

## CHAPTER ONE

### INTRODUCTION

‘Fifty years ago the idea that aircraft might become a field for the application of the Criminal Law would have seemed fanciful. Even thirty years ago our legislators would have thought it premature to contemplate legislation on the subject. A dozen or so people, probably all men, flying together for an hour or two in conditions of discomfort would hardly have had either the opportunity or the vitality to be otherwise than law-abiding. But now we have one to 200 people flying together, commonly for four to seven hours, at times for 12 to 15 hours. They fly in conditions of security and comfort (*sic*). They have room to move about (*sic*). They include both sexes. They are plentifully supplied with alcoholic stimulants and the purely statistical chances of abnormal behaviour are obviously greatly increased. Moreover, aircraft pass rapidly over frontiers which on land may be carefully controlled. They offer great opportunities for the transfer from one country to another, possibly a thousand miles or more away, of commodities for which a high price will be paid and which cannot pass to their most profitable market by land or sea: things such as gold, drugs, diamonds, secret plans and designs. It is very tempting for passengers on these aircraft and for their crews to undertake or lend themselves as accessories to these trades. So crimes may be committed on aircraft and aircraft may be used for unlawful activities.’<sup>1</sup>

1. Lord Wilberforce, as he later became, was writing in 1963 about ‘ordinary’ crimes committed on aircraft and the legal complications they were producing. Soon, further problems were to arise with the advent of widespread and persistent terrorist crimes against aircraft. Although terrorism today now takes many forms, it was terrorist attacks against civil aircraft, particularly hijacking, which prompted States to begin to devise means to prevent terrorist crimes and bring terrorists to justice. We will therefore begin by outlining the history of the twelve universal<sup>2</sup> counter-terrorism treaties – seven ‘Conventions’, three ‘International Conventions’ and two ‘Protocols’ (hereinafter, simply, ‘conventions’),<sup>3</sup> and explaining some of their most important common features. The conventions are:

Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963 (‘Tokyo Convention’)

Convention for the Suppression of Unlawful Seizure of Aircraft, 1970 (‘Hague Convention’)

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971 (‘Montreal Convention’)

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Montreal Convention, 1988 (‘Montreal Protocol’)<sup>4</sup>

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<sup>1</sup> R. Wilberforce: ‘Crime in Aircraft’ (1963) 67 *Journal of the Royal Aeronautical Society*, p. 175.

<sup>2</sup> ‘Universal’ does not mean that all States are bound by them, merely that they are open to all States in the hope that all States will eventually become bound by them.

<sup>3</sup> ‘Treaty’ is the generic term, and some treaties are even called ‘Treaty’, but the most common names are Agreement, Convention and Protocol. ‘International Convention’ is just another name; they are all international.

<sup>4</sup> Although adopted long after the Montreal Convention, since it is intimately linked to the Convention, the Protocol will be discussed immediately after the Convention.

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973 ('Diplomats Convention')

Convention on the Physical Protection of Nuclear Material, 1979 ('Nuclear Convention')

International Convention against the Taking of Hostages, 1979 ('Hostages Convention')

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 ('Rome Convention')

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988 (Rome Protocol')

Convention on the Marking of Plastic Explosives, 1991('Explosives Convention')

International Convention for the Suppression of Terrorist Bombings, 1997 ('Bombings Convention')

International Convention for the Suppression of the Financing of Terrorism, 1999 ('Financing Convention').

