1971 PHILIP C. JESSUP INTERNATIONAL LAW

MOOT COURT COMPETITION

MEMORANDUM FOR JUDGES

This memorandum will be as brief and uncomplicated as the substantive issues of the problem will allow. This approach has been initiated because the 1971 Jessup problem has a relative dearth of applicable "law" in comparison with previous Jessup problems. It has been characterized by its author as a think piece, one that should involve the student participant in original and creative throught regarding the creation of effective legal methods to deter aircraft-hijacking. It must be kept in mind that this memorandum of law is not exclusive and is not a case book solution to the problem.

GENERAL PURPOSE OF THE PROBLEM

The problem is focused upon current attempts to control by legal means (whether multilateral convention or bilateral treaty arrangements), and by non-legal, community action, the forcible diversion of aircraft and their air crew and passengers from their original flight destinations.

At the core of the problem, of course, is the Tokyo Convention of 1963 which officially came into force between those states which had already ratified it, ninety days after the deposit of the twelfth instrument of ratification -- that is, in December, 1969. Article 6 of the Tokyo Convention gives the aircraft commander power to impose reasonable measures including restraint which are necessary to protect the safety of the aircraft or of persons or property therein, or to maintain good order and discipline on board. Article II of the same Convention imposes a duty on all contracting states to take all appropriate measures to restore control of a hijacked aircraft to its lawful commander or to preserve his control of the aircraft; and, in the event that a hijacked aircraft lands in their territory, contracting states are obligated to permit the aircraft's passengers and crew to continue their journey as soon as practicable, and to return the aircraft and its cargo to the persons lawfully entitled to possession.

In the specific fact-situation given in the problem, one immediate question is the legal responsibility and liability for actions of security guards placed on aircraft to prevent hijack-

ings. A further question is as to the control measures open to the country of nationality of an aircraft, once it has been hijacked: do these measures include the entry by armed planes into the national airspace of another country without prior permission, and what is the standard of liability, if any, if such control measures should cause loss of life or property damage within that other country?

Still further questions relate to the obligations of states once hijacked aircraft have landed in their territory. Are there general obligations, beyond those to be found in the Tokyo Convention, as to release of the air crew and passengers of hijacked aircraft, especially where these include international civil servants and diplomatic personnel? Are there, further, obligations to permit the extradition of hijackers of aircraft particularly where no attempt is made to prosecute them criminally under the municipal law of the country in which they have landed? This particular question raises, of course, the ambit of the "political exception" to demands for extradition from one country to another, and the question whether there are any limits established by general international law to the characterisation of any act or acts as "political."

A further gloss in the problem is as to private (non-governmental) responses to a hijacking, and as to the legal responsibility of individual national governments for any such actions on the part of their citizens or private associations, especially where such actions involve interferences with what might be called international "essential services" like the posts.

Finally, the problem includes, in addition to any general obligations imposed under the Tokyo Convention or under general international law, a species of more limited, bilaterally-imposed obligation, two of the parties having concluded a "Canadian" bilateral agreement conditioning, under certain circumstances, the mutual conferment of landing rights and other facilities upon adherence to and performance of the obligations of the Tokyo Convention of 1963.

A reasonably full documentation of and commentary on the relevant international law provisions as to illegal diversion of aircraft may be found in the appendices and supporting documents to the just-published Provisional Report of the Institut de Droit International's Eighteenth Commission (Illegal Diversion of Aircraft).

Lastly, certain questions to which the students should nec-

essarily direct themselves to after their presentation of the legal arguments applicable to the facts of the problem situation are as follows:

1. To what extent,if at all, is the existing international law of piracy (whether customary international law, or conventional, treaty law) applicable to the act of hijacking of an aircraft in its contemporary manifestations?

2. Does the Tokyo Convention of 1963, as it now stands - assuming, of course, some more general, near universal, signature and ratification of that convention in the future - provide adequate international controls for the problem of hijacking of aircraft? If not, then what substantive provisions should any such special protocol or further convention contain?

