

CONFLICT IN THE COMPETENCE AND JURISDICTION OF COURTS OF DIFFERENT STATES TO DEAL WITH CRIMES COMMITTED ON BOARD AIRCRAFT AND THE PERSONS INVOLVED THEREIN

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*Le droit sera un jour le souverain
du monde.*

MIRABEAU.

The separate conclusions which the writers propose to submit at the end of this study, will be applicable only to crimes committed by persons, whether passengers or crew, on board civil aircraft in flight, anywhere. Crimes committed on board a state plane, infractions against discipline or internal regulations, whether the aircraft rests on the ground or is in flight, present problems which will not be discussed here.

The real problem with which we have to deal is, as yet, legally unsolved; nevertheless, a practical solution imposes itself, and, therefore, we are charged with the responsibility to formulate principles which, each of the writers hopes, would be acceptable to the civilized world. Modern aircraft with their fantastic and almost unbelievable speed of travel and playing havoc with the theory of national territorial jurisdiction have added to our burden in an endeavour to arrive at a solution of this vexed problem.

Within the short space of a few hours, an aircraft may have flown over the sovereign territory of many states, over territorial waters, over the high seas, or, perhaps, over uninhabitable locations devoid of any known sovereignty, with the attendant present-day conflict of competence and jurisdiction in the matter of crimes committed on board.

Jurists of great learning and world-wide reputation have, singly and in concert with others, assembled in conferences and congresses and have attempted to grapple with this tremendously involved legal issue, and to formulate general principles of conduct. In our judgment, in that respect, the highest praise is due to the *coterie* of learned jurists who were responsible for the research

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carried on under the auspices of the Harvard Law School.¹ The exhaustive and painstaking research and study as well as the complete data with which it abounds, makes this *chef-d'oeuvre* an indispensable *vade mecum* of the international lawyer.

The paucity of the reported cases with reference to crimes committed on board an aircraft is no indication of the import of the subject in world relations. There has been only one outstanding case, a brief analysis of which will show that in the absence of international understanding, co-operation and accord in matters of crime committed on board aircraft, the result must inevitably be (a) multiplicity of national laws with as many predilections, (b) no law at all, or, (c) drifting into a haphazard and inconsequential legal *dolce farniente*.

The case is *United States v. Cordova*.² A carrier plane took off from San Juan airfield in Puerto Rico bound for New York. The plane was the property of Flying Tigers, an American corporation and at the time of flight was under charter to American Airlines. While the plane was travelling over the high seas a fight occurred, with the result that Cordova assaulted both the pilot and the stewardess. The plane landed at La Guardia field in New York City, where Cordova was apprehended and charged with the offense.

The federal district judge arrested judgment because no federal statute covered crimes committed on board American aircraft over the high seas. The United States Code, Title 18, section 451 which extends federal criminal jurisdiction to offenses (a) committed upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, and (b) committed on board any American vessel within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, was held not to be broad enough to cover this offense because it was not committed *upon* the high seas but *over* them, and an aircraft is not a vessel.³

In a recent comment on this decision, Mr. Arnold W. Knauth stated:

. . . it was apparently, at the date of this writing in June, 1951, legally safe to commit almost any crime in the calendar while travelling in an American airplane over the ocean.

. . . Congress should restore, both for ships and for aircraft, the principle expressed in section 5 of the Act of 1825, and assert and exercise the power, by criminal laws, to control the conduct of all persons who are in or on every ship and aircraft registered as a vessel or as an aircraft of the United States. The statute should reach every act done, or omitted to be done, while an airplane which bears United States registry marks is in flight in the airspace of any foreign state or sovereign, or on the ground or on the waters of any foreign state or sovereign, by any person who is a

¹*Harvard Research in International Law, Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 437-639 (Supp. 1935).

²1950 U.S. Av. R. 1.

³*Id.* at 7, 8.

part of the 'company' of the aircraft, or a passenger, or on board in any other capacity, such as a stowaway.

. . . In conclusion, it seems clear that there is today no criminal law to reach a criminal act initiated and completed in an American airplane above the high seas, except stealing the plane and embezzling the carrier's money. If a criminal act is done in an American plane in flight above the land or water of a foreign state or sovereign, that sovereign may apply his criminal laws and procedures, but it lies entirely within his discretion whether to do so, and if he does nothing, the offender goes free.⁴

In October, 1951, a Bill was introduced in the House of Representatives at Washington "to confer federal jurisdiction to prosecute certain common law crimes of violence when such crimes are committed on an American airplane in flight over the high seas or over waters within the admiralty and maritime jurisdiction of the United States."⁵

A large number of nations have enacted legislation of like character upon the supposition that the law of the flag of the aircraft, in these matters, is, or should be paramount.

In his treatise, Maurice Lemoine refers to the French law which governs the subject matter under discussion:

In so far as crimes and infractions committed on board aircraft are concerned, the French law provides a single section, No. 10: "The juridical relations between the persons on board a foreign aircraft in flight are governed by the law of the flag of the aircraft, every time the territorial law would in the ordinary course be applicable.

"Nevertheless, in the event of a crime or infraction being committed on board a foreign aircraft, the French courts are competent if the accused or the injured person is of French nationality, or the craft lands in France after the crime or infraction has been committed."⁶

In Great Britain, section 62 of the Civil Aviation Act, 1949, provides that

. . . any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be.

A German ordinance of May 6, 1940, provides:

Article I, Section 5. German law applies independently of the law of the place of the act, for acts committed on board a German ship or aircraft.

⁴*Crime in the High Air — A Footnote to History*, 25 TULANE L. REV. 447, 460, 461 (1950-51).

⁵H.R. REP. No. 5547, 82nd Cong., 1st Sess. (1951). Since this article was written, § 7 of Tit. 18, U.S. Code, has been amended by adding at the end thereof a new sub-section reading as follows: "(5) Any aircraft 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 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." [Pub. L. No. 514, 82nd Cong., 2d Sess., c. 695 (July 12, 1952)].

⁶LEMOINE, *TRAITÉ DE DROIT AÉRIEN* 795 (1947) (Writer's translation).

Article II. The procurator can abstain from prosecuting the act committed abroad by a German national or by a foreign national on board a foreign ship or aircraft in German territory, when the prosecution would not be advantageous from the viewpoint of the German community, or would present difficulties disproportionate with its object. The act committed by a foreigner is prosecuted by the procurator only upon instruction from the Minister of Justice.⁷

All crimes committed on board Italian aircraft, wherever located, are governed by the provisions of the Code of Navigation, of March 30, 1942:

Article 5. All deeds and acts committed on board a ship or aircraft in the course of navigation in places or spaces subject to the sovereignty of a foreign State, are governed by the national law of the ship or aircraft in all cases, where, in terms of the provisions for the application of law in general, the law of the place where the act has been committed would be applied.