### **The terrorist threat**

2. States focused first on attacks on air travel. Since the passage quoted at the start of this chapter was written forty years ago, the notion of crime on board aircraft has become all too familiar. The vast expansion in the volume of international air traffic greatly increased the incidence of criminal conduct on board aircraft, including that late 20<sup>th</sup> century phenomenon, 'air rage'. Moreover, aircraft are no longer merely the stage for criminal activities; they have become their target, and on 11 September 2001, the very means itself. The unlawful seizure of aircraft, happily less today, was once commonplace. The very nature of international travel by air - the carriage of large numbers of persons in a confined space, through the territorial airspace of many States and outside the territory of any State, on board aircraft purchased at enormous expense - renders aircraft, their passengers and crews particularly susceptible to terrorist and other criminal activities. Furthermore, the easy mobility of aircraft may enable hijackers to escape to a State whose government is sympathetic to their cause, or just spineless, thereby evading arrest and punishment. Until 2001 perhaps the most frightful development had been politically-motivated sabotage of large airliners resulting in their destruction and great loss of life. Today, the dangers from all forms of terrorism remain fearfully great. In concluding several multilateral treaties to combat terrorist activities States have had to overcome the legal difficulties which inevitably arise when the interests of a large number of States are actually or potentially involved.

### **The sectoral, segmental or incremental approach**

3. Because of the continuing lack of international agreement on a definition of terrorism, it has not been possible to adopt a treaty covering all its forms.<sup>5</sup> Each of the conventions therefore focuses on a particular form of terrorism which States regard as unacceptable because, irrespective of who commits them or their reasons, they involve acts so evil that no State was brave, or unwise, enough to seek to justify them, at least on the international legal stage. Ten of the conventions deal with the prosecution of terrorist offences. The other two are usually included and so make up the twelve. The Tokyo Convention is included even though it has more to do with filling the jurisdictional gaps which used to exist over crimes

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<sup>5</sup> A proposed Comprehensive Convention on Terrorism is still being negotiated in the United Nations, but the discussions are beset by political problems, in particular how to define terrorism.

committed on board aircraft. It is included more because one provision (Article 11) deals with hijacking, and some other provisions were later used as the basis for provisions of the terrorism conventions proper. The Explosives Convention has no penal provisions, but is included because it is significant for the prevention of terrorism.

4. The principal purpose of this publication is to examine the *legal* problems which call for international action, and to explain the ways in which the conventions attempt to solve them.

### **Jurisdictional problems**

5. The basic problem encountered when seeking to regulate conduct, and especially criminal conduct, on board an aircraft or ship, or otherwise, is one of jurisdiction. It is therefore convenient to consider first the nature of criminal jurisdiction and the different senses in which the term is employed. There are three different concepts<sup>6</sup>

- (i) Prescriptive jurisdiction: the power of a State to make legal rules;
- (ii) Enforcement jurisdiction: the power of a State to enforce legal rules by executive action;
- (iii) Judicial jurisdiction: the power of the courts of a State to apply legal rules and punish their contravention.

Enforcement jurisdiction is almost exclusively restricted to the territory of the State, since generally no State may enforce its laws outside its territory, or against the ships or aircraft of another State, without consent. Prescriptive jurisdiction, which defines the ambit of the criminal law of a State and its power to characterize conduct as lawful or unlawful, is not so limited and there are many examples of States prescribing rules for the conduct of their nationals abroad. In practice, prescriptive jurisdiction will often be closely bound up with questions of judicial jurisdiction. In considering whether a court can exercise criminal jurisdiction in a particular case one must find out whether the conduct constitutes an offence contrary to the law of the State (see also paragraph 10 below).

6. The exercise of criminal jurisdiction by States is often explained in terms of certain factors that link the conduct and the State exercising jurisdiction. Common law systems generally claim to prescribe and enforce criminal law on grounds of *territoriality* i.e. the conduct took place in the territory of the State. For this purpose, vessels and aircraft registered in a State are often assimilated to the territory of that State. But, territorial jurisdiction may also be exercised under the *subjective* and *objective* principles of territoriality that can apply when activities take place partly in the territory of one State and partly in the territory of another. The State where the conduct is initiated exercises jurisdiction on the basis of subjective territoriality, and the State where the conduct is completed exercises jurisdiction on the basis of objective territoriality, provided that the conduct constitutes a criminal offence in the law of each State if performed there in its entirety, and if an element of the *actus reus* of the offence took place there. These extensions of territorial jurisdiction are frequently encountered in common law systems, and are often bound up with notions of constructive presence.

