

May 1969

## Aircraft Piracy - Crime or Fun?

Seymour W. Wurfel

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Air and Space Law Commons](#)

---

### Repository Citation

Seymour W. Wurfel, *Aircraft Piracy - Crime or Fun?*, 10 Wm. & Mary L. Rev. 820 (1969),  
<https://scholarship.law.wm.edu/wmlr/vol10/iss4/4>

Copyright c 1969 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

# AIRCRAFT PIRACY—CRIME OR FUN?

SEYMOUR W. WURFEL\*

## THE FRAME OF REFERENCE

When Caesar (he who afterwards became Dictator) was still a private citizen, he pursued with a hastily raised fleet the pirates by whom he had been captured on an earlier occasion. Some of their boats he put to flight, some he sank; and when the Proconsul neglected to punish the guilty captives, Caesar himself put out to sea again and crucified the culprits, influenced undoubtedly by the knowledge that the judge to whom he had appealed was not fulfilling the functions of the judicial office, as well as by the consideration that it was apparently possible to take such action guiltlessly upon the seas, where one is governed not by written precepts but by the law of nations.<sup>1</sup>

In these words in 1604 Hugo Grotius described and evaluated the action taken by Julius Caesar over two thousand years ago to punish piracy. The enforcement frustration then experienced by Caesar has proved to be chronic. At least through the seventeenth century, the legal solution remained the same. Barrister Charles Malloy, an authority of that era, wrote:

If Piracy be committed on the Ocean, and the Pirates in the attempt there happen to be overcome, the Captors are not obliged to bring them to any Port, but may expose them immediately to punishment, by hanging them up at the Main-yard end before a departure; for the old natural liberty remains in places where are no judgments.

And therefore at this day, if a Ship shall be on a Discovery of those parts of the unknown World, and in her way be assaulted by a Pirate, but in the attempt overcomes the Pirate, by the Laws Marine the Vessel is become the Captors; and they may execute such Beasts of prey immediately, without any solemnity of condemnation.

So likewise, if a Ship shall be assaulted by Pirates, and in the attempt the Pirates shall be overcome if the Captors bring them

---

\*B.A., 1927, Pomona College; LL.B., 1930, Harvard University; J.D., 1950, Emory University; Professor of Law, University of North Carolina.

1. 2 H. GROTIUS, *DE JURE PRAEDAE*, at 95 (Williams transl. 1950).

to the next Port, and the Judge openly rejects the Tryal, or the Captors cannot wait for the Judge without certain peril and loss, Justice may be done upon them by the law of Nature, and the same may be there executed by the Captors.<sup>2</sup>

In the last third of the twentieth century, enforcement frustration has resulted, exacerbated by current mores which find high seas crucifixion unacceptable as meeting minimum standards of due process of law, and by the complications of cold war nuances.

Caesar's pirate problems were two-dimensional upon the surface of the sea. Neither Caesar, Grotius, nor Malloy contemplated the three-dimensional situation of piratical acts against aircraft in flight, let alone the possibility of four-dimensional piracy directed against space craft or space platforms in outer space. Without speculating on how long it may take mankind to contrive space piracy into an actual legal problem, it is a simple fact that aircraft piracy is now a critical legal issue.

The Congress of the United States, confronted in 1961 with "piratical" attacks on aircraft, by amendment to the Federal Aviation Act of 1958, created the statutory federal crime of aircraft piracy. This it defined as "any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent of an aircraft in flight in air commerce."<sup>3</sup> The offense or attempts are punishable by death or imprisonment for not less than twenty years. The possibility of the death penalty as a deterrent becomes academic in view of the fact that in 1968 there was not one execution of a death sentence in the United States, although four hundred and thirty-five prisoners so sentenced were confined in death rows.<sup>4</sup>

The two millennia history of the law of piracy from Caesar to the Nixon administration, is a tortuous one, much of which is beyond the scope of this article. Moreover, the purpose of this discussion is to link the newest manifestation of piracy, skyjacking, to its generic ancestry and to assess its legal significance.

#### SKYJACKING FACTS

On May 1, 1961, an armed Cuban in a United States flag National Airlines Convair over the Florida Keys forced the pilot to fly him to

---

2. C. MALLOY, *De Jure Maritime et Navali*: or, *A Treatise of Affairs Maritime and of Commerce*, 57, 58 (3d ed. 1682) [hereinafter cited as MOLLOY].

3. 49 U.S.C.A. § 1472(i) (1958).

4. N.Y. Times, Dec. 31, 1968 § C, at 17; Federal Bureau of Prisons Report.

Havana. The other passengers and crew members were allowed to return to the United States on the plane.<sup>5</sup> Similar hijackings of both commercial and private planes have occurred since then with monotonous regularity, with the one variant that the majority of the pistol pointers have been Americans, not Cubans.<sup>6</sup>

There were twenty-one such aircraft piracies to Havana in 1968 alone.<sup>7</sup> Twelve of these took place on regularly scheduled airline flights.<sup>8</sup> In the last, a Negro, using a toy pistol and carrying a child in his arms, chose an Eastern Airlines jetliner, on a flight from Philadelphia to Miami, with fifteen passengers aboard, for his trip to Havana. Consistent with the 1968-69 pattern, at the Havana Airport, the culprit was permitted to disembark and the crew was allowed to fly the plane to Miami. The passengers were detained, taken by bus ninety miles to Veradera Beach and the next day flew to Miami on two Eastern Electras sent to Varadera for that purpose.<sup>9</sup> Cuban spokesmen asserted this was necessary for passenger safety although the Havana Airport has a 10,500 foot jet runway. Speculations as to why this routine has been required included: Cuban fear of possible take-off crash involving passengers following servicing of the plane in Havana; sheer harassment; the propaganda purpose of forcing passengers to see a more attractive Cuban area before returning. Speculation terminated when an agreement, negotiated through the Swiss Embassy in Havana, was reached between Cuba and the United States whereby passengers now return on the hijacked plane with the understanding that the United States assumes full safety responsibility. This procedure commenced February 10, 1969.<sup>10</sup>

---

5. N.Y. Times, July 25, 1961, at 1, Col. 7. The citation of newspaper authority in legal writing would not normally be acceptable. Since, with rare exceptions, skyjackers have been neither apprehended nor brought to trial and their cases have not produced official records nor judicial opinions, the raw material of aircraft piracy must of necessity be derived from the news media and not from official sources.

6. Durham Morning Herald, Dec. 8, 1968, § C at 12. This article states that in only nine of twenty-three cases in which nationality has been determined was the skyjacker a Cuban. One was a Puerto Rican, another a French national, and twelve were American citizens. Of these twelve, one is a grandson of a deceased Vice President of the United States, another a United States Army career army sergeant, and a third a Michigan professor of sociology. Domestic trouble was present in two of these instances. At least two of these hijackers had previous criminal records.

7. The Washington Post, Dec. 20, 1968, § A, at 7.

8. N.Y. Times, Dec. 12, 1968, § C, at 49, col. 8.

9. The Washington Post, Dec. 20, 1968 § A at 7; N.Y. Times, Jan. 10, 1969, § C, at 5, col. 1.

10. Durham Morning Herald, Dec. 8, 1968, § C, at 12; Feb. 2, 1969, § A, at 1.

The Cuban Government imposes high charges on the airlines for landing and fueling fees and for food and lodging furnished passengers while in Cuba.<sup>11</sup> Airline experts calculate the average service charge for each hijacking made by the Castro Government is \$3,000. The United States State Department pays these charges and then forwards the bill to the airline involved.<sup>12</sup> State Department sources have said there is "no substance at all" to published reports the United States has paid more than \$30,000 for return of an airliner and there has "not been the slightest suggestion that blackmail" has ever been attempted by Cuba.<sup>13</sup> Total airline cost per hijacking has run between \$7,000 and \$10,000.

The hijacking debut for 1969 indicates that new records for the activity will be established. On January second the Federal Aviation Agency announced that an Eastern Airlines DC8-61, enroute nonstop from New York to Miami with one hundred and forty-eight persons aboard, was seized over Jacksonville, Florida, and taken to Havana. In this instance the Negro hijacker was accompanied by a female companion. Their ploy was to hold the pistol on a two-year-old boy whom they snatched from a seat beside his mother and carried forward in the plane. A stewardess unlocked the door to the cockpit. Once inside the crew cabin, another stewardess obligingly held the hostage child for the gunman. In a deviation from routine, fifteen sick passengers were permitted to return from Havana on the original plane. The other passengers waited for two planes sent to Veradera Beach to retrieve them. This hijacker was reputed to have said he was leaving Harlem for "a happy Cuba."<sup>14</sup>

The multinational dimension was increased when an Olympic Airways DC 6 bound from the island of Crete to Athens on January 2, 1969, was forced to fly to Cairo. The stewardess stated to the passengers "that she had been given orders from the captain to say nothing, but to keep calm." The pistol-equipped hijacker, a Cretan and a former Greek Army deserter, was taken into custody by Egyptian authorities. Curiously, the pattern was followed of the passengers deplaning at Cairo and completing their journey to Athens in another Olympic airliner sent to get them.<sup>15</sup> Five Colombian airlines were hijacked to Havana in a one year period ending in January, 1969.

---

11. N.Y. Times, Dec. 13, 1968, § C, at 46, col. 1 (editorial).

12. *Id.* Jan. 10, 1969, § A, at 5, col. 1; Feb. 12, 1969, at 1, 7.

13. Durham Morning Herald, Jan. 9, 1969, § A, at 1.

14. *Id.* Jan. 4, 1969, § A, at 8.

15. *Id.* Jan. 3, 1969, § A, at 8.

On January 9, 1969, an Eastern Airlines flight from Miami to the Bahamas with seventy-nine passengers aboard was diverted to Cuba by a hijacker who accomplished his purpose by holding a knife with a seven-inch blade to the side of a stewardess. This Purdue University drop-out announced he was from Indiana, hated the United States, was a communist who had just completed a mission, and was running from the FBI.<sup>16</sup>

January 11, 1969, produced two skyjackings to Cuba. The first occurred as an ASPA Peruvian National Airlines Convair 990, with one hundred and ten passengers aboard prepared to land at Miami. The gunman, who boarded the jetliner at Guayaquil, Ecuador, and was travelling under a Mexican passport, broke into the flight cabin after the stewardess had announced the plane was approaching Miami and was quoted as saying, "My life doesn't matter. Neither do the lives of you or the passengers. I want to get to Havana."<sup>17</sup>

The second seizure of the day occurred aboard a United Airlines jetliner enroute from Jacksonville to Miami carrying nineteen persons. This crewcut hijacker, who pulled his pistol from a brief case, is reputed to have told the pilot to radio ahead: "Tell Fidel Red is coming." This character, however, tarnished his swashbuckling image by trying to open the door at ten thousand feet when he thought the plane had landed and when it did land at Havana by opening the door before the ramp arrived and dangling by his fingers until rescued by ground guards who helped him land on his feet. One of the other passengers, not otherwise involved in this incident, did not return from Cuba.<sup>18</sup>

January thirteenth produced a frustrated aircraft piracy aboard a Delta flight from Detroit to Miami with seventy-seven persons aboard. The hijacker, a first class passenger, accompanied by his three year old son, waited until the Convair 888 was in the landing pattern over Miami and only three minutes from the ground. He then removed a sawed-off, double-barreled shotgun from a suitcase, pressed it into the stomach of a stewardess, and told her to tell the pilot to go to Cuba. She entered the cockpit and the door locked behind her. She reported the demand to the pilot, who directed the second officer to keep an eye on the hijacker, radioed the ground for police to stand by, and completed his

---

16. *Id.* Jan. 10, 1969, at 1.

17. *Id.* Jan. 12, 1969, at 1; Jan. 13, 1969, § A, at 1; N.Y. Times, Jan. 12, 1969, at 28, col. 1.

18. Durham Morning Herald, Jan. 13, 1969, § A, at 1.

landing. When officers arrested the frustrated hijacker he was sitting quietly in his seat, the shotgun beneath it and the shells in his suitcase.<sup>19</sup>

January nineteenth brought two more hijackings. The pilot of an Eastern Airlines jet, non-stop from New York to Miami, with one hundred and seventy-six persons aboard, radioed from over Florida: "There's a man in the cockpit with a gun and a handgrenade. We're heading for Havana." One stewardess gave the mustached skyjacker access to the cockpit and another translated from Spanish to English for him. He held a Dominican Republic passport in one hand. The plane crew and five ailing passengers were permitted to fly to Miami from the Havana airport. The other passengers were temporarily detained for later return. The pilot after arriving at Miami was quoted as saying that the assailant did not have a pistol, and that: "He said he was 19 years old and kept hollering Cuba, Cuba and had what appeared to be a handgrenade. I don't think he was mentally unstable. He was a very clean cut, nice looking man."<sup>20</sup>

On the same day, the second unscheduled arrival at Jose Marti Airport was an Ecuadorian prop-jet carrying eighty-one persons, including three government officials of Ecuador. The flight, commencing at Guayaquil, Ecuador, was destined for Miami, but over the coast of Ecuador was seized by ten men, three of whom proved to be armed with submachine guns. They held tickets from Guayaquil to Panama City. The craft landed at Barranquilla, on the north coast of Colombia, to refuel. There it was surrounded by police cars and Colombian President Lleras Restrepo, being informed, ordered that refueling be refused. The pilot radioed that one of the men would kill him if fuel was denied. The Colombian Ministry of Defense then ordered the fuel delivered "in order to avoid a tragic incident." This was done and the plane was permitted to proceed to Havana.<sup>21</sup>

Subsequent skyjackings included:

(1) A National Airlines jet flight from Key West to Miami was taken over just after takeoff on January 24, 1969, by an individual who stated he was a Navy deserter and had refused to go to Viet Nam. The pilot radioed: "Here we go again. There is a kid with a knife in the cockpit."

(2) A National Airlines jet bound from Los Angeles to Miami was

---

19. *Id.* Jan. 14, 1969, § A, at 1.

20. *Id.* Jan. 20, 1969, § A, at 1, 2.

21. *Id.*

seized, on January 28, 1969, after leaving New Orleans, by two Chino, California, prison escapees armed with a pistol and four sticks of dynamite.

(3) On the same day, an Eastern Airlines DC 8 enroute from Atlanta to Miami with ninety-seven passengers was commandeered by three hippie-clad Negroes.

(4) On February 3, 1969, two smartly-dressed couples took over an Eastern Boeing 727 flight from New York to Miami, with ninety-three persons aboard.

(5) The same day a mustachioed, long-haired, knife-wielding student from Dutchess Community College in Poughkeepsie, New York, and a female companion, tried to divert a National airliner with seventy-three passengers aboard as it prepared to land at Miami on a flight from New York. The pilot said he had to land for fuel and did so. Another crew member disarmed the young man and the pair were turned over to the police.

