

Air Law

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1 Introduction

Air Law is a series of rules governing the use of airspace and its benefits for aviation, the general public and the nations of the world. Definition of which is plenty but it cannot be applied indiscriminately or without exceptions. Like, the terms of Aviation Law and, or Navigation Law are become out-dated, the designation of Air Transportation Law has been employed on occasions, but the areas it covers are only conveying a narrow interpretation. In presence, the term of Aeronautical Law¹ is currently being used especially in Romance languages, while Air Law is practically adopted in the rest regimes.

Air Law is found interesting on the ground of Aviation is in the process of achieving its next phase of development and arouses interest in ever-larger circles. For instance, when a person boards an aircraft as a passenger and reads the small print on his ticket he suddenly realizes that he is bound by the provision of the Warsaw Convention. It will be useful to possess some means of appreciating the benefits and disadvantages of the rules to which he has become bound. Besides, Air law is intertwined with other areas of laws. It involves many aspects of Constitution law, Administrative Law, Civil law, Commercial law and especially Criminal Law. Its international nature is always paramount.

This paper may be aimed to falling into the category of penal legislation and its procedures insofar as it provides a logical description of the legal institutions and rulings and the effects of the law in connection with international criminal matters. Since the laws have been subject to analysis by cases and my paper has also been covered two cases laws to explain the present conclusion of the law in criminal aspect.

2 The History and Development of Air Law

Because of the first engine-powered flight had successfully been carried out by the Brothers Wright in 1903, it is already 100 years in the year of 2003. It is possible to review to the past when one takes into account the national rules and regulations in various states.

The first concerted attempt at codification on an international scale took place before 1910, when German balloons repeatedly made flights above French territory.² The French Government was of the opinion that for safety reasons it would be desirable for the two governments involved to try and reach an agreement to resolve the problem. As a result the Paris Conference of 1910 was convened, the tendency of the conference did not adopt the idea of 'freedom of the air' but was in favor of the sovereignty of states in the space above their

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¹ E.van Bogaert, *The Relativity of the Nation of the Law of the Air*, Studia Diplomatica, Brussels, 1979, Vol. XXXII, No. 6, Pg. 621-637, Noted also by Nicolas M. Matte, *The Treatise on air –Aeronautical Law*, 1981, pg. 50.

² *The International Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons*, (The Hague, 29 Jul 1899)

territories, which was reflected on the draft convention at the plenary session of the conference.³

Following the 1st World War, the first scheduled air service between Paris and London come into force on 8 Feb 1919, the existing regulations was considered incorporated into a convention. But a choice had to be made between a free airspace analogous to the principle of maritime law, and an airspace governed by the sovereignty of the states. No matter the rule of Air Law was to be made subject to the rules existent to regulate other means of other transportation like rail, road or sea. Air Law in a general viewpoint that covers an area which is determined by the special characteristics and demands of aviation, but whenever this implies a departure from the existing law, the justification for this departure must be most carefully assessed and weighed. Between those two poles Air Law will have to find its range and its limits thereof.

2.1 Source of Air Law

Air law has taken on its international character and emerged on an international plane almost from the very beginning, that is, the first flights between Paris and London, the Paris Convention was concluded in 1919, the year in which that flight took place. Due to the rapid developments in aviation and with the lawmakers attempting to keep pace, custom has largely been bypassed as a source of law, but the result that Air Law is mainly consisting of written law.

Treaty Law encompasses all international treaties in which multilateral conventions are the primary source of air law. As a matter of fact that subject participants like the state, the owner, the operator, the passengers, the owner of the on-board goods, the mortgage holders, etc, their rights are properly safeguarded by the achievement of the most important elements of Air Law. The implementing measures are found in international agreement and conventions. Another classifications relevant for Air Law are bilateral instruments, such as national Law, contracts between states and airline companies or contracts between airlines companies, and general principle of International Law⁴.

International Custom, in practical, constitutes an important source of international law applicable in the absence of an agreement or complementing it. But in the view of the development of treaty laws, the application of International Custom is not much in use in the domain of aviation as time goes by.

Litigation between national and international law, or it between private and public law is applicable in Air Law. Private International Law, in its context means the series of rules pertaining to the relations between private persons involved in the operation and use of aircraft, whereas Public International Law is the corpus of legal norms pertaining to the relations involving states and international organizations in respect of those activities in aviation among problems of political, technical, economical, financial, social or legal nature. In the phase of my paper, military aviation is departed from my focus.

2.2 Main Organizations in Aviation

2.2.1 ICAO – The International Civil Aviation Organization

³ J.C. Cooper, The international Air Navigation Conference, Paris, 1910

⁴ Prof. Dr I.H.Ph. Diederiks-Verschoor,, An Introduction to Air Law, Kluwer Law and Taxation Publishers, Deventer/Antwerp, 1988, pg. 3-4.

ICAO is playing an outstanding role in world aviation events. Its set-up is starting by the agreement concluded during the Chicago conference of 1944⁵. The impulse of its set-up is generated as to the field of aviation in structural innovations of international co-operation and law making after the 2nd World War.

Its daily business is run by a council, a permanent body which performs a variety of duties in the legal, technical and recently also in the economic field. It has a state membership of over 150 at present and operates under the supervision of an assembly with important budgetary powers. It also contains a legal committee, which is taking charged with preparing and drafting international treaties and conventions on the Air Law prior to their submission to a Diplomatic Conference for final approval. One of the important roles of the council lies to the settlement of disputes as it is authorized to request legal opinions from the ICJ, The International Court of Justice at the Hague offering interpretation of treaties and conventions⁶, or acting as a mediating role in disputes⁷.

2.2.2 IATA – The International Air Transportation Association

IATA is not an official body but its aim and objective are clearly set out in its incorporating acts for the safe, regular and economical air transport for the benefit of the air aviation, to foster air commerce and to study problems connected therewith by means of collaboration among airlines engaged directly or indirectly in international air transport service. Its job is always working with ICAO and the other international organization, lies in the sectors of technical and commercial.

IATA has another important functions, one of which is performing as a clearing-house, handling the ticketing clearing for airlines' account under the responsibility of its financial committee since 1947 in London, later, it moved to Geneva. The other function of IATA is to fix tariff rates for international air transport, its activities find their expression in Resolutions and Recommended Practices adopted by the Traffic Conferences which become binding on the member when approved by interested governments.⁸

2.3 State Sovereignty in Territorial Airspace

2.3.1 The Air Sovereignty Concept and Its International Recognition

State sovereignty over its territorial airspace is the basic principle underlying the whole system of International Air Law. Irrespective of whether the airspace can be regarded as a part of a state's territory, it generally recognized that it is a sovereign right over the airspace above its land and territorial waters. After the collapse of the short lived concept of freedom of the air in the first decade of 19 century, air law theory is base on the concept of air sovereignty as airspace is regarded as an extension of state's land and maritime territorial or its complementary element.