7. Complementing these bases of jurisdiction are various types of *extraterritorial jurisdiction*. The *principle of nationality*, whereby States exercise jurisdiction over the

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<sup>6</sup> See further M. Shaw, *International Law* (4<sup>th</sup> ed., Cambridge, 1997), pp. 452-478.

conduct of their nationals, wherever it takes place, is particularly favoured by civil law systems, but it is increasingly invoked in common law jurisdictions. States sometimes also exercise criminal jurisdiction on the ground that their nationals are the victims of the crime (*passive personality principle*), or that the crime imperils the vital national interests of the State (*protective principle*), or, occasionally, that the effects of conduct abroad are experienced within the territory of the State (*effects principle*).

8. Furthermore, certain crimes, such as piracy and war crimes, are regarded as so inhuman and prejudicial to the interests of all States, that any State may exercise jurisdiction over them, wherever they take place and whatever the nationality of the alleged offender (*universal jurisdiction*). So-called *quasi-jurisdiction* is discussed at paragraphs 15 and 16 below.

9. These jurisdictional principles are useful in describing the grounds on which States normally claim to exercise jurisdiction in the absence of a right to exercise jurisdiction conferred by treaty. However, it should not be supposed that an exercise of extraterritorial jurisdiction is permissible in international law only if it can be accommodated within one of these established categories. International law does not prohibit States from extending the application of their laws and the jurisdiction of their courts only if this can be justified by reference to a permissive rule of international law. On the contrary, international law leaves a good measure of discretion to States. We shall see that the conventions which seek to establish a uniform approach to terrorist offences require States to establish their jurisdiction in some circumstances where there are present none of the traditional jurisdictional linking factors. Nevertheless, the exercise of jurisdiction in the circumstances contemplated by the conventions has been accepted by States as entirely in conformity with international law.

10. A further important, technical note of caution must be sounded. The jurisdiction of a State's courts and the ambit of its laws are inseparably bound together, for unless the *criminal law* of a State extends to conduct outside its territory, for example, on board a ship registered with the State when on the high seas, conduct cannot be characterised as unlawful, and consequently there is no offence over which the courts of that State can exercise jurisdiction. There is therefore a vital need to ensure that a State's laws (not just its jurisdiction) extend to conduct on board its registered ships and aircraft, and that its courts are competent to exercise jurisdiction over infringements of those laws (see, for instance, clause 3 of the model Bill at page 40 below).<sup>7</sup>

11. Each of the conventions has to deal with these jurisdictional difficulties. For example, the Tokyo Convention requires each Party<sup>8</sup> to extend its jurisdiction over offences

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<sup>7</sup> In *R. v. Martin* (1956) 2 Q.B. 272, the accused were charged with being in possession of raw opium on board a British-registered aircraft flying between Bahrain and Singapore. Devlin J. (as he then was) held that under the relevant drugs legislation the offence could be committed only if the acts constituting the offence were committed in England. He considered that Section 62, Civil Aviation Act, 1949 (which provided that any offence whatever that is committed on a British aircraft shall, for the purpose of conferring jurisdiction, *be deemed to have been committed in any place where the offender is for the time being*) did not create offences or extend the ambit of existing criminal laws. Instead the Act merely provided the place where an act might be tried *if it was an offence if committed on board a British aircraft outside England*. Since the ambit of the drugs legislation under which the accused were indicted did not extend to the circumstances in which the particular act was committed, there was no offence over which the English courts could exercise jurisdiction. The vacuum in English law exposed by this judgment was later remedied.

<sup>8</sup> The conventions speak of 'Contracting State' or, more often, 'State Party'. The legally-correct term is

committed on board aircraft registered in that State. The Hague and later conventions come close to establishing universal jurisdiction over various terrorist acts. The conventions also make detailed provision for extradition thereby considerably reducing the risk that offenders will escape arrest and punishment. Apart from Tokyo and Explosives, the conventions, although by no means identical, contain these and certain other common provisions, the most important of which will now be described.

