.

22. Ibid.

23. McWhinney, n. 2, pp. 5-6.

24. For a detailed discussion on the differences between "hijacking" and "piracy", see, Chapter II infra.

passengers or private aircraft and directed against another ship or aircraft.

The Tokyo Convention of 1963 does not make any attempt to define the crime. Article 11, the sole article of Chapter IV which is entitled as "unlawful seizure of aircraft", refers to "an act of interference, seizure or other wrongful exercise of control of an aircraft in flight". A brief analysis of this article also reveals the absence of any provision pertaining to the extradition, adjudication, or possible punishment of the offenders.

Article 1 of the Hague Convention defines the offence of unlawful seizure of aircraft. This Convention also nowhere uses the terms "hijacking" or "aerial piracy". It runs as follows:

> Any person who on board an aircraft in flight:
> (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizure or exercises control of that aircraft, or attempts to perform any such act or,
>
> (b) is on accomplice of a person who performs or attempts to perform any such act commits an offence. (25)

This provision does not attempt to define the crime as such but instead it specifies the constituting elements

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25. The Hague Convention of 1970, n. 18, Article 1.

of the offence.[26] These elements are: (1) use of force or threat thereof, or any other form of intimidation in committing the offence (or any attempt to do so), (2) the use of the means mentioned in (1) or attempt to use them should be for the purpose of seizing or exercising control of an aircraft, (3) the use of force is unlawful i.e. without legitimate basis, (4) the acts mentioned above must be committed while the aircraft is in flight.

Although this definition is relatively short, it is complex and it caused extensive debate during the conference. The provisions of Article 1 of the Convention are identical to those which are mentioned in the ICAO Legal Committee's draft.[27] But the legal sub-committee's draft did not contain the phrase "or by any other form of intimidation". The suggestion that the word "intimidation" be included was proposed by Japan.[28] The Japanese delegate emphasized that not only physical force but also psychological force should be included. The condition laid down in the provision requiring the use of force or the threat thereof in committing the offence of hijacking raises the following question: Can hijacking be committed through a means other than those

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26. R.H. Mankiewicz, "The 1970 Hague Convention", in a symposium on Hijacking, Journal of Air Law and Commerce, Vol. 37, 1971, p. 199.

27. See, ICAO Doc. 8877-LC/181, (1970).

28. Ibid., p. 26.

mentioned in the provision? If, for instance, the pilot of an aircraft himself hijacks or if the hijackers secure his cooperation in exercising control over the aircraft, would this be a cause of hijacking under the Hague Convention? Or if the hijackers secure the cooperation of an air hostess and ask her to administer drugs in the drink of the pilot, and after he has lost consciousness, the hijackers take over the command of the aircraft and divert it to a destination of their choice, does this case come under the Convention? In both the examples neither force nor the threat thereof has been used in carrying out the crime.[29] During the discussion the Australian delegate felt that the definition of the offence would be unduly restrictive if it were to apply only to those situations where actual physical force was used or threatened. He maintained that an act of unlawful exercise of control over the aircraft should be punished if the offender employed such tactics as blackmail, bribery, or impersonation, on board an aircraft. He further suggested that if the committee did not wish to delete all references to the use of force, Article 1(a) should read "by force or threat thereof" as well as in "any other manner".[30] This definition was opposed by

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29. Sami Subber, "Aircraft Hijacking Under the Hague Convention 1970 - A New Regime", International and Comparative Law Quarterly, Vol. 22, 1973, pp. 691-92.

30. ICAO Doc., n. 21, pp. 27-28.

a number of delegates. The United States delegate contended that the suggested wordings were vague.[31] The Indian delegation stated that under the Australian proposal any unlawful exercise of control would come within the purview of the Convention. India pointed out that even such acts as a pilot flying with an expired license could be included within the crime.[32]

The delegate from United Kingdom suggested the insertion of the words "or by any other means of coercion" after the phrase in Article 1(a) "by force or threat thereof".[33] After much debate the legal committee, by a vote of 25 to 7, rejected the Australian proposal[34], but adopted the proposal of the United Kingdom.[35] In the final draft, the term "coercion" was changed into the term "intimidation".

Article 1(b) of the Convention provides that an accomplice will be treated as if he himself has committed the crime. The issue that confronted the members of the committee was whether this provision should be limited to include only those accomplices who were actually present on board the aircraft. The Israeli delegation proposed

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31. Ibid.
32. Ibid., p. 28.
33. Ibid., p. 29.
34. Ibid., p. 33.
35. Ibid., p. 34.

that while the scope of the Convention should be restricted to an act of unlawful seizure committed on board the aircraft in flight, the accomplice provision should be expanded to cover accomplices on the ground as well as those who were on the board aircraft. The Italian delegation also supported the Israeli proposal.[36] In response to this proposal, the French delegate, the Chairman of the Committee, stated that it was the decision of the sub-committee that the accomplice should be covered only if they were on board the aircraft. The French delegate maintained that the accomplices on the ground would not go unpunished as they would be guilty under the domestic laws of the state concerned. Thus the Israeli proposal was rejected.

In addition to defining the types of acts which constitute "the offence", Article 1 specifies the time period within which the offence must be committed if it is to come within the scope of the Convention: the unlawful seizure of the aircraft must occur when the aircraft is "in flight". Article 3(1) of the Convention provides that "an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation". It should be noted that

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36. Ibid., p. 22.

37. Ibid., pp. 21-22.

the period of time specified by this definition is longer and commences earlier than its counterpart in the Tokyo Convention. Article 1(3) of the Tokyo Convention defines an aircraft to be in flight from " ... the moment when power is applied for purpose of take off until the landing run ends". Moreover Article 3 of the Hague Convention specifically says "that in case of a forced landing the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board." In addition, Article 3(3) provides that the Convention would not be applicable where the point of take off of a hijacked aircraft and the point of actual landing are within the territory of the state of registration of the aircraft. Article 3(3) states:

> The Convention shall apply only if the place of actual landing of the aircraft on board which the offence is committed is situated outside the territory of the state of registration of that aircraft; it shall be immaterial whether the aircraft is engaged in an international or domestic flight. (38)

While adopting this provision it was thought that this would be a matter purely within the jurisdiction of the national law of the concerned state since no other state was involved. But what would be the position if the aircraft

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38. The Hague Convention of 1970, n. 18, Article 3(3).

is brought back to the same territory after the occurrence of crime and after the aircraft has failed in an attempt to land in a foreign territory.[39] Norway put forward a meaningful suggestion regarding the definition of a domestic flight, viz., where the aircraft takes off in the state of registration, flies exclusively over the territory of and is scheduled to land in, the same state and actually does land there. All other flights, it suggested, would have an international aspect and ought therefore to be covered by the Convention.[40]

The definition under the regime of the Hague Convention only covers the acts "on board an aircraft in flight". Acts of sabotage and armed attacks against international civil aviation and its facilities, which are not uncommon, are not covered by the Convention. But they have now been covered by another Convention, namely, Montreal Convention of 1971. Article 1 of this Convention defines and enumerates the offences of unlawful interference with aircraft as follows:

> 1. Any person commits an offence, if he unlawfully and intentionally:
>
> (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft in flight, or

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39. Agrawala, n. 7, pp. 30-31.

40. ICAO Doc. 8877-LC/61, p. 148.

(b) Destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight, or

(c) Places or causes to be placed in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or the cause damage to it which is likely to endanger its safety in flight, or

(d) Destroys or damages air navigational facilities or interfers with their operation if any such act is likely to endanger the safety of aircraft in flight, or

(e) Communicates information which he knows to be false thereby endangering the safety of an aircraft in flight.

2. Any person also commits an offence if he:

(a) Attempts to commit any of the offences mentioned in paragraph 1 of this article

(b) Is an accomplice of a person who commits or attempts to commit any such offence. (41)

It should be noted that Article 1 portrays two common ingredients, namely, unlawfulness and malicious intention.[42] Secondly, the attempt and complicity give rise to the same degree of culpability as the Commission of the crime. Another major contribution of this Convention is that neither the persons who committed the offence nor

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41. Montreal Convention, 1971, n. 19, Article 1.

42. Abraham Abramovsky, "Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft, Part II: The Montreal Convention", Colombia Journal of International Law, Vol. 14, No. 2, 1975, p. 282.

nor their accomplices need be on board the aircraft. Under the Hague Convention it is necessary that the culprits and their accomplices must be on board the aircraft.

The Problem of Jurisdiction over the Crime

As all persons and things within the territory of a state fall under its territorial supremacy, the concerned state has jurisdiction over them. However, customary law of nations gives a right to every state to claim to so-called extra territoriality and, therefore, exemption from local jurisdiction, chiefly for its head, its diplomatic missions, its men of war, and its armed forces abroad.[43]

The problem posed by crimes committed on board an aircraft in flight is basically one of conflict of jurisdiction. By its very nature this crime is committed in more than one state and, consequently, more than one jurisdiction may be involved. The state of registration of the aircraft may legitimately claim jurisdiction over offences committed on board its national aircraft. The state in whose airspace a crime has been committed may claim the right to exercise jurisdiction over the crime. Similarly, the state of landing in the course of the commission of the offence may claim the same right. The

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43. L. Oppenheim, International Law Treaties, Vol. 1 (London, 1966), pp. 325-26.

state of the victim and that of the offender may sometimes also claim the right to exercise jurisdiction due to their connections with the persons involved. Of course, the state of landing is always in the best position to prosecute the offenders. But if the interest of the state of landing is not involved, it may be reluctant to exercise its jurisdiction. International law does not make it clear as to which state should get priority in the exercise of jurisdiction and which state, as a matter of right, can claim extradition of the offenders. After three important Conventions we still do not have definite provisions as to which state should get priority in exercising jurisdiction, although the Hague Convention of 1970 did try to provide a reasonably adequate framework for the purpose.

Meaning and Definition of Jurisdiction

In International Law the term "jurisdiction" has been defined differently by various authorities. The Harvard Research Draft defines the jurisdiction of a state as "its competence under international law to prosecute and punish for crime".[44] Dr. F.A. Mann says:

> When public international lawyers pose the problem of jurisdiction, they have in mind

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44. Harvard Law School, "Draft Convention on Jurisdiction with respect to Crime", Article 1(b), American Journal of International Law, Vol. 29, 1935, Supp., p. 439.

> the state's right under international law to regulate conduct in matters not exclusively of domestic concern. (45)

Professor Cheng has divided the term "jurisdiction" into two terms, namely, "jurisfaction" and "jurisdiction". According to him, the former denotes the legislative power of a state as well as the competence of its courts to apply such rules. The latter describes the actual administration of justice and the enforcement of such laws, such as powers of arrest, passing sentence, imprisonment, and so forth.[46] The jurisdiction is one aspect of the exercise of sovereignty by states, the limits of which are laid down by international law and any violation of these limits constitute a breach of international law.

In the Tokyo Convention on Offences and Certain Other Acts committed on Board Aircraft, 1963[47], a general definition of jurisdiction over crime in the air was provided in favour of the flag state, but concurrent jurisdiction was conferred on other states on grounds of territorial effectiveness, active or passive nationality, security of

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45. F.A. Mann, "The Doctrine of Jurisdiction in International Law", III RCDI (1969), p. 9, quoted in Sami Subber, Jurisdiction Over Crimes on Board Aircraft (The Hague, 1973), p. 49.

46. Professor B. Cheng, "Crimes on Board Aircraft", <u>Current Legal Problems</u>, Vol. 12, 1959, pp. 181-82.

47. For details see Chapter III.

the state, breach of flight rules, and the exercise of the jurisdiction was made necessary for the performance of obligations under multilateral agreements.[48] This mixed jurisdiction has long been regarded as the best solution.

While the Convention does not require mandatory extradition or punishment of hijackers, it does recognize several categories of possible state responses to seizures. Rather than allowing universal jurisdiction, the Convention calls for universal coercive measures to be taken against hijackers by the signatory states. There were certain other drawbacks of the Convention. The aircraft used in the air services of a state but registered in a foreign state were not covered by the Convention. Since registration and nationality are the attributes of states only, can an international organisation register an aircraft? What law will be applicable and who has jurisdiction over offences and acts committed on board such aircraft?

The Hague Convention for the Suppression of Unlawful seizure of aircraft 1971[49], tried to provide a reasonably adequate framework for the exercise of jurisdiction with obligation of extradition or rendition according to the

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48. Carg N. Horlick, "The Developing Law of Air Hijacking", Harvard International Law Journal, Vol. 12, 1971, No. 1, p. 35.

49. See Chapter III for details.

existence of an extradition treaty. Under this Convention (Article 4), three states possess concurrent jurisdiction over an alleged offender: first, when the offence is committed on board an aircraft registered in that state (Article 4(II)(a)); second when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board; (Article 4(I)(b)); third, when the offence is committed on board an aircraft leased without crew to the lessee who has his principal place of business, or, if the lessee has no such place of business, his permanent residence, in that state (Article 4(I)(c)). Jurisdiction of the state of registration is concurrent with that of other states described in the article and in no way preempts their jurisdiction, though many of the delegates maintained that the state of registration should have primary jurisdiction.

The provisions enumerated in Article 4(2) and Article 7 empower a state to exercise jurisdiction over an alleged hijacker no matter how or when he enters that country and regardless of nationality. No connection between the state and the hijacker need be established other than his presence within its boundaries and the state's refusal to extradite him.

The position remains substantially the same in the Montreal Convention for the Suppression of Unlawful

Acts against the safety of civil aviation, 1971[50], which was aimed at including other criminal offences on board aircraft. Article 5(1)(a) reaffirms and codifies the traditional jurisdictional basis of territoriality. This Convention adopted more or less all the provisions of the Hague Convention concerning jurisdiction. Like the Hague Convention, the Montreal Convention does not provide a system of priorities in the exercise of jurisdiction.

