CHAPTER TWO

CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT THE HAGUE, 16 DECEMBER 1970

Although the Tokyo Convention includes certain provisions relating to the unlawful seizure of aircraft, these are both general in their terms and limited in their effect. The principal objective of the Tokyo Convention is to ensure that offences and acts which jeopardise the safety of aircraft or persons or property on board or which jeopardise good order and discipline on board aircraft should not go unpunished because of a lack of jurisdiction over the person or persons responsible. To this end it sets out detailed rules as to jurisdiction. The Tokyo Convention does not create or define particular offences; questions as to what constitutes an offence are left to be answered by the applicable system of criminal law. Proposals made by the United States and Venezuelan delegations at the Fourteenth Session of the I.C.A.O. Legal Committee held in Rome in 1962 led to the inclusion in that Convention of Article 11 and certain ancillary provisions which are the only provisions which relate to a specific offence. They do not require contracting States to prohibit or punish conduct which constitutes an unlawful seizure of an aircraft within the meaning of the Convention. They merely require contracting States to take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft, to permit its passengers and crew to continue their journey as soon as practicable and to return the aircraft and its cargo to the persons lawfully entitled to possession.

These provisions of the Tokyo Convention were insufficient to effectively combat the hijacking of aircraft.

During 1968 and 1969 there was a rapid increase in the number of hijackings. Between 1930 and 1967, 67 hijackings occurred; in 1968 there were 35 hijackings and in 1969 there were 87. A further international Convention was urgently required in order to co-ordinate State action in deterring and punishing such conduct. In September 1968 the Assembly of I.C.A.O. requested the Council of I.C.A.O. to institute a study on the prevention of hijacking. The question was referred to the Legal Committee and a sub-committee comprising of representatives of thirteen States held two sessions in Montreal in 1969 during which it prepared a draft Convention. The Legal Committee then produced a second draft which was sent to the I.C.A.O. Council. A conference was convened at The Hague in December 1970. On 16th December 1970 the conference adopted the Convention for the Suppression of Unlawful Seizure of Aircraft. The Convention entered into force on 14th October 1971, thirty days after the deposit of the tenth instrument of ratification. The text appears as Appendix 4.

One hundred States are currently parties to the Hague Convention. A further twelve States have signed the Convention but have not yet ratified it. The United Kingdom ratified the Convention on 22 December 1971 "in respect of the United Kingdom of Great Britain and Northern Ireland and Territories under the territorial sovereignty of the United Kingdom as well as the British Solomon Islands Protectorate." A number of these territories have since attained independence. Of these, The Bahamas and Papua New Guinea have both formally succeeded to the Convention. A number of other newly independent Commonwealth States are entitled to succeed to the Convention. Certain other newly independent Commonwealth States have acceded to the Convention. A complete list of signatures, ratifications, accessions and successions is set out in Appendix 5.

Object and Application of the Convention

In the preamble to the Convention the contracting States express their grave concern at the occurrence of acts of unlawful seizure of aircraft, which jeopardize the safety of persons and property, seriously affect the operation of air services and undermine confidence in the safety of civil aviation. The preamble also refers to the urgent need to provide appropriate measures for the punishment of offenders, for the purpose of deterring such acts.

The approach adopted by the Hague Convention is entirely different from that employed in the Tokyo Convention. The Hague Convention begins by establishing an offence of hijacking (Article 1). It then imposes an obligation on contracting States to make the offence punishable by severe penalties (Article 2). Each contracting State is required to take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against the passengers or crew of an aircraft, in certain defined circumstances (Article 4). Each contracting State, if satisfied that the circumstances so warrant, is under a duty to take an alleged offender into custody or to take other measures to secure his presence (Article 6). A contracting State in the territory of which an alleged offender is found is under a duty to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite him (Article 7). The Convention also deals with questions of extradition (Article 8).

The Convention is intended to apply only to civil aircraft and provides that it shall not apply to aircraft used in military, customs or police services (Article 3(2)) This provision is identical with that contained in Article 1(4) of the Tokyo Convention, and may give rise to the same

difficult questions of interpretation which have been considered in Section II.

Generally, the Convention applies only if the place of take-off or the place of actual landing of the aircraft on board which the offence is committed is situated outside the territory of the State of registration of that aircraft.(Article 3(3).) It is important to note that the scheduled destination is irrelevant for this purpose. If a case falls within the general rule in Article 3(3) it is immaterial whether the aircraft is engaged in an international or a domestic flight. Consequently the Convention will apply to acts on board an aircraft registered in State A during a flight of which the point of take-off or the point of landing is outside the territory of State A. The Convention will also apply to acts on board an aircraft registered in State A during a flight between two points in the territory of State B. To this general rule there exist a number of exceptions which will be considered subsequently.

The Offence of Hijacking

Article 1 of the Hague Convention provides:

"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 (hereinafter referred to as "the offence")."

Under Article 2 each contracting State undertakes to make the offence punishable by severe penalties.

The component elements of the principal offence are four in number:

(i) The seizure or the exercise of control of an aircraft or an attempt to perform any such act;

(ii) The seizure or the exercise of control or the attempt must be by force or threat of force or by any other form of intimidation;

(iii) The seizure or exercise of control or the attempt must be unlawful;

(iv) The seizure or exercise of control or the attempt must take place on board an aircraft in flight.