3. In particular, who should have jurisdiction over the hijacking? The state of registration; the state in whose airspace or on whose territory the hijacking occurred; the state in whose territory the hijacked aircraft landed; the individual states of nationality of the members of the air crew and of the passengers of the hijacked aircraft? Should such jurisdiction be concurrent, or should one or more of the foregoing states be given priority regarding prosecution?

4. Should the international law as to hijacking include specific provisions requiring the state where the aircraft lands to apprehend the hijacker and either prosecute or extradite him?

5. Should extradition be automatic, once a request is made by a state having jurisdiction; or should such request for extradition remain subject to a "political exception" in favor of bona fide requests for political asylum? If differentiations between hijacking and extradition is desired, what arguments can be made against claims of political asylum as a human right, advanced by, or in behalf of, hijackers?

6. Do you consider that the problem of hijacking lends itself to solution by international law (whether international legislation, conventions, and the like, or customary international law; or do you think, rather, that under present political conditions it can only be effectively controlled by national legislation or by action of private, non-governmental associations and groups such as IATA, IFALPA, for example)? If the latter, do you see any special problems of international law involved in any such private, non-governmental action?

JURISDICTION

Aegea can claim jurisdiction of the hijackers because it is a signatory of the 1963 Tokyo Convention. It is the state of registration of the aircraft under Chapter II, article 3, section I. Franconia in reply to Aegea's claim can argue that since it, Franconia, has not ratified the 1963 Tokyo Convention it is

not bound by the provisions of that Convention. This is in spite of the fact that under its 1966 bilateral air agreement with Aegea it is expressly bound by that agreement to observe the conditions and obligations imposed by it. This particular arguments gains its support from the fact that Franconia submitted a statement of understanding to Aegea at the signing of the 1966 agreement nullifying its obligations under the 1963 Tokyo Convention until it ratified it. Franconia's view is identical with the traditional English view as expressed in Malkins, Reservations to Multilateral Treaties 7 B.Y. 141,162 (1926) an McNair, The Law of Treaties, at 160 (1961).

Aegea can produce support for the opposite principle, namely, assent needs expression for a reservation to become effective. This view is expressed in Hackworth, Digest, V. 482 entitled Reservations at the Time of Ratifying Multilateral Treaties. McNair at 159 of the above cited book states that this principle is equally applicable to bipartite treaties. Finally, Aegea can cite Whiteman, Digest of International Law, 188, § 21 for the proposition that Franconia by agreeing to be governed by the dispute settlement procedure of the 1963 Tokyo Convention in regard to offenses prohibited by that Convention is, in fact, obligated to observe that Convention since its raison d'etre is to provide for peaceful settlement of disputes such as the present one.

Under the nationality concept of jurisdiction, Barcelona can advance a justifiable claim to jurisdiction since the hijackers are Barcelona nationals, the diplomatic personnel being detained by Franconia are Barcelona nationals, and lastly, because one of the murdered guards was a Barcelona national. (Rest. II, For. Rel. Law of the U.S. §10, para. b, 1965).

The protective and universal concepts of jurisdiction can also support a claim of jurisdiction on behalf of Aegea and Barcelona. (Rest. II, For Rel. Law of the U.S. §33, 1965). The particular state interests involved here are freedom of movement and the necessity of a free flow of commerce. The latter principle, universality has been strongly advocated as the proper specie of jurisdiction as witnessed by the remarks of the members of the 18th Commission of the Institut de Droit International - Hijacking: they favored universal jurisdiction in hijacking situations because this act is analogous to "infractions graves" as found in the four 1949 Geneva Conventions (46 A.J.I.L. 393, supp. 1952). The members also felt that such jurisdiction was in order since universal jurisdiction is a practical reality when general interests protected by international law such as piracy and interference or damage to means of international communication are involved. Further support for this position can be found in 9 Col. J. Trans. L. 1 (1970) where it is argued that aircraft-hijacking is analogous to the

crime of genocide as defined in the Genocide Convention of 1948; therefore, jurisdiction and punishment should also be identical.