Practical considerations pose problems for assuring the punishment of convicted hijackers though accepted as an international obligation. A state may refuse to punish even hijackers motivated solely by personal reasons, (as against political considerations), simply to avoid doing anything considered desirable by a state with which it is on unfriendly terms. Another question that needs to be considered is the possibility of the general acceptance by states of submission of such disputes to international jurisdiction, including the possibility of the jurisdiction of an international tribunal. On the basis of an analysis of various cases in different parts of the world an attempt is made in the study to assess the trends of the developments in the law relating to hijacking.

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50. See Chapter III for details.

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Plan of Work

As far as the scheme of present study is concerned, first of all customary international law has been discussed and analysed. Sometimes hijacking is described as "aerial piracy". To remove any doubts, about the difference between hijacking and piracy a thorough analysis is made of the difference between the two crimes. The textual analysis of the concept of sovereignty, the territorial and the extra-territorial application of national laws etc. is the subject matter of Chapter II of this study. The discussion in this chapter is made in historical perspective because it helps in demonstrating the development of the law.

Chapter III is devoted to the study of three main Conventions on the subject, i.e., the Tokyo Convention of 1963, the Hague Convention of 1970, and the Montreal Convention of 1971. A critical analysis of the efforts by the International Law Association also forms a part of this Chapter.

In Chapter IV an effort is made to bring out the lacunas in the jurisdictional provision of these Conventions. The provisions relating to extradition and the lack of system of sanction have been discussed in the chapter.

The last chapter is a recapitulation of various aspects of the problem and our suggestions and recommendations.

Chapter II

JURISDICTION OF STATES UNDER CUSTOMARY INTERNATIONAL LAW

Soon after the aircraft was invented, lawyers began considering the problem of jurisdiction over crimes committed on board an aircraft and the question as to which law would be applicable. As early as in 1902, the French jurist P. Fauchille, one of the pioneer in air law, discussed the question as to which state was competent to exercise jurisdiction over offences and other acts committed on board an aircraft in flight. The question was also considered by international bodies during the various stages of development of civil aviation, even while the aircraft was still in its early stages of development. It has been rightly said that, "there are very few subjects connected with the law of the air on which lawyers have written so much or which they have discussed so often at international conferences as crimes on aircraft".[1]

Since there was no concept of hijacking or the other crimes on board an aircraft prior to 1930, the traditional customary international law dealt with piracy on the sea and conferred upon states the extraordinary jurisdiction to

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1. Sir Richard Wilberforce, "Crimes in Aircraft", Journal of the Royal Aeronautical Society, Vol. 67, March 1963, p. 175.

prosecute and punish sea pirates. Due to the resemblance of both the crimes, the rules and regulations applicable to piracy in international law have a direct bearing on the crimes committed on board an aircraft.

Some jurists recommended the term 'aerial piracy' for the crime of hijacking. But it is admittedly inaccurate.[2] Various other terms were also used for this crime, like "aerial hijacking", "unlawful seizure of aircraft" and "skyjacking". There was no law and no clear rule as to which state should exercise jurisdiction to prosecute and punish the "sky-pirates". But there was a strong feeling that hijacking is a crime against all nations and that the rules which were applicable to piracy should also be applicable to the gradually emerging concept of hijacking. However, the customary concept of piracy _jure gentium_[3] has certain limitations when applied to hijacking. It must be remembered that a pirate ship never claims allegiance with any nation[4], and in most cases piracy is committed to satisfy personal ends of the pirates. Another factor

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2. Edward McWhinney, _The Illegal Diversion of Aircraft and International Law_ (Leyden, 1975), p. 5.

3. "Jure gentium" is a Latin term referring to a law which is common to all nations. See, Charles G. Fenwick, _International Law_ (New York, 1948), 3rd edn., pp. 47-48.

4. Marjorie M. Whiteman, _Digest of International Law_, Vol. 4 (Washington D.C., 1965), pp. 648-66.

which should also be kept in mind while discussing the resemblance of both the crimes is that, the act of piracy violates international customary law only when it is "committed in a place not within the territorial jurisdiction of any state".[5] Moreover, piracy itself is neither a crime against the law of nations nor is there any universal institution to prosecute and punish the pirates.

In 1972, President Mr. Richard Nixon of United States firmly asserted that -

> "Piracy is not a new challenge for the community of nations. Most countries, including the United States, found effective measures of dealing with piracy on the high seas a century ago. We can and we will deal effectively with pirary in the skies today". (6)

If the President is right in the above assertion, customary international law relating to piracy must give us a framework to assess the legal problem of hijacking.

Evolution of Piracy Laws

International law is developed as a "code of conduct" using treaties, conventions and diplomatic agreements to govern the relations between the nations. But it also directs itself to the practices of individuals whose actions

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5. Draft Convention on Piracy, with Comments", The American Journal of International Law, Vol. 26, 1932, p. 760.

6. Richard M. Nixon, "U.S. Position on Air Hijacking", Public Information (Washington, D.C., 1972), series P 025, p. 3.

violate the "very essence of international goodwill" and "frustrate the efforts of the nations and their citizens" to live in peace and harmony.[7] One category of such individuals who violate international law is sea pirates.

Piracy is defined as an unauthorised act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.[8] In order to constitute piracy jure gentium, the act of violence must be sufficient in degree, e.g. robbery, destruction by fire, or other forcible depradations, such as grave injury to persons or property; it should be committed on the high seas as opposed to acts committed within the territorial jurisdiction of any state:

> "The offenders at the time of the commission of the act, should be in fact free from lawful authority or should have made themselves so by their acts, or as Sir L. Jenkins says, ... out of the protection of all laws and privileges .... In short, they must be in the predicament of outlaws". (9)

The customary international law which is formulated by consensus amongst states over a long period of time treats

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7. Hersch Lauterpracht, "Position of Individuals in International Law", Transactions of Grotius Society, Vol. 29, p. 4.

8. Whiteman, n. 4, p. 649.

9. Henry Wheaton, "Elements of International Law", ed., George G. Wilson (Oxford, 1936), p. 269.

pirates as common enemies of all mankind. The high seas are believed to be the common domain of all mankind and, therefore, a universal jurisdiction was proclaimed over the offence of piracy committed on high seas. Wheaton in his book describes the generally accepted principle as follows -

> It is true that a pirate jure gentium can be seized and tried by any nation, irrespective of his national character or of that of the vessel on board which, against which, or from which the act was done. The reason of this must be, that the act is one over which all nations have equal jurisdiction. This can result only from the fact, that it is committed where all have a common, and no nation an exclusive jurisdiction i.e. upon the high seas; and if on board ship, and of her own crew, then the ship must be one in which no national authority reigns. The criminal may have committed but one crime, and intended but one, and that against a vessel of a particular nation; yet, if done on the high seas ... he may be seized and tried by any nation. (10)

The most important question arises about the interests of the states to prosecute the guilty. What happens if the pirates remain inside the territorial waters of a state and come out occasionally to pursue their piratical activities? Another question is whether a state surrenders its vested interest to protect and punish its national on board a ship. Paul Stiel, a late nineteenth century author strongly recommends that "Piracy is not a special ground or criminal judicial jurisdiction under the law of

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10. Ibid., p. 163.

nations".[11] A jurisdiction can be acquired on the basis of passive protective personality principle. In this principle a state claims jurisdiction over a foreigner for injuries inflicted to the state's nationals.[12] The jurisdiction is acquired on the basis that the foreigners' activities are deemed injurious to the interests of the state.[13] But while exercising this sort of jurisdiction, a state cannot enter into another state's territory to capture the criminals. It has to honour the territorial integrity of other states. Only if there is some treaty between two states to this effect it can request the return of the criminals on the basis of reciprocity.[14] Backett further writes that -

> It is now a generally recognised and accepted rule of international law that a state possess the right of trying and punishing aliens for all infractions of its penal laws committed inside its territory. The question is whether it has a full extent of jurisdiction over them. There is certainly a recognized right (and it is sometimes said an international duty) to punish aliens for the crime of piracy on the

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11. Paul Stiel, Der Tatbestand der Piraterie, cited in Joseph Bingham, "Harvard Research on Piracy", American Journal of International Law, Vol. 26, 1932, p. 761.

12. S.S. Lotus Case, Permanent Court of International Justice, Series A, no. 10, 1927.

13. A detailed discussion is given at the end of this chapter.

14. W.E. Becket, "The Exercise of Criminal Jurisdiction over Foreigners", British Yearbook of International Law, 1925, pp. 44-60.

> high sea, which is unaffected by the nationality of the ship on which they are sailing. (15)

Though piracy on the high seas constituted a grave threat to international shipping and commerce, there are no recorded instances, prior to Harvard Draft Convention on piracy in 1932, of any attempt to codify laws of piracy. Early bilateral agreements concerning piracy were related solely to the elimination of the African slave trade. The documents of slave trading as an heinous act of piracy received international concurrence in the Treaties of Paris, Kiel and Ghent in 1814, declaration of 1815 Congress of Vienna and an addendum to the treaty of peace concluded in Paris on February 8, 1815.

Further support of the abolition of African slave trade was seen through multilateral treaties between Great Britain, Spain and Portugal between 1815 and 1817 and an agreement with Brazil in 1826.[16] Great Britain, Russia and Austria agreed to prohibit the slave trade as a piratical act in the Treaty of 1841 and conceded a mutual right to search flag vessels of their respective nations suspected of violating the convention.[17]

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15. Ibid., p. 50.

16. Henry Wheaton, n. 9, p. 165.

17. Ibid.

Consequently, in the pre-twentieth century, the slave trade rather than piracy as plunder on the high seas, received international attention through the promulgation of bilateral and multilateral agreements denoting it as a crime against the law of nations.

Efforts of the League of Nations to codify the law concerning piracy could not be fruitful. Thereafter, Harvard Research in International Law took initiatives to codify it. The Harvard Research on Piracy[18] embodies a most comprenehsive expression of customary law of piracy. It also provides the first reference to aircraft piracy as logical extensions from the high seas to high skies. The draft was modernized to the extent that no where we find the place for the expressions like piracy "*jure gentium*" or *hostes humani generis*". It formulated a clear functional rule of common territorial jurisdiction.[19]

The Harvard Research Draft deals with three distinctive areas of piracy - (i) problem of the definition; (ii) assertion that the piracy is crime against the law of nations, and (iii) the common jurisdiction of states to prosecute and punish the pirates. We are not concerned here with the previous two, only the third one is relevant for our purpose.

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18. Harvard Research in International Law, "Draft Convention on Piracy, with Comments", *American Journal of International Law*, Vol. 26, 1932, p. 764.

19. Comments, ibid., p. 759.

The meaning of the terms "jurisdiction" and "territorial jurisdiction" are found in Article 1, sections 1 and 2 respectively of the Harvard Draft.[20] Article 2 of the Harvard Research Draft proclaims the universal jurisdiction over the crime. It says that "every state has jurisdiction to prevent piracy and to seize and punish persons and to seize and dispose of property because of piracy. This jurisdiction is defined and limited by this Convention." While jurisdiction in international law concerns "the legal governmental power and right as limited by the law of nations"[21], territorial jurisdiction is said in Article 1 to include a state's jurisdiction "over

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20. Articles 1 and 2 of the Harvard Research Draft -

<u>Article 1</u>

As the terms are used in this Convention:

1. The term "jurisdiction" means the jurisdiction of a state under international law as distinguished from municipal law.

2. The term "territorial jurisdiction" means the jurisdiction of a state under international law over its land, its territorial waters and air above its land and territorial waters. The term does not include the jurisdiction of a state over its ships outside the territory.

3. The term "territorial sea" means that part of of the sea which is included in the territorial waters of a state.

4. The term "high sea" means that part of the sea which is not included in the territorial waters of any state.

5. The term "ship" means any water craft or air craft of whatever size.

21. Lassa Oppenheim, International Law, A Treatise, ed., Hersh Lauterpacht (London, 1947), p. 458.

its land, its territorial waters and the air above its land and territorial waters. The term does not include the jurisdiction of a state over its ships outside its territory".[22]

But the Harvard Draft does not reflect the traditional view of jurisdiction over piracy, the reason may be that the modernization of ocean shipping and transportation, coupled with increased use of commercial air travel, necessitated a revisionist approach to jurisdictional delineations under the law of nations.[23] A thorough perusal of the Draft shows that the common jurisdiction granted to all nations under international law provided a special ground for the apprehension, prosecution and punishment of pirates on the high seas. It extends rather than limits the ordinary well-known state jurisdiction over persons and territory. Thus, the Draft acknowledged the unilateral legitimacy of a nation-state to seize and prosecute those persons accused of a piratical act, and in doing so reaffirmed the equal common jurisdiction of all nations.

Incidents of Aerial Piracy (1930-58) and Geneva Convention on the High Seas (1958)

The first ever incidence of aircraft seizure took

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22. Article 1, section 2, n. 20.

23. Jacob M. Denaro, "In flight crimes, The Tokyo Convention and Federal Judicial Jurisdiction", Journal of Air Law and Commerce, Vol. 35, 1969, pp. 171-203.

place in 1930 when unsuccessful revolutionaries seized control of an aircraft in Peru in an attempt to flea that country. The second incident occurred after seventeen years, this time to escape from a communist country. In the period from February 1968 to September 1969, there were more successful acts of aircraft hijacking than there had been during the previous twenty years. Reports for some 121 completed hijackings have been found for the period from January 1948 through the beginning of September 1969.[24] While an upsurge in hijacking is evident in the periods 1948-1950 (seventeen instances) and 1958-1962 (seventeen instances), the figures for the period between February 1968 to the first week of September 1969 are remarkable. In 1968 there were thirty successful hijackings of aircraft. In the first 33 weeks of 1969 there were forty-six successful hijackings.[25]

On the basis of the Harvard Draft it can be argued that an aircraft seizure always involves robbery of the aircraft and threat of violence. But such attempts usually begin and terminate within the territorial jurisdiction of

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24. Alona E. Evans, "Aircraft Hijacking: Its Causes and Care", American Journal of International Law, Vol. 63, 1969, p. 697.