The offence created by Article 1 of the Hague Convention is very similar to the notion of wrongful interference with aircraft employed in Article 11 of the Tokyo Convention, although no offence is created by the Tokyo Convention. A further important difference between the two provisions is that the Hague Convention makes express provision for the liability of accomplices.

(i) <u>The seizure or the exercise of control of an aircraft</u>

The first component element of the offence is that there should be a seizure of an aircraft or the exercise of control over an aircraft, or an attempt to perform either of these acts. The offence may be narrower than the notion of unlawful seizure of an aircraft in Article 11 of the Tokyo Convention which refers to "an act of interference, seizure or other

wrongful exercise of control of an aircraft in flight". It is theoretically possible to imagine conduct which might constitute an act of interference which would not constitute a seizure or an exercise of control over an aircraft. However if such an act of interference were performed with the intention of seizing or exercising control over the aircraft it seems likely that it would be sufficiently proximate and unequivocal to constitute an attempt within Article 1(a) of the Hague Convention. The three heads of seizure, exercise of control and attempt to commit either of the foregoing seems to be sufficiently wide to meet the mischief contemplated by the Convention. However these terms are not terms of art and no advantage is to be gained by attempting to distinguish between seizure or exercise of control. Taken together, the three categories clearly cover, inter alia, cases where a pilot is replaced, and cases where a pilot is ordered to follow the hijacker's instructions either through the use or threat of force against the pilot or the threat or use of force against other members of the crew, passengers or the aircraft.

However, it should be noted that under the Hague Convention the seizure or the exercise of control of an aircraft or an attempt to do so **must** be committed by a person or persons on board that aircraft. This requirement is considered in detail subsequently.

(ii) <u>The use or threat of force or any other form of intimidation</u>

The unlawful seizure or exercise of control over an aircraft will constitute an offence within

Article 1 of the Hague Convention only if it is committed by the use or threat of force or by any other form of intimidation. Generally, hijackings are accomplished by the threat of force rather than the use of force, although there are a number of reported hijackings where force has been employed and passengers and members of the crew have been killed or wounded in the course of the seizure or taking of control. Both categories are included within the offence. The threat of force contemplates all cases where the use of force or violence is threatened against members of the crew, passengers or the aircraft itself. The offence may also extend to a threat to use force against persons or property not on board the aircraft, provided that the threat was made by a person or persons on board the aircraft for the purpose of seizing or taking control of the aircraft. It is doubtful whether the words "or by any other form of intimidation" extend the offence since such conduct is likely to involve the threat of force. However, it is perhaps just possible that a hijacker might attempt to gain control of an aircraft by making threats to the pilot, other than threats to use force. Such threats would probably constitute intimidation within the Hague Convention.

Certain other means of seizure or exercise of control appear to fall outside the offence created by Article 1. If the crew of an aircraft is bribed to fly it to a destination other than its scheduled destination the case falls outside Article 1. Similarly if the crew decide to fly the aircraft to a different destination for an unauthorised purpose, there may be an unlawful

exercise of control over the aircraft, but in the absence of the threat or use of force the case falls outside Article 1. Again, a case where control over an aircraft is established by deceit falls outside Article 1 provided that the threat or use of force was not subsequently employed to retain control of the aircraft. The travaux preparatoires of the Legal Committee of I.C.A.O. suggest that it was intended that cases of hijacking not involving the use or threat of force or other form of intimidation should be excluded from the scope of the Convention. (Report of the Legal Committee, 17th Session, I.C.A.O Document 8877-LC/161 pp. 28,30,33.)

(iii) Illegality of threat or use of force

A further component element of the offence created by Article 1 is that the conduct should be unlawful. A similar qualification is included in the notion of wrongful interference with aircraft in Article 11 of the Tokyo Convention. The inclusion of the word "unlawfully" in Article 1 of the Hague Convention serves to emphasise that the conduct must be without legal excuse or justification. Consequently, the acts of members of the crew or a police officer in attempting to regain control of an aircraft which has been seized by hijackers would not constitute an offence within Article 1. It is not clear by which legal system the legality of such conduct is to be judged. However, conduct which is justifiable in the law of the State of registration of the aircraft would certainly fall outside the scope of Article 1.

(iv) <u>On board an aircraft in flight</u>

An offence within Article 1 may be committed only by a person or persons on board an aircraft in flight. For the purposes of the Hague Convention, 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. (Article 3) This provision conforms with the wider of the two definitions of "in flight" employed in the Tokyo Convention. In addition, an aircraft is deemed to be in flight under the Hague Convention in the case of a forced landing until the competent authorities take over the responsibility for the aircraft and for persons and property on board.

There are a number of reported incidents where an attempt was made to hijack an aircraft during the embarkation of passengers and before the external doors of the aircraft were closed. Such conduct, although taking place on board an aircraft, does not take place on board an aircraft in flight and consequently does not constitute an offence within Article 1. However, the consequences of this limitation on the scope of the offence are not as serious as might at first appear. If the attempt is unsuccessful and the hijacker apprehended, it is entirely appropriate that he should be prosecuted under the local law. On the other hand, if the attempt is successful and results in the closing of the external doors of the aircraft before take-off an offence within Article 1 is committed because the actor or actors continue to exercise control over an aircraft which is now considered to be

in flight. However, although the matter is not entirely free from doubt, it appears to follow from Article 3(3) that an offence within the Convention is committed in such circumstances only if the closing of the external doors is followed by the take-off of the aircraft. A third possibility is that the attempt might take place on board an aircraft during embarkation and before the external doors are closed and that although the attempt fails the actor or actors escape arrest in the State of embarkation, but are subsequently apprehended in another contracting State. In these circumstances such persons have not committed an offence within Article 1 of the Hague Convention. The same analysis would apply, it is suggested, in the three corresponding situations during disembarkation after an external door is opened.