(6) On February 7, 1969, a federal charge against a Portland, Oregon, salesman was dismissed. While on a United flight from San Francisco to Hawaii, he was accused of suggesting that the plane fly to Cuba. The United States Attorney said the accused realized it was, "a stupid joke."

(7) February 10, 1969, on an Eastern flight carrying one hundred and eleven passengers from San Juan, Puerto Rico to Miami, a man, who said he had to see his sick father in Havana, diverted the plane at pistol point.

(8) The following day seven armed young men seized an Aeropostal DC 9 twin jet operated by the Venezuelan Government, enroute from Maracaibo to Caracas and took it to Santiago, Cuba. Two passengers of the seventy-three persons aboard were majors in the Venezuelan Army. This hijacking was believed to have taken place in retaliation for the November, 1968, temporary seizure of a Cuban fishing vessel in Venezuelan waters for assertedly engaging in supplying Castroite guerrillas in Venezuela. The Cuban Government announced the release of the aircraft a week later, after the payment of \$31,466.60 expenses by the Venezuelan Government.

(9) The same day a skyjacker was frustrated on a British West Indies Airways jet from Jamaica. As the aircraft made its final approach to Miami the culprit tried to seize the controls, but was overpowered by the pilot and held down by passengers until the plane landed.



(10) February 1, 1969, an American, one of ninety-six passengers aboard an Eastern Airlines Boeing 720 jet flight from Boston to San Juan, told the stewardess he had a gun and wanted to go to Cuba. The plane, due to radio trouble, made an unscheduled stop at Hamilton, Bermuda, where police boarded the plane and arrested the passenger after a brief struggle. After police stated the accused had been drinking, had no gun and was being funny, a Hamilton magistrate dismissed breach of the peace charges and ordered the accused and his wife to leave Bermuda.<sup>22</sup>

The fact that four out of these last ten skyjackings were frustrated and the culprits apprehended gives some hope that on-board counter measures may be improving. Statistics compiled by the Federal Aviation Agency, commencing in 1961 with the first aircraft piracy, through February 3, 1969, revealed that the number of United States registered aircraft that had been hijacked is forty-six. By February 16 this total had reached fifty-one. Of these, thirty-six have been successful and fifteen unsuccessful. All but one of the completed skyjackings terminated in Cuba; in that one instance the plane was compelled to return to Honolulu by teenage hijackers. Thirty-nine of the fifty-one piracies took place after February 1, 1968. Including the hijackings of seventeen more aircraft, registered in the British West Indies, Canada, Colombia, Ecuador, Greece, Mexico, and Venezuela, all but two of which ended up in Cuba, the total of aircraft piracies stood at sixty-eight on February 17, 1969. There have been arrests, other than in Cuba, made in eighteen of the hijackings, with convictions in two cases with twenty year sentences; a Mexican conviction with an eight year and nine month sentence; three juvenile reform school sentences; one court-martial conviction; two dismissals; and one acquittal. The other cases are pending.<sup>23</sup>

It would be solacing to be able to ascribe this turbulent state of affairs to a Castro plot and Cuban machinations to harass and embarrass the United States. Such apparently is not the case. It has been reported that the Federal Aviation Agency has no evidence of a Cuban conspiracy. All American national hijackers upon reaching Havana have

---

22. *Id.* Jan. 25, 1969, § A, at 1; Jan. 26, 1969, § A, at 7; Jan. 29, 1969, § A, at 1, 2; Jan. 30, 1969, § A, at 8; Feb. 4, 1969, § A, at 1; Feb. 8, 1969, § A, at 2; Feb. 11, 1969, § A, at 1; Feb. 12, 1969, § A, at 2; N.Y. Times, Feb. 4, 1969, § C, at 16; Feb. 12, 1969, at 1, 7; Feb. 18, 1969, § C, at 81.

23. Durham Morning Herald, Feb. 17, 1969, § B, at 6. Statement of Acting Administrator of FAA, before the House Committee on Interstate and Foreign Commerce, [1969] 18 DEPARTMENT OF STATE FOREIGN POLICY BRIEFS, No. 14 (1968).

been jailed and some are still in custody. However, none have been involuntarily returned to the United States and President Castro has taken no steps to disembarass the United States. Since Cuba and the United States severed diplomatic relations in 1961, all official communications have been conducted via the Swiss Embassy in Havana.<sup>24</sup> This situation drastically impedes negotiation.

At least one successful hijacking involved a refueling on United States soil, after the seizure and before the plane departed for Havana. In this instance a National Airlines, Boeing 727 jet was seized as it approached Miami on a flight from New York. This aircraft with a crew of seven and twenty-eight passengers continued on to the Key West commercial airport, refueled there, and then proceeded to Havana. The ship was on the ground for ninety minutes while jet fuel, not available at the commercial airport, was trucked from nearby naval facilities. No effort was made to subdue the lone gunman.<sup>25</sup>

A fairly typical factual pattern of aircraft piracy consists of: (1) a pistol, knife, or explosive equipped, maladjusted individual, usually motivated by personal considerations, sometimes a fugitive from justice, and occasionally accompanied by a woman or child; (2) a destination from which extradition is highly unlikely; (3) no effective effort made by the air carrier to search passengers for weapons; (4) the cockpit door either not locked or immediately opened from the passenger side by a stewardess upon demand; (5) complete nonintervention by the remainder of the crew while the hijacker holds his weapon on the pilot or a hostage; (6) no effort to subdue the culprit while refueling or at any other time; (7) extreme crew caution, presumably to preserve life and the multimillion dollar aircraft investment; and (8) detention of the hijacker by the Cuban Government at destination, but no extradition. There has been no reported personal injury, loss of life or property, resulting from Havana destination aircraft piracies.

The kind treatment the airlines afford to hijackers does not necessarily extend to passengers. Orders to pilots are: "If you don't get the hijacker at the gate, take him where he wants to go."<sup>26</sup> By way of contrast, several otherwise inoffensive passengers have been ejected

---

24. Durham Morning Herald, Dec. 8, 1968, § C, at 12.

25. N.Y. Times, Dec. 3, 1968, at 1. This account quotes a National Airlines spokesman as saying: "As long as the ship is under the control of a hijacker with a lethal weapon, we automatically stay away. It is one man who took the plane." A Key West police dispatcher was quoted as follows: "We have officers out there along with the FBI and the sheriff's office. There is really nothing they can do right now."

26. N.Y. Times, Dec. 13, 1968, § C, at 46, col. 1.

from aircraft before takeoff for having made some reference to Havana in an effort at humor. No less a personage than Marlon Brando was ejected from a National Airlines flight, purportedly for having asked a stewardess in jest: "Is this the flight to Cuba?"<sup>27</sup>

It would be most inappropriate at this point to pronounce value judgments regarding the facts of aircraft piracy. Perhaps it is well to keep in mind that the year 1968 which produced these hijackings, also brought to the United States a 37 percent increase of armed robbery over 1967, an overall increase in crime of 19 percent,<sup>28</sup> an anticipated 12 percent dollar increase in shoplifting,<sup>29</sup> a record crop of vandalism and crime in the 154 national forests,<sup>30</sup> and new highs in city bus robberies, urban riots, and campus violence. Perhaps the increase in aircraft piracy is only a confirming statistic in the signs of the times. Observations regarding possible preventive measures against aircraft piracy will be made in the final section of this article.

#### PIRACY JURE JENTIUM

The legal concept of piracy *jure jentium*, that is under the law of nations, antedates the emergence of national criminal legal systems. The classical writers of international law were preoccupied with the summary punishment that might properly be administered to pirates rather than with firm definitions of pirates or piracy. It may be that in the society of that day the nature of the offense was considered to be self-evident. We find Pierino Belli writing that it is neither necessary to declare war upon nor to keep faith with a pirate,<sup>31</sup> Samuel Von Pufendorf, that it is lawful to slay pirates in the defense of property,<sup>32</sup> Hugo Grotius, that free nations possess a common maritime right to punish pirates captured at sea,<sup>33</sup> and Francisco Suarez, that it is not necessary to extend the right of *postliminium* to pirates.<sup>34</sup>

In contrast with this academic severity was the long-standing practice of European nations to extend recognition to the Barbary States

27. The Washington Post, Dec. 20, 1968, § A, at 7.

28. N.Y. Times, Dec. 17, 1968, at 1, col. 2.

29. Durham Morning Herald, Dec. 17, 1968, § A, at 1.

30. *Id.* Dec. 16, 1968, § B, at 5.

31. P. BELLI, DE RE MILITARI ET BELLO TRACTATUS 83 (Nutting transl. 1936).

32. S. VON PUFENDORF, DE OFFICIO HORMINES ET CIVIS JUXTA LEGEM NATURALEM LIBRO DUO, 34 (Moore transl. 1927).

33. H. GROTIUS, DE JURE PRAEDAE, 237 (Williams transl. 1950).

34. F. SUAREZ, DE TRIPLIC: BIRTUTE THEOLOGICA, FIDE, SPE, ET CHARITATE 842 (Williams, Brown and Waldron transl. 1944).

and to be permissive in submitting to robbery at sea and to the taking into slavery of their nationals by these States. During World War I, when it appeared possible that a similar permissiveness might be applied to the unrestricted submarine warfare waged by Germany, a paper pointing out the parallel was read before the Grotius Society.<sup>35</sup>

The society also discussed some of the difficulties encountered in an effort to define piracy *jure gentium*.

Though it is agreed with some appearance of authority that the action of German submarines as the law now stands is not technically piracy, yet it is not altogether clear what piracy is in law. In the case of *Re Attorney-General of Hong Kong v. Kwok a Sing* (L. R. 5 P. C., pp. 199-200), we are told that "piracy is only a sea term for robbery; piracy being a robbery within the jurisdiction of the Admiralty. . . . If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself or any of the goods with a felonious intention in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy." Sir James Fitzjames Stephen considers the definition

---

35. It gave this account of the Barbary pirates:

During the age of Grotius the pirate States of the Mediterranean were at the height of their power, and certainly the treaty with Algiers of 1646 which purported to secure freedom for English trade and exemption from slavery for English subjects did little to save the world from the evils of State-organized piracy. The group of piratical States had the substantial support of the Ottoman Porte. . . .

For more than three centuries these States were able to take advantage of the divisions of Europe to prey on peaceful merchants of all lands. At any time by joint action they could have been exterminated, certainly at any time after the year 1600. But such a policy was deemed impossible. The various countries of Europe traded freely with the pirates, and supplied them with the means of carrying on their career of crime. These ferocious creatures freely passed in and out of the great trading ports of Europe, securing their guns, their tackle and their stores, and marking down their prey. The merchandise of the world was at their mercy, and the great nations instead of crushing by combination the most insolent federation for crime in history before these present wars, actually tolerated the criminals, treated them as international equals, and entered into treaties with them so phrased as to place the most Christian King on conditions of something very like inferiority to the rulers of these African States. It is one of the most amazing stories in the world, and reached its climax when the newly-formed United States of America followed the example of Europe and solemnly entered into treaties with pirates far more efficient and dangerous than the old pirates of the Spanish Main, creatures as ferocious, though not so inhuman, as the German submarine commanders of our time. DE MONTMORENCY, TRANSACTIONS OF THE GROTIUS SOCIETY, June 18, 1918, at 87, 93.

sound so far as it goes, but not one that covers all cases. He adds: "it may safely be stated that, in modern times at least, no case has been treated as piracy unless the ship itself has been taken from the control of its lawful master and either plundered, carried off or scuttled by the criminals, or unless the criminals have been cruising as robbers or thieves. Whether mere cruising in order to commit piracy has been treated as piracy by courts of law I cannot say, but I think that commanders of British men-of-war would feel no hesitation in treating as a pirate an armed vessel cruising for piratical purposes even if there were no proof that it had accomplished them.

. . . . .

The point which I am anxious to make is that it will be necessary in the treaties which will conclude these present wars that we should definitely enlarge the conception of piracy to meet the conditions revealed by these wars; that we should repudiate the doctrine that there cannot be such a thing as a pirate State, and that a State Commission is sufficient to turn acts of murder and robbery on the high seas into acts of war. In other words, we must not in the negotiations which precede the formal establishment of peace make the mistake that the nations of Europe made in dealing with Algiers, Morocco, Tripoli and Tunis.<sup>36</sup>

This problem of whether piracy *jure gentium* must be committed for private ends or can also be committed by persons acting on behalf of a State or of a politically organized group for a public as distinguished from a private purpose, is not new. It was dealt with by Malloy in the seventeenth century in these words:

Though Pirates are called Enemies, yet they are not properly so termed: *For he is an Enemy*, says Cicero, *who hath a Commonwealth, a Court, a Treasury, Consent and Concord of Citizens, and some way, if occasion be, of Peace and League*; and therefore a Company of Pirates or Freebooters are not a Commonwealth, though perhaps they may keep a kind of *equality* among themselves, without which no Company is able to consist. . . .

Pirates that have reduced themselves into a Government or State, as those of *Algier, Sally, Tripoli, Tunis*, and the like, some do conceive ought not to obtain the Rights or Solemnities of War, as other Towns or places; for though they acknowledge the Supremacy of the *Port [Constantinople]*, yet all the power

---

36. *Id.* at 88-9.

of it cannot impose on them more than their own Wills voluntary consent to. . . .

*Tunis* and *Tripoli* and their Sister *Algier* do at this day (though nests of Pirates) obtain the right of Legation, and Sir *John Lawson* did conclude a Peace between his now Majesty by the Name of the most Serene and Mighty *Prince Charles the Second, by the Grace of God King of Great Britain, France, and Ireland, Defender of the Faith*, etc. and the most Excellent Signors *Mahomet Basham, the Divan of the Noble City of Tunis, Hagge Multapha Dei, Mozat Dei, and the rest of the Souldiers [sic] in the Kingdom of Tunis*; and with them of *Tripoli* by Sir *John Narborough* by the Name of *Habil Basham, Izbahim Dey, Aga Divan, and Governours of the Noble City and Kingdom of Tripoli in Barbary*. So that now (though indeed Pirates) yet having acquired the reputation of a Government, they cannot properly be esteemed Pirates but Enemies.<sup>37</sup>

Malloy's basic definition of piracy seems to exclude public purpose. It was:

A Pirate is a Sea-Thief, or *Hostis humani generis*, who for to enrich himself, either by surprise or open force, sets upon Merchants and others trading by Sea, ever spoiling their Lading, if by any possibility they can get the mastery, sometimes bereaving them of their lives, and sinking of their Ships; the Actors wherein, *Tully* calls Enemies to all, *with whom neither Faith nor Oath is to be kept*.<sup>38</sup>

It has been held that insurgents not recognized by the government of any sovereign power may be pirates.<sup>39</sup> C. G. Fenwick pointed out with good humor that Captain Galvao and his men in the famous 1961 seizure of the Portugese civilian vessel, *Santa Maria*, in the South Atlantic, were guilty of piracy. Although Captain Galvao claimed this act was the first step toward overthrowing the Portugese dictatorship of Salazar, they did not qualify as insurgents nor were their acts directed at the government against which rebellion was declared, but against civilian lives and property. Accordingly, they were pirates, and in any event were guilty of robbery and murder (unfortunately the vessel's

37. MALLOY, *supra* note 2, at 53-4.

38. *Id.* at 51.