25. Ibid., pp. 697-98. The period 1948-50 was marked by political disturbance in Czechoslovakia and China: 1958-1962 was the period in which the Castro regime came into power and consolidated its authority in Cuba. There is no single explanation for the figures for 1968-69.

some state, thus placing the incidents outside the suggested guidelines of Harvard Draft.[26] In short, while the Harvard Draft did recognize that in future the piracy like acts might be committed in the air, it did not provide any workable solution for them.

The Geneva Convention on the High Seas of 1958 makes it quite clear that the laws relating to piracy on the "high seas" are also applicable to the piracy on the "high skies". Articles 14-22 specifically deal with piracy, whether committed by ships or aircraft.[27] Sami Shubber writes that in order to discern whether hijacking of aircraft amounts to piracy as defined by Geneva Convention on the High Seas of 1958, it is necessary to compare it with piracy under the regime of that Convention.[28] Article 15 of the Geneva Convention 1958 defines piracy consisting of the following acts.

1. Any illegal acts of violence, detention or any act of depradation, committed for private ends by the crew or the passengers of a private ship or a private

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26. Nancy Douglas Joyner, <u>Aerial Hijacking as an International Crime</u> (Leiden, 1974), p. 95.

27. Arthur H. Dean, "The Geneva Conference on the Law of the Sea: What was accomplished", <u>American Journal of International Law</u>, 52, 1958, p. 608.

28. Sami Shubber, "Is Hijacking of Aircraft Piracy in International Law", <u>British Yearbook of International Law</u>, 43, 1968-69, p. 194.

aircraft, and directed:

(a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft.

(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any state.

2. Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft.

3. Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

It is to be noted that the definition emphasises on the following factors - (i) the enumeration of illegal acts of violence shall be determined by municipal state law; (ii) that the pirates be motivated by private as opposed to political ends; (iii) that the act of piracy involve action from one ship to another ship and from one aircraft to another; (iv) that the acts of violence, detention, or depradation take place outside the jurisdiction of any state.[29] The duty of the state to suppress the act of piracy (Article 14) is further enhanced by Article 19 which

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29. Haro F. Van Panhuys, "Aircraft Hijacking and International Law", Columbia Journal of Transnational Law, Vol. 9, 1970, p. 5.

reaffirms the universal principle by which the state may extend their jurisdiction to apprehend and punish the pirates whose arena for such criminal activities has been the high seas or high skies.

It must be noted that in most cases the hijacking is committed for political as against private ends.[30] In several cases it is very difficult to ascertain whether the act was done to meet private ends or to fulfil some public ends.[31] The second factor, which distinguishes aircraft hijacking from piracy is that in the latter case the illegal violence and detention must be directed against another ship on the high sea. But in the case of hijacking the crime is committed on board an aircraft whereever it may be.[32] However, it may be noted here that under general international law, it has not been essential that piracy be directed against another vessel only.[33]

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30. The political motive was involved in 64.4% of cases of hijacking according to a report by INTRPOL; ICAO Doc. 8877-LC/161, p. 132.

31. Johnson, "Piracy in Modern International Law", Transactions of the Grotius Society, Vol. 43, 1957, pp. 76-78.

32. The question of the applicability of the Geneva Convention arose in the incident of Santa Maria (1961) when a group of persons aboard the ship seized a Portuguese liner "Santa Maria". There was great deal of controversy amongst the jurists about the applicability of the Convention as the act was not directed against another ship.

33. Oppenheim, "International Law", 8th edn., Vol. I, p. 609.

As mentioned earlier, the Geneva Convention recognizes an extension of piracy on the high seas to piracy in the high skies. However, the legal ingredients of piracy are not directly related to the aircraft. A clear distinction between aerial hijacking and air piracy must be drawn. The distinctive elements of air piracy are : illegal acts of violence, detention or any act of depredation committed - (i) for private ends, (ii) by the crew or passengers of a private aircraft against another, and (iii) on the high seas or in a place outside the jurisdiction of any state. Whereas unlawful seizure of aircraft or hijacking requires the following essential elements - (i) person on board an aircraft, (ii) unlawfully committing against the same aircraft an act of interference, seizure of other wrongful exercise of control, and (iii) while the aircraft is in flight.[34]

The Concept of Sovereignty in the Air and its Relevance to International Law

The foundation of international law rests upon the general principle that the states occupy a specified geographical area. Within that limited area states are said to possess "sovereignty",[35] i.e. "supreme authority over

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34. S.K. Agarwala, Aircraft Hijacking and International Law (Bombay, 1973), p. 77.

35. The word "sovereignty" was used in France for an authority, political or otherwise, which had no authority above itself. The word "sovereign" is derived from the late Latin "superanus". For details see Oppeheim, International Law - A Treatise, ed. by Lauterpacht (London, 1961), pp. 120-23.

territory and nationals".[36] In the early considerations of international law governing aircraft and aviation, probably the most discussed question was whether state has the sovereignty over the airspace above its territory.

A draft Convention on the regulation of aerial navigation was submitted to the Institute of International Law in 1902, in which two theories of the sovereignty over air space were propounded, viz., the theory of complete freedom of the air and the theory of sovereignty of states over the air space above their territories.[37] The Institute accepted a proposal that the ideas be combined to allow the freedom of the air subject to the right of self defence.[38] Earlier in 1901, the French jurist Fauchille proclaimed the view of the complete freedom of the air on the analogy of Grotius' doctrine of the freedom of the seas.[39] Fauchille based his theory on the assumption that it was impossible for a state to control the air space above the level up to which a building can be erected.[40] Prior to 19th century

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36. James L. Brierly, The Law of the Nations, 4th edn., Oxford, 1949, p. 142.

37. Honig, Legal Status of the Aircraft (The Hague, 1956), pp. 10-12.

38. Ibid., p. 10.

39. Hazeltine, The Law of the Air (London, 1911), p. 45.

40. Honig, n. 37, p. 10.

whosoever supported the concept of sovereignty in the air space, supported it in the basis of the ability of the subjacant state to have effective control over this and not otherwise.[41]

Over the high seas, it was generally admitted that the air space was free. But with regard to the air space over land, including internal and territorial waters, we may reduce the above discussion to three theories.[42]

1. That the air is free, subject only to the rights of states required in the interests of their self-preservation. This theory is mainly based on the argument advanced by Fauchille that the air is incapable of appropriation because it cannot be actually occupied. But sovereignty does not imply continuous presence. "A state can exercise sovereignty over a huge desert, or the summit of an uninhabitable mountain, if it is in de facto control and is in a position to suppress internal disorder and repel external attack. In that sense a state does control the air space above it".[43]

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41. J.C. Cooper, "High Altitude Flight and National Sovereignty", International Law Quarterly, July 1951, pp. 411-18.

42. Arnold Duncan Mcnair, The Law of the Air (London, 1953), pp. 6-8. And also see Hazeltine, n. 39 for a scholarly discussion on the controversy.

43. Mcnair, Ibid., p. 7.

2. The second theory was based upon the analogy of the maritime belt of territorial waters. There is a lower zone of territorial air space and a higher and unlimited zone of free air space over the land and waters of each state.

3. The third theory was that a state has complete sovereignty in its whole air space to an unlimited height.

As we have said above, the principle of sovereignty over the air space is usually regarded as a corollary of the theory that the air space above the territory of a state is integral part of that territory. This view is supported by a number of writers.[44] During World War I, states acted upon the assumption that they had complete sovereignty and jurisdiction over their air space.[45] Article 1 of the International Convention for the regulation of aerial navigation 1919 (The Paris Convention) endorsed the same view.[46]

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44. Kuhn, "The Beginning of an Aerial Law", <u>American Journal of International Law</u>, Vol. 4, 1910, p. 109; and Hersey, "The International Law of the Aerial Space", <u>American Journal of International Law</u>, Vol. 6, 1912, p. 381.

45. J.M. Spaight, <u>Air Power and War Rights</u> (London, 1947), pp. 420 ff.

46. Article 1 of the International Convention for the Regulation of Aerial Navigation of 1919 (The Paris Convention): "The High Contracting Parties recognize that every power has complete and exclusive sovereignty over the air space above its territory. For the purpose of the present Convention the territory of a state shall be understood as including the national terri-

The theory of the sovereignty over the air space is thus established. The question of liberty of passage through air space was dealt with immediately after the sovereignty over the air space had been affirmed. Sovereignty is not absolute but can be restricted by treaty provisions.[47] It should be noted that there is a practice, developing among the nations to relax their sovereignty rights in favour of civil aviation.[48]

The International Civil Aviation Conference held in Chicago in 1944 recognised the complete and exclusive sovereignty of states in regard to the air space above their territory. Article 1 of the Chicago Convention is almost identical to Article 1 of the Paris Convention.

Not only over the air space of land territory, but also over the air space of the territorial and internal waters of the state, a state has sovereign jurisdiction.

Footnote 46 Cont'd...

tory, both that of the Mother country and of the colonies and the territorial waters adjacent thereto". The Pan American Aeronautics Federation 1926, Scandinavian Air Conference of 1918 and the Air Navigation Conference of 1910 also pronounced in favour of the sovereignty principle.

47. Article 2 of the Paris Convenion 1919 provides for innocent passage.

48. In Corfu Channel (Merit) case (1949), a liberal attitude was taken by Judge Azevedo towards the civil aircrafts. He said that as regards military aircrafts, a state can make regulations as it deems fit but a "tendency" according to the learned Judge exists to permit the free passage of civil aircrafts.

Article 2 of the United Nations Convention on Law of the Sea, 1983, reads as follows.[49]

> Article 2 - Legal status of territorial sea, of the air space over the territorial sea and of its bed and sub-soil:
>
> 1. The sovereignty of the coastal state extends, beyond its land territory and internal waters and in the case of an archipelagic state, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
>
> 2. This sovereignty extends to the air space over the territorial sea as well as to its bed and sub-soil.

On the basis of the evolutionary process outlined above, the principle of sovereignty and an exclusive jurisdiction of each state over the air space above its territory is firmly anchored in international air law. Just as sovereignty extends over the territorial waters, the sovereignty of a state extends to territorial air space. The air space above the high seas is free.

Nationality of the Aircraft

The question of the nationality of aircraft has been discussed at considerable length since the beginning of this century. The issue of the nationality is of immense value, both in case of an aircraft as well as a ship. The

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49. Law of the Sea; Official Text of the United Nations Convention on Law of the Sea with Annexes and Index (United Nations, 1983), p. 3.

international practice of states recognizes that a state of which a ship is a National by virtue of this fact alone gains a certain legislative, administrative and judicial jurisdiction over the vessel on both the international and domestic levels that no other state can challenge.[50] There are two opposing views on the subject, viz., the view of those who favour the analogy with ships, and the view of those who want to have aircraft treated in the same way as motor cars etc. Supporters of the first view hold that there must be a special relationship between the aircraft and its country of origin, expressed by conferring on the aircraft the nationality of that country. The supporters of the latter view consider it sufficient if the aircraft can be identified by a certain distinctive mark. It should be noted here that in case of a ship it is commonly recognised practice that the flag of the ship's nationality is flown as a symbol of her nationality. But it is only a prima facie and not a conclusive evidence.[51] The right to fly a given flag is governed not by international law, but by municipal law and the regulations of the state whose flag is flown. The state, whose flag the ship is flying,

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50. Whiteman, n. 8, Vol. 9, p. 3.

51. Ibid., p. 5.

must provide the documents to that effect.[52]

Although Fauchille advocated free air theory, he acknowledged that the states concerned ought to have certain rights of self-preservation. Thus, he himself made a distinction between a national and a foreign aircraft. In 1908 Daus declared that "an aircraft flying above the high seas must be regarded as part of the territory of its country of origin".[53] In the same year Kuhn expressed the view that it might be advisable to introduce government supervision of aircraft which would entail the registration of all aircrafts, as well as the granting of a nationality, which would be symbolized in the flag it would carry.[54]

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52. Article 91 of the III United Nations Convention on the law of the sea:

    Nationality of Ships

    1. Every state shall fix the conditions for the grant of its nationality to ships for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship.

    2. Every state shall issue to ships to which it has granted the right to fly its flag documents to that effect.

53. Daus, "Die Luftschiffahrt in Staats und Volkerrechtlicher Minsicht, 1908, p. 6 as quoted by J.P. Honing, The Legal Status of Aircraft (The Hague, 1956), p. 42.

54. A.K. Kuhn, "Aerial Navigation in Its relation to International Law", Proceedings of American Political Science Association, 5th Annual Meeting, 1908, p. 85.

Fauchille in his report to the Institute of International Law suggested that every aircraft should have a nationality. In the draft for an international air agreement drawn up at the International Air Navigation Conference held at Paris in 1910, the very first chapter was devoted to the nationality and registration of an aircraft. Article 6 of the Paris Convention of 1919 and article 17 of the Chicago Convention of 1944 also recognized the principle of nationality of the aircraft.[55] The registration and the nationality of the aircraft not only provide the jurisdiction to the state of registration but they also ensure that whereever such aircraft may be, it shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force.[56]

Criminal Jurisdiction Over Aircraft

According to Article 1 of the Chicago Convention, 1944, a state has jurisdiction to prosecute and punish crimes and offences committed on board aircraft within the area of its sovereignty, which also includes the air space above its territory. But in most of the cases the states refrain themselves from exercising the jurisdiction if

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55. Article 6 of the International Convention for the Regulation of Aerial Navigation 1919 (the Paris Convention) and Article 12 of the Convention of International Civil Aviation of 1944 (Chicago Convention).

56. Article 12 of Chicago Convention of 1944.

their interests are not harmed, or when the aircraft is flying over the high seas when the crime is committed on board. In the United States vs. Cordova, a U.S. court declared that it did not have jurisdiction to punish the offences since the offence was committed over the high seas. Later this lacuna was rectified by passing a legislation.

As a general rule the states declare their criminal law applicable to persons who commit a crime on board vessels carrying their national flag. In a number of cases the states exercise jurisdiction although the aircraft carrying their flag is located in or over the territory of another state. According to the rules of international law, a state has jurisdiction over offences committed by aliens abroad their ships when such an offence is also punishable in the country where it is committed.[57] Thus a state has two types of jurisdiction over its air space i.e. territorial and extra-territorial.