Reference has been made to the fact that the principal offence contemplated by Article 1 may be committed only by a person or persons on board the aircraft which is the object of the actual or attempted seizure or exercise of control. The effect of this provision is to severely limit the scope of the offence. The threat or use of force must come from within the aircraft. Consequently the offence does not extend to a case where an aircraft is forced to change course by the threat or application of force from another aircraft. Similarly, a person who leaves explosives on board an aircraft before the flight commences and then, through radio contact from the ground to the aircraft in flight, threatens to detonate the explosives unless his instructions are followed would not commit an offence within Article 1. In

such a case, many legal systems would apply a notion of constructive presence and thereby deem the actor to have been on board the aircraft in flight, but there is no indication that the offence as defined in the Convention was intended to extend to such a case. However, such conduct would now fall within the scope of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971. This Convention is considered in detail subsequently.

The offence established by Article 1 of the Hague Convention differs from aerial piracy, as defined in the Geneva Convention on the High Seas in two vital respects. Firstly, aerial piracy within the Geneva Convention requires that the acts constituting piracy must be directed against another aircraft. There is no such requirement under the Hague Convention. Indeed, an attack from one aircraft against another would not constitute an offence within the Hague Convention. Secondly, whereas an act must be performed for private ends if it is to constitute aerial piracy within the Geneva Convention, motive is irrelevant under the Hague Convention. Consequently, the offence under the Hague Convention more closely reflects the nature of the current threat to civil aviation.

Accomplices

Article 1 makes express provision for the liability of accomplices. Any person who on board an aircraft in flight is an accomplice of a person who performs or attempts to perform acts which would constitute the principal offence himself commits the offence. (Article 1(b).) The conduct

of an accomplice must take place on board an aircraft in flight if it is to constitute an offence within Article 1. This conclusion emerges from a literal interpretation of the provision in which the opening words are clearly intended to qualify both sub-clause (a) and sub-clause (b). This conclusion is also supported by the travaux preparatoires. The Sub-Committee of the Legal Committee of the I.C.A.O., which produced the first draft of the Convention intended that the offence should not extend to include the conduct of accomplices not on board the aircraft. An attempt at the Hague Conference to extend the scope of the Convention to the acts of accomplices on the ground was unsuccessful. Consequently this is another important limitation on the scope of the offence. The person who smuggles guns or explosives on board the aircraft and leaves the aircraft before the flight commences for example, does not commit an offence within Article 1. While such a limitation is regrettable, it should be remembered that such conduct would probably constitute an offence contrary to the local law and is not likely to give rise to the jurisdictional problems which might arise from conduct on board an aircraft in flight. Furthermore, this limitation does not detract from the effectiveness of the Convention in combating the principal mischief at which it is aimed, namely that offenders out of reach of national jurisdiction by virtue of the fact that they are on board aircraft in flight might escape prosecution.

Jurisdiction

Article 4 of the Hague Convention provides:

"1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection

with the offence, in the following cases:

(a) when the offence is committed on board an aircraft registered in that State;

(b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;

(c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence in that State.

2. Each Contracting State shall likewise 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 it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law."

This provision is of central importance to the scheme of the Convention.Article 4(1) and Article 4(2) oblige contracting States to establish their jurisdiction over the offence, as defined in Article 1, in certain specified circumstances. Those circumstances are extremely wide in their ambit.

It has been suggested, both in the Introduction and in relation to Article 3(2) of the Tokyo Convention, that the problem does not simply relate to questions of the jurisdictional competence of municipal courts but that, in addition, it involves questions of the ambit of a State's laws. Many ofthe problems which have arisen in this context are due not so much to the lack of a court of competent jurisdiction as to the inapplicability of rules of municipal law to conduct on board aircraft. In considering

the Tokyo Convention it was suggested that the effect of Article 3(2) of that Convention was probably to require a contracting State to extend certain rules of its municipal law to conduct on board aircraft registered in that State but that, in any event, such an extension was necessary if the extension of the jurisdiction of its courts was to have any effect, for without such an extension of its law there could be no offence over which to exercise jurisdiction. This argument applies with equal force to Article 4 of the Hague Convention. However, in the case of the Hague Convention it seems clear that such an extension of the criminal law of contracting States is required. For the Hague Convention begins by defining an offence and then goes on to require contracting States to establish their jurisdiction over it. Furthermore, by virtue of Article 2 each contracting State undertakes to make the offence punishable by severe penalties. It seems therefore that each contracting State is under a duty, in the first place, to render the conduct described in Article 1 of the Convention (i.e. "the offence") an offence contrary to its municipal law, if it is not already an offence contrary to that law. Secondly, each contracting State must ensure that that part of its municipal law extends to such conduct which takes place in the circumstances set out in Article 4(1)(a), (b) and (c) and Article 4(2) of the Convention. Thirdly, each contracting State must ensure that its municipal courts are competent to exercise jurisdiction over such conduct when occurring in such circumstances.

