

A Search For an International Solution to the Problem of Aircraft Hijacking

by

R. J. McGrane

INTRODUCTION

One of the most serious by-products of the jet age has been the unlawful seizure of, or interference with aircraft engaged in commercial air transport. During the past few years there have been many examples of hijacking for extortion, hijacking for a joyride, hijacking for the achievement of political ends, and hijacking purely as a terrorist activity. Fortunately, many attempts have been thwarted, and in the cases of successful hijacking, most have resulted in little more than discomfort and inconvenience for the passengers, and considerable expense for the airlines involved. However, in several tragic instances, hijacking has ended in the death of innocent persons and the destruction of aircraft worth many millions of dollars.

While the internal laws of many nations provide punitive sanctions that guarantee swift and sure punishment for the offenders, the same cannot be said with regard to the international scene. The purpose of this paper is to look at the international agreements and extradition law which are directly concerned with the hijacking problem, to determine their effectiveness as preventive and punitive measures.

I. INTERNATIONAL AGREEMENTS

Three major Conventions, which are directly concerned with aerial piracy, have been prepared within the last eleven years. However, the problem has not been confined merely to that period. Hijacking incidents have been reported ever since 1930, but in the last decade,

the number has steadily increased.¹ For this reason, ICAO (i.e., the International Civil Aviation Organization) instructed its Legal Committee to look into crimes in the air, and a draft convention was prepared for a diplomatic conference at Tokyo in 1963.

A. *The Tokyo Convention 1963*

The major provisions of the Convention dealt with jurisdiction over offences committed on board aircraft in flight, and the powers given to the aircraft commander in order to maintain order and discipline on board.

Article 3 gives the state of registration of an aircraft jurisdiction over offences committed on board. However, Article 3(3) states that the Convention "does not exclude any criminal jurisdiction exercised in accordance with national law". Thus jurisdiction can also be exercised on the basis of nationality of the offender, etc., but nowhere does the Convention lay down any order of jurisdictional priorities to deal with the overlapping which could result under this article.

Article 6 enables the aircraft commander to use reasonable measures, including restraint, to protect the safety of the aircraft, and maintain good order and discipline, when he has reasonable grounds to believe that a person has committed an offence. However, there is no attempt to define "reasonable measures", and so how far the use of force would extend is debatable, especially in cases where an armed person is threatening to blow up an aircraft. It may well be that the use of reasonable measures under these circumstances would exceed the force required to disarm a person on the ground. However, the commander is given protection under Article 10 which expressly provides that:

Neither the aircraft commander, any other member of the crew, any passenger, the owner or operator of the aircraft, nor the person on whose behalf the flight was performed shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken.

The problem of unlawful seizure of aircraft is covered by Article 11. However, it is a long way short of adequately dealing with hijacking. For example, the article applies only to aircraft in flight which is defined in Article 1(3) as "from the moment when power is applied for the purpose of take-off until the moment when the landing run ends". Thus hijacking attempts initiated whilst the aircraft is parked or taxiing are excluded. Furthermore, Article 11 makes no

¹ See table of Worldwide Hijacking Statistics, A. F. Lowenfeld, *Aviation Law Cases and Materials: Documents Supplement* (1972), 533-543.

provision for dealing with any accomplices of hijackers, nor does it lay down any penalties for offenders.

B. *The Hague Convention 1970*

1. Background

Unfortunately the Tokyo Convention did not deal properly with the problem of hijacking. It was ratified very slowly, and in fact did not enter into effect until 4 December 1969. Lowenfeld suggests that "in 1962-63 the international community was not ready to address collectively a problem that inevitably had political implications and that seemed to be predominantly confined to the Carribean".²

However, towards the end of the 1960s, there was a very large number of hijackings,³ particularly in North America, and in September 1968, the ICAO Assembly adopted a resolution that Article 11 of the Tokyo Convention did "not provide a complete remedy". Thus the Legal Committee was once again ordered to draft a new convention which was presented to another diplomatic conference, this time at The Hague in the Netherlands in December 1970.

2. The Convention

The scope of the Hague Convention is defined in Articles 1 to 3. Article 1 specifies the acts constituting the offence to which the Convention applies and reads 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, seizes, or exercises control of, that aircraft, or attempts to perform any such act; or
- (b) is an accomplice of a person who performs or attempts to perform any such act
commits an offence. . . .

Furthermore, Article 2 lays down that "each Contracting State undertakes to make the offence punishable by severe penalties".

There are, however, several limitations to the scope as outlined. Firstly, since under Article 1, the act must be committed by a person "on board an aircraft in flight", the Convention does not apply to an attempt to seize or exercise control of an aircraft by a person on the ground or in another aircraft. And unfortunately, the Convention applies only to accomplices who are also on board an aircraft in flight. It is submitted that this limitation is a serious defect in the

² A. F. Lowenfeld, *Aviation Law Cases and Materials* (1972), Ch. 6, 87.