Franconia in rebuttal may argue that neither of the above two principles is applicable here because the act of hijacking cannot be equated with the act of piracy as defined in the 1958 Geneva Convention on the High Seas since they are in a technical sense completely different (9 Col. J. Trans. L. 1, 4-5, 1970). The analogy to genocide can also be rebutted simply because there has yet been no formal convention explicitly equating the two crimes and furthermore, there has not been even an unofficial statement of universal agreement regarding the severity of the crime. Lastly, in regard to the protective principle, it can be argued that neither the security of Aegea and Barcelona nor a governmental function has been seriously threatened since only a civil aircraft is involved not a state aircraft. (Rest. II, For. Rel. Law of the U.S., §33. 1965).

Eden, though not a party to the action, nevertheless, could validly claim jurisdiction in accordance with the normal conflict of laws rule, lex loci delicti, since the diversion of the aircraft and the murder of the two security guards occurred in Eden airspace (109 Recueil de Cours II, 263; 2 Annals of Chin. Soc. Int'l. L. 37, 1965).

Two other items should be mentioned. The "law of the flag" concept will not confer jurisdiction upon Barcelona because dual nationality of aircraft is not permitted under article 18 of the 1944 Chicago Convention (15 U.N.T.S. 295, T.I.A.S. 1591, stat. 61:1180). A related concept, notwithstanding the above prohibition, the "effective link" concept would probably not suffice either since Aegea would seem to have the most effective links.

EXTRADITION

Barcelona can claim a right of extradition by virtue of the 1933 Barcelona-Franconia Extradition Treaty which is set out in full on page 3 of the problem. Under that treaty Barcelona can assert that, since the hijackers murdered the two security guards, section 1 of the treaty provides a justification for extradtion. Section 4 could also be claimed as a basis for extradition, since an aircraft could be considered a vessel or a means of transportation which logically must be included within this section (10 W.&M. L. Rev. 820, 1969).

Franconia can argue that the offense charged, and the one for which extradition is sought - aircraft hijacking - is not an extraditable offense under the 1933 treaty since it is not specifically stated. The treaty in the problem is based on the bilateral extradition treaty between Cuba and the United States of

1905 as modified in 1926. Therefore, all of the available literature regarding the U.S.-Cuba treaty is relevant. The majority of this material is contained in 10 W.&M. L. Rev. 820, 1969. The general conclusion of the author is that the treaty with Cuba is unworkable as it relates to the offense of aircraft-hijacking. Franconia can also assert that a workable extradition treaty presupposes diplomatic relations. Since Barcelona severed diplomatic relations with Franconia in January, 1969, the operation of the treaty, for all practical purposes, can be said to be suspended.

Aegea can claim extradition of the hijackers under the 1963 Tokyo Convention because it is the state of registration of the aircraft. Extradition of a hijacker under this approach would still be problemmatical since there is no consensus of opinion as to whether, under customary international law, acts occurring on board an aircraft in the airspace of another state are subject to the jurisdiction of the state of registration (30 J. Air L. & Com. 305, 351 (1964); 58 Geo. L. J. 1135, 1138 (1970).

Even though a political exceptions provision is present in the treaty, Aegea and Barcelona can argue it should not be applicable because of the nature of the delict. Support for this contention can be drawn from the 1937 Convention for the Prevention and Repression of Terrorism and the Genocide Convention of 1948. In the latter convention, article VII states that genocide and the other acts enumerated in article III "shall not be considered as political crimes for the purpose of extradition." Furthermore, article 14 of the Universal Declaration of Human Rights affirms that the right of asylum cannot be invoked in the case of prosecutions arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. Lastly, the power to grant political asylum is limited, especially in those cases where the persons seeking asylum have violated the common interests of the world community. The analogy to be drawn is, of course, that aircraft-hijacking is such a serious crime that it should - and arguably is - to be considered a crime against humanity (U.N. Press Release WS/477, 11/20/70 and U.N. Press Release WS/478, 11/27/70).