Article 4 requires contracting States to establish their jurisdiction in four sets of circumstances. It is convenient to consider each of these in turn.

(1) Conduct on board an aircraft registered in the contracting state

Article 4(1)(a) of the Convention requires each

contracting State to take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, when the offence is committed on board an aircraft registered in that State. This provision applies wherever the aircraft is situated at the time of the relevant acts, whether in the airspace of the State of registration, in the airspace of another State or outside the territory of any State.

Special provision is made for the case of aircraft which are subject to joint or international registration. Contracting States which establish joint air transport operating organizations or international operating agencies which operate aircraft which are subject to joint or international registration are required to designate for each aircraft the State among them which shall exercise jurisdiction and have the attributes of the State of registration for the purpose of this Convention. Notice of this designation must be communicated to I.C.A.O. which, in turn, will communicate the notice to all Contracting States (Article 5). This provision corresponds with Article 18 of the Tokyo Convention. However, in cases concerning joint air transport operating organizations or international operating agencies which operate aircraft which are subject to joint or international registration, the Hague Convention does not apply if the place of take-off and the place of actual landing of the aircraft on board which the offence is committed are situated within the territory of the same State if that State is one of the States participating in the operation of the aircraft. (Article 3(4).) This is an exception to the general rule stated in Article 3(3) which has been considered above.

(2) Aircraft landing in the territory of a contracting State with a hijacker on board

Article 4(1)(b) of the Convention requires each

contracting State to take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence when the aircraft on board which the offence was committed lands in its territory with the alleged offender still on board. The provision contemplates the exercise of jurisdiction in a wide range of circumstances. It extends to conduct on board an aircraft whether registered in that State or not. Furthermore, the provision applies to conduct on board an aircraft which subsequently lands in a contracting State with a hijacker on board, without regard to the position of the aircraft at the time of the relevant acts. If the relevant acts took place on board an aircraft which was at that time in the territorial airspace of the State in which it subsequently landed, the jurisdiction exercised by the State of landing over such acts would not be an extra-territorial jurisdiction. This would normally be the case when a hijacking was successful because the offence would continue in the territorial air-space of the State of landing until the flight ended. However it would not be the case when an attempted hijacking was unsuccessful and the offence had ceased before the aircraft entered the air-space of the State of landing. Consequently, the provision seems to be sufficiently wide to envisage the exercise of jurisdiction over conduct which has no connecton with the State exercising jurisdiction save for the possibly fortuitous fact that the aircraft subsequently lands there with the hijacker on board. For example, in a case where an aircraft registered in State A crewed by and carrying passengers of the nationality of State A is the subject of an attempted hijack by nationals of State A when the aircraft is in the air-space of State A or over the high seas and after the hijackers are overpowered the aircraft enters the air-space of State B and lands there, the Hague Convention contemplates the exercise of jurisdiction by State B. In this case there are present none of the traditional

jurisdictional linking factors on which the exercise of extra-territorial jurisdiction is generally explained. Consequently, the provision may be regarded as establishing a new basis for the exercise of extra-territorial jurisdiction, founded on a new jurisdictional link. The provision was, as might have been expected, the source of some controversy before the Legal Committee of I.C.A.O. (Legal Committee, 17th Session, pp. 50-52, 88). However, the measure is welcome in that it is likely to assist in plugging a number of jurisdictional gaps and is justifiable both by reference to the nature of the offence and to the fact that in such circumstances the State of landing is in the best position to apprehend and punish the wrongdoers.

(3) Conduct on board aircraft leased without crew to a lessee who has his principal place of business or his permanent residence in the contracting State

Article 4(1)(c) of the Convention requires each contracting State to take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State. This provision is intended to cast the net of jurisdiction even wider, so as to include conduct on board aircraft which, whether or not they are registered in a contracting State, are effectively operated by a person with his principal place of business or, if he has none, his permanent residence in a contracting State. In such circumstances the State from which the aircraft is operated may well have a more substantial connection with the operation of the aircraft and consequently a greater interest in the

exercise of jurisdiction than the State of registration. However, it is not entirely clear why the provision is limited to cases of aircraft without crew. While it is arguable that aircraft leased with crew might have a stronger connection with the State of registration, the State from which it is substantially operated would nevertheless retain a strong interest in exercising jurisdiction.

While the jurisdiction established in accordance with Article 4(1)(c) may be exercised in relation to intra-territorial acts, for example where the relevant conduct takes place on an aircraft leased without crew in the territorial air-space of the contracting State where the lessee has his principal place of business, it is clear that it also extends to extra-territorial activities. Furthermore, it envisages the possible exercise of an extra-territorial jurisdiction in circumstances where there are present none of the jurisdictional linking factors on which the exercise of extra-territorial jurisdiction is usually explained. Consequently, as in the case of Article 4(1)(b), the provision may be regarded as establishing a new basis for the exercise of extra-territorial jurisdiction founded on a new jurisdictional link.

(4) Alleged offender present in territory of a contracting State

Article 4(2) of the Convention requires each 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 it does not extradite him to:

(a) the State in which the aircraft on board which the offence was committed was registered;

(b) a State in which the aircraft on board which the offence was committed landed with the alleged offender still on board; or

(c) the State where a person to whom the aircraft on which the offence was committed was leased without crew, has his principal place of business or, if he has none, where he has his permanent residence.