³ See fn. 1.

Convention, for it is conceivable that an accomplice could be involved on the ground with refuelling, negotiating with authorities, etc.

The second limitation is that Article 2 does not prescribe the exact penalties to be imposed by contracting States, but merely obliges each contracting state to make the offence punishable by severe penalties. But as Michael Poucelet points out,⁴ this has resulted in sentences varying in different countries from three years in prison to the death penalty. Thus hijackers are able to choose an ultimate destination which will be the most lenient on them.

The third point concerns the expression "in flight" defined in Article 3 as follows:

. . . 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. . . .

However, this definition leaves outside the scope of the Convention any hijacking initiated or attempted before the closing or after the opening of the aircraft's doors. As a consequence, such acts are punishable only under the law of the state where they are committed, and the jurisdictional articles of the Hague Convention do not apply. Furthermore, it follows that such acts are punished merely by the general criminal law of the state concerned, unless special legislation is introduced to cover unlawful seizure of aircraft committed or attempted on the ground.

However, the fourth limitation is the most serious. According to Article 3(3), the Convention applies only if the place of take-off or the place of actual landing is situated outside the state of registration of the aircraft. Under this rule, the relevant place of landing is NOT necessarily the one specified in the timetable or in the flight plan because the article specifically refers to the "actual landing". Hence, if a hijacking is committed or attempted on board an aircraft registered in New Zealand, flying from Auckland to Sydney, for example, and the aircraft returns immediately to Auckland rather than landing in Sydney, the unlawful act is outside the Convention. Clearly this kind of situation could be covered by our Aviation Crimes Act 1972, but nevertheless, the principle is illustrated that where the flight of the hijacked aircraft does not meet the criteria laid down in Article 3(3), the Convention does not apply; and, in the absence of any domestic legislation within the landing state to cover unlawful seizure of aircraft, the offender could go unpunished.

Article 3(3) thus applies only to international flights and domestic flights outside the state of registration. But it is difficult to understand

⁴ Michael Poucelet, "Hijacking: The Limitations of the International Treaty Approach" in Edward McWhinney, *Aerial Piracy and International Law* (1971), 55 at 58.

why it is inapplicable to domestic flights within that state. In support of such exclusion, it could be argued that the unlawful seizure of an aircraft within the state of registration falls automatically under that state's jurisdiction, and thus does not give rise to any international legal problem. But it is submitted that any such argument is weak as it applies with equal force when the departure, hijacking and actual landing take place in the same state where that state is not one of registration, and yet this situation appears to be covered by the Hague Convention. Moreover, the argument is illogical because the Convention applies to a domestic flight where a foreign registered aircraft (which has taken off and actually landed within the same state), is operated by an airline of that same state under a lease agreement with the aircraft owners. Since such a case of a purely domestic hijacking is covered by the Convention, it is surprising to discover that Article 3 prevents its application when the places of take-off and actual landing are situated within the state of registration, and may, in fact, even be separated by the high seas or by a foreign state, e.g., an aircraft registered in New Zealand on a flight from Auckland to Rarotonga. Michael Poucelet also finds this inconsistency in the Convention difficult to understand.⁵

He states that:

The Convention should cover not only international acts of hijacking, but also domestic acts—that is to say, acts occurring on a flight which began and ended on the territory of the state of registration of the aircraft concerned—in order to internationalise the offence.

It is submitted that the Convention should apply to any unlawful seizure of aircraft, regardless of the geographical location, or the places of departure and landing, and the nationality of the aircraft. Lowenfeld recommends that the following clause would have been more suitable.⁶

A person who by use or threat of force seizes or attempts to seize control of an aircraft, commits an offence regardless of where the act or offence takes place, and all contracting states shall be competent to punish such person in accordance with the provisions of this Convention.

3. The Problem of Jurisdiction

The Hague Convention has enlarged Articles 3 and 4 of the Tokyo Convention considerably. Taking into account the increasing number of aircraft leased without crew, it provides that jurisdiction must be established by that state in which the lessee of the hijacked aircraft has his principal place of business, or if no such place of business exists, his permanent residence.⁷ In addition, paragraph 2 of Article 4

⁵ *Ibid.*, 56-57.

⁶ A. F. Lowenfeld, *op. cit.*, Ch. 7, 91.

⁷ Article 4(1) (c), Hague Convention 1970.

requires every contracting state to "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 does not extradite him". This provision is necessary in order to increase the possibility of effective punishment, even if the hijacker is not prosecuted in, or escapes from the state of landing, or is not extradited to the state of registration of the aircraft.