The provision of the preceding paragraph applies equally to all deeds and acts committed on board a ship or aircraft of foreign nationality in places or spaces subject to the sovereignty of the Italian State, under conditions of reciprocity on the part of the State which sponsors the ship or aircraft.⁸

The Polish Criminal Code of 1932 provides:

Article 3(1). Polish criminal law is applicable to all persons who committed a crime on the territory of the Polish State or on board a Polish sea or air/craft. As territory of the State are also considered the inland and coastal waters as well as the air over such territory.⁹

The Penal Codes of Mexico and Spain use nationality of aircraft as a basis for determining the jurisdiction over crimes committed on board aircraft. The Spanish Penal Code leaves no doubt as to its applicability in respect of landed Spanish planes on foreign soil:

Article 19. There shall also be considered as Spanish territory, by extension for these purposes: Spanish vessels and aircraft on the high seas, or in the free zone of the air, or anchored in a foreign port, or in a foreign aerodrome.¹¹

It would appear that the British legislation above is the most drastic of all. If a crime is committed on board a British aircraft — it doesn't matter where the aircraft was at the time, it doesn't matter who committed the crime — the alleged offender may be flown to England, taken to London and brought before the Central Criminal Court for trial and punishment, under the English law. It is difficult to say whether the British Parliament considers this "national" legislation.

In commenting upon section 14 of the Air Navigation Act, 1920, which is similar in terms with section 62 of the Civil Aviation Act, 1949, referred to

⁷Meyer, *Crimes et délits commis à bord des aéronefs*, 9 REV. GÉN. AIR 621 (1946).

⁸*Ibid.*

⁹7 L. REP. OF TRIALS OF WAR CRIMINALS 84 (Selected and prepared by the U.N. War Crimes Commission, 1948).

¹¹*Draft Convention on Jurisdiction with Respect to Crime, supra* note 1, at 515, 517.

above, Halsbury¹² suggests that there may be two possible interpretations of the same, the second of which

confers also jurisdiction in respect of such offences on Courts in the United Kingdom, wherever and by whomsoever (whether British subjects or subjects of other States) the offense is committed.

If, however, it can be said that the words 'for the purpose of conferring jurisdiction' are entitled to receive the wider interpretation, the effect of the provision appears to be not only to confer local jurisdiction, but to make any offence whatever committed on a British aircraft justiciable in the Courts of the United Kingdom in any place where the offender may for the time being be, wherever and by whomsoever committed and, in effect, to confer upon a British aircraft to the extent and for the purposes specified [Air Navigation Act, 1920, 10 & 11 GEO. V, c. 80, § 14(1)] a character analogous to that of a British ship. It is submitted that there is ground upon which such wider interpretation of the provision can be supported and it is to be preferred to the narrower interpretation, but it must be pointed out that this provision has not at present been the subject of judicial interpretation.

It should be noted that an English Court (Blackburn, Lush, Field, JJ.) construed a somewhat similar section of a British statute, in 1875.¹³

A statute provided that for the purpose of certain proceedings under it, every cause of complaint shall be deemed to have arisen " . . . in any place in which the person charged or complained against happens to be." Said Blackburn, J.:

. . . I am further of opinion that the words 'happens to be' must mean in any place in which he is after the offence is complete.¹⁴

One could easily construe this British legislation to be an attempt to enact international law by way of unilateral action. The value of such a law to the particular state itself does not come into play here, and need not be considered. One may, however, question the wisdom of passing laws which would, in effect, take in the whole world under the guise of enacting national laws.

It is, to say the least, doubtful whether this is the most effective or rational way to obtain international understanding — it certainly is not international law — in dealing with crimes committed on board aircraft in flight.

Because of the frequent use of nationality in municipal law, a brief study of nationality of aircraft becomes necessary.

The articles in the Chicago Convention of 1944 referable to nationality are numbered 17, 18 and 19:

Article 17. Aircraft have the nationality of the State in which they are registered.

Article 18. An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another.

¹²31 HALSBURY, LAWS OF ENGLAND 853, art. 1351, n.(q) (2d ed. 1938).

¹³*Johnson v. Colan* (1875), L.R. 10 Q.B. 544.

¹⁴*Id.* at 548.

Article 19. The registration or transfer of registration of aircraft in any contracting State shall be made in accordance with its laws and regulations.

The Chicago Convention did not originate the doctrine of nationality of aircraft: it assumed its existence and proceeded to legislate upon that assumption in the manner partially referred to above. It is quite evident that we may have aircraft with as many different kinds of nationality as there are contracting States. Needless to say that the ingredients of one kind of nationality — because of different individual national registration laws — may be wholly distinct from the ingredients constituting the nationality of any other contracting State.

Let us now consider a supposititious case where nationality is used as the basis for resolving conflicts of jurisdiction arising from crimes committed on board aircraft.

An aircraft belonging to Company *X* is registered in contracting State *A*. Under the laws of this State, any five persons of the age of majority, by subscribing and filing a memorandum with the Secretary of State and paying a gradually increasing fee, depending upon various factors, but, in any event, not less than \$10,000., may be incorporated as an airplane company. The planes of such a company shall *ipso facto* be deemed to be registered in State *A* and to have acquired the nationality of that State.

Five such persons, resident and domiciled respectively in Canada, Brazil, France, Italy and Egypt become incorporated as an airplane company under the above law and their planes at once become endowed with the nationality of State *A*.

One may pertinently ask this question: What justification or rationale is there in law, in morals, in principle or in just plain ordinary good sense to assert that, in the event of a crime being committed on board such a plane by a Javanese against a Samoan over the high seas, the accused should be tried by the courts of State *A*, in accordance with the provisions of the criminal law of that State? Granted this is an extreme case, but very often such cases re-direct our thoughts towards a healthier appreciation of the law — *le droit*.

The writers are not at all persuaded that the law of the flag of the aircraft constitutes an infallible or even a paramount criterion in the matter of competence and jurisdiction in respect of crimes committed on board aircraft. It is not to be understood, however, that the writers undervalue the efficacy of the principles flowing from the nationality of the aircraft. The question is of immense importance in many respects. The fact that its existence has been acknowledged by, and legislated into the Chicago Convention makes nationality a doctrine of universal concept, but we must guard against the notion of over-emphasizing it.

The question arises: why have aircraft been invested with nationality? The answer to this question may be closely linked with a study of maritime law. If the reasons for the nationality of aircraft may be discovered in the

reasons for the nationality of ships, then it becomes a moot point how far maritime law could be made to apply to the punishment of crimes committed on board aircraft.

