Aerial Hijacking as an International Crime

by Nancy Douglas Joyner

Aerial Hijacking as an International Crime

by Nancy Douglas Joyner

1974
OCEANA PUBLICATIONS,INC. – DOBBS FERRY, N.Y.
A.W. SIJTHOFF – LEIDEN

To C.C.J.

Maintenant, à jamais pour toujours

Library of Congress Cataloging in Publication Data

Joyner, Nancy Douglas, 1945-
A Contemporary concept of piracy in international law.

Bibliography: p.
1. Hijacking of aircraft. 2. Pirates. I. Title.
JX5775.C7J68 341.77 74-8380
ISBN 0-379-00004-0 (Oceana)
90-286-0374-3 (Sijthoff)

Manufactured in the United States of America.

PREFACE

The subject of this study is the historical evolution of the concept of piracy in international law, its relevance to modern-day aircraft seizures, and the degree of compliance exhibited by states which have agreed to international conventions to prevent the unlawful seizure of aircraft.

Moreover, this study is intended to ascertain if piracy on the high seas can be considered analogous to "piracy in the high skies." Evidence of underlying legal and political distinctions is presented to support the conclusions that (1) piracy on the high seas is a crime in the municipal laws of many states, but not in international law; and (2) that aircraft hijacking has been elevated to the status of an international crime through recent international conventions.

Statistical data on all known aircraft hijacking incidents was analyzed to determine whether signatories and/or parties to the "Convention for the Suppression of Unlawful Seizure of Aircraft" signed at the Hague on December 16, 1970, have adhered to the enforcement of this international agreement.

The author wishes to express her deepest appreciation to Dr. Richard B. Gray, Major Professor *par excellence*; to Dr. William Zavoina, for his sincere concern and development of the "Probit" Program at the Florida State University; to Eugene "Andy" Witzleben, for his patience and alacrity in helping whenever needed; to Pam Harrison, a superb typist; to the memory of my dear friend and mentor, Dr. Ross Oglesby; to my family and friends for their loyal encouragement; and, above all, to my loving husband, Chris, a scholar of the highest caliber.

TABLE OF CONTENTS

Page

PREFACE iii

LIST OF TABLES vii

LIST OF ILLUSTRATIONS viii

INTRODUCTION 1

Chapter

I. TRADITIONAL PIRACY ON THE HIGH SEAS: A PRE-TWENTIETH CENTURY VIEW 13

Early Attempts to Define Sea Piracy
Piracy Jure Gentium
Piracy in Municipal Law and International Law
Universal Jurisdiction on the High Seas
A Counter-View of Universal Jurisdiction
Jurisdiction over Public and Private Vessels
Piracy: Loss of National and Territorial Jurisdiction?
Right of Approach for Suspected Piracy: Times of Peace
Flags of a Pirate Ship
Rebels on the High Seas: "Political Acts" of Piracy
A Review of Pre-Twentieth Century Piracy

II. A TWENTIETH-CENTURY CONCEPT OF PIRACY 58

The Washington Naval Treaty of 1922
The League of Nations: Attempts to Codify International Law
Harvard Draft Research on Piracy
The Harvard Research Definition of Piracy in the Sense of the Law of Nations
The Demise of Piracy Jure Gentium
A Re-Birth of Common Jurisdiction
The Harvard Draft in Retrospect

Chapter Page

The International Law Commission
The Geneva Convention on the High Seas (1958)

III. TOWARDS A NEW INTERNATIONAL LAW OF AIRCRAFT SEIZURE: THE TOKYO CONVENTION 116

Purposes of the Tokyo Convention
Scope of the Tokyo Convention
Provision on "Hijacking"
Jurisdiction Over the Offender
Assertion of State Jurisdiction
Extradition
Limitations of the Tokyo Convention

IV. THE HAGUE AND MONTREAL CONVENTIONS: CONCERTED INTERNATIONAL ACTION TO SUPPRESS AIRCRAFT SEIZURES 165

Designating the Offense
Towards Mandatory Universal Jurisdiction over Hijacking
Asylum, Safe Haven, and the Political Crime
The Montreal Convention

V. THE EVOLUTION OF PIRACY IN INTERNATIONAL LAW 230

Traditional Piracy
Contemporary Piracy
Conventional Law of "Air Piracy"
A Concluding Assessment