Territorial Jurisdiction

A state has complete and exclusive jurisdiction within its territory and this is the cardinal rule of international customary law. A state has jurisdiction over any crime committed on its territory within the territorial waters

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57. Honig, The Legal Status of Aircraft (The Hague, 1956), p. 138.

and in its air space. This is so irrespective of the nationality of the aircraft. In other words, foreign aircraft as well as national aircraft are governed by this principle. Professor Jennings put it in the following words.

> The first principle of jurisdiction is that in general every state is competent to punish crimes committed upon its territory. This rule requires no authority to support it; it is everywhere regarded as of primary importance and of fundamental character. (58)

An important objection to the territorial jurisdiction may be that in the course of flight the aircraft generally passes through the jurisdiction of several states. For example, if an aircraft passes over Europe with a speed of more than 400 kms. per hour, it is bound to attract the jurisdiction of more than one state and it will be very difficult to determine which state was flown over at the time of occurrence of the offence. Apart from the above-mentioned objection to the territorial system, it may be argued that often the state above whose territory the aircraft is flying has not the slightest interest in what happens on board the aircraft and will, therefore, be unconcerned with questions of the applicable law and jurisdiction.

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58. Professor Jennings, "Extra-territorial Jurisdiction and the United States Anti-trust Laws", British Yearbook of International Law, 1975, p. 148.

Another problem which is worth considering is the extent and type of the jurisdiction a state may exercise within and without its territory. So far as the type of jurisdiction is concerned, a state can lawfully exercise its legislative, executive and judicial jurisdiction. It can legislate for a situations, and if they materialize, it can arrest the offenders and try them. As regards the extent of jurisdiction, a state cannot exercise its executive jurisdiction in the territory of another state without the latter's consent.[59] For example, if while travelling on an aircraft registered in state A, X stabs Y while the aircraft still is in the air space of state A, and the aircraft subsequently lands in state B, state A cannot send a unit of its police force into the territory of the latter in order to fetch X and bring him back to its territory for trial. "There is general agreement that a state may not, unless by permission, exercise its power in a physical sense in the territory of another state".[60]

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59. Judge Huber said in the Palmas case (1928), between U.S. and the Netherlands, that territorial sovereignty is the point of departure in settling most questions that concern international relations : "Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the function of a state". <u>United Nations Reports of International Arbitration Awards</u>, Vol. 2, 1928, p. 838.

60. Professor Jennings, n. 58, p. 149.

So it may be concluded that, within its boundaries including territorial waters, the state of registration of an aircraft has exclusive jurisdiction over crimes committed on board an aircraft flying therein. It is also true with regard to the foreign aircraft flying within the said boundaries. The basis for assertion is the principle of sovereignty under customary international law. Thus, the state, which is not the state of registration of the aircraft, can also exercise jurisdiction on the basis of the principle of sovereignty discussed above.

Extra-Territorial Jurisdiction

> Though it is true that in all systems of law the principle of territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their actions to offences committed outside the territory of the state which adopts them, and they do so in ways which may vary from state to state. (61)

Extra-territorial jurisdiction means the extention of the jurisdiction of a given state to conduct and acts outside its territory. States are entitled under international law to make laws applicable to their nationals abroad, even though they are in a foreign territory.

As early as in 1910, Fauchille was convinced that unrestricted application of a single principle could not

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61. The S.S. Lotus Case, PCIJ Series A-10, 1927, p. 20.

lead to a solution. In principle he agreed that the law of the flag could be overridden by territorial law if the acts in question affected the interests of the state flown over. Fauchille thus abandoned the principle of complete freedom of the air, which he originally advocated. He made provisions for the jurisdiction of the state whose public order and safety were threatened by the offences committed.[62]

The Draft of the Paris Convention 1919 adopted the system of territorial jurisdiction. According to it legal relations between persons on board the aircraft were to be governed by the law of the flag.[63] Article 4 of the Harvard Research Draft, stated that -

> A state has jurisdiction with respect to any crime committed in whole or in part upon a private ship or aircraft which has its national character. This jurisdiction extends to -
>
> (a) Any participation outside its territory in a crime committed in whole or in part upon its private ship or aircraft; and
>
> (b) Any attempt outside its territory to commit a crime in whole or in part upon its private ship or aircraft. (64)

Therefore, the state of registration of the aircraft has, under international law, the competence to subject

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62. Honing, n. 57, p. 106.

63. Ibid., pp. 108-09.

64. Article 4, A.J.I.L., Vol. 29, 1935, Supplement, pp. 508-09.

to its laws crimes committed on board the aircraft bearing its nationality while flying outside its territory. There is no problem when the offence is committed over high seas or over no man's land, but the problem arises when the aircraft is flying over the territory of another state. It attracts the jurisdiction of two states, one of the flag and that of the state flown over. In the case of conflict, however, the jurisdiction of territorial state prevails. This is because, under international law, if there is a conflict between the various forms of sovereignty, territorial sovereignty overrides quasi-territorial sovereignty and personal sovereignty, while quasi-territorial sovereignty overrides personal sovereignty.[65]

The exercise of jurisdiction on the part of national state of the aircraft will be the manifestation of its personal sovereignty.[66] Consequently, "any exercise of executive jurisdiction on the part of the captain of an aircraft in compliance with national law, such as the arrest of a passenger, will be a violation of the sovereign rights of the state flown over".[67]

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65. B. Chang, General Principles of Law as Applied by International Courts and Tribunals (London, 1953), pp. 138-39.

66. Ibid., p. 184.

67. Savarkar Case (1911), Scott. I Hague Report, p. 276.

Now we come to the question of the extra-territorial jurisdiction of the states which are not the state of the registration of the aircraft. International law empowers states to exercise jurisdiction over crimes committed by its nationals outside its territory. This right can be exercised whether the offence has been committed on the territory of another state or in its air space. There are four principles relating to the exercise of extra territorial jurisdiction by a state of non-registration.

1. The Nationality Principle

Under customary international law a state has the right to exercise jurisdiction over its nationals without territorial limits, if the state's legitimate interests are involved.[68] In S.S. Lotus case, Judge Moore said that "no one disputes the right of a state to subject its citizens abroad to the operations of its own penal laws, if it sees fit to do so".[69] The Harvard Research also provided for the jurisdiction of a state over any crime committed by a "natural person", outside its territory who was the national of that state.[70] This extra-territorial

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68. Jenning, "Extra-territorial Jurisdiction and the United States Anti-Trust Laws", British Yearbook of International Law, Vol. 33, 1957, p. 153.

69. PCIJ Reports, A-10, p. 92.

70. Article 5(a) of the Harvard Draft, American Journal of International Law, Vol. 29, 1935, p. 519.

jurisdiction is based on the personal sovereignty of every state over its nationals. But as a matter of fact a state cannot take executive action against its nationals abroad unless there is some treaty to that effect. The question arises what would be the test of nationality? In this connection we must consider the genuine link theory propounded by the International Court of Justice in Nottebohm case, 1953. The court said, "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments".[71]

Therefore, it may be concluded that under customary international law, a state has the jurisdiction over the conduct of its nationals in foreign registered aircraft flying outside its territories.

2. <u>The Principle of Passive Nationality</u>

According to this principle, "A state claims the right to punish aliens for offences committed abroad to the injury of their own nationals".[72] In S.S. Lotus case, judge Moore vigorously criticised this principle. According to him this type of jurisdiction would create a panic. "In this way an inhabitant of a great commercial city, in which foreigners congregate, may in the course of an hour

71. *I.C.J. Reports*, 1955, p. 53.

72. Jennings, n. 68, p. 154.

unconsciously fall under the operation of a number of foreign criminal codes".[73] A foreigner will have to submit to the territorial laws of that country; he cannot carry his own laws for his protection. The Harvard Research Draft, too did not approve it.

3. Principle of State Security

According to this principle, a state may exercise extra-territorial jurisdiction over crimes of aliens directed against its security, credit, political independence, or territorial integrity.[74] Article 7 of the Harvard Draft provided -

> A state has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that state, provided that the act or omission which constitute the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed. (75)

According to this principle, if a national of state Y, while travelling in an aircraft registered in state D, in the air space of state Z, deals with counterfiet currency of state N, the latter state also has the jurisdiction over such an offence on the basis of security principle.

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73. P.C.I.J. Reports, A-10, p. 92.

74. Jennings, n. 68, pp. 154-55.

75. See, American Journal of International Law, Supplement, Vol. 29, 1935, p. 579.

4. Universality Principle

A state can exercise jurisdiction over certain offences for the protection of the general interest of all the nations, like in cases of piracy. We have already discussed this in the beginning of the chapter.

It may be noted here that all the states do not have laws for the extra-territorial operation of their jurisdictions. The cases of Cardova[76] and R. Vs. Martin[77] show the lack of jurisdiction of the United States courts. English criminal law also does not operate extra territorially.[78]

The above discussion reveals that customary international law prescribes an extraordinary jurisdiction to prosecute and punish the pirates only. Since the concept of hijacking or other crimes on board an aircraft is a new concept, a proper and satisfactory answer about the problem of state jurisdiction has not been given in traditional international law. This led to the emergence of a new conventional law to give a relatively satisfactory basis of jurisdiction. The Tokyo Convention of 1963 tried to provide a legal basis for the unification of the rules

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76. See, 1950, United States Aviation Reports, p. 1.

77. See, 1956, W.L.R., Vol. 2, p. 975.

78. R. Vs. Keyn (1876), 2 Ex. D., p. 160.

on the jurisdiction over crimes on board an aircraft. The Hague Convention of 1970 specifically dealt with the crime of unlawful seizure of aircraft. The Montreal Convention of 1971 also came out with its provisions regarding other crimes like sabotage or placing of bomb on board aircraft etc. All this forms the theme of the following chapter.

Chapter III

JURISDICTION UNDER CONVENTIONAL INTERNATIONAL LAW

A state can exercise jurisdiction over the crimes committed on board aircraft on the basis of the principle of nationality if the aircraft is registered in that state. A state, which is not the state of the registration of the aircraft, can also claim jurisdiction on the basis of territorial sovereignty, active or passive nationality, and on the basis of its security. Customary international law provides for the jurisdiction of various states without fixing the priorities.

Preliminary Efforts by International Law Association

Realizing the importance or regulations on the issue of jurisdiction in aerial crimes, the International Law Association dealt with the subject soon after the First World War. The Aviation Law Committee of the International Law Association compiled a report which included a draft for a set of regulations concerning jurisdiction in civil and criminal matters over all persons carried in aircraft. This draft was discussed during the 31st conference of the International Law Association at Buenos Aires in 1922,[1]

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1. International Law Association, Report of the Thirty-first Conference, Buenos Aires, 1922, p. 211.

and it received further consideration during the 33rd conference at Stockholm in 1924.[2] It contained the following provisions with respect to crimes and offences -

Article 2

A public airship which is above territory of a foreign state remains under the exclusive jurisdiction of the state of which it has the nationality.

A private airship which is above the territory of a foreign state is subject to the laws and jurisdiction of such state only in the following cases:

(1) With regard to every breach of its laws for the public safety and its military and fiscal laws.

(2) In cases of a breach of its regulations concerning air navigation.

(3) For all acts committed on board the airship and having effect on the territory of the said state.

In all other respects a private airship follows the laws and jurisdiction of the state of the flag.

The general rule laid down in this draft is that the law of the flag state of the aircraft is applicable to crimes and offences committed on board an aircraft in all cases where the interests of the state, flown over, are not

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2. Ibid. Report of the Thirty-third Conference, Stockholm, 1924, p. 113.

harmed. On the other hand, if the interests of the state flown over are harmed, then this state is entitled to prosecute and punish the guilty.[3]

The draft prepared by the International Law Association was put aside in 1950 when Professor Cooper prepared a report for the Association on the subject. Professor Cooper prepared his draft in the light of Chicago Convention which had already come into force in 1944. Cooper raised five questions about the jurisdiction. In the first question he asked: "Should the Chicago Convention as now in effect be accepted both in principle and terminology as the background for the proposed new Convention on the respective conflicts and jurisdiction of the state of flag of the aircraft and other states?"[4] Secondly, whether the civil and criminal jurisdiction should be dealt with together, or should criminal jurisdiction be dealt with separately and urgently? He himself felt that it was most important to deal with criminal jurisdiction first.[5] The third question he put forward was whether the jurisdiction in civil and state should be treated equally.[6] Fourthly, he asked whether the jurisdiction provided in the draft

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3. J.P. Honig, Legal Status of Aircraft (The Hague, 1955), p. 157.

4. International Law Association, Report of the Forty-fifth Conference, Lucerne, 1952, p. 114.

5. Ibid., p. 116.

6. Ibid.

Convention should be exclusive of all existing state legislations.[7]

Finally, "What general rules of jurisdiction should be provided as to civil aircraft in the draft Convention in addition to existing national legislation as to crimes committed on board?"[8] At its 45th conference at Lucerne in September 1952, the International Law Association decided to give priority to the problem of criminal jurisdiction, as recommended by Cooper.[9] We shall deal with the above questions raised by Cooper and answers given by him in the perspective of the Chicago Convention of 1944.

<u>Jurisdiction Under Chicago Convention of 1944</u>

Convention on International Civil Aviation Chicago 1944 is the main international agreement on the subject of public international air law. It prescribes the terms and conditions under which scheduled international services may be operated in the airspace of states other than the states of registry. It also establishes detailed conditions as to the nationality of the aircraft, obligations of the individual states to facilitate air navigation, and conditions to be fulfilled with respect to aircrafts operating

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7. Ibid., p. 117.

8. Ibid.

9. Ibid., p. 109.

internationally. Besides, the Convention also created an organisation, called International Civil Aviation Organisation, for the regulation of the International civil aviation.

The Chicago Convention recognizes the complete and exclusive sovereignty of each state over the airspace above its territory.[10] Chapter II, entitled "Flight over Territory of Contracting States", establishes basic agreement among the contracting parties as to certain rights of aircraft of one state to operate in the airspace of other states. Article 11 of the Convention provides for the territorial applicability of the rules and regulations over the aircraft. It reads as follows:

> Subject to the provisions of this Convention, the laws and regulations of a contracting state relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory shall be applied to the aircraft of all contracting states without distinction as to nationality, and shall be complied with by such aircraftupon entering or departing from or while within the territory of that state.

