THE WISDOM OF TREATY MAKING

A Glance at the Machinery behind the Production of Law-Making Treaties

and

A Case Study of the Hague Hijacking Conference of 1970

BY

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I

1. *Introduction*

The Paris Declaration on Naval Warfare of 1856[1] introduced, it is often said, a remarkable development in the legislative sphere. It marked the advent of the multilateral international treaty which determines the contents of the legislation in the various contracting states.[2] These so-called law-making treaties, among which the Paris Declaration may be seen as a tender *primeur,* have spread particularly within the field of international communications. Within certain sectors of life, indeed, the very creation of those treaties has been institutionalized. Permanent organizations have been created to see to it that such treaties are drafted when and as an international need arises for them.[3] Today, civil aviation has one of the foremost among these organizations, viz. the International Civil Aviation Organization (ICAO). The creation of this body, first provisionally in 1944, and later permanently, brought into existence stable machinery for the production of law-making treaties designed to deal with the many legal problems which accompany the advances in aviation.[4] From a first beginning in 1948, when the ICAO General Assembly adopted the first postwar treaty of this type relating to the recognition of rights in aircraft, there has developed a procedure whereby, since 1952, the ICAO Legal Committee prepares a draft which is then considered and ultimately adopted as a treaty by a diplomatic conference convened on the initiative of ICAO.[5]

The role thus conferred upon the diplomatic conferences when

[1] 15 *Nouveau Recueil Général* 791; Hertslet, *Map of Europe by Treaty,* vol. ii, p. 1282.

[2] See, e.g., Nussbaum, *A Concise History of the Law of Nations,* New York 1950, pp. 192 f.

[3] Nussbaum, *op. cit.,* p. 193.

[4] Schenkman, *International Civil Aviation Organization,* Geneva 1955, p. 364.

[5] Schenkman, *op. cit.,* pp. 365, 366, 368.

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the treaty comes into existence is of considerable jurisprudential interest. The following is a case study of a conference which I myself visited in the capacity of observer on a subject on which I have a reasonable amount of knowledge. It deals with the international air law conference at The Hague, December 1–16, 1970, which was convened for the purpose of drafting and adopting a convention for suppression of the unlawful seizure of aircraft, and is known colloquially as the Hague Hijacking Conference.

Reporting from an international conference in civil service jargon is one thing. There have been several such reports from the Hague Conference lately.[6] Whatever these reports are, however, they are not jurisprudential in attitude. But to report, as I shall try to do, what goes on behind the scene with a view to establishing the very technique and basis of agreement and to assessing its merits and demerits is quite another matter. I am not unaware of the dangers involved. An international conference spans the full distance between the principle in the American Administrative Procedure Act, 1946, that nothing authorizes the withholding of information to the public except as specifically stated in the Act (sec. 3), and the principle in the British Official Secrets Act, 1911, that the mere receiving of information from a governmental officer which he has obtained owing to his office, is itself a misdemeanour (sec. 2). There is every likelihood that someone's toes will be stepped upon even if a majority of readers should be found who accept the legitimacy of the scholar's concern and research. If so, I shall have to console myself with the fact that there are some precedents. Two examples suggest themselves offhand: the off-the-record session at the Warsaw Conference in 1929 at which charters were discussed, and the three weeks of off-the-record meetings in which the body of the Chicago Convention was hammered out. Certainly, we have all been grateful to those who have ventured to disclose what happened at these meetings.

2. *Procedure*

Much has happened since the Westphalian Peace Congress, during its year-long wait for the delegates to arrive, staked out the

[6] Schmidt-Räntsch, "Die Internationale Luftrechtskonferenz in Den Haag und das Abkommen zur Bekämpfung der widerrechtlichen Inbesitznahme von Luftfahrzeugen", 20 *ZfLW* 63 (1971); FitzGerald, "The Hague Convention, 1970", in *Air Hijacking in International Perspective, International Conciliation,* Nov. 1971, no. 588, pp. 51–66; Cheng, Symposium on the Hague Convention on Hijacking of Aircraft—The Legal Aspects, Air Law Group of Royal Aeronautical Society, Nov. 1, 1971.

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first rules for running these big conferences. The present-day procedures of the law-making treaty conferences can be traced to the two Hague Conferences of 1899 and 1907 and the preparatory procedure of the London Maritime Conference of 1908–1909.[7] In aviation law there are established ways of preparing and organizing conferences. The preparation has been channelled to the Legal Committee of ICAO, and since the 1950s the organization has been settled by way of recurrent and broadly unchanging rules of procedure. In particular one should note rule 20, which requires decisions of the conference (but not of commissions) on all matters of substance to be taken by a two-thirds majority of the representatives present and voting.

The right size of a decision-making machinery is one of the classical questions. The advantages that go with small-scale machinery have been easier to see as the size of the assembly has grown. Generally, some measure of governability has been made possible by a developed system of committees. To move the conference work to the committees, however, has meant difficulties for those countries which for one reason or another only want to send a small delegation and which consequently have found it difficult to look after what takes place in several committees meeting simultaneously. In contrast to this there has emerged a tendency to make a "Commission of the Whole", that is to say, the entire assembly forms a drafting committee. This technique allows all delegations to participate in the debates and to influence, and to be influenced by, the discussion at the conference. The price exacted has been felt to be only a lengthening of the debates and a consequent loss of valuable time.[8]

A diplomatic conference is, in principle, only a negotiation between the participating powers for the purpose of reciprocally adjusting their interests. A law-making diplomatic conference, however, tends to stray away from this path and to approach the situation in a legislating assembly.[9] This tendency is marked

[7] Mastny, (Rapporteur), Report submitted, League of Nations, Committee of Experts for the Progressive Codification of International Law, 20 *Am. J. Int. L.* Suppl. 207 (1926); cf. David Johnson, "The Conclusions of International Conferences", 1959 *Brit.Y.B.Int'l L.* 6 ff.