APPENDICES 267

A. OFFENSES AT SEA ACT, 1536 268
B. HARVARD DRAFT, 1932 271
C. GENEVA CONVENTION, 1958 278
D. TOKYO CONVENTION, 1963 282
E. INTERNATIONAL CIVIL AVIATION ORGANIZATION RESOLUTION A16-37 (SEPTEMBER, 1968) . . . 294
F. UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 2551 (DECEMBER 12, 1969) 296
G. HAGUE CONVENTION, 1970 298
H. MONTREAL CONVENTION, 1971 306

Chapter Page

I. UNITED STATES-CUBAN MEMORANDUM OF UNDERSTANDING ON HIJACKING OF AIRCRAFT AND VESSELS AND OTHER OFFENSES (FEBRUARY 15, 1973) 316

BIBLIOGRAPHY 320

INDEX 339

LIST OF TABLES

Table Page

1. Exposure to Hijacking Attempts and Individual State Support of the Tokyo Convention (as of June 11, 1973): Early Parties 147

2. Exposure to Hijacking Attempts and Individual State Support of the Tokyo Convention (1968-1970): Middle-Range 149

3. Exposure to Hijacking Attempts and Individual State Support of the Tokyo Convention (1971 to June 11, 1973): Late Parties 157

4. Enforcement Response by State of Hijacking 186

5. Enforcement Response by Hijacking Initiation in Registration State 188

6. Enforcement Response by Participation of Terminating State in the Tokyo Convention 192

7. Enforcement Response by Participation of Terminating State in the Hague Convention 195

8. Aggregate State Enforcement Response By Alleged Motivation of Hijacker 209

9. Impact of Variables Upon Predicting State Enforcement Response to Hijackers 213

Table Page

10. Index of International Cooperation to Suppress "Skyjacking:" Degree of State Participation in Three Conventions (September 14, 1963-June 11, 1973) 254

11. Index of International Cooperation to Suppress "Skyjacking:" Degree of State Participation in Two Conventions (September 14, 1963-June 11, 1973) 257

12. Index of International Cooperation to Suppress "Skyjacking:" Degree of State Participation in One Convention (September 14, 1963-June 11, 1973) 259

LIST OF ILLUSTRATIONS

Figure Page

1. The Influence of Worldwide Hijacking Attempts on Cumulative State Support of the Tokyo Convention (January, 1960-June 11, 1973) 161

2. The Evolution of the Crime of Piracy in International Law (1536-1973) 234

INTRODUCTION

For centuries piracy on the high seas has been recognized as a heinous crime detrimental to the interests of all nations. Perpetrators of the crime found themselves unquestionably subjected to the jurisdiction of any state which seized them. Any state making the capture was authorized to take immediate and effective action to prosecute the pirates under the customary international law principle of universal jurisdiction.

In the 1940's, however, a different type of seizure occurred over a new means of transportation, i.e., the hijacking of aircraft. Since early reports of such incidents were referred to as air piracy, it was assumed--though not substantiated through written international agreements--that the "pirates" involved could be seized and prosecuted by the state on whose territory the aircraft landed under the recognized principle of universal jurisdiction over pirates as though applied to incidents on the high seas.

As the number of attempts to illegally divert aircraft increased, the use of the term "air piracy" declined and was replaced with a variety of descriptive terms, such as "aerial hijacking," "unlawful seizure of aircraft," or "skyjacking." Moreover, concomitant with the decline of the

concept of air piracy was the recognition of universal jurisdiction over the persons who had seized the aircraft. Thus, the failure to prosecute alleged "pirates of the sky" on the part of many nations in whose territory the illegally seized aircraft landed lends credibility to the notion that an analogy of the term piracy as applied to the high seas and piracy as applied to the "high skies" may not be feasible.

It appeared that the customary international law concept of piracy jure gentium[1] had certain limitations when applied to the hijacking of aircraft.[2]

Only when the act of piracy had been ". . . committed in a place not within the territorial jurisdiction of any state"[3] did it violate customary international law, which considers the high seas to be the common heritage of all mankind. Consequently, piracy, per se, can not be considered a crime against the law of nations. Rather, the crime must be

---

[1]Jure gentium is the Latin term referring to a law which is common to all nations. Piracy jure gentium violates principles of law and justice as interpreted by all nations. See Charles G. Fenwick, International Law (3rd ed.; New York: Appleton-Century-Crofts, Inc., 1948), pp. 47-48, for an interesting analysis of the term jus gentium as applied to that portion of Roman law applicable to citizens and non-citizens alike.