This provision is intended to create a jurisdictional safety-net. Its effect is to require contracting States to extend their jurisdiction in such a way that even if a hijacker evades arrest in those States directly concerned with the hijacking he may be tried and convicted for the offence in any contracting State in which he is subsequently found. Since 100 States are currently parties to the Convention, the possibility of hijackers escaping prosecution is considerably reduced.

This provision is considerably wider than that contained in Article 4(1)(b) which applies only in the case of a hijacker landing in the territory of a contracting State on board the aircraft on which the offence was committed. The present provision is intended to apply in addition when a hijacker is subsequently found in a contracting State. The extension of extra-territorial jurisdiction envisaged by Article 4(2) is potentially enormous. As in the case of the other provisions considered above, the extra-territorial jurisdiction which it envisages is not limited to those cases where there is present one of the conventional jurisdictional linking factors which are normally invoked in support of the exercise of extra-territorial jurisdiction. Article 4(2) requires a contracting State to establish its jurisdiction in circumstances where there is no connection between the alleged offence and that State save that the

alleged offender is subsequently found there.

It has been suggested above that Article 4(1) and Article 4(2) require each contracting State to ensure that the ambit of its criminal law extends to the relevant conduct on board aircraft in the circumstances specified in those provisions so as to render such conduct an offence contrary to its law. The extension of the ambit of a State's criminal law so as to include the relevant conduct in the circumstances contemplated by Article 4(2) effectively requires each contracting State to establish in its municipal law an offence of hijacking which may be committed by any person on board any aircraft anywhere in the world. Such a result is achieved by the United Kingdom Hijacking Act 1971, for example, which provides:

> "1(1) A person on board an aircraft in flight who unlawfully, by the use of force or by threats of any kind, seizes the aircraft or exercises control of it commits the offence of hijacking, whatever his nationality, whatever the State in which the aircraft is registered and whether the aircraft is in the United Kingdom or elsewhere..."

This provision is subsequently qualified in accordance with the Hague Convention but nevertheless establishes an offence of extremely wide ambit. It was necessary that the intended extra-territorial application of the provision be expressly stipulated in order to rebut the presumption against extra-territorial effect normally applied by English courts in interpreting domestic legislation.

It is, of course, the case that the obligation imposed by the Hague Convention on a contracting State to extend its jurisdiction to such circumstances is limited to cases where the contracting State does not extradite the alleged offender to one of the relevant States. However,

arrangements for the extradition or return of fugitive offenders are so incomplete and so imperfect that a contracting State could never be certain that it would be able to extradite an alleged hijacker apprehended in its territory. Furthermore, a contracting State in whose territory an alleged hijacker is apprehended may not receive requests from any of the relevant States for his extradition. Consequently, it seems that in order to comply with the requirements of the Convention contracting States must establish offences of an ambit as extensive as that of the offence created by section 1 of the United Kingdom Act.

In the result Article 4(2) comes very close to rendering the offence of hijacking an offence subject to universal jurisdiction. It appears that the conduct defined in Article 1 constitutes an offence contrary to the law of each of the contracting States regardless of the nationality of the actor, the State of registration of the aircraft on board which the alleged offence took place or its position at the relevant time. It is suggested that this enormous extension of the extra-territorial jurisdiction of contracting States is justifiable by reference to the nature of the offence of hijacking which necessarily imperils the common interests of all States in preserving the safety of civil aviation. Whether hijackers are or are not pirates in international law, they are without doubt hostes humani generis. The extension and the exercise of jurisdiction in the circumstances contemplated in Article 4 are essential if the Convention's stated objectives of deterring and punishing such activities are to be achieved.

Finally, in this context, reference must be made to Article 4(3) which provides that the Convention does not exclude any criminal jurisdiction exercised in accordance with national law. A similar provision is contained in

Article 3(3) of the Tokyo Convention. It is difficult to see why this provision was included in the Hague Convention and its effect is not entirely clear. It seems likely, however, that the provision merely seeks to emphasise that the jurisdictional provisions of the Convention are not intended to prejudice the other bases on which States have claimed to exercise jurisdiction over hijackers. Consequently the Convention does not prevent contracting States from exercising jurisdiction in circumstances not specified in the Convention.

As in the case of the Tokyo Convention, the Hague Convention makes no provision for priority of competing jurisdictions.

<u>The effect of the jurisdictional provisions of the Hague Convention on non-contracting States</u>

A further matter arises for consideration here. What effect, if any, do the jurisdictional provisions of the Hague Convention have on non-contracting States?

Whereas the Tokyo Convention applies only to conduct on board aircraft registered in a contracting State, the Hague Convention is not so limited by its terms. Article 1 establishes an offence which may be committed on board an aircraft in flight and which is not restricted to conduct on board an aircraft registered in a contracting State. Similarly Article 4(1)(b),(c) and Article 4(2), in setting out the circumstances over which contracting States are required to establish their jurisdiction, do not limit this requirement to conduct on board aircraft registered in a contracting State. Furthermore, the duty to extradite or to submit the case to the competent authorities for the purpose of prosecution imposed by Article 7 applies equally to conduct on board aircraft registered in contracting and

non-contracting States. The application of the Convention to aircraft registered in non-contracting States is established not only by the plain meaning of the Convention but also by its travaux préparatoires. It was the clear intention of the Hague Conference that the Convention should apply to all aircraft, wherever registered. (e.g. Hague Conference Vol. 1, para. 46) Similarly the Convention is intended to apply to the conduct of persons on board aircraft in flight, regardless of whether they are nationals of a contracting State.