Article 12 of the Chicago Convention provides:

> Each contracting state undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft

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10. Marjorie M. Whiteman, Digest of International Law, Vol. 9 (Washington, D.C., Department of State Publication, 1968), p. 352.

> carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each contracting state undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under the Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting state undertakes to ensure the prosecution of all persons violating the regulations, applicable.

The plain reading of above mentioned provisions of Chicago Convention shows that both the state of the registry as well as the state in whose airspace the aircraft exists have the jurisdiction over the aircraft. They are required to take measures that the aircraft shall comply with the rules and regulations of those states. It is based on the assumption that not only for the purpose of the criminal rules and regulations, this jurisdiction exists also for the purpose of the civil rules and regulations. According to Whiteman these provisions "place upon the state of registry, as well as upon the aircraft operator, an obligation to assure compliance with the rules and regulations of the state in the airspace of which the aircraft is being operated".[11] This also means that the regulations of the state in whose airspace the aircraft is flying has the preemption over the state of registry.

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11. Ibid., p. 366.

Under the terms of these articles both the states are entitled to prosecute a breach of their air traffic rules by any aircraft over their territory, besides being entitled to prosecute a breach of the air traffic rules of another country by an aircraft carrying its flag.[12] It is, of course, contrary to the Article 2 of the draft prepared by the International Law Association. In the draft only one state, that is the state flown over, had the jurisdiction. But under the Chicago Convention two states have jurisdiction. That is why Cooper declared that the draft should be in the conformity with the Chicago Convention. Two drafts were submitted before the International Law Association in this regard, one prepared by Cooper and another by Meyor. Cooper proposed that the following principles should be embodied in the draft Convention:[13]

> <u>Article 1</u>
>
> The jurisdiction of a contracting state extends:
>
> (a) to all aircrafts which bear its nationality mark wherever such aircraft may be;
>
> (b) to all aircrafts within its territory, including its airspace.
>
> <u>Article 2</u>
>
> For the purpose of conferring jurisdiction in case of a crime committed in the air space, such crime may be deemed to have been committed in the air space of any contracting state through which

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12. Honig, n. 3, p. 158.

13. International Law Association, n. 4, p. 116.

> the aircraft has passed, beginning with the last departure of the aircraft preceding the crime until the first landing thereafter.

Accordingly Cooper's draft referred to a number of jurisdictions. The state of the flag of the aircraft, the state of departure, the state of arrival, and the state over whose territory the aircraft had flown, all have the jurisdiction. Meyor agreed with Cooper that the principles and terminology of the Chicago Convention must be adhered to in drafting regulations on the application of criminal law and jurisdiction with respect to the crimes and offences committed on board aircraft, but he thought that Article 12 of the Chicago Convention was nothing more than a recommended procedure for the contracting states, and, therefore, Cooper's concurrent jurisdiction need not necessarily be followed.[14]

Meyor drafted his proposal as follows:[15]

> 1. Crimes committed on board aircraft in flight above the territory of state are subject to the laws and the jurisdiction of this stage, excepting the cases mentioned in paragraph 2.
>
> 2. Crimes committed on board of aircraft in flight above the territory of a state follow the laws and jurisdiction of the state of the flag -
>
>   (a) if it was practically impossible to determine where the crime has been committed;

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14. Meyor, Zeitscrift fur Luftrecht, Vol. I, 1953, p. 58. Quoted in, Honig, Legal Status of Aircraft (The Hague, 1955), pp. 157-58.

15. International Law Association, n. 4, p. 130.

(b) if the state in the airspace of which the crime has been committed decides in a proper space of time not to assume the jurisdiction.

Thus Meyor's proposal conflicted with the draft of Cooper since he preferred territorial jurisdiction over the concurrent one. Chauvean criticised both Cooper and Meyor. He pleaded for the application of the law of the flag, except in a case where the interests of the state flown over were affected.[16] Professor Arnold W. Knauth in his draft gave preference to the state of the first landing of the aircraft after the crime had been committed.[17]

Work Done by the International Civil Aviation Organisation (ICAO)

The ICAO, which was a creation of the Chicago Convention 1944, came into existence on 4th April 1947[18] with the objectives to provide a safe air transport to the people,[19] and to promote safety of flights in international aerial navigation.[20] In 1950, the Legal Committee of ICAO decided to take up the problem of the legal status of the aircraft

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16. Chauvean, International Law Association, n. 4, p. 132.

17. Professor Arnold W. Knauth, Ibid., p. 135.

18. Professor B. Cheng, The Law of International Air Transport, 1962, p. 31.

19. Article 44(d) of the Chicago Convention.

20. Ibid., (h).

and, accordingly, in 1953 set up a Legal Sub-committee to perform the task. The Sub-committee in its first plenary session in Geneva in 1956 decided to limit the scope of study to the criminal aspect only.[21] After prolonged discussions, drafting and redrafting, the legal sub-committee submitted a report to the Legal Committee during its 14th session at Rome in 1962. The Legal Committee prepared a final draft on the question of offences and other acts committed on board aircraft entitled "Draft Convention on Offences and Certain Other Acts Committed on Board Aircraft"[22] and submitted it to ICAO Council. This Rome draft was placed before the International Conference on Air Law held in Tokyo on 20th August 1963.[23]

The Convention on Offences and Other Acts Committed on Board Aircraft (The Tokyo Convention), 1963 (24)

The Tokyo Convention, 1963 was intended to create a suitable regime for the regulation of the question of jurisdiction over offences on board aircraft and to provide

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21. International Conference on Air Law, August-September, 1963, held at Tokyo, ICAO, Conference Document No. 5, pp. 3-4.

22. See Legal Committee, 14th session, Rome, Vol. I, Minutes, ICAO Documents 8302-LC/150-1, p. xix.

23. See, International Conference on Air Law, n. 21.

24. For the Text of the Convention see American Journal of International Law, Vol. 58, 1964, p. 566.

some solution for the problem.[25] It came into existence with the main objectives of unifying the rules on jurisdiction and filling the gap in jurisdiction.[26]

Jurisdiction of the State of Registration of the Aircraft Under Tokyo Convention

The most important feature of the Tokyo Convention was the creation of the extra-territorial jurisdiction of the national state of the aircraft. Article 3(1) provides the state of registration with the jurisdiction over the crimes committed on board her national aircraft abroad.[27] During the discussion of legal sub-committee in Munich in 1959, the Chairman of the sub-committee said that "one of the aims of paragraph (1) of Article 3 was to acknowledge the jurisdiction of the state of the flag, including extra-territorial jurisdiction of that state".[28] Furthermore, during the discussion on Article 3(1) of Montreal Redraft of 1962, at Rome, the U.S. representative stated that -

> The principal purpose of Article 3(1), as originally conceived, had been to provide international

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25. Sami Subber, Jurisdiction Over Crimes on Board Aircraft (The Hague, 1973), p. 17.

26. Charles F. Butler, "The Path to International Legislation against Hijacking", in McWhinney, ed., Aerial Piracy and International Law (Leiden, 1971), p. 29.

27. See Appendix for Article 3 of the Tokyo Convention.

28. Legal Committee, 12th session, Munich, Vol. I, p. 77.

> recognition for the extra-territorial exercise of jurisdiction by one state over an event that might occur in the airspace of another. This was not commonly accepted principle of international law .... if contracting states were going to be permitted to exercise extra-territorial jurisdiction, some international document should specifically authorise this. This was what Article 3(1) had set out to do. (29)

Another objective of the Tokyo Convention was to fill the gap in jurisdiction, which could not be achieved unless the Tokyo Convention was applied extra-territorially.[30] Article 3(1) of the Tokyo Convention reads: "The state of registration of the aircraft is competent to exercise jurisdiction over offence and acts committed on board". The following illustration can show the jurisdictions involved. An aircraft which is registered in state A was flying over the state B when one of the passengers stabbed another. The aircraft subsequently flew over state C, where the injured person died. The aircraft finally landed in state D. What would be the legal position if we assume that the offender belongs to state E and the victim was from state F? If we analyse the jurisdiction, we find that a number of jurisdictions are involved. State A can claim the jurisdiction as the state of registration, provided their laws apply extra-territorially. States

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29. See Legal Committee, 14th session, Rome, Vol. I, p. 79.

30. Sami Subber, n. 25, pp. 24-28.

B and C can claim the jurisdictions on the basis of territoriality principle as the offence was committed within their airspace. State D can claim jurisdiction as it is the state of landing and the States E and F can claim jurisdiction on the basis of the nationality of the accused and the victim. If two or three of these states wish to exercise jurisdiction, there will be a conflict of jurisdictions. It is true that the priority goes in favour of the territoriality principle,[31] but in this example the territories of two states i.e. B and C are involved and it is very difficult to find out, in most of the cases, where the crime was actually committed. But Article 3(1) of the Tokyo Convention makes it quite clear that the state of the registration of the aircraft has the authority to apply its laws to the events occuring on board its aircraft while in flight no matter where the crime might have been committed.[32] The state of registration in our illustration is state A. Therefore it has the jurisdiction irrespective of where the aircraft might have been in flight at the time of the commission of the offence. All the other states are excluded, but Article 4 of the Convention

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31. Cheng, "Crimes on Board Aircraft", Current Legal Problems, Vol. 12, 1959, p. 183.

32. Boyle and Pulsifer, "The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft", Journal of Air Law and Commerce, Vol. 30, 1964, p. 328.

gives jurisdiction to the territorial state subject to the specified conditions. Sami Subber says that, "this in effect may amount to the creation of one uniform rule, namely, the jurisdiction of the national state over offences committed on board its aircraft flying without its boundaries. Therefore, it could be said that the body of Article 3(1) of the Convention has created among the parties to it, the principle of extra-territorial jurisdiction of the state of registration of the aircraft".[33] Commenting on Article 3(1) of the Tokyo Convention, Fitz Gerald says that "it is intended to achieve two main objectives .... to ensure that, in the case of offences against penal law committed on board aircraft, there will always be a jurisdiction (namely, the state of registration) in which a suspected offender may be tried".[34]

On the contrary, it is sometimes argued that although the Convention has specifically referred to the jurisdiction of the state of registration, the other jurisdiction may not have been denied and included implicitly. But it is submitted that if this interpretation is accepted it would be nothing except maintaining the status quo. The intention

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33. Sami Subber, n. 25, p. 22.

34. Fitz Gerald, "Offences and Certain Other Acts Committed on Board Aircraft: The Tokyo Convention 1963", Canadian Year Book of International Law, 1964, p. 192.

of ICAO Legal Committee was to avoid the conflict of various jurisdictions. As the Legal Committee said:

> National jurisdiction in respect of criminal acts are based on criteria which are not uniform: for example, on nationality of the offender, on nationality of the victim, on the locality where the offence was committed, or on nationality of the aircraft on which the crime occurred. Thus, several states may claim jurisdiction over the same offence committed on board aircraft in certain cases. Such conflict of jurisdiction could be avoided only by international agreement. (35)

In the words of the American delegation at the Tokyo Conference, 1963:

> One of the important aims of Conventions, in so far as international transport was concerned, was that they created a uniformity of rule on which persons might rely. (36)

Moreover a treaty is to be interpreted keeping in view its object and purpose. Article 31(1) of the Vienna Convention on the law of the Treaties, 1969, provides:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (37)

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35. Report of the Subcommittee on the Legal Status of the Aircraft, Geneva, September 1956, Legal Committee 11th session, Tokyo, 12-25 September 1957, ICAO Document 7921-LC/143-2, pp. 158-59, para 8(91 and (b).

36. See, International Conference on Air Law, Tokyo, August-September 1963, Vol. I, Minutes, ICAO Document 8565-LC/162-1, p. 227, para 32.

37. Article 31(1) of the Vienna Convention, 1969, See *American Journal of International Law*, Vol. 63, 1969, p. 885.

For these reasons, we come to the conclusion that Article 3(1) of the Tokyo Convention recognizes the jurisdiction of the flag state to the exclusion of all others, except the territorial state under certain specified conditions provided by Article 4, although this is not expressly stated in the Convention.

Jurisdiction of Other States Which are not the National State of the Aircraft

We have already seen customary international law on the jurisdiction of the states, which are not the state of registration, in the preceding chapter. In the Tokyo Convention Article 4 is included for this purpose. It runs as follows:

> A contracting state which is not the state of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:
>
> (a) the offence has effect on the territory of such state;
>
> (b) the offence has been committed by or against a national or a permanent resident of such state;
>
> (c) the offence is against the security of such state;
>
> (d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuver of aircraft in force in such state;
>
> (e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such state under a multilateral international agreement.

This provision deals with the jurisdiction of the contracting states which are not the states of registration. Nowhere in this provision do we find the word territorial state. Therefore some of the people argue that all the states have jurisdiction over the crime, wherever it may have been committed. But this proposition cannot be accepted. The words "in flight" show that the aircraft must be in flight within the territory of the contracting state. A state cannot exercise its jurisdiction as long as the aircraft is "in flight" in the territory of some other state. If the aircraft is on high seas it is solely under the jurisdiction of flag state and except in the case of piracy, self defence, or a treaty obligation, no other state can exercise jurisdiction over such aircraft (or ship).[38] The words "has effect on the territory" denote the physical effect, which is not possible unless the aircraft is in the territory of the state concerned. Boyle and Pulsifer comment on Article 4 of the Convention in the following terms:

> The purpose served by Article 4 is to prescribe the conditions under which the state in whose airspace an offence has been committed may interfere with an aircraft while in flight within its airspace for the purpose of exercising its criminal jurisdiction .... It is important to note precisely the limitation imposed on the so-called

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38. Sami Subber, n. 25, pp. 84-87.

territorial state by this Article. The territorial state is not to interfere flight of aircraft in its airspace except under the enumerated conditions in order to exercise its criminal jurisdiction. (39)

Paragraphs a, b, c, d and e envisage the conditions which a territorial state is to satisfy to acquire the jurisdiction.