39. *The Ambrose Light*, 25 F. 408 (S.D.N.Y. 1885); *The Magellan Pirates*, 167 Eng. Rep. 47 (Ad. 1853).

Third Officer was killed) on the highseas while on a Portugese vessel.<sup>40</sup> The grant of asylum given by Brazil to Galvao and his men upon their surrender of the vessel and themselves terminated the matter without reported legal proceedings. The point here involved is the inherent difficulty of resolving when and if public acts may constitute piracy *jure gentium*.<sup>41</sup>

The celebrated appeal to the House of Lords, *In Re Piracy, Jure Gentium*, raised the question whether actual robbery was an essential element of the offense. In 1931, on the high seas adjacent to Hong Kong, armed Chinese nationals in two Chinese junks pursued and fired upon a Chinese cargo junk. A British warship intervened, the armed Chinese were brought as prisoners to Hong Kong and indicted for the crime of piracy. The jury verdict was guilty, subject to the question: "Whether an accused person may be convicted of piracy in circumstances where no robbery has occurred?" The Full Court of Hong Kong concluded robbery was necessary to support a conviction of piracy and acquitted the defendants. Only the question of law was certified to the Judicial Committee of the Privy Council. It said:

Speaking generally, in embarking upon international law their Lordships are to a great extent in the realm of opinion, and in estimating the value of opinion it is permissible not only to seek a consensus of views but to select what appear to be the better views upon the question. . . .

. . . [A] person guilty of . . . piracy has placed himself beyond the protection of any State. He is no longer a national, but *hostis humani generis*, and as such he is justiciable by any State anywhere. Grotius (1583-1645) *De Jure Belli ac Pacis*, Vol. II, cap. 20, section 40.

. . . International law was not crystallized in the seventeenth century, but is a living and expanding code.

. . . A body of international law is growing up with regard to aerial warfare and aerial transport of which Sir Charles Hedges in 1696 could have had no possible idea.

. . . When it is sought to be contended, as it was in this case, that armed men sailing the seas on board a vessel without any

---

40. Editorial Comment, "Piracy" in the Carribean, 55 AM. J. INT'L L. 426 (1961).

41. Some of these difficulties are lucidly set forth in JOHNSON, TRANSACTIONS OF THE GROTIUS SOCIETY, 76-82 (1957) [hereinafter cited as JOHNSON]. "As was shown in the Nuremberg Trial, particularly in those parts of the Judgement relating to Doenitz and Raedar, it was possible to deal with acts of illegal submarine warfare as war crimes without introducing the notion of piracy." *Id.* at 82.

commission from any State could attack and kill everybody on board another vessel sailing under a national flag, without committing the crime of piracy unless they stole, say, an article worth sixpence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law . . .

Possibly the definition of piracy which comes nearest to accuracy coupled with brevity is that given by Kenny (1847-1930), *Outlines of Criminal Law*, at page 320, where he says that piracy is "any armed violence at sea which is not a lawful act of war," although even this would include a shooting affray between two passengers on a liner, which could not be held to be piracy.

It would, however, correctly include those acts which, so far as their Lordships know, have always been held to be piracy—that is, where the crew or passengers of a vessel on the high seas rise against the captain and officers and seek by armed force to seize the ship . . .

However, that may be, their Lordships do not themselves propose to hazard a definition of piracy . . .

A careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance with situations either not thought of or not in existence when the older juriconsults were expressing their opinions.

All that their Lordships propose to do is to answer the question put to them, and, having examined all the various cases, all the various statutes, and all the opinions of the various juriconsults cited to them, they have come to the conclusion that the better view and the proper answer to give to the question addressed to them is that stated at the beginning—namely, that actual robbery is not an essential element in the crime of piracy *jure gentium*, and that a frustrated attempt to commit piratical robbery is equally piracy *jure gentium*.<sup>42</sup>

In a contemporary note on this opinion, Charles Fairman said: "One hazards little in assuming that the Judicial Committee would be prepared to uphold a conviction for piracy in an attack in or from the air."<sup>43</sup> On the other hand, with regard to this same opinion a British barrister commented: "Although, however, the Judicial Committee

---

42. *In Re Piracy Jure Gentium* [1934] A.C. 586. This opinion is reprinted in 29 AM. J. INT'L L. 140 (1935).

43. Note, *In re Piracy Jure Gentium*, 29 AM. J. INT'L L. 508, 509 (1935).



discussed in a tantalizing manner several definitions of piracy *jure gentium*, it wisely refrained from giving one."<sup>44</sup> He further observed: ". . . [T]hat there is in modern international law, no agreed definition of this crime."<sup>45</sup>

Another area of uncertainty is whether piracy *jure gentium* may be committed in territorial waters and in ports as well as on the high seas. A paper before the Grotius Society dealing with this question concluded that: "[P]iracy must . . . be committed on the high seas or at any rate in a place outside the jurisdiction of any State."<sup>46</sup> In reaching this conclusion, reliance was placed on that portion of the opinion of the Permanent Court of International Justice in the *Lotus* case stating that "failing the existence of a permissive rule to the contrary [a State] may not exercise its power in any form in the territory of another State."<sup>47</sup>

The same conclusion had been reached by Malloy who stated the rule as follows:

Though a Port be *Locus publicus uti pars Oceani*, yet it hath been resolved more than once, that all Ports, not only the Town, but the Water is *infra corpus Comitatus*.

If a Pirate enters into a Port or Haven of this Kingdom, and a Merchant being at Anchor there, the Pirate assaults him and robs him, this is not Piracy, because the same is not done *super altum Mare*; but this is a down-right robbery at the Common Law, for that the Act is *infra corpus Comitatus*, and was inquirable and punishable by the Common Law. . . .<sup>48</sup>

While this conclusion seems correct, what rule should apply where the acts in question commence in port or territorial waters and are continued on the high seas? This situation arose in *The Magellan Pirates* where a British and an American vessel were seized and their owners murdered in a Chilean port, and the vessels were then navigated out to sea by civilian insurgents. The objection was raised that these acts were not piratical since they did not occur at sea. Without deciding what the rule would be if the vessels had been recaptured while lying in port, the court found these facts constituted piracy, saying:

---

44. JOHNSON, *supra* note 41, at 70.

45. *Id.* at 69.

46. *Id.* at 76.

47. *Id.*

48. MALLOY, *supra* note 2, at 62-63.

. . . [T]he ships were carried away and navigated by the very same persons who originally seized them. Now, I consider the possession at sea to have been a piratical possession: to have been a continuation of the murder and robbery: and the carrying away of the ships on the high seas to have been piratical acts, quite independently of the original seizure.<sup>49</sup>

It is submitted that this reasoning is sound and might be equally applicable to aircraft piracy situations so far as this precise issue is concerned.

The sweep of piracy *jure gentium* was not flexible enough to extend to criminal sanctions against the slave trade. Henry Wheaton, in the first half of the nineteenth century wrote:

The African slave-trade, though prohibited by the municipal laws of most nations, and declared to be piracy by the statutes of Great Britain and the United States, and, since the treaty of 1841, with Great Britain by Austria, Prussia, and Russia, is not such by the general international law; . . . .

The African slave-trade, once considered not only a lawful but desirable branch of commerce, a participation in which was made the object of wars, negotiations, and treaties between different European States, is now denounced as an odious crime, by the almost universal consent of nations. This branch of commerce was, in the first instance, successively prohibited by the municipal laws of Denmark, the United States, and Great Britain, to their own subjects. Its final abolition was stipulated by the treaties of Paris, Kiel, and Ghent, in 1814, confirmed by the declaration of the Congress of Vienna, of the 8th of February, 1815, and reiterated by the additional article annexed to the treaty of peace concluded at Paris, on the 20th of November, 1815.<sup>50</sup>

Here it was promptly recognized that only statute and treaty could make criminal, conduct which changing social mores would no longer countenance as legal.

For a final sampling of the nebulous ambit of piracy *jure gentium*, resort will be made to the leading American case of *United States v.*

---

49. 167 Eng. Rep. 47 (Ad. 1853). Quoted in JOHNSON, *supra* note 41, at 72. See also 55 AM. J. INT'L L. at 428 (1961) where it was said: "It matters not that the act was begun on shore, by disguised entrance into the ship."

50. H. WHEATON, ELEMENTS OF INTERNATIONAL LAW, 165-69 (Dana ed. 1866). See *The Slave Trade as Piracy, Id.* at n.169.

*Smith*.<sup>51</sup> The defendant and others, part of the crew of the vessel *Creollo*, commissioned by the government of Buenos Aires, mutinied in the port of Margaritta in 1819 and left that vessel; in the same port violently seized a privately owned, armed vessel, the *Irresistible*, commissioned by the government of Artigas; proceeded to sea and there plundered and robbed a Spanish vessel. Daniel Webster for the defendant argued that the statute under which the indictment was laid was so indefinite as to be unconstitutional. In upholding the indictment, Justice Story, writing the majority opinion of the Supreme Court, stated:

The act of Congress upon which this indictment is founded provides, "that if any person or persons whatsoever, shall, upon the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall be brought into, or found in the United States, every such offender or offenders shall, upon conviction thereof, etc. be punished with death." . . . The constitution declares, that Congress shall have power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." The argument which has been urged in behalf of the prisoner is, that Congress is bound to define, in terms, the offence of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation.

. . . . .  
. . . To define piracies, in the sense of the constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done either by a reference to crimes having a technical name, and determinate extent, or by enumerating the acts in detail, upon which the punishment is inflicted.

It is next to be considered, whether the crime of piracy is defined by the law of nations with reasonable certainty. What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law. There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furadi*, is piracy. The same doctrine is held by all the great writers on maritime law, in terms that admit of no reasonable

---

51. 18 U.S. (5 Wheat.) 153 (1820).

doubt. The common law, too, recognizes and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations, (which is part of the common law,) as an offence against the universal law of society, a pirate being deemed an enemy of the human race. . . . [W]hether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offence against the law of nations, and that its true definition by that law is robbery upon the sea.<sup>52</sup>

In dissent, Justice Livingston wrote:

The object, therefore, of referring its definition to Congress was, and could have been no other than, to enable that body, to select from sources it might think proper, and then to declare, and with reasonable precision to define, what act or acts should constitute this crime; and having done so, to annex to it such punishment as might be thought proper. Such a mode of proceeding would be consonant with the universal practice in this country, and with those feelings of humanity which are ever opposed to the putting in jeopardy the life of a fellow-being, unless for the contravention of a rule which has been previously prescribed, and in language so plain and explicit as not to be misunderstood by any one.<sup>53</sup>

Justice Story applied "natural law" and the jurisprudential monist view that, at least in this area, international and domestic law were one. In his dissent Justice Livingston reacted in the manner of an Austinian positivist and a dualist by insisting that there must be explicit adoption of a rule of international law into municipal law before there can be a fusion of the two. Reputable legal scholars continue to disagree on

---

52. *Id.* at 157-62. Undertaking "to show that piracy is defined by the law of nations," Justice Story concludes:

The foregoing collection of doctrines, extracted from writers on the civil law, the law of nations, the maritime law, and the common law, in the most ample manner confirms the opinions of the court in the case in the text; and it is with great diffidence submitted to the learned reader to aid his future researches in a path, which, fortunately for us, it has not been hitherto necessary to explore with minute accuracy. *Id.* at 180 n.(a).

*Accord*, *United States v. Pirates*, 18 U.S. (5 Wheat.) 184, 204 (1820).

53. 18 U.S. (5 Wheat.) 179-83.

this point.<sup>54</sup> Since the current United States penal statute denounces "the crime of piracy as defined by the law of nations,"<sup>55</sup> the question is not wholly moot and will be examined hereafter.

The preceding discussion of piracy *jure gentium* does not purport to be exhaustive. It does seek, selectively, to present the aroma of piracy as dealt with by the law of nations before codification.

Lawyers and legislators when confronted with new sea or air depredations tend first to evaluate them against the background of piracy *jure gentium*, only to find the latter inadequate to cope with the former. This course has been taken by legal writers in seeking punitive sanctions against the slave trade, various gradations of insurgents, unrestricted submarine warfare, hijacking of rum-running vessels in eighteenth amendment and Volstead Act days,<sup>56</sup> and now against violence in the air.

Naturally, the same historical approach was used in the effort to codify the international law of piracy. Perhaps the most comprehensive treatment of piracy *jure gentium* is that contained in the Research in International Law Under the Auspices of the Harvard Law School, prepared in 1926 for use by the First Conference on the Codification of International Law convened by the League of Nations.<sup>57</sup>

It seems fair to say that the hoary ancestor, piracy *jure gentium*, established the family and reputation, but as the family has proliferated into diverse progeny, it has become progressively necessary to give authenticating baptismal names to these descendants by means of specific statutes or treaties. Thus violence in the air is not "piracy," but when christened "Aircraft Piracy" in a defining statute or treaty it becomes a

54. Lenoir, *Piracy Cases in the Supreme Court*, 25 J. AM. INST. CRIM. L. S. C. 532 (1934).

. . . [P]iracy is not sufficiently defined by international law so that offenders may be prosecuted by reference to that law alone. . . . Nor is piracy generally considered to be a crime against international law. . . . International law enters into the matter by condemning the practice and permitting the states to exercise jurisdiction over piratical acts. . . . Only when there are lacunae or ambiguities in the municipal law is the court bound to look to international law for rules, or for evidence as to the intention of the framers of the statute. *Id.* at 552-53.

See also Wilson, *International Law in Treaties of the United States*, 31 AM. J. INT'L L. 271, 276 (1937). *Contra*, Dickenson, *Is the Crime of Piracy Obsolete?* 38 HARV. L. REV. 334 (1925).

55. 18 U.S.C. § 1652 (1958).

56. Dickenson, *supra* note 54.

57. Articles of Convention, *Piracy*, 26 AM. J. INT'L L. 743 (Supp. 1926).

recognized member of the offensive family. We now direct our attention to the statutory progeny.