The legal status of airspace held effective only if the age of flight had begun, especially of the thread caused to national security and public order had been apparent by the outbreak of 1st

⁵ Art. 64 of Chicago Convention

⁶ Art. 96(2) of the UN Charter stating 'other organs of the UN and specialized agencies, which may at opinions of the Court on Legal questions arising within the scope of their activities'.

⁷ Art 84 of Chicago Convention stating whenever a state is involved in a dispute which cannot to be settled by negotiation, the council is called upon for a decision.

⁸ P.P.C. Haanappel, Ratemarking in International Air Transport, 1978, pg. 57

world war, the principle of sovereignty in usable space over national land and water had been accepted by international community as a customary rule. Even during the preparation and signature of Paris Convention of 1919 merely acknowledged and restated the already existing rule of customary international air law. The words⁹ of the rule emphasize the intention of ‘contracting states’ to recognize an existing rule rather than to create a new one for mentioning every state, thus the rule also includes ‘non-contracting states’ in which the words are implied recognition of legitimate enforcement of air sovereignty, although complete and exclusive, it cannot be considered absolute or free of any legal constraints under international law. Its exercise is actually subject not only treaty obligations but also to some generally accepted rules of customary law. As stated, air sovereignty cannot be understood as being absolute if international flight is occurred. The rights even if are exclusive are also subject to limitations.

2.3.2 Extension of Airspace

In international air law, it is somewhat strange either in private law or in public law, that the air sovereignty rule has been recognized and strictly applied without definition of the limits of the airspace itself. The various definitions of the upper limit can be referring to the past, the striking distance of a man standing upright on the ground, the height of buildings, the range of weapons, the range of vision, the altitude in which man is able to survive, the flight ceiling of aircraft or the point of equilibrium between the earth and other planets, were never been ended. As such, sovereign jurisdiction could only be concluded as high as the airspace an aircraft in which the gaseous atmosphere is sufficiently dense to keep it sustained. Sovereignty would therefore be limited to usable or navigable airspace.

With the advent of space flight, discussion on delimitation of state territorial airspace and international outer space has been re-opened. To date, in the absence of appropriate air law, regulation and state practice provide evidences to cover the outer space, the use of customary law might be a solution of easing the loophole in one of the cases of the circulation of the earth satellites moved in route of orbit, it properly overpasses states territory. No matter the exact height up to which state sovereignty extends, it undermines the emergence within the framework of developing space law, or perhaps a new aerospace law encompassing both airspace and out space flight.

2.3.3 Problems of National Jurisdictions

There is no system of general rules of international law for the definition of the scope of national laws and jurisdictions. In the view of the basic rules of international law recognizing complete and exclusive sovereignty of states over state-territorial airspace involving prohibition of unauthorized flights and obligation to conform to territorial laws and regulations by the foreign aircrafts, the implementation of these rules by the state becomes most important. As experienced, international law does not provide immediate measure to protect territorial airspace and to cease the violation. The mentioned ‘freedom of the air’, like the ‘sovereignty’ itself in the basic rule of international law, cannot be considered solely to be absolute and unrestricted.

A state sovereignty in territorial airspace and its legal consequences cover:

⁹ The rule, restated in Art 1 of Paris Convention and Art 1 of Chicago Convention of 1944, ‘the contracting states recognize that every state has complete and exclusive sovereignty over the airspace above its territory.’

1. freedom of air navigation in non-territorial airspace;
2. nationality of aircraft involving control, responsibility;
3. right of protection assigned to the registered state¹⁰ of the flag;
4. use of lawful means to suppress unlawful use of aircraft;
5. recognition either of exclusive jurisdiction of the territorial state or of state of the aircraft's nationality; and
6. concurrent jurisdictions in other areas of civil aviation activities.

The fundamental rules of customary international law underlying the regulatory system of international civil aviation, the major part of which is formed by treaty law. Although customary rules had been provided a basic premise for the application of treaty obligation, state practice also seems to be indicative of the direction in which the development of international air law is likely to go.

Bilateral air agreement, using the notion of airline nationality associated with its ownership and effective control, recognition of transfer of responsibility from the registration state to the state of aircraft operator, refraining from interference by the territorial state with its internal order prevailing onboard the foreign aircraft.

As a result of the pressures of the continuing technological revolution and expanding international and extra terrestrial activities, there will also be a potential conflict of states jurisdiction in the matter of certain cases.¹¹

3 Penal Law and Aviation

In the past few years, the development of new rules and sanctions were tensed as to the criminal offence happened in flight become frequent. There are three international conventions governing the provision of penal law in the aspect of aviation. They are:

1. The Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963 (Tokyo Convention)
2. The Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970 (Hague Convention)¹²
3. The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971 (Montreal Convention)¹³

3.1 The Tokyo Convention

It is necessary to determine, in the basic concept of the international character of aviation and air law, which state is competent to exercise jurisdiction in case of criminal offences happened on board aircraft. In 1910 the Paris Convention was expressed the principle of law that state sovereignty over the airspace above its territory where was also indicated in 1944 the Chicago Convention. However, we may face a situation in which complication arises when a state other than the state in which an aircraft is registered attempts to exercise its

¹⁰ Art 1(2) of Tokyo Convention stating that 'this convention shall apply in respect of offences committed or acts done by a person on board any aircraft registered in a contracting state, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any state.'

¹¹ Cited by Marek Zylicz, *International Air Transport Law*, Martinus Nijhoff Publishers, the Netherlands, 1992, pg.70-71.

¹² It is also named as Hijacking Convention.

¹³ It is also named as Sabotage Convention.

jurisdiction with regards to offences committed on board such aircraft, due to the offence is committed above territories not subject to sovereignty of any particular state, like high sea, or when the place cannot be distinguished precisely. We may find number of occasions discussed and recorded on the agenda of the International Law Association, the draft convention was worked out by the ICAO legal committee in Munich 1959 and Rome 1962 and other cities, the final text of Tokyo Convention was concluded at the Diplomatic conference held in Tokyo in 1963¹⁴.

3.1.1 Several Theories

According to the various draft conventions and materials as above mentioned, an analysis of the following theories regarding jurisdiction to which is resorted:

1. the territorial theory – the law of the state in whose airspace the offence has taken place will be applied by its national courts. Clearly it is not always possible to determine the exact position of the aircraft at the time the offence was committed; for that reason is impracticable for a state to base its jurisdiction solely on this principle.
2. the national theory – according to this theory the law of the state where the aircraft is registered is always applied.
3. the mixed theory – side by side with the law of the aircraft's nationality and the law of the state over which the aircraft passes is enforceable whenever the security or public order of such state is threatened by offences committed on board.
4. the theory of the law of the state of departure.
5. the theory of the law of the state of landing.¹⁵

3.1.2 Case Law - Hijacking / An International Crime

The eternal pursuit of man has been to lead peaceful life. This is possible only if he believes and acts in the principle of 'live and let live'. This is equally good for states as they are organizations of human being. Like Municipal Law, International Law also is a body of rules followed by the states to regulate their actions **inter se**.