It seems therefore that the Hague Convention may require a contracting State to exercise jurisdiction over a hijacker found in its territory in respect of activities which have no jurisdictional link with any State other than States which are not parties to the Convention. Let us take an extreme example. X, a national of State A, hijacks an aircraft registered in State B in the airspace of State C. He escapes and is subsequently arrested in the territory of State D. State A, State B and State C are not parties to the Hague Convention. State D is a party to the Hague Convention. In such circumstances, if State D does not extradite X it is obliged to submit the case to its competent authorities for the purpose of prosecution and those authorities must take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of State D (Article 7).

The exercise of jurisdiction by State D in such circumstances cannot be justified, as against State A, by reference to the provisions of the Hague Convention for it is a well-established rule of international law, now reflected in Article 34 of the Vienna Convention on the Law of Treaties, that a treaty creates neither obligations nor rights for States which are not parties thereto, without their consent. It is necessary to consider therefore whether the exercise of jurisdiction in such circumstances

against a national of a non-contracting State is in accordance with customary international law or whether it is prohibited. It is submitted that such a restriction upon the independence of States and their freedom to exercise jurisdiction in their own territory cannot be presumed. There is no general prohibition on the extension of a State's laws or the jurisdiction of its courts to persons outside its territory subject only to exceptions in defined cases. The position is, rather, that international law leaves a very wide measure of discretion to States in such matters, and it is limited only by certain prohibitive rules.There is no evidence to support the existence of any rule of customary law which would prohibit the exercise of jurisdiction in the circumstances contemplated in Article 4(1)(b)(c) and Article 4(2) of the Hague Convention. Furthermore, when one considers the nature of the offence over which jurisdiction is to be exercised, it seems highly improbable that a non-contracting State would protest against an exercise of jurisdiction in accordance with Article 4.

Duties of contracting States

When any of the acts which constitute the offence of hijacking within Article 1(a) have occurred or are about to occur, contracting States are under a duty to take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft (Article 9(1)). In such cases, any contracting State in which the aircraft or its passengers or crew are present must facilitate the continuation of the journey of the passengers and crew as soon as practicable and must, without delay, return the aircraft and its cargo to the persons lawfully entitled to possession (Article 9(2)). This provision closely resembles Article 11 of the Tokyo Convention.

A contracting State in the territory of which an alleged offender is present is required to make immediately a preliminary enquiry into the facts. (Article 6(2).) Upon being satisfied that the circumstances so warrant, a contracting State in the territory of which the offender or the alleged offender is present must take him into custody or take other measures to ensure his presence (Article 6(1)). It is difficult to explain the inclusion of the words "upon being satisfied that the circumstances so warrant..." for the obligation imposed by Article 7 to extradite an alleged offender or to submit the case to the competent authorities for the purpose of prosecution would suggest that in every case the circumstances warranted the taking of some measures to ensure the alleged offender's presence. Article 6 further provides that the custody or other measures shall be as provided in the law of the State. The application of a national standard as opposed to an international standard to the treatment of aliens has been considered in detail in the context of the Tokyo Convention and the conclusions stated there apply equally in relation to the Hague Convention. However, the following matters are particularly worthy of note in the context of the Hague Convention:

(i) The national standard applies only to custody or other measures taken to ensure the presence of an alleged offender (Article 6(1));

(ii) The custody or other measures to ensure the presence of an alleged offender may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted (Article 6(1));

(iii) Any person in custody must be assisted in communicating immediately with the nearest

appropriate representative of the State of which he is a national (Article 6(3));

(iv) When a State has taken a person into custody it must immediately notify the fact that such person is in custody and the circumstances which warrant his detention to:

(a) the State of registration of the aircraft;

(b) where the alleged offence took place on board an aircraft leased without crew, the State where the lessee has his principal place of business, or, if he has none, his permanent residence;

(c) the State of nationality of the detained person;

(d) if it considers it advisable, any other interested States. (Article 6(4).)

(iv) The findings of the preliminary inquiry must be promptly reported to the States listed in paragraph (4) above, with an indication whether it is intended to exercise jurisdiction. (Article 6(4).)

Article 7 is of central importance to the scheme of the Convention. It provides that a 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. The authorities are required to 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. The effect of this provision is that whenever an alleged offender is found in the territory of one of the 100 States which are currently parties to the Hague Convention, the State is bound either to extradite him or to submit the matter to its prosecuting authorities. As a result, no hijacker can find refuge in any of the States parties to the Hague Convention. The provision does not impose an absolute obligation to prosecute in such circumstances. It would perhaps be unreasonable to require States to abandon their discretion whether or not to prosecute in such circumstances. Nevertheless the requirement that the decision be taken in the same manner as in the case of ordinary offences of a serious nature under the law of that State renders it probable that such persons will be prosecuted in the vast majority of cases.

