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RECENT DEVELOPMENTS IN AERIAL HIJACKING: AN OVERVIEW

IAN E. MCPHERSON*

ALTHOUGH THIS PART of the symposium has been entitled "Recent Developments in Aerial Hijacking," I feel that it might be useful if we had a brief refresher on the development of the international law relating to this subject. In any event, I am afraid that we must admit that anything within the last ten years or so, in law, is recent. This is particularly so with respect to the development of international law.

The first multilateral public international law treaty directed specifically towards the legal suppression of acts of violence affecting civil aviation was not concluded until 1963, and I refer here to the Tokyo Convention.¹ It was quite apparent for many years prior thereto to those interested in the subject, that the international law, and in many instances the domestic law, was badly wanting in this respect. As far back as 1931, a group of armed soldiers in Peru captured a Panagra airliner which they planned to use for dropping propaganda leaflets, and in many other countries where aviation had assumed significant proportions incidents of this nature are recorded. As a generality it is safe to say that when crimes were committed on aircraft overflying and landing in a country, particularly if the aircraft was registered in that country, the question of jurisdiction and with it the question of punishment of the offender did not pose a great problem. However, with the post-war rapid development of international commercial flying, the question of criminal jurisdiction and related problems assumed practical as well as academic significance. A well known case occurred in 1948 where one Cordova committed an assault on board an aircraft registered in the United States flying between Puerto Rico and New York. In the ensuing trial,² it was held that the United States had no jurisdiction to punish the perpetrator of the assault committed on an aircraft in flight over the high seas. As I understand it, it was as a direct result of this particular incident that your Congress passed the Act relating to Crimes In Flight Over the High Seas.³ Similar lacunas in criminal law jurisdiction were

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¹ 20 U.S.T. 2941; T.I.A.S. 6768 [hereinafter cited as The Tokyo Convention, Art.].

² United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1952).

³ 62 Stat. 685.

encountered in other parts of the world. In Canada, we only remedied this in 1959 when we extended the jurisdiction of our Criminal Code to cover Canadian aircraft registered wherever they were flying and any aircraft if they first landed in Canada after the offense had been committed.⁴ Although amendments to national legislation did much to eliminate the possibility of crimes committed on aircraft going unpunished, it was recognized in international legal circles that the matter of jurisdiction could only be satisfactorily resolved by an international treaty.

As you know, the International Civil Aviation Organization,⁵ which sits in Montreal, was established by the Convention On International Civil Aviation (Chicago Convention),⁶ signed in December, 1944, and is the body entrusted by over one hundred Contracting States to develop methods to ensure, amongst other things, the safe and orderly growth of international civil aviation throughout the world. The Legal Committee of ICAO has been the main instrument in developing the international law required to effect this object. It was the work of this Committee that culminated in the diplomatic conferences that agreed upon the three Conventions to which I am now going to refer.

The Convention on Offenses and Certain Other Acts Committed on Board Aircraft was open for signature at Tokyo on September 14, 1963.⁷ The Convention was intended primarily to ensure that when an offense had been committed on board an aircraft, at least one State, the State of registration of the aircraft, would be able to take jurisdiction over the suspected offender.⁸ The Convention also authorized the aircraft commander and others on board to take certain action with respect to the offender to preserve the safety of the aircraft⁹ and it placed obligations on Contracting States with respect to the offender when put in their custody.¹⁰ The Tokyo Convention does not define offenses and the only section directly relating to hijacking is Article 11 thereof which reads as follows:

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.

⁴ 1970 Rev. Stat. Canada Chap. Crim.-34 as amended by 1972 Stat. Canada. Chap. 13.

⁵ Hereinafter cited as ICAO.

⁶ 61 Stat. 1180; T.I.A.S. 1591; 51 U.N.T.S. 295.

⁷ The Tokyo Convention.

⁸ *Id.* Art. 3.

⁹ *Id.* Art. 6.

¹⁰ *Id.* Art. 13.

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 its possession.

I was fortunate enough to be on the Canadian delegation at Tokyo and my recollection is that Article 11 was introduced during the Conference by the United States of America, and its acceptance encountered considerable opposition as a number of delegates considered that it was politically motivated and, notwithstanding the experience elsewhere in the world, was primarily directed towards Cuba. Although the Convention did not come into force until 1969 the principle established in Article 11 has been followed in subsequent Conventions directed to the suppression of unlawful acts endangering international flight. As we all know now, the United States delegation, I think, perhaps should be recognized as having been clairvoyant rather than politically motivated.