(a) Offences having Effect on the Over-flown Territory

As we have said above, the "effect over territory" means physical effect. As Professor Jennings says, "It is used to denote that part of the offence which occurs in the claimant territory and upon which territorial jurisdiction is therefore founded. In this sense 'effect' means a direct physical result which is itself a constituent or essential element in the offence charged: whether it be the killing of a person by a shot from a gun; or the receipt of fraudulant letter which is acted upon".[40] Article 4(a) is nothing but the expression of the territorial principle in which the jurisdiction of the territorial state is established to prosecute and punish for crime commenced without the state, but consummated within its

39. Boyle and Pulsifer, "The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft", Journal of Air Law and Commerce, vol. 30, 1965, pp. 336-37.

40. See, Jennings, Nordisk Tidsskrift for International Ret (1962), p. 215, quoted by Sami Subber, n. 25, p. 89.

territory.[41]

(b) <u>The Offences has been committed by or against a national or a permanent resident of such state</u>

This paragraph of Article 4 brings two principles of customary international into picture, i.e. the principles of active and passive nationality, which we have discussed in the preceding chapter.[42] The nationality of the offender and the victim are the decisive factors, which may led to the interference in the flight of an aircraft for the purpose of exercising the criminal jurisdiction.

(c) <u>Offences against the security of the territorial state</u>

If the security of the contracting state is endangered, it acquires the jurisdiction to intefere with the flight and prosecute and punish the offender. Offences of this nature are like espionage, dropping the political leaflets, endangering the territorial integrity and political independence of the state concerned, etc.

(d) <u>Breach of air regulations in the territorial state</u>

This provision in essence repeats Article 12 of the Chicago Convention which provides -

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41. Jennings, "Extra-territorial Jurisdiction and United States Anti-trust Laws", <u>British Year Book of International Law</u>, Vol. 33, 1957, p. 156.

42. See, Chapter II for detailed discussion.

> Each contracting state undertakes to adopt measures to ensure that every aircraft flying over or manoeuvering within its territory shall comply with the rules and regulations relating to the flight or manoeuvre of aircraft there in force. Each contracting state undertakes to ensure the prosecution of all persons violating the regulation applicable. (43)

The commander of the aircraft or any other person who has taken the control of the aircraft unlawfully may be responsible for such breach of the regulations and thus may be prosecuted by the territorial state. Like in a case of unlawful seizer, the hijacker would be prosecuted under Article 4(e) and Article 11 of the Tokyo Convention.

(e) Compliance of International Obligations by the Territorial State

According to paragraph (e) of Article 4 of the Convention, a state which is not the national state of the aircraft may interfere with an aircraft in flight if "the exercise of jurisdiction is necessary to ensure the observance of any obligation of such state under a multilateral international agreement". This is a somewhat complicated provision. Sami Subber has given two examples to the application of the provision. In the first example, on board an aircraft flying from Moscow to London a person takes possession of some secret documents detrimental to Warsaw Pact while the aircraft is flying over Romania.

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43. Article 12 of the Chicago Convention, 1944.

suppose the parties to the Pact have undertaken the obligation to take all measures to eliminate any danger to the alliance. Is Romania competent to compel the aircraft to land in order to exercise its criminal jurisdiction?[44]

Another example is to the effect, that in pursuance of the resolution passed by Security Council outlawing the export of arms, whether a state can exercise jurisdiction over an aircraft flying in its territory to export the arms.[45] Answer in both the examples is in affirmative, because in both the cases the intervention by the territorial state is to ensure the observance of an undertaking under a multilateral treaty.

Jurisdiction over Hijacking under Tokyo Convention

Article 11, is the only article in Chapter IV of the Convention which deals with the offence of unlawful seizure or hijacking of the aircraft. It reads -

> (1) When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, contracting states shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.

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44. Sami Subber, n. 25, p. 96.

45. Ibid.

> (2) In the cases contemplated in the preceding paragraph, the contracting state in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable and shall return the aircraft and its cargo to the persons lawfully entitled to possessions. (46)

The plain reading of para 1 of this article shows that all the contracting states have jurisdiction to deal with the crime, wherever it might be committed. But this leads to an ambiguity and treats the crime of hijacking equal to that of piracy.[47] It is certain that in the Tokyo Convention delegates did not regard the crime of hijacking as piracy. Talking about hijacking the U.S. representative remarked at Rome in 1962 that "the legislation of his country provide for acts of piracy on the high seas, but these acts to which he was referring (hijacking) did not come under the Convention on the High Seas and, consequently, did not constitute piracy.[48] But many jurists have tried to equate or even assimilate the crime of hijacking with piracy. We submit that the words "restoration of control of the aircraft to lawful commander", or preservation of his control, create a jurisdiction of all the contracting states. Professor Johnson is of the opinion that Article 15 of the Geneva Convention on the High Seas is capable

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46. See, Article 11 of the Tokyo Convention.

47. See, Chapter II for the detailed discussion.

48. See, ICAO Legal Committee, 14th session, Rome, Vol. I, Minutes, Document 8302-LC/150-2, p. 149.

of the interpretation that piracy included unlawful seizure of aircraft flying above the high sea.[49] It shows that this provision has created a limited type of universal jurisdiction in case of hijacking, so far as a state cannot go to the others' territory to "restore the control". In this regard we must remember that the emphasis is placed on the safe return of the aircraft, not on the prosecution of the offender.[50] Rather than allowing the universal jurisdiction, (as in the case of piracy), the Convention merely calls for "universal coercive measures" to be taken against the hijackers by the signatory states.[51]

Analysing the jurisdictional provisions of the Tokyo Convention, D.H.N. Johnson says, "there is a danger that whereas in the past there has sometimes been insufficient jurisdiction with regard to crimes committed on board aircraft, there may in future be too much".[52] It is a drawback of the Convention that it has not clearly expressed the relationship of Articles 3, 4 and 11. It

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49. Johnson, "Hijacking - Why Governments Must Act", Journal of Royal Aeronautical Society, Vol. 74, 1970, p. 143.

50. McWhinney, "International Legal Problem Solving", in McWhinney, ed., Aerial Piracy and International Law, pp. 21-22.

51. See, Aviation Week and Space Technology, vol. 91, no. 10, September 8, 1969, p. 14.

52. D.H.N. Johnson, Rights in Air Space (Dobbs Ferry, N.Y.: Oceana Publication, 1965), pp. 78-79.

does not say what would happen if a situation falls in more than one categories specified in these Articles. There might be conflict of jurisdiction as the Convention does not fix the priorities.[53] The Hague Convention 1970, has considerably removed the difficulties. After the adoption of the Tokyo Convention the ICAO started putting stress on the particular question of unlawful seizure of the aircraft. In December 1968, the Council of ICAO, having considered resolution A 17-37 of the Assembly of ICAO, decided to refer the question of hijacking to the Legal Committee for the formation of a sub-committee.[54] A sub-committee was formed with thirteen members, including India.

After prolonged discussions a diplomatic conference was called at the Hague on 1 December 1970 to consider the draft Convention prepared by the Legal Committee on the question of suppression of hijacking of aircraft. On 16 December 1970 the Conference adopted the Convention for the Suppression of Unlawful Seizure of Aircraft.[55]

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53. The Legal Committee decided in Munich, 1959, not to have a system of priority of jurisdiction. See, Legal Committee, 14th session, Rome, Vol. II, Documents, para 17, p. 14.

54. See, Resolution A 16-37, section (1) and (2), the text is reproduced in ICAO, Doc. 8838-LC/157, p. 37.

55. For the text of the Convention see American Journal of International Law, Vol. 75, 1971, pp. 441-44. The Convention came into force on 14 October 1971.

The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970

Nancy D. Joyner writes that "the weaknesses of the Tokyo Convention were translated into the strengths of the Hague and Montreal Conventions. The provisions set forth in the Tokyo Convention had left major questions unanswered regarding custody and prosecution of hijackers. The planners of the new Conventions utilized the Tokyo agreement as a vantage point from which an international law of hijacking could be effectively implemented".[56] It was very much needed to supplement the bland provisions of the Tokyo Convention, which were not much effective in the new upsurge of aircraft seizures.[57] The Tokyo Convention (especially Article 11) did not do much except re-stating the existing customary law without taking the "extra-steps of giving them teeth by providing effective sanctions for their enforcement".[58]

Jurisdiction of States Under the Hague Convention

Jurisdiction over the offence of hijacking is

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56. Nancy Douglas Joyner, Aerial Hijacking as an International Crime (Leiden, 1974), p. 165.

57. Malmberg Jr., Address by K.E. Malmberg Jr., American Journal of International Law, Proceedings 65, September 1971, p. 77.

58. Edward McWhinney, The Illegal Diversion of Aircraft and International Law (Leyden, 1975), p. 41.

governed by Article 4 of the Hague Convention, which runs as follows:

> 1. Each contracting state shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in following cases:
>
>   (a) when the offence is committed on board an aircraft registered in that state;
>
>   (b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
>
>   (c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that state.
>
> 2. Each contracting state shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the states mentioned in paragraph 1 of this Article.
>
> 3. The Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

According to this provision a number of states have right to take measures necessary to establish their jurisdiction over the offence of hijacking and other acts of violence committed by the hijackers in connection with the offence of hijacking. It is to be noted that the provision does not declare the competence of the states

enumerated therein to prosecute the guilty, but it merely says that each contracting state "shall take such measures as may be necessary to establish its jurisdiction". Does it mean that the state is to take measures to establish the jurisdiction without its enforcement, or does it really declare the jurisdiction of the contracting states.[59] If a state establishes the jurisdiction by enacting a legislation and then refuses to exercise it, would it be fulfilling its obligation? The basis for this question is the wordings of the provision, which require nothing more than taking measures to establish jurisdiction.[60]

On the other hand, it is argued that the intention is to confer the jurisdiction itself. The states are obligated to establish and exercise their legislative, executive and judicial jurisdictions. This interpretation is supported by Article 2 of the Convention, where the contracting states expressly undertake to exercise their legislative jurisdiction in a certain manner i.e. by making hijacking punishable by severe penalities.[61] The states are also under obligation to prosecute the guilty

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59. Sami Subber, "Aircraft Hijacking under Hague Convention 1970", International Law and Comparative Law Quarterly, Vol. 22, October 1973, pp. 706-7.

60. C.M.E. White, "The Hague Convention for the Suppression of Unlawful Seizure of Aircraft", The Review, International Commission of Jurists, Vol. 6, 1971, pp. 41-42.

61. Subber, n. 59, p. 707.

if they decide not to extradite them.[62] Let us now see the jurisdiction involved under the provision.

1. The State of Registration of the Aircraft

According to para 1(9) of Article 4 of the Convention, the state of registration of the aircraft has the jurisdiction over the offence of hijacking. This provision is declaratory of the customary international law principle of nationality and is based on Article 18 of the Tokyo Convention. It is interesting to note that the jurisdiction of the state of registration of the aircraft is equal to the other states described in the Article. The proposals of Soviet Union and Ghana were defeated in this regard to give priority to the state of registration.[63]

2. The State where the Aircraft lands with Hijackers

A contracting state has the jurisdiction under para 1(b) of Article 4 if the aircraft having hijacker on its board lands in its territory. It is not necessary that the offence of hijacking is committed within its airspace (territorial principle). But it amounts to creation of a new jurisdiction if the offence is committed outside its territory. "It may be said to be similar to the exercise

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62. See Article 7 of the Hague Convention.

63. See ICAO Doc. 8972-LC/185-2, p. 81.

of jurisdiction by states over piracy on the high seas or outside the jurisdiction of any state".[64] But this is of course a very important development and a very vital gap in the jurisdiction has been removed.

3. State where the Lessee of the Leased Aircraft has his Principal place of Business or Permanent Residence

This provision (Article 4(1)(c)) is also a new provision. According to this principle, if an aircraft registered in state A is leased without crew to a person having residence in state B and the aircraft is hijacked over high sea by a national of state C. There is no connection between the state B and the crime. But it has the jurisdiction to prosecute the hijackers. There is no such provision in Tokyo Convention. It is a welcome provision because if an aircraft is leased without crew, the state of registration may not have interest to prosecute the offender or it may not successfully prosecute the guilty as the crew of the aircraft return back to the place of the lessee, who would be essential witnesses in the case.[65] This provision is designed so that due to this lacunae no offender goes unpunished.

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64. Subber, n. 59, p. 709.

65. White, n. 60, pp. 41-42.

4. State where the Hijacker is Found

It is possible sometimes that the hijacker escapes after the commission of the offence to another contracting state and such state decides not to extradite him. In such a case this state has been conferred with jurisdiction. The guiding consideration was that the states most interested and most able to punish the offender may establish the jurisdiction.[66]

Criminal Jurisdiction according to National Laws

Article 4, para 3 of the Hague Convention says that "this Convention does not exclude any criminal jurisdiction exercised in accordance with national law". This provision is substantially identical to Article 3(3) of the Tokyo Convention. According to G.M.E. White, this provision is created with the intention of recognizing the existing jurisdiction through national legislations. She says, "Article 4 expressly provides that it does not exclude any criminal jurisdiction exercised in accordance with national law. Thus, although the Convention does not require a state to establish jurisdiction over, for example, hijacking committed by its own nationals in foreign air-

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66. S.K. Agarwala, Aircraft Hijacking and International Law (Bombay, 1972), pp. 41-42.

craft anywhere in the world, it does not preclude it from doing so".[67] According to Nancy Douglas Joyner, it is purposely designed so that municipal states can deal with serious criminal offences, e.g., murder, assault, kidnapping or extortion which might take place during the unlawful seizure of the aircraft.[68]

Not only the cases of unlawful seizure but also other acts of interference with the aircraft endanger the life and safety of the people aboard them.[69] Tokyo Convention, of course, dealt with the problem but it was mainly directed towards formulating an international multilateral agreement to prevent jurisdictional gaps through which offenders could escape punishment for unlawful and criminal acts committed on board an aircraft. Moreover, it was applicable in cases where the offender was on board an aircraft in the flight.[70] It should be noted

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67. White, n. 60, p. 41.

