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Banishing Fear From the Skies: A Statutory Proposal*

Robert A. Friedlander**

INTRODUCTION

On November 3, 1977, for the third time within a decade, the United Nations General Assembly condemned by consensus the unlawful interference with air transport, and called upon all states to take whatever steps they believed necessary to combat the global threat of aerial hijacking.¹ The main tenor of the General Assembly's Resolution was to urge the adoption by every state of the three international agreements which attempt to regulate criminal acts interfering with civil aviation,² while at the same time the Resolution rejected any resort to the unilateral type of rescue action carried out first at Entebbe during July, 1976, and then at Larnaca in February, 1978.

The United Nations originally went on record in December, 1969 urging national legislation prohibiting and penalizing the illegal seizure of aircraft, and also supporting efforts of the International Civil Aviation Organization (ICAO) toward drafting an international convention.³ The following year, in November, 1970, the

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** Associate Professor of Law, Ohio Northern University College of Law; Member, Committee on International Terrorism, World Association of Lawyers; Ph.D., Northwestern University (1963); J.D., DePaul University (1973). The author wishes to acknowledge the assistance of Mr. E. Barry Greenberg, J.D., Lewis University (1978), in the preparation of this Statute.

2. See notes 34-36 and accompanying text infra.
3. Forcible Diversion of Civil Aircraft in Flight, G.A. Res. 2551 (XXIV), 24 U.N. GAOR,
General Assembly once again denounced all interference with civil air travel, but in addition urged states: (1) to extradite or prosecute (according to the recognized maxim of *aut dedere aut punire*) all hijacking perpetrators it had apprehended; (2) to accede to the one existing Convention, signed in 1963, criminalizing offenses committed on board civilian aircraft and additionally to support another anti-hijacking Convention which was negotiated that year; (3) to take joint and separate action in concert with ICAO and in consonance with the principles of the United Nations Charter; (4) to make special efforts for securing the safe return of any hijacked aircraft along with its crew, passengers, and cargo.\(^4\)

As of 1977, all three international Conventions proscribing the interference with air transport had entered into force. Yet, barely half of the world community subscribes to either one or all of these agreements, and their total impact has been less than inhibiting. Thus far, eighty-eight nations have ratified the Tokyo Convention of 1963, seventy-nine states have ratified the Hague Convention of 1970, and only seventy-five countries have adhered to the Montreal Convention of 1971.\(^5\) Given the statistics on aircraft hijacking alone since the year 1967, this global indifference is astonishing to say the least. There have been 527 various acts of hijacking or attempted hijacking worldwide during the decade 1967-1977, with the number of incidents of last year (32) almost double that of the preceding twelve months (18). Between 1961 and 1978, there have been 190 individual hijackings of United States registered aircraft, and new incidents occurring in the first three months of 1978 indicate that the level of aviation criminality is not receding.\(^6\)

None of the three existing hijacking Conventions has actually come to grips with the real challenge involved—namely, the questions of punishment and sanctions.\(^7\) One expert has identified five

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6. These statistics are taken from the current Federal Aviation Administration (FAA) update of its reports relating to civil aviation security, March 17, 1978 [hereinafter cited as FAA Report]. I am indebted to Mr. V.L. Krohn, Chief, Operations Liaison Staff, Civil Aviation Security Service, for providing me with these figures. The International Air Transport Association (IATA) recorded 392 attempts since 1969 (not including the December, 1977, hijacking of an Eastern Airlines plane to Atlanta), 201 being rated successful. Chicago Tribune, Dec. 11, 1977, § 1, at 5, col. 3.

7. *See* E. McWhinney, *The Illegal Diversion of Aircraft and International Law* 103-
different typologies of motivations for air hijackers: asylum, felonious escape, mental defect, criminal extortion, and ideological or political terrorism. The earliest aerial hijackings occurred in 1947 and 1948. They were occasioned by politically motivated actors of Romanian, Yugoslavian, and Czech nationality, who sought to flee political oppression. During the early years of Cold War era, these fugitives found a sympathetic reception in their host countries. The highwater mark of international tolerance for asylum-oriented seizures of civil air transport came in an April, 1952, decision by the Swiss Federal Tribunal. Given the repressive nature of the Yugoslav regime, the Swiss Court held that escape by whatever means from government constraint was "worthy of asylum," and that, therefore, the political motivation for the act in question outweighed the criminality of such offense. Contrast this with the attitude of the West German courts which treated two separate hijacking incidents involving Czech nationals seeking to obtain political asylum as a criminal act, necessitating a term of imprisonment. Nevertheless, the West German government also refused to comply with Czechoslovakia’s extradition request and indicated that asylum would be granted the defendants upon completion of their prison term, thus satisfying the requirements of the aut dedere aut punire principle.