Various attempts have been made to recognize and establish the authority of law. United Nations Charter recognizes the need for the rule of law on an international plane and stipulates one of the purposes of the organization to preserve 'principles of Justice and International Law'¹⁶. The United Nations also endeavors to harmonize the relations of the states for avoiding those situations may bring sorrow to the mankind. For this purpose, the organization also enters into agreements with the specialized agencies established by inter-governmental agreements and having wide international responsibilities.¹⁷ For checking the international delinquencies and international delinquents, the members of the United Nations are committed.¹⁸ Thus, the United Nations and members of the United Nations jointly and severely are committed to respect justice and international law. But, it appears that the case

¹⁴ See the Minutes and Documents of the International Air Law Conference (Tokyo, 8-9/1963), the ICAO Doc. 8565-LC/151-1 and 151-2 and The Tokyo Convention of 1963.

¹⁵ I.H.Ph. Diederiks-Verschoor, *An Introduction to Air Law*, Kluwer Law and Taxation Publishers, Deventer. Antwerp, 1988, pg. 162

¹⁶ Art 1 (1) of the U.N. Charter

¹⁷ Art 57 and 63 of the Charter, the Economic and Social Council is authorized to enter into agreement subject to the approval of the General Assembly.

¹⁸ See Preamble to the U.N. Charter, the people of the United Nations are 'determined to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'.

of Pakistan is deliberately violating the international law and the Charter of the U.N. although she is a member of the U.N. This is manifested in her support to two international delinquents who hijacked the Indian aircraft to Pakistan.

The Incident¹⁹

On 30 January 1971, an Indian Airlines, Fokker Friendship aircraft, with 28 passengers and a crew of 4 on board was hijacked. The plane, which was on a shuttle service from Srinagar to Jammu took a sudden turn towards Pakistan border just when it should have started to come into land. Minutes before the plane was to land, the Jammu control Tower picked up a message from the pilot, said he was being skyjacked. It landed at Lahore (West Pakistan) at 1.25 pm. The first official message from the civil aviation of West Pakistan was received by the Director-General at about 6.0 pm. It said that all are safe but 'the hijackers are still in the aircraft and refuse to come out. No sooner the hijackers leave the aircraft, the crew and passengers will leave back for destination to India wherever desired.' However, in spite of eagerness of the government of India for sending another aircraft to fetch the passengers and crew, the Pakistan government delayed the return deliberately and at last sent the passengers and crew by road. The aircraft, 2 other passengers (who hijacked) and the cargo were not returned. Meanwhile, political asylum was granted to these hijackers and certain conditions were purported to, have been put by the hijackers were also conveyed to India. These conditions were:-

- the relatives of the hijackers should not be harassed.
- 36 Al-Fatah men arrested in Kashmir during last few days be released.

Non-acceptance of these conditions was threatened with the warning of blowing up the aircraft.

It may be pertinent to mention that the first condition purported to, have been put by the hijackers was not at all material. India is governed by rule of law and all citizens and aliens are protected by constitution, the supreme law of the land²⁰. The supremacy of law and impartiality of courts has also been accepted by British Courts. So far as the 2nd condition is concerned, it appears that Pakistan who is instigating subversive activities in India was behind this move.²¹ Therefore, this amounts to intervention in the affairs of India²². Pakistan being a member of the United Nations cannot interfere in the domestic affairs of India without violating the charter of the United Nations²³. Again, if there are any differences and disputes, they are to be settled in accordance with the provisions of the Charter²⁴. Hijacking and Spying²⁵ are not recognized means, both being against the rules of international Law. This is

¹⁹ The brief of the newspaper report, the Sunday Standard, New Delhi, 31 January 1971.

²⁰ See Art 14 extends equality before law and equal protection of law, Art 20 prohibits prosecution by state except for any omission or commission, which is an offence at the time of the act, and Art 22 protects the liberty. The courts-high court and the supreme court jealously watch these freedom.

²¹ The first secretary of Pakistan Embassy in New Delhi was declared by India a persona non grata when it was proved that he was the master mind behind this espionage gang known as Al-Fatah.

²² See Oppenheim, L., International Law, a treatise, 1, pg. 305, 1955 stating 'intervention is dictatorial interference by a state in the affairs of another state for the purpose of maintaining or altering the actual condition of things'.

²³ See Art. 2 (7) of U.N. Charter.

²⁴ See Preamble, Art I(1), 2(3)(4), 33(1) of the U.N. Charter

²⁵ See Oppenheim, L., International Law, a treatise, pg. 862 stating 'a state can never protect a spy, since it (state) cannot officially confess to having commissioned a spy.'

more so in view of the Tashkent Declaration²⁶ under which both states (India & Pakistan) had agreed to exert all efforts to create friendly relations as envisaged in the U.N. Charter. This incident cannot be categorized as a friendly act.

The hijacked aircraft was blown up by the 2 hijackers at Lahore airport at 8.35 pm (I.S.T.), the same evening the Indian government handed over the aide memoire²⁷ to the Pakistan High Commissioner in India and Foreign Ministry at Islamabad.

Violation of International Law

Law of Nations for international law includes treaties. Treaty includes convention. In regard to the matters of international criminal law, in 1963, the Tokyo Convention on offences and other Acts committed on Board Aircraft was signed dealing with the questions of jurisdiction, in which Art 11 is majored to deal with hijacking. It declares actual or attempted hijacking of aircraft as an act of quasi-piracy committed against the community of nations. The states parties are obliged to take measures for the restoration of control to the lawful owner.

Pakistan has committed a breach of International law both by granting asylum to the hijackers²⁸ as well as by not taking measures to restore the control of the hijacked aircraft. Air navigation is of vital importance, freedom and security in this already risky transport is of prime importance for the states.

Various attempts as stated before have been made in the past to regulate air navigation. The necessity for an international agency to deal with the important development was felt and the 1919 convention established an international commission for Air Navigation as a permanent commission under the direction of the league of states. This was taken over by the International Civil Aviation Organization (ICAO) created by the International Civil Aviation Convention of 1944. This specialized agency having wide international responsibilities subsequently became a specialized agency of the U.N.²⁹ Since then, ICAO is working along with U.N when airlines and private owners of aircraft in the western Hemisphere began to be plagued by an increasing incidence of hijacking of planes. The Tokyo Convention of 14 September 1963 is the first attempt to check the problem of the increasing incidence of hijacking *inter alia* in the Middle East with a comprehensive international action.

Concentrated Efforts

In concern of the danger caused by hijacking is tremendous, the legal committee of ICAO prepared the draft treaties, (The Hague Convention and the Montreal Convention) seeking Panel aspects of aviation to deal with hijacking. It is to modify on the Warsaw system and the Tokyo Convention, the diplomatic conferences were held during 1960 to 1970, which is to adopt an agreement to deter acts of violence or intimidation to seize control of civilian aircraft

²⁶ Signed by the Prime Minister of India and President of Pakistan under the good offices of USSR on 10 January 1966 at Tashkent.