Fauchille, in his draft of 1902, adopted nationality as the norm governing the law and jurisdiction in respect of occurrences on board aircraft. He also made nationality the basis for identification of aircraft.¹⁵ The First Committee of the 1910 Paris Conference resolved that nationality should be used to establish State responsibility for, as well as diplomatic protection to aircraft; cabotage was also predicated upon the same notion. Nevertheless, nationality was not to form any basis for resolving conflicts of law and competence.¹⁶ The same year, Henry-Couannier wrote that nationality constituted the very foundation of international order in navigation, and, further, that it was required to identify the craft in the event of damage to property.¹⁷ Two years later, de Lapradelle advanced the theory that nationality controlled the civil and criminal jurisdiction in respect of all occurrences on board, thereby disagreeing with the views of the 1910 Paris Conference, which adopted the resolution of its First Committee.¹⁸ He concurred, however, in the view that nationality was a powerful ingredient for the protection of a State's national aircraft.¹⁹ In an article written in 1932, Kingsley agreed with Fauchille and de Lapradelle that nationality determines the law and jurisdiction applicable to offences on board aircraft. He assigned three other reasons for the necessity of endowing aircraft with nationality: cabotage, protection of national defence secrets from foreign observers in the air and a basis for establishing minimum safety standards.²⁰

In his excellent article, written in 1934,²¹ Fernand de Visscher agreed that the nationality of aircraft was being used to resolve questions of jurisdiction and legislative competence, but asserted that these purposes were different from the aims for which nationality was originally intended. An interesting observation in the light of the resolution of the First Committee of the Paris Conference of 1910, to which the learned jurist does not allude. The primary reasons for the nationality of aircraft, says de Visscher, were twofold: economic and military. Economically, nationality enabled a State to reserve its subsidies and other national benefits, such as cabotage, to aircraft which flew the flag of the State. Militarily, nationality would enable the State to requis-

¹⁵19 ANNUAIRE DE L'INSTITUT DE DROIT INT'L [hereinafter ANNUAIRE] 19-77 (1902).

¹⁶Conférence internationale de navigation aérienne, PROCÈS-VERBAUX DES SÉANCES 104-116, 282-296, 328-337 (1910).

¹⁷Henry-Couannier, *De la nationalité et du domicile des aéronefs*, 1 REV. JUR. INT'L LOCOMOTION AÉRIENNE 165 (1910).

¹⁸3 REV. JUR. INT'L LOCOMOTION AÉRIENNE 165, 166 (1912).

¹⁹*Ibid.*

²⁰3 J. AIR L. 50 (1932).

²¹de Visscher, *Les conflits de lois en matière de droit aérien*, 48 RECUEIL DES COURS 285 (Académie de Droit International, 1934).

tion aircraft in time of emergency²². Recently, Pépin appears to stress the principle of identity, that is "the necessity for each State to know the nationality of the aircraft flying over its territory."²³ Lemoine's view is that the primary and ultimate justification for the adoption of nationality of aircraft is the need which the States assert for the requisition of aircraft in time of war.²⁴

The notion of nationality for ships, in contradistinction with that of aircraft, has been worked out, empirically perhaps, in the course of many centuries of use of physical force, arbitrary procedure, judicial pronouncement, bilateral or multilateral treaties, political arrangements of *modus vivendi* or other accords, or understandings, and is now fully entrenched as customary international law.

Ships appear to have been invested with this quasi-personality as early as the maritime treaties between Carthage and Rome in the year 508 B.C.²⁵ Certainly, by the time of Queen Elizabeth, nationality for ships was a well-settled doctrine.²⁶ Why has it become so firmly imbedded in maritime law? What purpose does it serve? The answer is that nationality forms the basis on which international good conduct is preserved on the high seas.²⁷ It is a nation's guarantee of the manner in which her ships use the sea.²⁸ It enables a nation to protect the ships which bear its national character.²⁹ It is through nationality that a nation asserts the right to control the ships that fly her flag and the persons and property on board.³⁰ In essence, nationality reflects three juridical ties between a ship and the State of its flag: the ship is subject to the control of the State, is entitled to the protection of the State and is under the responsibility of the State.³¹

In *The Lotus*,³² the World Court laid down principles which no international body can disregard, whether we agree with the majority judgment, or not. By the Court: International law does not prohibit

a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.

. . . This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the

²²de Visscher, *supra* note 21, at 30.

²³71 RECUEIL DES COURS 507 (1947).

²⁴LEMOINE, *op. cit. supra* note 6, at 163.

²⁵2 PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 75 (1911).

²⁶POTTER, *FREEDOM OF THE SEAS* 39 n.25 (1924).

²⁷HIGGINS and COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 188, 248 (1943).

²⁸*Id.* at 188.

²⁹1 WESTLAKE, *INTERNATIONAL LAW* 169 (1910).

³⁰1 OPPENHEIM, *INTERNATIONAL LAW* 490 (4th ed. 1928).

³¹1 WESTLAKE, *op. cit. supra* note 29, at 169: "Nationality enables a State to protect, have authority over and assume responsibility for those ships which fly its flag."

³²*The S.S. Lotus (France v. Turkey)*, Permanent Court of Int'l Justice, Sept. 7, 1927, Ser. A, no. 10, p. 18; 2 HUDSON, *WORLD COURT REPORTS* 20, 35, 44 (1935).

part of other States; it is in order to remedy the difficulties resulting from such variety that efforts have been made for many years past, both in Europe and America, to prepare conventions the effect of which would be precisely to limit the discretion at present left to States in this respect by international law, thus making good the existing lacunae in respect of jurisdiction or removing the conflicting jurisdiction arising from the diversity of the principles adopted by the various states.

. . . Neither the exclusive jurisdiction of either State (France and Turkey) nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.

However, we have been warned not to enlarge the analogy between ship and aircraft unduly, to the extent of completely assimilating one with the other. In his book, McNair admonishes us that

from a juristic point of view, the analogy between a ship and an aircraft is fundamentally wrong and misleading

and that

any general attempt to invest the aircraft, as such and wherever it may be, with the characteristic legal panoply which belong to a ship will be disastrous.³³

On the other hand, both Hazeltine and Lycklama, at the meeting of the International Law Association, in 1920, pointed out how aircraft nationality, as expressed in the 1919 Paris Conference, was like that of ships.³⁴

The question of jurisdiction over offences committed on board civil aircraft has received the attention of many famous international associations as well as jurists. Although no tangible results have been achieved, in the sense that the deliberations of those learned bodies and jurists ever became the subject of serious study or controversy in a gathering of any kind, where a substantial number of the nations of the world had sent representatives, yet, the discussions carried on and the resolutions formulated, as well as the conventions recommended by such bodies and jurists, give us an indication of the trend of thought of lawyers of international learning.

Essentially, there are four distinct bases upon which jurists and international associations dealing with air law, sought to establish uniform rules governing conduct on board aircraft. One school advocates nationality of the aircraft as the controlling factor. Another contends that the sovereignty of the State over its airspace should be predominant. Still other jurists maintain that the place of landing should, in all cases, be determinative, at least, as to jurisdiction. Finally, there are those who believe that a combination of two

³³McNAIR, *THE LAW OF THE AIR* 91 (1932).