68. Joyner, n. 56, pp. 182-83.

69. For example on December 26, 1968 an EAI plane was shelled in Athens, Greece by a group of Arab terrorists. On February 18, 1969, four Arab terrorists attacked an EAI plane in Zurich, Switzerland, seriously wounding six passengers. On February 21, 1970, a Swissair aircraft was destroyed in flight, killing all passengers and crew members on board. See Abraham Abramovsky, "Multilateral Convention for the Suppression of Unlawful Seizure and Interference with Aircraft, part II: The Montreal Convention, Columbia Journal of International Law, Vol. 14, 1975, p. 268.

70. See, Fitz Gerald, "Offence and Certain Other Acts Committed on Board Aircraft: The Tokyo Convention of 1963", Canadian Year Book of International Law, No. 2, 1964, pp. 191-93.

that the Tokyo Convention was formulated prior to the occurrence of the unlawful interferences.[71] A conference was called for the purpose at Montreal in 1971, which adopted the Convention for the suppression of unlawful acts against the safety of civil aviation on September 23, 1971.[72]

The provisions for the jurisdiction in the Hague Convention and the Montreal Convention are more or less similar. Therefore, before discussing the drawbacks of the Hague Convention we take up the Montreal Convention.

Jurisdiction Under the Montreal Convention 1971

Article 5 of the Montreal Convention deals with the jurisdiction which provides -

> 1. Each contracting state shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:
>
> (a) when the offence is committed in the territory of that state;
>
> (b) when the offence is committed against or on board an aircraft registered in that state;
>
> (c) when the aircraft on board which the offence is committed lands in its territory with alleged offender still on board;
>
> (d) when the offence is committed against or on board an aircraft leased without crew

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71. Abramovsky, n. 69, p. 277.

72. See, for text of the Convention, American Journal of International Law, Vol. 66, 1972, p. 455.

to a lessee who has his principal place of business or, if the lessee has no such place of business his permanent residence in that State;

2. Each contracting state shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph (a), (b) and (c), and in Article 1 paragraph 2, in so far as that paragraph relates to those offences in the cases where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the states mentioned in paragraph 1 of this Article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Paragraph 1(a) of this Article reaffirms and codifies the traditional basis of territoriality.[73] Paragraph 1(b) and (c) and (d) are identical to the paragraph 1(a),(b),(c) of Article 4 of the Hague Convention. Article 5(1)(b) empowers the state of registration to exercise the jurisdiction. Article 5(1)(c) provides that the landing state preserves the jurisdiction.

Article 5(2) of the Convention is based on a similar provision in the Hague Convention, i.e., Article 4(2), except the words, " ... offences mentioned in Article 1, paragraph 1(a), (b) and (c) and in Article 1, paragraph 2, in so far as that paragraph relates to those offences ..."

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73. See for detailed discussion of the principle, Chapter II above, and L. Oppenheim, International Law, 8th edn., 1955, p. 461.

This was done because some states were totally against universal jurisdiction over all the alleged offenders[74], although several others pleaded for universal jurisdiction.[75] Therefore, the scope for the jurisdiction is limited to the cases following under Article 1(a), (b) and (d) and Article 1(2) only. Article 5(3) of the Convention is reiteration of Article 4(3) of the Hague Convention.

The Hague and Montreal Conventions have certainly helped in dealing with the offence of hijacking and the other unlawful acts and interference on the board an aircraft in flight. These Conventions have created a wider jurisdiction which is almost as wide as universal jurisdiction over the offence of piracy with only one difference. The difference is, that the basis of piracy is customary international law and, therefore, every state has a right to deal with the crime. On the other hand, the basis of jurisdiction in aerial crimes is the conventional law which, therefore, is applicable only to the states parties to the Conventions.

However, these Conventions may be criticised on the ground of their failure to provide a system to avoid

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74. For example, at the Montreal Conference, the French delegate stated, " ... his delegation belonged to those delegations which would have the greatest difficulties in signing text which was too broad". ICAO Doc. 9081-LC/170-1, p. 16.

75. Ibid., for example United States and Soviet Union.

conflict of jurisdiction. Under Article 4 of the Hague Convention, and Article 5 of the Montreal Convention, several states are entitled to prosecute and punish the guilty. There would be conflict if more than one state wish to try the offence. No system of priority has been provided by the Conventions. Proposals were submitted by the Soviet Union and Ghana for this purpose. The delegate from Ghana pointed out that the Hague Convention's jurisdiction provisions could be a source of international friction due to the possibility of the conflicting claims of jurisdiction.[76] Both states maintained that the state of registration should be given priority because it was the most concerned and affected state.[77] Even the United States was in favour of first priority in favour of the state of registration of the aircraft.[78]

A state is not obligated under the Conventions to establish jurisdiction over unlawful seizure of other acts of interference, committed abroad. But a contracting state can do so under Article 4(3) by its municipal criminal law[79], but this would not make the crime extraditable

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76. ICAO Doc. 8979-LC/162-2, p. 33.

77. Ibid., p. 81.

78. See Charles F. Butler, "The Path of International Legislation Against Hijack", in ed., McWhinney, Aerial Piracy and International Law, 1971, p. 34.

79. White, n. 60, p. 41.

under Article 8 of the Hague and Montreal Conventions. None of these Conventions provide that extradition is mandatory. Extradition has been left on the existence of mandatory provisions of extradition. These Conventions also do not provide for sanctions against the states which do not fulfil their obligation under the Conventions. The lack of these two systems causes the inapplicability of whatever the mixed and limited jurisdiction provided by these Conventions. This will be discussed in the next chapter.

Chapter IV

NEED FOR A NEW LAW FOR THE PUNISHMENT OF OFFENDERS

Professor McWhinney said in 1976 that:

> If the Tokyo Convention of 1963 can fairly be described as purely hortatory in practical significance, the two later Conventions of the Hague and Montreal do attempt to face up to the problem of applying sanctions to the individual hijacker or aircraft saboteur by requiring contracting states either to extradite the offender when they find him within their territory, or themselves to move to punish the offender. (1)

Yet there are gaps in the jurisdictional provisions provided by the three Conventions.[2] First, neither the Tokyo Convention nor the Hague and Montreal Conventions provide a system of priorities in the exercise of jurisdiction, as we have seen in the last chapter. During the discussion on the Montreal Convention, the Soviet Union proposed that the state of registration be granted priority of jurisdiction. The Soviet delegate maintained that -

> The state of registration would have the greatest interest in the case because any offence directed against crew, passengers, aircraft or cargo would inevitably affect the safety of the aircraft itself. (3)

In addition, he suggested that the adoption of his

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1. Edward McWhinney, The Illegal Diversion of Aircraft and International Law (Leyden, 1976), p. 48.

2. Ibid.

3. See, ICAO Doc. 9081-LC/170-1, p. 61.

proposal would prevent possible disputes between states which are competing for the jurisdiction.[4] After a debate the Soviet proposal was rejected by a vote of 33-9 with 8 abstentions.[5] But even if the Soviet proposal had been accepted it would have been an utter failure in the absence of mandatory provisions for extradition.

Extradition of the Offenders under the Hague and Montreal Conventions

The two Conventions (The Hague and Montreal) require only that once a ratifying state declines to extradite the offender, it should submit the case to its prosecuting authorities. Article 7 of the Hague and Montreal Conventions provide in the same words that -

> The contracting state in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged without exception, whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of the state. (6)

From this article one may conclude that once a party to the Convention declines an extradition request of another member state, it is obliged to prosecute the offender.

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4. Ibid., p. 58.

5. Ibid., p. 62.

6. Article 7 of the Hague Convention and also Article 7 of the Montreal Convention.

But despite the mandatory terms as "without exception whatsoever", it may not be as effective or as forceful as it appears on the face.[7] The states are bound under these Conventions to submit the case to its competent authorities for the purpose of prosecution.[8] But there is no guarantee that the prosecution will follow. In many cases the state, motivated by their political interests, never submit the case to their competent authorities or even if they do it, they deliberately try to linger it on to the indefinite period.

Article 8 of the Hague Convention declares the offence of hijacking as an extraditable crime. It says that -

1. The offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between contracting states. Contracting states undertake to include the offence as every an extraditable offence in every extradition treaty to be concluded between them.

2. If a contracting state which makes extradition conditional on the existence of a treaty receives a request for extradition from another contracting state with which it has not extradition treaty, it may at its option consider the Convention as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested state.

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7. Abraham Abramovsky, "Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft, Part I : The Hague Convention", Columbia Journal of Transnational Law, Vol. 13, no. 3, 1974, p. 398.

8. McWhinney, n. 1, p. 48.

3. Contracting states which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested state.

4. The offence shall be treated, for the purpose of extradition between contracting states as if it had been committed not only in the place in which it occurred but also in the territories of the states required to establish their jurisdiction in accordance with Article 4, paragraph 1. (9)

Article 8 of the Montreal Convention of 1971 carries the same provision for extradition except the word "offence" used in this Article has become "offences". The parties to the Hague Convention and the Montreal Convention agreed to include this concept of extraditability in existing extradition treaties as well as those which are to be concluded in future. So far as the existing treaties are concerned, states parties to the Conventions expressly undertook to include hijacking as an extraditable offence in these treaties.[10] The net result of this is that existing extradition treaties between contracting parties have been automatically amended by this provision.[11] But the Conventions do not compel a contracting state to

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9. Article 8 of the Hague Convention of 1970.

10. Sami Subber, "Aircraft Hijacking under the Hague Convention 1970 - A New Regime", International and Comparative Law Quarterly, Vol. 22, 1973, p. 718.

11. Ibid.

extradite an offender upon the request of another party to the Convention. The object of Article 8 seems to be that the plea of hijacking being a political crime is no longer available. However, a party to the Convention may still deem a particular hijacker to be a political refugee and grant him asylum. There are the two generally regarded exceptions included in the bilateral extradition treaties. First if the crime is committed by the nationals of the requested state,[12] and second if the offenders are regarded a political offenders.[13] Since Article 8 instructs states to exercise extradition, subject to the conditions provided by the law of the requested state,[14] a nation may lawfully reject an extradition plea based upon the "nationality" or "political offence" exceptions if they appear in the extradition treaty with the requesting state.

Moreover, with the proviso that it should submit the case to its competent authorities for the purpose of prosecution, a member state may, pursuant to the express provisions of Article 7 of the Convention, refuse an extra-

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12. Whiteman, Digest of International Law, Vol. 6, 1968, pp. 800, 875.

13. On the disputed issue of "political offence" as an extraditable crime, See Lora L. Deera, "Political Offences in the Law and Practice of Extradition", American Journal of International Law, vol. 27, 1933 pp. 247-70; and Garica Mora, "The Nature of Political Offences: A Knotty Problem of Extradition Law", Virginia Law Review, Vol. 48, 1962, p. 1229.

14. The Hague Convention, Article 8, paragraph 2.

dition request.[15] The proposal of Poland and the Soviet Union to mandate extradition of alleged offenders irrespective of their motive for unlawful seizure of the aircraft was defeated.[16] Article 8(4) permits all the states which have jurisdiction over the crime under Article 4 of the Hague Convention (Article 5 in case of the Montreal Convention) to request extradition. However, no guidelines are provided for determining as to which state is entitled to priority. Thus, if more than one request is made, the requested state may extradite the offender to any one of the requesting states.

The absence of a provision for mandatory extradition may enable countries which habitually give shelter to offenders to evade extradition in spite of these Conventions. By adhering to a strict interpretation of Article 7 of the Convention, these states need only present the matter to their prosecuting officials for their consideration.

Enforcement of the Tokyo, the Hague and the Montreal Conventions

The International Civil Aviation Organisation which has been formed under the Chicago Convention, 1944 consists of an Assembly and Council. The Council has been entrusted

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15. Abramovsky, n. 6, p. 403.

16. ICAO Doc. 8979-LC/165-1, 1972, p. 129.

with certain mandatory[17] and permissive[18] functions. Some of the mandatory functions are : to report to, carry out recommendations or determinations of the Council, report to the Assembly any infraction of this Convention, and adopt international standards and practices. One permissive function is to investigate, at the request of any contracting state, any situation which may appear to present avoidable obstacles to the development of international air navigation and to report thereon. The Assembly can examine and take appropriate action on the reports of the Council and decide on any matters referred to it by the Council.

Another defect of the Hague and Montreal Conventions is that there is no provision for the possible sanctions against a contracting state that wilfully or negligently fails to fulfil its obligation under the Conventions, either to extradite or to prosecute the hijackers. Not only this, but there are a few nations who actively support the crime. The example of Indian Airlines Plane, which was hijacked to Lahore (Pakistan) on January 30, 1971, is the best example to quote.[19] The Pakistan Government granted asylum to the hijackers and they were acclaimed as

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17. Article 55 of the Chicago Convention.

18. Ibid., Article 55.

19. See, Times of India, January 31 to February 6, 1971.

heroes.[20] The hijackers blew up the plane in full view of Pak troops. India informed the Preisdent of ICAO on February 1, 1971 about the incident. The ICAO asked Pakistan to permit aircraft occupants and cargo to continue journey immediately. This was not done. The failure of ICAO to take measures against Pakistan led India to suspend all overflights of Pakistani aircrafts over Indian territory. In this case Pakistan not only violated the provisions of Chicago and Tokyo Conventions but also violated the General Assembly resolution of December 12, 1969[21] on the 'forcible diversion of civil aircraft in flight' and the resolution of November 25, 1970.[22] In another case of an Indian Airlines Plane's hijacking to Pakistan, on 24th August 1984, the passengers of the plane alleged that the arms were supplied to hijackers at Lahore airport by the Pakistani authorities.[23] Criticising the indifferent manner in which the Pak government was dealing with the hijackers issue Mr. Rajiv Gandhi, the Prime Minister of

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20. There are some other examples when the hijackers were welcomed as heroes. Syria printed a special stamp in 1969 to commemorate the seizure of a Trans World Airline Boeing 707 jetliner to Damascus. The stamp boldly depicts the aircraft, with its nose section blown off, surrounded by the jubiliant hijackers. See, R. Hotz, "More on Hijacking", (editorial), Aviation Week and Space Technology, Vol. 91, no. 19, November 10, 1969, p. 11.

