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REDUNDANCY AND UNEMPLOYMENT BENEFITS

The lack of understanding on the purpose of redundancy payments was strikingly demonstrated by the refusal of the Social Welfare Department, implementing ministerial instructions, to pay unemployment benefits to workers dismissed as redundant while their severance money lasted. The somewhat confused reasons for declining payment can be summarised briefly. Redundancy payments, according to statements emanating from official sources, represent wages for a certain number of weeks, and notwithstanding the termination of the employment relationship the worker has been paid for that period. Simply, perhaps simplistically but in any case paradoxically, this means that although the worker has lost his job, he is not unemployed, at least for the purposes of entitlement to benefit.

A brief examination of the concept and purpose of redundancy payments in Britain under the Redundancy Payments Act 1965 will help in pointing out the error in any such approach. Admittedly for some years after the coming into operation of the statute some industrial tribunals appeared to have been under the same misconception holding that redundancy payments were merely intended to help a man over a period of unemployment, and when he succeeded in obtaining another job immediately, it would be unfair and wrong to grant him any severance payment *(a)*. Conversely, on the same logic, if he receives a redundancy payment, he should not be entitled to an unemployment benefit. In 1968, however, the President of the Industrial Tribunals when clarifying the policy and purpose of the legislation took a different view *(b)*:

> "The policy behind redundancy payments is not that they should tide a worker over a period of unemployment, earnings related benefits are intended for that purpose. The stated purpose of the redundancy payments scheme is twofold: it is to compensate for loss of security, and to encourage workers to accept redundancy without damaging industrial relations. A redundancy payment is compensation for loss of a right which a long term employee has in his job. Just as a property owner has a right in his property and when he is deprived he is entitled to compensation, so a long term employee is considered to have a right analogous to a right of property in his job, he has a right to security and his rights gain in value with the years. The purpose of redundancy pay is to compensate a worker for loss of job, *irrespective of whether that loss leads to unemployment.* It is to compensate him for loss of security, possible loss of earnings and fringe benefits, and the uncertainty and anxiety of change of job. These may all be present *even if a man gets a fresh job immediately*" *(c)*.

In New Zealand, unlike in the United Kingdom, redundancy has never been the subject of legislative regulation, except in a negative way *(d)*, and the concept of property rights in the job has not been generally recognised. The issue of redundancy has, nevertheless, become a most important one in wage settlement negotiations. A small number of collective agreements provide for some, usually modest, payment to redundant employees *(e)*, but unfortunately not all of them draw a clear distinction between payment for redundancy and payment for the period of notice. Under the title of "Redundancy" the clause merely stipulates the length of notice that should be given after a certain years' continuous service or payment in lieu of notice *(f)*. This unhappy failure to distinguish between these two kinds of payment tends to obscure the real purpose of the

redundancy pay and gives support to the assertion that the dismissed worker should not get unemployment benefits for the period he has received wages.

One week's notice up to two years' continuous service, or even two weeks' notice after two years, hardly can be called redundancy payment. It is merely the usual, the common law, period of notice necessary to make lawful a dismissal, which otherwise might be wrongful *(g)*. The criterion of notice on the magnet that pulls the indicator of the compass towards "wrongful" or "lawful" has lost its importance to a great extent. The question when using the statutory grievance *(h)* or victimisation *(i)* procedure is whether the dismissal has been justifiable. Both a dismissal with, or without, notice may be found unjustifiable *(j)*. The justifying reason can arise either from the worker's capacity or conduct, or from the operational requirements concerning the employer *(k)*. Redundancy dismissal belongs to the second category, but one most important element of its justification is that the redundant worker receives compensation for the loss of his job.

This compensation is not the same as compensation for unjustifiable dismissal granted at the conclusion of a grievance or victimisation procedure. It has already been clarified that it is not, and should not be, payment of wages for the period, or in lieu, of notice. It is compensation for the loss of security in the job, of seniority entitlements in respect of wage rates, leave, superannuation and allowances; for dislocation, inconvenience, uncertainty and anxiety. In sum for the loss of property rights in the job *(l)*.

The present economic situation makes it imperative to focus attention on redundancy and pave the way towards an institutionalised solution. Nobody would assert that the Redundancy Payments Act 1965, even as amended by the Employment Protection Act 1975, has achieved the perfect solution, but even with its defects it can be regarded as a considerable advance. There is no necessity, however, to follow the English pattern, and the differences in the industrial background may rule out any slavish imitation as inapplicable. Perhaps a smaller country would provide a better example. The Swedish manpower policy which combines redundancy with replacement and re-training would deserve a thorough study *(m)*. New Zealand's excellent economic and industrial relations experts in the universities, government departments and the central organisations of employers and employees would be able to formulate a suitable adaptation of the Swedish scheme, and draw up a plan for implementation by Government *(n)*. Scandinavian ideas have already been proved transplantable to New Zealand, as most obviously demonstrated by the success of the Ombudsman concept.

If the philosophy of the English redundancy legislation that the purpose of severance payments is to compensate for the loss of property rights in the job will be recognised as correct, then the parallel with compensation for taking real property becomes obvious. Persons whose land has been taken either for the Clutha dam development or for urban motorway are, no doubt, entitled to a just compensation that would enable them to acquire a comparable property, and also to some extent make good the expenses, inconvenience and anxiety arising from the uprooting and re-establishing their home or business premises. When deciding on the amount of compensation, other properties they may have and income they may earn do not come into consideration. Similarly, persons

(a) *Hawkins v Thomas Forman & Sons Ltd* [1967] ITR 59, 61.

(b) *Wynes v Southrepps Hall Broiler Farm Ltd* [1968] ITR 407; this view was indirectly confirmed by Lord Denning MR in *Lloyd v Brassey* [1969] 2 QB 98. 101.

(c) Emphasis added.

(d) Wage Adjustment Regulations 1974, Part III A, added by Am No 8, limited the amount of redundancy pay; Part III A expired on 31 December 1977.

(e) Eg, Auckland City Journalist's Coll Ag (1977) BA 813, providing for 2 weeks' wages under 6 months' service, 3 weeks between 6 months and 1 year, and an additional 1 week for each further year.

(f) Eg, NZ Aerospace Industries Coll, Ag (1977) BA 7981, ch 33; many instruments merely stipulate that the employer should advise the union of any impending redundancy situation; many instruments are silent on redundancy.

(g) *Addis v Gramaphone Co Ltd* [1909] AC 488, HL; even common law recognises a longer notice in many cases as a reasonable one; see Szakats, *Introduction to the Law of Employment*, 1975, para 134 (1).

(h) Industrial Relations Act 1973, s 117; see [1977] NZLJ 319.

(i) Ibid, s 150; see [1977] NZLJ 348.

(j) Eg, *General Motors Ltd v Lilomaiava* (1977) BA Ind Ct 109; *Boswell v Regional Hydatids Control Authority* (1977) BA Ind Ct 141.

(k) ILO Recommendation No 119, concerning termination of employment on the initiative of the employer, (1963) cl 2.

(l) F Meyers, *Ownership of Jobs*, 1964.

(m) *Modern Swedish Labour Market Policy*, Nat Labour Market Board, Stockholm 1966.

