INTRODUCTION

> "Fifty years ago the idea that aircraft might become a field for the application of the Criminal Law would have seemed fanciful. Even thirty years ago our legislators would have thought it premature to contemplate legislation on the subject. A dozen or so people, probably all men, flying together for an hour or two in conditions of discomfort would hardly have had either the opportunity or the vitality to be otherwise than law-abiding. But now we have one to 200 people flying together, commonly for four to seven hours, at times for 12 to 15 hours. They fly in conditions of security and comfort. They have room to move about. They include both sexes. They are plentifully supplied with alcoholic stimulants,... and the purely statistical chances of abnormal behaviour are obviously greatly increased. Moreover, aircraft pass rapidly over frontiers which on land may be carefully controlled. They offer great opportunities for the transfer from one country to another, possibly a thousand miles or more away, of commodities for which a high price will be paid and which cannot pass to their most profitable market by land or sea: things such as gold, drugs, diamonds, secret plans and designs. It is very tempting for passengers on these aircraft and for their crews to undertake or lend themselves as accessories to these trades. So crimes may be committed on aircraft and aircraft may be used for unlawful activities." (Wilberforce: Crime in Aircraft (1963) 67 Journal Royal Aeronautical Society 175).

In the period of almost twenty years which has elapsed since these words were written the notion of crime on board aircraft has become all too familiar. Today, the opportunities to utilise air travel for the furtherance of international criminal activities are as great as ever and the vast increase in the volume of international air traffic has greatly increased the likelihood and the incidence of criminal conduct on board aircraft. Furthermore, during this period the problem has assumed an entirely

new dimension with the emergence of international terrorism on a large scale. Aircraft are no longer merely the theatre for criminal activities; they have become their object and their unlawful seizure has become almost commonplace. The very nature of international travel by air - the carriage of large numbers of persons in a confined space through the territorial airspace of many States and outside the territory of any State on board aircraft purchased by their operators at enormous expense - renders aircraft, their passengers and crews particularly susceptible to international terrorist and criminal activities. Furthermore the mobility of aircraft often enables hijackers to escape to a State whose government is sympathetic to their cause, thereby evading arrest and punishment.

During the last two decades terrorist and criminal activities in relation to aircraft have increased to such an extent that the international community has been obliged to conclude multilateral treaties to combat them and to overcome the legal difficulties which inevitably arise when the interests of a large number of States are actually or potentially involved. Three multilateral treaties, each concluded under the auspices of the International Civil Aviation Organisation, are relevant here:

(i) Convention on Offences and certain other Acts committed on board Aircraft, Tokyo, 14 September, 1963;

(ii) Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December, 1970;

(iii) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September, 1971.

The principal object of this document is to examine the problems which call for resolution by international agreement and to explain the ways in which these treaties attempt to solve them. Before embarking on a detailed examination of each of these treaties, however, it is convenient to consider certain preliminary matters.

The basic problem encountered in seeking to regulate conduct on board aircraft is one of State jurisdiction. It is therefore convenient to consider at the outset the nature of criminal jurisdiction and the different senses in which the term is employed. Three different concepts arise for consideration here:

(i) Legislative jurisdiction by which is meant the power of a State to prescribe legal rules;

(ii) Executive or enforcement jurisdiction by which is meant the power of a State to enforce legal rules by execution action;

(iii) Curial jurisdiction by which is meant the power of the courts of a State to enforce legal rules and punish their contravention.

Enforcement jurisdiction is necessarily limited to the territory of the acting State for no State may enforce its laws within the territory of another State. Legislative jurisdiction, which describes the ambit of the criminal law of a State and its power to characterise conduct as lawful or unlawful, is not so limited and there are many examples of States prescribing rules for the conduct of their nationals and aliens abroad. In practice legislative jurisdiction will often be closely bound up with questions of curial jurisdiction because in considering the entitlement

of a domestic court to exercise criminal jurisdiction in a particular case one is concerned to ascertain not only whether the conduct in question is a matter in respect of which the court may properly exercise jurisdiction but also whether the conduct constitutes an offence contrary to the law of that State.

The exercise of criminal jurisdiction by States is often explained in terms of certain jurisdictional linking factors between the relevant conduct and the State exercising jurisdiction. Common law systems generally claim to prescribe and enforce criminal law on grounds of territoriality i.e. that the relevant conduct took place within the territory of the State exercising jurisdiction. State registered vessels and aircraft are often assimilated to State territory for this purpose. Furthermore, this theoretical basis of jurisdiction has been extended by the subjective and objective theories of territoriality to include activities which take place partly in the territory of one State and partly in the territory of another. In such circumstances the State where the conduct is initiated exercises jurisdiction on the basis of subjective territoriality and the State where the conduct is completed exercises jurisdiction on the basis of objective territoriality if, in each case, the conduct would constitute a criminal offence by the law of that State if performed there in its entirety and if an element of the actus reus of the offence took place there. These extensions are frequently encountered in common law systems and are often bound up with notions of constructive presence. The principle of nationality, whereby States exercise jurisdiction over the conduct of their nationals wherever it takes place, is particularly favoured in civil law systems but it is also frequently invoked in common law jurisdictions. In addition, States sometimes exercise criminal jurisdiction on the grounds that