Paragraph 1 of Article 4 provides that in addition to establishing jurisdiction over the unlawful seizure of aircraft, the states mentioned therein shall also establish jurisdiction over "any other act of violence against passengers or crew committed by the alleged offender in connection with the (hijacking)". This provision will no doubt be useful when the state in which the hijacker is located, is reluctant to prosecute for the unlawful seizure of the aircraft, but nevertheless may be willing to prosecute for other violent offences committed at the time.

A very important point to note is that although Article 4 requires the contracting states to assume jurisdiction over the unlawful seizure of aircraft within the limits of Article 3, it does not answer whether each of the states is obliged actually to prosecute the alleged offender. However, the answer is found in Article 7 which reads:

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 that State.

Article 7 thus states that authorities having jurisdiction under Article 4 are at liberty not to prosecute a hijacker and his accomplice if it is determined that the offenders would not be prosecuted had they committed another "ordinary offence of a serious nature". It is interesting to note that both the U.S.A. and the Soviet Union urged that states should be compelled to prosecute the alleged offender if extradition was not granted, but this was not adopted because a number of countries such as the United Kingdom grant discretion to prosecuting authorities, who act independently of the executive. It may well be that Article 7 achieves a reasonable compromise, and that any stricter ruling may well have resulted in non-ratification of the Convention. However, it is submitted that this lack of compulsion is a serious weakness in the Convention, and stands in the way of an *effective* international solution to hijacking. This point is taken up later in this paper under the discussion of extradition.

A final comment on jurisdiction is that suggested by one writer that the Convention should provide for some extra-territorial status

or immunity from jurisdiction for the benefit of the passengers and crew in the state to which the aircraft has been hijacked.⁸ He suggests that this type of rule, which should also apply to all cases of unscheduled landings in a foreign country, is urgently needed, particularly in the event of unlawful seizure of aircraft. His argument is that not only does experience show that the persons disembarking from a hijacked aircraft are sometimes searched and detained, frequently for purely political reasons, but they may also be arrested and subsequently prosecuted for an offence which they have allegedly previously committed in a state to which they had no intention of returning, and where they were brought against their will.⁹ It is submitted that this argument is valid, and that the rule in international law, that grants a degree of immunity from local jurisdiction to ships, their crew, passengers and cargo entering a foreign port in distress should be applicable to hijacked aircraft.

C. *The Montreal Convention 1971*

1. Background

The Hague Convention dealt only with unlawful seizure committed on board aircraft and does not apply to sabotage committed on the ground, nor does it cover unlawful interferences with air navigation facilities and services such as airport control towers or radio aids. Attempts made at The Hague to extend the scope of the Convention to cover these possibilities were unsuccessful. Nevertheless, the Assembly of ICAO, held in Montreal in June 1970, adopted a resolution directing the Council of ICAO to convene the Legal Committee to prepare a draft convention on acts of unlawful interference against international civil aviation. Consequently another draft convention was prepared by the Legal Committee, and a Convention for the Suppression of Acts against the Safety of Civil Aviation was opened for signature at Montreal on 23 September 1971. As at 31 May 1974, a total of fifty-four countries had ratified this Convention.

2. The Convention

The most important provisions are contained in Articles 1 and 2. Article 1 creates a new series of offences which can be committed without the offender being on board the aircraft. The same definition for an aircraft in flight was given in Article 3(1) of the Hague Convention applies, but the Montreal Convention introduces a new term, "aircraft in service", defined as follows:¹⁰

⁸ R. H. Mankiewicz, "The 1970 Hague Convention" (1971), 37 *Journal of Air Law and Commerce*, 195 at 208.

⁹ *Ibid.*, 208 fn. 44.

¹⁰ Article 2(b), Montreal Convention 1971.

An aircraft is considered to be in service from the beginning of the pre-flight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing; the period of service shall, in any event, extend for the entire period during which the aircraft is in flight. . . .

The two offences concerning aircraft in service are contained in Article 1 which lays down that any person commits an offence if he unlawfully and intentionally:

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
Places or causes to be placed on an aircraft 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 to cause damage to it which is likely to endanger its safety in flight.

Therefore it is now possible for any state which can establish jurisdiction under Article 5 to prosecute and punish offenders who unlawfully destroy aircraft on the ground. Moreover, any such offence is extraditable.¹¹

It is submitted that the establishment of offences endanger aircraft in service is extremely important, because there is always a very real possibility that aircraft could be unlawfully interfered with by unauthorised persons while still on the ground.

Article 1 also lays down three other offences in paragraphs a, d and e relating to aircraft in flight. Paragraph d makes it an offence to damage air navigation facilities or interfere with their operation, if any such act is likely to endanger the safety of aircraft in flight. However, paragraph 5 of Article 4 restricts the scope of paragraph d above to air navigation facilities which are used in international air navigation. It has already been shown from previous discussion that the Hague Convention applies to domestic flights within a state where such state is not the state of registration of the aircraft or where a foreign registered airliner is operated by the airline of that state under a lease agreement. Why then does the Montreal Convention specifically exclude air navigation facilities which may be used by such aircraft on internal flights? Presumably any such interference would be punishable under the municipal law of most states,¹² but it is surprising to find that it is specifically excluded from the Convention.