³⁴International Law Ass'n, *REPORT OF THE 29TH CONFERENCE* 396 (1920).

or more of the above systems should govern conduct on board aircraft. In the last group mentioned, there are some who advocate a concurrence of competence and/or laws, while others would establish a priority system.³⁵

Nationality

Fauchille was one of the first jurists to consider the subject of offences committed on board aircraft. He was the first to advance the view that aerostats, like ships, have nationality which should constitute the basis for judging acts committed on board aircraft. In his proposals to the Institute of International Law, in 1902, Fauchille stated:

Article 15. Crimes and misdemeanours committed on board aerostats in any part of the space, by members of the crew or by any other persons on board, fall under the competence of the courts of the nation to which the aerostat belongs and are judged according to the laws of that nation, regardless of the nationality of the authors or the victims.

Fauchille supplemented nationality, as the primary basis, with the principle of protection. Article 15 continued:

Nevertheless, infractions which endanger the security or the property of the State, such as conspiracy, treason, counterfeit money, should, wherever committed, be judged by the courts and according to the laws of the injured State.³⁶

The latter portion of Article 15 above corresponds with Article 8 of von Bar's proposals to the Institute of International Law at Munich, in 1883, which were to govern the whole subject of crimes.³⁷

In his second draft to the Institute of International Law, Fauchille made a further exception with respect to acts which occurred on board while the aircraft was on the ground. In such case, the jurisdiction and the law applicable were those of the territorial State.³⁸

The International Juridical Committee of Aviation (Comité Juridique) adopted at Frankfurt, in 1913, an International Air Code which substantially incorporated the theories of Fauchille:

Article 23. The things done and the events occurring in space on board aircraft which do not affect the security or public order of the subjacent State remain subject to the legislation and jurisdiction of the country whose nationality the aircraft bears.³⁹

³⁵Although Meyer, Morpurgo, Lemoine and others mention a fifth basis — the place of departure — this system has few serious advocates and has gained no recognition. It is acknowledged by most jurists to have the same disadvantages, and not all the advantages of the place of landing.

³⁶19 ANNUAIRE 51 (1902).

³⁷7 ANNUAIRE 125 (1883-85): "Each State will punish, independently of the place where the offender committed the act and of his nationality, all infractions to its security."

³⁸24 ANNUAIRE 105-120 (1911); Meyer, *supra* note 7, at 615.

³⁹Comité juridique int'l de l'aviation, TROISIÈME CONGRÈS INT'L DE LÉGISLATION AÉRIENNE 22 (1913).

This principle is introduced in the text adopted by the Comité Juridique at Geneva, 1912. Article 23 of the Paris Convention draft, 1919, provided that the nationality of the aircraft would be the primary basis governing the punishment of offences committed on board aircraft in flight. It contained an exception to the effect that when the offence was committed against a national of the State flown over and was followed by a landing in that State, the jurisdiction of the State flown over applied.⁴⁰ However, this article was struck out before the Convention was signed. In 1921 and 1922, at Monaco and Prague, the Comité Juridique re-affirmed its position in new Air Codes that nationality was determinative in respect of occurrences on board.⁴¹ In 1922, at Buenos Aires, the International Law Association adopted a proposal submitted by Hofmannstahl that the law and jurisdiction of the State of the flag of the aircraft should apply to all acts in flight which do not directly affect the subjacent State.⁴² Provision is made, as in Fauchille's draft of 1902, for the arrest and extradition of the offender by the authorities of the State where the aircraft first lands after the commission of the offence.⁴³ However, while the International Law Association would place a duty on the State of landing to arrest the offender, Fauchille would grant discretionary power to do so.⁴⁴ At Stockholm, in 1924, the International Law Association re-affirmed its advocacy of the principle of nationality. At its 44th conference, Copenhagen 1950, the International Law Association decided to review the 1924 Stockholm position.⁴⁵ This matter will be further discussed at the 1952 conference, the results of which are not yet available.

In 1929, Schrieber prepared a draft convention on aircraft for the Air Transport Committee of the International Chamber of Commerce, in which he proposed that nationality of the aircraft should control both the law and jurisdiction.⁴⁶ In favour of this theory was the report presented by Niemeyer to the German section of the Comité Juridique, in 1929.⁴⁷ He would make an exception where the offence affected the interests of the State flown over. Niemeyer's report contained an original provision to the effect that the State flown over would be the sole judge whether its interests had been affected.

Finally, in 1946, Meyer advocated nationality for aircraft, both in respect of law and jurisdiction, where the State flown over was not affected. However,

⁴⁰McNAIR, *op. cit. supra* note 33, at 87.

⁴¹Meyer, *supra* note 7, at 616.

⁴²International Law Ass'n, REPORT OF THE 31ST CONFERENCE 220 (1922).

⁴³*Id.* at 264.

⁴⁴*Ibid.*

⁴⁵International Law Ass'n, REPORT OF THE 33RD CONFERENCE 118 (1924); REPORT OF THE 44TH CONFERENCE 226-233 (1950).

⁴⁶SCHRIEBER, PRINCIPLES OF A DRAFT CONVENTION ON NATIONALITY OF AIRCRAFT (prepared for the Air Transport Committee of the Int'l Chamber of Commerce, 1929).

⁴⁷Niemeyer, *Crimes et délits commis à bord des aéronefs*, (1929) DROIT AÉRIEN 285, cited in LEMOINE, *op. cit. supra* note 6, at 794.

Meyer would allow both the State flown over and the State of the flag of the aircraft to determine which of the two had jurisdiction.⁴⁸ Presumably, it is meant that the State which has the custody of the offender would decide the issue. The project is silent as to the results which would follow if a third disinterested State has custody of the offender, and both the State of the flag and that flown over request extradition.

Territoriality

In 1932, Mandl proposed to the Comité Juridique that for acts committed on board during flight, the jurisdiction of the subjacent State should prevail, in exactly the same way as if the acts had been committed on the surface of the State flown over.⁴⁹ Where a crime is committed over the high seas or the Arctic regions, Mandl suggests that the aircraft's nationality should be the basis for competence. This system has been a favourite of various American organizations because of the constitutional guarantee of the right of trial in the state where the offence is committed.⁵⁰ In 1932, the American Bar Association and the National Conference of Commissioners on Uniform State Laws proposed a uniform law for aeronautics. This Uniform State Law was adopted by over twenty states in the United States.⁵¹ In 1938, the Conference of Commissioners proposed a draft for a Uniform Air Jurisdiction Act. Here again, the offender was to be subjected to the laws of the state flown over at the time of the offence. However, the inflexibility of the rule as laid down in the 1932 Uniform Law was relaxed by the addition of a presumption as to jurisdiction:

In the absence of proof to the contrary (a) it is presumed that any act or transaction in the air, involved in any proceedings of the court of this state, was committed or occurred in the state or country from which the aircraft last took off previous to such act or transaction or the discovery thereof, (b) if it is determined that at the time of the act, or its discovery, the aircraft had passed the venue of take-off, it shall be presumed to have been committed in the venue district which it next entered.⁵²

Place of Landing

In 1922, the Aviation Law Committee of the International Law Association proposed that the right to try and punish, according to its own laws and procedure, felonies and misdemeanours committed in the air en route, should vest in the State of the place of landing of the aircraft. It further

⁴⁸Meyer, *supra* note 7, at 631.