[2]Traditional piracy referred to plunder of ships on the high seas for private gain by pirates who claimed no allegiance to any nation. See Marjorie M. Whiteman, Digest of International Law, Vol. 4 (Washington, D.C.: Department of State, 1965), pp. 648-666.

[3]"Draft Convention on Piracy, with Comments," The American Journal of International Law, Supplement, 26 (1932), 760.

defined according to the municipal law of the prosecuting state. Customary international law only confers upon the state the extraordinary jurisdiction to prosecute and punish sea pirates. It does not obligate the states to exercise that jurisdiction, nor does it interfere with piratical acts which may take place within the asserted and recognized territorial waters of the state as exemplified by municipal law.

In the case of an unauthorized seizure of aircraft, nations in whose sovereign territory the aircraft landed did not always feel an obligation to prosecute the captured hijackers. Several reasons can be postulated for their reluctance to prosecute aircraft hijackers as pirates. First, the traditional concept of piracy appears to be an inadequate description of the series of events which tend to shroud an incident of aircraft seizure. Second, there are no recorded instances of plunder for private gains of one airborne aircraft claiming no national registry against another which flies a flag of state registry. Third, if such an action were to take place, it must necessarily occur outside the airspace of any sovereign territory, i.e., in the "high skies."[4]

---

[4]As in the case of the high seas, airspace not above a sovereign territory is considered communes omnium, for the common use of all nations. Nicholas M. Matte, Aerospace Law (London: Sweet and Maxwell Limited, 1969), p. 15.

In the 1950's, the majority of hijackings occurred for the purpose of securing political asylum, e.g., American aircraft to Cuba, or what Oliver Lissitzyn calls "hijacking for travel purposes."[5] Since the alleged purpose of the hijacking was attainment of political asylum and was not animo furandi (robbery for private gains), the receiving state asserted its sovereign right to grant asylum to political refugees,[6] regardless of the manner in which they entered that state's territorial boundaries. In such cases, many states displayed unwillingness to prosecute the hijackers and refused to surrender fugitives to other states, despite treaty provisions which required surrender.

---

[5]Oliver J. Lissitzyn, "International Control of Aerial Hijacking: The Role of Values and Interests," American Journal of International Law, 61 (September, 1971), 83.

[6]Article 14 of the "Universal Declaration of Human Rights," adopted by the U.N. General Assembly on December 10, 1948, states that everyone has"the right to seek and enjoy in other countries asylum from persecution." However, "this right is qualified in that it may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." G.A. Res 217 (III) A.

Later, on December 14, 1967, the General Assembly unanimously proclaimed in its "Declaration on Asylum" that "it shall rest with the state granting asylum to evaluate the grounds for the grant of asylum." U.N. Doc. A/6912.

It should also be noted that a U.N. Declaration, unsupported by a treaty, lacks binding force in international law. See L. C. Green, "Hijacking and the Right of Asylum," in Edward McWhinney, ed., Aerial Piracy and International Law (Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1971) for pertinent comments on the General Assembly Resolutions on asylum.

A second type of hijacking involving kidnapping, injury of some kind, the detaining of passengers and crew, or the destruction of property, appeared in the late 1960's and early 1970's. The purpose of such an act often entailed international blackmail, usually to foster a political movement, as evidenced by recent hijackings of aircraft to the Middle East.[7]

The difficulty in analogizing between air piracy and piracy on the high seas as crimes against the law of nations arises from the relationship between the act of seizing an aircraft (usually regarded as theft if not designated a more serious crime in municipal law) and the act of political flight in search of asylum (an act to which nations often appear sympathetic). A thorough analysis of the conceptual evolution of piracy and its analogy to air piracy is essential if the status of aircraft hijacking as an international crime is to be ascertained.