#### INTERNATIONAL CONVENTIONAL EFFORTS TO DENOUNCE PIRACY

As late as 1957 it was correctly stated, ". . . there is as yet no international convention dealing with piracy."<sup>58</sup> However, significant preparatory work toward this end had been performed. The Research in International Law Under the Auspices of the Harvard Law School in 1926 produced a draft convention on piracy and an extensive supporting document dealing with the law of nations on piracy. This was submitted to the First Conference on the Codification of International Law which was sponsored by the League of Nations. That proposal, however, never came into effect as a convention.<sup>59</sup>

Thirty years later the International Law Commission adopted a law of the sea draft convention which included eight articles devoted to piracy.<sup>60</sup> The General Assembly followed the recommendation of the Sixth Committee and referred this draft to the 1958 Geneva International Conference of Plenipotentiaries to Examine the Law of the Sea.<sup>61</sup> The resulting Convention on the High Seas<sup>62</sup> entered into force September 30, 1962. Forty-three nations including the United States, Russia, and the United Kingdom have ratified the Convention, but Cuba is not among these nations.<sup>63</sup>

The Convention preamble recites that it is "generally declaratory of established principles of international law." Article 1 defines "high seas" as "all parts of the sea . . . not included in territorial sea or in the internal waters of a State." The definition does not extend to air space above the sea. Nine<sup>64</sup> of the thirty-seven articles concern piracy and seven of these expressly refer to aircraft<sup>65</sup> as well as to ships.

58. JOHNSON, *supra* note 41, at 65.

59. *Supra* note 57, at 743, 749 (Supp. 1926).

60. Int'l L. Comm'n, Report, 11 U. N. GAOR, Supp. 9, U. N. Doc. A/3159 (1956).

61. G. A. Res. 1105, 11 U.N. GAOR, Supp. 9, U.N. Doc. A/3159 (1957).

62. Convention on the High Seas, Sept. 30, 1962, [1962] 13 U.S.T. 2312, 45 U.N.T.S. 82.

63. Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions, List of Signatures, Ratifications, Accessions, etc., as at 31 Dec. 1967, Treaties in Force, Jan. 1, 1965, at 263. *See also* Letter from Chief of the Treaty Section, Office of Legal Affairs, United Nations to Seymour W. Wurfel, Jan. 25, 1969, on file at the University of North Carolina School of Law.

64. Convention on the High Seas, Sept. 30, 1962, [1962] 13 U.S.T. 2312. T.I.A.S. No 5200. arts. 14-22.

65. *Id.* arts. 15-21.

However, Article 15,<sup>66</sup> which defines piracy, appears to exclude activity on a single aircraft in flight. The language applicable to aircraft provides: "Piracy consists of . . . any illegal acts of violence, detention or . . . deprecation, committed for private ends by . . . crew or . . . passengers of a private . . . aircraft and directed on the high seas against another . . . aircraft, or against persons or property on board such . . . aircraft." This requires the illegal act to be against *another* aircraft or its contents; not the one on which the actor is present. Grammatically "such aircraft" as stated in subparagraph (a) refers to "another aircraft" in the same subparagraph and not back to the aircraft mentioned in subparagraph (1) on which the actor is crew or passenger. Acts of skyjacking up to now have involved only one aircraft. Moreover, the illegal act must be "on the high seas." As defined in Article 1 this excludes air space above the high seas as well as territorial air space.

The other offense denounced by Article 15(1)(b) is: "Any illegal acts . . . against a ship, aircraft, persons or property in a place outside the jurisdiction of any State." Assuming the aircraft referred to in subparagraph (b) does relate back to the aircraft on which the actor is crew or passenger as stated in subparagraph (1), the illegal acts of skyjacking do not occur "in a place outside the jurisdiction of any State." If the hijacking act occurs on "aircraft in flight in air commerce"<sup>67</sup> or if a very wide assortment of other illegal acts are committed in planes in such flight,<sup>68</sup> the United States exercises statutory criminal jurisdiction. Certainly, as to offenses so committed aboard aircraft flying under the United States flag or as to United States nationals aboard any aircraft in flight in air commerce, international law would

---

66. Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of deprecation; committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(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 subparagraph 1 or sub-paragraph 2 of this article.

67. 49 U.S.C.A. § 1472(i) (1958). *United States v. Healy*, 376 U.S. 75, 84 (1963), held: "Air commerce means interstate, overseas or foreign air commerce."

68. 49 U.S.C.A. § 1472(k) (1958).

raise no objection to the exercise of this national criminal jurisdiction.<sup>69</sup> Thus, skyjacking aboard a United States flag aircraft does not occur "in a place outside the jurisdiction of any State."

Subparagraph (2) of Article 15 declares voluntary participation in the operation of an aircraft with knowledge of facts making it a pirate aircraft is piracy. According to Article 17 an ". . . aircraft is . . . a pirate . . . aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 15 . . . (or) if the aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of the act." Although this definition does not confine itself to acts denounced by subparagraph (1) of Article 15, if it is read to apply to subparagraph (2) of Article 15 it simply establishes a circuitry and the two provisions read together do not define an offense.

Subparagraph (3) of Article 15, which declares piracy to be "[a]ny act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 . . ." runs into the same difficulties which respectively, render both subparagraphs (1) and (2) ineffective to denounce violent piratical acts in a single aircraft.

Another conceivable difficulty with Article 15 is that by its terms it is applicable only to ". . . illegal acts . . . by the crew or the passengers." A stowaway is neither. It is most doubtful that the limited category of culprits expressly enumerated in subparagraph (1) could be enlarged by the general language of subparagraphs (2) and (3) to include stowaways. While it may be more difficult to stowaway on an aircraft than in a surface ship it has been done and is by no means impossible, particularly as passenger jets grow ever larger.

The other articles of the High Seas Convention relating to piracy<sup>70</sup> are all either in aid of, or impose procedural limitations on, Article 15. They do not supply the lacking elements. Since this Convention made a real effort not only to be "declaratory of established principles of international law" but to include the air as well as the sea in the domain

69. Cf. The S.S. "Lotus", [1927] P.C.I.J., ser. A, No. 10. Article 18 of the High Seas Convention provides: "A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived." See Mendelsohn, *In Flight Crime: The International and Domestic Picture Under the Tokyo Convention*, 53 VA. L. REV. 509 (1967).

70. Convention on The High Seas, Sept. 30, 1962, [1962] 13 U.S.T. 2312, T.I.A.S. No. 5200, art. 16-22.



of piracy this inadequacy is disappointing. It tends to confirm a 1957 foreboding concerning this Convention before its adoption:

... [T]he confusion caused by the use of the word "piracy" ... in a rather loose sense in moments of tension, raises the question whether anything is really to be gained, ... at the proposed Conference on the Law of the Sea ... by an attempt to define piracy in the abstract. The dangers inherent in any such attempt may of course be largely evaded if it is frankly stated that the definition is for the purposes of a particular convention only. But it may on the whole be wiser if, having regard to the long and confused history of the doctrine of piracy in international law, those who are concerned with the codification or progressive development of the law of the sea—or air—set out quite precisely those acts for the punishment of which they wish to provide, as distinct from those acts for the punishment of which they do not wish to provide, irrespective of the question whether under existing international law certain acts do or do not constitute the crime of piracy. In this way, it is submitted, it might be easier to solve the relevant problems on their merits without excessive regard being paid to doctrinal controversies of the past.<sup>71</sup>

The older multilateral civil aviation conventions, including the Warsaw Convention,<sup>72</sup> the Chicago Convention<sup>73</sup> and the protocols thereto,<sup>74</sup> the International Air Services Transit Agreement,<sup>75</sup> and the Convention on the International Recognition of Rights in Aircraft<sup>76</sup> do not consider the question of aircraft piracy.

In 1963, The International Civil Aviation Organization took the initiative to produce a multilateral treaty to cope with aircraft piracies and related matters. This document entitled, *Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, was opened for signature at Tokyo, Japan, on September 14, 1963. It constitutes a

71. JOHNSON, *supra* note 41, at 85.

72. Oct. 29, 1934, 49 Stat. 3000, T.S. No. 876, reprinted in *Air Laws and Treaties of the World*, 87th Cong., 1st Sess. 1332-70 (1961) [hereinafter cited as *Air Laws*].

73. Dec. 7, 1944, 61 Stat. 1180, T.S. No. —, reprinted in *Air Laws*, *supra* note 72, at 1372-1401.

74. Reprinted in *Air Laws*, *supra* note 72, at 1404-06; see also Aeronautical Statutes and Related Material, Civil Aeronautics Board, 406-09 (1963).

75. International Air Service Transit Agreement, Dec. 7, 1944, 59 Stat. 1693, E.A.S. 487; reprinted in *Air Laws*, *supra* note 72, at 1408-13.

76. International Recognition of Right in Aircraft, June 19, 1948, 4 [1948] U.S.T. 1830, T.I.A.S. No. 2847, reprinted in *Air Laws*, *supra* note 72, at 1415-22.

substantial step in the right direction, but neither the United States nor Cuba has ratified it. The Convention provides that it shall not come into force at all until ninety days after the deposit of the twelfth instrument of ratification. As of February 4, 1969, only eight nations had deposited ratifications.<sup>77</sup>

The Tokyo Convention applies to "offenses against penal law . . . [and] acts which . . . may or do jeopardize the safety of aircraft or of persons or property therein, or which jeopardize good order and discipline on board . . . any aircraft registered in a Contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State."<sup>78</sup> This language overcomes a number of legal pitfalls heretofore encountered in piracy law. Jurisdiction over such acts and offenses is given to the State of registration.<sup>79</sup> Contracting States are required to take all appropriate measures to restore control of the aircraft and its cargo to its lawful commander and to permit the aircraft, its passengers and crew to continue their journey.<sup>80</sup>

---

77. 2 INT'L LEG. STUDIES 1042-46 (1963); Tokyo Convention; 58 AM. J. INT'L L. 566-73 (1964); HOUSE SUBCOMM. ON INTERAMERICAN AFFAIRS, AIR PIRACY IN THE CARRIBEAN AREA, H.R. REP. NO. 179, 90th Cong., 2d Sess. 21 (1968) [hereinafter cited as AIR PIRACY REPORT]; 3 CRIM. L.Q. 77-83 (1965). The historical background of the Tokyo Convention is discussed in; Boyle & Pulsifer, *The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, 30 J. AIR L. & COM. 305 (1964); Fitzgerald, *The Development of International Rules Concerning Offenses and Certain Other Acts Committed on Board Aircraft*, 1 CAN. Y. B., INT'L L. 230 (1963). Detailed descriptions of certain provisions of the Tokyo Convention are to be found in Fitzgerald, *Offences and Certain Other Acts Committed on Board Aircraft; The Tokyo Convention of 1963*, CAN. Y.B. INT'L L. 191 (1964); Mendelsohn, *supra* note 69.

An official communication from the Legal Officer of ICAO, dated February 4, 1969, states that thirty-three nations are parties signatory to the Tokyo Convention, and there are eight ratifications, all without reservations. The Republic of China, Denmark, Italy, Norway, Philippines, Portugal, Sweden, and the United Kingdom have ratified.

78. INT'L LEG. STUDIES 1042, Ch. I (1963).

79. *Id.* Ch. II.

80. *Id.* Ch. IV, Art. 11—Unlawful Seizure of Aircraft. The complete wording of the Chapter is:

1. When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.

2. In the cases contemplated in the preceding paragraph, the Contracting State in which the aircraft lands shall permit its passengers and crew

The aircraft commander, to protect the aircraft, persons, or property therein, may restrain violators, require assistance from the crew, request assistance of passengers, and disembark violators in any country in which the aircraft lands, or deliver to competent authorities in any contracting State any person he reasonably believes has committed, on board, an act which is a serious offense according to the penal law of the State of registration of the aircraft.<sup>81</sup> Contracting States undertake to take delivery or custody of violators for the time necessary to enable criminal or extradition proceedings to be instituted and to notify the State of registration and the State of nationality when a person has been taken into custody. Such acceptance by a Contracting State is not considered as admission to its territory for the purpose of applying its law relating to entry or admission of persons, nor extradition and expulsion, but otherwise such disembarkee or detainee shall be treated as a national of that State.

The Convention expressly provides it does not "create an obligation to grant extradition."<sup>82</sup> Hence, even if both Cuba and the United States were "Contracting Parties," and if the language of the convention proves adequate to cover all other aspects of aircraft hijacking, it would still be necessary to have an effective extradition treaty between the two nations, plus a political climate which would engender good faith compliance with both the Tokyo Convention and the extradition treaty.

The Tokyo Convention, to which the United States was a party signatory, was not submitted to the Senate for its advice and consent until September 29, 1968. One can only speculate as to the reason for this five year delay. There was one school of thought which may, in part at least, explain it. A member of the United States Delegation to the Tokyo Conference in 1963 wrote an article in 1967 expounding a reason for the delay, with the usual caveat that it was his own and did not necessarily reflect that of the Department of State.<sup>83</sup> The view was

---

to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.

81. *Id.*

82. *Id.* Ch. VI, art. 16, which reads:

1. Offences committed on aircraft registered in a Contracting State shall be treated, for the purpose of extradition, as if they had been committed not only in the place in which they have occurred but also in the territory of the State of registration of the aircraft.

2. Without prejudice to the provisions of the preceding paragraph, nothing in this convention shall be deemed to create an obligation to grant extradition.

83. Mendelsohn, *supra* note 69. At the time of writing, this author was an attorney

that the Convention's grant of jurisdiction over all in-flight crimes to a contracting State of registry was too broad, since it extended to all offenses without regard to where the commercial aircraft might be. It was felt that this could produce undesirable, overlapping jurisdiction, and that changes in United States jurisdictional statutes and extradition treaties would be necessary to comply with Tokyo Convention requirements. This objection that the Convention unnecessarily broadened jurisdiction may have become secondary in the light of the urgent need to punish aircraft piracy. The Senate has not taken action on the Tokyo Convention. In January, 1969, a joint resolution was introduced in the House calling for the United States to initiate through the

---

in the Office of the Legal Advisor, United States Department of State. The article is a painstaking analysis of jurisdiction problems pertaining to in-flight crimes in general, raised by the Tokyo Convention. It deals only peripherally with aircraft piracy and Article 11 of the Tokyo Convention. This is apparent from the author's thesis that the proper basis of jurisdiction over in-flight crimes would be to vest it in the "place of landing" after an offense has been committed. This proposal surely must not have contemplated aircraft piracies with their built-in "place of landing" in Cuba. It alone provides no solution for aircraft piracies terminating in Cuba, no matter how well it might conceivably work in other States for other offenses. The author states that with a "place of landing" basis of jurisdiction, the United States could then comply with the Tokyo Convention obligation to detain and surrender offenders arriving in the United States aboard aircraft of foreign registry. *Id.* at 557. Regarding this matter the author makes this observation:

It would be interesting to know whether other countries have been troubled by this same problem and whether this might in part be responsible for the delays in ratification by so many of the states that signed the Convention almost four years ago. If so, the place of landing theory of jurisdiction would solve this problem. *Id.* at 557 n.117.