⁴⁹Mandl, *Adresse au Xe Congrès International de Législation Aérienne*, 1 REV. GÉN. DROIT AÉRIEN 304 (1932).

⁵⁰HOTCHKISS, *THE LAW OF AVIATION*, App. H, I (2d ed. 1938).

⁵¹*Id.* at 459.

⁵²*Id.* at 498.

proposed that where the judicial authority of such place declined jurisdiction, the State of the victim could demand extradition of the accused.⁵³ Morpurgo urged this system in 1928 when he commented upon the disappearance of the banker Loewenstein from a private aircraft over the English Channel. The State flown over could always require the plane to land on its territory, writes Morpurgo, when an act committed in the airspace of such State was of a nature to affect its interests.⁵⁴

In July 1929, Pholien presented a report to the Belgian section of the Comité Juridique, which favoured the place of landing as a basis for State competence.⁵⁵ Pholien would provide an auxiliary competence in the State of last departure, where the act was not an offence in the State of first landing.

Mixed Basis

Lycklama, in 1910, was the first to propose what in reality was a mixed basis for penal competence. She declared "the jurisdiction of the ground State to be the prevailing one in the air, though with some rational exceptions."⁵⁶ Lycklama made a comparison between ships in a foreign port, under the French doctrine, and aircraft over a foreign State. Aircraft should be exempt from the jurisdiction of the State flown over in respect of acts of interior discipline and of offences committed by the officers and members of the crew, as long as the peace, order and safety of the State flown over is not affected. No reference is made to passengers. However, Lycklama foresaw the case where, because "aerostats flew at full speed", the State in whose domain the offence had been committed could not be ascertained. In all such cases "where identity of the ground State is uncertain", she suggested that the State of the flag of the aircraft might entertain jurisdiction.

In 1911, Hazeltine, in one of his lectures delivered in the University of London, stated:

I believe the proper solution of the whole problem is to recognize the full sovereignty of the subjacent state in its entire airspace, thus bringing all crimes committed in that airspace within the jurisdiction of the courts of the subjacent state itself. To be sure it is still possible to give the state of the air-vehicle's flag a concurrent jurisdiction as regards crimes committed on board which do not in any way seriously affect the subjacent state.⁵⁷

⁵³International Law Ass'n, REPORT OF THE 31ST CONFERENCE 218 (1922).

⁵⁴Morpurgo, *Quelques considérations sur les conflits internationaux de juridiction en matière pénale aéronautique à propos de la mort du banquier Loewenstein*, 2 REV. JUR. INT'L LOCOMOTION AÉRIENNE 397, 408, 414 (1928).

⁵⁵Pholien, *Des crimes et délits commis à bord d'aéronefs en vol*, (1929) DROIT AÉRIEN 289.

⁵⁶LYCKLAMA A NIJEHOLT, AIR SOVEREIGNTY 62, 63 (1910).

⁵⁷HAZELTINE, THE LAW OF THE AIR 93. (Three lectures delivered in the University of London at the request of the Faculty of Laws. Second Lecture: *The Principles and Problems of National Law*).

In effect, therefore, Hazeltine, like Lycklama, recommended a duality of system, because most crimes committed on board aircraft do not "seriously affect the subjacent state." Spaight, writing in 1919 before the signing of the Paris Convention, advocated that murder and other common law crimes committed in the air, whether or not affecting the subjacent State, should come under the jurisdiction either of the subjacent State or the State of the nationality of the aircraft.⁵⁸

There have been so many advocates of dual or multiple competence since 1919, that only a few of the more important can be mentioned here. The system of Danilovics and Szondy proposed to the Comité Juridique in 1930, distinguished between aircraft over the high seas and aircraft over sovereign territory. In the former, the law of the State of the nationality of the aircraft should govern offences on board; in the latter, either the law of the State flown over, or of the State of the flag of the aircraft should prevail. The nationality of the offender is of no account.⁵⁹

The system which the Comité Juridique adopted at the meeting in Budapest, in 1930, was the one proposed by de Lapradelle. It provided that both the State flown over and the State of the flag of the aircraft could entertain jurisdiction. It further provided that of the two, the State which had actual control over the offender should be given priority. However, where a third disinterested State had custody of the offender, the State of the flag of the aircraft would be entitled to have the offender extradited, except where the criminal act affected the interests of the State flown over.⁶⁰ Presumably, the third State would be the final arbiter with respect to the subjacent State's interests being affected, where both States simultaneously demand extradition.

The Seventh Pan American Conference, meeting in Montevideo, in 1933, proposed a system which combined the nationality and the place of landing theories.⁶¹ The legislation and jurisdiction of the national State always applied to its aircraft, wherever located. However, for an offence committed in flight, the place of landing could also assert jurisdiction, but the law to be applied was that of the State in whose airspace the offence was committed. Where that could not be determined, the law of the State of the flag of aircraft obtained.

Finally, in 1935, the Harvard Draft Convention on Criminal Jurisdiction was completed. This draft places ships and aircraft in the same category and recognizes that both have the characteristics of territory. It vests a State with "jurisdiction to any crime committed in whole or in part upon a public or private ship or aircraft which has its character". It also gives jurisdiction to a State over any crimes committed in whole or in part within its territory.

⁵⁸SPAIGHT, AIRCRAFT IN PEACE AND THE LAW (1919).

⁵⁹(1930) DROIT AÉRIEN 402.

⁶⁰Meyer, *supra* note 7, at 616.

⁶¹Cited in MANCE, INTERNATIONAL TRANSPORT 73 (1944).

Territory is described as land and territorial waters and the air above them: consequently, "where the crime was in foreign territorial waters or air" there was concurrent jurisdiction of the State of the flag of the aircraft and the territorial State.⁶²

The system put forward by de Visscher is, perhaps, the best known and most stoutly defended. De Visscher rejects the terms "Conflicts of Law" and "Rules of Private International Law". The former, says the learned jurist,

supposes that one or the other law necessarily prevails. This is not so for penal laws, where nothing prevents simultaneous jurisdictions; and the latter is too narrow, since air law embraces rules belonging to many diverse subjects, *e.g.*, public, private, criminal, civil.

