NOTES

POLITICAL ASYLUM AND THE REFUGEE HIJACKER: A SUGGESTED ALTERNATIVE

I. INTRODUCTION

Two Soviet Jews attempted to hijack an Aeroflot Airliner to Western Europe as a first step to escape to Israel.[1] These Jews were not successful. They were arrested and convicted for their attempted escape and sentenced to fifteen years in prison.[2] A question nevertheless remains. If these Soviets, and others similarly situated,[3] were successful, how would they be treated by the state in which they landed? Would they be considered common criminals for the airline hijacking, thereby subject to extradition to the Soviet Union for prosecution of the crime? Or would these Soviet Jews be considered political refugees, victims of persecution entitled to political asylum?

Hijacking as a means of escape from persecution is not new. Shortly after World War II, hijacking became a popular means of escape from behind the Iron Curtain.[4] In the 1960's, however, hijacking took on a new dimension.[5] Airline hijacking became the tool by which the greedy,[6] the cowardly,[7] and the politically minded terror-

1. N.Y. Times, June 22, 1970, at 1, col. 1. While there is no record of an attempted hijacking from the Soviet Union recently, hijacking as a means of escape from a totalitarian regime is by no means extinct. See note 4 *infra*.

2. N.Y. Times, Dec. 16, 1970, at 3, col. 5. Twenty persons were arrested and given sentences ranging from four years to fifteen years in prison for taking part in the plot to escape. The two Jews who organized the activity, and who had previously been actively seeking permission to lawfully emigrate to Israel, were initially given the death sentence for the attempted hijacking. *Id.* The Supreme Court of the Soviet Union later commuted the death sentence to fifteen years in prison. *Id.*, Jan. 1, 1971, at 1, col. 2.

3. *Id.*, Jan. 8, 1973, at 14, col. 1.

4. The first recorded use of hijacking as a means of escape was on April 9, 1948. Twenty passengers and a crew member seized control of a Czechoslovakian airliner and forced it to land in Germany. N.Y. Times, Apr. 9, 1948, at 1, col. 2. *See also id.*, Mar. 25, 1953, at 1, col. 2; *id.*, Mar. 25, 1950, at 1, col. 2; *id.*, May 8, 1948, at 7, col. 2.

The practice is by no means extinct. *See, e.g.*, *id.*, May 11, 1978, at 4, col. 3; *id.*, Feb. 7, 1978, at 2, col. 5; *id.*, Oct. 12, 1977, at 8, col. 4; *id.*, Oct. 29, 1976, § I, at 5, col. 1; *id.*, Apr. 19, 1972, at 2, col. 4; *id.*, Oct. 28, 1970, at 1, col. 2; *id.*, Oct. 16, 1970, at 1, col. 5; *id.*, Nov. 21, 1970, at 3, col. 6; THE TIMES (London), Aug. 31, 1978, at 1, col. 1.

5. N.Y. Times, Jan. 15, 1978, § X, at 20, col. 5.

6. The most publicized and successful attempt of this kind of hijacking occurred on November 24, 1971, when a Northwest Orient airliner was hijacked. The hijacker demanded and received $200,000 cash, parachuted from the plane, and has never been apprehended, although he was indicted by a grand jury for the offense. *Id.*, Nov. 25, 1976, at 20, col. 6.

ist[8] reaped economic gain and political advantage from the international community. Strong measures were necessary to combat the abuse to which international airline transportation had been subjected.[9] As a result, several multilateral conventions[10] were signed establishing a uniform system of dealing with offenses committed in the air.[11]

For other examples of this type of hijacking, see *id.*, Jan. 21, 1978, at 2, col. 3; *id.*, Apr. 8, 1976, at 18, col. 1; *id.*, May 11, 1974, at 10, col. 1.

7. The most noteworthy example of this type of hijacking occurred on October 31, 1969. Raphael Minichiello diverted a T.W.A. airliner from California to Rome. Minichiello claimed he had escaped because he feared he would not get a fair trial on burglary charges he faced in the United States. *Id.*, Nov. 1, 1969, at 1, col. 1. See note 138 *infra*.

Another highly publicized hijacking of this type occurred on November 12, 1972 when a Southern Airways airliner was hijacked to Cuba by three men, two of whom were wanted on rape charges in Detroit. The third was a fugitive from justice in Tennesee. N.Y. Times, Nov. 13, 1972, at 1, col. 1.

8. The first hijacking of this type occurred on July 23, 1968, when an El Al airliner was hijacked by three members of the Popular Front for the Liberation of Palestine. The Israeli passengers were detained until Israel released several members of the Popular Front for the Liberation of Palestine. *Id.*, July 23, 1968, at 1, col. 7.

A more recent example of terrorist hijacking is the "Entebbe" incident of June 28, 1976. An Air France airliner was hijacked to Entebbe airport in Uganda where Israeli passengers were detained while hijackers bargained for the release of 150 terrorists jailed in Israel, West Germany, France, Switzerland, and Kenya. *Id.*, June 28, 1976, at 1, col. 2. For other examples, see *id.*, May 4, 1972, at 3, col. 1; *id.*, Feb. 22, 1972, at 1, col. 2; *id.*, Sept. 7, 1970, at 1, col. 4; *id.*, July 23, 1970, at 1, col. 6; *id.*, Dec. 22, 1969, at 17, col. 1; *id.*, Aug. 30, 1969, at 1, col. 8.

9. *See Hearings on Resolutions Concerning Aircraft Hijacking and Related Matters Before the House Commitee on Foreign Affairs*, 91st Cong., 2nd Sess. 6 (1970) [hereinafter cited as *Aircraft Hijacking Hearings*]; *Actions to Deal With the Menace of Air Piracy*, 63 DEP'T STATE BULL. 341, 341 (1970); S. SHUBBER, JURISDICTION OVER CRIMES ON BOARD AIRCRAFT 170 (1973).

10. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *done* Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570 (entered into force Jan. 26, 1973) [hereinafter cited as The Montreal Convention]; Convention for the Suppression of Unlawful Seizure of Aircraft, *done* Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192 (entered into force Oct. 4, 1971) [hereinafter cited as The Hague Convention]; Convention on Offenses and Certain Other Acts Committed on Board Aircraft, *done* Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219 (entered into force (U.S.) Sept. 14, 1963) [hereinafter cited as The Tokyo Convention].

11. Prior to the Tokyo Convention, there were no expressly formulated uniform rules concerning offenses committed on board aircraft. Brooks, *Skyjacking and Refugees: The Effect of the Hague Convention Upon Asylum*, 16 HARV. INT'L L.J. 93, 95 (1975). *See* Fitzgerald, *The Development of International Rules Concerning Offences and Certain Other Acts Committed on Board Aircraft*, 1 CANADIAN Y.B. INT'L L. 230, 240-51 (1963); Horlick, *The Developing Law of Air Hijacking*, 12 HARV. INT'L L.J. 33, 33-34 (1971).