There is a duty on contracting States to afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offence or other acts of violence against passengers or crew committed by the alleged offender in connection with the offence. (Article 10(1).) However, this duty is without prejudice to any obligations arising under any other treaty relating to mutual assistance in criminal matters.

It should be noted that in the case of the provisions considered above there is a further exception to the general rule as to the application of the Convention. These provisions apply whatever the place of take-off or the place of actual landing of the aircraft, if the offender or the alleged offender is found in the territory of a State

other than the State of registration of that aircraft. (Article 3(5).)

Each contracting State is under a duty to report to the Council of I.C.A.O. as promptly as possible, any relevant information in its possession concerning the circumstances in which a hijacking took place and the action taken to restore or preserve the control of the commander of the aircraft, to facilitate the continuation of the journey by the passengers and crew and to return the aircraft and its cargo to the persons lawfully entitled to possession. In addition, each contracting State is required to notify the Council of I.C.A.O. of any measures taken in relation to the offender or alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings. (Article 11)

It is now necessary to consider the powers and duties of contracting States in the matter of extradition.

Extradition

Effective arrangements for the extradition or return of alleged hijackers are of the greatest importance if such activities are to be deterred and punished. However, the great increase in terrorist activities against aircraft in the late 1960s immediately revealed the inadequacy of existing extradition arrangements to meet this threat. There is no duty imposed by customary international law to surrender individuals accused or convicted of offences in other States. The surrender of such individuals is therefore dependent upon the existence of an extradition treaty or some similar arrangement, such as the scheme for the return of fugitive offenders which operates among Commonwealth States. However these arrangements for the extradition or return of alleged

offenders have been shown to be far from complete in that it has often been the case that no such arrangement existed between the State where the hijacker had taken refuge and the State seeking his extradition, thereby rendering his return impossible. The Hague Convention acknowledges this difficulty and attempts to remedy it by extending existing arrangements for extradition and by providing a basis for new arrangements.

The first method employed by the Convention is to deem the offence of hijacking, as defined in Article 1, to be included as an extraditable offence in any extradition treaty existing between contracting States.(Article 8(1).) As a general rule, States include in extradition treaties lists of offences in respect of which extradition may be requested. The effect of the provision is to amend all previously existing extradition treaties between contracting States so as to include the offence of hijacking, as an extraditable offence. In this way the provisions of one multilateral treaty serve to amend a number of bilateral treaties between States which are parties to the multilateral treaty. However, if such an amendment is to be effective in the law of a contracting State it may well require legislation so as to add the offence of hijacking to the offences which are extraditable under the law of that State.

Secondly, contracting States undertake to include the offence of hijacking as an extraditable offence in every future extradition treaty to be concluded between them. (Article 8(1).) The effect of the failure of contracting States to include such a provision in a subsequent extradition treaty between them is uncertain. It would clearly be a breach of the Hague Convention but it is doubtful whether such a provision should be deemed to be included in the later treaty, in the absence of clear words to that effect. Furthermore, it

should be noted that the provision applies only in relation to treaties subsequently concluded between parties to the Hague Convention; it has no application to extradition treaties subsequently concluded between a party to the Hague Convention and a non-contracting State.

Thirdly, the Convention itself supplies a new legal basis for extradition. It provides that 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 the Hague Convention as the legal basis for extradition in respect of the offence of hijacking. (Article 8(2).) This is a novel approach to the problem. Whereas under the Tokyo Convention extradition was possible between contracting parties only if there existed an extradition treaty or comparable arrangement between them, the Hague Convention itself provides a substitute for such a treaty or arrangement. For the purposes of the extradition of alleged hijackers, the Hague Convention is a multilateral extradition treaty which can be invoked when there is available no other legal basis for extradition. However, the Hague Convention may discharge this function only at the option of the State to which the request for extradition is addressed. If the Convention is invoked in this way, the extradition of the alleged offender must, nevertheless, comply with the other conditions for extradition stipulated by the law of the State to which the request was addressed. This provision imposes no obligation on a contracting State, to which a request for extradition is addressed, to extradite the alleged offender. However, if it fails to do so it must then submit the case to its competent authorities for the purpose of prosecution in accordance with Article 7.

Fourthly, the Convention contains a comparable provision which applies to contracting States which do not make

extradition conditional on the existence of a treaty. The Convention provides that such States shall recognise the offence of hijacking as an extraditable offence between themselves. (Article 8(3).) The Hague Convention therefore provides the basis of a multilateral arrangement for the extradition of hijackers. Once again the conditions for extradition laid down by the national law of the contracting State to which the request is addressed must be complied with. Furthermore, the arrangement may be invoked only at the option of the contracting State to which the request is addressed, but in the event of a failure to extradite that State is obliged by Article 7 to submit the case to its competent authorities for the purpose of prosecution.