### **Definition of the offences**

12. Although each convention requires the parties to legislate for the offences defined in it, many will already be crimes under existing law, such as murder, causing explosions, kidnapping. (For extra clarity, the offences will sometimes be referred to in this publication as ‘Convention offences’.)

### **National liberation movements**

13. None of the conventions make any exception for acts done in furtherance of the aims of national liberation movements (NLMs). In the case of the Hostages Convention there were proposals to limit the protection of the Convention to ‘innocent’ hostages, and to justify the taking of hostages in certain situations, such as by national liberation movements (NLMs). These were not accepted. However, unique among the conventions, the Hostages Convention has, in Article 12, a provision concerning the relationship with the Geneva Conventions 1949 (and the 1977 Additional Protocols thereto).<sup>9</sup> This excludes from the scope of the Convention hostage-taking when it is a ‘grave breach’ of the Geneva Conventions, and for which the Parties to those Conventions have an obligation to prosecute or extradite. Unfortunately, the tortuous language of Article 12 - in particular the last few lines - has led some over-optimistic writers into the mistaken belief that hostage-taking by NLMs is legitimised by the Convention. That is wrong. The effect of the article is simply that in certain circumstances where an alleged offender can be prosecuted for a war crime pursuant the Geneva Conventions, he cannot be prosecuted for an offence under the Hostages Convention.<sup>10</sup>

### **Preparatory acts, ancillary offences and conspiracy**

14. Preparatory acts are not included in the conventions, unless they amount to an attempt to commit, or complicity in, an offence. The conventions therefore reflect the common law principle, which is similar to those in other legal systems, only the precise application of the principle varies.<sup>11</sup> The offences under the conventions include attempts and being an accessory or accomplice, though the formulas vary slightly. It is unclear whether the concept of complicity is wide enough to embrace conspiracy. Thus, beginning with the Terrorist Bombings Convention 1997, the concept of conspiracy was added, or at least made explicit;

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simply ‘Party’, which is defined in Article 2(1)(g) of the Vienna Convention on the Law of Treaties 1969 as ‘a State which has consented to be bound by the treaty [i.e. has ratified or acceded], *and for which the treaty has entered into force*’. Properly used, the term ‘Contracting State’ refers to a State which has consented to be bound, but for which the treaty may not yet be in force. ‘State Party’ adds nothing.

<sup>9</sup> 75 UNTS 3 (Reg. Nos. 970-3); UKTS (1958) 39 and 1125 UNTS 3 (Reg. No. 17512); UKTS (1999) 29 and 30.

<sup>10</sup> See J. Lambert, *Terrorism and Hostages in International Law* (Grotius, Cambridge, 1990), pp. 263-298. *He* does not fall into the trap.

<sup>11</sup> But see, for example, the substantive offence of possession of an article in circumstances which give rise to a reasonable suspicion that its possession is for a purpose connected with, inter alia, the preparation of an act of terrorism: (UK)Terrorism Act 2000, section 57.

and the Terrorist Financing Convention 1999 made a clearer distinction between the civil law concept of *association malfaiteur* and the roughly similar common law concept of conspiracy.<sup>12</sup>

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All but the Tokyo and Explosives Conventions have at their heart the crucial principle that an alleged offender must not find a safe haven in the territory of any Party, whatever his nationality or wherever the offence was committed. This is done by three means: establishment of quasi-universal jurisdiction, the *aut dedere aut judicare* rule (so-called ‘extradite or prosecute’) and more effective extradition provisions.