Escape for political reasons may be sought from any country. Two incidents of criminal extortion involving United States’ aircraft have been interpreted by the Algerian government and by French courts as being politically motivated, and consequently the United States requests for extradition in both these cases were denied. Mentally disturbed hijackers, however, have uniformly been subjected to stiff penalties, and the United States-Cuba Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offenses of February 15, 1973, was aimed as much at those...
individuals as at political offenders. Despite Prime Minister Castro's denunciation of that agreement on October 15, 1976, the United States-Cuban prohibition against the illegal seizure of aircraft, and Castro's harsh treatment of such offenders, has totally eliminated skyjacking between the two countries. For the most part, pure criminality in the skies is treated as such by all civilized nations.

It remains one of the great curiosities of contemporary international law that although there is still no legally accepted definition of international terrorism, aerial hijacking is considered per se to be an act of terror-violence. One authority has even termed hijacking a peremptory norm. And therein lies the rub. Although the offense of interference with air transport is widely held to be an essential part of international criminal law, the offending actors are subject to the prevailing rules of extradition, which can be negatived by a political offense exception. Many states, the United States and Canada among them, recognize treaties as the sole source of extradition law. Canada has executed only three treaties with other countries—Austria, Sweden, and the United States—which make the unlawful seizure of aircraft an extraditable offense. Therefore, it can well be said that the central problem posed by the interference with air transport is, basically, one of conflict or lack of jurisdiction.

14. 24 U.S.T. 737, T.I.A.S. No. 7579 (1973). An identical pact was signed the same day between Canada and Cuba.
15. DIGEST OF U.S. PRACTICE, 1976, supra note 12, at 400.
17. FAA Report, supra note 6.
18. See the various analyses put forward in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW (M. Bassioumi & V. Nanda eds. 1973); INTERNATIONAL TERRORISM AND POLITICAL CRIMES (M. Bassioumi ed. 1975); INTERNATIONAL TERRORISM: NATIONAL, REGIONAL, AND GLOBAL PERSPECTIVES (Y. Alexander ed. 1976); TERRORISM: INTERDISCIPLINARY PERSPECTIVES (Y. Alexander ed. 1977); INTERNATIONAL TERRORISM AND WORLD SECURITY (D. Carlton & C. Schaerf eds. 1975); McWHINNEY, supra note 7; D. JOYNER, AERIAL HIJACKING AS AN INTERNATIONAL CRIME (1974).
19. Whiteman, "Jus Cogens" in International Law, with a Projected List, 7 GA. J. INT'L & COMP. L. 609, 625 (1977). Political terrorism is mentioned separately, which is a definite minority view, and terrorism is also listed as jus cogens, again a minority view.
20. See M. Bassioumi, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 370-400 (1974) [hereinafter cited as Bassioumi]; G. La Forest, EXTRADITION TO AND FROM CANADA 61-82 (2d ed. 1977) [hereinafter cited as La Forest].
21. Bassioumi, supra note 20, at 24-26; La Forest, supra note 20, at 17-18, 34.
22. La Forest, supra note 20, at 34. The legal basis for extradition practice among all civilized nations is formulated either by treaty, comity, or reciprocity.
There is also no doubt that state responsibility, as evidenced in the Entebbe and Larnaca episodes, is likewise of critical significance if commercial air travel is to continue operating on the principle of innocent safe passage. A recent, well-argued, and richly detailed study has clearly demonstrated that international norms establishing state responsibility for terroristic acts, including the interference with civil aviation and seizure of nonmilitary aircraft, already exist, and that an international due process can be effectively implemented. The American and Canadian governments as early as 1973 proposed suspension of all commercial air service to countries providing safe havens to hijackers. In 1974, the United States Congress passed an Anti-Hijacking Act which authorized the President to suspend air service to countries providing safe havens to hijackers. The United States Senate passed a similar resolution in 1976, and the Omnibus Anti-Terrorism Act which is now under consideration by that same body contains stringent proposals. However, the Carter Administration has consistently shied away from any tough-minded approach to the international skyjacking menace.