Finally in his conclusion the author sounds this word of caution:

The single purpose of this Article is to encourage a broad and fundamental review by the United States Government of the method by and the extent to which it will exercise extraterritorial criminal jurisdiction over crimes committed aboard aircraft. This review can be undertaken in conjunction with the ratification by the United States of the Tokyo Convention. More important, this review should be conducted in a calm and deliberate manner, free from the sense of urgency and emergency that has characterized previous efforts by the United States Government in this complicated area of national and international law. To the extent that the suggestions advanced in this Article are adopted—particularly those relating to the enactment of a place of landing jurisdiction and a revision in our extradition practices—the United States would be embarking on a sound and effective approach both to the exercise of United States extraterritorial jurisdiction over crimes committed aboard aircraft, and to the international administration of justice in cases of extraterritorial criminal activity. *Id.* at 562.

United Nations an international convention to prevent aircraft hijacking.<sup>84</sup>

The Director General of the International Air Transport Association has appealed to its members to ask their governments to seek United Nations action to make aircraft hijacking an international crime.<sup>85</sup> Hopefully these efforts will be directed to obtaining as many ratifications and adherences to the Tokyo Convention as possible plus a strengthening protocol.

The United States Department of State is supporting ratification of the Tokyo Convention. Additionally, the State Department has proposed to the International Civil Aviation Organization that it negotiate a supplementary protocol to the Tokyo Convention. This protocol would require a Contracting State to detain hijackers and, after a probable cause hearing, upon request, to return them for trial to the State where the aircraft is registered. No exception would be made for a political offender, but he could be tried only for the offense of aircraft piracy not for any political offense from which he might be fleeing. This protocol would be applicable only in cases of civil aircraft carrying passengers for hire.<sup>86</sup> Problems of extradition will receive separate treatment later in this article.

Remedy by international convention will remain frustrated so long as either the United States or Cuba refuses to ratify the Tokyo Convention, a protocol thereto and an effective extradition treaty, or equivalents thereof. From this international impasse, we move to the United States domestic law of piracy in general, and aircraft piracy in particular.

#### UNITED STATES PIRACY LAW

Previously an examination was made of the *Smith* case in which the

---

84. H. R. Con. Rec., 91st Cong., 1st Sess. (1969). This resolution, introduced by Congressman Anderson of Illinois, reads:

Resolved by the House of Representatives (the Senate concurring), that it is the sense of the Congress that the President, acting through the United States delegation to the United Nations should take such steps as may be necessary to initiate an international convention to prevent aircraft hijacking with a view toward countering the growing menace of aircraft hijacking, and reducing the international tensions resulting from aircraft hijacking, by means of an international agreement providing, among other things, for severe and uniform penalties for the act of hijacking aircraft.

85. N.Y. Times, Jan. 16, 1969, § C, at 18.

86. This State Department view is contained in a communication to the author from an informed officer of that department.

United States Supreme Court upheld the 1819 Act of Congress defining piracy. That statute provided: ". . . [I]f any person . . . shall, upon the high seas, commit the crime of piracy, as defined by the law of nations, and . . . be . . . found in the United States, . . . such offender . . . shall, upon conviction . . . be punished with death."<sup>87</sup> The present United States statute denouncing piracy reads: "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."<sup>88</sup> This section was based upon the Act of 1909.<sup>89</sup> Writing in 1925, regarding this 1909 provision, Dickinson said: "The rule now in force derives directly from Section 5 of the Act of 1819."<sup>90</sup> Patently, the only material difference between the 1819 statute and its successor in force in 1969 is the reduction of the punishment from death to life imprisonment.

Since 1885,<sup>91</sup> there has been only one reported piracy prosecution. In 1935, it was held that the 1909 statute was insufficient to support an indictment for piracy where it was stipulated that the acts were committed against the gambling ship, *Monte Carlo*, anchored off the shore of California, but landward of a line drawn between two points at the mouth of San Pedro Bay. Since the ship lay in American waters and not upon the high seas, the court decided it was without jurisdiction as to the piracy charge.<sup>92</sup>

Counts in the same indictment charging plundering and attacking with intent to plunder, were upheld as being within the admiralty and maritime jurisdiction of the United States.<sup>93</sup> The case assumes that if the violence had taken place on the high seas the indictment for "piracy

87. Act of March 3, 1819, ch. 76, § 5, 3 Stat. 510, cited in *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 154 (1820).

88. 18 U.S.C. § 1651 (1964).

89. Act of March 4, 1909, ch. 321, 290, 35 Stat. 1145, as amended 18 U.S.C. § 595 (1958):

Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

. . . (d) Assault by striking, beating, or wounding, by fine of not more than \$500 or imprisonment for not more than six months, or both (e) Simple assault, by fine of not more than \$300 or imprisonment for not more than three months, or both.

For more than twenty years Congress has not seen fit to act upon this recommendation to restate the law of piracy as defined by the law of nations.

90. DICKINSON, *supra* note 54, at 350.

91. *The Ambrose Light*, 25 F. 408 (S.D. N.Y. 1885).

92. *United States v. Carrillo*, 13 F. Supp. 121 (S.D. Cal. 1935).

93. 18 U.S.C. 488-89 (1940), as amended by 18 U.S.C. 1658-59 (1958).

as defined by the law of nations" would be good, although this point was not squarely raised. However, the fact that there has been no decision since 1885 upholding a prosecution for piracy, as defined by the law of nations, indicates the obsolescence of that provision, and that action where necessary, is being taken under more precise sections of the United States criminal code expressly denouncing specific conduct of a piratical nature.

In considering whether the law of nations on piracy is a means by which to punish aircraft piracy, it is unnecessary to choose between the jurisprudence of Justice Story and that of Justice Livingston in the *Smith* case. The law of nations approach is interdicted by other pertinent considerations of United States domestic law. First is the doctrine that the federal criminal law in the United States is wholly statutory and can be derived only from an act of Congress. In 1812, a majority of the Supreme Court said:

The only question . . . is, whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases.

. . . The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offense.

. . . exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers.<sup>94</sup>

Adamant adherence to this inflexible rule probably precludes the extension of the law of nations on piracy to any situation to which it had not been applied at the time of Justice Story's decision in the *Smith* case in 1820.

Moreover, an offense committed in the air cannot come within the prohibition of the present "piracy as defined by the law of nations" statute since it does not occur "on the high seas." The reasoning in

---

94. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). *Accord*, *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415, 416 (1816) which states:

A difference of opinion . . . exists, among the members of the court. We should, therefore, have been willing to have heard the question discussed, upon solemn argument. But the attorney-general has declined to argue the cause . . . Under these circumstances, the court would not choose to review their former decision in the case of the *United States v. Hudson* . . ., or draw it into doubt.

*Accord*, *United States v. Britton*, 108 U.S. 199 (1883). *See also* *Bearden v. United States*, 304 F.2d 532, 536 (W.D. Tex. 1962).

*United States v. Carrillo*,<sup>95</sup> is applicable, as well as that in *United States v. Cordova*.<sup>96</sup> In 1948, Cordova, a passenger on a Flying Tigers commercial flight from San Juan, Puerto Rico to New York, while over the high seas, engaged in a quarrel with another passenger. This led to intervention by a stewardess and finally by the pilot, both of whom were assaulted and bitten by Cordova. Cordova was charged with two counts each of assault by striking, wounding, and beating and simple assault, within the admiralty and maritime jurisdiction of the United States.<sup>97</sup> The court arrested judgment on a finding of guilty, holding that a plane in flight is not a "vessel" nor is it on the "high seas," nor do the words "high seas" extend to the air space over them, and hence that the court was without jurisdiction. Although the judge who decided *Cordova* expressly invited appeal, none was taken by the Attorney General. The resulting gap in jurisdiction was remedied by Congress in 1952 by expressly extending federal criminal jurisdiction to United States aircraft in flight over the high seas or over other waters within the admiralty and maritime jurisdiction of the United States.<sup>98</sup> This made

95. 13 F. Supp. 121 (S.D. Cal. 1935).

96. 89 F. Supp. 298 (E.D. N.Y. 1950).

97. Cf. Ch. 11, § 272, 35 Stat. 1142 (1909), as amended 18 U.S.C. 113 (d) (e) (1958); see also the definition of the admiralty and maritime jurisdiction in Ch. 11, § 272, 35 Stat. 1142 (1909), as amended 18 U.S.C. 7 (1958). In *Cordova v. United States*, 89 F. Supp. 298, 299 (E.D.N.Y. 1950) the court said: "the relevant statutes are substantially the same now as they were at the time of the offenses." Accordingly, the 1948 revisions to which the court referred, and which continue in force are here given. 18 U.S.C. § 113 (1958), in part reads:

Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

- . . . (d) Assault by striking, beating, or wounding, by fine of not more than \$500 or imprisonment for not more than six months, or both.  
 (e) Simple assault, by fine of not more than \$300 or imprisonment for not more than three months, or both.

18 U.S.C. § 7(1) (1958) states:

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes: (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

98. A new subparagraph (5) to 18 U.S.C. § 7 (1958) (originally enacted as Act of July 12, 1952, ch. 695, 66 Stat. 589) defines the term "special maritime and territorial jurisdiction of the United States." It reads:

Any aircraft belonging in whole or in part to the United States or any



applicable to United States aircraft, while "out of the jurisdiction of any particular State," the criminal code sections denouncing assaults,<sup>99</sup> maiming,<sup>100</sup> theft,<sup>101</sup> receiving stolen property,<sup>102</sup> murder,<sup>103</sup> manslaughter,<sup>104</sup> attempts to commit murder or manslaughter,<sup>105</sup> rape,<sup>106</sup> carnal knowledge,<sup>107</sup> and robbery.<sup>108</sup> This jurisdiction was broadened to include interstate flights by extending it to acts committed on "an aircraft in flight in air commerce" by a 1961 addition to the Federal Aviation Act of 1958.<sup>109</sup> It was the intent of Congress that these crimes "be punishable regardless of whether there was any connection between the specific crime and the offense of aircraft piracy."<sup>110</sup>

This extension of jurisdiction still did not prohibit aircraft piracy as such. Certainly, most if not all hijacking of aircraft would involve assaults and kidnapping, and others might, under their facts, constitute murder, manslaughter, or robbery. However, at the same time these

citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

99. 18 U.S.C. § 113 (1958).

100. *Id.* § 114.

101. *Id.* § 661.

102. *Id.* § 662.

103. *Id.* § 1111.

104. *Id.* § 1112.

105. *Id.* § 1113.

106. *Id.* § 2031.

107. *Id.* § 2032.

108. *Id.* § 2111.

109. 49 U.S.C.A. § 1472(k) (Pub. L. No. 87-810) (1961), provides:

(1) Whoever, while aboard an aircraft in flight in air commerce, commits an act which, if committed within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of Title 18, would be in violation of section 113, 114, 661, 662, 1111, 1112, 1113, 2031, 2032, or 2111 of such Title 18 shall be punished as provided therein.

(2) Whoever, while aboard an aircraft in flight in air commerce commits an act, which, if committed in the District of Columbia would be in violation of section 9 of the Act entitled "An Act for the preservation of the public peace and the protection of property within the District of Columbia," approved July 29, 1892, as amended (D.C. Code, § 22-1112) shall be punished as provided therein.

D.C. Code § 22-1112 prohibits indecent exposure, indecent sexual proposals and other lewd acts.

110. 2 U.S. CODE CONG. & ADM. NEWS 2571 (1961).

jurisdictional enlargements were made, Congress wisely created the new and distinct statutory offense of "aircraft piracy."<sup>111</sup>

The need for special aircraft piracy legislation was underscored by *United States v. Bearden*<sup>112</sup> where the piracy occurred on August 3, 1961, thirty-five days before the aircraft piracy and enlarged "special maritime and territorial jurisdiction" statutes became effective. Bearden and his sixteen-year-old son boarded a commercial aircraft in Phoenix, Arizona with tickets for El Paso. In flight over New Mexico they drew pistols, announced to the pilot and crew that they were taking command of the aircraft and intended to take it to Mexico and then Cuba. The pilot was ordered to turn and this was done, but the original course was resumed almost immediately because the crew convinced Bearden the plane could not reach Mexico unless it refueled in El Paso. Alerted by radio, El Paso law enforcement officers met the plane. Bearden allowed most of the passengers to deplane. After the refueling, Bearden ordered the crew to get under way. Police in automobiles followed the plane down the runway firing bullets into its tires and engines, thus preventing its takeoff. Officers then boarded the aircraft and arrested Bearden and his son: no one was injured. In affirming in part, a conviction, the Fifth Circuit Court of Appeals said:

Appellant was convicted under three counts in the United States District Court for the Western District of Texas in El Paso, count one charging the crime of kidnapping, count three charging theft of an aircraft in interstate commerce and count six charging the crime of obstructing commerce. From his conviction appellant took an appeal to this court which affirmed the conviction by a divided court. The Supreme Court vacated that judgment of this court [and remanded]. . . .<sup>113</sup>

---

111. 49 U.S.C.A. § 1472 (i) (1958).

112. 320 F.2d 99 (5th Cir. 1963).

113. *Id.* at 100. The court's footnote numbering has been preserved and its footnotes are as follows:

1. 18 U.S.C. § 1201: Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away and held for ransom or reward or otherwise, is guilty of a violation of the laws of the United States and shall be punished according to law. (As instructed by the court).

2. Some of the counts were dismissed before trial.

3. 18 U.S.C. § 2312: Whoever transports in interstate or foreign commerce a motor vehicle or aircraft knowing the same to have been stolen,

The court found the evidence sufficient to support convictions on all three counts, but reversed and remanded as to counts one and three because of errors in the instructions to the jury. The conviction under count six for obstructing commerce was affirmed. The Supreme Court denied a petition for certiorari.<sup>114</sup>

### THE AIRCRAFT PIRACY STATUTE

In 1961, Congress, with the primary purpose of extending federal criminal law to aircraft hijacking,<sup>115</sup> amended the Federal Aviation Act

shall also be punished according to law. (As instructed by the court).

4. 18 U.S.C. § 1951: Whoever in any way or degree obstructs, delays or affects commerce—[that means business between the States]—or the movement of any article or commodity in commerce, by extortion, or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this law, shall be punished according to law. (As instructed by the court).

5. 304 F.2d 532 (5th Cir. 1962).

6. 372 U.S. 252, 83 S.Ct. 875, 9 L.Ed.2d 732. *Id.* at 101 nn.1-6.

114. 376 U.S. 922 (1964).

115. The House Committee Report states:

The primary purpose of this legislation is to amend the Federal Aviation Act of 1958 so as to extend Federal criminal laws to certain acts committed on board aircraft—in particular, such acts as aircraft "hijacking," murder, manslaughter, assault, maiming, carrying concealed deadly or dangerous weapons, and stealing personal property. . . .

Recent events have demonstrated the urgent need for stronger Federal laws applicable to criminal acts committed aboard commercial and private aircraft. . . .