### **Quasi-universal jurisdiction**

15. A Party must establish its jurisdiction over the offences defined in each convention if they are committed in its territory or, generally, by one of its nationals abroad or on board a vessel or aircraft registered with it. Other bases for jurisdiction are also to be found. To ‘establish jurisdiction’ means that, under its domestic law, a Party must be able to deal with an alleged offender. It has sometimes been asserted that the obligation to establish jurisdiction means that a party must also *exercise* that jurisdiction. That is wrong. All that is required is that the domestic law must *enable* the alleged offender to be detained and, if appropriate, extradited or put on trial.

16. Beginning with the Hague Convention, even when neither the crime nor the alleged offender has any connection with a Party, it must nevertheless ensure that it has jurisdiction over the offence if the alleged offender is ‘present [or found] in its territory’. It is then able to detain him and, if appropriate, prosecute him, if it does not extradite him to another Party in accordance with the *aut dedere aut judicare* rule (paragraph 22 below). Acts of piracy and war crimes can be tried by any State since they are regarded as the concern of all States and are therefore subject to universal jurisdiction. Jurisdiction is termed ‘quasi-universal’ when it has the same purpose as universal jurisdiction, but is authorised only by treaty. Its purpose is to ensure that there will be no hiding place for alleged offenders in the States that are Parties to the treaty.

### **Non-Parties**

17. The conventions require each Party to establish its jurisdiction over an alleged offender present or found in its territory. There is no requirement that he be one of its nationals or have any connection with that or another Party. This is essential for the effectiveness of the conventions. But it has sometimes been questioned whether these jurisdictional provisions of the conventions can apply to the nationals of a State that is not a Party to the relevant convention (usually termed ‘a third State’) when the act is not done in the territory of a Party, or on a ship or aircraft registered with that Party and the person is not linked in some way with the Party. Under the Law of Treaties no treaty obligation can be imposed on a third State without its written consent.<sup>13</sup> But the conventions do not purport to place any obligation on third States; the obligation is on the Party in whose territory the person is found. The conventions were adopted within universal international organisations either by consensus or by thumping big majorities. This represents a sufficient degree of the

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<sup>12</sup> See pages 244 (para. 9) and 270 (para. 23) below. Article 2(5)(c) of the Financing Convention was taken from Article 25(3)(a) of the Statute of the International Criminal Court 1998 (UNTS Reg. No. 38544); ILM (1998), p. 1002.

<sup>13</sup> See Aust, pp. 207-211.

acceptance by States that such jurisdiction is not contrary to international law. The principle has now become so well established in ten of the conventions, and in universal treaties on other subjects,<sup>14</sup> that its legality is now beyond reasonable doubt. The application of the principle was begun in 1970 with the Hague Convention. That it applies to aircraft registered in third States is established not only by the plain meaning of the Convention, but also by its *travaux préparatoires* (negotiating history). It was the clear intention of the Hague Conference that the Convention should apply to the hijacking of aircraft wherever they are registered. Similarly the Convention is intended to apply to the conduct of persons on board aircraft in flight regardless of whether they are nationals of a Party.

18. Starting in 1988 with Article 6(2) of the Rome Convention, the conventions usually give a Party a *discretion* to establish its jurisdiction in certain other circumstances, such as if the offence is committed abroad but against one of its own nationals. It is necessary for this power be given by treaty since many states do not generally accept this ‘passive personality principle’ or ‘protective principle’ (see para. 7 above).

19. The conventions do not say which State has *priority of jurisdiction*. In practice the Party which has custody of the alleged offender has the first option to prosecute, and if it does not extradite it has an obligation to start proceedings for a prosecution (see paragraph 21 below).

### **Exercise of jurisdiction**

20. With the usual exception of Tokyo and Explosives, each convention requires a Party in whose territory an alleged offender is found to make a preliminary inquiry into the facts of the case. This is done in accordance with domestic law. However, as we will see next, while the Party must be satisfied that the circumstances warrant custodial measures to ensure the presence of the suspect, the conventions do not provide a similar discretion to refrain from instituting the preliminary inquiry. While a Party may trust the alleged offender not to disappear, any potential sympathy with the motivation underlying the act will not permit it either to evade its duty to conduct a proper inquiry, or at the very least an examination by the police of the evidence.