In truth, politics as usual prevails not only in the United States, but also in the United Nations. Truly effective preventive and punitive measures have not been achieved because domestic political considerations have taken priority over international needs. This has not been more dramatically demonstrated than in October of last year. Not until the threat of a global strike by the International Federation of Airline Pilots Association (IFALPA) did the United Nations finally act to condemn by resolution (November 1-3, 1977) the most recent hostage-style seizures of commercial air transport. The Deputy President of IFALPA was not impressed by the United


25. See U.S. DEP'T OF STATE, BULL. NO. 68 at 1, 3 (Jan. 1973); Bell, The U.S. Response to Terrorism Against Civil Aviation, 19 ORBIS 1326, 1337 (1976) [hereinafter cited as Bell].

26. Bell, supra note 25, at 1339.


Nations' qualified reaction, indicating that he would have preferred a declaration "with more punch."\(^{31}\)

Jurisdiction remains the key to the skyjacking dilemma, but without a willingness to exercise the proper jurisdictional authority, terror-violence will continue to menace the skies. The model statute which follows below is designed to clarify jurisdictional issues, to provide precise and workable guidelines in support of the principle of *aut dedere aut punire*, to specify the nature and substance of criminal offenses relating to the interference with air transport, to identify clearly the elements of said illegal activities, and to devise acceptable means for the safety of aircraft, passengers, and crew in the event of an attempted or successful seizure.

The grim, and hopefully unacceptable alternative, is the use of counterforce as a first response whereby "nations which are serious about ending terrorism . . . act unilaterally in Operation Entebbe-type strikes rather than to rely on the goodwill of the world community."\(^{32}\) But in order to achieve the international rule of law, one must first develop a viable international legal system. The words of President James Earl Carter delivered to the thirty-second session of the United Nations General Assembly serve as both a warning and a call to action:

> Violence, terrorism, assassination, undeclared wars all threaten to destroy the restraint and the moderation that must become the dominant characteristic of our age. Unless we establish a code of international behavior in which the resort to violence becomes increasingly irrelevant to the pursuit of national interests, we will crush the world's dreams for human development and full flowering of human freedom.\(^{33}\)

**THE STATUTORY PROPOSAL**

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Section 1: Preamble

THE STATES PARTIES TO THIS STATUTE

CONSIDERING that unlawful acts against the safety of civil aviation jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation;
CONSIDERING that the occurrence of such acts is a matter of grave concern;
CONSIDERING that for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders;
AGREE AS FOLLOWS:

**COMMENTARY**

Three major international conventions dealing with the subject of aircraft hijacking have been signed and have entered into force: the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, done at Tokyo on September 14, 1963,\textsuperscript{34} the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on December 16, 1970,\textsuperscript{35} and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on September 23, 1971.\textsuperscript{36}

While Tokyo, Hague, and Montreal contain many similar elements, their respective provisions were born of different needs. Tokyo was intended by its drafters to restore possession and control of the hijacked aircraft to those lawfully in command. The drafters of Hague believed that Tokyo was not adequate to meet the needs of the continued threat of aircraft hijacking posed by the events of the previous decade. Hague, therefore, attempted to invoke the established norm: *aut dedere aut punire*. Montreal expanded the scope of the two previous Conventions to include sanctions against perpetrators of sabotage and other offenses committed not only against the aircraft and its personnel, but also upon air navigational facilities which likewise served as targets of such misconduct.

**Section 2: Elements of the Offense**

2.1 Any person commits an offense if he unlawfully and intentionally:

\textsuperscript{34} 20 U.S.T. 2941, T.I.A.S. No. 6768 (entered into force on December 4, 1969) [hereinafter referred to as Tokyo];
\textsuperscript{35} 22 U.S.T. 1641, T.I.A.S. No. 7192 (entered into force on October 14, 1971) [hereinafter referred to as Hague];
\textsuperscript{36} 24 U.S.T. 564, T.I.A.S. No. 7570 (entered into force on January 26, 1973) [hereinafter referred to as Montreal].
(a) performs an act of violence against a person or persons on board an aircraft in flight, if that act is likely to endanger the safety of that aircraft; or
(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 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; or
(d) communicates information which he knows to be false or misleading, thereby endangering the safety of an aircraft in flight.