It is true that, in the case of crimes committed in the airspace over States of the United States, most of the acts with which this legislation deals would be violations of the laws of one or more of such States. However, crimes committed in the airspace over a State pose peculiar and extremely troublesome problems of enforcement which are not present when such crimes take place on the ground. . . . State officials are often faced with an insuperable task in trying to establish that a particular act occurred in the airspace over that State—and in some cases, under State law, it would be necessary to prove that the offense was committed over a particular county in the State. It is obvious that such proof may be very difficult and often impossible if the offense is committed on a jet aircraft traveling at 600 miles per hour at an altitude of 30,000 feet.

The offenses punishable under this legislation would not replace any State jurisdiction but would, where both Federal and State law provided for punishment for the same act, be in addition to the State criminal law.

The language of this legislation, coupled with the definition of "air commerce" in the Federal Aviation Act of 1958, will operate to make certain of its provisions applicable not only to acts committed on

of 1958 by adding a subsection denouncing aircraft piracy.<sup>116</sup> The congressional report expressly dissociates this statutory offense from piracy on the high seas.<sup>117</sup> The Act defines aircraft piracy as "any

---

American-flag aircraft in flight in air commerce over foreign countries but also to such acts committed on foreign aircraft in flight in air commerce over foreign countries, but only if such aircraft are engaged in flights originating at or destined to points in the United States. Most such flights carry large numbers of American citizens. The committee feels that it is necessary and appropriate for the legislation to have this broad coverage if it is to operate as an effective deterrent to crime and promote safety in air commerce. H.R. REP. NO. 958, 87th Cong., 1st Sess. (1961); 2 U.S. CODE CONG. & ADM. NEWS 2563-64 (1961).

116. 49 U.S.C.A. § 1472(i) (1968) reads:

(1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished—

(A) by death if the verdict of the jury shall so recommend, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order; or

(B) by imprisonment for not less than twenty years, if the death penalty is not imposed.

(2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce.

117. The House Committee report further states:

There is no intention, however, that the meaning and interpretation of this subsection shall be influenced in any way by precedents or interpretations relating to "piracy on the high seas." In recent weeks, because of news reports in the press and on TV and radio, the term "piracy," along with the term "hijacking," has come to be associated with the incidents that have occurred in which individuals, by force or violence or threats thereof, have taken over the control of aircraft and forced the pilot and other flight crew members to do their bidding, often at risk of life to crew and passengers. Therefore, in defining this particular offense it seemed both convenient and desirable to use the term "piracy."

The term "air commerce" was used designedly. . . . The term is defined in existing law to include not only interstate, overseas, and foreign air commerce and the transportation of mail by aircraft, but also any operation or navigation of aircraft in a Federal airway or any such operation or navigation which directly affects, or may endanger safety in, interstate, overseas, or foreign air commerce.

The committee considered and rejected the proposal which has been made, in an effort to meet the "hijacking" problem, to apply the concept of piracy on the high seas to offenses committed aboard aircraft in flight in air commerce.

....

Because of the uncertainties involved in trying to apply the law of piracy on the high seas to aircraft in air commerce, no provision to do this is included in this bill. Instead, the committee has decided to deal with the problem of "hijacking" directly and in terms which, in the committee's opinion, describe the essential elements of the offense.

seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce," and makes its commission or an attempt punishable by death or imprisonment for not less than twenty years. This aircraft piracy statute has withstood United States Supreme Court scrutiny. In *United States v. Healy*,<sup>118</sup> the indictment alleged that the accused had kidnapped at gunpoint the pilot of a private airplane and compelled him to fly from Florida to Cuba. Count one charged violation of the Federal Kidnapping Act,<sup>119</sup> and count two charged the defendant with aircraft piracy. The district court dismissed both counts stating pecuniary benefit to the defendant was necessary to constitute kidnapping and that the aircraft piracy statute applied only to commercial airplanes and not to private airplanes. On direct appeal the Supreme Court unanimously reversed this judgment of dismissal as to both counts. It held that "a nonpecuniary motive did not preclude prosecution under the [Federal Kidnapping] statute,"<sup>120</sup> and that a private airplane may be the subject of aircraft piracy. The latter ruling was predicated on the statutory definition of "air commerce"<sup>121</sup> and the legislative history of the aircraft piracy statute.<sup>122</sup>

Three other penal sections, all closely related to aircraft piracy, were added to the Federal Aviation Act in 1961. The first of these denounces interference with flight crew members or flight attendants.<sup>123</sup> This

---

H.R. REP. No. 958 89th Cong., 1st Sess. (1961); 2 U.S. CODE CONG. & ADM. NEWS 2567-69 (1961).

118. 376 U.S. 75 (1964).

119. 18 U.S.C. § 1201 (1958), which provides:

(a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished. . . .

120. 376 U.S. 75, 81.

121. The Court quoted, 49 U.S.C. § 1301(4) (1958) which provides:

"Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

122. *Supra* notes 115, 116, 117.

123. Whoever, while aboard an aircraft in flight in air commerce, assaults, intimidates, or threatens any flight crew member or flight attendant (including any steward or stewardess) of such aircraft, so as to interfere with the performance by such member or attendant of his duties or lessen the ability of such member or attendant to perform his duties,

section was held to apply to a passenger who had been drinking and interfered with the pilot's operation of a private airplane by forcible manipulation of dual controls. Placing reliance on the reasoning in *Healy*, the court in this case found that the term "flight crew member clearly . . . included the pilot of an aircraft in flight in air commerce."<sup>124</sup>

The second related section prohibits boarding or attempting to board with a concealed deadly weapon, an aircraft being operated by an air carrier in air transportation.<sup>125</sup> As pointed out by the Supreme Court in *Healy*, this particular section refers solely to commercial airliners and not to private aircraft.<sup>126</sup> With rare exceptions, this offense has already been committed by those who later attempt or accomplish aircraft piracy of a commercial aircraft. This provision will be a salutary deterring sanction if the airlines bring themselves to apply some preventive technique of examining passengers as they board planes to detect concealed weapons.

The other related prohibition is against knowingly imparting false information concerning an alleged attempt to commit aircraft piracy.<sup>127</sup>

shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be imprisoned for any term of years or for life. 49 U.S.C.A. § 1472(j) (1958).

124. *Mims v. United States*, 332 F.2d 944, 946 (1964).

125. The statute states:

Except for law enforcement officers of any municipal or State government, or the Federal Government, who are authorized or required to carry arms, and except for such other persons as may be so authorized under regulations issued by the Administrator, whoever, while aboard an aircraft being operated by an air carrier in air transportation, has on or about his person a concealed deadly or dangerous weapon, or whoever attempts to board such an aircraft while having on or about his person a concealed deadly or dangerous weapon, shall be fined not more than \$1,000 or imprisoned not more than one year, or both. 49 U.S.C.A. § 1472(1) (1958).

H. Rap Brown, black militant, was convicted of this offense in 1968 for carrying a gun on a flight to New Orleans. In January, 1969, under this act, two armed members of the Black Panther Organization were arrested as they were about to board a jetliner at Kennedy International Airport for San Francisco. Each had a loaded pistol and their attorney said they were going to a funeral. Bail was fixed at \$50,000 each. *N.Y. Times*, Jan. 25, 1969, § C, at 60.

126. *United States v. Healy*, 376 U.S. 75, 84 (1964).

127. (1) Whoever imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by subsection (i), (j), (k), or (l)

The FBI in January, 1969, arrested a passenger in Cleveland under this section on a charge of making a false report concerning an attempt to commit aircraft piracy. The passenger was seen inspecting the landing gear and as he walked to the ramp he said he wanted to make sure the landing gear was all right as he intended to take the plane to Cuba.<sup>128</sup>

These 1961 penal additions to the Federal Aviation Act, tailored as they were to cope with the hijacking of aircraft in flight, seem adequate for the purpose so far as law in the books is concerned. The pending prosecutions: for aircraft piracy against the hijacking sergeant who voluntarily returned with his two-year-old daughter from Havana and surrendered in Miami;<sup>129</sup> for attempted aircraft piracy against the culprit whose effort to divert a plane over Miami was frustrated; for attempting to carry a concealed deadly weapon aboard a commercial flight; and for falsely reporting an attempted aircraft piracy, may raise new legal issues. However, it is probable that if these facts are established by competent evidence, convictions will be upheld.

By the very nature of the offense, a successful aircraft piracy terminates with the arrival of the plane in a country other than that of the aircraft registry or that from which the plane departed. Consequently, no matter how perfect the domestic laws dealing with aircraft piracy of the nation of registry, or the nation of flight departure, they cannot come into effective play unless there is an operative extradition treaty between the country of registry, or of flight departure and the country in which flight terminates. This is so whether it be the United States or

of this section, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(2) Whoever willfully and maliciously, or with reckless disregard for the safety of human life, imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by subsection (i), (j), (k), or (l) of this section, shall be fined not more than \$5,000 or imprisoned not more than five years, or both. 49 U.S.C.A. § 1472(m) (1958).

128. Durham Morning Herald, Jan. 21, 1969, § A, at 1. Query: Would a defense predicated on an assertion that the accused's statement was not false, constitute a confession of the offense of attempt to commit aircraft piracy?

129. *Id.* Jan. 12, 1969, § A, at 10; *Id.* Jan. 14, 1969, § A, at 1; *Id.* Jan. 21, 1969, § A, at 1; N.Y. Times, Jan. 25, 1969, § C, at 60. Alben W. Truitt, grandson of the late Vice President Alben Barkley, was deported from Canada to the United States in February, 1969. He was arrested, and at Plattsburg, New York, charged with aircraft piracy for allegedly forcing the pilot of a chartered Cessna 177 to take him from Cuba to Key West in 1968. The case is pending. See Durham Morning Herald, Feb. 9, 1969, § A, at 13; *Id.* Jan. 31, 1969, § C, at 8.

any other nation which is seeking return of the culprit. It is true even if both nations involved are parties to the Tokyo Convention.<sup>130</sup> It is equally true whether the receiving nation is politically friendly or hostile to the requesting nation.

#### EXTRADITION PROBLEMS

The United States Supreme Court has said: "The principles of international law recognize no right to extradition apart from treaty."<sup>131</sup> Uniform United States policy is that it has no authority to surrender fugitives to a foreign state in the absence of treaty.<sup>132</sup> Hence it cannot, consistently, expect other nations to surrender fugitives to it in the absence of an extradition treaty applicable to the offense in issue. This threshold problem obviously arises in every case, regardless of whether or not Cuba happens to be the nation from which extradition is desired.

The basic bilateral extradition treaty between Cuba and the United States came into force in 1905.<sup>133</sup> In 1926, by a new treaty,<sup>134</sup> the list of extraditable crimes was expanded but these additions are not here relevant. Pertinent parts of the original treaty will be examined.

There is a provision that extradition shall be granted for robbery<sup>135</sup> and kidnapping.<sup>136</sup> These two offenses as defined in the treaty are possibly broad enough to apply to the facts found in most aircraft piracy situations. However, if extradition were granted for either or both of these offenses the fugitive could not then be tried for aircraft piracy. This results from the inclusion in the treaty of the usual provision that "[no] person surrendered . . . shall, without his consent, . . . be triable . . . for any crime . . . committed prior to his extradition, other than

---

130. *Supra* note 82.

131. *Factor v. Laubenhimer*, 290 U.S. 276, 287 (1933).

132. 1 MOORE, *EXTRADITION* ch. 2 (1891); 4 HACKWORTH *INTERNATIONAL LAW* 13-16 (1942).

133. *Treaty with Cuba for the Mutual Extradition of Fugitives from Justice*, April 6, 1904, 33 Stat. 2265; I. MALLOY, 366, 371.

134. *Additional Extradition Treaty with Cuba*, Jan. 14, 1926, 44 Stat. 2392.

135. *Treaty with Cuba for the Mutual Extradition of Fugitives From Justice*, April 6, 1904, art. II, para. 3, 33 Stat. 2265: "Robbery, defined to be the act of feloniously and forcibly taking from the person of another . . . property by violence or by putting him in fear." 1 C. MALLOY, *supra* note 133 at 367.

136. "Kidnapping of minors or adults, defined to be the abduction or detention of a person or persons . . . for any . . . unlawful purpose." *Id.* at art. II, para. 4; MALLOY, *supra* note 133 at 368.



that for which he was delivered up. . . ."<sup>137</sup> The other possibility for extradition is under the clause: "Crimes committed at sea, to wit: (a) Piracy, by statute or by the law of nations."<sup>138</sup> In view of the domestic law of the United States on this matter previously considered, it could not be maintained that aircraft hijacking is piracy by the law of nations; it is "piracy by statute." However, it does not occur "at sea" under the reasoning of the *Cordova* case.<sup>139</sup> Thus, it could not be seriously asserted that the present United States extradition statute includes the statutory offense of aircraft piracy.

The extradition treaty provides that an accused is to be rendered up only "upon such evidence of criminality as, according to the laws of the place where the . . . person so charged shall be found, would justify his . . . commitment for trial if the . . . offense had been there committed."<sup>140</sup> This requires that aircraft piracy be an offense under Cuban law. Furthermore, the offense must be punishable "in the Republic of Cuba by imprisonment, hard labor or capital punishment."<sup>141</sup> Press reports state that skyjackers arriving from the United States are confined in Cuba. With what offense or offenses they are charged is not clear.

Article III requires that "[r]equisitions for . . . surrender . . . shall be made by the diplomatic agents of the contracting parties, or in the absence of these . . . may be made by the superior counselor officers."<sup>142</sup> This does not contemplate the intervention of Swiss diplomatic officers which is now the only means of diplomatic communication between Washington and Havana. This absence of direct diplomatic intercourse is a major impediment to accomplishing extradition.

Art. III also provides that ". . . extradition . . . shall be carried out . . . in conformity with the laws regulating extradition for the time being in force in the state in which the demand for the surrender is made."<sup>143</sup> While this language is perhaps ambiguous, Cuba would read this to make Cuban domestic law applicable. That law is subject to change at any time at the pleasure of the Cuban legislature.

Article V provides that "[n]either . . . shall be bound to deliver up

137. *Id.* at art. VIII; MALLOY, *supra* note 133 at 370.

138. *Id.* art. II, para 12(a); MALLOY, *supra* note 133, at 368.

139. *United States v. Cordova*, 89 F. Supp. 298 (E.D. N.Y. 1950).

140. Treaty with Cuba for the Mutual Extradition of Fugitives From Justice, April 6, 1904, art. I, 33 Stat. 2265; MALLOY, *supra* note 133, at 367.

141. *Id.* art. II; MALLOY, *supra* note 133, at 368.

142. *Id.*

143. *Id.*

its own citizens under . . . the treaty.”<sup>144</sup> Since most of the fugitives are not Cuban citizens this would be only a partial impediment.