21. Resolution 2551(XXIV).

22. Resolution 2645(XXV).

23. See, Times of India, August 25 to August 29, 1984.

India, stated that a simple case of "unlawful possession of arms" had been registered against the terrorists involved in the recent hijacking of an Indian Airlines jet, while hijackers of a Pakistan International Airlines (PIA) plane were sentenced to death.[24] It is a very dangerous trend. There must be some sanctions which can be applied against delinquent states.[25]

For this purpose, the United States prepared a plan with a proposal for collective action by the signatories to the Conventions to suspend airline services with those countries which refuse to honour the obligation either to extradite or to punish aerial hijackers or aircraft saboteurs generally. The United States' Draft Convention on Sanctions (a Convention regarding the safety and security of International Civil Air Transport Services) was presented as a working paper and circulated by ICAO Legal Committee in October 1970.[26] But these measures were opposed by France, Great Britain and the Soviet Union. The United States therefore withdrew it.[27] These efforts were frustrated because the majority of states were not prepared to create an enforcement machinery outside the United

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24. See Times of India, November 21, 1984.

25. McWhinney, n. 1, p. 48.

26. See ICAO Legal Committee/Working Draft No. 776, 9 October 1970.

27. McWhinney, n. 1, pp. 52-53.

Nations' ineffective system of enforcement action under the authority of the Security Council.[28]

Another legal objection the French Government raised was that the Hague Convention established legal obligations only between states parties to it and, therefore, it permitted imposition of sanctions only against those parties, a legal consequence arising out of Articles 34 and 35 of the Vienna Convention on Treaties. In the absence of any provision legally to bind third parties who had not signed and ratified the Hague and Montreal Conventions,[29] such a sanction in this view would be impermissible.

The failure of sanction-based approach was evident due to political interests and values of various states. As John B. Rhinelander writes, "A policy to support the principle of sanctions is of course quite different from taking a decision to implement a joint action in a given case. The question whether a sanction, such as suspension of air services, would ever be used, involves sensitive and difficult political, economic and legal considerations for every state. There would be, without question, a reluctance to impose such a drastic remedy on the part of many states."[30]

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28. S.K. Agrawala, Aircraft Hijacking and International Law (Bombay, 1972), p. 126.

29. McWhinney, n. 1, pp. 58-59.

30. John B. Rhinelander, "The International Law of Aerial Piracy, New Proposals for the New Dimensions", in McWhinney, ed., Aerial Piracy and International Law, (New York, 1971), pp. 69-70.

The primary concern in responding to the new dimensions of the threat of hijacking today is, of course, to ensure the safety and well-being of the passengers and crew. Recent efforts of governments to curb hijacking have been directed towards security measures at airports and on board aircraft. Such measures were the subject of intensive discussion in the Extraordinary Seventeenth ICAO Assembly, which met in June 1970. Among the steps that have been introduced are examination of passengers by the use of electronic and other surveillance devices; physical searches of persons and luggage, and the use of various kinds of profiles on potential hijackers. A procedure has been developed to warn crew members of a possible hijacking on board aircraft. The United States and some other states have decided to place specially trained guards on board commercial airlines.[31]

Some suggestions may be made keeping in view the magnitude of the risk involved to human life and property in hijacking. The states should be obliged to extradite hijackers and the plea of political motive should not be available to them.[32] Article VII of Genocide Convention provides that genocide cannot be considered a political

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31. Ibid., pp. 61-62.

32. S.C. Chaturvedi, "Hijacking and the Law", Indian Journal of International Law, Vol. 14, 1974, p. 102.

crime.[33] This article provides that -

> Genocide and other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition. The contracting parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force. (34)

Article 8 of the Hague and Montreal Convention can be amended likewise. It should be expressly stated that hijacking shall not be considered a political crime for the purpose of extradition.[35] If the hijackers know that escape from the state of registration of the aircraft is not going to profit them, as they are likely to be extradited, they may be deterred from carrying out the hijacking.[36]

This is not the only instance where the offenders with political motive have to be extradited. The General Assembly in its Resolution 8(1) of February 13, 1944 on the Extradition and Punishment of War Criminals and in the Resolution 170(II) of October 31, 1947 on the surrender of War Criminals and Traitors has consistently affirmed that the war criminals are to be extradited. Weis says

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33. Genocide Convention 1948, For the text of the Convention, see American Journal of International Law, Vol. 45, Supp. 7, 1951.

34. Ibid., Article VII.

35. Gerald F. Fitz, "Development of International Legal Rules for the Repression of the Unlawful Seizure of Aircraft", Canadian Yearbook of International Law, 1969, p. 292.

36. Chaturvedi, n. 32, p. 102.

that -

> The principle that particularly heinous crimes, such as crimes against humanity, even if perpetrated in pursuance of a particular policy, should not be considered a political offence and should therefore not be excluded from extradition, can be regarded as widely recognized today. (37)

Both the Conventions, the Hague and Montreal, have failed to declare in unambiguous terms that hijacking is a crime against the Law of the Nations. Calling the various acts as merely "an offence" is not of much use.[38] This is a serious drawback of these Conventions. If such an amendment is accepted, the offenders will lose the protection of their home state, or any other state which is likely to give asylum to them. Everyone will be entitled to apprehend a hijacker or other offenders and they may be brought to justice anywhere in the world.

As we have already discussed, no attempt has been made to solve the problem of conflict of jurisdictions in these Conventions. In order to solve the question of jurisdiction it is most relevant to consider the extent to which the hijackers and the offence are particularly connected with any one country. "The domicile or residence of the parties, the situs or real or personal property,

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37. P. Weis, "The United Nations Declaration on Territorial Asylum", 7 Canadian Yearbook of International Law, 1969, p. 137.

38. Chaturvedi, n. 32, p. 103.

the locus of crimes, torts of legal transactions all these may be of fundamental importance.[39] For the purpose of avoiding conflict of jurisdiction it has been suggested that the accused in all the cases may be tried by an international tribunal set up in advance. U. Thant, the then Secretary General of U.N., proposed in 1970 that the hijackers should be tried by an international tribunal. Speaking at a dinner marking the 25th anniversary of the United Nations on 15 September 1970, he said: "Many hijackers have not been brought before any court of justice although the overwhelming majority of peoples and governments have rightly condemned them".[40] The international air transport was an activity, which must be placed under an international rule of law.[41] He therefore suggested that it might be of help if all governments pledged themselves to extradite the skyjackers irrespective of their nationality or political affiliation and bring them before an agreed international tribunal.

In spite of all the practical difficulties, the proposal made by U. Thant can be of immense value, if implemented, and it should be given a serious consideration. In 1950 the International Law Commission suggested that it

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39. McNair, The Law of the Air (London, 1964), 3rd edn., p. 263.

40. Indian Express (New Delhi), September 16, 1970.

41. Ibid.

was possible to establish an international judicial organ for the trial of persons charged with genocide or other crimes over which the jurisdiction would be conferred by treaties.[42]

The chief obstacle which comes in the way of creation of an international tribunal is "national sovereignty". It is certainly incompatible with the effective functioning of an international organisation.[43] But the maintenance of peace and security requires a partial surrender of sovereignty in favour of international organisations. The inadequacy of purely national tribunals to deal effectively with the crimes in the air raises a need for the establishment of impartial international judicial organ.

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42. For the text of the report see, American Journal of International Law, Vol. 44, Supp., 1955, p. 136.

43. See, Goodrich Hambro and Simons, Charter of United Nations, 3rd edn., 1969, pp. 37-38.

Chapter V

CONCLUSIONS

As the foregoing discussion suggests, much has been done by some States unilaterally and by a number of States in common efforts through multilateral Conventions to bring hijacking and other international crimes on board an aircraft under control.

The Tokyo Convention of 1963 brought about for the first time in the history of airlaw an international instrument designed to regulate the complex problem of jurisdiction over crimes and other dangerous acts committed on board aircraft in flight. Prior to 1963 rules of jurisdiction concerning crimes on board an aircraft varied from one State to another. A clash of jurisdiction would occur if two or more states wished to exercise jurisdiction with regard to a particular crime committed on board an aircraft in flight. The regime created by the Tokyo Convention may be described as a considerable improvement on the regime under international customary law. The Convention created one uniform system whereby the state of registration of the aircraft can assume jurisdiction over the crimes committed on board its national aircrafts, wherever they may be. The territorial state, i.e. the state flown over, can also do so provided some conditions are satisfied, such as the crime being against

a national of such state, its territory, and security etc. Thus the territorial states conceded a certain amount of the exercise of their sovereign rights in this field. This was something new in air law in view of the exclusive jurisdiction of the territorial state over its airspace (Article 1 of the Chicago Convention of 1944, which is a rule of international customary law).[1]

It may be seen that the rules of jurisdiction are closely related to the principle of the nationality of the aircraft. The Tokyo Convention applies to the aircrafts registered in contracting states alone. As we have seen, the principle of the nationality of the aircraft raises several problems. Some solutions for these problems have been provided by the Convention itself. According to Article 18 of the Tokyo Convention provides for the registration of the aircrafts of the joint air transport operating organisations in a designated state. ~~There~~ These aircrafts bear the nationality of the designated state. However, the major problem of the aircraft Charter remained unsolved, in spite of the awareness of the drafters of its significance and importance in the field of civil aviation. But this is now covered by the Hague Convention of 1970.

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1. See Professor Jennings, "International Civil Aviation and the Law", British Year Book of International Law, Vol. 22, 1945, p. 195.

The main advantage of the Tokyo Convention was that at least one jurisdiction was always available whether the crime was committed on high seas or terra nullius. Apart from it the Convention provided the aircraft commander crew members and passengers with wide range of authority to act against anybody threatening the safety of an aircraft. Thus, in the words of Professor Johnson, the Tokyo Convention was certainly "a step on the road towards a more mature and more comprehensive law of the air".[2]

The Hague Convention of 1970 and the Montreal Convention of 1971 may be considered as big steps forward in the effort of the international community to suppress hijacking of aircraft and remove the threat caused to international civil aviation by it. These Conventions have enlarged the number of states competent to exercise jurisdiction which, till now, were unrecognised in an international Convention. First is the jurisdiction of the state where the charterer of an aircraft has principle place of business or permanent residence, and the second is the jurisdiction of the state where the hijackers (or other offenders) are found.

The scheme of jurisdiction over the offenders under these Conventions give to almost all the contracting states the right to exercise jurisdiction over the offenders on

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2. See D.H.N. Johnson, Right in the Air Space (Manchester, 1965), p. 78.

one basis or another. Thus, it makes it virtually impossible for a hijacker or any other offender to escape the normal process of the law. The universalization of jurisdiction in air crimes have brought the offence of hijacking very near to piracy under international customary law.

But despite all the significant provisions of these Conventions the offenders go unpunished. There are four main reasons. First, the priority in the exercise of jurisdiction has not been given. Second is the lack of mandatory extradition provisions. Third, there is lack of effective provisions of the sanctions against the states which do not fulfill their obligations under these Conventions. Lastly, the most important reason is the political motive behind the crime.

The most interested state in the offence of hijacking is the state of registration. Therefore, there must be a first priority in its favour. On the other hand, the most effective state for the prosecution of the offenders is generally the state of landing. But the state of landing may or may not be interested in prosecuting the offenders, for it may regard crime as political. Therefore, two steps are urgently needed to control hijacking. First, the crime must be declared as non-political, and second, there must be mandatory provisions for the extradition of criminals

to the state which is most interested in the prosecution of the crime.

The jurisdiction of states today to prosecute hijackers and other offenders is much wider. Almost all the states which may be involved or may be interested in the crime have been given jurisdiction to prosecute the offenders. But as we have already discussed, the problem arises when the state which has custody of the offenders neither prosecutes nor extradites them. Obviously, such a state does not fulfill its obligation under these Conventions. Therefore, there must be some sanctions against delinquent states for the actual application of the jurisdictional provisions of these Conventions.

The United States and Canada have been strong proponents of such sanctions and presented a draft Convention in April 1971 which was not acted upon by the International Civil Aviation Organisation (ICAO). In regard to specific proposals for some kind of international enforcement measures, during the discussion in the legal sub-committee of ICAO there was a division between those states which favoured an independent sanctions Convention, and those who preferred to amend the Chicago Convention for this purpose. The delegates of Denmark, Finland, Norway, and Sweden submitted a proposal (Nordic proposal) providing that a contracting

state which considered that another state had detained an aircraft and the persons on board, or had not taken measures to assure control of the aircraft to its commander, or had failed to take an offender into custody or to extradite him, or submit each such person for prosecution, could request that the ICAO Council be convened to deal with the complaint. The Council could inquire into the factual situation or, if authorised, could appoint a commission of experts to do so. If the Council found that the complaint was valid, it could recommend that the state concerned " ... take appropriate measures to remedy the situation".[3]

The sanctions could be applied either through joint concerted action by the international aviation community as such, or by individual states. The economic implications of the suspension of flights could be very serious not only for the state against which they are applied, but also for the states which apply them. It must be noted here that there may be a lack of complete solidarity on the part of many states. Because these measures may jeopardise their economic interests and, therefore, they may not adhere to the prescribed sanctions. In the alternative, the individual states must be free to apply the sanctions. Moreover, there should be an enforcement machinery, quite independent

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3. ICAO, proposals by the delegates of Denmark, Finland, Norway, Sweden, LC/Working draft No. 831, Rev. 24/1/73, p. 3.

from the present day United Nations machinery which may not take any action due to the use of veto by any of the big powers.

It is submitted that the success of these Conventions is dependent on the adoption of an enforcement framework whereby sanctions could be brought against an offending state to compel its adherence to existing international law obligations. These Conventions need "real teeth" to eliminate the heinous crimes on board an aircraft.

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