their nationals are the victims of the relevant conduct (passive personality principle) or that such conduct imperils the vital national interests of the State (protection or security principle) or, occasionally, on the grounds that the effects of conduct abroad are felt within the territory of that State (effects principle). Finally, certain conduct is regarded as so prejudicial to the interests of the international community that any State may exercise jurisdiction over it wherever it takes place and whatever the nationality of the actor (universality principle).

These jurisdictional linking factors are useful in that they describe the grounds on which States frequently claim to exercise jurisdiction. However, it should not be supposed that an exercise of extra-territorial jurisdiction is permissible in international law only if it can be accommodated within one of these established categories. International law does not prohibit States from extending the application of their laws and the jurisdiction of their courts save when this may be justified by reference to a permissive rule of international law. On the contrary, international law leaves a wide measure of discretion to States in such matters and this is subject only to certain prohibitive rules. We shall see that the treaties which seek to establish a uniform approach to offences committed on board aircraft require contracting States to establish their jurisdiction in circumstances where there are present none of the traditional jurisdictional linking factors. Nevertheless, the exercise of jurisdiction in the circumstances contemplated by these treaties is, it is suggested, entirely in conformity with existing rules of international law.

A further note of caution must be sounded at the outset. The jurisdiction of a State's courts and the ambit of its laws are inseparably bound together for unless

the criminal law of a State extends to conduct on board aircraft that conduct cannot be characterised as unlawful and consequently there is no offence over which its courts may exercise jurisdiction. A neat example is provided by R.v. Martin [1956] 2 Q.B. 272. The defendants were charged with being in possession of raw opium on board a British-registered aircraft flying between Bahrein and Singapore. Devlin J. held that the offence with which the defendants were charged, under the Dangerous Drug Regulations, 1953, was committed only if the acts constituting the offence were committed in England. He also considered that section 62, Civil Aviation Act, 1949, which provided that any offence whatever committed on a British aircraft should, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be, did not create offences or extend the ambit of existing criminal laws but merely provided the place where an act which was already an offence, if committed on board a British aircraft outside England, might be tried. Since the ambit of the Regulations under which the defendants were indicted did not extend to the circumstances in which the conduct took place, there was no offence over which the English courts might exercise jurisdiction. The vacuum in English law exposed by this decision has since been remedied by legislation. Nevertheless, the decision demonstrates the necessity of ensuring that a State's laws extend to conduct on board its registered aircraft and that there exist tribunals competent to exercise jurisdiction over infringements of those laws.

Traditionally States have claimed a universal jurisdiction over acts which have constituted piracy in the law of nations. It is necessary, therefore, to consider whether the concept of piracy jure gentium includes conduct on board aircraft or which is directed against aircraft. The customary international law on the subject is now

codified in Article 15 of the Geneva Convention on the High Seas, 1958, which reflects an extension of the traditional concept by analogy so as to include certain acts in relation to aircraft. Article 15 provides:

> "Piracy consists of any of the following acts:
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> (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
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> (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
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> (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
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> (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft.
>
> (3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph (1) or sub-paragraph 2 of this article."

Article 19 of the Convention provides for universal jurisdiction over pirates.Nevertheless, the inadequacy of the modern law of piracy as a means of combating hijacking will be immediately apparent. In particular, the following matters limit its effectiveness.

(i) The illegal acts must be committed "for private ends". While there have been many examples of hijackings which have been performed for private ends, usually the extortion of a sum of money, the majority have been committed for overtly political objectives and consequently do not constitute piracy jure gentium;

(ii) The acts must take place on (or presumably over) the high seas or in a place outside the jurisdiction of any State. Consequently the unlawful seizure of an aircraft in the airspace of any State is not piracy jure gentium;

(iii) Although Article 15 is not entirely clear on the point, it seems that if acts are to constitute piracy jure gentium they must be directed by the crew or passengers of one ship or aircraft against another ship or aircraft.This would exclude virtually all recorded instances of hijacking from the scope of the provision.

Each of the three treaties with which this document is concerned seeks, inter alia, to deal with these jurisdictional shortcomings. The Tokyo Convention requires contracting States to extend their jurisdiction over offences committed on board their registered aircraft. The Hague and Montreal Conventions come close to establishing a universal jurisdiction over acts of unlawful seizure and other acts against the safety of civil aviation. In addition these Conventions make detailed provision for extradition and require contracting States to extradite persons in certain circumstances, thereby considerably reducing the risk that offenders will escape arrest and punishment. Each of the three treaties will now be considered in turn.