21. When an alleged offender is present in the territory of a Party, if it is ‘satisfied that the circumstances so warrant’ it must, in accordance with its law, take him into custody, or take such other measures to enable any criminal or extradition proceedings to be instituted.<sup>15</sup> This limited discretion is common to the conventions, but must be exercised reasonably and in good faith. The ‘circumstances’ which can be taken into account in deciding whether to take action are primarily evidentiary; a Party is not required to arrest any person alleged to be an offender, there must be some evidentiary grounds. But the discretion is not limited to such matters. Although a Party cannot decline to take action for purely political reasons, in an extreme case a Party might, on humanitarian grounds, grant free passage through its territory to alleged offenders in order, say, to save the lives of hostages or secure their release. In such

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<sup>14</sup> United Nations Convention against Illicit Traffic in Narcotic Drugs (UNTS Reg No. 27627; ILM (1989), p. 493; UKTS (1992) 26 (Article 6(9)); Convention on the Safety of United Nations and Associated Personnel 1994 (UNTS Reg. No. 35457), Article 10(4).

<sup>15</sup> The wording varies slightly between the conventions, but not in substance. The reason for the differences here, and in the other conventions, is mainly due to the forum in which each convention was negotiated (UN, IAEA, ICAO, IMO).

a case, the obligations of the other Parties would remain the same. The requirement applies to every Party, whether or not the crime was committed on its territory, and whether or not it has received a request for provisional arrest pending a formal request for extradition.

### **Aut dedere aut judicare<sup>16</sup> ('extradite or prosecute')**

22. Building on a somewhat similar principle in the Geneva Conventions of 1949, the conventions require that when an alleged offender is found in the territory of a Party, it must either to extradite him or 'without exception whatsoever and whether or not the offence was committed in its territory submit the case to its competent authorities for the purpose of prosecution'.<sup>17</sup> There can be many reasons why a State refuses to extradite: the person may be one of its own nationals and its law prohibits their extradition; it may not have confidence in the fairness of the other legal system; it may not trust the other state to prosecute (the very special factors in the Lockerbie case are dealt with at page 80 below). The phrase 'extradite or prosecute' is merely shorthand, since the actual wording makes it clear that there is no obligation to prosecute whatever the circumstances, for example if there is not sufficient evidence.

23. Although comprehensive statistics on extraditions and prosecutions pursuant to the conventions are not easy to find, extradition of alleged offenders appears to happen rarely, even if the person is a foreigner. If the crime was committed in the territory of another Party, there is an advantage in sending the alleged offender there since most of the evidence and the witnesses should be there, and the chances of conviction are therefore greater.

### **Extradition**

24. Effective arrangements for the extradition or return of alleged offenders are of the greatest importance if such activities are to be deterred or punished. The great increase in terrorist acts against aircraft in the late 1960s immediately revealed the inadequacy of existing extradition arrangements to meet this threat. There is no duty imposed by customary international law to surrender individuals accused or convicted of offences in other States. Their surrender is therefore dependent upon the existence of an extradition treaty or some similar arrangement, such as the scheme for the return of fugitive offenders which operates among Commonwealth countries. However extradition arrangements are far from complete; sometimes no arrangements exist between the State where the alleged offender has taken refuge and the one seeking his extradition, thereby rendering his return virtually impossible. The Hague Convention acknowledged this difficulty and attempted to remedy it by extending existing arrangements for extradition and by providing a basis for new arrangements. These provisions are repeated in the later conventions, some of which have additional provisions (which will be noted in the relevant chapter), but which do not affect the four basic elements.<sup>18</sup>

25. *First*, a convention offence is deemed to be included as an extraditable offence in any extradition treaty existing between Parties. (As a general rule, States include in extradition treaties lists of offences in respect of which extradition may be requested.) The effect of the

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<sup>16</sup> Also sometimes described *aut dedere aut punire*.