A debatable point would be whether or not a bomb hoax communicated to an airline's headquarters after one of its aircraft had become airborne, would be covered by Article 1(e). In most circumstances the aircraft would have to fly to the nearest airport, but this would not necessarily endanger its safety, despite all the inconvenience it may cause. However, it is conceivable that certain

¹¹ Article 8(1), Montreal Convention 1971.

¹² For example s. 300, New Zealand Crimes Act 1961.

situations could arise, in which bomb hoaxes would fall within Article 1(e), e.g., adverse weather conditions at the alternative airport. It is submitted that the paragraph would have been better worded as follows:

Any person commits an offence if he unlawfully and intentionally . . .

- (e) communicates information which he knows to be false affecting the safety of an aircraft in flight.

D. *Conclusion on the Conventions*

It is apparent from all three Conventions that many of the problems relating to definitions of crimes in the air, and jurisdiction over such offences have been solved. But even if the offence of hijacking is established and jurisdiction is given to a particular state, there is still no guarantee that the offender will be tried and punished. We have already seen that there is a discretion given to state authorities as to whether or not they will prosecute. Furthermore, if no prosecution proceedings are initiated, the Conventions do not oblige any state to grant extradition of the offender to a requesting state. Therefore no really effective solution has been achieved, despite the many elaborate provisions which have been incorporated in these three international agreements.

Is a solution possible? Ideally the solution is that given by Dr P. P. Heller:¹³

“Potential criminals, and hijackers in particular, will be discouraged from committing criminal acts only if there is no country in which they can find refuge. This requires international agreement among the states, followed by legislation in each state, providing either for the punishment of persons committing such crimes, or for their extradition to another state where they will be punished.”

But it is submitted that such a solution may not be possible today, with many countries wanting to retain the right to grant political asylum to foreign criminals. The idea of prosecuting an aeroplane hijacker has been considered as presenting a delicate question of balancing law enforcement and security of travel against freedom of political expression, etc. The following Swedish case is useful to illustrate the problems involved.

1. The Tsironis Case¹⁴

Dr Tsironis, a passenger on an Olympic Airways domestic flight on 16 August 1969, ordered the pilot to fly to Albania. From there

¹³ (1973) 37 *New Zealand and South Pacific Aviation Digest*, 6.

¹⁴ Quoted from A. F. Lowenfeld, *op. cit.*, Ch. 7, 34.

Tsironis, his wife and sons unsuccessfully tried to enter Italy and France. Finally, however, the family was granted political asylum in Sweden, and Tsironis was given an alien passport. Furthermore, the Swedish Government paid him \$NZ1,500 per month.

Under the Swedish Penal Code, if an alien living in Sweden has committed an act outside of Sweden which is an offence both where it was committed and in Sweden, he may be tried in a Swedish Court according to Swedish law. Thus the situation in the country that had granted Tsironis asylum was very close to the situation that would prevail in all countries if a universal crime of hijacking was established. The question was whether the Swedish authorities would prosecute.

The Swedish Attorney did open a preliminary inquiry into the hijacking incident, but was unable to find out much from either the Greek or Albanian authorities. Following such a weak response, plus the incongruity of treating someone as a welcome guest, and at the same time prosecuting him for an offence which had enabled him and his family to go to Sweden, the preliminary investigation was closed. However, after the wilful destruction of three commercial aircraft at Dawson Field, Jordan, on 12 September 1970, by Palestinian guerillas, the inquiry was re-opened and Tsironis was brought to trial and sentenced to three and a half years' imprisonment.

It was quite obvious that the Swedish attitude changed only after the deliberate destruction of many millions of dollars worth of aircraft, but in the absence of such an event, would action against Tsironis still have been taken? This question is difficult to answer, but the important point is that until September 1970 Tsironis was a free man in Sweden, even though he had unlawfully seized control of a Greek aircraft and, despite the fact that Swedish law had a specific provision under which he could have been prosecuted. No doubt he would have been punished by a Greek Court, but an application by Greece for extradition was refused.¹⁵ The various legal issues involved in extradition applications are also another major problem standing in the way of an effective solution to hijacking.