(n) FJL Young, *The Supply of Labour in New Zealand*, VUW, 1971; same author *Active Employment Policy: The Challenge of Full Employment in a Changing Society*, VUW, 1975; GL Jackson, *Active Labour Market Policy in New Zealand*, seminar paper, VUW, 1974; NS Woods, "Manpower Planning and Labour Market Policy" in *Industrial Relations, a Search for Understanding*, Wellington, 1975.

whose "property" is their skill and ability to work, their years of accumulated service and rights incidental to it, should be equally entitled to compensation for their loss, regardless of any income they may have. If a redundant worker is fortunate enough to find another employment immediately, nobody would suggest that he should refund the redundancy payment. If he cannot find another job, then he is obviously unemployed. He should not be compelled to sell or pawn his car, television or whatever little tangible property he has, or to live on his redundancy pay. His misfortune of losing his work and not getting another job is injury enough. The state should not discriminate against him and add insult to injury by denying unemployment benefits.

Alexander Szakats

CASE AND COMMENT

Discretion to exclude

Stowers v Auckland City Council (Auckland Supreme Court, 21 December 1977) represents yet another development in the law relating to blood/alcohol prosecutions and the exclusion of unfairly obtained evidence. The facts, one hopes, were ususual. The appellant had been requested to accompany an Auckland City Traffic Officer for purposes of obtaining a blood sample. While waiting in the Administration Building, he was assaulted by another officer and soon thereafter consented to give the blood sample which was the basis of the prosecution. In the Magistrate's Court, the appellant contended that the evidence, although obtained legally, should have been excluded by the magistrate on the grounds of fairness. The learned magistrate rejected this defence, doubting whether any such discretion existed in view of the relevant legislation which requires consent for breath and blood tests. Furthermore, the magistrate did not feel that the appellant was compelled to give consent as the result of force applied to him.

On appeal, Mahon J expressed a different view of the legislation. While it was true that the Transport Act provides a penal sanction for those not consenting, still a suspect may withhold consent if he or she wishes, and any consent which is extracted by unfair or oppressive means is subject to the same exclusionary discretion as other types of evidence. Relevant authority discussed included *The Queen v Ireland* (1970) 44 ALJR 263, *Scott v Baker* [1969] 1 QB 659 and an unreported decision of the Full Court of Western Australia, *Cross v Bunning.* On the facts before him, his Honour accepted the appellant's submission that although the consent in this case was not the direct result of force or violence, the conduct of the police must have played some part in the decision to give the blood sample. The violence was so closely associated with the act of compliance that it was reasonably possible that the consent, and thus the sample, was the product of oppressive, unlawful conduct and should have been excluded. The appeal was allowed and the conviction set aside.

In the course of the judgment Mahon J stated that for a charge of unlawful refusal to give consent, the prior assault by the officer would have been irrelevant; the appellant would nevertheless have been guilty of that offence as no lawful excuse existed for refusal. If this is the law, that after an unlawful assault one who indignantly refuses further co-operation can be guilty of an offence, while one who gives in to the intimidations can thereafter escape punishment by having the evidence excluded, a strange situation exists indeed.

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"Random" Breath Testing

The popular press has recently made much of a rather insignificant blood alcohol appeal, wherein Mr Justice Chilwell upheld a routine conviction, in the Magistrate's Court, of a violation of s 58A of the Transport Act 1962: *Felton v Auckland City Council.* Supreme Court, Auckland. 18 November 1977 (M1337/77). Chilwell J.

Ironically, large portions of this oral judgment, not intended for publication, were printed in the *New Zealand Herald* of 25 February 1978, some 3½ months after the date of judgment. In the debate which followed, the media did not always make clear that date, and indeed, various remarks of Mr Chilwell were taken out of context and quite improperly, to be oblique references by the learned Judge to the more contemporaneous Contraception, Sterilization, and Abortion Act controversy.

The substantive legal confusion in the press revolved around the difference between a random stop of a vehicle, and random breath testing of the driver. *Felton v Auckland City Council,* as argued before the Magistrate, and in the Supreme Court, concerned only the former, and not the latter. The Magistrate was unable to resolve a conflict of fact in the evidence concerning Felton's driving. In doubt about the true route of the defendant's vehicle, the Magistrate concluded that had

the defendant been charged with a simple motoring offence (failure to yield the right of way), defendant would have won acquittal. In upholding the Magistrate's conviction of Felton on the blood alcohol charge, Chilwell J rejected counsel's submission that since the original stop was not for good cause, the breath test must have been "random" and improperly administered. It was clear from the facts that good cause had been obtained after the stop, during conversation between the traffic officers and the driver, albeit he may have been stopped for no reason. As Chilwell J concluded "there is nothing in the Act which requires as a condition precedent that the constable or traffic officer must have some reason for stopping the motorist". This conclusion is amply supported by the Court of Appeal decision in *Police v Bradley* [1974] 1 NZLR 113, at 116 and decisions of Roper J in *Ministry of Transport v Von Hartizch* [1972] NZLR 928 and *Fletcher v Police* [1970] NZLR 702.

In addition to the substantive legal question discussed, supra, the press also featured the learned Judge's obiter dicta concerning Ministers of the Crown and the law.

These remarks of Mr Justice Chilwell have been printed elsewhere in this journal, at page 57, but suffice it to say that they may have been sparked by counsel's submissions and, not necessarily, ministerial interference. On the other hand, the remarks may well be symptomatic of the concern of the legal profession generally for the Rule of Law in this country.

Blood alcohol is an area where litigation is persistent and regular, an area where ministerial misstatement can be quickly put to right. Much more harm, and real human tragedy, may be effected by ministerial pronouncements, perhaps based on Crown Law Office opinions, in areas of the law where litigation is rare, and fraught with lengthy penal sentences. In such areas, the ordinary citizen, and perforce the ordinary lawyear, may well avoid the courts, guide his conduct, and suffer injury because of what a politician has said. Such an area may well be the recent abortion legislation.

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LEGAL LITERATURE

Land Law by GW Hinde, PBA Sim and DW McMorland, Butterworths, Wellington 1978. lxiv + 651. Cased 57.50, limp $45. Reviewed by Gordon Cain.

It is trite but true to say that this work fills a need of overlong duration in the textbook treatment of land law in this country. The last edition of *Garrow's Real Property* was published in 1961 and there has been an uncomfortable and increasing credibility gap in its contents because of the many changes in the law since then. The new book is, then, welcome on that account alone, but it is doubly welcome because of its own merits; the authors are to be congratulated on producing a work of top quality. They could be said to have achieved this result by two means: arrangement, and content.

As to arrangement (always a most important factor in enabling the reader quickly to understand what is being put forward), the first chapter, "The Background" adequately and succinctly summarises for the student such of the massive history of land law as is necessary for him to appreciate the significance of the surviving features of the feudal law, and the impact of equity on that. The next chapter, "Title to Land" explains the system of private conveyancing and the deeds system without descending to unnecessary detail, and quickly passes to the Land Transfer system on which the main emphasis is placed. Chapter 3 explains the modern estates and Chapter 4 deals with future interests and the perpetuities rule; the next chapter with leases and rent control. This completes Volume 1; Volume 2, expected to be published in a few months, will deal with easements, licences, land as security and subsidiary matters. This arrangement allocates topic-emphasis to meet modern conditions; over the many years since Garrow was first published and practical aspect of the subject has assumed an increasing importance over the historical, and the successive editions of Garrow did not attempt to recognise this. The mechanics of the arrangement are sure to find acceptance; the placing of footnotes to follow the relevant text rather than at the foot of the page makes for easier reading; the decimal system of numbering paragraphs, while at first sight appearing cumbersome when four figures are involved, is logical and will facilitate quick reference; the use of abbreviations to denote important statutes and text books avoids a lot of verbiage.