Finally, the treaty also expressly excludes offenses “of a political character” from its scope. In some instances there are political overtones in an aircraft piracy situation. What constitutes a political offense is left to the final determination of the government on which the demand for surrender is made.<sup>145</sup> The remedy for this is an express agreement excluding from exemption political refugees charged with the offense of aircraft piracy, and precluding their trial, upon extradition for aircraft piracy, for any other offense, political or otherwise. This would insure that political fugitives would accomplish their travel by conventional means and not by aircraft hijacking. It must be remembered that the Tokyo Convention expressly states that “nothing in this Convention shall be deemed to create an obligation to grant extradition.” Thus, even if Cuba and the United States were parties thereto, that alone could not resolve extradition problems.

Speaking generally, these same difficulties would be found to exist in most extradition treaties. They are not unique to the United States-Cuban instrument. Obviously, a workable extradition treaty presupposes diplomatic relations between the contracting parties. Without such relations little cooperation can be expected, even though the mere cessation of diplomatic and consular exchange does not itself abrogate the extradition treaty. For all practical purposes, in the absence of diplomatic communication, the operation of the treaty is suspended.

State Department efforts to secure Cuban cooperation in extradition for aircraft piracy have so far been unsuccessful. The hope is that under the auspices of the International Civil Aviation Organization, of which Cuba and the United States are both members, a protocol to the Tokyo Convention may be negotiated which would expressly cover all points necessary to insure extradition of aircraft pirates to the country of registry of the aircraft. Still lacking is the ratification of either the Tokyo Convention or the proposed protocol thereto by either the United States or Cuba. The same result would be possible by a direct bilateral extradition treaty between the two nations applying only to the offense of aircraft piracy. Prospects of obtaining Cuban cooperation under either procedure appear doubtful.

---

144. *Id.*; MALLOY, *supra* note 133, at 369; see *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936).

145. *Id.* art. IV; MALLOY, *supra* note 133, at 369.

## POSSIBLE SOLUTIONS

The question remains, how may the increasing number of aircraft piracies be effectively suppressed? In treating the skyjacking syndrome, an ounce of prevention is probably more efficacious than a ton of cure. Perhaps, possible remedies should be classified as preventive or curative rather than extra-legal and legal.

An ingenious proposal, the origin of which is attributed to congressional and aviation circles, is that dissatisfied Cuban nationals, if individually approved by both United States and Cuban Governments, may be transported free from Miami to Veradera Beach, Cuba on southbound Freedom Flights. This airlift, now in its fourth year of operation by mutual agreement with Cuba, has brought to Miami more than 131,000 Cuban refugees. Ten passenger planes make this flight each week at United States expense and southbound they are empty. There are no direct commercial flights permitted between the United States and Cuba. On July 10, 1968 the State Department requested the Swiss Embassy in Havana to explore the acceptability of this proposal to the Cuban Government. No Cuban response was made until February 1969 when the Cuban Government announced it was unprepared to permit return of "all Cubans who want to go back . . . but may permit limited return on a selected basis," but that the matter was still to be resolved.<sup>146</sup>

Early in 1969, a House bill was introduced to authorize such transportation for Cuban nationals, determined by the Secretary of State to have a legitimate reason for traveling to Cuba and acceptable to the Cuban Government. The bill would make transportees ineligible to receive a United States entry visa for five years thereafter.<sup>147</sup> If ac-

146. U.S. DEP'T OF STATE, VOL. XVIII, PUB. NO. 14, FOREIGN POLICY BRIEF (Dec. 30, 1968); N.Y. Times, Feb. 14, 1969, § C, at 38; Durham Morning Herald, Feb. 12, 1969, § A, at 2.

147. H.R. 493, 91st Cong. 1st Sess. The bill provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of State is authorized to provide free transportation to Cuba for any national or former national of Cuba physically present in the United States if—

(1) such national or former national makes application therefor to the Secretary in such form as the Secretary may prescribe;

(2) the Secretary determines that such national or former national has a legitimate reason for traveling to Cuba; and

(3) the Secretary determines that the Government of Cuba is willing to permit such national or former national to enter Cuba.

Sec. 2. Notwithstanding any other provision of law, any national or

cepted by Cuba and approved by Congress this procedure would afford only a partial solution. Most hijackers are not Cuban nationals. Of those who are, some are fugitives from either Cuba or the United States<sup>148</sup> and, accordingly, would neither apply nor be acceptable. Moreover, if and when normal relations are resumed between Cuba and the United States, it is reasonable to suppose that the Freedom Flights would themselves be terminated.

Another possible preventive measure which has not been tried would be for the airlines to exercise control over boarding passengers to preclude their carrying weapons with which to make successful skyjacking demands. It is a crime to carry or attempt to carry a concealed weapon aboard an airliner,<sup>149</sup> but with rare exceptions hijackers have done this with impunity. There is also a federal statute which provides: "Subject to reasonable . . . regulations prescribed by the [Federal Aviation] Administrator, any air carrier is authorized to refuse transportation to a passenger . . . when, in the opinion of the air carrier, such transportation . . . might be inimical to safety of flight."<sup>150</sup> It appears these statutes are broad enough to support a regulation requiring air carriers to search passengers in order to refuse transportation to those who, because they have concealed weapons, might be inimical to safety of flight. Such a regulation could be limited to areas and flights as to which experience makes the expectation of the existence of this safety-of-flight hazard reasonable. Why has this step not been taken? FAA regulations provide that no person on a passenger aircraft may "carry on or about his person, a deadly or dangerous weapon, either concealed or unconcealed."<sup>151</sup> Except for the extension to unconcealed weapons, this regulation merely parallels the criminal provision.

The FAA and the airlines have examined methods of detecting concealed weapons in handbags and clothing. These devices have included the use of X-ray, radar, electro-magnetic detectors, magnetometers, fluoroscopes, and isotope tracers. All of these are expensive. An acceptable standard of performance has been prescribed as a very high probability of detection and a very low probability of giving false

---

former national of Cuba who obtains transportation to Cuba under the first section of this Act shall be ineligible to receive a visa to enter the United States for a period of five years from the date of his transportation to Cuba under such first section.

148. AIR PIRACY REPORT, *supra* note 77.

149. 49 U.S.C. § 1472(1) (1961).

150. 49 U.S.C. § 1511 (1961).

151. AIR PIRACY REPORT, *supra* note 77, at 4.

warning.<sup>152</sup> Such performance, in making sophisticated distinctions between innocent key rings and cigarette lighters and forbidden weapons, has not been fully achieved. If perfected, such devices would not preclude hijackers from using simulated weapons made of plastic or glass.<sup>153</sup> The airlines apparently have no intention of making manual inspections of passengers, even on a highly selective area basis. It would be time consuming, it would annoy some passengers, and it might be bad for business. Moreover, recently Eastern Airlines in a press release said business was booming and that some passengers enjoyed the experience of being aboard a hijacked flight.<sup>154</sup> Conditions will probably have to worsen materially to cause effective preventive measures to be taken on the ground before passengers go aboard. A crash of a hijacked airliner might provide the necessary incentive.

Once aboard, or in flight, there is almost no deterrent to the sky-jacker. One of the standing instructions of a major airline to all of its flight officers is: "In the fact [sic] of an armed threat to any crew member, comply with the demands presented."<sup>155</sup> This same flight instruction

152. *Id.* at 5. Statement of David D. Thomas, Acting Administrator, FAA, before the House, Interstate and Foreign Commerce Committee on Feb. 5, 1969, respecting hijacking.

153. N.Y. Times, Jan. 20, 1969, at 16.

154. Durham Morning Herald, Jan. 27, 1969, § A, at 9, "if we could," said one airline official, "we would advertise the prospect of a free side trip to Havana. It gives people a vicarious thrill."

155. AIR PIRACY REPORT, *supra* note 77, at 4, Appendix C, sets forth an Eastern Airlines Flight Brief. That interesting document, in its entirety provides:

March 27, 1968

To: All flight officers.

Subject: Aircraft piracy—Hijacking policy.

The most important consideration under the act of aircraft piracy is the safety of the lives of the passengers and crew. Any other factor is secondary.

Therefore, company policy is:

In the fact of an armed threat to any crewmember, comply with the demands presented.

Remember, more than one gunman may be on board. If not allowed to make a radio contact, it is suggested you might be able to go to code 77 (emergency) on the transponder. This would alert all ATC air defense radar stations in your vicinity that an emergency exists on your flight.

If allowed to make radio contact, as much information as to the status of your condition, whether violence has or has not taken place, and so forth, is desirable for both the United States and Cuba authorities to know.

Previous experience has indicated that the U.S. and Havana centers

prescribes routine procedures to be followed in trips to Havana under aircraft piracy conditions. Most pilots flying to Miami carry maps of Havana's Jose Marti Airport and are briefed on its approaches and landing procedures. The FAA Miami Traffic Control Center maintains a "hot line" to Jose Marti to inform Cuban authorities when a hijacked airplane is enroute. The Swiss Embassy uses a pro forma message to request return of plane and passengers, in which only blanks need be filled.<sup>156</sup>

An FAA regulation, with two exceptions, requires the pilot of a large craft carrying passengers to "insure that the door separating the flight crew compartment from the passenger compartment is closed and locked during flight."<sup>157</sup> The instruction to flight crews to "comply with the demands presented,"<sup>158</sup> seems to extend to unlocking the door upon demand of the hijacker, thus nullifying the FAA regulation. Such access is routinely granted. One wonders whether the crew that, in January 1969, disregarded a hijacker's shotgun, locked the cockpit door against him, remained in the landing pattern, landed, and turned the assailant over to authorities<sup>159</sup> was commended or condemned for taking this

---

are well coordinated in these instances and will handle you in a routine manner, including handoff to the tower.

Your Latin American H/L en route chart covers the airways involved to Cuba.

There is no published approach procedure for Jose Marti Airport, Havana, Cuba. The jet runway is 5-23, 10,500 feet long, and elevation is 210 feet. The radio facility is a radio beacon, approximately 3 miles southwest of runway 5. The frequency is 348 kilocycles.

Ground support for both the aircraft and the passengers and crew have been available at Jose Marti Airport, offered by Cubana. Services have included telephone to the United States, fuel, air starting equipment, weather information, and so forth. It is not recommended that fuel be taken in Cuba unless absolutely required. Fuel is available from the Navy at Key West (Boca Chica). The Swiss Embassy has proved to be most helpful and will probably have a representative at the airport. If not, a call to the Swiss Embassy for any help you require is in order.

To sum up: Going on past experience, it is much more prudent to submit to a gunman's demands than to attempt action which may well jeopardize the lives of all on board.

J. H. O'Neill  
Division Vice-President—Flight.

156. N.Y. Times, Jan. 20, 1969, at 16.

157. AIR PIRACY REPORT, *supra* note 77, at 4.

158. *Supra* notes 151, 152, 157.

159. Durham Morning Herald, Jan. 14, 1969, § A, at 1.

action. This occasion was not unique. There are at least three other instances of hijacking efforts which have been frustrated in flight.<sup>160</sup>

There has been talk of private detectives riding on selected flights. None has yet appeared on a hijacked plane. The Department of Justice has designated certain FAA personnel to serve as peace officers and deputy United States marshals to ride aboard aircraft to protect passengers and crew where there is cause to suspect that there may be a hijacking attempt.<sup>161</sup> An FAA air traffic control specialist was aboard a National Airlines plane bound from New Orleans to Miami when it was successfully hijacked in January 1969. It was reported he had accompanied the crew for "routine observation." The FAA Acting Administrator has stated he is opposed to putting "shotgun riders" aboard Miami-bound planes because of the possible results of an exchange of gunfire.<sup>162</sup>

Refueling stops in non-Cuban territory, at which no effort is made to overcome the hijacker, are difficult to understand except as spectacular consequences of the policy of absolute permissiveness. Ground efforts to frustrate a culprit involve minimum risk to both aircraft and passengers. They were successfully employed in the *Bearden* case,<sup>163</sup> with no injury to persons and only minor damage to the airplane.

The airlines and the Federal Aviation Administration have stated they have not yet found a way to prevent hijacking.<sup>164</sup> The House Inter-American Affairs Subcommittee in its report said that ". . . hearings were necessary to determine . . . what can be done in the future to . . . prevent such acts. To date, all measures have failed."<sup>165</sup> Seldom is criminal activity completely eradicated by preventive measures and there must usually be resort to after the fact, curative or punitive measures. Is this approach available under existing circumstances?

It is possible that innocent passengers, hijacked to Cuba, who suffer loss of time and compensable damages may resort to civil legal proceedings. The Civil Aviation Act requires ". . . every air carrier to provide . . . safe and adequate service . . . in connection with . . . transporta-

---

160. AIR PIRACY REPORT, *supra* note 77, at 9, 11; Durham Morning Herald, Feb. 4, 1969, § A, at 1.

161. AIR PIRACY REPORT, *supra* note 77, at 5.

162. Durham Morning Herald, Feb. 1, 1969, § A, at 3; N.Y. Times, Feb. 6, 1969, at 77.

163. *Bearden v. United States*, 320 F.2d 99 (5th Cir. 1963).

164. N.Y. Times, Dec. 13, 1968, § C, at 46 (Editorial); Durham Morning Herald, Dec. 8, 1968, § C, at 12.

165. AIR PIRACY REPORT, *supra* note 77, at 1. See also, Statement, *supra* note 152.

tion.”<sup>166</sup> Alternatively, passengers in civil suits against air lines might allege that the discriminatory treatment accorded to a passenger who improperly insists on being taken to Havana is violative of the anti-discrimination provision of the Civil Aviation Act.<sup>167</sup> Under this provision a passenger victimized by a regular practice of overbooking flights was allowed both actual and exemplary damages for resultant delay.<sup>168</sup> The two situations, each resulting from a regular airline practice, might be found to be analogous. A third possibility would be to predicate a civil suit upon the common-law liability imposed upon a common carrier to transport the passenger safely. Such suits might survive nonsuit motions and reach juries for determination of the issue whether, in light of the known hijacking hazard, airline preventive measures now employed meet legal standards of due care. Systematic filing of such passenger suits might cause airlines to reevaluate present policies and to escalate preventive procedures. It would require an organized passenger effort not likely to occur except in the context of multiple wrongful death suits arising out of a crash of a skyjacked plane, an eventuality no one wants to contemplate.

Remaining possible curative measures are penal in nature, and depend on both effective domestic criminal laws and effective extradition treaties or protocols with all nations, including Cuba. The 1961 federal penal statutes enacted to deal with aircraft piracy, as previously discussed, seem adequate to the purpose.<sup>169</sup> The basic aircraft piracy section has had Supreme Court approval.<sup>170</sup> Thus, ultimate cure by penal legal measures is dependent upon effective extradition mechanisms which will cause hijackers who are initially successful, to be routinely returned to the United States to be prosecuted for aircraft piracy. When

---

166. 49 U.S.C. § 1374(a) (1958).