II. EXTRADITION

We have already seen that although hijacking has been made an extraditable offence by the Hague and Montreal Conventions, neither created any obligation to grant extradition to a requesting state where the requesting state had established jurisdiction to deal with the offence. This is consistent with the principle of law in many countries

¹⁵ *Ibid.*, 36.

that an offender shall not be surrendered to a foreign country if the offence for which his extradition is requested is one of a political nature.¹⁶ Professor Van Panhuys believes that "the 19th century has left us with the conceptual legacy that political offenders should not be extradited and that as a matter of principle, political asylum should be granted to them".¹⁷ He says that such a conception exists in democratic countries because a political offender may in fact be a defender of liberty against an oppressive government and he may not be given a fair and impartial hearing if he is returned to his political opponents. Thus "international law leaves to the state of asylum, the sovereign right of deciding, according to its municipal law and practice, the question whether or not the offence, which is the subject of a request for extradition, is a political crime".¹⁸

It would therefore seem that if a hijacker could show that the offence is of a political character, extradition need not be granted. In the English case of *Re Castioni*,¹⁹ Denman J. said²⁰ that for an offence to be considered political, "it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands . . .". Later on the learned judge continues:²¹

The question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part.

It would appear that the above definition does not extend to a private act taken by a single individual either for his own political ends or because he was politically opposed to the country in which his offence was alleged to have taken place. Support for this proposition is to be found in the judgment of Cave J. in *Re Meunier*²² where the learned judge says:²³

It appears to me that, in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or other in pursuance of that object, it is a political offence, otherwise not. In the present case there are not two parties in the State, each seeking to impose the Government of their own choice on the other, for the party with whom the accused is identified by

¹⁶ See for example s. 5(1), New Zealand Extradition Act 1965.

¹⁷ Haro F. Van Panhuys, "Aircraft Hijacking and International Law" (1970), 9 Columbia Journal of Transnational Law, 13.

¹⁸ J. G. Starke, *Introduction to International Law* (6th ed.), 307.

¹⁹ [1891] 1 Q.B. 149.

²⁰ *Ibid.*, 156.

²¹ *Ibid.*, 159.

²² [1894] 2 Q.B. 415.

²³ *Ibid.*, 419.

the evidence, and by his own voluntary statement, namely the party of anarchy, is the enemy of all Governments. Their efforts are directed primarily against the general body of citizens.

A very comprehensive judicial statement on the definition of political offences was given by the Court of Appeal of Grenoble in France in *re Giovanni Gatti*,²⁴ where it was laid down that:

Political offences are those which injure the political organism, which are directed against the constitution of the Government and against sovereignty, which trouble the order established by fundamental laws of the state and disturb the distribution of powers. . . . In brief what distinguishes the political crime from the common crime is the fact that the former only affects the political organisation of the state, the proper rights of the state, while the latter exclusively affects rights other than those of the state. The fact that the reasons of sentiment which prompted the offender to commit the offence belong to the realm of politics does not itself create a political offence. The offence does not derive its political character from the motive of the offence but from the nature of the rights it injures. The reasons on which non-extradition is based do not permit the taking into account of mere motives for the purpose of attributing to a common crime the character of a political offence.

It is obvious from these judicial decisions that hijacking, regardless of the motives, could never be considered a political offence which would exempt an offender from extradition. However, there are cases which have resulted in a more liberal approach than that given in *re Castioni*.²⁵ In the English case of *Ex parte Kolczynski*,²⁶ a number of Polish seamen mutined and brought their vessel to England. They claimed that although they were not part of an organised political movement seeking to overthrow their government, they were entitled to asylum as political fugitives from their country, and hence were exempt from the Anglo-Polish Extradition Treaty. The court allowed the claim on appeal. Lord Goddard, C.J., pointed out that the actions of the seamen did not fall within the *Castioni* definition but he maintained²⁷ that in that case the Court was:

Not giving an exhaustive definition of the words 'of a political character'. . . . The evidence about the law prevalent in the Republic of Poland today shows that it is necessary, if only for reasons of humanity, to give a wider and more generous meaning to the words we are now construing, which we can do without in any way encouraging the idea that ordinary crimes which have no political significance will be thereby excused.

Prima facie it thus appears that an individual or group of individuals could successfully claim that a hijacking from, for example, a Communist country to a non-Communist country, is to be regarded as a political offence and hence is a bar to any extradition application.

The Federal Tribunal in Switzerland took this approach in the case

²⁴ (1947) 14 Annual Digest and Reports of Public International Law Cases, 145-146.

²⁵ *Supra*.

²⁶ [1955] 1 Q.B. 540.

²⁷ *Ibid.*, 551.

of *Re Kavic, Bjelanovic and Arsenijevic*,²⁸ in which two Yugoslav pilots were successful in diverting a scheduled flight (from Ljubljana to Belgrade) to Zurich, where they sought political asylum. During the flight the pilots were alleged to have committed various offences including deprivation of personal freedom, endangering public transport and deprivation of property. In that case an application for extradition by the Yugoslavian Government was refused. The Court concluded the case by saying:²⁹

Recent practice has been too restrictive in making the relative political character of an offence dependent on its commission in the framework of a fight for power. Such a character must also be attributed to offences which were committed in order to escape the constraint of a State which makes all opposition and, therefore, the fight for power impossible.