In the absence of international rules concerning jurisdiction on board aircraft, some offenders escaped prosecution. *See, e.g.*, United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950). During a flight between San Juan, Puerto Rico and New York, a fight broke out between Cordova and a passenger. Cordova was charged with assault, but was not prosecuted. The court held there was no federal jurisdiction over any act committed in aircraft while

A contracting state in which a hijacker is found now has an obligation to either extradite the individual to a state with jurisdiction to prosecute,[12] or submit the case to its proper authorities for prosecution.[13] The determination of whether or not to extradite depends on the nature of the crime committed.[14] If the crime is deemed to be a political offense,[15] the state has a right to refuse extradition.[16] If the crime is deemed to be a common crime, the state must extradite the offender.[17] The definition of a political offense is determined by the state in which the hijacker is found.[18]

A state's duty to extradite an airline hijacker conflicts with the state's right to grant asylum. It is an established principle in international law that a state has absolute discretion to grant asylum to whomever it wishes.[19] The right to asylum is also a basic human right guaranteed by the Universal Declaration of Human Rights.[20] An individual has a right not to be returned to a country in which his life or freedom is in danger.[21]

This Note will examine the circumstances under which a state may grant asylum to an individual who has committed an airline hijacking. It has been suggested that any airline hijacker who has committed a political offense and is exempt from extradition is thereby entitled to asylum.[22] It is submitted that a more limited

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flying over the high seas. Under the federal law, as it existed then, there could be no punishment for crimes committed on the high seas, unless the act occurred in a vessel. *Id.* at 303. *See also* R. v. Martin, [1956] 2 Q.B. 272, [1956] 2 W.L.R. 975.

See S. SHUBBER, *supra* note 9, at 24-48; J.C. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 288-92 (7th ed. 1972); Abramovsky, *Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft—Part I: The Hague Convention*, 13 COLUM. J. TRANSNAT'L L. 380, 392 (1974) [hereinafter cited as Abramovsky, *The Hague Convention*]; Abramovsky, *Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft—Part II: The Montreal Convention*, 14 COLUM. J. TRANSNAT'L L. 268, 278 (1975); Fitzgerald, *Offenses and Certain Other Acts Committed on Board Aircraft: The Tokyo Convention of 1963*, 2 CANADIAN Y.B. INT'L L. 191 (1964).

12. The Montreal Convention, *supra* note 10, art. 8; The Hague Convention, *supra* note 10, art. 8. There is no obligation to extradite under the Tokyo Convention, *supra* note 10, art. 16, para. 2.

13. The Montreal Convention, *supra* note 10, art. 7; The Hague Convention, *supra* note 10, art. 7.

14. See notes 160-61 *infra* and accompanying text.

15. See notes 164-68 *infra* and accompanying text.

16. See notes 162-63 *infra* and accompanying text.

17. See note 160 *infra* and accompanying text.

18. See notes 169-83 *infra* and accompanying text.

19. See notes 33-35 *infra* and accompanying text.

20. G.A. Res. 217, U.N. Doc. A/810, at 71, art. 14 (1948).

21. Convention Relating to the Status of Refugees, *done* July 8, 1951, 189 U.N.T.S. 137, art. 33 (entered into force Apr. 22, 1954) [hereinafter cited as 1951 Refugee Convention].

22. Green, *Extradition v. Asylum for Aerial Hijackers*, 10 ISRAEL L.J. 207, 217 (1975).

distinction be made. Only the individual who is truly seeking refuge from political persecution has a right to enjoy political asylum elsewhere. The terrorist or fugitive from justice, irrespective of his motives, has no right to asylum. He should, therefore, be extradited under all circumstances.

II. THE DOCTINE OF ASYLUM

A. General Principles

The doctrine of asylum is the product of a number of competing interests.[23] Its aim is to protect an individual's basic human rights,[24] while at the same time maintain legal order within individual states and the international community.[25]

For the individual, the right to asylum is a basic human right guaranteed by the Universal Declaration of Human Rights.[26] This right is also recognized in the 1951 Convention Relating to the Status of Refugees[27] and its 1967 Protocol.[28] However, it is the state in which asylum is sought that has absolute discretion to decide whether or not asylum should be granted.[29]

A state's right to grant asylum to individuals in its territory stems from the exclusive character of territorial jurisdiction.[30] It is

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23. Brooks, *supra* note 11, at 99. *See generally* Horlick, *The Public and Private International Response to Aircraft Hijacking*, 6 VAND. J. TRANSNAT'L L. 144, 153-54 (1972).

24. *See* Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force (U.S.) Nov. 1, 1968) [hereinafter cited as 1967 Protocol]; 1951 Refugee Convention, *supra* note 21; Montevideo Convention on Political Asylum, *done* Dec. 26, 1933, 49 Stat. 3111, T.S. 882, 165 L.N.T.S. 45 (entered into force (U.S.) Jan. 25, 1935), *reprinted in* 6 HUDSON, INTERNATIONAL LEGISLATION 607 (1937); Convention Relating to the International Status of Refugees, *done* Oct. 28, 1933, 159 L.N.T.S. 199 (entered into force June 13, 1935) [hereinafter cited as 1933 Refugee Convention]; Havana Convention on Asylum, *done* Feb. 20, 1928, 46 Stat. 2753, T.S. 815, 132 L.N.T.S. 301 (entered into force (U.S.) May 21, 1930), *reprinted in* 22 AM. J. INT'L L. (Supp.) 158 (1928); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 79, U.N. Doc. A/6316 (1966); Universal Declaration on Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948); The American Declaration of the Rights and Duties of Man, *reprinted in* 43 AM. J. INT'L L. (Supp.) 133 (1949); M. GARCÍA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT (1956); Krenz, *The Refugee as a Subject of International Law*, 15 INT'L & COMP. L.Q. 90, 104 (1966); Weis, *The International Protection of Refugees*, 48 AM. J. INT'L L. 193, 198 (1954).

25. Brooks, *supra* note 11, at 99.

26. G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).

27. 1951 Refugee Convention, *supra* note 21.

28. 1967 Protocol, *supra* note 24.

29. Green, *supra* note 22, at 207.

30. *See* C. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 182-83 (1957); S.P. SINHA, ASYLUM AND INTERNATIONAL LAW 155-61 (1971); J.C. STARKE, *supra* note 11, at 252-54; 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 686-87 (1968).

an essential attribute of the sovereignty of the state that it should possess jurisdiction over all persons and things within its territorial limits.[31]

The decision of a state to grant asylum depends on existing international agreements,[32] municipal law,[33] and the nature of the individual's offense or motive[34] in seeking asylum. In the absence of a controlling municipal law or international agreement governing a particular case, a state has absolute discretion to determine whether or not asylum should be granted.[35] Where a state is a party to an international agreement providing the circumstances under which asylum should be granted,[36] the state has an obligation under international law to abide by the agreement.[37]

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31. Campania Naviera Vascongado v. Cristina S.S., [1938] A.C. 485, 496-97. *See* Feller, *Jurisdiction Over Offenses With a Foreign Element*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 5, 17 (M.C. Bassiouni ed. 1973); J.C. STARKE, *supra* note 11, at 242-43.