²⁷ 'It is the responsibility of the government of Pakistan, in accordance with the established international usage and practice, to ensure the immediate and safe return of the skyjacked aircraft together with the baggage cargo and mail.' The Indian Express, New Delhi, 3 February 1971.

²⁸ See Starke, G.J., In Municipal Law hijacking is piracy, pg. 64, stating 'Persons Hijacking an aircraft have become subject of conventional rules of international criminal law in much the same way as pirates jurisdiction under customary rules'. President Kennedy signed a Bill in 1961 declaring hijacking of aircraft an act of piracy, with penalties for the offence ranging up to death cited Glahn, G. Von, Law Among Nations, pg. 329, 1970.

²⁹ See Art 57 and 63 of the U.N. Charter.

in flight.³⁰ The General Assembly of U.N. also referred to the matter of the draft resolution recommended by the 6th committee regarding aerial hijacking with the votes in favor to none against.³¹

Gist of the Resolution

The General Assembly condemns without exception all acts of aerial hijacking or other interferences with civil air travel. It calls upon the states to take all appropriate measures to deter, prevent and suppress such acts within their jurisdiction and for the extradition of such persons for their prosecution and punishment. The state in whose territory the hijacked aircraft is landed is obliged to look after the passengers and crew and provide for their continuous journey. The state is also under an obligation to return the aircraft and its cargo to the lawful owner. The resolution also calls upon the states to take collective and severe action in conformity with the U.N. Charter and in co-operation with the U.N. and ICAO to ensure that aircraft engaged in civil aviation is not used as a means of extorting advantage of any kind.

Pakistan is a party to the resolution and has voted for it in the legal committee as well as in the General Assembly. Pakistan therefore cannot shirk the responsibility from it.³²

Reparation for Delinquency

The act of hijacking is a violation of conventional law, U.N. Charter and the Resolution of U.N. and the Conventions of the ICAO. This act is termed as quasi-piracy by the Tokyo Convention of 1963 and the hijackers have become one of the subjects of the Conventional Rules of International Criminal Law. In regard to the hijacking of Indian aircraft, its destruction in Pakistan and failure of Pakistan government to prevent the destruction amounts to international delinquency by Pakistan. The principle legal consequences of an international delinquency are reparation of the moral and material wrong done.³³ It is a settled rule of international law that a state becomes responsible if it facilitates the commission of the **ultra vires act** or it violating an independent duty of international law. In the present context Pakistan both facilitated the commission of crime, by granting asylum to the delinquents and by not prohibiting the destruction of cargo, mail and the aircraft, which was negation of a legal duty imposed on Pakistan by the U.N. Resolution and the Tokyo Convention. To contend the inability in protecting the aircraft, cargo and mail is a lame excuse. Not only this, Pakistan government cannot harbor the 2 hijackers without violating international law.

The quantum of compensation to be paid by a state for international delinquencies must be adequate, has been settled by the ICJ. It is a principle of international law³⁴ that the breach of an international engagement involves an obligation to make reparation in an adequate form. Pakistan therefore should pay the adequate compensation to India as demanded along with a formal apology.

3.1.3 The Scope and Purpose of the Tokyo Convention

³⁰ See 64, American Journal of International Law, 31 Dec 1970

³¹ Resolution no. A/RES/2745 (XXV). See U.N. Monthly Chronicle Vol. VII, 11 December 1970.

³² Chicago Convention and various conventions on aerial navigation prescribe for freedom of air navigation to aircraft, and the 1963 of Tokyo Convention for hijacking.

³³ Kelsen, Hans. Principles of International Law, 2nd edition, 1966, pg. 199-200, and Briggs H.W. The Law of Nations, Cases, Documents and Notes, 2nd edition, 1952, pg. 601-742.

³⁴ See Art 1 and 2 (3) of Rome Convention of 1952 and Art 25 of Warsaw Convention of 1966.

Under the Art 1 (1), the scope of Convention, it applies to:-

- offences against penal law,
- acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.

The exceptional domain is contained in (4) indicating that aircraft used in military, customs or police are departed from the general scope.

The objective of the convention is described as:-

1. to determine the penal law applicable when an offence has been committed above territories not belonging to any particular state, such as the high seas, or in cases in which the place where an offence has been committed cannot be precisely located.
2. to define the rights and obligations of the aircraft commander in respect of offences and acts committed on board which jeopardize the safety of the aircraft.
3. to define the rights and obligations of the authorities of the place where the aircraft lands after an offence or an act which jeopardizes the safety of an aircraft has been committed.

3.1.4 Jurisdiction

Under the wording of Art 3 dealing with jurisdiction in which the sub-item (3) is stating ‘the convention does not exclude any criminal jurisdiction exercised in accordance with the national law’. It properly means the jurisdictional rules contained in the convention are of a supplementary nature. But, we note that in the same area that the state of registration has been declared competent to exercise jurisdiction over offences committed on board. There are also cases in which states other than the state of registration have jurisdiction over such offences, as is apparent from Art 4 of the convention. The cases mentioned as follows:-

1. the offence has effect on the territory of such state
2. the offence has been committed by or against a national or permanent resident of such state
3. the offence is against the security of such state
4. the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such state
5. the exercise of jurisdiction is necessary to ensure the observance of any obligation of such state under a multilateral international agreement.

Under Art 2 of the Tokyo Convention, it is mentioned that ‘without prejudice to the provision of Art 4 and except when the safety of the aircraft or of persons or property on board so requires, no provision of this convention shall be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination. It should be noted there is nothing appears in either the Hague Convention or the Montreal Convention, both of which might be considered that political element in hijacking is somehow hard to be apart.

3.1.5 Unlawful Seizure

Under Art 11 of the Tokyo Convention 1963, there is a special offence to the chapter of unlawful seizure of aircraft since the phenomenon of which has become increasing frequent since the late 1940³⁵. This is given a deep concern but the article is failed to cover all forms of unlawful seizure, it is also failed to prescribe any effective counter-measures, confining itself to imposing on contracting states the obligation ‘to take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft’. It is experienced to find that the text of the convention which quoting hijacking is not adequately covered, as illustrated in afore case law, failure to prescribe any sanction against the offence as well. In order to enhance protection against unlawful seizure, a separate convention focus on hijacking, that is, the Hague Convention of 1970 is established to conclude more specific.

3.1.6 Extradition

Under Art 16 (1) of the Tokyo Convention states ‘Offences committed on aircraft registered in contracting state shall be treated, for the purpose of extradition, as if they had been committed not only in the place in which they have occurred but also in the territory of the state of registration of the aircraft’.