[8] Cf. Sinclair, "Vienna Conference on the Law of Treaties", 19 *Int'l & Comp. L.Q.* 47, particularly 51–53 (1970).

[9] It has not been easy to locate in the literature the thinking which must certainly have been devoted to the (often English or American-derived) forms in which international conferences work and the substantive law effects of such forms. The United Nations working methods have attracted the attention of some authors. I may here refer to Hernane Tavares de Sà, *The Play Within the Play—The Inside Story of the UN,* New York 1966,

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by several technical details. Among the more important is the anonymous voting procedure which dominated at the Hague conference. The votes were normally only counted and not identified, and the feeling of personal responsibility for the vote was correspondingly blunted. The voting delegates were led to feel as one with the multitude. Nice distinctions in voting are parts of the nebulous idea of legislating. Habit has produced a certain understanding of the motives operating when a delegation abstains from voting. To "abstain" is by no means taken to imply that the delegation would have liked to vote for the resolution but did not dare to do so for fear of offending somebody, but is rather considered to show discontent with some detail in the proposition voted upon. At times, however, political control would descend on the assembly like a chill wind. Two things tended to remind the assembly of the world outside the assembly hall: the request for a roll call, i.e. that the votes should be placed on the record individually, and the offering by a delegation of an explanation of how it had voted and why.

3. *The Delegate*

When the legislating atmosphere descends upon the assembly, the individuals which make up the latter inspire a new interest.

which concentrates on the political side of the matter, and mention should also be made of Lall, *Modern International Negotiation—Principles and Practice*, New York & London 1966. The scientific congresses organized under the auspices of the United Nations, however, have also evoked some critical articles. Mention should here be made of the two dealing with the London Conference on Prevention of Crime and Treatment of Offenders, 1960: W. H. Nagel's "General Observations" in 1 *Excerpta Criminologica* 161–2 (1961), and J. E. Hall William's note "Two International Congresses", in 1 *British Journal of Criminology* 254, at 257–61 (1961). The article by J. Barents, "Vanity Fair? International Congresses Reconsidered", 53 *American Political Science Review* 1090–94 (1959), is formally addressed only to the problems of the international congresses of the International Political Science Association, but, as it happens, these problems are to some extent the same as those which beset a diplomatic conference. The same merit is possessed by W. H. Nagel's remarks in his article "International Collaboration in the Field of Criminology", in *Le droit pénal international—Recueil d'études en hommage à Jacob Maarten van Bemmelen*, Leiden 1965, p. 193, at pp. 216–21. —In the Swedish-language literature the following articles may be mentioned: Åke Holmbäck, "Arbetssättet i Förenta Nationernas generalförsamling. Några fakta och många reflektioner", *Sv.J.T.* 1952, pp. 560–87; Lögdberg, "Några ord om tillkomst, ändring och verkan av internationella konventioner på privaträttens område med särskild hänsyn till revisionen av Bernkonventionen i Stockholm 1967", in *Nordisk Gjenklang—Festskrift til Arnholm*, Oslo 1969, pp. 197–211; and Conrad Persson, "Den sjätte världskongressen i Haag för invalidvård (rehabilitering)" *Folkpensioneringen (Organ för Föreningen för främjande av pensionsstyrelsens verksamhet)* 1955 (vol. 55), pp. 58 ff.

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They turn out to be as interesting in themselves as are the states which they represent. I think it can be said, too, that the spotlight which was attracted by a conference on the dramatic topic of hijackings had a particular influence on the delegates who normally led an obscure existence in ministries and agencies back home: this was their hour and they wanted to make the most of it! The procedure used, furthermore, brought an interesting return on individual characteristics.

First, the importance of special seniority should be noted. The tying of the preparatory work to the ICAO Legal Committee directly converted seniority in the Legal Committee to prestige in the assembly. The Spanish Delegate, a juridical assessor in the Spanish Air Ministry named Carlos Gomez Jara, seemed to profit most from this fact. While he was not widely known outside his ministry, he had been connected with the ICAO treaty drafting work as far back as 1952. Two other delegates, W. Guldimann and Arnold Kean, representing Switzerland and the United Kingdom, respectively, enjoyed similar prestige.

Secondly, one should note the importance of the training which some delegates had received at the few air law institutes in the world. The fact that the representative of the island state of Barbados had been trained at the McGill Institute of International Air and Space Law allowed him to exercise an activity and an influence which was by no means proportionate to the importance of the island itself.

When one recalls that Johannes Hellner[1]—then an appeal court judge—commented angrily after the 1904 Hague Conference that he did not speak French sufficiently well to have been able to be particularly active at the Conference and furthermore always had felt indifferent to foreigners,[2] it is natural to also attach some importance to the knowledge of languages and to a cosmopolitan attitude. The perfect French in which the Congolese delegate, Mr F. X. Ollassa, addressed the audience, certainly allowed him to influence the debates in a way unattainable for, for instance, the Swedish ministry lawyers with their limitation to more homespun varieties of English.