With hijackings and other forms of violence directed towards air operations becoming epidemic in the last decade, the Legal Committee of ICAO began drafting international law directed more specifically towards offenses, and on December 16, 1970, there was opened for signature at the Hague in the Netherlands the Convention for the Suppression of Unlawful Seizure of Aircraft,¹¹ *i.e.*, hijacking. This Convention established hijacking as an offense although it does not use the term and it applies only to actions on board aircraft.¹² The Convention requires Contracting States to make the offense punishable by "severe penalties,"¹³ to take the hijacker into custody and to notify his national State and the State of registration of the aircraft.¹⁴ Further, the offense is deemed to be an extraditable offense¹⁵ and if the Contracting State in the territory of which the offender is found does not extradite him, it is obliged to submit the case to its competent authorities for the purpose of prosecution.¹⁶ The Hague Convention is in force and now has over forty States adhering to it including the United States and Canada.

Finally, on September 23, 1971, a diplomatic conference agreed on a Convention entitled Convention for the Suppression of Unlawful Acts

¹¹ T.I.A.S. 7192 entered into force, October 14, 1971 [hereinafter cited as *The Hague Convention*, Art.].

¹² *Id.* Art. 1.

¹³ *Id.* Art. 2.

¹⁴ *Id.* Art. 6, para. 4.

¹⁵ *Id.* Art. 8.

¹⁶ *Id.* Art. 7.

Against the Safety of Civil Aviation,¹⁷ and the distinction there being hijacking under the Hague Convention and other acts such as sabotage under the Montreal Convention as it came to be known. This Convention defined a number of acts jeopardizing the safety of civil aviation to be an offense, for example acts of violence against a person on board an aircraft if it is likely to endanger the safety of the aircraft; destruction of an aircraft in service or damaging an aircraft in such a way as to render it incapable of flight or to likely endanger its safety in flight; placing on an aircraft a device or substance which is likely to cause the aforesaid destruction or damaging; destruction or damaging of air navigation facilities if likely to endanger the safety of aircraft in flight; and communicating information known to be false thereby endangering the safety of an aircraft in flight.¹⁸ Again, Contracting States are required to make such offenses punishable by "severe penalties."¹⁹ The application of the Convention is generally limited to international flights.²⁰ The Montreal Convention closely follows the Hague Convention with respect to the requirements regarding the taking into custody of an offender, the giving of notice to other interested States and the prosecution of the offender if the Contracting State does not extradite him. Again, the offense is deemed by the Convention to be an extraditable offense.²¹

The Montreal Convention also provides however, and this is where it is quite distinct from the Hague Convention, that Contracting States shall endeavor to take all practicable measures for the purpose of preventing the offenses defined in the Convention and any Contracting State having reason to believe that an offense "will be" committed is required to furnish any relevant information in its possession to the Contracting State where it believes the offense is to be committed, the Contracting State of registration of the aircraft and the Contracting State where the aircraft may land.²² To date the Convention has been ratified or adhered to by ten States but as they were not all signatories it is not yet in effect. This was, I think, a peculiarity of the Montreal Convention in that the ten that first adhered to it or ratified it had to be Signatory States.²³ There are other provisions for it coming into force later on. In my opinion, the provision in the Convention requiring a State which even has a reason to believe that an offense is to be committed to

¹⁷ 10 International Legal Materials 1151 (1971) [hereinafter cited as *The Montreal Convention*].

¹⁸ *Id.* Art. 1, para. 1.

¹⁹ *Id.* Art. 3.

²⁰ *Id.* Art. 4.

²¹ *Id.* Art. 8.

²² *Id.* Art. 12.

²³ *Id.* Art. 15, para. 3.

furnish information with respect thereto to other Contracting States will seriously compromise the possibility of wide ratification of this Convention.

Throughout the development of this international law, I think it is safe to say that the most controversial matter of principle was the question of extradition. Although the Tokyo Convention provided that offenses committed on aircraft should be treated for purposes of extradition as if they had been committed not only in the place where they occurred, but also in the territory of the State of registration of the aircraft,²⁴ the Convention stated specifically that nothing in it should be deemed to create an obligation to grant extradition.²⁵ Understandably, States were reluctant to derogate the long-established principle of international law that extradition requests would not be met when the State of refuge deemed that the offense alleged was of a political nature.²⁶ It is indicative of the grave concern held by most States with respect to the threat of hijacking that in both the Hague and Montreal conventions it is provided that if an extradition request is refused the State is "obliged without exception whatsoever" to submit the case to its competent authorities for the purpose of prosecution.²⁷ The Conventions further require that the authorities shall take their decision with respect to the prosecution in the same manner as in the case of an ordinary offense of a serious nature under the law of that State.²⁸ As the States are obliged to make hijacking and the other specified unlawful acts punishable by "severe penalties" this obligation is intended to ensure that even if there is not extradition the offender will be punished if guilty. (The question of what is a political offense is quite interesting because it is a very pregnant aspect of all this international legislation.)