The members of the Eighteenth Commission of the Institut de Droit International have also raised the argument of the principle of proportionality. They have asserted that, according to this principle, the "right" of asylum for those who commit acts of aerial hijacking is certainly inferior to the rights of free circulation in air travel. An argument from the principle of jus cogens has been advanced by members of the 18th Commission. It is that criminal acts of this nature should be considered as violating the most elementary principles of humanity, morality, and law; and that, therefore, rules regulating this matter should be counted among the "imperative rules" of international law, and thus binding also on states that re-

fuse to ratify or adhere to any convention on the subject - this in accord with the World Court's opinion on the Reservations to the Genocide Convention.

Franconia can assert that first, aircraft-hijacking is not specifically mentioned as an extraditable offense in the 1933 treaty. There is a provision for extradition in the case of robbery or kidnapping and these two offenses, as defined in the treaty, are possibly broad enough to apply to the facts found in most aircraft piracy situations. But the crime for which extradition is requested is aircraft-hijacking, therefore, these two bases will not permit extradition.

In the alternative, Franconia can argue that even if aircraft-hijacking be deemed an extraditable offense, it can refuse extradition under the express terms of the 1933 treaty. The political exceptions provision provides support for this position. Lastly, Franconia can argue that even if it is bound by the 1963 Tokyo Convention, articles 11 and 13 impose no obligation upon it to either prosecute or extradite the hijackers. This last argument will effectively eliminate Aegea's claim under the 1966 bilateral agreement that Franconia must prosecute Bossner and Bosch, and Barcelona's demand for extradition under the 1933 Extradition Treaty.

DIPLOMATIC PRIVILEGES AND IMMUNITIES

The detention of Baramozov and Boerr by Franconia is a violation of the 1961 Vienna Convention on Diplomatic Relations. Article 40 states: "If a diplomatic agent passes through or is in the terrotory of a third state, which has granted him a passport visa if such a visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return..." (Whiteman, Dig. Int'l. L., Vol. Vii, §10). This is applicable to Mr. Boerr. Franconia can assert that the fact that Mr. Boerr was on a flight from Aegea to Damascus clearly shows that he does not fit within this provision of the 1961 Geneva Convention. In fact, it could be justifiably stated that he comes within the exception to that provision, namely, the diplomatic agent vacationing in a third state or present there for personal reasons is not and should not be entitled to any special privileges and immunities (DOS, letter of 4/9/64, file POL 17-2 US). In rebuttal to this position, there is support for the view that in spite of this technicality, the true international rule would be that the ambassador should be allowed in all cases the jus transitus innoxii (Hershey, Diplomatic Agents and Immunities, 18, 1919).

Mr. Baramozov, an employee of the United Nations, is a special case. Under article IV of the General Convention on Privileges and Immunities of the United Nations, the detention of Bara-

mozov by Franconia is an express violation of Franconia's duties as a U.N. member. A closely analogous case is the Guinea-Ivory Coase Dispute of 1967 (Whiteman, Dig. Int'l. L., Vol. XIII, §9, p. 129-131). This is an excellent precedent for a judgement in favor of Barcelona on this particular issue. Franconia could lastly argue that, at least as regards Boerr, it is not a signatory of the 1961 Vienna Convention on Diplomatic Relations, therefore, it is under no duty to Mr. Boerr. While this is true under the facts of the present case, the Secretary General's remarks regarding article 40 of the 1961 Geneva Convention in the Guinea-Ivory Coase dispute are pertinent. He states that "the Ivory Coast's actions appear to be contrary to the general principle of international law embodied in article 40."

Lastly, Barcelona can argue that irregardless of the above Conventions, Baramozov and Boerr should not have been detained. They should have been released immediately by Franconia since it is universally recognized that governments may not be hampered in their foreign relations by the arrest or forcible prevention of the exercise of a duty in the person of a governmental agent or representative. Barcelona can argue that Franconia's actions are exactly the type which have been comdemned time and again by such organizations as the U.N. and O.A.S. as witnessed by the recent Inter-American Juridical Committee's draft convention on Terrorism and Kidnapping (9 ILM 1177, 1970).