De Visscher favoured a plurality of laws both for a subject title and as to content. The subjacent State, the State of the flag of the aircraft, the State where the infraction produced its results, would all have equal competence to apprehend and try the offender. Subsidiarily, the State of the place of landing could assume jurisdiction, where extradition was not requested upon any of the first three bases referred to above. The exception to this plurality of laws would be infractions of a disciplinary character, disobedience of passengers and disorderly acts of the crew. In such cases, de Visscher would apply the analogy of maritime law, namely, that such internal matters should be controlled solely by the State of the flag of the aircraft. This system was presented to the Institute of International Law, in September, 1937, by de Visscher as *rappporteur*, and was adopted with only minor modifications.

CONCLUSIONS OF JOHN FENSTON

Even a superficial analysis of the manifold proposals and systems submitted by the international bodies and jurists — these proposals and systems have been very sketchily described in the preceding pages — must inevitably result in an unanimous verdict, namely, the utter hopelessness of ever succeeding to reconcile these divergent proposals and systems, with the view of arriving at a feasible, practical or logical conclusion.

Whether we agree with the proponents of the theory of *convenience* or *fiction* — the law of the flag — or, with those who advocate extended or limited territorial jurisdiction of the State flown over, or whether concurrent, or a plurality of jurisdictions, or any kind of subsidiary jurisdiction is to be the ultimate salvation, it is clear that the various international bodies and jurists have approached the subject predicated upon the premise that there can never be an understanding between the nations in respect of *crimes de droit commun* committed on board aircraft in flight; that to envisage such a possibility would be committing unpardonable heresy, or delving into pure utopian speculation.

⁶²Draft Convention on Jurisdiction with Respect to Crime, *supra* note 1, at 509.

These international authorities have completely ruled out international accord and condemned the world *a priori* to perpetual internecine strife and conflict, simply because of their intransigent view of the present idiomatic political structure. A large number of these international bodies and jurists have inaugurated doctrines and adopted theories which are, for the most part, based on *convenience*.

With all due deference and respect, convenience is a very poor substitute for law — *le droit*. Convenience may be a political shiboleth or stratagem; it may be a principle of conduct as between political entities, but it does not take the place of the fundamental legal concept of what is just and right. The reference here is not to just and right merely as a matter of abstract or academic jurisprudential speculation, but what the consensus of public opinion accepts such notion to be, as between man and man.

Because they chose to direct their minds along the restricted channels of limited national borders, the inevitable result followed, namely, the international bodies and jurists fell back upon the principle of nationality — it was extremely convenient to do so — and brought forward a set of rules principally based upon the law of the flag. Opinions became divided and so we have a variety of choices as to what law or principle, or what alternative law or principle, should be followed in the event of a *crime de droit commun* being committed on board aircraft in flight.

The grievous sin which most, if not all of these bodies and writers committed, was that instead of boldly assuming leadership, they became followers in that they accepted without a murmur something which they believed to be an existing political trend of thought, namely, the perpetual disaccord between nations. Luckily, there are nations of good will as there are men of good will.

The legal basis of the proposal which this writer has the honour to submit is to be found in a quotation which appears at page 572 of the Harvard project. Speaking of the difficulty involved in setting up a classification of certain offences as *delicta juris gentium*, Donnedieu de Vabres says:

To our knowledge there isn't a single infraction 'de droit commun' to which one had attributed the character of international infraction; on the other hand, there isn't a single infraction of this type to which the possibility of acquiring such character ought to be denied.⁶³

Let the world accept the far-visioned conception of Donnedieu de Vabres. Let the world accept the proposition that a *crime de droit commun* committed on board aircraft in flight, anywhere, is an international crime, and that each civilized nation is charged with the duty and responsibility to suppress and punish the same.

Even the staunchest protagonist of nationality *à outrance* will have to agree that, from a politico-national point of view, it is very much easier to

⁶³de Vabres, *Pour quels délits convient-il d'admettre la compétence universelle?* 9 REV. INT. DROIT PÉNAL 315, 318 (1932) (Writer's translation).

write an international Code on *crimes de droit commun* than it would be to write a Civil Code for the entire world.

Jurists belonging to the whole civilized world will take part in writing such an international Code.

In his report of the *Cutting Case*,⁶⁴ the learned writer reproduces the Annual Message of President Cleveland, which was delivered on December 6, 1886. The Message deals with the repercussions of this international *cause célèbre*. Here is what President Cleveland said, in part:

But there is another ground on which this demand [for the release of the alleged offender Cutting] may with equal positiveness be based. By the law of nations, no punishment can be inflicted by a sovereign on citizens of other countries unless in conformity with those sanctions of justice which all civilized nations have in common.

Among those sanctions are the right of having the facts on which the charge of guilt was made examined by an impartial court, the explanation of the accused of these facts, the opportunity granted to him of counsel, such delay as is necessary to prepare his case, permission in all cases not capital to go at large on bail till trial, the due production under oath of all evidence prejudicing the accused, giving him the right to cross-examination, the right to produce his own evidence in exculpation, release even from temporary imprisonment in all cases where the charge is simply of threatened breach of the peace, and where due security to keep the peace is tendered.

. . . In respect of the latter ground [that the claim being made in the legislation of Mexico, the question is one solely for the decision of the Mexican tribunal] it is only necessary to say, that if a Government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either to States or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a government cannot appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. Such regulations may either exceed or fall short of the requirements of international law, and in either case that law furnishes the test of the nation's liability and not its own municipal rules. This proposition seems now to be so well understood and so generally accepted, that it is not deemed necessary to make citations or to adduce precedents in its support.

Would any one quarrel with the suggestion that the principles so excellently put forward by President Cleveland, ought to be incorporated in such an International Code? Once the Code has been completed and accepted, national jealousies aroused because of conflict of both jurisdiction and law are bound to disappear: the whole civilized world — or as many nations as are willing to participate — will constitute one jurisdiction where *crimes de droit commun* could be heard, tried and punished.

The venue for an offence committed on board aircraft, anywhere, may be laid within the territory of any State. All the nations will have equal jurisdiction and each will administer and apply the International Code of *crimes de*

⁶⁴2 MOORE, INTERNATIONAL LAW DIGEST 228, 237 (1906).

droit commun — the law common to the whole world, or to the greater portion of it. The individual national forms of procedure may not be interfered with; or, it may be found advisable to unify them.

The judges of the first instance will be chosen from among the lawyers who have been trained in International Law as well as International Air Law, who have made a special study of the International Code of *crimes de droit commun* and who otherwise possess the requisite social and psychological studies of a modern lawyer, trained to assist the court with the administration of the criminal law.

Each nation will appoint its own judges. The suggestion that these judges should be affiliated with the World Court of International Justice and thus acquire the status of judges *ad hoc*, should not be lightly eliminated.