The environment thus created could reward the concentration

[1] Johannes Hellner was a leading Swedish lawyer with a Liberal affiliation which resulted in his being made Foreign Minister during the final years of the first world war.

[2] Joh. Hellner, *Minnen och dagböcker* (ed. by W. Odelberg), Stockholm 1960, p. 99.

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of a state's representation in the hands of one or a few delegates only. The Norwegian delegation, e.g., consisted as a practical matter of a single person, a woman. This concentration, which probably was based on the delegate's linguistic talent, her excellent intellectual capacity, her interesting sex and appearance, won for the Norwegian interventions in the debate an interest which far surpassed what the much more numerous but also more divided Swedish and Danish delegations could attract.

The far-reaching parcellization of the world into small states has been accompanied by a great demand for persons suitable for sending to diplomatic conferences. Normally it is the law faculties of the great colonial powers that have found themselves entrusted with the production of most of the people needed. This again has entailed a discreet but noticeable influence exercised by British and possibly also French professors of international law, comparative law, and other legal subjects with an international appeal. Having seen the former student of non-European origin conferring with his old professor in the corridors of the congress palace about formulas and actions, I am disposed to see here a factor not without influence upon the outcome of the conference.

II

4. *Introduction to the Real Problem*

The oratory and the legislating atmosphere which characterized the 1970 Hague Conference should not, however, cause us to overlook the fact that it dealt with a real problem of a very serious nature. Civil aviation, after having expanded in volume and spread to all corners of the earth and having increased in efficiency and profitability continuously during the postwar period, had suddenly suffered a vigorous setback as a result of an epidemic of hijackings which during the crisis of September 1970 had even brought forth a meeting of the Security Council. However limited the results of that meeting, it certainly served to underline the political aspect of the problem.

5. *General Analysis*

The crime picture which came to light during the development of the hijacking epidemic had three different parts.

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First, there were the *escape cases*. They were in turn the product of what may be termed the Iron Curtain problem. People avoided the electrified fences, the land mines and later the "Mauer" of the Iron Curtain by making their escape by aircraft above them. The revolution in Cuba switched the roles. People of desperate inclination started to flee from the United States to what turned out to be another Iron Curtain country: Cuba. Secondly, the *mental case* character of a great number of these escapes became more and more evident and finally the Cuban Government, in spite of the loss on the propaganda side, started to return the more mentally confused and the more criminal individuals among the hijackers to the United States. Thirdly, a military element began to appear. The hijackings developed into *acts of guerilla warfare*. This element found its most extreme expression in Operation Abu Thalaat in September 1970 when the whole military apparatus of the Palestine Popular Front was engaged in carrying through a *per se* quite successful blackmailing operation against international civil aviation.

The distinction between escape cases, mental cases and acts of guerilla warfare had a roughly equivalent counterpart in the distribution between the Iron Curtain problem, the Caribbean problem and the Mediterranean problem, although at many points a spillover could disrupt the more perfect trichotomies.

6. *Distribution of Interests*

The epidemic which thus started in the early 1960s and which expanded spectacularly towards the end of 1968 also had the result that among the various countries some came to appear as target states and others as victim states.

Among the *target states*—i.e. those states which hijackers picked as destination for their hijacked aircraft—were first of all to be found the countries along the western side of the Iron Curtain: Austria, West Germany and Denmark. But there were also to be found those countries which sympathized with the terrorist actions against civil aviation, if indeed they did not directly support and finance them. Here were found the Arab states in so far as terrorist actions against Israel were concerned, as well as the Black African states in so far as terrorist actions against the white bloc in Southern Africa were concerned. In the same category may be placed Cuba and to some extent Chile after its recent switch to a Socialist regime, these two countries being

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from ideological motives in opposition to other Latin American states.

Among the *victim states* were to be found those states whose civil aviation had been made the victim of the epidemic. Here were the countries along the eastern side of the Iron Curtain, i.e. the Eastern bloc headed by the Soviet Union. In the Caribbean world the Latin American Continental powers were included in this category in so far as escape cases were concerned. The United States of North America had suffered in particular from the mental cases. In the Mediterranean world, Israel was the most exposed country, victimized particularly by acts of guerilla warfare, but Italy, Switzerland and Spain had also been sufficiently hit to be included in the category, as was likewise the world aviation of the United Kingdom and the United States.

The less affected states were involved in varying degrees. There were completely unaffected states such as France and Norway, and there were nervous small powers such as Finland, Sweden and Austria. British interests in the Arab world conferred special status upon the United Kingdom; and Israel had some devoted friends, among which the Netherlands may warrant special mention.

7. *Technical Analysis*

Early in the conference the Swiss delegate, Dr Guldimann, introduced Information Paper No. 2, in which he pointed out the important questions that called for action by the assembly. He underlined the importance of the issues of an absolute duty to prosecute hijackers and of the duty to extradite them. Behind this analysis lay an awareness that the problem of hijacking mirrored a deeper political cleavage and that the activities which went with hijacking were already criminal everywhere, but that this fact was of little avail since so few prosecutions were instituted. In the ICAO Legal Committee draft it was even assumed that no absolute duty to prosecute should be laid down.[3] The intended convention was only to be—to use the lobby phrase of the conference hall—"a propaganda exercise". The convention was to limit itself to a moral condemnation of hijackings: for the rest matters should remain the way they were.