In this connection there can also be applied the principle that the relation between the purpose and the means adopted for its achievement must be such that the ideals connected with the purpose are sufficiently strong to excuse, if not justify, the injury to private property, and to make the offender appear worthy of asylum. Freedom from constraint of a totalitarian State must be regarded as an ideal in this sense. In the present case the required relationship undoubtedly exists; for, on the one hand, the offences against the other members of the crew were not very serious, and, on the other, the political freedom and even existence of the accused was at stake, and could only be achieved through the commission of these offences.

It is submitted, however, that this reasoning would not apply to the numerous hijacking incidents today, which result in demands for the release of prisoners held by another country. In these cases, the offender is not fleeing to save his life or even to secure a better way of life, and thus the *Re Kavic* decision would not apply. Professor Van Panhuys goes further than this by saying that he does not believe that the decision of the Swiss Court lays down a general rule for hijacking cases, no matter how justifiable the acts of the offenders might have been.³⁰ His argument is that enormous risks are brought upon the crew and passengers during a hijacking attempt, and hence it is difficult to maintain that the political freedom of one or two individuals should be held to outweigh the risk to the lives of sometimes a very large number of persons travelling in today's commercial airlines. Therefore he advocates a general rule that the plea of political offence should not apply to hijacking, but acknowledges that there are problems involved. For example, because of political overtones, the sentences of the courts of the state of landing will be too mild, whereas the opposite situation would exist in the state of registration. To overcome this state of affairs Van Panhuys suggests a possible solution that prosecution be taken over by a third state

²⁸ (1952) 19 International Law Reports 371.

²⁹ *Ibid.*, 374.

³⁰ Van Panhuys, *loc. cit.*, 14.

which is considered by the other two states to be neutral in the relevant political issue.³¹

Support for this view can be found in another more recent decision by the House of Lords in *Schtraks v. Government of Israel*³² which seems to revert to the *Castioni* principle. This case concerned an Israeli request for the return of an alleged child-kidnapper who contended that the abduction was at the instruction of the child's grandfather and related to the religious education of the child, arguing that religious and school issues were political questions in Israel and that as a political offender he should not be extradited. The House of Lords did not uphold the appellant's claim and Lord Hodson had this to say at the end of his judgment:³³

According to (*the Castioni*) test there must be either in existence or in contemplation a struggle between the State and the fugitive criminal. I prefer to adhere as far as possible to the guidance which I find in the *Castioni* case. . . . It may well be that cases will arise as in the *Polish Seamen's case* . . . where special considerations have to be taken into account. In some modern states, politics and justice may be inextricably mixed, and it is not always easy, for example, to say what amounts to a revolt against the Government. No special feature exists in this case, and I find no substance in the contention that extradition should be refused because of the political character of the offences charged.

Thus it can be concluded from the previous line of cases that hijacking for ransom or to secure the release of imprisoned criminals would not be a political offence. Furthermore, in the light of the *Schtraks* case which reaffirms the *Castioni* principle, it would appear that hijacking to escape from persecution in a totalitarian State is also not a political crime, particularly since it often involves an enormous risk to the lives of passengers and crew.

The above principles are, however, by no means conclusive, and it is conceivable that some States could follow the decision of *re Kavic* and refuse extradition. This compounds the problem even further because Van Panhuys points out that in some countries such as Algeria, Egypt and Syria, there is an unwillingness to prosecute offenders after extradition has been refused.³⁴ Thus we are left with an impossible situation—some states unwilling to bring to trial and punish a hijacker, and at the same time refusing to allow another State, which has jurisdiction over the offence, to deal with the offender, because extradition to that state has not been allowed.

III. AN EFFECTIVE SOLUTION

It is submitted that there are at least three ways in which the problem could be solved.

³¹ *Ibid.*, 19-20.

³² [1964] A.C. 556.

³³ *Ibid.*, 612.

³⁴ Van Panhuys, *loc. cit.*, 20.

(i). By prevention:

The means for deferring the hijacking threat is a combination of psychological, sociological and technological devices designed principally for determining the persons who demonstrate a higher statistical probability for committing the offence than the general population.³⁵

The Montreal Convention clearly recognised the desirability of such devices and Article 10(11) reads as follows:

Contracting States shall, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing the offences mentioned in Article 1.