Under Art 16 (2) states ‘without prejudice to the provision of preceding paragraph, nothing in this convention shall be deemed to create an obligation to grant extradition.’

The entire Art 16 merits a special attention as pointedly illustrated in the previous case law on extradition, but the problem in the absence of restrictive approach to extradition is required to be elaborated by the Hague Convention of 1970 as following.

3.2 The Hague Convention

3.2.1 The need for the Hague Convention

Hijacking is in the fact difficult to overcome because it is vulnerable, the criminal acts involved are also manifold and unpredictable. Under the summarization of the criminal acts which can be break-down by the IFALP (International Federation of Air Line Pilots Associations) as:-

1. A fight between the crew and the hijackers may cause a complete loss of control of the aircraft.
2. Essential damage may be caused if weapons are used in the cockpit.
3. Collisions may result from an aircraft being unable to observe traffic regulations.
4. Fuel shortage may occur.
5. The crew may be unfamiliar with a particular airport and its approach procedures.³⁶

Hijacking activities was focus mainly in the areas of Middle East and the Caribbean during the decade years of 60s to 70s. As a result to counteract hijacking, a wider context concerted action was started at the end of 1960 that entailing the Hague Convention can be reached in December 1970 which made hijacking to be an internationally punishable offence.

It is perhaps worthily to mention that the impression of Air Piracy is being used and taken to be interchangeable with aircraft hijacking. As known that in maritime law in the 1958

³⁵ See AF Lowenfeld, Aviation Law, Documents Supplement, 1981, pg. 1181 (World-wide Hijacking statistics)

³⁶ IH Ph. Diederiks-Verschoor, An Introduction to Air Law, Kluwer Law and Taxation Publishers, Deventer.Antwerp, 1988, pg. 169-170

Convention on the High Sea, Piracy was declared as an offence, provided it has been committed for private motive against another ship or aircraft or against persons or property on board such ship or aircraft³⁷. However, under Art 1 of the Hague Convention, the offences must have been committed on board an aircraft in flight, it means there is only one aircraft to be involved in the matter of hijacking. The Hague Convention also contributes more definitions to the offences like:-

1. The act must be unlawful.
2. There must be some use of force or threat of force.
3. The act must consist in seizure of an aircraft and exercise of unlawful control over it or attempt the threat.

3.2.2 The Scope of Convention

Either the flight is domestic or international is applicable to this convention.³⁸ It also provides provision, on the pursuit and punishment of hijackers, applicable only to persons on board the aircraft in flight, but is concluded that hijacking as offences. Besides, the definition of the term 'in flight' is different in the Hague Convention, which is considered that 'the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation.'³⁹ The scope of the Hague Convention is therefore wider and more precise as compared with the Tokyo Convention.

3.2.3 Jurisdiction

According to Art 4 of the Hague Convention, jurisdiction is assigned to the following contracting states:-

1. The state of registration, when the offence has been committed on board an aircraft registered in that state.
2. The state of landing, when the alleged offender is still on board.
3. The state where the lessee of an aircraft without his principal place of business or his permanent residence.
4. The state where the alleged offender is found and apprehended, and which does not extradite him to any of the states previously mentioned.
5. Not only hijacking, but also the offender's use of force in connection with the seizure is covered by the jurisdiction.

According to Art 5 of the Hague Convention, it deals with aircrafts operate under joint operating organizations and international operating agencies may be established by the contracting states.

According to Art 6 (1) (2) of the Hague Convention, in order to ensure the offender's presence, taking into custody or taking other measures have been made obligatory for the state where he is present, as well as making a preliminary enquiry into the fact. The actual prosecution and trial mandatory have not mentioned that given an overall situation - the Hague Convention introduces the principle of universality of jurisdiction, it implies an offender is liable to prosecution anywhere in the world, but with an restriction made subject to

³⁷ See Convention on the High Sea, Geneva, 29 Apr. 1958

³⁸ See Art 3(3) of Hague Convention of 1970.

³⁹ See Art 3 (1) of Hague Convention of 1970.

the actual presence of the offender in the particular state instead of fully honoring this principle.

3.2.4 Extradition

According to the Art. 7 of the Hague Convention, it states ‘the contracting state in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state.’ It contains a reversal of the rule of Art 15 & 16 of the Tokyo Convention, however, it may see in Art 8 (2) (3) that clearly states extradition shall be ‘subject to the other conditions provided by the law of the requested state’. It means extradition can only be exercised in accordance with the laws of the requested state which will involve the rules of any extradition treaty that the state may have confronted. Art 8 is designed to provide a legal basis for extradition for all states to the convention. But states enable to exercise extradition are relied on the existence of extradition treaty in question. So, the states may or may not accept the convention as a legal basis for extradition is determined by the offence is recognized an extraditable one, where another restriction to be noted that the convention is being limited to the offence as described in the terms of Art 1 that the unlawful acts committed in connection with such an offence are not covered by the extradition provision of the convention. As to the Art 8 (4) mentioned that ‘the offence shall be treated, for the purpose of extradition between contracting states, as if it had been committed not only in the place in which it occurred, but also in the territories of the states required to establish their jurisdiction in accordance with Art 4 (1)’, the number of states, as regard, will be increased accordingly to the terms be stated.

If Offenders claiming political asylum it should be noted that the convention is silent on that point, although a ban on it had been contemplated during the preliminary discussions. It comes to determine whether a state applies Art 7 much, if not all, it will depend on the integrity and capability of the prosecuting authority. If they wish to ignore their obligation to wither extradite or prosecute, then there is nothing to stop them. It is why the provision of asylum for the hijackers in afore mentioned case law is able, even it is condemnable. There is nothing can do to prevent states from granting political asylum to hijackers, if they so choose.

However, a European Convention on the Suppression of Terrorism was concluded in Strasbourg in 1977,⁴⁰ has widened the range of extradition possibilities for acts of terrorism (including hijacking) by cutting the offences of political, race or religion elements that the offences will not be able to escape trial.

3.2.5 Other Provisions of the Hague Convention

The Hague Convention has adopted the provision in Art 11 of the Tokyo Convention safeguarding the right of passenger and crew to continue their journey and the return of the aircraft and its cargo to the persons legally entitled to it, this rules has been emphasized in the Hague Convention by adding the words ‘without delay’.

Mutual assistance in criminal matter under Art 10 of this Convention, obligation of which will not be bias under any other treaties. Under Article 10, it states:-

⁴⁰ European Convention on the Suppression of Terrorism, Strasbourg, 27 January 1977.

1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offence and other acts mentioned in Article 4. The law of the State requested shall apply in all cases.
2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

Under Art 12, all the disputes concerning the interpretation or application of this convention shall be submitted to arbitration. When the dispute cannot be settled, it shall be submitted to the International Court of Justice.