More important however than mere arrangement and layout is the quality of the content. The

work will be of great value both to the practitioner and the student. It is often difficult to accommodate the needs of both in one text but the problem has been substantially overcome here without violence to the simplicity of exposition so necessary for the student, nor to the practitioner's requirements of accuracy and conciseness in portrayal of the present law. The needs of both are further recognised in the frequent presentation of differing views on particular topics, rounded off with comments by the author on the line he would expect the law to take. The whole treatment is scholarly, authority-based and authoritative. Some areas deserve special mention; the handling of the unregistered instrument and its priority; of indefeasibility under the Land Transfer Act, with the gathering together of the many threads into a composite and attractive whole; of future interests and the rule against perpetuities, with explanation of the interaction of case law and statute, with valuable comments on such difficult topics as the application of the statutory class closing rules to the rules established by case law; this is the first published treatment in New Zealand in a text book of this complex branch of the law and will be most useful also to practitioners dealing in estates and trusts.

The character of the new work is such as to ensure its prominence among the major legal textbooks, whether published in this country or elsewhere.

Gordon Cain

CRIMINAL LAW

ABORTION AND THE CRIMES AMENDMENT ACT 1977

By DAVID KEMBER, *a Wellington Practitioner.*

Introductory

The principal achievement of the abortion legislation passed in the last session of Parliament is undoubtedly the machinery established by the Contraception, Sterilisation and Abortion Act rather than any possible changes in the legal grounds for abortion wrought by the Crimes Amendment Act. The first-mentioned Act makes it an offence, subject to one exception of not particularly great practical significance *(a)* for a doctor to terminate any pregnancy without the certificate of two certifying consultants, the effect, and indeed the very purpose, of which is virtually to remove altogether the possibility of the new substantive provisions in the Crimes Act being tested in the courts. Thus it has now been put into the hands of those administering the law to bring about a quite drastic reversal of the situation previously obtaining if they are so minded.

However, notwithstanding that the certifying consultants' interpretation of the law will be for all intents and purposes unimpeachable, they are nonetheless charged by section 33 of the Contraception, Sterilisation and Abortion Act with administering the law as they find it, according to its terms, and not by reference to what the legislation's sponsors might have hoped would be its effect. To enable the certifying consultants to address themselves to the new criminal law provisions conscientiously the construction of these provisions is of some importance. For even though the new procedure creates the potential for an extremely restrictive regime it may equally work the other way.

The principal issue examined in this article is whether the Crimes Amendment Act has indeed changed the law in any way. But another issue that bears thinking about is whether the amendment is on any basis a creditable addition to our criminal code. Some consideration is given to that question as well.

PART I – THE LAW PREVIOUSLY APPLYING

Before the advent of the Contraception, Sterilisation and Abortion Act 1977 the law had been declared by the Court of Appeal in terms sufficiently flexible to allow what the bulk of the medical profession and the public would regard as legitimate purposes. It had become apparent, furthermore, that no jury was likely

(a) Section 37 (2) which exempts a medical practitioner "who believes that abortion is immediately necessary to save the life of the patient or to prevent serious permanent injury to her physical or mental health". While it is well known that the risk of morbidity resulting from termination increases significantly after the first trimestre, so that a doctor who is first confronted with a case late in the first trimestre and believes that termination is warranted might claim the indulgence of this provision to prevent a permanent danger to future pregnancies, it is not thought this is likely to occur very often.

ever again to convict a practitioner under s 183 for terminating a pregnancy in regular professional conditions.

1.1 *The Crimes Act 1961* – Before the passing of the Contraception, Sterilisation and Abortion Act and Crimes Amendment Act last year, the circumstances in which pregnancies might legally be terminated were taken as being defined by ss 182 to 187 of the Crimes Act 1961 and the line of case authorities stemming from Macnaghten J's direction in *R v Bourne* in 1938 *(b)*. As it is now a matter of considerable public interest whether the 1977 legislation has in any degree changed the substantive criteria for lawfulness and as the effect of new legislation can often be gauged only against the background of the earlier law, some analysis of that law is necessary. Unfortunately the decision of the Court of Appeal in *R v Woolnough (c)* remains unreported, and since it is the writer's opinion that the proper significance of the judgments has not yet been recognised in any of the official comments on it, the decision is examined here in some detail.

1.2 As they then stood, ss 182 and 183 of the Crimes Act 1961 read as follows:

"182. Killing unborn child – (1) Everyone is liable to imprisonment for a term not exceeding fourteen years who causes the death of any child that has not become a human being in such a manner that he would have been guilty of murder if the child had become a human being.

"(2) No one is guilty of any crime who before or during the birth of any child causes its death by means employed in good faith for the preservation of the life of the mother."

"183. Procuring abortion by drug or instrument – (1) Everyone is liable to imprisonment for a term not exceeding fourteen years who, with intent to procure the miscarriage of any woman or girl, whether she is with child or not,–

"(a) Unlawfully administers to or causes to be taken by her any poison or any drug or any noxious thing; or

"(b) Unlawfully uses on her any instrument.

"(2) The woman or girl shall not be charged as a party to an offence against this section."

2. Section 182 - Killing Unborn Child

Section 182 is an adjunct of the law of homicide and has no application to abortion unless possibly in the very last stages of pregnancy.

2.1 Section 182 has its genesis in the discovery of a gap in those provisions of the criminal law dealing with the procuring of a miscarriage and with homicide. The lacuna first came to light during the investigations of the 1866 Royal Commission on Capital Punishment. The killing of a child in the act of birth appeared not to be an offence at all. If the child died after birth from injuries inflicted either before or during parturition there was no doubt that that was a culpable homicide, but no offence appeared to be committed if the child died before it was fully born. The many references to the question in the proceedings of the 1866 Commission and of the various Commissions and Parliamentary select committees instituted during the remaining years of the 19th century to reform and codify the criminal law *(d)*, leave little room for doubt that closing this gap was what the authors of s 182 had in mind.

2.2 While there can be little argument about the purpose of s 182 its actual effect has not always been clear. However, although no one seems to have been prosecuted under that section, the point has been more or less settled by the decision of Speight J in the declaratory proceedings brought by the AMAC trustees to test the effect of the Hospitals Amendment Act 1975 *(e)*, and by the Court of Appeal in *Woolnough*.

2.3 In the Hospitals Act proceedings the issue was whether the freedom of action conferred by the word "unlawfully" in s 183 (procuring miscarriage) was limited to the defence allowed by subs (2) of s 182 (child destruction). While holding that he was not required to decide the general question of the scope of the offence, Speight J did say obiter that the section did not appear to be directed at abortion as much as to be an adjunct of the law of homicide.

In *Woolnough* (a prosecution under s 183) the issue arose because it was submitted by the Crown that for the purposes of s 182 the word "child" embraced a foetus or embryo from the moment of conception on, and that accordingly (scil where pregnancy was admitted or proven) a person charged under s 183 was limited to the justifications allowed by s 182 (2). Hence some determination

(b) [1939] 1 KB 687; [1938] 3 All ER 615.