32. See note 24 *supra* and accompanying text.

33. Most states claim in theory to exclude all aliens at will. J.C. STARKE, *supra* note 11, at 345.

In Great Britain this right was declared in Musgrove v. Chun Teeong Toy [1891] A.C. 272. Similarly, in the United States this view has been stated in Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953); Harisiades v. Shaghnessy, 342 U.S. 580 (1952); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Nishimura Ekiu v. United States, 142 U.S. 651 (1892); The Chinese Exclusion Case, 130 U.S. 581 (1889).

34. See notes 160-83 *infra* and accompanying text. *But see* E. MCDOWELL, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 170 (1975). The United States' criminal laws do not recognize motive as an element of a criminal offense. Motive therefore has no bearing on determining whether a specific act is a common crime or a political offense. M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 384 (1974).

35. S.P. SINHA, *supra* note 30, at 155.

The United States Supreme Court stated in Factor v. Laubenheimer, 290 U.S. 276, 287 (1933):

> [T]he principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under a moral duty to do so . . . the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.

While a state has no obligation under international law to grant asylum in the absence of a treaty, there is nothing to prevent it from making such a grant if it so desires. *See* S.P. SHINA, *supra* note 30, at 18, 155; 8 M. WHITEMAN, *supra* note 30, at 681.

36. *E.g.*, 1967 Protocol, *supra* note 28; 1951 Refugee Convention, *supra* note 21.

37. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27 at 289, art. 29, *reprinted in* 63 AM. J. INT'L. L. 875, 885 (1969). *See* T. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 11 (2nd ed. 1973); MCNAIR, LAW OF TREATIES 5, 124, 749-52 (1961); G. VON GLAHN, LAW AMONG NATIONS 11 (1970); 1 M. WHITEMAN, *supra* note 30, at 70-74.

B. International Agreements Governing Asylum

1. The Universal Declaration of Human Rights

To achieve international cooperation in promoting and respecting human rights, without distinction as to race, sex, language, or religion,[38] the Universal Declaration of Human Rights was adopted by the United Nations in 1948.[39] The Declaration was intended as a guideline of basic principles of human rights and freedoms for all peoples of all nations.[40] It implies that an individual has certain inalienable rights that cannot be taken away by sheer fiat of the state.[41] One of those inalienable rights is the right to asylum from persecution.[42] Article 14 of the Declaration expressly provides that "[e]veryone has the right to seek and enjoy in other countries asylum from persecution."[43] This right is limited only "in the case of prosecutions genuinely arising from nonpolitical crimes or from acts contrary to the purposes and principles of the United Nations."[44]

The right to seek asylum from persecution is a well established principle in international law. Vattel made this right clear in *The Law of Nations; or, Principles of The Law of Nature:*[45]

> if the sovereign, or the greater part of the nation, will allow but one religion in the state, those who believe and profess another religion have a right to withdraw, and to take with them their families and effects. For, they cannot be supposed to have subjected themselves to the authority of men, in affairs of conscience . . . .[46]

While Article 14 of the Universal Declaration of Human Rights states that an individual has "the right to seek and enjoy in other

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38. U.N. Charter art. 1, para. 3.

39. The Declaration was intended to be the first of three stages of a program designed to achieve an international bill of rights. The three stages were to be (1) a declaration defining the various human rights which ought to be respected; (2) a convention containing binding treaty obligations regarding human rights; and (3) measures and machinery for implementation. Report of the Commission on Human Rights, 6 U.N. ESCOR, Supp. (No. 1) 3, at 5-6, U.N. Doc. E/600 (1947). *See* J.C. Starke, *supra* note 11, at 359; 5 M. Whiteman, *supra* note 30, at 242.

40. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71, preamble (1948). *See General Assembly Adopts Declaration of Human Rights*, 19 Dep't State Bull. 751, 751 (1948); 5 M. Whiteman, *supra* note 30, at 243.

41. M. García-Mora, *supra* note 24, at 17-18.

42. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71, art. 14 (1948).

43. *Id.* art. 14, para. 1.

44. *Id.* art. 14, para. 2.

45. 3 E. Vattel, The Law of Nations or Principles of The Law of Nature (1856).

46. *Id.* at 106.

countries asylum from persecution,"[47] there is no guarantee that asylum will be granted.[48] According to the drafting history of Article 14, a proposal to include a provision to be granted asylum,[49] was substituted by a right to enjoy asylum.[50] Furthermore, a declaration is only advisory in nature. It does not have the legal force of an international convention to which all parties are bound.[51] Thus, one must turn to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol to determine the extent to which an individual has a right to asylum.

2. Convention Relating to the International Status of Refugees (The 1951 Refugee Convention)

The 1951 Refugee Convention[52] aimed to protect individuals who, driven from their country of origin by fear of persecution, refused to return to a regime they regarded as intolerable.[53] The Convention applies to anyone who falls within the Article 1(A)(2)

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47. G.A. Res. 217, U.N. Doc. A/810, at 71, art. 14, para. 1 (1948).

48. H. Lauterpacht, International Law and Human Rights 421-23 (1968).

49. Draft Declaration of Human Rights, U.N. Doc. A/C.3/285/Rev.1 (1948).

50. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71, art. 14 (1948).

51. United Nations Action in the Field of Human Rights, Report by the Division on Human Rights of the United Nations Secretariat, at 163, U.N. Doc. ST/HR/2 (1974). *See* Lauterpacht, *The Universal Declaration of Human Rights*, 25 Brit. Y.B. Int'l L. 354, 383 (1948).

52. The Economic and Social Council of the United Nations decided in Resolution 248B(IX) of August 8, 1949 to establish an *ad hoc* committee consisting of government representatives to prepare a convention relating to the international status of refugees. The *Ad Hoc* Committee had its first session from January 16 to February 16, 1950, which resulted in the Draft Declaration Relating to the Status of Refugees, Report of the *Ad Hoc* Committee on Statelessness and Related Problems, U.N. Doc. E/1618 (1950). The final act was adopted on July 28, 1951. U.N. Doc. A/CONF. 2/108 (1951).

A Protocol Relating to the Status of Refugees was signed on January 31, 1967. The purpose of the Protocol was to broaden the definition of "refugee" contained in Article 1 of the 1951 Refugee Convention to include persons who became refugees as a result of events occurring after January 1, 1951. The Protocol incorporates Articles 2 through 34 of the 1951 Refugee Convention. 1967 Protocol, *supra* note 24. As of January 1, 1978 sixty-four states were parties to the Convention: Algeria, Argentina, Australia, Austria, Belgium, Benin, Botswana, Brazil, Burundi, Cameroon, Canada, Central African Empire, Chile, Congo (Brazzaville), Cyprus, Denmark, Djibouti, Ecuador, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Federal Republic of Germany, Ghana , Greece, Guinea, Guinea-Bissau, Holy See, Iceland, Iran, Ireland, Israel, Italy, Ivory Coast, Liechtenstein, Luxembourg, Mali, Malta, Morocco, the Netherlands, New Zealand, Niger, Nigeria, Norway, Paraguay, Portugal, Senegal, Sudan, Swaziland, Sweden, Switzerland, Tanzania, Togo, Tunisia, Turkey, Uganda, United Kingdom, United States, Uruguay, Yugoslavia, Zaire, and Zambia.