[3] ICAO Legal Committee, 17th Session, Minutes (ICAO doc. 8877-LC/161 p. 69, cf. pp. 51, 52).
For the reader's guidance, a table with the various formulas on prosecution and extradition discussed by the Conference is annexed at the end of this article.

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8. *Initial Positions*

The Americans were intent on producing a "strong" convention which could help them to solve the Caribbean problem and which could enhance the political prestige of their President back home. Already prior to the conference, an American document had circulated proposing a revision of the Legal Committee draft. This revision proposal now surfaced as Document 28. It was drafted to prevent the waiving of prosecutions on the ground that the crime was political in character. The men behind the American proposal believed more in extradition than in an absolute duty to prosecute. They felt that, even if such a duty was established, local political turmoil would adversely affect the administration of justice, whereas it could not have this effect if extradition was granted. Hence, Document 28 sought to prevent the exception of political crime in extradition proceedings by means of a new clause, art. 6 bis. This endeavour to make extradition the main rule was supplemented by an attempt to create an absolute duty to prosecute as well.

In order to create the basis for a rule of extraditing hijackers without exception, the Americans had suggested the formula: "the offence, whatever its motivation, shall be considered to be a serious common crime and not a political offence".

In order to create a basis for an absolute duty to prosecute, the formula was proposed that the governmental authorities of the target country should "take all steps within their competence to prosecute".

9. *The Counter-Attack*

Document 28, however, had no easy passage. The West Europeans, who had received the American proposal in advance of the conference and been less than enthusiastic about it, went sour already on the second day of the conference. A private meeting was held with the American delegation after the official session on December 2. The West Europeans attempted to explain to the Americans at this off-the-record meeting that certain countries —e.g. Germany[4]—would have constitutional difficulties with an exceptionless rule of extradition. Document 28, too, could hardly be reconciled with the European Extradition Treaty which several states had already ratified.[5]

[4] The German Federal Constitution of 1949 provides in art. 16, para. 2, that "the politically persecuted shall enjoy the right of asylum".

[5] 359 *United Nations Treaty Series* 273 (no. 5146). The European Con-

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After this meeting, the matter was discussed informally between members of the West European group. Five days later, on Monday, December 7, there was held a new off-the-record meeting, in which some British Commonwealth countries and some Latin American countries also took part. At this meeting a friendly counter-proposal was produced which came to be known as Document 72. This document revived the "soft" formulas of the Legal Committee on the duty to prosecute, i.e. those which the Americans had already rejected. The counter-proposal, however, sought to make itself more appetizing to the Americans by including the formula of art. 6 bis, "whatever the motive for the offence". Since on the same day the Commission of the Whole had already accepted an extension of the penal-law jurisdiction, which the Americans had not even proposed, the counter-proposal also included this extension. It meant, roughly, a variation of the universality principle which, incidentally, is established in Swedish law: when the hijacker was found in the contracting state a prosecution should be initiated "whether or not the offence was committed in its territory".

This counter-proposal was officially introduced on December 10.

10. *The Americans Go to Work: "The Frozen Language"*

It was a hard time for the American Delegation. The West Europeans were uncooperative. In their newspapers the Americans could read about the public indignation at home over a shameful Iron Curtain incident which had taken place in the very territorial waters of the United States. It was the story of the Lithuanian sailor Simonas Kudirkas who had tried to escape from his Soviet ship, the "Sovjetskaja Litva", to the US Coast Guard cutter "Vigilant", but had been returned to the Russians by the American officers.[6] This case was a stab in the back of the Ameri-

vention on Extradition which is a result of cooperation within the Council of Europe, was signed in Paris on December 13, 1957, by eleven European states, among them Sweden. Sweden ratified the Convention in 1958 and this ratification plus two more brought the Convention into force in 1960. Among other states adhering to the treaty are Denmark, Greece, Ireland, Israel, Italy, Switzerland and Turkey. The treaty forbids extradition for political crime. A version of the Belgian *attentat* clause has however been introduced (art. 3, para. 3).

[6] For detail, see the account in *Naval War College Review* 1971, May issue, by Mann, "Asylum Denied: The Vigilant Incident", pp. 4–31; cf. Goldie, "Legal Aspects of the Refusal of Asylum by US Coast Guard on 23 November 1970", same issue pp. 32–40. A subsequent report by Anatole Shub from Kudirkas' trial before the Lithuanian Supreme Court, May 17–20, 1971, is

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can Delegation which was charged with pleading the necessity of an absolute duty to extradite and which consequently had to dismiss summarily the need for a right of asylum.

However, the Americans went to work. It is part of the routine for American delegations to have biographical data on other conference members. The Americans had installed themselves on the top floor of the Kongressgebouw tower. Here, they invited and received one delegation after another, each being treated according to what the advance information suggested might be appreciated. Finally, using stick and carrot—or at least the Kissinger doctrine of linkage and lavish treatment—the Americans had erected the necessary platform for a compromise. The compromise made meant that the Americans were to revoke Document 28 in return for being allowed to influence the language of Document 72. The final compromise text was worked out during a cocktail party given by the German delegation on Wednesday, December 9. Thus was created what later, when it was agreed upon between the Americans and the other Western delegates, came to be called "the frozen language"—the formula that must not be changed.