(c) Court of Appeal, CA 14/76, unreported. Judgments reproduced in full in JS O'Neill (1976, see reference (e) below) pp 117 to 133.

(d) 1874: Select Committee on Homicide Law Amendment Bill; 1878: Criminal Code (Indictable Offences) Bill; 1879: Criminal Code Bill; 1880: Criminal Code Bill (No 1); Criminal Code Bill (No 2).

(e) Auckland Supreme Court, A1156/75, unreported. Referred to in "Foetus-in-Law", JS O'Neill, Dunedin 1976, at p66 et seq. See also Report of Royal Commission on Contraception, Sterilisation and Abortion at pp 145 to 146.

of the question of the relation of s 182 to s 183 was necessary, and in this connection it was stated:

"... the language of s 182 (2) contemplates that the entire section is concerned only with the situation where the death of a 'child' is caused 'before or during its birth'. In ordinary language I do not think that this is an appropriate description of the destruction of an embryo or foetus brought about at a very early stage of pregnancy as the result of an induced miscarriage. In the present case the Court is concerned only with abortions carried out during the first trimestre of pregnancy and all I need say is that in my opinion s 182 has no application to such cases" (per Richmond P).

2.4 *Therapeutic infanticide* – It was conceded that this implied a test on a sliding scale of stringency according to the stage of advancement of the pregnancy, so that at a sufficiently late stage the justifications required by the two offences would be the same. On this basis, without putting too fine a point on precisely how near to term the question would arise, at or near term the word "life" might have to be read quite literally and the perceived danger be obvious and imminent. Some, perhaps, might think that it is as well, for it would tend to obviate one of the more interesting consequences of what one may regard as the misplaced attempt to apply s 182 to abortion. Interpreted according to the formula emerging from *Bourne* s 182 would allow what would in effect be therapeutic infanticide. Just as the medical profession has managed in recent years to deal with foetal abnormality diagnosed during pregnancy under the "mental health" indication, provided the child is not born alive doctors might similarly claim the indulgence of a broad interpretation of s 182 (2) when abnormality only becomes apparent at the time of parturition.

3. The meaning of "unlawfully" – Section 183 – Therapeutic abortion recognised

3.1 At the time of the passing of the Crimes Amendment Act 1977 *Woolnough* had become the determining authority on the legality of abortion in this country. The formal question in the case was whether the trial judge's direction on the meaning of the word "unlawfully" in s 183 was correct in law. The gist of the direction was that the desire to avert a "serious danger" to the physical or mental health of the woman was itself a sufficient justification regardless of whether the woman's actual life was in danger.

3.2 *The decision* – On the function of the word "unlawfully" in s 183 there have traditionally been two schools of thought: one holding that the word owes its presence to a drafting style that pre-dates the modern codifications and is therefore redundant *(f)*, and the other that its retention through several revisions implies that it was intended by the legislature to have some effect. Our Court of Appeal has taken the second view and has given us a rather more refined exposition of the nature of the implied justification than has hitherto been provided *(g)*. First, as a corollary of what was held to be the effect of s 182, the defences available under s 183 are independent of s 182 (2), having been part of the relevant provision since 1803. Secondly, and contrary to the view taken by Menhennitt J in *R v Davidson (h)*, the defence under s 183 is not referrable to the doctrine of necessity. Having thus acknowledged the independent principle of therapeutic abortion, the Court answered the formal question in the affirmative and in addition held that Chilwell J's rider, that the perceived danger be not merely the normal danger of pregnancy and childbirth, was unhelpful and perhaps confusing.

Both Richmond P and Woodhouse J held that by "serious danger" the jury would have understood the trial judge to mean "a real risk of serious harm" in the sense of describing not just the probability of the contingency but also "the quality of the consequences if they should occur" *(i)*.

3.3 *Not liberal enough?* – Reflecting the very useful potential for variety in an appellate tribunal of three judges, each of the judgments in *Woolnough* stands very much on its own ground and one will search in vain for unifying statements of principle going beyond the formal issue such as one might expect to find in some other contexts. But while the formula " real risk of serious harm to physical or mental health" will probably dominate the headnote should the case ever edge its way into the New Zealand Law Reports, the formula should not be taken as a firm principle of general application. Richmond P and Woodhouse J both stated their unwillingness to lay down any general principle beyond broad recognition of the lawfulness of therapeutic abortion. Indeed, Woodhouse J went as far as to say that when compared with the formulae used by Morris J in *R v Bergmann and Ferguson (j)* and by Ashworth J in *R v*

(f) As per Laskin CJC in *R v Morgentaler* (1975) 53 DLR, (3rd) 161 at 185 (Supreme Court of Canada).

(g) The finding that "unlawfully" is not redundant follows *Bourne* (b) but departs from it to the extent that Macnaghten J leaned heavily on the proviso in the Infant Life (Preservation) Act 1929 that is the equivalent to the NZ s 182 (2).

(h) [1969] VR 667.

(i) Per Woodhouse J.

(j) 1948, unreported.

Newton and Stungo (k) the one put to the jury by Chilwell J might be thought to be somewhat conservative. All one could say with any certainty was that Chilwell J's direction was not too liberal.

3.4 *Additional justification – Foetal abnormality and rape* – A question expressly left open in the majority judgments was whether such consideration as foetal abormality and rape could constitute grounds for termination in their own right. It would be only fair to acknowledge that hitherto the orthodox view has been that where either foetal abnormality or unlawful intercourse is the basis of the desire to discontinue the pregnancy, the claim to legal justification must be addressed to the impact of the pregnancy on the mother's health. When the decision of doctors to terminate in such cases has been questioned, the justification has by and large been grounded in the psychiatric indication. In practice there seem to have been few problems in aborting diagnosed abnormalities and the question has never been tested, but comments made in the judgments in *Woolnough* suggest that should the question arise for determination the Judges might be prepared to entertain foetal abnormality and pregnancy resulting from rape or incest as grounds in themselves now that the question of the legal scope for early abortion is no longer affected by s 182. At all events it is difficult to imagine a Court of Appeal not confirming the legality of recognised medical practice.

3.5 *Bona fide intent* – It has been said from time to time that the involvement of more than one doctor in the decision to terminate is necessary to evidence the regularity of the procedure and to establish the bona fides of the operative. The judgments in *Woolnough* offer no guidance on this point and all that can be said, perhaps, is that the result of the trial has vindicated the procedures used by the AMAC clinic.

A subsidiary matter that has been clarified, however, is precisely what has to be proven to show good faith. It seems now to be accepted, following the decision of the House of Lords in *R v Morgan (l)* that as a matter of law there is no requirement that the operative's belief as to the necessity for the termination be based on reasonable grounds. While it will normally be difficult to convince the jury of the genuineness of one's belief if reasonably plausible grounds are not offered as the basis, there will be no *legal* requirement of reasonableness in addition to the simple one of honesty. The notion of criminal naievity supported by such cases as *R v Ewart (m)* and *R v Strawbridge (n)* both earlier decisions of the New Zealand Court of Appeal, has been criticised by commentators as being contrary to the basic principles of criminal intent *(o)* and the acknowledgement of the ruling in *Morgan* in the President's judgment in *Woolnough* is an indication that *Ewart* and *Strawbridge* might have to be considered again.