53. Refugees and Stateless Persons and Problems of Assistance to Refugees, Report of the United Nations High Commissioner for Refugees, 6 U.N. GAOR, Supp. (No. 19) 5, U.N. Doc. A/2011 (1952).

definition of a political refugee.[54] A person who, owing to a well-founded fear of persecution because of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his origin, and who is unable to return because of this fear, is a "political refugee" within the meaning of the Convention.[55]

A state, in whose territory a refugee is found, is forbidden from forcibly returning the refugee to a country where he is likely to suffer political persecution.[56] This doctrine of *non-refoulement*[57] emphasizes the highly humanitarian characteristic of the grant of asylum to a political refugee.[58] The *travaux préparatoires* suggest a strict interpretation of the provision.[59] Measures of expulsion may be taken only if the continued presence of the refugee seriously threatens the country of refuge.[60]

To be protected by the 1951 Refugee Convention, an individual must be outside the country of his nationality.[61] Being outside the country means he "has to leave, shall leave or remains outside" the country.[62] Whether the individual has entered the country of refuge lawfully or unlawfully is irrelevant for this purpose.[63] It is also irrelevant whether or not the country of the individual's origin is a party to the Convention.[64]

The individual must be outside the country of his origin because of a well-founded fear of persecution.[65] A well-founded fear exists when "a person has actually been a victim of persecution, or can show good reasons why he fears persecution."[66] The fear may be

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54. 1951 Refugee Convention, *supra* note 21, art. 1(A)(2).

55. *Id.*

56. *Id.* art. 33(1).

Article 33(1) provides:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

57. The rule of *non-refoulement* was first established in the 1933 Refugee Convention, *supra* note 24. Article 3(20) obliged contracting states "in any case, not to refuse entry to refugees at the frontiers of their country of origin." *Id.*

58. C. DE VISSCHER, *supra* note 30, at 183.

59. S.P. SINHA, *supra* note 30, at 111.

60. 1951 Refugee Convention, *supra* note 21, art. 33(2).

61. *Id.* art. 1(A)(2).

62. S.P. SINHA, *supra* note 30, at 100.

63. *Id.*

64. *Id.*

65. 1951 Refugee Convention, *supra* note 21, art. 1(A)(2).

66. Report of the *Ad Hoc* Committee on Statelessness and Related Problems, U.N. Doc.

based on past persecution, or simply the circumstances and the background of the person concerned.[67] Persecution includes threats to life, limb or physical freedom,[68] economic measures seriously depriving a person of all means of livelihood,[69] or persistent refusal to permit re-entry to the home country.[70] The persecution must be for reasons of "race, religion, nationality, membership of a particular social group or political opinion."[71]

The protection granted under the 1951 Refugee Convention does not extend to certain common criminals or persons guilty of war crimes and other offenses against the international community.[72] Article 1(F)(b) states that the Convention shall not apply to anyone who has committed "a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."[73] This provision is based on Article 14 of the Universal Declaration of Human Rights[74] which limits the right of asylum in cases "of prosecutions genuinely arising from non-political crimes."[75] The drafters of the Convention wanted to ensure that the instrument they drew up was not abused by fugitives from justice seeking to avoid extradition.[76]

Article 1(F)(a) also excludes from the scope of the Convention anyone guilty of "a crime against peace, a war crime, or a crime against humanity."[77] This provision is based on Article 6 of the London Charter of the International Military Tribunal.[78] Crimes against peace are defined as acts involving the waging of war;[79] war crimes include murder, ill-treatment, or deportation to slave labor

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No. E/1618 (1950). *See* 1 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 176 (1972).

67. S.P. SINHA, *supra* note 30, at 102.

68. *See* 1 A. GRAHL-MADSEN, *supra* note 66, at 197-201.

69. *Id.* at 201-09.

70. S.P. SINHA, *supra* note 30, at 102.

71. 1951 Refugee Convention, *supra* note 21, arts. 1(A)(2), 33(1).

72. *Id.* art. 1(F).

73. *Id.* art. 1(F)(b).

74. 1 A. GRAHL-MADSEN, *supra* note 66, at 290.

75. G.A. Res. 217, U.N. Doc. A/810, at 71, art. 14, para. 2 (1948).

76. 1 A. GRAHL-MADSEN, *supra* note 66, at 290.

77. 1951 Refugee Convention, *supra* note 21, art. 1(F)(a).

78. The London Charter is annexed to the London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, *done* Aug. 8, 1945, 59 Stat. 1544, E.A.S. 472, 82 U.N.T.S. 279 (entered into force (U.S.) Aug. 8, 1945), *reprinted in* 39 AM. J. INT'L L. (Supp.) 257 (1945). *See* 1 A. GRAHL-MADSEN, *supra* note 66, at 272-74; Brooks, *supra* note 11, at 103.

79. The London Charter, *supra* note 78, art. 6(a).

of civilians or prisoners of war;[80] crimes against humanity are inhumane acts committed against any civilian population including extermination, enslavement, or persecution on political, racial, or religious grounds in connection with any other crime.[81]

Article 1(F)(c) of the 1951 Refugee Convention excludes from its protection any individual guilty of "acts contrary to the purposes and principles of the United Nations."[82] The provisions of the United Nations Charter are addressed only to governments.[83] The applicability of this Article seems limited, therefore, to persons occupying governmental posts.[84]

The purpose of the 1951 Refugee Convention is to protect individuals who, under the Universal Declaration of Human Rights,[85] have a right to seek and enjoy asylum,[86] while at the same time uphold general principles of international law that mandate extradition of one guilty of a serious crime.[87] While an individual has a right not to be returned to a country in which he fears persecution,[88] this right does not extend to a refugee who is a danger to either the security or the community of the country in which he is found.[89]

III. EXTRADITION AND THE AIRLINE HIJACKER

A. Extradition: General Principles[90]

A state's right to grant asylum to an individual seeking it[91] is also governed by the state's obligation under existing treaties[92] or

80. *Id.* art. 6(b).

81. *Id.* art. 6(c).

82. 1951 Refugee Convention, *supra* note 21, art. 1(F)(c).

83. U.N. CHARTER arts. 1, 2.

84. 11 U.N. ESCOR (166th mtg.) (Social Committee) 6, U.N. Doc. E/AC.7/SR.166 (1950). *See* 1 A. GRAHL-MADSEN, *supra* note 66, at 286; Brooks, *supra* note 11, at 103-04.

85. G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).

86. 1 A. GRAHL-MADSEN, *supra* note 66, at 290.

87. See notes 90-101 *infra* and accompanying text.

88. 1951 Refugee Convention, *supra* note 21, art. 33, para. 1.

89. *Id.* art. 33, para. 2.

90. *See generally* 4 G.H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 1-241 (1942); 4 J.B. MOORE, INTERNATIONAL LAW DIGEST 239-424 (1906); 6 M. WHITEMAN, *supra* note 30, at 727-1122.