More than four decades have passed since the first recorded successful aircraft seizures. While this is a relatively brief time for the formation of customary

---

[7]Members of the Popular Front for the Liberation of Palestine (PFLP) successfully seized a Trans World Airline and Swiss Air Jet Liner and forced them to land on the Jordanian desert near Khanna. The Palestine guerrillas demanded the release of Palestinian prisoners being held in various Western nations in exchange for the release of the hostages aboard the hijacked planes. See New York Times, September 13, 1970, p. 1, ff, for a description of the hijacking and the tension-wrought events which led up to the eventual release of the hostages.

international law (which usually evolves slowly and gradually over a long, though unspecified period of time), it appears that the promulgation of two major international conventions (viz., the Tokyo Convention of 1963 and the Hague Convention of 1970) and the substantial number of states ratifying the resultant multilateral treaties may reflect strong communal attitudes to re-instate universal jurisdiction over aircraft hijackers.[8]

Clarity of the conceptual evolution of piracy in international law requires a framework of analysis. This study focused on the interpretation of international law as a system of hierarchically derived norms formally acknowledged by sources cited in the Statute of the International Court of Justice.

Article 38 of the Statute of the International Court of Justice (ICJ) can be viewed both as sources of international law and as steps in the law-creating (legislative) process of the international legal system.

---

[8]Article 4 of the Hague Convention (1970) for the "Suppression of Unlawful Seizure of Aircraft," specifies that each Contracting State may establish its jurisdiction over the offense (as defined in Article 1) if the offense is committed on board an aircraft registered in that state, if the aircraft lands in its territory with the offender still aboard, if the offense is committed on board an aircraft leased without crew to a lessee who has his principal place of business or permanent residence in that state, or in cases where the alleged offender is found in the state's territory.

Several states may well become involved in establishing jurisdiction over the offender, thus approaching in principal a lesser form of universal jurisdiction. See infra, pp. 24-26.

The mode of analysis used to develop the evolution of the concept of piracy consists of the following stages:

1) international conventions;

2) international custom;

3) general principles of law recognized by civilized nations;

4) judicial decisions and the teachings of most highly qualified publicists (as subsidiary sources).[9]

---

[9]International conventions consist of written agreements between nations of either a multilateral or bilateral nature and represent the primary stage of development in the international legal process; international customs refer to the slow and gradual process of formulation of legal rules reflecting a considerable degree of consensus in community demands; general principles of law recognized by civilized nations is a more nebulous term derived from the Roman words, jus gentium (law of the people). It should be interpreted as ". . . those principles which govern or are included in domestic legal systems throughout the world and can serve as sources by analogy for international legal norms." See William Coplin, The Functions of International Law: An Introduction to the Role of Law in the Contemporary World. (Chicago: Rand McNally and Co., 1966), p. 11.

The Soviet Union, for example, does not recognize "general principles of law" as a separate step in the international legislative process. Rather, Soviet jurists consider it as an encompassing category for any agreements accepted by a majority of states in the international community. See Richard E. Erickson, International Law and the Revolutionary State (Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1972) for an enlightening discussion of the views of Soviet jurists on "general principles of the law" and customary international law.

Judicial decisions and the teachings of most highly qualified publicists include decisions of national and municipal courts and statements by prominent national and international spokesmen, e.g., the Secretary-General of the United Nations, a prime minister, a foreign secretary, or world-renowned scholars in the field of international law.

Through the use of Article 38 of the Statute of the International Court of Justice, it was determined whether an analogy between piracy on the high seas and piracy in the high skies could be posited, and by doing so, revealed the historical norm of piracy in international law vis-à-vis its contemporary status as an international crime. This analysis is normative, however, only in the sense that it seeks to clarify the evolution of legal standards relating to the concept of piracy. It is not normative in the sense of judging or assessing the rightness or wrongness of interpretative views which nations (via national courts) place upon the concept of piracy.

When the conceptual evolution of piracy and the status of aerial hijacking as an international crime was discerned, statistical data on all known aircraft seizure attempts was analyzed to ascertain the degree of compliance of individual nations to the norm of air piracy which has been established through the international law-making process.

Since international law maintains no central enforcement agency or universal sovereign to effect compliance with established international norms, it relies upon voluntary compliance of participating states to advance international order. Richard A. Falk indicates that

> . . . norms of international behavior are secured by considerations of self-interest (the preferred course of action), habits of compliance, and reciprocity