However, to say "subsidiary" in the present context may be to understate the importance of the question. The plausibility of the grounds for a professional judgment is not likely to affect the issue such in the case of a person claiming to have genuinely mistaken a marijuana plant for a tomato vine. But it might affect things considerably when other doctors are asked to comment on the grounds that a fellow practitioner had for terminating a pregnancy. Doctors might therefore be reassured to know that it will be their honesty only that is directly in issue and not their professional judgment as well.

4. The self-reforming s 183

4.1 Not faced with having to decide on the constitutional validity of criminal laws governing abortion the Court of Appeal in *R v Woolnough* was not able to embark on an exercise of judicial legislation in quite the same way as the United States Supreme Court was able to in the cases of *Roe v Wade* and *Doe v Bolton (p)*. Nonetheless, within the recognised limits of their more restricted function the majority Judges in *Woolnough* did as much as they could to try and shorten the reach of the law in this area and to bring it more into line with evolved public and professional attitudes and changed facts of medical life.

4.2 For those who are apt to see our Judges as a brake on the development of social habits that would otherwise more freely evolve, the following two passages from the majority judgments in *Woolnough* merit some attention:

> ". . . the function impliedly entrusted to the courts by s 183 is not to say who is right and who is wrong as between the extreme views held by different sections of the community as regards this highly controversial subject. Rather the courts have to do their best to draw a line at a point where the procuring of a miscarriage ceases to be merely a matter of debate, from a religious, moral or ethical point of view, and finally becomes activity of a kind which warrants its designation as criminal *(q)*.

(k) [1958] Crim LR 469.
(l) [1975] 2 All ER 347; [1976] AC 182.
(m) (1906) 25 NZLR 709.
(n) [1970] NZLR 909.
(o) Cf Prof ID Campbell: "Crime by Omission" in *Essays in The Criminal Law in NZ*, Clark (ed) (1971).
(p) 410 US 113 (1973).
(q) Per Richmond P.

"The issue of abortion is a divisive and sensitive subject matter. It engenders in the community every sort of response. Yet Parliament has been prepared (at least until now) to leave it to the Courts to do their best to estimate the limits within which the termination of a pregnancy could be regarded as legally justified. It is easy enough to identify the unsavoury and risk-ridden activities of the backyard abortionist as falling fairly and squarely on the wrong side of any proper dividing line. The acute difficulty is to delineate the boundaries between *therapeutic* abortions that are justified and within the law on the one hand and those that are to be regarded as illegal and wrong on the other. Nor is the difficulty made easier by those who see the clearest answers in moral or personal terms but who do not always remember that the purpose of the law at this point is to label certain activity as not merely undesirable but highly criminal.

"While the problem continues to be left in this way to solutions that really involve judicial legislation I think it can only be dealt with by a sort of evolutionary process. I say 'evolutionary' because the ambit of the word 'unlawfully' in s 183 of the Crimes Act 1961 cannot sensibly be constrained by any conventional use of the doctrine of precedent. The ethical or social evil that Parliament has intended to proscribe is not amenable to that approach. The concept is elusive enough in itself but it is not merely that. It is very much a shifting and developing concept as well and it would be dangerous to assume that acceptable solutions will follow from the use of a legal strait-jacket. There is the additional consideration that a characteristic and cautious preference for the status quo is far more likely to be detected in the work of each generation of Judges in this field than marked impulses to activist lawmaking. It may be as well that it is so. But the fact makes it so much more important to evaluate with some care the contemporary significance of earlier cases" *(r).*

4.3 Given a controlling judicial attitude in these terms it would not, with respect to the Royal Commission *(s),* have been inconceivable that if left to their own devices the Courts would in due course have given their sanction to the unfettered practice of such procedure as menstrual extraction and even the very early termination of confirmed pregnancies without their having to be justified according to some specific indication.

5. Summary of law before 1977 legislation

5.1 Against the acknowledged unlikelihood of a jury ever again in this country convicting a doctor for terminating a pregnancy in regular medical conditions *(t)* the legal framework pointed to by the *Woolnough* decision, while not having the measure of certainty that the criminal law ought as a matter of principle to carry, was probably one that the public and medical profession could have lived with. It may be summarised thus:

5.2.1 Section 182 has no application at least to first trimestre terminations.

5.2.2 The legal grounds for terminating pregnancy at least in the early stages are those implied by the word "unlawfully" in s 183 and are not defined by s 182 (2).

5.2.3 In a prosecution under s 183 for procuring miscarriage a direction to jury that the termination is lawful if carried out in order to avert a real risk of serious harm to the physical or mental health of the woman is certainly not insufficiently stringent and may even be too restrictive.

5.2.4 Foetal abnormality, maternal subnormality, rape and incest may upon examination have independent standing under s 183 as legal grounds for abortion.

5.2.5 The only issue for a jury in a prosecution under s 183 is whether the accused did not form the genuine judgment that termination was clinically warranted. The reasonableness of the grounds on which the judgment was formed may be evidence from which the jury might draw conclusions about the honesty of the accused's purpose, but it is not itself a matter in issue. The onus, further, is on the prosecution to prove that the accused did not form the genuine opinion that the procedure was in order *(u).*

5.2.6 Passages in the majority judgments in *Woolnough* encourage the view that menstrual extraction and even very early abortion require very little in the way of specific justification.

(r) Per Woodhouse J.

(s) See Report at p281.

(t) The content of the criminal law has changed remarkably little since the beginning of the nineteenth century. The major changes have been in the area of punishments and if any one of the organs of justice has been the chief agent of reform it has been the jury. Political recognition of the need for changes have very frequently come about only as the result of juries refusing to convict.

(u) Expressions such as "honest", "bona fide" or "genuine" belief are themselves redundant. If the belief is not honest there is no belief at all.

PART II: THE CRIMES AMENDMENT ACT 1977

If Parliament's principal concern in passing the Crimes Amendment Act 1977 was to clarify the law the result of its efforts is an indication of the circumstances in which the final shape of the Act was determined. All law should be clearly stated so that citizens can know where they stand, but none more so than the criminal law. In its attempt to supply statutory meaning to the word "unlawfully" in s 183 the legislature has raised more questions than it has answered.

6. Definitions – Whither the IUD?

6.1 The definition of the word "miscarriage" supplied by the new s 182A leaves the problem of the intra-uterine device unresolved. What the principal effect of the intra-uterine device is, has long been a matter of controversy, but there now seems to be a large measure of agreement that it is capable of interfering with all stages of conception from fertilisation to implantation and is even capable of causing the expulsion of an ovum that has become implanted. Although the broad clinical purpose of the IUD may still be said to be to prevent pregnancy by averting conception, as a clearer picture emerges of the process involved the purpose of the device might have to be redefined in terms of what is understood to be its effect. If for example, it were to be found that the intra-uterine device does indeed work largely by physical interference with the implanted ovum it could no longer be said, except somewhat disingenuously, that it was being prescribed to prevent contraception. Nothing, however, will alter the fact that the intra-uterine device is universally accepted on the same footing as any other contraceptive and if it emerges that the device is technically an abortifacient, lawyers, doctors and judges are likely to find themselves in the situation of having to rationalise their way out of the necessary effect of the definition.