91. See text accompanying notes 30-37 *supra*.

92. The practice of asylum preceeded in origin that of extradition. Extradition, therefore, became the exception to asylum and was rarely granted in the absence of a treaty. M.C. BASSIOUNI, *supra* note 34, at 86; J.C. STARKE, *supra* note 11, at 350.

There are two categories of extradition treaties: the traditional type which contains a specific list of offenses for the commission of which a fugitive will be surrendered; and the newer type, of twentieth century origin, which simply provides for extradition in all cases where the offense in question is punishable in both countries involved in the case. G. VON GLAHN, *supra* note 37, at 252; 2 O'CONNELL, INTERNATIONAL LAW 722 (2d ed. 1970).

conventions[93] to extradite one accused of committing an airline hijacking.[94] Extradition is the process by which an individual, charged with a crime against the law of a state and found within a foreign state, is surrendered to the former state for prosecution.[95] The purpose of extradition is twofold: first, to ensure that serious crimes do not go unpunished; and second, to permit the state in which the crime occurred to punish the offender.[96]

Extradition is a national act,[97] granted only when permitted under the domestic law of the state to which the request is made.[98] Most states prohibit extradition unless bound to do so by treaty or agreement with a foreign state.[99] In the absence of an agreement, no obligation to extradite exists.[100] Similarly, where there exists an ex-

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93. The Hague Convention specifically refers to hijacking as an extraditable offense. The Hague Convention, *supra* note 10, art. 8, para. 1.

For a discussion of regional conventions on extradition, see M.C. BASSIOUNI, *supra* note 34, at 19-24.

94. While many bilateral and multilateral conventions on extradition do not specifically refer to hijacking as an extraditable offense, under Article 8, Paragraph 1 of the Hague Convention, hijacking is deemed to be included as an extraditable offense in any extradition treaty existing between contracting states. See notes 124-27 *infra* and accompanying text.

95. M.C. BASSIOUNI, *supra* note 34, at 2; J.C. STARKE, *supra* note 11, at 348; 6 M. WHITEMAN, *supra* note 30, at 727.

96. J.C. STARKE, *supra* note 11, at 349.

97. 6 M. WHITEMAN, *supra* note 30, at 728.

98. *Id.; see* 4 HACKWORTH, *supra* note 90, at 11.

99. *Id.* The Supreme Court of the United States laid down the principle that no obligation to extradite exists apart from that imposed by treaty. Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840). This position has since been maintained. *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936); Factor v. Laubenheimer, 290 U.S. 276 (1933); Rauscher v. United States, 119 U.S. 407 (1886).

British law authorizes extradition only "where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals . . . ." Extradition Act of 1870, 33 & 34 Vict., c. 52, § 2 (*cited in* 6 M. WHITEMAN, *supra* note 30, at 731). The British courts have held this attitude since 1815. 2 MCNAIR, INTERNATIONAL LAW OPINIONS 41, 41-51 (1963); 6 BRITISH DIGEST OF INTERNATIONAL LAW 453-61 (1965).

In the Soviet Union, extradition "shall be granted only under the procedure and in the cases provided for by treaties . . . ." 6 M. WHITEMAN, *supra* note 30, at 735.

In some states, the authority to grant extradition is conditioned on a guarantee of reciprocity from the requesting government. For example, in 1953 the Supreme Court of Venezuela surrendered an American national to Panama in the absence of a treaty with that country. In granting the request, the Court stated that the request was "in conformity with the public law of nations [whereby] friendly states recognize a reciprocal obligation to surrender offenders who have taken refuge in their respective countries." In re Tribble, 20 I.L.R. 366 (Ven. Fed. Ct. 1953).

Similar provisions requiring a guarantee of reciprocity as a condition precedent may be found in the laws of Argentina, Austria, Belgium, Iraq, Japan, Luxembourg, Mexico, Peru, Spain, Switzerland, and Thailand. M.C. BASSSIOUNI, *supra* note 34, at 11.

100. G. VON GLAHN, *supra* note 37, at 252.

tradition treaty but the particular case falls outside the treaty, the same principle applies.[101]

B. Multilateral Conventions Governing Extradition of an Airline Hijacker

1. Convention on Offenses and Certain Other Acts Committed on Board Aircraft (The Tokyo Convention)

The Tokyo Convention[102] was the initial undertaking by the world community to establish a uniform system dealing with offenses committed in the air.[103] The purpose of the Convention is first, to ensure that persons committing crimes on board aircraft in flight do not escape punishment simply because no country has jurisdiction to prosecute the offender;[104] and second, to give the aircraft commander, members of the crew or passengers special authority to restrain any individual from committing a criminal offense on board the aircraft.[105]

There are two problems with the Tokyo Convention regarding the treatment of airline hijackers. First, the Convention is not limited in its application to the offense of hijacking.[106] In fact, it was not until 1963, when the Convention was in the last stage of draft-

101. 6 M. Whiteman, *supra* note 30, at 733.

102. The International Civil Aviation Organization (ICAO) began studying and preparing a draft Convention on jurisdiction over crimes on board aircraft in 1950. The final draft of the Convention emerged on September 14, 1963 at Tokyo. Sixty-one states and five international organizations were present at the conference. S. Shubber, *supra* note 9, at 12.

As of January 1, 1978, eighty-nine states were parties to the Convention: Afghanistan, Argentina, Australia, Austria, the Bahamas, Barbados, Belgium, Brazil, Burundi, Canada, Chad, Chile, China, Colombia, Costa Rica, Cyprus, Denmark, Dominican Republic, Ecuador, Egypt, Fiji, Finland, France, Gabon, Federal Republic of Germany, Ghana, Greece, Guatemala, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Japan, Jordan, Kenya, Korea, Laos, Lebanon, Lesotho, Libya, Luxembourg, Madagascar, Malawi, Mali, Mauritania, Mexico, Morocco, the Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraquay, Phillipines, Poland, Portugal, Romania, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Singapore, South Africa, Spain, Sweden, Switzerland, Thailand, Togo, Trinidad & Tobago, Tunisia, Turkey, United Kingdom, United States, Upper Volta, Uruguay, Yugosalvia, Zaire, and Zambia.

103. *See* Aircraft Hijacking Hearings, *supra* note 9, at 6; S. Shubber, *supra* note 9, at 177; Brooks, *supra* note 11, at 91; Horlick, *supra* note 11, at 34; Mendelsohn, *In-Flight Crime: The International and Domestic Picture Under the Tokyo Convention*, 53 Va. L. Rev. 509, 513 (1967).

104. The Tokyo Convention, *supra* note 10, art. 3; J.C. Starke, *supra* note 11, at 289; Abramovsky, *The Montreal Convention*, *supra* note 11, at 276; Fitzgerald, *supra* note 11, at 192.