Appeals from the decision of single judges may follow the usual national procedure in each State. It would not be inappropriate to suggest that the final appeal may, at the instance of the prosecutor or accused, be taken before the State Supreme Court, or to the World Court of International Justice. A panel of three or five judges from the latter court would constitute the Bench to hear and determine such appeals. There will be no intricate or involved technical rules or forms of procedure to bring such appeals before the World Court, and there will be no costs of appeal.

This is not to be construed as a blueprint, but rather as a general outline for the peaceful solution of a vexed world-problem.

What the writer does not envisage in his Conclusions is to set up a so-called international juridical relationship predicated upon fiction, for the sole reason that national idiosyncrasies or sensibilities, actual or imaginary, ought to be placated.

Any attempt to rationalize an international accord, based upon, or by analogy with, a variety of individual national conceptions, is bound to end in dismal failure, as one-half century of fruitless discussions (since Fauchille, 1902) have so abundantly demonstrated.

The writer is not a protagonist of the "super or supra-state"; but neither does he believe that the civilized nations who will ultimately be called together to deal with this subject in a diplomatic conference *ad hoc*, are so desperately enamoured of their law-breakers that each nation would consider it a crime of *lèse-humanité* to allow another nation to prosecute such law-breakers, under the provisions of a common universal Code, surrounded with all the safeguards which an accused person is entitled to receive at the hands of his accusers, in order to enable him to make full and proper defence.

The civilized world condemns piracy as a crime against mankind, and the jurisdiction to try a pirate is vested equally in all nations. Would it be such an unbearable shock to our innate sense of justice to consider — for the purpose of jurisdiction — an offence committed on board aircraft in flight, a crime against mankind?

In this manner, we will have resolved the issue in the only practicable way — this writer believes — in which it can be resolved, and will have forever eliminated from the consideration of the subject under discussion the internationally unsolvable questions dealing with nationality, territoriality, place of landing, concurrent or plurality of jurisdictions, extradition, as well as their respective appendages, appurtenances, conveniences, fictions and *tutti quanti*.

There should be no insuperable difficulty to translate this outline into a real, lasting and beneficent accord — perhaps a humble beginning of many such future accords — if we would only remember that “we are the drops of one sea, the leaves of one tree, the fragrance of one garden”.

CONCLUSIONS OF HAMILTON DE SAUSSURE

In order to consider proposals for governing crimes on board aircraft, we must enumerate the several dilemmas which make this whole subject one of the least susceptible to international legislation.

First is the conflict created by the flight of an aircraft from one nation through the airspace of another. We have observed that the attribute of nationality for aircraft is now firmly rooted in international law. Equally well settled in the community of nations is the principle that every State has exclusive and complete sovereignty over the airspace above its territory.⁶⁵ Whenever, therefore, a plane bearing the nationality of one State flies over the airspace of the territory of another State, there is a duality of control.

Second is the very knotty conflict as to competences inherent in crimes in general which contain international aspects. The bond between a nation and its citizens (nationality), the right of a State to govern the acts of all individuals within its domain (territoriality), the reprehensibility of some crimes making that fact alone the basis for punishment everywhere (universality), the practice of States to defend themselves against any attack on their social existence (protection) and the tendency of some States to punish crimes against their citizens wherever they may occur (passive personality) are incorporated in the national laws of nations as a basis for punishing criminals, to completely divergent degrees. They must be recognized. However, no effort to reconcile these various bases for the prosecution of crimes can be attempted in proposals which only deal with the narrow field of those crimes occurring on board aircraft.

Third is the two diverging legislative tendencies which have evolved with the development of the airplane. There is the trend toward uniform international rules governing the conduct of aircraft in flight, as for example the Chicago and Warsaw conventions, and at the same time and with increasing frequency, nations have enacted positive laws to govern their national aircraft

⁶⁵For a discussion of sovereignty in the air, see LYCKLAMA A NIJEHOLT, *op. cit. supra* note 56.

and foreign aircraft over their airspace, as for example the British Civil Aviation Act, and the United States Air Commerce Act. This dilemma has been adverted to as the conflict between *universality* and *nationality*. A draft covering crimes on board aircraft, to be useful, must not collide with the existing municipal legislation of the various States. Proposals which disregard internal legislation will never be universally accepted, no matter how alluring.

Fourth is the problem of the maritime analogy. To what extent should the rules covering crimes on board ships be applied to air law? That the analogy has been officially employed, regardless of how often criticized, is apparent in the air legislation of Great Britain, Spain and other European nations.

Fifth is the consideration of dynamics. When we realize that such an international airport as Idlewild, New York, where planes take off and land every three minutes of every day, and recollect that less than fifty years ago there was no controlled flight at all, we begin to grasp the fantastic development of the airplane as an instrumentality of transport. To be practical, to be effective, the method by which aerial activity is sought to be regulated, to wit air law, cannot remain static in such an essentially dynamic field. For example, when Fauchille submitted his draft covering crimes on board aircraft to the Institute of International Law, in 1910, the latest airplane was made of bamboo and varnished linen. It had a high speed of 42 miles per hour, a capacity of two people, two hours' gasoline supply and a ceiling of about 8,000 feet. Today, while lawyers still struggle to settle this problem uniformly, the cause of this dilemma has been transformed into a machine which can carry 150 passengers, at 50,000 feet, at speeds up to 600 miles per hour.

Finally, we must keep separate the question of applicable law and applicable jurisdiction. Because of the common law principle that no State will punish the violations of the criminal laws of another State, it is, for English jurists, fatally easy to think of these two questions as co-extensive.

With this background, let us refer back to the four categories of proposals for regulating crimes committed in the air. The writer is not in accord with those who have favored nationality of aircraft as the exclusive basis for prosecution. It is true that the nationality of ocean-going ships determines applicable jurisdiction for crimes committed on the high seas. Nationality of aircraft would, in a like manner, solve the problem of appropriate competence where the crime occurs on an aircraft *over* the high seas or non-appropriated territory, or, where, because of night or weather flying, the location in the airspace where the crime was committed cannot be pinpointed. Further, nationality of aircraft would have the advantage of subjecting passengers to only one set of laws and jurisdiction for the entire trip across, perhaps, many States.

But the relationship between an air traveller and his plane is more casual and transitory than that between a sea voyager and his ship. The crew and

passengers of a ship form a hierarchical society, where authority can be imposed and maintained, but air travellers are more like train commuters, confined basically to assigned seats. Further, it has been said that

the choice of a plane is a circumstance most often purely accidental and ought to have no effect on the juridical relation of the passengers.⁶⁶

The most serious objection to nationality of aircraft as the sole basis is the very tenuous connection this affords to a plane, halfway across the world from the State of the flag, flying foreign passengers. To require extradition from San Francisco to London, for a simple assault, because a Japanese en route from Tokyo to Washington assaulted another on board a British aircraft, is too cumbersome. Finally, as deVisscher pointed out, since ownership is the basis for nationality in many States, an Englishman domiciled in France for twenty years might thus be subject exclusively to English laws and courts everytime he took off at Calais in his private plane.