7. "Unlawfully" defined

7.1 The word "unlawfully" in s 183 has been given an exclusive definition so that any purported justification falling outside the stated criteria is no longer valid. There is thus now much less room for creative interpretation than was possible following the decision in *Woolnough.*

8. Pregnancies up to 20 weeks

8.1 Section 187A (1) (a) embodies what is purported to be the law as stated by the Court of Appeal in *Woolnough.* To say, as the Minister of Justice and Solicitor-General have said, that the formula is that adopted by the Court of Appeal is to misrepresent the Court. As has been recorded above in Part I of this article, the majority Judges took pains to state that all they were deciding was that the formula was not unwarrantedly liberal. Subject to what is essayed in the next paragraph, the amendment crystallises the therapeutic justification for abortion into a formula that is arguably restrictive.

9. "Not being danger normally attendant upon childbirth"

9.1 Here we have the unusual occurrence of a judicial interpretation of a novel statutory provision being available before the provision was passed. Included, no doubt, in order to underline the requirement that the danger be a serious danger, the words in parenthesis can be interpreted as either amplifying the word "serious" or just as plausibly as defining it by contrast, so that any danger not being one of the ordinary dangers attendant on the physical stresses of parturition thereby becomes a "serious" danger.

9.2 Borrowed by Chilwell J from Menhennitt J's formulation in *Davidson,* the qualification "not being danger normally attendant upon childbirth" probably has its roots in concern in certain quarters that the fact that the statistical risks pertaining to the termination procedure are these days rather less than those inherent in childbirth itself, might be used as a general and unqualified warrant for termination *(v).* In the Court of Appeal in *Woolnough* Richmond P grounded his misgivings about the phrase in difficulties associated with the word "normal" ie in as much as the word could be taken as referring either to the statistical risks at large or specifically as they would apply to the particular woman under consideration.

The notion of the "normal" dangers of childbirth is a statistic formed of the average of the individual cases making it up. Beyond the general proposition that the statistical risk pertaining to termination is nowadays rather less than that involved in childbirth, the expression is without meaning once an assessment is made of the individual patient's gynaecological status. Such an assessment will show the particular degree in which the patient is exposed and in some cases the prospect of the stress of parturition posing a serious danger to the patient will be substantial. Where this is the case it would be quite wrong not to consider it as a ground for termination in the ordinary way.

9.3 An equally grave difficulty is the one that Woodhouse J touched upon.

"The conjunction of the references to 'serious

(v) Cf Report of NZ Royal Commission, 1977, at p271.

danger' or 'serious harm' to health with the immediate mention of '*normal* dangers of pregnancy or child birth' could have the effect of minimising the significance of the earlier words; while if they did not they are redundant" *(w)*.

If, in accordance with the customary canon of statutory interpretation, Parliament is to be taken as having intended that the words in parentheses, being new, should have some effect and not be redundant, their natural effect is to weaken the strength of the words "serious danger". The word "serious", after all, is itself fairly elastic. It does not necessarily mean "grave" but can just as easily mean simply "palpable", in the sense of something not to be taken lightly. Chilwell J in his direction to the jury canvassed the various alternatives such as "substantial" and "real" and concluded that they were all different ways of saying the same thing. As Woodhouse J pointed out, the words "not being danger normally attendant upon childbirth" push the word "serious" toward the lower end of the scale of severity and if that is achieved without doing violence to the word, then that must be the intendment to be taken from it.

10. Temporary v permanent dangers

10.1 The distinction drawn by the legislature between pregnancies up to 20 weeks of gestation and those beyond reflects the intellectually inexact but nonetheless intuitively plausible philosophy shared probably by most people in the community, that the justification required for terminating a pregnancy should be on a graduated scale of stringency according to how far the pregnancy has advanced. On this footing it is significant that s 187A (3) in the case of pregnancies beyond twenty weeks requires perception of a risk of *permanent* injury whereas by contrast s 187A (1) says nothing. The inference is thus invited that for first and second trimestre cases, the risk of some serious danger will be a sufficient justification even though it be only a temporary injury that is in prospect. This contrast, it is submitted, can only add weight to the view tendered in the preceding paragraph, that the kind of danger implied by s 187 (1) (a) is one well toward the lower end of the scale.

11. A danger that "cannot be averted by any other means"

11.1 While this phrase, too, should be approached on the footing that it was not intended by Parliament to be surplusage, it should be remembered also that the broad policy of the Act is to give legal recognition to abortion in a regular medical framework and that it would be a complete absurdity if the legislature were to be taken as having intended that doctors should now start prescribing treatments whose impact on physical and mental well-being is worse than the complaint itself. The Solicitor-General's circular letter for the Minister of Justice *(x)* goes part of the way in recognising this:

"There is a further difference in that the new section contains the words 'the danger cannot be averted by any other means'. In my view those words were in most, if not in all, instances, implicit in the test under the old law. One would have thought that a doctor could not. generally speaking, say there was a 'real or substantial risk of serious harm' if there were feasible and practicable means of avoiding that risk other than by abortion. No doubt in some situations the matter might present problems, but in my view it is a practical question that the doctor has to ask himself.

"If the issue is the mental health of the mother, and that I gather is the case in almost all the cases, one would ask what other means are there available to avert the danger than abortion. I understand that substantially the only other means available at the time the question arises, is psychotherapy treatment. Whether that is an alternative means is a practical question for the doctor. The law does not require a theoretical or abstract possibility. The alternative means must be feasible and practicable.

"It might be argued, for example, that there was another way of avoiding the danger than abortion, namely, sedating the mother with drugs which would keep her in a comatose state for the whole of the pregnancy and for so long thereafter as necessary. Such an alternative is unreal in a practical world. Obviously minor tranquillisers for the whole pregnancy and thereafter would be an acceptable alternative means to abortion if they were effective and without serious side effects; drugs that produced comatosity for the whole pregnancy period would, in the general run of cases, not be 'any other means' in a realistic sense."

11.2 But one has difficulty in seeing any distinction between the second of the two examples given by the Solicitor-General and the first. At a time when all medication is being recognised to be something of a pis aller, protracted medication with tranquillisers could hardly be regarded as a clinically better alternative than termination where

(w) *R v Woolnough* per Woodhouse J.

(x) 26 January 1978. Addressed to the Minister of Justice and circulated to the medical profession. See also the Minister's own press statement, 21 December 1977.

the span of the pregnancy iself, and the predictable impact on the woman's stability of the whole array of the pregnancy's consequences, offer little promise of there ever being a complete readjustment.

11.3 *Alternative avenues closed* – On another footing the words in parentheses amount to little more than a reminder that before he considers the case as a pure [sic] medical problem the doctor should be sure that the patient has been offered advice and assistance on all the other aspects of her situation that might have led to her rejecting the pregnancy. As for psychiatric help, the Solicitor-General has probably put it as well as it could be:

> ". . . but I understand for psychotherapy to be effective it requires some willingness on the part of the patient to accept the treatment. Short of committal under the Mental Health Act persons cannot be compelled to enter psychiatric hospitals, nor can they be compelled to accept psychotherapy. If a person refuses to accept psychotherapy the doctor will have to consider the degree of danger to the woman's mental health and the nature of the reasons for refusing to accept psychotherapy; and if satisfied that the refusal, whatever the reasons for it, is implacable and the danger sufficiently serious, then he may be satisfied that the danger cannot be averted by other means within the terms of the legislation. I repeat that it is a practical question and the doctor's belief based on feasible and practicable means, not just theoretical or abstract possibilities" *(x)*.