A further difficulty experienced in recent attempts to secure the extradition of alleged hijackers has been that States have frequently invoked the political nature of the offence of hijacking as a ground for refusing to surrender hijackers. This is hardly surprising when one considers that a substantial proportion of offences of hijacking are committed from a political motive or with the purpose of escaping from a political system in force in a particuar State and that hijackers frequently seek to turn to their advantage a political antipathy between the different States involved. However the Hague Convention does not deal with the question of the political offence exception to extradition. This omission may be regarded, prima facie, as a major weakness in the treaty. This would, no doubt be so if it was intended that the Convention should render the extradition of hijackers mandatory. However, this is not the case. Although the delegates from the Eastern bloc argued at the Hague Convention in favour of mandatory extradition, such a course was not adopted. While the Convention is likely to be highly effective in extending existing arrangements for extradition and in establishing new arrangements, it clearly contemplates

that extradition is only one possible course of action available to a contracting State in whose territory an alleged hijacker is found. This is demonstrated by Article 7 which imposes a duty to submit the case to the competent authorities for the purpose of prosecution if the alleged offender is not extradited. This seems highly realistic for it is clear that in the case of an offence such as hijacking, which is likely in a large number of instances to possess political undertones, a Convention imposing a mandatory requirement of extradition would be unlikely to gain general support in the international community. The position adopted in the Convention whereby a contracting State will generally have the choice of extraditing an alleged hijacker found in its territory or prosecuting him itself is a workable compromise which has already received the assent of a large majority of States.

Extradition treaties frequently provide that the offence in respect of which the return of the alleged offender is requested must have been committed in the territory of the State seeking his extradition. Such provisions are likely to give rise to difficulty in the case of requests for the extradition of hijackers. For example, the relevant offence may have been committed on board an aircraft registered in the State requesting extradition at a time when it was over the high seas or in the airspace of another State. This difficulty is overcome by Article 8(4) of the Hague Convention which provides that the offence of hijacking shall be treated, for the purpose of extradition between contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of:

(a) the State of registration of the aircraft;

(b) the State in which the aircraft lands with the alleged offender still on board;

(c) in the case of an aircraft leased without crew, the State in which the lessee has his principal place of business or, if he has none, his permanent residence.

By the use of this fiction, problems arising from the actual location of the offence are solved in the case of a request for extradition made by any of these three States.

We have seen that the Hague Convention makes no provision for priority in the exercise of jurisdiction by contracting States. Similarly, the Convention does not attempt to establish a scheme of priority in the matter of extradition. A United States proposal that priority should be given to a request for extradition made by the State of registration of the aircraft on which the alleged offence was committed was not included in the Convention. (Hague Conference para. 29) However, this omission is hardly a serious defect in the scheme of the Hague Convention.

Finally in this context it should be noted that the provisions dealing with extradition constitute a further exception to the general rule as to the scope of the Convention. These provisions apply whatever the place of take-off or the place of actual landing of the aircraft on board which the offence was allegedly committed, if the offender or the alleged offender is found in the territory of a State other than the State of registration of that aircraft. (Article 3(5).)

Final Clauses

The Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America are the Depositary

Governments of the Hague Convention. The Depositary Governments are required to inform promptly all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession, the date of entry into force of the Convention and other notices (Article 13).

The procedures to be followed in acceding to the Hague Convention are considered below.

A contracting State may denounce the Convention by written notification to the Depositary Governments. Denunication takes effect six months following the date on which notification is received by the Depositary Governments. (Article 14).

The Convention provides that any dispute between two or more contracting States concerning the interpretation or application of the Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months of the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the State of the Court. Article 12(1).) However, a contracting State may at the time of signature, ratification or accession enter a reservation declaring that it does not consider itself bound by Article 12(1). Such a reservation operates on a reciprocal basis.(Article 12(2).) A contracting State may withdraw a reservation by notification to the Depositary Governments. (Article 12(3).)

Procedures on accession

The Hague Convention is open to accession at any time by any State which did not sign the Convention before it came into force on 14th October 1971. (Article 12(1).)

The instrument of accession must be deposited with the Depositary Governments, namely the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America. (Article 13(2).) The Convention enters into force for an acceding State thirty days following the date of deposit of its instrument of accession. (Article 13(4).) The Depositary Governments are required promptly to inform all signatory and acceding States of the date of deposit of each instrument of accession. (Article 13(5).)

Unlike the Tokyo Convention, the Hague Convention includes no prohibition on reservations. Consequently, before accession can be effected it will be necessary to decide whether the accession is to be subject to a reservation. If it is intended to accede subject to a reservation, the reservation should be communicated in writing to the Depositary Governments not later than the time of accession. The most convenient course is that the instrument of accession should include the terms of the reservation.

A number of newly independent Commonwealth States are entitled to succeed to the Hague Convention which was ratified by the United Kingdom "in respect of the United Kingdom of Great Britain and Northern Ireland and Territories under the territorial sovereignty of the United Kingdom as well as the British Solomon Islands Protectorate." The Bahamas and Papua New Guinea have both formally succeeded to the Convention. It is not possible in the context of this document to consider in detail the question of State succession in respect of treaties. However, it should be noted that the position of each newly-independent State in this regard, and in particular the question of provisional succession, will vary according to the practice adopted by that State on independence.

Legislation will be necessary to give effect to the Convention in municipal law. In the United Kingdom this was provided by the Hijacking Act 1971 (1971 c.70). A draft Bill is produced in Appendix 6.

By virtue of the Hijacking Act 1971 (Overseas Territories) Order 1971 (S.I. 1971 No. 1739) as amended by S.I. 1973 No. 1893 sections 1,2,3,4 and 5 of the Hijacking Act 1971 as modified by those Statutory Instruments were extended to a number of Territories including the following which have since attained independence:

- British Honduras
- British Solomon Island Protectorate
- Gilbert and Ellice Islands Colony
- Seychelles