The extension of the territorial principle to crimes committed in a State's airspace is also inadequate as the sole basis. A crime may often be committed in the airspace over the high seas, or in the Arctic regions, to which no sovereign's control extends. Further, the subjacent State may often have no real interest in, for example, the theft of a wallet on board a plane high in the stratosphere, simply because that State's airspace happens to lie athwart the course line of the aircraft.

The place of landing, as the basis for prosecuting crimes in the air, does have many real advantages. Physical power over the accused lies within the State upon whose territory the accused alights and, therefore, this is the place where custody of the accused can best be secured and he can be most quickly prosecuted. However, the State of landing may not have sufficient interest in prosecuting. Where the nationality of the aircraft, the airspace where the offense occurred, and the nationality of the offender and the victim are all foreign to the State in which the plane lands, this system would be arbitrary. Further, most Anglo-American criminal laws do not have extra-territorial application. Where the crime is committed thousands of miles away from the State of landing, that State, if it followed the common law, might be made powerless by its own national laws to prosecute.

Therefore, the writer favors the fourth category, that of concurrent jurisdiction. The writer reached his conclusion by a process of elimination. (a) No single basis on which to support jurisdiction over crimes on board aircraft is sufficient. Neither territoriality, nationality, nor place of landing, standing alone will cover the many instances where the crime's connection with the one or the other basis is too thin to warrant punishment in the corresponding State. (b) Only nationality and territoriality are universally accepted bases

⁶⁶Coquoz, *Droit privé aérien*, 7 REV. GÉN. DROIT AÉRIEN 29, 34 (1938) (Writer's translation).

for criminal prosecution. Therefore, no international convention on crimes in the air should incorporate any other bases. Ever since Fauchille's 1902 draft, air codes proposed by such legal groups as the Comité Juridique, the Institute of International Law, and the International Law Association have included the principles of protection and passive personality as bases for criminal competence. As the United States never prosecute on those principles, and Great Britain only rarely for a few isolated types of crimes, such as treason, it would probably be unacceptable to these countries to have such principles embodied in international legislation.

This leaves us with a combination of the nationality and territorial principles. Nationality, despite its manifold deficiencies, is too firmly rooted to ignore. All State laws mentioned use nationality as a basis for jurisdiction over their aircraft, most of such legislation making a direct analogy to ships.

Territoriality is the prime basis for punishment of criminals in all civilized nations. It must be included. But, in deference to the increasingly amazing speed of the aircraft (our problem of dynamics) we must establish a fiction. This fiction is that the offense may be deemed to have been committed in the airspace of any State through which the aircraft travelled on its non-stop flight. Too frequent will be the case where the event constituting the crime cannot be isolated in point of time in retrospect. Because of weather, a pilot may not know where, on his course, he was at the time a crime occurs. Or, a passenger may know that his brief case was stolen on a particular flight, but not at what precise place in the journey. This problem has arisen with respect to ships and trains both in Great Britain and the United States. In construing the British Criminal Law Act which relates to offenses committed on journeys or voyages, an English judge said:

The object of the enactment is clear enough. If property is stolen during a journey, it may in many cases be quite impossible for the prosecutor to ascertain at what part of the journey the offense was committed. The statute, to get rid of that difficulty, provides that the offender may be indicted in any of the counties through which the carriage passed in the course of the journey.⁶⁷

In construing an Illinois statute which gave the right to try the accused in any county in which the offence was *alleged* to be committed, the court said:

Those who were on the train are, for the time being, completely segregated from the communities through which they are rapidly passing, and there is ordinarily no circumstance which can make it more advantageous for a person accused of such a crime to be tried in one county than in another.⁶⁸

The course of journey fiction is not only broader than the place of landing, but seems the best for such instrumentalities as the aircraft and train which customarily pass through the control of several sovereigns on one journey.

⁶⁷*Regina v. Sharp* (1854), 24 L.J.M.C. 40, 24 L.T. (o.s.) 170, 18 J.P. 743, 3 W.R. 21.

⁶⁸*Watt v. People*, 126 Ill. 9, 18 N.E. 340, 11 A.L.R. 1020 (1888), cited in Lambie, *Universality Versus Nationality of Aircraft*, 5 J. AIR L. 246, 281 (1934).

Besides reconciling with all national laws on this subject, nationality and territoriality, in concurrence, are the identical bases provided in Article 12 of the Chicago Convention for the control and prosecution of infraction to air rules. It was also the basis given in Article 25 of the 1909 Paris Convention. It is, in essence, the views of such eminent jurists as Lycklama, Hazeltine and Spaight. This writer does not favor a system of priority when two or more contracting states are eligible to request the extradition of an accused. Such an arrangement might hinder an offender's right to a speedy trial, as when the state with prior claim is dilatory or indifferent thereby retarding action on the application of other eligible states who might be more concerned with the prompt arraignment of the accused. The simplest and the best method, it is submitted, is to grant extradition to the first qualified state to petition for it.

In any convention on this subject which incorporates the concurrent jurisdiction theory, there should be an express negation of a second state's right to prosecute after one contracting state has brought the accused to trial. This, it is submitted, does not create international law, but simply spells out the existing practice of states.⁶⁹

In conclusion, no endeavour should be made to internationally legislate as to applicable law. Each State, when assuming jurisdiction, can best determine this problem by its own laws. The following is this writer's view of a proposed draft of an International Convention to govern crimes on board aircraft.

Article I. Definitions for the purpose of this Convention.

Aircraft means civil aircraft, and includes those instrumentalities enumerated in Annex 7 of the Chicago Convention, 1944.

Crime is an act or an omission to act which is made an offense by the law of the State assuming jurisdiction.

Jurisdiction is a State's competence to prosecute and punish for a crime committed on board an aircraft.

State means a member of the community of Nations.

Airspace has the same meaning it does in Article 1 of the Chicago Convention.

Article II. The jurisdiction of a contracting State extends to all aircraft which bear its nationality mark.

Article III. The jurisdiction of a contracting State extends to all aircraft within its territory and territorial waters and to the airspace above these regions.

For the purpose of conferring jurisdiction, the crime may be deemed to be committed in the airspace of any State through which the aircraft travelled from the first departure of the aircraft immediately preceding the crime until the first point of landing immediately subsequent thereto.

⁶⁹Cf. GIBB, INTERNATIONAL LAW OF JURISDICTION 285, 286 (1926).

Article IV. Where the accused is apprehended in a contracting State which will not or cannot assume jurisdiction, the accused will be delivered, if at all, to the first contracting State, eligible under Articles II and III, to formally request his extradition.

Article V. This Convention does not alter any bases for jurisdiction a State may have independent of Articles II and III.

Articles VI. Any person brought to trial by virtue of this Convention may not be retried for the same offense in the courts of another contracting State.