2.2 Any person also commits an offense if he:

(a) attempts to commit any of the aforesaid offenses in Section 1; or
(b) is an accomplice of a person who commits or attempts to commit any such offense.

2.3 Any person also commits an offense if he destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of the aircraft in service, or its passengers, or cargo.

(a) An aircraft is considered to be in flight from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for the purpose of disembarkation; or
(b) In the event of a forced landing, the flight shall be deemed to continue until lawfully authorized personnel reassert unimpeded control over the aircraft and reassert protection of the persons and property on board said aircraft.
(c) An aircraft is considered to be in service for a specific flight from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew until 24 hours after any landing.

(1) This period of service shall extend for the entire
time during which the aircraft is in flight as defined in paragraph (a) of Section 2.3 of this Statute.

2.4 This Statute is applicable to any international or domestic flight, if:

(a) the place of take-off or the place of landing, whether actual or intended, is situated outside the territory of the State of registration for the hijacked aircraft; or
(b) the offense is committed in the territory of a State other than the State of registration for the aircraft; or
(c) the offender is found within the territory of a State other than the State of registration for the aircraft; or
(d) the offense is committed or the offender is found within the territory of a State other than a State involved in an international or joint operation under Section 4.4, but whose places of take-off and landing are in the territory of the same State; or
(e) the air navigation facilities contemplated in Section 4.4 are used in either domestic or international air navigation.

2.5 This Statute shall also be effective as against offenders alleged to have hijacked aircraft used primarily or exclusively for military, customs, or police services.

Commentary

The major portion of this section is taken from articles 1, 2, and 4 of Montreal. Its scope, however, is substantially expanded, since it applies to any of the offenses listed above, whether or not the offender is actually on board the aircraft and whether or not the offense endangers aircraft which are in flight or which are in service.

Any unlawful exercise of control over the aircraft, its passengers, its crew, or its cargo, by whatever means, should be considered as a commission of the offense of aircraft hijacking. Under article 31 of the Vienna Convention on the Law of Treaties, treaties are to be interpreted in a reasonable sense, bearing in mind their objects and purposes. Montreal not only applies sanctions against perpetra-

tors of sabotage and other offenses committed upon the aircraft and its personnel, but also includes attacks upon air navigational facilities. Montreal was in fact specifically designed to deal with unlawful interference as well as unlawful seizure. A reasonable interpretation of this Statute would include as an offense any such control by whatever means achieved. Certain forms of harm or threat of harm to the crew and passengers on board the aircraft may be exercised by some form of psychological coercion originating from actors not physically present on said aircraft, for example, actors who are present in the air navigation facility, such as the control tower or the passenger terminal. Presence in these areas incontrovertibly creates unlawful interference likely to endanger the safety of any aircraft, wherever located.

Section 2 likewise includes the acts of an accomplice, whether in their inchoate or completed form. Here, the haven state or its authorities may be considered as an accomplice or accomplices before or after the fact, since the intent of the section is to include as offenders all active or passive participants—whether conspirators, actors, or accessories. As subjects of international law, states should be responsible not only for their unlawful commissions but also for any unlawful omissions. Therefore, state actors as well as individual actors must be held to compliance with the minimum standards set forth in this section.

Additionally, offenses are deemed to be committed whether the air navigation facility is used for domestic or international flights without regard to the particular acts constituting the offense as specified in Montreal.

Section 3: Sanctions

3.1 Any signatory State having authority to exercise jurisdiction over the offenses enumerated in Section 2 of this Statute and which exercises its priority rights as enumerated in Section 4 of this Statute must comply with one of the following measures:


(a) Where the offender has been prosecuted and convicted of any of the offenses listed above in Section 2, the prosecuting State shall impose a sentence of life imprisonment or, at its option, capital punishment, in accordance with its domestic substantive and procedural laws.
(b) Where death results, directly or causally from any of the acts constituting an offense as listed in Section 2, then the prosecuting State shall impose a capital penalty; but if the domestic laws of such State prohibit capital punishment, then the appropriate sentence shall be life imprisonment at hard labor with no possibility of parole.