Document 72 revised, containing "the frozen language", was introduced by the Italians, but not until Thursday afternoon. It meant the return to some of the formulas of Document 28. The choice of words of the Legal Committee had been "as in the case of other offences". "The frozen language" was: "as in the case of any other *ordinary* offence *of a serious nature*". The Legal Committee's choice of words had been "for their decision whether to prosecute him". "The frozen language" changed this to "for the purpose of prosecution". By excluding the use of the alternative in the formula, which after all suggested that one also could decide to abstain from prosecution, the Americans hoped to attain an absolute duty to prosecute.

11. *The Penitents*

On Friday morning, "the frozen language" of Document 72 revised was adopted by the Commission of the Whole. Already during the previous evening, however, "the frozen language" had turned out to provoke strong controversy. The Egyptians were evidently intent on fighting the text. They opposed the formula "whatever the motive for the offence". Instead, they wanted the

given in the *International Herald Tribune*, August 7–8, 1971, pp. 1, 2. Kudirkas was sentenced to ten years' hard labour for his escape attempt.

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formula used in the United Nations resolution of November 25, 1970, which said "without exception whatsoever". When the session closed on Thursday night, a group of Western delegates assembled on the staircase leading up to the coffee room one flight up to have a word about it with the leader of the American delegation. The latter, however, insisted upon the agreement made. If he were to depart from "the frozen language" he would first have to cable Washington for permission. The others had to leave for their quarters: "the frozen language" was adopted during Friday.

On Friday evening, the Secretary General of the Conference, P. Roy, gave a cocktail party for the conference participants. During this party, the Egyptians tirelessly worked upon the British and the Swiss in order to make them defect from "the frozen language". They did so with such success that—or so it was reported in the lobbies—the Russians tried to stop them and even made them cable Cairo to report that they, the Russians, had intervened.

The Swiss were particularly worried. A main Swiss interest was to safeguard Swissair's safety in its Mediterranean operations. But if the Egyptians did not accept the ultimate convention, this safety would in no way have improved. In other words, if the Egyptians refused to sign, the Swiss would have gained nothing. The attitude of the chief British delegate, on the other hand, was very much determined by the Foreign and Commonwealth Office, which was eager to please the Arabs.

The Swiss talked the matter over with the Americans. As matters then stood, the only winners were the Russians. The Russians could display the Convention text under banner headlines in *Pravda* and claim it as a major success, inasmuch as even the West now condemned the hijackers who had fled from East to West. But the Americans insisted on the commitment to "the frozen language".

On Saturday morning, discontent was so vociferous that the opening of the session was delayed while the Americans met with their partners in Conference Room 1. The Americans insisted that their partners were committed to "the frozen language": "We are not releasing you." The Dutch supported them. The British delegate, however, took the opposite view. He thought that the Americans were unreasonable. Consequently he did not feel bound by his commitment. In his view the UN formula was better and he was going to vote for it.

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The end of the story was that "the frozen language" succeeded in passing through in the reading of the draft treaty text in the Commission of the Whole, but many wondered what the outcome would be when this text was read in the Conference.

12. *The Black-and-Brown Counter-Offensive*

On Monday morning, December 14, the Conference reading of the draft convention started. Not until that afternoon were the articles on prosecution and extradition arrived at. During the debate on these articles, it became evident that a pact had been made between the Brown and the Black. The Arabs wanted "the frozen language" defeated in order to have a free hand with the military hijackings. The Black African delegations wanted the extradition article in "the frozen language" defeated in order to have a free hand in dealing with South Africa and Portugal. The Arabs and Black Africans seemed to have committed themselves to support each other's proposals reciprocally and thus they were able to muster almost one third of the votes. As a result, they represented a threat that the conference would not attain the two-thirds majority required for adoption of the draft convention.

During the Monday afternoon session, Kenya moved for a return to the UN language, i.e. to replace the formula in art. 7 "whatever the motive for the offence" by the UN formula "without exception". Kenya here used a two-word formula. The real UN formula, however, had been a three-word formula: "without exception whatsoever". This detail did not immediately attract attention. The US delegation, e.g., initially thought the three-word formula was used. Kenya also proposed another change which struck at "the frozen language", viz. the deletion of the word "other" in the formula "as in the case of any other ordinary offence of a serious nature".

Under the impact of this frontal attack and considering that the Swiss and the British seemed to have defected from "the frozen language" deal with all the consequences that might entail, the Americans were forced to contemplate retreat rather than run the risk that there would be no convention at all. The USSR came to their assistance and requested that at least the UN three-word formula "without exception whatsoever" be reinstated. Kenya opposed "whatsoever" and furthermore proposed a return to the alternative Legal Committee formula at the expense of the formula "for the purpose of prosecution" which

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was part of "the frozen language". At this moment, general confusion broke out and the session was adjourned.

