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RECENT DEVELOPMENTS IN AERIAL HIJACKING: THE ROLE OF INTERNATIONAL NEGOTIATION

ROBERT P. BOYLE*

I WOULD LIKE TO COMMENT on what Mr. McPherson has said from two different points of view. In the first place, I would like to talk about the development of air law, international air law, through the treaties he has mentioned. I would also like to talk a little bit about the fact that the air law problem is one with a minor exception referred to in the Montreal Sabotage Agreement,¹ which really takes account of what you do with the hijacker after the hijacking has occurred, and you have him in your clutches. It does not talk too much about what you can do to prevent it; that comes through another avenue, another channel.

It seems to me that hijacking has been a developing kind of thing. It has developed not only in terms of the nature of the hijacking that occurred but it also has developed in the sense that many of the nations of the world were not ready to take really affirmative actions to do anything about hijacking until relatively recently. Ian McPherson said that possibly we were clairvoyant at Tokyo. Well, I was chief of the U.S. delegation at Tokyo, and I do not regard myself as being particularly clairvoyant. As a matter of fact, I knew darn well at the time, that we were leaving tremendous gaps in an effective system. However, as Winston Churchill said, "Politics is the art of the possible," so we did what we could do. We got as much as we could get and admittedly we left major gaps in the international legal system.

There was no undertaking under the Tokyo Convention by anyone to make aircraft hijacking a crime. There was no undertaking to see to it that if a nation made it a crime it was one that was punishable by severe penalties. Furthermore, there was no undertaking to do anything with a hijacker once you had him in your clutches. Thus, while it might offend the moral sense of the international community to have a hijacker

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

standing in front of you and doing nothing to him, there was no *legal* obligation on anyone to take action.

This was the situation in 1963 when the Tokyo Convention was developed. From 1963 until 1969, or 1970, there was no further action in the field of international air law to close the gap. I think the Dawson Field incident, of Labor Day 1970, probably was the spur under which the international community finally buckled down to work again and produced the Hague Convention.²

The Hague Convention closes the precise gaps we left at Tokyo. First, there is an undertaking by every Nation signing that agreement, or adhering to it, that they will make hijacking a crime under their national law.³ Admittedly, this does not make hijacking an international crime in the classic sense, but the obligation of states to make it a crime under their national law probably is as good.

Second, states party to the Hague Convention agree to make hijacking a crime punishable by severe penalties.⁴ Third, they undertake that they will, as Mr. McPherson said, either submit the offender to prosecution under their law or extradite him.⁵ These three undertakings, I think, close a major gap. It was a great step forward when that was done. It is a treaty that is now in effect. However, treaties, as Mr. McPherson said, are good only when they are respected and enforced. The United States at the moment is of the opinion that further action is necessary to see to it that there is a mechanism (international mechanism possibly, or hopefully, possibly even a domestic mechanism if an international mechanism cannot be agreed upon) that will see to it that some kind of sanctions are applied if a country does not respect an international commitment, or if a country does not in effect comply with what I believe this series of treaties is beginning to do—establish an international norm of conduct.⁶ I hesitate to call it international customary law because such law is not developed normally in this fashion. Nevertheless, I believe that our constant action in developing treaties on hijacking, the constant resolutions from the United Nations⁷ and the International Civil Aviation Organization,⁸ calling upon all governments

² T.I.A.S. 7192; entered into force, October 14, 1971.

³ *Id.* Art. 2.

⁴ *Id.* Art. 2.

⁵ *Id.* Art. 7.

⁶ See Statement by the Secretary of Transportation and the Council of ICAO, Sept. 18, 1970.

⁷ 25 U.N. SCOR, 1552nd meeting 1 (1970).

⁸ ICAO Res. A17-3, cited at 9ILM 1276.

to apply the central major provisions of these treaties, even though they have not ratified them in appropriate cases, certainly has the effect of creating an accepted international norm of conduct even though it is not quite the traditional classic international customary law.

In any event, we, in the United States, believe that an additional sanction is necessary in order to assure that nations who do not comply with an international standard of conduct have something happen to them. This is where it is very difficult for us to get any agreement at the moment. We thought action had been taken looking in this direction. A resolution was adopted by the Council of the International Civil Aviation Organization⁹ at U.S. instigation. The Secretary of Transportation went to Montreal and presented it on behalf of the President, following the Dawson Field incident. This resolution, among other things, indicated that possibly multilateral action against an offending nation might be appropriate in some circumstances. This is a very carefully, cautiously worded resolution, as it has to be. The language of government, particularly the international Secretariat is exceedingly tortious, so that the resolution was very cautiously worded but nevertheless, it was there. We got a majority adoption of that by one vote, a most unexpected vote I must admit. Thus, we thought that appropriate action was going forward so, working with our good friends in Canada, we produced a draft convention which we put on the table at a Legal Committee meeting in London in 1970. We thought we were making good progress and then all of a sudden in Vienna a year ago last June, the General Assembly of ICAO backed off from the council resolution and decided no more work was to be done on that subject in the Legal Committee of ICAO.

We did not give up. We kept pushing it, and I think the result of the events of this last summer; the Lufthansa hijacking, with the \$5-million ransom; possibly to some extent the Munich Olympics incident; a number of such things combined to create an atmosphere in which it was possible for us to persuade the Council of ICAO to reactivate the study. As Mr. McPherson pointed out, we had a very recent Legal Committee meeting in September of 1972 in Washington. I do not want to say the meeting was successful, but certainly there was further progress toward possible agreement on a convention which would apply some sort of sanction to an offending nation. At least enough agreement was reached that a full ICAO Legal Committee Meeting in January 1973, was desirable, and we can hope for a diplomatic conference possibly in

⁹ ICAO Council Resolution on Hijacking, of 19 June 1972, 11 ILM 897.

the summer of 1973. That is where the international law aspect stands. As you see, it is still developing.

ICAO also has been very active in developing international standards and practices for use in preventing hijacking. They have produced what I think is a very creditable job of manuals containing standards and suggestions with respect to all forms of security at airports. For example, the separation of the air side of an airport from the ground side; the kind of screening of passengers and luggage that should be undertaken; the exchange of information with respect to potential hijackings or saboteurs, etc. All of these things have been done by ICAO.

There was an Extraordinary Assembly of ICAO convened specifically for the purpose of considering all of the things that might be done to prevent hijacking. The Assembly produced a resolution which has about, I would say, fifteen to twenty pages of recommended actions that all of the Contracting States of ICAO are implored to undertake. The trouble with all of these measures is that they take money. You cannot put a magnetometer on a gate without spending the money for the magnetometer. You cannot provide fencing or lighting around the perimeter of an airport without spending money. The financial aspect is one of the problems that faces airport security today. The airlines shoulder some of the burden, possibly a fair share of it, although some think not. I am not going to argue the point. The fact of the matter is that airport security is a costly and expensive business, and the communities of the world, and the states of the world, are going to have to spend money to provide more protection at the ground side than they have at the moment.

We can do what we wish with a hijacker when we have him in our clutches providing the world community agrees, but the safest thing to do is prevent him from ever getting off the ground.