Samuels suggests that the devices should include careful checking of passenger lists, the magnetometer to detect weapons, armed guards, armed flight crews, depressurisation, non-access to flight decks, etc. But as he points out, these have their limitations too. For example, the magnetometer can detect inoffensive items causing embarrassment and delay to passengers; inaccessibility to the flight deck does not protect the stewardess who can be made a hostage, etc. It is submitted that Samuels is quite wrong in suggesting depressurisation as a possible preventive device. Sudden depressurisation results in an immediate loss of oxygen inside the cabin and the emergency supply must be used straight away to prevent suffocation. The aircraft is forced to descend steeply to an altitude where there is sufficient oxygen to breathe normally, because the emergency system contains only a limited supply. This type of descent has two major drawbacks. Firstly, it is potentially dangerous because the aircraft may have to fly through other airways and a collision with another aeroplane could occur. Secondly, it can frighten passengers who are not fully aware of what is happening, and the psychological effect on them may be worse than what they would suffer during a hijacking attempt. However, with reference to the other devices which Samuels mentions, he is correct in saying that "so long as states are willing to put themselves in a position to ensure the prevention of abuse should it arise, the substantial interest in preserving the safety of air travel by preventing hijacking by utilising protective devices clearly outweighs any potential misuse of those techniques".

A year ago a hijacking attempt occurred at Dubai when a British Airways VC10 was forced to fly to Tunisia. The offenders actually seized control of the aircraft after it had landed and some of the passengers and crew had disembarked. They demanded that the pilot and his flight crew return to the plane, and ordered that various Arab prisoners in Egypt be released. During the incident one West German man was shot dead and a hostess was injured. Later the hijackers

³⁵ Alec Samuels, "The Legal Problems: An Introduction" (1971), 37 *Journal of Air Law and Commerce*, 163 at 164-165.

threatened to blow up the aircraft with three crew members aboard unless they were given a guarantee by Tunisian authorities that they could remain in that country free from any prosecution for their actions. This whole tragic episode illustrates the need for even tighter security at international airports. Would-be offenders must be denied access to parked aircraft by construction of high fences around tarmacs and employment of more trained guards to police the area. It is obvious from this affair that not only must there be thorough screening and checking of passengers travelling on aircraft, but also of those persons who have access to tarmac areas. Auckland International Airport would be particularly susceptible to this kind of attack.

New Zealand is not the only country in the world which is lacking in this area. Peter Clyne³⁶ quotes examples of other countries with inadequate preventive measures.³⁷ In one instance, the *Sunday Times* in England sent two investigators on random flights throughout Europe and America to find out how often they were searched. Seventy-two test flights were made, and on fifty of these no inspections of any kind were carried out. One of the investigators travelled on an Eastern Airlines flight from Miami to the Bahamas which was regarded as "a regular meeting ground for skyjackers".³⁸ At the airport, the metal-detecting device was not triggered off, though he was carrying a metal clock and metal razor in his briefcase. During the flight, he walked through the aircraft and began to open the cockpit door—no attempt was made to stop him by any of the cabin crew. And so the *Sunday Times* made the comment in the edition of 9 July 1972—"It's still all too easy for hijacking."

Clyne believes that "adequate preventive measures could stamp out air crime almost completely".³⁹ But he feels that the reason that such measures are not adopted is because they would considerably increase the cost of flying to the passenger. At the time his book was published he said that at Heathrow Airport in London, there was an X-ray system capable of detecting metal and explosives, but the cost of using it (about \$NZ30 per plane load) was considered to be excessive and hence it was not in current operation. The Norelco Saferay detection system which is a similar piece of equipment, was also not being used and has been described as "the magic eye that Heathrow will not use".⁴⁰ It would thus appear that some airlines are just not prepared to bear the additional cost to eradicate the

³⁶ *The Anatomy of Skyjacking* (1973).

³⁷ *Ibid.*, 128-131.

³⁸ *Ibid.*, 130.

³⁹ *Ibid.*, 128.

⁴⁰ *Ibid.*, 128.

problem of hijacking. Furthermore, it is submitted that today, the possibility of future implementation of adequate preventive devices is even more remote, as international airlines throughout the world face mounting fuel bills and rapidly increasing running costs. Clyne is totally opposed to the airlines' attitude in this regard. He concludes his discussion by saying:⁴¹

If then, we fail to take those measures, this is simply because self-interest prevails when airlines resolve their equations of survival, because of sheer apathy or recklessness, and because our approach to the whole problem is fragmented and sporadic, when it ought to be guided by international thinking and long-term planning.

(ii). By direct action: We have already seen how attempts to eliminate hijacking have been frustrated by irresponsible Governments who are unwilling to take effective action against hijackers and even welcome them into their country. But, some retaliatory steps could be taken to induce such states to change this kind of attitude. Other States could refuse to fly to an offending country. Nationals of an offending country could be refused air travel unless they previously consent to a thorough search. Some measure of success has already been achieved when the IFALPA's proposed boycott of Algeria helped in securing the release of a detained aircraft, crew and passengers. But there is, of course, always a danger of retaliation and in an inter-dependent world, this could present a problem, e.g., a recurrence of the Arab embargo on oil supplies. However, the problem of hijacking is so serious that sanctions of this kind should be invoked in an effort to provide an effective solution.