During the recess, unity was restored. The Kenya delegate met his old professor in the corridor and when the session reopened Kenya said that it accepted the whole of the UN formula. The Americans seconded this proposal but opposed further changes. The assault on "the frozen language" begun by Kenya was then taken over by Chile, which proposed a return to the alternative formula. At this point, however, the British stood firm in support of "the frozen language" and even found themselves assisted by the Rumanians. If the conference threw out the strengthened language, said the latter, it might be known as the mountain which give birth to a mouse—and the conference found itself listening to the Latin phrase: *parturiunt montes, nascetur ridiculus mus.* At the vote, the UN formula was adopted by 61 votes to nil, 11 states abstaining. In this connection it appears that the word "other" also disappeared.[7]

Thereupon the conference reached the matter which the Black Africans had at heart—extradition. In the Commission of the Whole, the solution had been chosen that the hijacking treaty should operate as an extradition treaty between the contracting states. This Zambia could not accept. Zambia had no extradition treaty with South Africa and felt it dishonourable to have one. Black Africans and Arabs now concentrated their efforts. This formula meant life and death for the convention, said El Hicheri, the delegate of Tunisia. The British supported the Black-and-Brown coalition. The Eastern Bloc, however, opposed it and called for the retention of the Commission text. Again the session was adjourned.

During the recess Zambia found British help in drafting a new formula and this was thereupon introduced by Zambia. It meant that the contracting state would, if it so wanted, consider the convention as an extradition treaty: "may at its option consider this Convention as the legal basis for extradition". This formula was voted on and adopted by 62 votes to nil, with 9 abstentions.

13. *Epilogue*

The final Convention text was settled with only slight variations of what thus had been ironed out. The extradition provision in

[7] An account of how it disappeared will be found in FitzGerald, "Towards Legal Suppression of Acts Against Civil Aviation". *International Conciliation,* Nov. 1971, no. 588, p. 59.

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art. 8 was given—leaving out some parts here irrelevant—the following wording: "If a Contracting State which makes extradition conditional on the existence of a treaty receive 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 offence." (Art. 8, para. 2.) The prosecution article acquired the wording: the Contracting state shall, if it does not extradite the alleged offender "without exception whatsoever ... submit the case to its competent authorities for the purpose of prosecution". The Convention expressed a general condemnation of hijacking. It was signed on December 16, 1970, by 49 of the 77 states present. And, undeniably, at about this time hijackings decreased considerably in number. Had the Convention achieved its purpose?

In reality, it was hardly the Convention which achieved this result. It was King Hussein's army which solved the military hijacking problem by crushing its base organization, the Palestine guerilla movement. The gain of the West Europeans from the Convention therefore was more apparent than real: King Hussein had solved the Mediterranean problem. The Caribbean problem, on the other hand, was brought under acceptable control by President Nixon's security agents. The Nixon administration sky marshal programme was created independently of the Convention and had already by early December 1970 proved an efficient deterrent to any attempts by political terrorists to hijack US airliners.[8] As a spillover, most other hijackers reacted in the same way, too.

What the Convention has done, however, is to raise the "Mauer" into the skies. It is the Soviet Bloc which has profited most from the Convention. The immediate results of the Hague Conference were the death sentences in Leningrad the night before Christmas Eve.[9] Indeed, the result of the Hague Conference was relied upon by the authorities in support of the severe sentences. Less noticed, perhaps, has been the fact that upon appeal the

[8] See interview with Lt Gen. Benjamin O. Davis, head of sky marshal programme, as reported in *International Herald Tribune,* December 8, 1970, p. 2, col. 8; cf. Jan. 1–2, 1972, p. 2, col. 5.

[9] According to an official report, printed in *Leningradskaya Pravda,* June 16, 1970, 12 people had been seized the day before at Smolny, a Leningrad airport, while walking from the terminal to a small An-2 aircraft that was to take off for Petrozavodsk. Leib G. Khanokh and eight more were later tried in the Leningrad City Court and sentenced for this act as part of an escape attempt.

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Turks, on March 8, 1971, deprived an Iron Curtain case of its character of a political crime.[1] Art. 64 (a) of the Criminal Code of the RSFSR, which provides for the punishment by death, if necessary, of the treason consisting of "flight abroad", had received an important support.[2]

On the other hand, when ratification was being prepared in the West European states, the exact formulas of art. 7 did not matter much in spite of all the conference energy devoted to their drafting. The British Hijacking Act of 1971 states expressly in sec. 5 that "proceedings for an offence under this Act shall not be instituted ... except by or with the consent of the Attorney General". Perhaps not too much should be attributed to the powers to stay a proceeding thus bestowed upon the Attorney General? After all, it seems to be understood that "he has not unlimited discretion in these matters" and that "he would normally always have to institute proceedings, political offence or no political offence".[3] But suspicion is aroused when the German delegate at the Hague Conference takes no less a broad view of the action permissible under art. 7: "The competent authorities, however, are not obliged to institute criminal proceedings but are bound only by the domestic law on how to deal with the perpetrator of any other criminal offence, including sections 153 ff. of the Straf-Prozessordnung relating to when in special cases the proceedings may be stayed." He concludes that "the prosecuting authorities have a margin when deciding exceptional cases".[4] And if this is not enough, even blunter statements will be found in the Swedish and Norwegian bills for hijacking legislation: the right to exercise discretion whether or not to prosecute which is given to the prosecuting authorities under the domestic law is left unaffected by the Convention.[5] If the Leningrad trials are suspected of having awakened "l'esprit d'escalier" in some delegates, it is hard to avoid the impression that "l'escalier" also was the place for deals among other delegates as to how to interpret the formula of art. 7 on prosecution.