Many extradition treaties also provide for the denial of extradition if the offense is punishable by death in the State requesting surrender of the fugitive, when the State in which he is found provides for a lesser penalty for the same offense.²⁹ As many States have abolished the death penalty or do not provide it for hijacking, the death penalty, although intended to deter hijackings, may in fact result in the frustration of

²⁴ The Tokyo Convention, Art. 16, para. 1.

²⁵ *Id.* Art. 16, para. 2.

²⁶ *See, e.g.*, Convention on Extradition Between the United States and Sweden, 18 U.S.T. 1845; T.I.A.S. 5996; 494 U.N.T.S. 141; Art. V, para. 5 [hereinafter cited as Extradition Treaty Between U.S. and Sweden.].

²⁷ The Hague Convention, Art. 7; The Montreal Convention, Art. 7.

²⁸ *Id.*

²⁹ *See, e.g.*, Extradition Treaty Between U.S. and Sweden, Art. VIII.

extradition when the hijacking is successful. That comment is directed actually to your law which I think under your Federal Aviation Act has a provision in it for the death penalty in the event of air piracy. There is another very interesting point in the same area. An American psychiatrist, Dr. David Hubbard, who has been making a very close study of hijackers, has come to the conclusion that the possibility of being put to death if they are captured in fact may motivate some of these unfortunate creatures in that they have subconscious, if not conscious, suicidal tendencies.

It will be recalled that the Tokyo Convention did not come into force until six years after it was drafted. Perhaps, however, even more frustrating than delay in the adoption of these treaties is the failure by Contracting States to adhere to their provisions. In an effort to forestall this and in anticipation of the signing of the Hague and Montreal conventions, Canada and the United States submitted proposals to the ICAO Assembly in June, 1970. Canada suggested that bilateral Air Transport Agreements be amended to provide for the suspension of services to a State that failed to comply with relevant Conventions.³⁰ The United Nations proposes a multilateral Convention with the same objectives. The subsequent machinations of the various formations within ICAO are too complex to enumerate here. Suffice it to say that as recently as July, 1971, the ICAO Assembly relegated the subject of compliance to the non-current part of the work programme of the Legal Committee. However, under pressure of further outrages and the worldwide strike of the International Federation of Air Line Pilots Association on June 19, 1972, the Council of ICAO gave the following instructions in a Resolution:

DIRECTS the Legal Committee to convene immediately a special Subcommittee to work on the preparation of an international convention to establish appropriate multilateral procedures within the ICAO framework for determining whether there is a need for joint action in cases envisaged in the first Resolution adopted by the Council on 1 October 1970 and for decision on the nature of joint action if it is to be taken.³¹

The special Legal Sub-Committee met in Washington September 4-15, 1972. Again, there was great divergence of opinion, many delegates reiterating the argument that no sanctions should be imposed outside the

³⁰ ICAO Doc. A17-W.P./49 15/6/70 ICAO Assembly 17th Sess. [extraordinary].

³¹ ICAO Doc. 9028-C/1008.

charter of the United Nations. Finally, the Sub-Committee concluded that its only conclusion was that its inconclusive report should be referred to the Legal Committee and that the whole subject should be considered by it.

In November, 1972, the Council of ICAO endorsed the recommendation of the Sub-Committee that its report be considered by a Special Session of the Legal Committee to be convened in January, 1973. The Council has also directed the secretariat to "provide for" a diplomatic conference in August. However, in the terminology of the international bureaucrats this does not mean that such an assembly of plenipotentiaries will necessarily be convened. In the meantime, every day brings the inevitable disaster closer.**

** [Ed. note—The report of the Washington Sub-Committee came before the ICAO Legal Committee in Montreal. Discussion in the Legal Committee resulted in a recommendation that the following meetings be convened: A session of the ICAO Assembly to consider two draft amendments to The Convention on Civil Aviation (Chicago Convention) which had been placed before the Legal Committee; a diplomatic conference to consider a draft convention on the question of action to be taken as to defaulting states; and a proposal to supplement the Hague and Montreal conventions with certain provisions including a provision which contemplates instant extradition of the alleged offender. In March, 1973, the ICAO Council decided to convene an extraordinary session of the ICAO Assembly and a diplomatic conference for the aforementioned purpose. These meetings will be held in Rome beginning on August 28, 1973.]