3.2 Where any State refuses either to extradite or prosecute in good faith, and thereby is in violation of the provisions of Section 4.5(e) of this Statute, any State whether or not a Party to this Code, is herein granted, with agreement of the signatories of this Code, legal authority to invoke any or all of the following measures:

(a) suspension of commercial air service to the offending State, as well as to any other State engaged in economic or business transactions of any nature with the offending State; or
(b) suspension of air rights to the violating State over the territory or territories of the invoking State, and to any other State engaged in economic or business transactions of any nature with the offending State; or
(c) suspension of economic transactions or charitable operations with an offending State or any other State engaged in trade or commerce with the offending State.

3.3 The offenses enumerated in this Statute shall not be considered as political crimes for the purpose of avoidance of extradition.

(a) Nothing in this Statute shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request for extradition for an offense or offenses listed in Section 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, or pol-
itical opinion; nor shall such person's position be prejudiced for any of these reasons.

**COMMENTARY**

This sanction section which expands article 3 of Montreal is designed to mandate good faith prosecution and conviction of offenders. States in violation of the provisions enumerated in section 2 may be subject to punitive action by any other state, whether or not granted competence by this Statute to exercise jurisdiction over the offending state. Article 34 of the Vienna Convention of the Law of Treaties specifies that "[a] treaty does not create either obligations or rights for a third State without its consent." Article 26 of that same Convention places the good faith obligation of *pacta sunt servanda* upon all treaty signatories. Nevertheless, there are recognized norms of state responsibility in customary international law that require due diligence to protect persons and property of foreign nationals from potential or actual harm. Article 25 of the Convention on International Civil Aviation, done at Chicago, on December 7, 1977 imposes upon each contracting State the duty to render all practicable assistance to any aircraft in distress within its own territory and to the owners of said aircraft or authorities of the state in which the aircraft is registered. It has been argued that the application of sanctions to states is within the exclusive purview of the Security Council, but the sanctions proposed herein are merely self-executing enforcement measures of the established principles of customary international law and may be applied in the same way as penalties for violations of the Geneva Conventions of August 12, 1949. State parties to those Conventions were required to enact legislation which would give their domestic courts jurisdiction to try offenders.

With respect to penalties, capital punishment is already imposed in the municipal legislation of Australia, France, Japan, and the Soviet Union, if the unlawful seizure or interference with an aircraft results in death or serious bodily harm. Israel and the Federal Republic of Germany provide for a maximum sentence of life imprison-

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ment in such cases (the sentence being mandatory in the former country). United States statutes, as a result of recent United States Supreme Court decisions, make a violator of the federal hijacking law subject to imprisonment for 20 years to life, if the offense took place outside the jurisdiction of the United States, or any term of years to life if the offense occurs within the United States special aircraft jurisdiction.43

The provision for the elimination of the protection granted to perpetrators of political crimes is similar to that of the European Convention on the Supression of Terrorism, done at Strasbourg on November 10, 1976.44 The offenses enumerated in sections 2.1, 2.2, and 2.3 are deemed to be common crimes and shall not provide an excusing condition for purposes of extradition. Even though a political exception to a request for extradition may still apply when there is serious reason to believe that this request was made for considerations of race, religion, nationality, or political opinion, any taking of hostages or seizure of property would generally negative this claim for protection.

Section 4: Jurisdiction over the Offense

4.1 Affected States: Each contracting State shall take such measures as may be necessary to establish its jurisdiction over such offenses as in the following cases:

(a) when the offense is committed in the territory of that State; or
(b) when the offense is committed against or on board an aircraft registered in that State; or
(c) when the aircraft on board which the offense is committed lands in its territory with the offender on board; or
(d) when the offense is committed against, or on board, an aircraft leased without crew to a lessee who had his principal place of business, or if none, his permanent residence, in that State.