ECONOMIC SANCTIONS AND THE A.A.P.A.

The AAPA is a state funded and chartered organization of Aegea, therefore, arguable, its actions are those of the Aegean government. But Aegea can assert that, since the AAPA is a member of an international organization, IFAPA, its actions are independent of Aegean governmental policy. Analogous retaliatory action was taken by Guinea against the Ivory Coast (detention of Ivory Coast nationls until the release of Guinean diplomatic personnel by the Ivory Coast) in the incident referred to earlier.

Furthermore, Aegea can contend that the AAPA, by calling for a boycott against Franconia, was merely attempting to bring some type of order to a chaotic situation. Its actions can be said to merely reflect the present state of ineffectiveness of international law to deter aircraft-hijacking and the other implications which arise in this problem. It has been stated that "no nation is immune from being the victim of air piracy. Thus, it would seem to be in every nation's interest to become a party to a multilateral agreement which presents a united deterrence to hijacking. Until now most nations, or at least their ruling elites, have subordinated the threat of air piracy to consideration of national sovereignty and individual determination of political asylum. The Federation of Pilots may hold the power to make it very costly for a nation to neglect to reorder individual national priorities in favor of consdierations of safety of their nationals as air passen-

gers" (Air Piracy: The Role of the International Federation of Air Pilots Association, Corn. Int'l. L.J., 1970).

Lastly, it may be argued by Aegea or the AAPA that pilots as a group, with the exception of commercial passengers, are most deeply affected by such actions. Malik, in an article in 9 Ind. J. Int'lL. L. 61, 69, 1969, states; "At the 24th Conference of The International Federation of Pilots Associations held at Amsterdam in March, 1969, the pilots voiced their frustration over the failure of governments to curb aerial piracy and urged the adoption of strong measure to safeguard air traffic. They also threatened boycott of the State which refuses to release the crew of hijacked aircraft. It might be mentioned that it was such a threat which forced the Algerian government to release the crew of a hijacked Israeli airliner." Also, the threat of a selective boycott was partly responsible for the release of an airliner hijacked to Syria in August, 1969.

Franconia can advance numerous arguments to rebut those advanced by Aegea and the AAPA. First, the AAPA has such a direct relationship with the Aegean government that, pragmatically, direct state action is involved here. Franconia can further argue that under Chapter VI of the U.N. Charter, article 33, Pacific Settlement of Disputes, Aegea and Barcelona did not follow the proper procedure as provided for in article 33. Instead, they made certain demands, and when they were not accepted, Aegea, through its state agency, AAPA, instituted coercive measures in the form of economic sanctions. This latter action arguably is a violation of articles 39 and 41 of the U.N. Charter. Article 39 specifically provides that the "Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42 to maintain or restore international peace and security." This language is obligatory. Therefore, Aegea's actions in allowing the AAPA to selectively boycott Franconia and to call for and gain practically total compliance with its request from the IFAPA should be considered a violation of the U.N. Charter by Aegea.

Franconia can also raise two other very important considerations: 1) that the selective boycott here imposed by the AAPA has caused unjustifiable chaos within Franconia and 2) the effectuation of a successful strike is illegal since the AAPA and IFAPA can be said to be in the analogous position of public service employees in the United States. Lastly, Franconia may assert that it is immaterial whether the boycott is legal or illegal. The withholding of medical supplies is a violation of the human rights of Franconia's citizens and the withholding of mail is a violation of Aegea's obligations under the Universal Postal Union, article 34 (169 U.N.T.S. 3, T.I.A.S. 2800).