It is clear there is a large improvement achieved by the convention, but a few inadequacies are still remained. One is referred to the earlier section regarding jurisdiction, as there is no obligation to prosecute. Another one is no provision on who is liable for damage to persons or goods resulting from a hijacking. Besides, to obtain such compensation one has to resort to the Warsaw System, but it does not always provide adequate relief. In concern of the growing rate of hijacking incidents as a weapon of terrorism has on various occasions, especially on the 911 incident, was prompted the suggestion of establishing an International Criminal Court to deal with this aspect of aviation.

3.3 The Montreal Convention

The offences committed on board aircraft are stated exclusively in the Hague and Tokyo Convention, the Montreal convention is the one to conquer the other unlawful acts against the safety of civil aviation. It is concluded in 1971 one year following the adoption of the Hague Convention.

A person is required to commit an offence under Art 1 (1) of the Montreal Convention, if he unlawfully and intentionally:-

1. Performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft, or
2. Destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight, or
3. Places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft or to cause damage to it which render it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight, or
4. Destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight, or
5. Communicates information he knows to be false, thereby endangering the safety of aircraft in flight.

Under item 5, if there is a false bomb alerts cause 'only delay and no damage' to the aircraft are not covered in this convention.

In Art 3, the contracting states have undertaken to impose severe penalties with regard to the offences listed above.

In Art 5, the contracting states may be necessary to establish its jurisdiction in the following circumstances:-

1. when the offence is committed in the territory of that states.
2. when the offence is committed against or on board an aircraft registered in that state.
3. when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board.
4. when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if he has no such place of business, his permanent residence in that state.

According to Art 5 (2), in the event of the offender being found on a state territory, the state should take such measures even the offender is not being extradited. Further more, under Art 10, the duty for contracting states is necessary to take any step to prevent the offences as Art 1 stated before by using either international law or national law.

Art 4 (2) indicates the convention is applicable to domestic as well as international flights if the point of take-off or landing, or both are situated outside the territory of the state of registration, or when the offence is committed in the territory of a state other than the state of registration.

The words ‘an aircraft is considered to be in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until 24 hour after any landing’ mentioned in Art 2 (b) is purposely extended the entire period of service during which the aircraft is in flight as defined in Art 2 (a) because the convention is designed applicable to domestic and international flight. Any landing is supposed to cover intended and forced landing.

Art 12 requires states supply each other with all relevant information when they have reason to believe that an offence mentioned in Art 1 is going to be committed.

Montreal Convention covers several identical subjects in the Hague Convention, they are:-

1. The non-applicability of convention to military, custom and police aircraft (Art 4)
2. The definition of the words ‘in flight’ (Art 2(a))
3. Joint and international operating agencies (Art 9)
4. The final provision, including settlement of disputes (Art 13-16)

3.3.1 Case Law - Lockerbie case

The Incident

On 21st December 1988 a Pan American Aircraft (flight 103) fell on the village of Lockerbie, Scotland, killing the 259 people aboard and 11 people on the ground, as well as damaging several residential buildings.

Investigation by a flight-commission found, that the crash was due to an intentional bomb aboard the plane. The bomb was in the luggage compartment. It was asserted that the luggage was coming from direct passengers boarding in Frankfurt as well as from some possible suitcases transferred form Air Malta flight 180 to Pan Am 103 in Frankfurt Airport.

The Plane and most of the passengers were American, the village of Lockerbie being in the territory of United Kingdom and 11 killed on the ground being Scottish citizens (British),

both British and American government become involved in the investigations. The bomb was estimated to have exploded inside British airspace.

During the aftermath of the investigations, British and American government and experts involved in the investigation began making a long series of unstable and ever changing allegations from which it seems, few countries in the Middle East escaped unscathed. The flow of information became confused and soon the incident lost its media appeal, whereas only a small specialized force of investigator kept looking for a possible clue to the terrorist act.

The Legal Ground of the Case

On 14 November 1991, a Grand Jury of the United States District Court for the District of Columbia handed down an indictment charging two Libyan national namely Lamén Khalifa Fhima and Abdel Basset Ali al-Megrahi, and, on the same day, the Lord Advocate of Scotland announced the issue of warrants for their arrest. The accusations were conspiracy to murder, murder according to British Penal Codes and offenses under the Aviation security Act of 1982 See 2(1) and 2(5)⁴¹, as well as accusation under the criminal justice Act of 1988⁴². The warrant for arrest was distributed to the member states of Interpol, which Libya is a member of. Due to the guidelines of Interpol etc., the 2 Libya citizens were seized and placed under customary arrest by the Libyan police.

At the time of the charge the two accused persons were situated in Libya, and have remained there since.

On 18 November 1991 the Libyan authorities issued a statement saying that they have received the indictment documents. A Libyan Supreme Court Justice had then been assigned to investigate the charges. Libyan judiciary declared themselves ready to cooperate with all legal authorities, according to general procedure of international criminal law.⁴³

Libya, having signed the Montreal Convention, turned to the Lord Advocate of Scotland requesting cooperation in the investigation and sought information from all related authorities, asking to review the evidence, eventually by traveling to Scotland or elsewhere, according to Art 7⁴⁴ and 11 (1)⁴⁵. But, Libya received no formal answers from the Lord Advocate of Scotland.

On 2 November 1991, the government of both the USA and UK issued a joint declaration demanding that Libya surrender for trial those charged with the crime, accept responsibility for the actions of Libyan officials, disclose all it knows of this crime, allow full access to the

⁴¹ Cited in the High Court of Justiciary at Camp Zeist, via <http://www.scotcourts.gov.uk/library/lockerbie/docs/lockerbiejudgement.pdf>.

⁴² US District Court Order Washington DC for Lamén Khalifa Fhima and Abdel Basset el-megrahi., via http://www.opsi.gov.uk/act/acts1988/ukpga_19880033_en_1.htm

⁴³ Press statement from Libyan Government, Copenhagen, Libyan Peoples Bureau 1992.

⁴⁴ Art 7 of Montreal Convention stating 'the contracting state in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner in the case of any ordinary offence of a serious nature under the law of that state.'

⁴⁵ Art 11(1) of Montreal Convention stating 'contracting states shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the state requested shall apply in all cases'.

evidence and pay appropriate compensation. At this date, the USA and UK were already working on the preamble for a resolution in the UN Security Council.⁴⁶

On 17 January 1992, Libya addressed the UK and the USA in two letters, reminding them of the Montreal Convention, the general rule of Jurisdiction in case of claims to extradite nationals, as well as asking for arbitration according to Art 14(1)⁴⁷ of the Montreal Convention.

On 21 January 1992 the UN Security Council adopted resolution 731/1992 calling on Libya to cooperate in the implementation of the provisions of that resolution and to commit itself to renounce and condemn terrorism. The resolution was based on the British and American demands put forward on the 27 Nov 1991.⁴⁸ However, the resolution did not oblige Libya to extradite the 2 national suspects. Libya declared, that it had fully cooperated in the case according to international jurisdictions, thus already having fulfilled the demands of the resolution.