<sup>17</sup> During the negotiation of the Diplomats Convention the Netherlands proposed that a Party should not be obliged to submit a case for prosecution unless it had first received and rejected a request for extradition, but this was not accepted. However, the Dutch Government made a reservation to this effect on accession. It did the same with later conventions. No other Parties have objected.

<sup>18</sup> See Lambert, pp. 243-4, inc. note 65.



provision is to amend all existing extradition treaties (and possibly some regional treaties) between the Parties so as to include the convention offence as an extraditable offence. However, if such an amendment is to be effective in the law of a Party it may well require legislation to add the convention offence to the offences which are extraditable under the law of that Party.

26. Parties also undertake to include the convention offence as an extraditable offence in every future extradition treaty to be concluded between them. The effect of the failure of Parties to include such a provision in a subsequent extradition treaty is uncertain. It would clearly be a breach of the relevant convention, but it is doubtful whether such a provision would be deemed to be included in the later extradition treaty in the absence of clear words to that effect. Furthermore, the provision applies only in relation to treaties concluded subsequently between Parties; it has no application to extradition treaties subsequently concluded between a Party to the convention and a non-Party.

27. *Secondly*, the convention itself supplies a new legal basis for extradition in providing for the case where a Party, which makes extradition conditional on the existence of an extradition treaty, receives a request for extradition from another Party with which it has no extradition treaty. It may then, at its option, consider the convention as the legal basis for extradition in respect of the convention offence. Whereas under the Tokyo Convention extradition is possible between Parties only if there exists an extradition treaty or comparable arrangement between them, the other conventions provide a substitute for such a treaty or arrangement. For the purposes of extradition, each convention is a multilateral extradition treaty which can be invoked when there is available no other legal basis for extradition. However, the convention may discharge this function only at the option of the *requested* Party. If the convention is invoked in this way, the extradition of the alleged offender must, nevertheless, comply with the other conditions for extradition stipulated by the law of the requested Party. The provision imposes no obligation on a requested Party to extradite the alleged offender. However, if it fails to do so it must then submit the case to its competent authorities for the purpose of prosecution in accordance with the *aut dedere aut judicare* rule.

28. *Thirdly*, the convention provides that where Parties do not make extradition conditional on the existence of a treaty, those Parties shall recognize the convention offence as an extraditable offence as between themselves. Once again the conditions for extradition laid down by the domestic law of the requested Party must be complied with. Furthermore, the arrangement may be invoked only at the option of the *requested* Party, but, in the event of a failure to extradite, that Party is obliged by the *aut dedere aut judicare* rule to submit the case to its competent authorities for the purpose of prosecution.

29. *Fourthly*, extradition treaties frequently provide that the offence in respect of which the return of the alleged offender is requested must have been committed in the territory of the Party seeking his extradition. Such provisions are likely to give rise to difficulty in the case of requests for the extradition of alleged terrorists. This is overcome by the provision that the offence shall be treated, for the purpose of extradition between Parties, as if it had been committed not only in the place in which it actually occurred, but also in the territory of the Parties required to establish their jurisdiction over the offence. By the use of this legal fiction, problems arising from the actual situs of the offence are solved in the case of a request for extradition made by any of the Parties.

30. We have seen that the conventions make no provision for priority in the exercise of jurisdiction by Parties.<sup>19</sup> Similarly, the conventions do not attempt to establish a scheme of priority in the matter of extradition.

### **The political offence exception**

31. The political exception must be clearly distinguished from the clause in most of the conventions that mutual legal assistance or extradition may be refused if it has been requested for the purpose of prosecuting or persecuting the person for his political opinion (see, for example, Article 9(1) of the Hostages Convention). In contrast, the political exception is the provision in certain extradition treaties, or domestic laws, which makes 'political offences' - crimes committed with a political motive - not extraditable. Given that most terrorist crimes are committed for some political purpose, and the earlier conventions do not prohibit the political exception, this can prevent extradition for a terrorist offence, though the requested Party would then have to follow the *aut dedere aut judicare* rule. However, the Terrorist Bombing Convention 1997 (Article 11) and the Terrorist Financing Convention 1999 (Article 14) do prohibit the political exception, as do some extradition treaties.