167. 49 U.S.C. § 1374(b) (1958). In pertinent part the statute reads:

(b) No air carrier . . . shall . . . give . . . undue or unreasonable preference or advantage to any particular person . . . or description of traffic in air transportation in any respect whatsoever or subject any particular person . . . or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantages in any respect whatsoever.

168. *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360 (S.D. Cal. 1961).

169. However, in at least one case, the accused was acquitted, and in another, the accused was declared to be a juvenile delinquent. AIR PIRACY REPORT, *supra* note 77, at 9. Occasional acquittals, obviously, do not indicate inadequacy of the statute.

170. *United States v. Healy*, 376 U.S. 75 (1963).



this situation prevails, skyjackings will cease. The Department of State is well aware of this reality and has undertaken appropriate action.

Historically, extradition treaties have been bilateral in nature. Direct negotiation with Cuba would comport both with traditional international law and diplomatic procedure. The existing suspension of diplomatic relations between the United States and Cuba makes bilateral negotiation impracticable, if not impossible. However, there is no principle of international law which precludes multilateral agreement to an extradition convention. This procedure is entirely logical where the extradition provisions pertain only to a specific offense, or limited group of offenses, which have been declared to be criminal by an existing or concurrently adopted multilateral convention. The Tokyo Convention establishing the offense was sponsored by the United Nations affiliated, International Civil Aviation Organization. Both Cuba and the United States are members of this technical non-political international body. The elimination of aircraft piracy is an operational problem of vital concern to ICAO and to all of its other member nations as well as to Cuba and the United States. The Tokyo Convention, on a completely multilateral basis, dealt with many aspects of aircraft piracy but did not make provisions for extradition.

Aircraft piracies have not been confined to Cuba and the United States. At least one Canadian, six Colombian, one Ecuadorian, one Greek, three Mexican, one Peruvian, and two Venezuelan aircraft have been hijacked.<sup>171</sup> Practically all of these were in 1968 and 1969. Egypt has been a receiving country as well as Cuba.<sup>172</sup> At the sixteenth Assembly of ICAO in Buenos Aires in September, 1968, a unanimous resolution<sup>173</sup> was adopted calling upon all member States of ICAO to

171. Foreign Policy Briefs, *supra* note 146.

172. Durham Morning Herald, Jan. 3, 1969, § A, at 8.

173. ICAO Resolution A16-37 provides:

*Unlawful Seizure of Civil Aircraft*

WHEREAS unlawful seizure of civil aircraft has a serious adverse affect on the safety, efficiency and regularity of air navigation;

THE ASSEMBLY,

NOTING that Article II of the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft provides certain remedies for the situation envisaged,

BEING, however, of the opinion that this Article does not provide a complete remedy,

(1) URGES all States to become parties as soon as possible to the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft;

(2) INVITES States, even before ratification of, or adherence to, the

ratify or adhere to the Tokyo Convention and to give immediate effect to Article II thereof, even before ratification. This same resolution requested the ICAO Council to study other measures to cope with the unlawful seizure problem. Cuba, as an ICAO member, voted for this resolution. On December 16, 1968, the ICAO Council at Montreal adopted and published a resolution urging contracting States to take measures to prevent unlawful seizures of aircraft and to cooperate with any State whose aircraft has been so seized.<sup>174</sup>

In addition, a Subcommittee of the Legal Committee of ICAO convened at Montreal on February 10, 1969, to consider the problem of aircraft piracy. At that meeting the United States Government, as a member State, presented a Draft Protocol to the Tokyo Convention, directed primarily to supplying the omission from that Convention of the obligation of each Contracting Party to return hijackers to the State of registry of the aircraft or to the State where the act took place, and the obligation, under domestic law, to punish criminally, hijacking of aircraft under its own registry. The original wording of this Draft Protocol made hijacking of commercial aircraft an international crime and requires parties to the Protocol to detain and return persons committing that crime to the State of registration of the hijacked aircraft, upon request, even though the person claims that he was fleeing political persecution. A person so returned could be tried only for aircraft hijacking or a related offense arising out of the same act, and not for any other offense.<sup>175</sup> It was believed this agreement would, in essence,

---

Tokyo Convention, to give effect to the principles of Article II of that Convention; and

(3) REQUESTS the Council, at the earliest possible date, to institute a study of other measures to cope with the problem of unlawful seizure.

174. This ICAO Council Resolution, reads:

The Council,

Noting with concern the serious threat to safety in air navigation from the increasing number of acts of forcible and unlawful seizure of aircraft, and

Taking particular account of the provisions of Article 44(H) of the convention on International Civil Aviation,

Urges Contracting States to take all possible measures to prevent acts of unlawful seizure of aircraft and, where appropriate, to cooperate with any state whose aircraft has been the subject of such a seizure.

175. This United States proposed Draft Protocol as finally modified and submitted at Montreal read:

I. Whoever, by force or violence or threat of force or violence, whether or not for private gain, wrongfully seizes or exercises control or attempts to seize or exercise control over an aircraft in flight carrying passengers for hire, in addition to any offense now provided by the law of nations,

preserve the traditional policy of refusal to return fugitives accused of common crimes who are determined to be fleeing from political persecution. At the same time, it would realistically meet the problem of preventing the unique crime of aircraft piracy which involves such great danger to lives and such high risk of producing violent political reaction. This Protocol is supplementary to, but separate from the Tokyo Convention. Thus, ratification of the Convention need not be delayed pending agreement upon the precise terms of the Protocol.<sup>176</sup>

---

shall have committed the international crime of aircraft hijacking (les détournements d'avions). The States parties to this Protocol agree that this crime shall not be considered to be a political offense for purposes of surrender or prosecution under this Protocol. Each State party to this Protocol undertakes to make criminally punishable under its municipal law the acts herein described as constituting the crime of aircraft hijacking when those acts involve an aircraft under its own registration or when that State is the place of first landing of any aircraft after or as a consequence of any such acts involving that aircraft.

II. Any State party to this Protocol which is satisfied that there is probable cause to believe that a person within its territory has committed the crime of aircraft hijacking shall detain that person and provided that the following conditions are met shall surrender him to the State of registration of the aircraft:

- (1) the State of Registration of the aircraft is a party to this Protocol and has made timely request for surrender of the person in question for criminal prosecution;
- (2) the acts described in Article I of this Protocol are subject to criminal prosecution in the State of registration of the aircraft;
- (3) the State to which the request for surrender is addressed is satisfied that there is probable cause to believe that the person whose surrender is requested has committed the crime of aircraft hijacking;
- (4) the State to which the request for surrender is addressed is satisfied that the person sought is not in fact sought for prosecution for a political offense in the requesting State and that, if returned, he would not in fact be prosecuted as a political offender: *Provided*, however, that if surrender is refused under this subparagraph by the State in which the aircraft involved in the crime of aircraft hijacking has landed, such State shall at the request of the State of registration submit the case to its competent authorities in order that prosecution under this Protocol may be initiated if considered appropriate in the light of the same considerations applied to other crimes. The State of registration will facilitate the transmission of evidence in its possession for use by these prosecuting authorities and shall be informed of the decision on its request for prosecution.

Appendix C to ICAO Document LC/SC SA Report 21/2/69.

176. The substance of the paragraph preceding this note is derived from the testimony of Frank E. Loy, Deputy Assistant Secretary of State for Transportation and Telecommunications, before the House Committee on Interstate and Foreign Com-

At the galley proof stage of this article, the Montreal sessions of the ICAO Legal Subcommittee on Unlawful Seizure of Aircraft had produced an eleven article Draft Convention. This Subcommittee proposal differs in detail from the United States proposal.<sup>177</sup> It becomes

---

merce on February 5, 1969. This testimony has not yet been formally printed nor paginated. See also, N.Y. Times, Feb. 6, 1969, at 1, 77.

177. The following text appears in ICAO document LC/SC SA 21/2/69 Report, Subcommittee on Unlawful Seizure of Aircraft, pp. 7-9.

*DRAFT CONVENTION.* Although it has been drafted as a Convention distinct from the Tokyo Convention, this draft could be adapted to form a protocol to the said Convention.

*Article 1*

1. Any person who on board an aircraft in flight—

- (a) unlawfully, by force or threat thereof, interferes with, seizes or otherwise wrongfully exercise control of that aircraft in order to change its itinerary, or
- (b) attempts to perform such an act, or
- (c) is an accomplice of a person who performs or attempts to perform such an act

shall be guilty of a penal offence.

2. Any of the acts referred to in paragraph 1 above is referred to herein as "the offence."

*Article 2*

1. For the purposes of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.

2. This Convention shall not apply to aircraft used in military, customs or police services.

3. The Convention shall not apply in the case where the flight took place within the territory of the State of registration of the aircraft.

*Article 3*

The offence shall be deemed to continue until the offender leaves the aircraft and ceases to have control of it.

*Article 4*

Each Contracting State undertakes to penalize the offence in an effective manner, taking into account its gravity.

*Article 5*

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence when:

- (a) it is committed on board an aircraft registered in such State, or
- (b) it is the State where the alleged offender leaves the aircraft.

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

*Article 6*

1. Upon being satisfied that the circumstances so warrant, the State in whose territory the alleged offender leaves the aircraft shall take custody or other measures to ensure his presence. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary enquiry into the facts.

the newest in the increasing number of efforts to deal effectively with aircraft piracy by international agreement. ICAO has not yet decided what the next step will be in developing this latest Draft Convention.<sup>178</sup> It is offered for signature and ratification and it will obviously be sub-

---

3. Any person in custody pursuant to paragraph 1 shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.

4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the State of registration of the aircraft and the State of nationality of the detained person and, if it considers it advisable, any other interested States of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its finding to the said States and shall indicate whether it intends to exercise jurisdiction.

*Article 7*

The State which has taken measures pursuant to Article 6, paragraph 1, shall, if it does not extradite the alleged offender, be obliged to submit the case to the competent authorities with a view to initiating legal proceedings against him. These authorities shall take their decision on grounds identical to those applied for other offences.

*Article 8*

1. The offence shall be deemed to be included as an extradition offence in any extradition treaty existing or to be concluded between the various Contracting States.

2. The Contracting States which do not make extradition conditional on the existence of a treaty or reciprocity shall recognize the offence as a case of extradition as between themselves.

3. The offence shall be treated, for the purpose of extradition, as if it had been committed not only in the place in which it occurred but also in the territory of the State of registration of the aircraft.

*Article 9*

1. In a case where the offence has been or is about to be committed, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.

2. In the case contemplated in the preceding paragraph, the Contracting State in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.

*Article 10*

At the request of the Council of ICAO each Contracting State shall furnish to that Organization as rapidly as practicable all relevant information relating to:

- (a) the circumstances in which the unlawful seizure of aircraft has been carried out;
- (b) the measures taken in applying Article 10 above;
- (c) any legal proceedings taken against the alleged offender.

*Article 11*

Each Contracting State shall facilitate the provision of evidence requested by another Contracting State which is bringing proceedings against an alleged offender.

178. Letter from the Office of Legal Adviser, Department of State, to Seymour W. Wurfel, April 2, 1969, on file at the Law School of the University of North Carolina.

ject to the hazards of delay and the usual vicissitudes encountered by any proposed multilateral convention. If and when it becomes law in Cuba, the United States, and elsewhere, it will indeed be helpful.

The Draft Convention or Protocol to the Tokyo Convention proposed by the ICAO Legal Subcommittee appears to solve *legally* the problem of international aircraft piracy. For it to resolve the United States-to-Havana manifestations of aircraft piracy a number of steps remain to be accomplished. These are: (1) The consent of the United States Senate to the Tokyo Convention and the notification of ratification thereof by the President to ICAO; (2) The adherence of Cuba to the Tokyo Convention; (3) The ratification by at least two more nations of the Tokyo Convention to provide the minimum of twelve required by its terms; (4) The elapsing of ninety days after the deposit of the twelfth instrument of ratification before the Convention comes into force; (5) The agreement by ICAO member States to the proposed protocol; (6) The opening of this Protocol for ratification; (7) The ratification of the Protocol by both the United States and Cuba; and finally, (8) Sufficient diplomatic cooperation between the United States and Cuba to carry out in good faith, at the operating level, the procedures specified in the Convention and the Protocol. Should all of this come to pass in what remains of the calendar year 1969, it would constitute a minor miracle and a major diplomatic achievement by all concerned. Possibly, United States and Cuban adherence to only the Draft Convention proposed by the ICAO Legal Subcommittee would accomplish the purpose.

#### CONCLUSION

It is not entirely fatuous to hope that within the foreseeable future both Cuba and the United States will be Contracting Parties to the Tokyo Convention and to an "aircraft piracy—extradition" Protocol thereto. There have been numerous reports that the Cuban Government was tiring of the logistical labor of the game at the Havana end. The putting into effect on February 10, 1969, of the new procedure of permitting passengers to return at once on the hijacked aircraft, marks definite progress. This resulted from negotiations between the two nations facilitated by the Swiss Embassy in Havana. The informal agreement and its implementation evidence some Cuban interest in a rational solution of the problem. On the part of the United States it is possible the Senate might be infused with a sense of urgency and give prompt

consent to both the Tokyo Convention and an appropriate Protocol thereto.

Cuba has announced it will start negotiations with Mexico toward a bilateral extradition agreement covering aircraft piracy, but taking "special care not to contravene the principle of asylum."<sup>179</sup> (Mexico is the only Latin American country now maintaining diplomatic relations with Cuba.)

Certainly the best, if not the only, legal solution is that of an ICAO sponsored Convention and Protocol. It would, of course, be possible by bilateral agreement between Cuba and the United States to put into effect at any time the procedures specified in the pending proposed Protocol. The availability of the multinationally oriented protocol proposal may possibly prove to be a catalytic agent productive of fruitful negotiations and operating arrangements between Cuba and the United States. There seems to be no other acceptable legal alternative to the Conventional and Protocol approach.

Turning to the question, Aircraft Piracy—Crime or Fun?; the answer emerges, mostly crime and very little fun. This in spite of the not too successful efforts of man for over two thousand years to define various piratical activities as criminal in terms clear enough to withstand the attacks of astute defense lawyers, and to fashion punitive remedies that would penetrate into the deepest piractical refuges.

It is impossible to resist the impulse to comment that Caesar's legal remedy of crucifying pirates at the scene of their crime is the most efficient that has yet been devised. Today many factors other than mere efficiency control legal remedies, including international legal remedies.

Finally, a wistful jurisprudential query; will the day ever come when there will be an impartial international criminal court with jurisdiction to punish individuals who have committed international crimes, so that one or a few nations may not legally thwart the rule of law in the international community? Until that distant day arrives, aircraft piracy and other crimes of a predominantly multinational character will continue to produce frustrating, even if not wholly insolvable, legal problems.

---

179. Durham Morning Herald, Feb. 15, 1969, § A, at 17.