4.2 Where two or more States are competent to exercise jurisdiction over any of the offenses enumerated in Section 2 of this

44. 15 Int’l L. Mat. 1272 (November 1976).
Anti-hijacking Statute, the following priorities must be observed in determining which requesting State takes precedence:

(a) first, the State of registration of the hijacked aircraft;
(b) second, the State in which the aircraft was hijacked;
(c) third, the State or States originally designated as disembarkation points, with the terminal point State taking priority;
(d) fourth, the State in which any offense was committed not on board under Sections 2.1 and 2.3 of this Statute;
(e) fifth, the States in which the hijacked aircraft actually lands, if at variance with Section 4.2(c), in order of such landings;
(f) sixth, the State in which the offender is apprehended.

4.3 This Statute does not exclude any criminal jurisdiction exercised in accordance with domestic law.

4.4 Contracting States which establish joint air transport operating organizations or international operating agencies, which operate aircraft subject to joint or international registration, shall designate for each aircraft the State which shall exercise jurisdiction and shall have the attributes of the State of registration for the purpose of this Statute, and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all State Parties subject to this Statute.

4.5 Upon being satisfied that the circumstances so warrant, any contracting State in the territory of which the offender is found, shall take him into custody under the domestic laws of that State, but only for such period of time as is necessary to enable any criminal extradition proceedings to be instituted, with the following procedures to be followed:

(a) The requested State shall immediately make a preliminary inquiry into the facts surrounding the offense;
(b) Any person in custody pursuant to the provisions of this Statute shall be assisted in communicating immediately with the nearest representative of the State of which he is a national;
The requested State shall immediately notify the States enumerated in Section 4.1 of this Statute, the State of nationality of the offender, and any other State it deems advisable, of the fact that such person is in custody and of the facts surrounding the offense which warrant his detention;

(d) The State making the preliminary inquiry under paragraph (a) above, shall promptly report its findings to the States enumerated in Section 4.1, and shall indicate whether it intends to exercise jurisdiction over the offender.

(e) The contracting State in the territory of which the offender is found shall be obliged without exception whatsoever, and whether or not the offense was committed within its territory, either to extradite the offender to one of the States competent to exercise jurisdiction over the offender, or otherwise to submit the case to its competent authorities for the purpose of good faith prosecution, punishable under Section 3.1 of this Statute.

4.6 If, however, an aircraft is hijacked which qualifies as one discussed in Section 2.3(a) of this Statute, then the State designated as competent to exercise jurisdiction therefrom, shall have precedence for purposes of extradition and prosecution over those priorities enumerated in Section 3.1(e) of this Statute.

4.7 The offenses described in Section 2 above shall be deemed to be included as extraditable in any existing extradition treaty between such States, subject only to the following limitations:

(a) 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 no extradition treaty, it may at its option consider this Statute as the legal basis for extradition in respect of the offense; the extradition under this Section shall be subject to the other conditions provided by the domestic law of the requested States; or

(b) Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offenses enumerated in Section 2 as extraditable offenses between themselves, and such extradition shall be mandatory if the custodial State does not prosecute in accord-
ance with Section 4.5 of this Statute; and
(c) Each of the offenses enumerated in Section 2 shall be treated as if it had been committed not only in the place in which it in fact occurred, but also in the territories of the States required to establish their jurisdiction in accordance with Section 4.1 of this Statute.

4.8 A contracting State shall take all practicable measures in accordance with both municipal and international law to prevent the offenses enumerated in Section 2 above.

(a) When any flight has been delayed or interrupted due to the commission of any of the offenses so enumerated, the contracting State in whose territory the aircraft, its passengers, or its crew are present, shall facilitate the continuation of the journey of the affected persons, and shall return the aircraft and its cargo to those lawfully entitled to its possession, as expeditiously as is practicable.

(b) Each contracting State shall in accordance with its municipal law, report to the Council of the International Civil Aviation Organization as promptly as possible any relevant information in its possession concerning:
   (1) the circumstances of the offense;
   (2) the action taken pursuant to Section 4.7(b);
   (3) the measures taken in relation to the offender and the results of any extradition proceedings or other legal proceedings.

(c) Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offenses enumerated in Section 2 above; in all cases, the domestic law of the requested State shall apply, and the provisions of this paragraph shall not affect obligations under any treaty governing mutual assistance in criminal matters.