11.4 *The necessary and desirable course* – All these rather lengthy recitals add up to the rather short point that is a truism of medical practice. What is required of doctors is that they should satisfy themselves that the course proposed is clinically the necessary and desirable one to take. This can only be considered as a matter of practical judgment and given that this is an area of practice where time really does march with lengthening strides the calculation cannot be expected to be too fine.

12. Summary of effect of provisions relating to pregnancies up to 20 weeks

12.1 Although, in s 187A (1) (a), the legislature has supplied a meaning to the word "unlawfully" in s 183, at least two of the key words in the paragraph, "serious" and "normally", are ones that are highly subjective. Even the word "health" has its problems, for if one adopts the World Health Organisation definition *(y)* there is the basis for legal termination of pregnancy on family planning grounds without more. While language of such variable meaning can work in two directions it should be remembered that the enactment under consideration is a criminal statute and that it is a fundmental principle that where the language used in a penal statute is capable of more than one plausible interpretation the one that is most favourable to the continued liberty of the subject ought to be followed. Thus, if a Judge were to direct a jury that the person charged was not guilty if he terminated the pregnancy after having reached the reasonable conclusion that continuation of the pregnancy threatened the woman's stability, that counselling was not likely to help, and that some other alternatives such as prolonged medication or the prospect of carrying to term for adopting out imposed risks of their own that were just as great, a Court of Appeal considering the direction could find it difficult to hold that it was not in accordance with the law.

13. Rape and age of woman as grounds for termination

13.1 One conclusively patent aspect of subs (2) of the new s 187A is the lack of legislative gumption that it reveals. The practical result of the new provision as to rape and age of the woman will be that these will end up as independent grounds for termination subject, of course, in the case of rape, to the natural caution that will for the time being prevail in assessing the evidence. These considerations were always logically relevant in appropriate cases and the paragraphs spelling them out are in their enacted form redundant. The only inference to be drawn is that they are an invitation to treat Parliament as having enacted something it did not have the courage to enact in fact.

14. Pregnancies beyond 20 weeks – Foetal abnormality

14.1 By the time the twentieth week approaches most women will have had ample opportunity to resolve in their own minds and with their medical advisers whether or not they really want or ought to carry a pregnancy to term. For the large run of cases, therefore, the requirement of s 187A (3) that there be the prospect of serious *permanent* injury to the mother's health is not going to cause any difficulty. It could, however, create problems in cases of foetal abornmality in so far as these can at the present time only be diagnosed late in the second trimestre. Nevertheless, it can also be said that the birth and indeterminate survival of a seriously deformed child will constitute a permanent factor of instability in the mental and physical disposition of the mother, and perhaps

(y) "Health is a state of complete physical, mental and social well-being not merely the absence of disease or infirmity." WHO 1946.

when the termination is not able to be performed until after the twentieth week the matter can be rationalised on that basis.

14.2 *How permanent?* – Again the word "permanent" does not need to bear the drastic implications that it might seem at first sight to have. In the medical context it can only mean that which does not carry the reasonable prospect of being merely temporary, and whether a likely injury is going to prove to be merely temporary or not is not something that a doctor can take too many safe bets on.

15. Termination pursuant to consultants' certificate – Onus of proof

15.1 Section 187A (4) is no doubt intended to cover the eventuality of the Supervisory Committee's screening being ineffective to prevent the appointment of persons with a positively liberal disposition as certifying consultants. A person who performs a termination pursuant to a certificate issued by certifying consultants is not entirely immune from prosecution as the section gives him the benefit only of the normal perquisities of proof in criminal cases. He cannot therefore take the certificate as being conclusive of the lawfulness of the grounds for the procedure.

15.2 *R v Smith* – The situation envisaged by s 187A (4) is not just a logically possible one but one that has actually occurred. In *R v Smith (z)* an English case, the two certificates required by the 1967 Act were made out in due form, with the "second" certificate having been signed by the operating doctor's anaesthetist. The doctor was convicted of unlawfully procuring a miscarriage as there was ample direct evidence that the only clinical consideration on which his belief as to the warrant for the termination was grounded was the fee being paid for the operation.

16. Doctor's standing where no certificate issued

16.1 The standing of a person who performs a termination without a certificate issued by two certifying consultants is the same as that of a person who has the benefit of a certificate. He may well be automatically guilty of an offence under s 37 of the Contraception, Sterilisation and Abortion Act 1977 but if charged under the Crimes Act he takes the benefit of the ordinary requirement as to guilty intent and standards of proof. The fact that the operation was undertaken without a consultants' certificate may be evidence upon which the jury may conclude that the accused did not believe that there were lawful grounds for the procedure, but the legal issue is unaffected.

(z) (1974) 58 Cr App R 106.

17. Conclusion: The Crimes Amendment Act as law

17.1 The acknowledged function of the criminal law, as opposed to other categories of law, is to mark out in bold type those rules the observance of which is agreed to be essential to civilised life, the contravention of which carries unqualified social disapproval, and which the vast majority of people would unhesitatingly require to be supported by the severest sanctions. On these criteria the continued presence in the Crimes Act of any restrictions at all on medical abortion is hard to justify in the contemporary scene, but it is now a matter of contemporary history that the legislature was not able to see things quite in this way.

At all events, one of the ostensible purposes of the legislature's intervention was to clarify the law so that it would conform at least to one of the canons of sound criminal law. But instead of making the law clearer the legislature has substantially added to the areas of uncertainty. No matter how much one may hold to a reasonably probable view as to the meaning of certain provisions, as the Solicitor-General reminds us, statutory interpretation is always in the last resort a question of predicting what a Court will hold it to mean. The irony of the present situation is that the uncertainty is never likely to be resolved in the usual way because it is the obvious purpose of the Contraception, Sterilisation and Abortion Act to prevent the issue from ever getting before a Court.

It is no comfort that the Crimes Amendment Act might be thought to be capable of a liberal application in practice. Apart from the specific shortcomings outlined in the foregoing paragraphs the Amendment Act has all the uncertainty of the case law and none of its potential for steady development. On that basis if on no other, and even if its sister Act turns out to be the real villain of the piece, the Crimes Amendment Act is a great leap sidways.

The Statutes of New Zealand 1976, volume 4, errata – In Volume 4 of the 1976 Statutes there were errors in this volume between pages 2826 and 2955. These pages (although numbered consecutively) are not in their proper sequence.

Although the pages concerned are all part of the reprint of the Companies Act 1955 the loose copy publication of the reprint of that Act is not affected by the errors.

There is no easy way of remedying the errors. Accordingly it has been decided to include a new reprint of the Companies Act 1955 in the 1977 Volume of Statutes. This will do away with the need to refer to the defective reprint in Volume 4 of the 1976 Statutes.

As an interim measure a correction list and adhesive labels with the correct numbers is available from the Government Printer.

INTERNATIONAL LAW

INTERNATIONAL LAW AND AIRCRAFT HIJACKING

By OSCAR M TRELLES II *Associate Dean and Associate Professor of Law, Nova University Center for the Study of Law Ft Lauderdale, Florida. New Zealand has acceded to the Tokyo, Hague and Montreal Conventions and has ratified the latter two. The implementing legislation is the Aviation Crimes Act 1972.*

I Introduction

Due to the technological advancements in the field of aviation, one can travel to almost any part of the world in a matter of hours by aircraft. At times, however, such travel occurs illegally. It is referred to as "aircraft hijacking", and is the topic with which this paper is concerned.