[1] Two Lithuanians, Panos Stasio Brazinskas and Algedas Brazinskas, managed to escape from Russia on Oct. 15, 1970, by hijacking an Aeroflot airliner and forcing it to land at Trabzon, Turkey.

[2] For a translation into English of the Criminal Code of the RSFR, see Berman, *Soviet Criminal Law and Procedure*, Harvard U.P. 1966.

[3] As stated by Lord Stow Hill, 322 *H.L. Deb.*, col. 1059 (July 21, 1971).

[4] Schmidt-Räntsch, "Die Internationale Luftrechtskonferenz in Den Haag und das Abkommen zur Bekämpfung der widerrechtlichen Inbesitznahme von Luftfahrzeugen", 20 *ZfLW* 63, at 93 (1971).

[5] *Proposition* 1971 no. 92, p. 56; *Ot. prp.* 1971 no. 52, p. 29 (Swedish and Norwegian Government bills, respectively).

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III

14. *Evaluation*

Looking back at this law-making treaty conference, its most noticeable feature would seem to be its strange division into three layers. The real political problems lay at the bottom, unavoidable and controlling. In the middle layer were the intrigues of the delegates and their agreements with one another. In the top layer was the debate in the conference hall. What contact was there between the various layers?

In the conference hall nobody ever touched the real problem. If Dr Guldimann had not produced his Information Paper, it is hard to know what the conference would have debated. To powers with one-sided interests, this may not have presented much of a problem. They knew well enough what the whole thing was about. The Arabs and Black Africans were absorbed in their determination to fight the Israelis and the "Boers", respectively. Three important Arab states, Syria, Iraq and Jordan, did not even bother to attend the conference. Chileans and Cubans were similarly intent on fighting the capitalists; Cuba, too, did not attend the conference. In this group will also be found the countries which ultimately abstained from voting when the Convention was adopted—Algeria and Chile. But outside of this group, where the situation was not so surrounded with prejudice, it was easier to become the victim of the environment. This was a *diplomatic* conference: that meant the proscription of frank speaking. Who then were those who spoke at the sessions? Not those most affected by the problem—the West Germans and the Israelis: they were almost silent. Most of the talking was instead done by those who suffered least from the problem. Some even considered it a demerit to remain silent and felt that they contributed to the solution of the problems by participating in the debate. There was a great display of oratorical fervour. Sometimes the people concerned addressed the assembly, sometimes the press in the gallery, sometimes presumedly interested professors, sometimes the public back home, and sometimes even posterity.

The debate thus came to be characterized by a *touch of unreality*. It never touched the real problems and all the important agreements were made in the lobbies and at the cocktail parties. Certainly this contributed to *confuse* people's minds.[6] Some fell

[6] The delegates certainly had very vague ideas of what could be the

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into believing that the military Marxist problem could be solved by a convention for the mental cases. The steps taken by the United Kingdom were certainly dictated by their experience of the military hijackings which had hit them in September. The steps taken by the United States were largely dictated by the mental cases. The steps taken by the Soviet Union were dictated by the escape cases. But both the United States and the Soviet Union considered themselves to be victim nations and thereby acquired a strange community of interest which from time to time, as has been seen, found expression in the manoeuvres in the conference hall. Behind the United States one would find a multitude of Latin countries, most of which had largely the same type of problems as the Soviet Union: Spain, the Latin American Continental powers (except possibly Chile), but also Italy. Within the Soviet Bloc order reigned, as usual. But among the West Europeans—apart from a chilly France—the confusion was as evident as were the good intentions.

The concentration of Israel upon the Mediterranean military problem made her forget the Iron Curtain problem. She was not the only one, as has already been shown. The name of Simonas Kudirkas always remained in the bottom layer. The *International Herald Tribune* had a full-page advertisement about the Leningrad defendants on Saturday, December 12, which circulated in the assembly. No delegates displayed any noticeable reaction to the contents of the advertisement. But when the death sentences were approaching towards the end of the conference, "l'esprit d'escalier" awoke among the Israelis. On the same day as the Convention was signed, on December 16, the Knesset met in extraordinary session to protest against the Leningrad trial and on December 25 Israel made a formal request to the Soviet Union that the death sentences be annulled.

This touch of unreality caused the Conference also at times to get lost among the problems. The Convention is written for giant airliners of the kind which were hijacked in Operation

purpose of an international treaty on how to draft the national penal law relating to a sector of life where the opposition between political aims was as strong as in the hijacking area. The debaters in the presumedly legislating assembly would no doubt have profited if they had recalled Nussbaum's observation that "municipal legislation on ... punishment of foreign criminals and of criminal acts committed abroad" above all "provide[s] in a case of diplomatic dispute some ground to stand on, especially in refuting a charge of arbitrariness in case of disputed international conduct". See *A Concise History of the Law of Nations,* New York 1950, pp. 196, 195.