(iii). If my previous conclusion that hijacking cannot be regarded as a political offence is correct, then a third possible solution would be negotiations to amend all extradition treaties to ensure that hijacking would under no circumstances be regarded as a political offence.

It is submitted that this would be the most effective solution to the problem. Such a global amendment with universal acceptance would achieve two important goals:

- (a) Any state which had jurisdiction to deal with an offender would be granted extradition in the event that the state holding the hijacker was unwilling to prosecute.
- (b) By making hijacking merely an exception to the rule, all states could retain their right to refuse extradition for other offences of a political nature.

There are, of course, disadvantages in this solution because the hijacker might well be tried for other political offences when he is

⁴¹ *Ibid.*, 131.

extradited. But one would have to rely, in this situation, on the international law doctrine of speciality, which is widely adhered to,⁴² and which provides that a person extradited for a given offence may not be tried for any other offence committed prior to extradition.

It is also interesting to note that the foundation stone to this proposal has already been laid, for in December 1971, the U.S.A. and Canada signed a bilateral extradition treaty which expressly excludes aircraft hijacking and kidnapping of foreign diplomats from the exemption for offences of a political nature.⁴³

Another possible solution is put forward by Peter Clyne.⁴⁴ He suggests the establishment of an Air Crimes Code which would achieve the following objectives:

- (1) Define air crimes.
- (2) Establish penalties for offenders.
- (3) Establish penalties against airlines and member countries who:
 - (a) Fail to carry out and enforce preventive measures outlined in the Code.
 - (b) Fail to surrender an accused hijacker to the Commission (see later) for trial.
 - (c) Commit offences in the course of administration, e.g., ill-treatment of prisoners.

Clyne says that the Code "should set up a network of police departments, courts, advocates, officials, prisons and administrative bodies, called an Air Crimes Commission, whose powers and responsibilities it would define".⁴⁵ The Commission would function as an international policeman, as an international Court, and as an international prison system, but only in relation to air crimes. The whole system would be financed on a pro-rata basis by every member country or alternatively through a special tax levied on the world's airlines. Clyne points out that ultimately the passenger will bear this cost by increased air fares, but he believes that the saving of human life and of money spent on replacing or repairing damaged aircraft, far outweighs the extra financial burden that the passengers must carry.⁴⁶

IV. CONCLUSION

This paper set out to look at the international conventions and extradition law which are directly concerned with hijacking, to

⁴² A. F. Lowenfeld, *op. cit.*, Ch. 7, 68.

⁴³ A. F. Lowenfeld, *op. cit.*, 73, fn. g.

⁴⁴ Peter Clyne, *op. cit.*, 163-169.

⁴⁵ *Ibid.*, 165.

⁴⁶ *Ibid.*, 168-169.

determine their effectiveness as preventive and punitive measures. It can be safely concluded that although much discussion and attention has been focused on the problem, the net result has been a series of international agreements with very few teeth in them. It is conceded that some progress has been made. Considerable powers of restraint have been given to the aircraft commanders, some of the jurisdictional problems have been sorted out, and various offences have been defined for unlawfully interfering with aircraft both on and off the ground. A number of states including New Zealand have passed special legislation making crimes committed on board aircraft and acts endangering civil aviation severely punishable. But have these agreements really been effective as punitive and preventive measures? It is submitted that the recent decline in the number of aircraft hijackings in the last year or so has been attributed more to the use of preventive devices, rather than to the legislative enactments made by various countries as a result of the conventions. In fact, some states are a haven for hijackers who seek asylum there after the offence has been committed.

Thus the Tokyo, Hague and Montreal Conventions do not really provide a satisfactory international solution to the problem of aircraft hijacking. Indeed their effect is best summed up in the following passage:⁴⁷

Perhaps the most vexing feature of aircraft hijacking is the paucity of unanimity among the affected nations in finding pragmatic methods for its control. The various conferences have been designed principally to relieve political unrest, the most common element in preventing a cure, but the doctor has caught the disease and the number of hijackings continues to rise.

Furthermore, the extradition question is uncertain because of the different interpretations which the courts have given to the word political offence.

Finally, it is submitted that the answer to the problem of aircraft hijacking is twofold. Firstly, there must be an effective international agreement amongst all countries of the world, recognising the seriousness of the offence and compelling such states to take all steps necessary to ensure that offenders do not go unpunished, either by prosecuting and sentencing them, or by extradition to a requesting State. Secondly, this must be accompanied by additional preventive measures at international airports, especially in those countries which are most vulnerable to attack. Such a solution would mean that if further hijackings did result, there would be no place on earth where the offender could secure his freedom. But, as this paper has pointed out, this is likely to remain merely an ideal solution, with little chance of ever becoming a reality.

⁴⁷ Editorial, (1971) 37 *Journal of Air Law and Commerce* 163.