(d) Any contracting State, having reason to believe that one of the offenses listed in Section 2 above will be committed, or is about to be committed, shall immediately furnish any relevant information in its possession to those States which it believes will be subject to the commission of such offenses.
Section 4 of this Statute largely relies upon articles 5, 6, 7, 8, 9, 10, 11, and 12 of Montreal. This section not only lists those states competent to exercise jurisdiction over the offender, but also under section 4.2 determines the priority of states that wish to exercise jurisdiction. No system of establishing such priorities can be found under any of the existing Conventions. This section serves notice upon all states adhering to this Statute as to which priorities shall be followed in the exercise of jurisdiction. Thus, costly time spent upon negotiations as to which state has the better right is eliminated, while the right of every state to enforce its own penal law is preserved.

Under this Statute, aerial hijacking and the interference with air transport facilities becomes delicta juris gentium affecting the interests of the entire international community. Perpetrators of the prohibited acts contained in section 2 become, as with pirates and piracy, hostis humani generis, and jurisdiction over such offenders is established even though the act itself may have occurred beyond the prosecuting state's boundaries. However, the priorities themselves are obligatory, and the duty to extradite or prosecute remains binding upon the signatories. The thrust of both Hague and Montreal was directed toward prosecution of the offender rather than upon the question of extradition. This Statute completes their initial steps. When section 4.4 becomes operative, the International Civil Aviation Organization is granted the competence to establish general guidelines, since that specialized international agency has dealt with the problems of air transportation from its formation in 1947.

Section 4 further mandates that a requested state shall apply the principle of aut dedere aut punire in good faith. It solves the problem raised by one authority of what happens when a hijacker of an aircraft registered in State A forces that aircraft to land and refuel in State B, then lands in State C, and escapes to State D where he is finally apprehended. It is conceded that certain problems will still arise such as the demand by State A, a political adversary of State B, for a suspected offender with national, racial, or religious ties to the requested state. The sanction provisions found in section 3.2 will serve to obviate the political risks otherwise involved.

Section 4.8 refines the language of the Chicago Convention, particularly articles 25 and 37, which place an obligation upon state parties to render all possible measures of assistance to an aircraft in distress, in order to facilitate onward carriage to its ultimate destination and to aid in the return of said aircraft to its lawful owners.

Section 5: Powers of the Aircraft Commander and Relief from Liability

5.1 The aircraft commander, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offense or act contemplated in Section 2, may impose upon such person reasonable measures including such restraint as is necessary to:

(a) protect the safety of the aircraft, or of persons or property therein; or
(b) maintain good order and discipline on board; or
(c) enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this Section.

5.2 The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any persons whom he is entitled to restrain.

(a) Any crew member or passenger may also take reasonable measures when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.
(b) Where any person attempts or succeeds in restoring full possession and control of the aircraft to those lawfully in command, only that degree of force or restraint may be invoked which he reasonably believes is necessary to defend himself or another against the use of unlawful force which is likely to cause death or serious bodily harm to himself, to the captain and crew, or to other passengers.

46. See note 42 and accompanying text supra.
5.3 Measures of restraint imposed upon a person in accordance with Sections 5.1 and 5.2 shall not be continued beyond any point at which the aircraft lands, unless:

(a) such point is in the territory of a non-contracting State and its authorities refuse to permit disembarkation of that person; or
(b) those measures have been imposed in accordance with Sections 5.1 and 5.2 above, in order to enable delivery of that person to competent authorities; or
(c) that person agrees to onward carriage under restraint.

5.4 The aircraft commander shall as soon as practicable, and if possible, before landing in the territory of a State with a person on board who has been placed under restraint in accordance with the provisions of Sections 5.1 and 5.2 above, notify the authorities of such State of the fact that a person on board is under restraint and of the reasons for such restraint.

5.5 The aircraft commander, insofar as it is necessary for the purpose of Sections 5.1 and 5.2 above, may disembark in the territory of any State in which the aircraft lands any person who he has reasonable grounds to believe has committed or is about to commit, on board the aircraft, an act contemplated in Sections 2.1 and 2.3 above.

(a) The aircraft commander shall report to the authorities of the State in which he disembarks any person pursuant to Section 5 the facts of and the reasons for such disembarkation.

5.6 The aircraft commander may deliver to the competent authorities of any contracting State, in the territory of which the aircraft lands, any person who he has reasonable grounds to believe has committed on board the aircraft an act which, in his reasonable opinion, is a serious offense according to the penal law of the State of registration of the aircraft.