105. The Tokyo Convention, *supra* note 10, art. 6.

106. The Tokyo Convention, *supra* note 10, art. 1; J.C. Starke, *supra* note 11, at 290.

ing, that a provision dealing specifically with hijacking was included.[107] All "offenses against penal law"[108] and acts which "jeopardize the safety of the aircraft"[109] are within the purview of the Convention. Secondly, while the Convention does refer to the offense of hijacking, there is no requirement that the state in which the hijacker is found extradite or prosecute the offender.[110] The Convention merely provides that offenses committed on board aircraft registered in a contracting state are to be treated, for the purposes of extradition, as if they had been committed not only in the state in which they occurred, but also in the state of registration of the aircraft.[111] Consequently, the Tokyo Convention merely restates customary international law regarding jurisdiction over an airline hijacker without providing steps for enforcement.[112]

2. Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague Convention)

The Hague Convention[113] was drafted with the inadequacies of the Tokyo Convention in mind.[114] Not only did the number of airline hijackings increase in the 1960's,[115] but the motive for the offense

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107. The Tokyo Convention, *supra* note 10, art. 11. *See* S. Shubber, *supra* note 9, at 170.

108. The Tokyo Convention, *supra* note 10, art. 1, para. 1(a).

109. *Id.* art. 1, para. 1(b).

110. The United States and the Venezuelan delegation originally proposed that the state in which the aircraft lands apprehend and prosecute the hijacker. ICAO Doc. 8302-LC/150-2, at 102 (1962). This provision was omitted in the final draft. ICAO Doc. 8838-LC/157, at 35 (1969). *See* Abramovsky, *The Hague Convention*, *supra* note 11, at 389.

111. The Tokyo Convention, *supra* note 10, art. 16.

112. E. McWhinney, The Illegal Diversion of Aircraft and International Law 41 (1974).

113. A conference was convened at the Hague on December 1, 1970, under the auspices of the ICAO, to formulate a final draft on the question of the suppression of airline hijacking. On December 16, 1970 the Conference adopted the final draft of the Convention by a vote of 74 to zero with two abstentions. S. Shubber, *supra* note 9, at 176. As of January 1, 1978, 83 states were parties to the Convention: Argentina, Australia, Austria, the Bahamas, Barbados, Belgium, Benin, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Cape Verde, Chad, Chile, China, Colombia, Costa Rica, Cyprus, Czechoslovakia, Denmark, Equador, Egypt, El Salvador, Fiji, Finland, France, Gabon, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Guinea-Bissau, Guyana, Hungary, Iceland, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Japan, Jordan, Kenya, Korea, Lebanon, Malawi, Mali, Mexico, Mongolia, Morocco, the Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Papua New Guinea, Paraguay, Phillipines, Poland, Portugal, Romania, Saudi Arabia, Sierra Leone, South Africa, Spain, Sweden, Switzerland, Trinidad & Tobago, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republic, United Kingdom, United States, Uruguay, Viet Nam, Yugoslavia, and Zaire.

114. E. McWhinney, *supra* note 112, at 41.

115. *See Aircraft Hijacking Hearings*, *supra* note 9, at 6; Abramovsky, *The Hague Con-*

also changed.[116] Hijacking was no longer simply a means of escape for the oppressed from a totalitarian regime.[117] Hijacking had become an epidemic spread by the terrorist, extortionist, and the fugitive from justice.[118] Stronger measures were necessary to suppress development of the crime.[119]

Accordingly, the purpose of the Hague Convention is to ensure that anyone guilty of an airline hijacking will be punished for the offense.[120] Article 4 requires a contracting state to take whatever steps are necessary to establish jurisdiction over the offense.[121] This provision applies to any state in which the aircraft is either registered, lands, has its principle place of business, or where the offender is found.[122]

The state in which the hijacker is found has an obligation to extradite the offender to any state requesting extradition that has jurisdiction to prosecute.[123] Under Article 8, hijacking "shall be deemed to be included as an extraditable offense in any extradition treaty existing between Contracting States."[124] If a contracting state receives a request for extradition from a state with which it has no extradition treaty, the Convention may be considered as the legal basis for extradition.[125] The effect of this provision is to enlarge the scope of existing international treaties on extradition to include hijacking. Where a state was prohibited by domestic law from extraditing a hijacker in the absence of a treaty,[126] the state must now extradite the offender.[127]

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vention, supra note 11, at 392; Horlick, *supra* note 11, at 68, 69; N.Y. Times, Jan. 15, 1978, § X, at 20, col. 1.

116. N.Y. Times, Jan. 15, 1978, § X, at 20, col. 5.

117. See note 4 *supra* and accompanying text.

118. See notes 5-8 *supra* and accompanying text.

119. See *Aircraft Hijacking Hearings, supra* note 9, at 6.

120. The Hague Convention, *supra* note 10, preamble.

121. *Id.* art. 4.

122. *Id.*

123. *Id.* art. 7.

Article 7 provides:

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Id.

124. *Id.* art. 8, para. 1.

125. *Id.* art. 8, para. 2.

126. See note 99 *supra* and accompanying text.

127. The Hague Convention, *supra* note 10, art. 8, para. 2.

The obligation to extradite an airline hijacker is subject to all other customary and conventional rules of law governing extraditable offenses.[128] As a general rule, extradition is denied where an individual is accused of committing a political offense.[129] All states recognize the granting of political asylum as a right to be determined by the state from which it is requested.[130] As the laws of a state may preclude extradition of an airline hijacker if the offense is regarded as political,[131] the existence of hijacking in an extradition treaty does not result in mandatory extradition.[132]

If a state does not extradite the offender, the case must be submitted to the proper authorities for prosecution.[133] While such terms as "without exception whatsoever"[134] are used, Article 7 does not mandate prosecution.[135] A state in which an airline hijacker is found must, if it does not extradite the offender, "submit the case to its competent authorities for the purpose of prosecution."[136] This may or may not result in prosecution depending upon the law of the state[137] and the nature of the individual's offense.[138]

A state does not act in any way contrary to the 1951 Refugee

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128. *Id.*

129. See notes 162-83 *infra* and accompanying text.

130. See notes 30-35 *supra* and accompanying text.

131. *See* Costello, *International Terrorism and the Development of the Principle Aut Dedere Aut Judicare*, 10 J. INT'L L. & ECON. 483, 487 (1975).

132. See notes 162-83 *infra* and accompanying text on the political offense exception to extradition.

133. The Hague Convention, *supra* note 10, art. 7.

134. *Id.*

135. *Id. See* J.C. STARKE, *supra* note 11, at 290; Emmanuelli, *Legal Aspects of Aerial Terorism: The Piecemeal vs. the Comprehensive Approach*, 10 J. INT'L L. & ECON. 503, 510-11 (1975).

136. The Hague Convention, *supra* note 10, art. 7.

137. According to a State Department report, of eighty Americans who have hijacked planes, about one-half are abroad as fugitives from the United States. N.Y. Times, May 1, 1977, at 15, col. 1. *See* Lillich & Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U.L. REV. 217, 276-80 (1977); Pierre, *The Politics of International Terrorism*, 19 ORBIS 1251, 1264 (1976).