Aegea, if the above arguments are raised, can respond in the following manner: First, it may argue that if the AAPA's actions are considered to be governmental action, then such actions are not a violation of its, Aegea's, U.N. charter obligations since retortion or reprisal are examples of legal measures short of war (Hyde, Int'l. law 1656, 1945). Secondly, article 51 of the U.N. Charter is related to the actions here by analogy to its use by the U.S. in justification of its quarantine of Cuba in 1961 (57 A.J.I.L. 592, 1963). By analogy, the hijacking of an Aegean registered aircraft, detention of Aegean nationals, detention of Barcelona diplomatic personnel, the destruction of the aircraft, the refusal of Franconia to either prosecute or extradite the hijackers, members of a revolutionary group in Barcelona, and, lastly, the strained relations between Barcelona and Franconia over Bemen province, the present situation could be deemed to be a threat to the international peace and security of the states of Aegea and Barcelona. In this situation, Aegea arguably has the inherent right to defend itself from further quasi-hostile actions. It has, therefore, defended itself with actions short of war, namely, economic sanctions. Lastly, Aegea's actions as viewed in the context of the problem, have been arguably entirely proper. The status quo generally has been preserved and peaceful negotiations and arbitration were instituted which proved fruitless. Consequently, the matter has now been referred to the ICJ. It can, therefore, be said that the actions taken by Aegea were merely those which were expected to and should produce a peaceful settlement of the dispute. In this progression of thought, even Aegea's withholding of mail may be justified. The U.N., if it sees fit, can suspend all mail service into a particular country. Aegea, therefore, as a member of the U.N., should be in the position to institute the same actions, if necessary, to bring about a desired U.N. result.

INVASION OF AIRSPACE - LIABILITY FOR DAMAGE

Every state has complete and exclusive sovereignty over the airspace above its territory. Consequently, no aircraft is normally entitled to enter the airspace above the territory of a foreign state without the latter's express permission. This seems to be a universally recognized right of a state and it was further strengthened by the 1944 Chicago Convention which reaffirmed this principle. The 1944 Chicago Convention made no provision concerning the privileges of intruding aircraft while in foreign territory on authorized or unauthorized visits. Franconia is, therefore, in the position to argue that the invasion of its sovereign airspace by Aegea and Barcelona was without permission. Therefore, a clear violation of its sovereign rights occurred. Furthermore, since Franconia had no way to apprehend or intercept the invading aircraft and since extensive personal and property damage resulted from this unjustified and illegal intrusion, Franconia's detention of the national of Aegea and Barcelona is completely justified. It is justified due to the amount

of damage incurred by Franconian nationals and industry.

Aegea and Barcelona have no apparent authority to justify their intrusion into Franconian airspace. Neither state had express authorization from Franconia for flights other than civil aircraft and neither state's aircraft were arguably victims of a force majeure. In regard to the hijacked aircraft itself, Aegea can argue that the entry of the hijacked aircraft was due to distress. The intrusion was not deliberately caused by persons in control of the aircraft and there was no reasonably safe alternative but to fly into Franconia. In this situation, Aegea can contend that the aircraft and its occupants may not be subjected to penalties or to unnecessary detention by the territorial sovereign for entry under such circumstances (Lissitsyn, 47 AJIL, 559, 588, footnote 105, 1953). This is in opposition to the argument that could be advanced by Franconia that intruding aircraft, whether military or not, and whatever the cause of the intrusion, are generally not entitled to the special privileges and immunities customarily accorded to foreign warships. They and their occupants may be penalized by the territorial sovereign for an intrusion not privileged by reason of distress or mistake.

CONCLUSION

These are the bulk of the arguments that can be raised. There is a reference to the Barcelona Traction situation in the first paragraph of the problem. The aircraft is owned by an Aegean corporation with 55% of its outstanding stock owned by Eden nationals. This is identical with the Barcelona Traction case where the majority of the stock was owned by Belgian nationals and the corporation was incorporated in Canada. The Court in Barcelona Traction first addressed itself to the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company incorporated in Canada, the measures complained of having been taken not in relation to any Belgian national, but to the company itself. In the context of the problem, the above is not the case since Aegea, the state of incorporation, is bringing the claim in behalf of the corporation and not in behalf of the shareholders.