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Abu Thalaat with hundreds of innocent victims on board. Over the Iron Curtain that is not the usual case. There, the escapes are made in small aircraft with a pilot and one or two passengers on the run. Collusion may be suspected, but if the pilot wants to return home, he had better appear to be forced to assist in the escape. The oratory used at the Conference about the safety of the passengers and the safety of civil aviation generally is apparently wasted in this situation. The Convention, which makes no distinction between various types of aircraft, thus represents a sort of over-kill capacity. Furthermore, the problems of evidence were never touched upon, although they would seem to have decisive importance when one considers the staging of trials based on what has taken place in far-away states and on far-away continents. Indeed, the Swedish delegation could have made some useful contributions on this point. No penetration was undertaken of the problem arising from the permanently frozen international sea which would seem to be such a likely landing place for escape cases, particularly between the Soviet Union and North America.

With the lapse of time, of course, these defects will be brought to light. But the reason why they were not noticed in the course of the creation of the Convention must certainly lie in the very character of the Conference. It did not allow any place to a legal-technical analysis of a type which would have improved the quality of the product which had left the preparatory machinery of the Legal Committee. And at this place, it may be pertinent to make some general remarks on what can be achieved by a law-making treaty conference.

Those who are inclined to doubt the possibilities for a conference with several hundred participants to achieve good results, are wont to recall the observation made by Prince C. W. L. de Metternich on the matter: "Les affaires les plus compliquées, les questions les plus délicates, gagneraient-elles par hasard à être traitées dans des réunions de 40 à 50 ministres, députés, indépendant l'un de l'autre, votant par assis et levés, prononçant à une majorité souvent problématique, souvent inadmissible, sur des intérêts que l'union intime et la prudence éprouvée de trois ou quatre cabinets ne réussissent qu'avec peine à régler d'une manière satisfaisante?"[7] The giant diplomatic conference un-

[7] Constantin de Grunwald, *La vie de Metternich,* Paris 1938, p. 145, reproducing the text of a letter by Metternich of 1822.

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deniably has little to offer in this respect. It has more the character of such mammoth assemblies as the League of Nations and the United Nations Organization. A former French diplomat in Stockholm, M. Serge de Chessin, once ascribed to Aristide Briand the merit of having brilliantly detected the true nature of such an assembly as that of the League of Nations. "He was sufficiently shrewd to understand that the League of Nations was but another kind of parliament which could be mastered and controlled by the same methods as other such parliaments: by lobbying, secret meetings and secret deals, and by demagogic rhetoric."[8] The proceedings of the hijacking conference at The Hague by no means contradict such a characterization, even though the proceedings were not dominated by an Aristide Briand.

Keeping this characterization in mind, it begins to appear singular that a conference of this type is recruited from ministerial officers. The assembly at The Hague consisted of some 300 people. The foreign-service sector contributed about 125, half coming from local missions, the rest from the ministries back home. Other specialized ministries and aviation agencies contributed about as many participants: one third from ministries of justice and of the interior, and the rest from governmental agencies in the communications sector. The crowd was completed by half a dozen professors of law and a slightly higher number of airline employees. Consequently, it was very much a technical assembly —a conference of technicians believing itself to be a parliament.

Of course, these technicians were subject to some political control. The guiding hand of the foreign-service sector may be seen in the fact that 46 of the chief delegates were from that sector while only 24 came from the governmental communications sector and only four from ministries of justice and of the interior. Political control was also exercised by means of instructions and by the possibility of refusing afterwards to ratify the Convention once it had been adopted—a possibility which was at times referred to in the debate.

Recruitment from ministerial officials raises certain questions in so far as Sweden is concerned. These follow from the working atmosphere in Swedish ministries. The officials in question are recruited from the Courts of Appeal, but the contact with things

[8] Serge de Chessin, *Diplomatiens ragnarök*, Stockholm 1941, p. 134 (my translation).

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international is normally very limited in these Courts. Nobody attempts to qualify for entry into the ministerial service by pursuing studies at foreign law faculties. The bespoke character of the work itself easily cultivates an attitude of submissiveness which in some cases is almost shocking.

It we limit ourselves to air-law cooperation, it may be said that participation in the ICAO Legal Committee—although one should not exaggerate the penetration of legal problems that is there possible—at least entails so much prestige in the conference work, particularly if the participation has lasted a long time, that it should control also the participation in the subsequent diplomatic conferences. In view of the advantages to be gained by concentration, it is not unreasonable to stop at this. If the working conditions and technical reasons should call for an increase in the size of the delegation, it is perhaps not unreasonable that in Sweden also one should consider, for the benefit of the international work, whether it might not be desirable to overstep the narrow limits dictated by the personnel policy in the ministries. Certainly, the degree of wisdom displayed in treaty-making would hardly suffer in that event.

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An Aide-mémoire

	Extradition	*Duty to prosecute*
U.S. Document 28	"the offence, whatever its motivation, shall be considered to be a serious common crime and not a political offence" (art. 6 bis)	"take all steps within their competence to prosecute"
Legal Committee draft	"The offence shall be deemed to be included as an extraditable offence in any extradition treaty ..."	"submit the case to its competent authorities for their decision whether to prosecute him"
Document 72		"whatever the motive for the offence ... to submit the case to its competent authorities for their decision whether to prosecute him. These authorities shall take their decision in the same manner as in the case of any other offence under the law of that State."
Document 72 revised: "the frozen language"		"whatever the motive for the offence ... to submit the case to its competent authorities *for the purpose of prosecution*. These authorities shall take their decision in the same manner as in the case of any other *ordinary* offence *of a serious nature* under the law of that State."
UN formula of November 25, 1970		"without exception whatsoever"

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