138. *See, e.g.*, the case of Raphael Minichiello, who on October 31, 1969 hijacked a TWA airliner en route to Los Angeles from San Francisco and forced it to fly to Rome, Italy. N.Y. Times, Nov. 1, 1969, at 1, col.1. The United States requested extradition of Minichiello. *Id.*, Nov. 2, 1969, at 1, col. 4. The request for extradition was denied on the ground that extradition need not be granted if penalties for the crime in the country requesting extradition are not permitted in the country that could grant it. Italy, unlike the United States, had no capital punishment for the offense. *Id.*, Nov. 27, 1969, at 11, col. 5. Minichiello was sentenced to seven and one-half years imprisonment on November 11, 1970. *Id.*, Nov. 12, 1970, at 1, col. 7. However, on May 1, 1971, six months after sentencing, Minichiello was released from the Rome prison. *Id.*, May 2, 1971, at 1, col. 1.

Convention,[139] if after granting asylum, it institutes proceedings against the individual for the hijacking.[140] A state may not, however, grant asylum to any offender, irrespective of his crime. Under the Universal Declaration of Human Rights[141] and the 1951 Refugee Convention,[142] one is only entitled to asylum from persecution based on "race, religion, nationality, membership of a particular social group or political opinion."[143] While the political offense criteria are the bases upon which extradition is denied or granted,[144] the basis upon which asylum is granted is limited to escape from persecution.[145] Thus, the nature of the hijacking must be determined—whether it was done as a means of escape from persecution, or whether the hijacking was part of a terrorist plot to gain recognition in the international community for what is claimed to be a political cause.

3. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (The Montreal Convention)

The Hague Convention is limited to airline hijacking committed on board the aircraft.[146] The Montreal Convention applies to all acts of sabotage or violence that interfere with international civil aviation.[147] The Convention declares that no one who sabotages a civil aircraft, whether on board the aircraft or not, shall find sanctuary anywhere in the world.[148]

The provisions of the Montreal Convention on jurisdiction to apprehend,[149] prosecute,[150] and extradite[151] an offender are exactly like those of the Hague Convention.[152] In all cases in which an individual must be extradited under the Hague Convention,[153] an offender under the Montreal Convention must also be extradited.[154]

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139. *See* Costello, *supra* note 131, at 496.
140. The Hague Convention, *supra* note 10, art. 7.
141. G.A. Res. 217, U.N. Doc. A/810, at 71, art. 14, para. 2 (1948).
142. 1951 Refugee Convention, *supra* note 21, art. 33, para. 2.
143. *Id.*
144. *See* note 162 *infra* and accompanying text.
145. *See* M.C. Bassiouni, *supra* note 34, at 107.
146. The Hague Convention, *supra* note 10, art. 1.
147. The Montreal Convention, *supra* note 10, art. 1.
148. N. Leech, C. Oliver, & J. Sweeney, Cases and Materials on the Internatinal Legal System 279 (1973).
149. The Montreal Convention, *supra* note 10, art. 5.
150. *Id.* art. 7.
151. *Id.* art. 8.
152. The Hague Convention, *supra* note 10, arts. 4, 7, and 8 respectively.
153. See notes 94-96 *supra* and accompanying text.
154. The Montreal Convention, *supra* note 10, art. 8.

While the Montreal Convention was signed to deter abuses of international airline transportation,[155] the Convention does not specifically apply to hijacking.[156] Nevertheless, it can be applied to an airline hijacker where a violent crime, for example, terrorism, is committed in conjunction with the hijacking. For this reason, the Montreal Convention is useful in drawing a distinction between the terrorist hijacker whose activities fall within the purview of both the Hague[157] and the Montreal[158] Conventions, and the refugee hijacker whose act is only in violation of the Hague Convention.[159]

IV. THE POLITICAL OFFENSE

Extradition is granted only when an individual is accused of committing a very serious offense.[160] Most extradition laws and treaties exempt certain offenses from extradition even when the crime of which the fugitive is accused otherwise constitutes an extraditable offense.[161] The most commonly excepted offense is the political offense.[162] The *raison d'être* of the exemption is based primarily on humanitarian grounds—to surrender an unsuccessful rebel to the demanding state would amount to delivering him to execution, or at least, the risk of being unfairly tried by other than an impartial judge.[163]

As a general rule, extradition treaties do not define the term political offense.[164] The term has been applied to both purely political offenses and relative political offenses. A purely political offense is one directed against the security of a state.[165] A relative political

155. *Id.* preamble.

156. *Id.* art. 1.

157. The Hague Convention, *supra* note 10, art. 1.

158. The Montreal Convention, *supra* note 10, art. 1.

159. The Hague Convention, *supra* note 10, art. 1.

160. J.C. STARKE, *supra* note 11, at 351.

161. 6 M. WHITEMAN, *supra* note 30, at 799. *See, e.g.*, Treaty on Extradition of January 21, 1972, United States-Argentina, 23 U.S.T. 3501, T.I.A.S. No. 7510, art. 7 (entered into force (U.S.) Sept. 15, 1972).

162. 6 M. WHITEMAN, *supra* note 30, at 800. The principle of non-extradition for political offenses was first laid down in 1833 in the Belgian Extradition Law. Extradition Law of 1833, art. IV, LES CODES 693 (31st ed. 1965).

163. M. GARCÍA-MORA, *supra* note 24, at 75. *See* M.C. BASSIOUNI, *Two Models of Extradition in Law and Practice*, in 2 TREATISE ON INTERNATIONAL CRIMINAL LAW 347, 362 (V. Nanda & M.C. Bassiouni ed. 1973). *See also* Evans, *Reflections Upon the Political Offenses in International Practice*, 57 AM. J. INT'L L. 1 (1963); García-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962).

164. 6 M. WHITEMAN, *supra* note 30, at 804. *See* Evans, *supra* note 163, at 15; García-Mora, *The Nature of Political Offenses*, *supra* note 163, at 1230.

165. Purely political offenses are limited to treason, espionage, and sedition. *See, e.g.*,

offense is a common crime so connected with a political act or motive that it is considered a political offense.[166] The determination of whether or not an individual is guilty of a common crime or a relative political offense is made solely on the facts of the specific case by the state in which the fugitive is located.[167]

It has been argued that hijacking can not be regarded, under any circumstances, as a political offense.[168] In reality, however, many states have exempted airline hijackers from extradition on the grounds of the political offense exception. The classic case in which a state refused to extradite a hijacker is *In re Kavic, Bjelanovic and Arsenjevic.*[169] In that case, three crew members of a Yugoslav airliner diverted the plane to Switzerland where they sought political asylum. Yugoslavia demanded the extradition of the offenders for endangering the safety of public transport, wrongful appropriation of property, and for restraining other members of the crew. The Swiss Federal Tribunal denied the request for extradition on the grounds of the political offense exception. The Court recognized three factors to consider in determining whether or not to refuse extradition. First, the crime with which the accused was charged must have been done in furtherance of a political purpose;[170] secondly, there must be a link between the crime committed and the

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In re de Serclaes, 19 I.L.R. 366 (Corte Cass. Italy 1952) (Belgium sought extradition of de Serclaes from Italy for having been convicted of treason); Denmark (Collaboration with the Enemy) Case, 16 Ann. Dig. 146 (Sup. Ct. Brazil 1947) (United States refused to extradite Horacio Julio Ornes, convicted of having committed crimes against the security of the Dominican Republic). *See also* Matter of the Extradition of Hector José Campora and Others, in 53 AM. J. INT'L L. 693 (1957); German Extradition Law of December 23, 1929, art. 3(2) which provides:

> Political acts are those punishable offenses which are directed immediately against the existence of the security of the State, against the head or a member of the government of the State, as such, against a body provided for by the constitution, against the rights of citizens in electing or voting, or against good relations with foreign states.