As the governments of the US and UK failed to respond, Libya resorted on 3 March 1992 to the International Court of Justice, in implementation of Art 14(1) of the Montreal Convention. The claim to the court was, that it should declare that Libya had complied with the Montreal Convention, and in addition Libya submitted a request for an order for provisional measures to protect Libya's international rights under international law in general.⁴⁹

During the waiting of judgment, the UN Security Council adopted another resolution no. 748/1992 the 31 March 1992. This resolution is calling for the use of economic and political sanctions against Libya, if the Libyan authorities continue to refuse extradition of the 2 nationals to either the USA or the UK for prosecution.

On 14 April 1992, the day before resolution 748 would come into action, the International Court of Justice declined to exercise its power to indicate provisional measures.

On 15 April 1992 economic, political and technical sanctions were put into force by the UN against Libya, and has been renewed every 6 months since then. Sanctions consist of an air-traffic ban, financial freeze of Libyan capital abroad, breaking diplomatic contact, and other economic trade-blockades.⁵⁰

Libya stated later in the letter to the UN General Secretary that they had tried everything within the law to resolve its dispute with the UK and the USA, accepting either to try the 2 accused nationals in Libya or transferring them for trial in a third party country, having no opposition to the trial being conducted by a Scottish Court applying Scottish Law.

Legislation and Claims – Libya

⁴⁶ Letter from Libyan Government to the UN Security Council dated 29 Nov 1991, enclosed in UN documents A/46/845 and S/23417, where Libya responds to the allegations, that it should be involved in any terrorist act regarding the Lockerbie-incident.

⁴⁷ Art 14 (1) of Montreal Convention stating 'any dispute between 2 or more contracting states concerning the interpretation or application of this convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within 6 months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the ICJ by request in conformity with the statute of the court.'

⁴⁸ See UN doc. S/PV/3033, 21 Jan 1992, pg. 104.

⁴⁹ ICJ report case Libya vs. United States/ United Kingdom 1992.

⁵⁰ Letter on another UN Security Council resolution 833 was passed to elaborate the sanction in further pressure for extradition.

The Libyan Penal Code and penal procedure are more or less in their content a heritage of European continental laws, mainly French and Italian. Since 1969 there have been efforts to renew the Penal Code in accordance with basic Islamic and traditional Libyan Legislations. Libyan Penal Law may thus be seen as a mix of both basic European continental values added a few Islamic legal points.

The issue of extradition is however quite clear, and does not differ much from the attitude of other penal codes elsewhere in the world. The criminal proceedings concerning extradition and other issues of international related are found in the Libyan Code of Criminal Procedures Art 490 and 510. Libya does reserve its sovereign right to prosecute nationals when found on national territory, and does not extradite nationals to prosecution outside national territory. Libyan Penal Code Art 6 declares that Libya has the right to prosecute a Libyan national for crimes committed in foreign territory if and when he returns to Libya. However, there has never been any Libyan cases found in the Libyan High Court Annuals 1977-1987, where national have been extradited, in contrary to Art 493A and 6.

Libya as a member of the Arab League has furthermore ratified the Treaty for Rendering Criminals of 1952, ratifying it on the date of 19 May 1957. Art 7 of that treaty declared a state can choose to refuse an extradition claim from the requesting state, if the subject for extradition is a subject of that states jurisprudence, i.e. national of the requested state. However, the requested state may choose to enter legal proceedings against the requested subject or choose to extradite, it is a legal term of **aut dedere aut judicare**.

There are no treaties of extradition between Libya and the UK/USA, i.e. Libya is not bound by any multi or bi-lateral treaty to extradite its citizens to the UK/USA for trial. However, Libya is bound to some legal procedures due to another treaty- the Montreal Convention.

Libya is a signatory to the 1971 the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civilian Aviation, as well as Britain and the USA. Libya's legal action in this case have been taken in accordance with that the Montreal Convention and Libya continuously refers to the Montreal Convention in its legal arguing. The legal points are as following:-

1. Under the Art 5 (2) of the convention, the Libya authorities assumed their responsibility for submitting the 2 accused to the processes of Libyan criminal law.
2. Under Art 6 (1)⁵¹ of the convention, the Libyan authorities took steps to ensure the presence of the 2 accused for the purpose of legal procedures. They were placed under custody arrest.
3. Under Art 7 of the convention, the Libyan authorities carried out a preliminary inquiry into the case. Libya's legal claim and argumentation is based on the idea, that the principle **aut dedere aut judicare** is incorporated into Art 7. Under which, the state is having custody of an offender suspected of having violated the laws of civil aviation, is free to choose whether to extradite him or submitting him for national/local prosecution.

⁵¹ Art 6 (1) of Montreal stating 'upon being satisfied that the circumstances so warrant, any contracting state in the territory of which the offender or the alleged offender is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that state but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to e instituted.'

4. Libya is claiming that the acts of force carried out by the USA and the UK to coerce Libya into extradition is a violation of Art 8 (2)⁵² of the convention.
5. Under 11 (1), the Libya authorities sought relevant judicial assistance from the USA and UK to take the process further. Libya also took the point of view, that the UK and USA were bound to cooperate with Libya and accept Libyan actions already taken, due to the article, since the article stipulates ‘the involved parties shall afford one another the greatest measure of assistancein the criminal proceeding’.
6. Under Art 14 (1) of the convention, the Libyan authorities requested arbitrational measures from the UK and USA since the 3 involved countries disagreed upon the actual application and interpretation of the convention. Later, Libya chose to proceed the case in front of the ICJ, since the issue of arbitration was rejected by the UK/USA. (The view of UK and USA concerning the provision or the use of Art 14 was incorrect by Libya. Art 14 conditions a 6 months waiting period. And Libya in the view of UK and USA had not abided this 6 months waiting period before taking the case to the ICJ. Judge Ni being one of the judges from ICJ affirmed this point of his decision.)

Libya’s point of view into the Lockerbie case has until the rise of the question in front of the UN Security Council, been a mere legal point of view. Libya regarded the case as a simple criminal case interesting with the rules of international criminal law. This was exactly why Libya presented the case in front of the ICJ and the case was presented as a conflict of legal interpretations, not a conflict of interpretation of the UN Charter or clarification of International Jurisprudence.

After the implementation of economical sanctions against Libya due to Security Council resolution 731 and 748, Libya’s legal argumentation split into two:-

1. Maintaining the use of the Montreal Convention to solve the case
2. Trying to use international law (UN Charter and Statute of the ICJ) to force the UK and USA to accept the use of the Montreal Convention in solving this case.

In fact, Libya’s claim in front of the ICJ is the first time in legal history raised the question of the legal structures in international criminal law challenging the legal power of the UN Security Council in drafting rules for international criminal law.

Legislation and Claims-USA / UK

Extradition as a general rule in the UK and USA, follows the normative rule of extradition in the rest of the world **aut dedere aut judicare**. General practice in both countries is not to request nor permit extradition in the absence of a treaty. Yet the legal procedures show several exceptions to this rule.