32. The lack of a prohibitive in the earlier conventions may, at first sight, be seen as a major weakness. This would no doubt be so if it was intended that the conventions should make extradition of alleged offenders mandatory. However, this is not the case. Although the Eastern bloc argued at the Hague Conference in favour of mandatory extradition, it was not adopted. While the Hague and other earlier conventions have been effective in extending existing arrangements for extradition and in establishing new arrangements, they clearly contemplate extradition as only one possible course of action available to a Party in whose territory an alleged hijacker is found. This is demonstrated by the *aut dedere aut judicare* rule, which requires a Party to submit the case to its competent authorities for the purpose of prosecution if the alleged offender is not extradited. It is clear that most terrorist acts are committed for political purposes, and therefore, at least until the end of the Cold War, a convention imposing a mandatory requirement of extradition would have been unlikely to gain general support. The position adopted in the earlier conventions, whereby a Party will have the choice of extraditing an alleged hijacker found in its territory or prosecuting him itself, is a workable compromise acceptable to the large majority of States.

### **Disputes**

33. Any dispute between two or more Parties about the interpretation or application of any of the conventions is subject to a common clause. Although it varies slightly in wording, the substance is the same. A dispute, which cannot be settled through negotiation can, at the request of any one of the parties in dispute, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organisation of the arbitration, any one of them can refer the dispute to the International Court of Justice by a request in conformity with the Statute of the Court. However, a Party may at the time of signature, ratification or accession declare that it does not consider itself bound by this provision, and this reservation operates on a reciprocal basis. A Party may withdraw the reservation.

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<sup>19</sup> Para. 19 above.

## **Reservations**

34. Unlike the Tokyo and Explosives Conventions, the other conventions include no prohibition on reservations, in addition to the reservation that can be made to the disputes article. When a multilateral treaty does not prohibit reservations or allow only specified reservations, reservations can be made provided they are compatible with the object and purpose of the treaty (Article 19(a) of the Vienna Convention on the Law of Treaties).<sup>20</sup> Consequently, before accession is effected it will be necessary to consider whether the accession is to be subject to a reservation. If it is intended to accede subject to a reservation, the reservation must be communicated in writing to the depositary of the convention not later than the time of accession. The most convenient course is for the instrument of accession to include the reservation.

## **Accession or succession**

35. The conventions provide for States to become Parties by signature followed by ratification, or by accession. Accession is the normal method available if the deadline for signature has passed. However, a Commonwealth State that was formerly an overseas territory may, if the particular convention was extended to it by the former colonial State, be able now to *succeed* formally to the Convention rather than accede. Such States should already have legislation implementing the Convention, enacted either by the local legislature or by the former colonial State. Succession is effected by depositing an instrument of succession with the depositary of the convention, who is named in each convention, the Secretary-General of the UN, ICAO, IMO or IAEA, as the case may be.<sup>21</sup> However, the attitude of Commonwealth States after gaining independence, as well as of foreign States in a similar position, will vary according to the practice adopted by each on and after independence.

## **Implementing legislation**

36. Before ratifying or acceding to any of the conventions, a State will usually have enacted legislation. Legislative provisions are attached to each chapter. However, careful consideration will have to be given by each State as to its precise needs for the content of the legislation.

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<sup>20</sup> The application of this rule is fraught with difficulties, see A. Aust, *Modern Treaty Law and Practice* (Cambridge 2000), Chapter 8, esp. pp. 108 – 112.

<sup>21</sup> For an explanation of succession generally, and procedure, see Aust, pp. 305-331.