(a) The aircraft commander shall as soon as practicable, and if possible, before landing in the territory of a contracting State with a person on board whom the aircraft commander intends to deliver in accordance with the pre-
ceding paragraph, notify the authorities of such State of his intention to deliver such person and provide the reasons therefor.

(b) The aircraft commander shall furnish the authorities to whom any suspected offender is delivered in accordance with the provisions of this Section with evidence and information which, under the law of the State of registration of said aircraft, are lawfully in the commander's possession.

5.7 Where the safety of any aircraft or air navigation facility has been placed in jeopardy by any of the offenses enumerated in Section 2 of this Statute, any of the following acts shall not be considered as a basis for civil liability:

(a) any inchoate or completed act by any pilot or crew member which is intended to restore full possession and control of the aircraft to those lawfully in command; or
(b) any inchoate or completed act by any employee or agent of an air navigational facility which is intended to restore full possession and control of such facility to those in lawful authority; or
(c) any inchoate or completed act by any private person, in the capacity of passenger or visitor at an air navigational facility or on board an aircraft, where that person is subjected to any of the acts constituting an offense as enumerated in Section 2 of this Statute, and thereby engages in any reasonable conduct intended to restore full possession and control of such aircraft or facility.

Commentary

The major portion of this section relies extensively on articles 6, 7, 8, and 9 of Tokyo. Its purpose is to designate command responsibility over an aircraft in flight in order to insure the maximum protection of passengers, crew, and property. The aircraft commander is given special authority to apprehend and restrain a suspected or potential offender, if there are reasonable grounds to believe that the suspect actor is about to commit, is committing, or has already committed an offense as described in section 2 of this Statute. The authority given the aircraft commander to require the
assistance of the crew or to request assistance from a passenger is derived from the common law authority of a peace officer's use of force in making an arrest and from the use of force by a private person assisting a peace officer or when making a citizen's arrest.\textsuperscript{47}

Section 5.7 enlarges the scope of article 10 of the Tokyo Convention. To protect the aircraft commander's position of authority and to insure the cooperation and assistance of passengers and crew in the event of the commission of an offense as defined in section 2 of this Statute, an exemption from civil liability is granted to those individuals who act in defense of their person and property and to protect the aircraft while in flight, or the aircraft facility, as long as the exempted acts were done reasonably.

Section 6: Statutory Interpretation

6.1 Any dispute between two or more contracting States concerning the interpretation or application of this Statute, which cannot be settled through negotiation, shall be submitted to arbitration at the request of any such State.

(a) If the State Parties are unable to agree on the measures to implement such arbitration within six months from the date of request, any State Party may refer the dispute to the International Court of Justice, in conformity with the Statute of the Court.

6.2 Any State may declare that it does not consider itself bound by Section 4.1 of this Statute, if such reservation is made at the time of signature, ratification, or accession; the other contracting States are thenceforth not bound by Section 4.1 to such reserving State; any reserving State may withdraw its reservation by due notification to the depository Governments.

6.3 Any contracting State may denounce this Statute by written notification to the depository Governments; such denunciation shall take effect three months after such notification is received by the depository Governments.

COMMENTARY

This Statute completes the preliminary steps taken by Tokyo, \textsuperscript{47} See Model Penal Code §§ 3.04-.08 (1962).
Hague, and Montreal to control the illegal seizure of aircraft and the interference with air transport. By delineating specific offenses, by clarifying and expanding jurisdiction over the offender, by setting forth priorities in extradition claims, and by establishing penalties applicable to individual offenders as well as providing sanctions against offending states, the above Statute fulfills the spirit of the three prior Conventions and the intentions of its drafters. The underlying purpose of this Statute is the establishment of a minimum standard of world public order, so that an energetic and concerted control action over any violation of those standards can be properly and effectively exercised. The right of the world community to innocent air passage under any and all conditions is absolute. It must be protected by the rule of law.

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*** The above Statute in somewhat different form has been incorporated by a special committee of the International Penal Law Association into a Draft International Criminal Code which will soon be submitted by its Secretary-General, Professor M. Cherif Bassiouni, to the United Nations International Law Commission.