Reichsgesetzblatt 1, Teil I, § 239 (1929); M.C. BASSIOUNI, *supra* note 34, at 379-83; 6 M. WHITEMAN, *supra* note 30, at 804-07.

166. A relative political offense must be predominatly political in its motive, objectives, and the circumstances of its commission. *See, e.g.*, In re Kavic, Bjelanovic and Arsenjevic, 19 I.L.R. 371 (Fed. Trib. Switz. 1952); In re Ficorilli, 18 I.L.R. 345 (Fed. Trib. Switz. 1951); In re Camporini, 2 Ann. Dig. 283 (Feb. Trib. Switz. 1924).

Other courts find it sufficient that the motive is such as to make the intent for the act political. *See, e.g.*, In re Campora, in 53 AM. J. INT'L L. 693 (1957) (Sup. Ct. Chile); In re Fabijan, 7 Ann. Dig. 360 (Sup. Ct. Ger.). *See also*, M.C. BASSIOUNI, *supra* note 34, at 383-88.

167. *See* M.C. BASSIOUNI, *supra* note 34, at 371.

168. Green, *supra* note 22, at 217.

169. 19 I.L.R. 371 (Fed. Trib. Switz. 1952).

170. *Id.* at 372-73.

political purpose;[171] and thirdly, the political objective must predominate the common crime.[172] In the instant case, the purpose of the act was to enable the hijackers to escape a regime with which they were in disagreement. The hijacking was the only means to effectuate their escape. The offenses against the other members of the crew were not very serious when balanced against the political freedom and even the existence of the hijackers.[173] The Court, therefore, had no problem denying the request for extradition.

Other courts have been less noble and explicit in their determination to deny extradition of an airline hijacker. On April 14, 1975, the Chambre d'accusation of the Cour d'appel of Paris refused to extradite Willie Roger Holder and Mary Katherine Kerkow to the United States for prosecution of a 1972 aircraft hijacking.[174] The United States argued that the political offense exception did not apply to this case. The fugitives did not attempt to overthrow the Government of the United States; they did not belong to any political group or engage in any political activities; there was no allegation that the fugitives were subject to political persecution.[175] The airline hijackers made a half-hearted attempt to divert the plant to Hanoi while demanding a $500,000 ransom. This motive does not make the crime political. In fact, "the extortion contradicts any notion of idealism or of 'political character' in this case."[176] The Cour d'appel did not consider any of the arguments made by the United States. The court denied the request for extradition based on the political motive of the hijacker.[177]

The Cour d'appel of Paris has consistently denied extradition of airline hijackers on the political offense exception. On July 2, 1976, the United States formally requested extradition of five Americans who diverted a plane to Algeria in 1972.[178] The hijackers had demanded a $1,000,000 ransom in return for the lives of the passengers and crew. Three of the hijackers were also fugitives from justice who had escaped from prison. Nevertheless, the Cour d'appel accepted the hijackers' contention that the hijacking was done to escape the segregation to which they had been allegedly subjected in

171. *Id.* at 373.
172. *Id.*
173. *Id.* at 374.
174. E. McDowell, *supra* note 34, at 169.
175. *Id.* at 171.
176. *Id.* at 172.
177. *Id.* at 174.
178. E. McDowell, Digest of United States Practice in International Law 124 (1976).

the United States as members of the Black Panther Party.[179]

The effect of these decisions is to "construe hijacking as a 'political offense' in any case in which a political motive is alleged, even where large sums of money are extorted under the threat of murder of the passengers and crew."[180] Since the term "political offense" is never defined in a treaty on extradition, a state to which a request is made is always free to deny extradition on the justification that the particular case falls within its definition of a political offense. In reality, no distinction is made between the true refugee hijacker whose only crime is the hijacking to escape persecution, and the fugitive from justice, extortionist, or terrorist who hijacks a plane claiming an obscure political motive.

V. CONCLUSION: A SUGGESTED SOLUTION

The most significant problem with the treatment of airline hijackers is a uniform application of the political offense exception in all types of cases to prevent extradition of the offender. The difficulty with this approach is that there are, in reality, two distinct types of hijackers. Different rules of law should apply to each type.

The first type represents the true "refugee hijacker." This individual hijacks a plane to escape persecution. He has committed no crime save the illegal use of transportation to protect his life or physical freedom. The second type of airline hijackers includes the "criminal hijacker"—the fugitive from justice, the extortionist, and the terrorist. This type of hijacker has committed a crime in addition to the hijacking. He claims the hijacking was necessary to effectuate the political objective of his first crime.

In all cases, a hijacker can lawfully escape extradition on the basis of the political offense exception. The legal basis on which asylum is granted, however, is not the same as that of extradition. One is only entitled to asylum for crimes predicated on race, religion, national origin or persecution on account thereof.[181] While a crime committed to avoid persecution may be deemed a political offense,[182] not all political offenses are committed on account of persecution.[183] Thus, politically motivated crimes do not fall within the purview of either the Universal Declaration of Human Rights or

179. *Id.* at 125.

180. E. McDowell, *supra* note 34, at 174.

181. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71, art. 14 (1948); 1951 Refugee Convention, *supra* note 21, art. 33.

182. In re Kavic, 19 I.L.R. 371 (Fed. Trib. Switz. 1952).

183. See note 165 *supra* with respect to treason, sedition, and espionage.

the 1951 Refugee Convention.[184]

To distinguish between the rights of the two types of airline hijackers, a protocol to the Hague and the Montreal Conventions should be signed. The Conventions should mandate extradition of all airline hijackers except the true "refugee hijacker". The provision should state:

> Extradition of the offender is required in all circumstances, without exception whatsoever, unless the offender is one who, under Article 14 of the Universal Declaration of Human Rights, has a right to enjoy asylum from persecution.

This suggestion is not intended to eliminate the political offense exception nor undermine a state's right to determine its definition. The application of the political offense exception should be eliminated only with respect to hijacking. The basis upon which extradition would be denied and asylum granted would be the criteria established by the United Nations in the Universal Declaration of Human Rights.

The purpose of the Hague and the Montreal Conventions is to prevent the abuse to which airline pilots and passengers have been subjected for the benefit of the "criminal hijacker." While hijacking had been used as a means of escape as early as 1948,[185] it was not until hijacking became the instrument of the terrorist and the extortionist that measures were taken to combat the crime. A protocol distinguishing between the true "refugee hijacker" and the "criminal hijacker" would further the purpose of the Conventions.

In conclusion, the Hague and the Montreal Conventions do not adequately distinguish between the true "refugee hijacker" and the "criminal hijacker." A protocol would satisfy the distinction by protecting one who hijacks a plane to escape persecution without encouraging those with less noble motives to use hijacking to effectuate criminal objectives.

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184. M.C. Bassiouni, *supra* note 34, at 107.
185. See note 4 *supra*.