In general, USA would like to accept a refusal to extradite if the requested state prefer USA to prosecute instead of, and that USA would not push for any derogation of that principle, unless it has been modified by a subsequent norm of general international law having the same essence or character. Whether the USA is promoting a resolution from the UN Security

⁵² Art 8 (2) stating ‘if a contracting state which makes extradition conditional on the existence of a treaty receives a request for extradition from another contracting state with which it has no extradition treaty, it may at its option consider this convention as the legal basis for extradition in respect of the offences. Extradition shall be subject the other condition provided by the law of the requested state.’

council as such a legal acceptable modification is a matter of necessity a deal with later on. In the Law of UK, extradition without the presence of a treaty is not accepted.

Actually, USA is a signatory to the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. Both the USA and UK are 2 of the main driving forces behind the making of it, thus implicating that there must have been a political as well as a legal need to cope with those situations described in the contents of the convention. The message of the Montreal Convention is that the mere use of bi-lingual treaties for the situations, i.e. hijacking, bomb on planes etc., in the past have not been a sufficient way of action.

However, both USA and UK points of views in the Lockerbie case are that they consider the 2 accused Libyan citizens to have acted as government-agents for Libya, thus placing the responsibility for the criminal act in the hands of the Libyan government, making the Lockerbie case an issue for the United Nations Security Council. That is why the case has not been chosen as a simple criminal act with international legal involvement, but as a semi-political issue. From the beginning of the case, the USA and UK have refused to apply the use of Montreal Convention to this case due to the reason mentioned. Instead of, they have made use of the UN Charter Chapter VII dealing with the use of force or economical sanctions against a member state in case of imminent danger to the peace of international community. The point is given the USA and UK a legal right according to the UN Charter Chapter VII acting in compliance with the chapter. On 27 Nov 1991 the approach to the Lockerbie case changed from a mere criminal one to a political one by issuing a joint declaration that in its context closely resembles the context of the later UN Security Council Resolution 731(21 Jan 1992), 748(31 March 1992) and their reaffirming Resolution 883(11 Nov 1993).

On 9 Sept 1993, following the settlement described in the case, the USA and UK notified the ICJ that they had agreed 'to discontinue with prejudice the proceedings' in the ICJ Lockerbie litigation. The Court so discontinued the proceedings and removed the cases from the court's list the following day.

The Trial of the Lockerbie Defendants

On 15 Aug. 2003, as part of an agreement with the USA, UK and lawyers for the families of those killed in the Lockerbie bombing, Libya presented a letter to the UN Security Council formally accepting responsibility for the actions of Libyan officials in the destruction of Pan Am Flight 103. Libya also deposited \$2.7 billion in an escrow account in a Swiss Bank, an amount sufficient to provide \$10 million in compensation to each of the victims' families. Libya agreed to pay \$4 million to each family on the lifting of UN sanctions and the remainder when all sanctions are lifted. The USA and UK indicated that Libya's actions were sufficient to permit lifting of UN sanctions, although the USA indicated that it would retain bilateral sanctions given continuing concern about Libyan actions abroad.

On 13 Sept 2003, the Security Council voted 13-0 (with France and the USA abstaining) to lift UN sanctions on Libya. The vote followed Libya's agreement to increase the compensation given to the victims of the UTA bombing. The vote had little immediate practical effect, since the UN had suspended its sanctions on Libya following Libya's decision 4 years earlier to surrender for trial 2 suspects in the Lockerbie bombing. Nonetheless, for Libya the vote was another step towards ending its long international isolation.

4 Conclusion

The interests of safety of aircraft on land and in the air and of the passenger, it is important that the 3 Conventions reviewed in this paper should be envisaged. During the discussion on how to impose sanctions on states and states somehow unwilling to participate in the Conventions, few positive results in sole legal terms have been achieved due to political and economical implications.⁵³ To date, there is still no real progress has been accomplished on the point of requiring the extradition of the offender to the state of registration, especially when the offender is a citizen of the state receiving such a request.⁵⁴ However, it is interesting to note that the United States authorities still insist on their partners to undertake bilateral agreements to the effect that the provision of the 3 penal Conventions will be applied. Extradition mostly consists of bilateral treaties. At present situation there is no worldwide extradition treaty or convention to be found in the context of international criminal law. Extradition outside the treaty or conventional regime today can only be negotiated between the involved states. In some cases, like in the mentioned Lockerbie Case, negotiations may prove to fail, and the result is international conflict between states. Some legal experts have thus put forward the proposal of creating some sort of uniform convention on the issues of extradition to avoid the matters just introduced.

There is a step towards an international accepted set of rule for extradition related to the issues of the Lockerbie case is the draft articles for a Convention on Extradition in Relation to Terrorist Offenses, adopted in 1988 by the International Law Association. If the convention would generate any international legal constitution on extradition, is however quite useless in international criminal law. The draft convention gives no clear definition of terrorist acts, and it does exclude extradition in political offenses, due to the Charter of Human Rights and due to political observations, that one's act of terrorism may not be viewed as a terrorist but the act by another state will use the view of politics rather than legalities. However, legality emancipates from politics is in the hope to render international criminal law, especially penal law in aviation is deemed a better legal tool to solve offences turning often in airspace. We must abolish some of the old-fashioned political views of international law in general. A modification of the UN Charter may be another step into the right legal direction.

ICAO also creates an Instrument for the Suppression of Unlawful Act of Violence at Airports for enlarging the coverage in serving with the International Civil Aviation. It is formed as a special Protocol to be annexed to the Montreal Convention adopted at the February 1988 ICAO conference held at Montreal.⁵⁵

From a legal point of view, the analysis of the Penal law in Aviation based on international conventions in international criminal law today is found rather ineffective on ground of the followings:-

1. The politically motivated interference of the UN Security Council.
2. The inability to present a uniform rules in crime definition and criminal procedure.
3. The inability to protect the individuals, being objective of international criminal law.

⁵³ See Rutgers (note 13, supra) Chapter VII, pg. 16

⁵⁴ See the 20th Session of the Extraordinary Assembly of ICAO (Rome, Aug-Sept 1973)

⁵⁵ See Bin Cheng, International Legal Instruments to Safeguard International Air Transport, the Conventions of Tokyo, The Hague, Montreal and a new Instrument concerning unlawful violence at international airports, in aviation security; How to safeguard international air transport (proceeding of a conference held at the peace palace, the Hague, 22-23 January 1987) pg. 23-46

In order to solve the problems above, we may take further action into the direction of creating some sort of international legal community with a common based legislation concerning international criminal law. Most of the legal problems mentioned in item 2 and 3 are open for any effort to be contributed. However, if any effort to solve the legal problems of international criminal law as put in item 2 and 3 by firstly tackling with political means will void the legal pattern so far we contributed.

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