"The offense of aircraft hijacking consists of a taking or conversion to private use of an aircraft as a means of transportation and forcibly changing its flight plan to a different destination" *(a)*. Thus, the scope of this paper will be confined to the international legal aspects of aircraft hijacking and their applicability to the hijacking of aircraft involved in international air transportation. This does not include hijackings which occur entirely within the territory of a State, nor any such international or domestic flights involving the military aircraft of a State.

Aircraft hijacking must be dealt with on an international level because of two basic reasons: first, the act often involves more than one State's Territory and/or National, and second, the offence is so serious that effective solutions to it can only be attained through international cooperation.

II The ICAO

In spite of the fact that the United Nations has been unsuccessful in obtaining specific international cooperation in dealing with aircraft hijacking, the International Civil Aviation Organisation (ICAO) has made substantial strides in the area of multilateral conventions. Its primary goal is to establish international agreements on international air transport by defining such things as the air over which a state has sovereignty *(b)*. Though the ICAO has made conscientious efforts, some problems such as those dealing with a state's jurisdiction, remain unresolved. For example, a state has jurisdiction over any aircraft flying over its territory. However, beyond that, jurisdiction remains unsettled with regards to air transportation. Some solutions have been suggested: the aircraft's State of registration; the State from which the aircraft departed; and/or the nationality of the passengers aboard the aircraft *(c)*. International conventions in force through the ICAO may have to go as far as granting jurisdiction to States whose nationals are aboard a hijacked aircraft.

Due to the alarming increase during the past decade of hijacking incidents, the ICAO instructed its Legal Committee to look into crimes in the air *(d)*. The result was the Tokyo Convention of 1963.

III The Tokyo Convention – 1963

This convention was not intended as an anti-hijacking measure. Instead, its primary purpose was to provide a clear international agreement on jurisdiction over crimes in the air, for prompt restoration of aircraft and cargo to its rightful owner, and for the speedy resumption of an interrupted flight *(e)*. The main provision of the Convention, Article 3 gives jurisdiction to the State of Registration of the aircraft over offences committed on board. It also grants jurisdiction to the State of which the offender is a national. However, no order of jurisdictional priorities are listed in case of overlapping which could result from the provisions under this article *(f)*.

Also, it provided for prompt return of control of the aircraft by the State of landing to the aircraft commander and assistance to aid the aircraft and passengers to promptly continue their journey *(g)*.

(a) Evans, *Aircraft Hijacking: Its Cause and Cure*, 63 Am J Int'l L 695, 696 (1969).

(b) Sassella, *The International Civil Aviation Organisation: Its Contribution to International Law*, 8 Melbourne L Rev 41, 42 (1971).

(c) Id at 43.

(d) McGrane, *A Search for an International Solution to the Problem of Aircraft Hijacking*, 2 Auckland UL Rev 83 (1975).

(e) Rosenfield, *Air Piracy: Is It Time to Relax Our Security?* 9 New England L Rev 81, 96 (1973).

(f) Supra note (d) at 84.

(g) Lay, *Some International Approaches to Dealing With Hijacking of Aircraft*. 4 Int'l Lawyer 444, 448 (1970).

Article 6 allows the aircraft commander to use reasonable measures, including force, to protect the aircraft and safety of the passengers, when he has reasonable grounds to believe that a person has committed an offence. There is no attempt to define what constitutes a "reasonable measure". However, it is probable that, due to the circumstances in which a hijacking takes place, a commander is justified in using more force than would be deemed reasonable in ordinary circumstances to detain the felon, *(h)*. In any event, the commander as well as crew members and passengers are given immunity from suits by the alleged offender against whom they acted, as Article 10 expressly provides:

"Neither the aircraft commander, any other member of the crew, any passenger, the owner or operator of the aircraft, nor the person on whose behalf the flight was performed shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken *(i)*.

Not only was skyjacking not made a distinct offence under the Tokyo Convention, but no obligation existed on part of the country of ultimate destination to extradite or to prosecute the offender *(j)*. These are two of the basic defects that rendered this Convention inadequate. Hence, the offender could claim political asylum in the State of landing, thus negating any possible extradition to the State of Registration, for extradition under international law does not apply when the offence was politically motivated and political asylum was granted. Hence, the State of landing had complete discretion to do with an offender as it pleased, since not being bound by the terms of the Convention, it could apply only the laws it wanted to.

Article 11 deals with the problem of the unlawful seizure of an aircraft. It is far from adequate in covering the issue of hijacking. Basically, the article applies only to aircraft in flight which is defined in Article 1 (3) as "from the moment when power is applied for the purpose of take-off until the moment when the landing run ends" *(k)*. (Hence, hijacking attempts initiated during the time the aircraft is parked or taxing are not considered). Furthermore, this article does not mention how to treat any possible accomplices of hijackers, nor does it mention how to punish offenders.

Because of the ineffectiveness of the Tokyo Convention and the alarming number of hijackings in 1968, 1969, and 1970, a protocol to the Tokyo Convention was called for by ICAO members. Out of this movement emerged two new multilateral conventions:

(1) Convention for the Suppression of Unlawful Seizure of Aircraft, popularly known as The Hague Convention on Hijacking *(l)*.
(2) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal in 1971 and known as The Montreal Convention *(m)*.

These three conventions form the core of international law on aircraft hijacking and related offences.

IV Defining the act of aircraft hijacking

The international status of a pirate is that he is beyond the protection of any state because the crime is viewed as "piracy jure gentium", that is, a crime against the law of nations which antidates the emergence of national criminal legal systems *(n)*. Thus, any state capturing a pirate may punish him under the principle of universal jurisdiction over pirates because he has committed a crime which, by customary international law, is a crime against all peoples of the world. The only way to define the jurisdiction problem of aircraft hijacking as being within that of piracy is to look upon the crime as a continuous one, thereby giving jurisdiction to any state capturing the offender (the universal jurisdiction principle, supra) or on a protective jurisdictional basis (ie any state affected or potentially affected by the act of the hijacked plane merely flying over its territory) *(o)*.

Many writers have come to but one conclusion: aircraft hijacking must be defined in and of itself as an international criminal offence, supported by jurisdictional, prosecution, and extradition definitions applicable to such an offence. The customary international law on piracy is just simply inadequate and incomprehensive enough to cope with the much more complex act of aircraft hijacking.

Since the Tokyo Convention did not deal with aircraft hijacking as a specific offence, there was obviously no definition under which international law could operate against the act.

(h) Supra note (d), at 84.

(i) Id.

(j) Brooks, *Skyjacking and Refugees: The Effect of The Hague Convention Upon Asylum*, 16 Harvard Int LJ 93, 96 (1975).

(k) Supra note (d), at 84.

(l) Supra note (e), at 96.

(m) Id at 97.

(n) Wurfel, *Aircraft Piracy-Crime or Fun?* 10 Wm & Mary L Rev 820, 829 (1969).

(o) Van Panhuys, *Aircraft Hijacking and International Law*, 9 Col J Trans L 1, 8 (1970).

As international law now stands, there is an exception widely applied by a majority of states, to extradition and prosecution of the hijacker when his act was politically motivated. Thus, any subsequent multilateral agreement will have to deal with this exception, and until it does, there will be safe havens available to hijackers seeking refuge from punishment, and as well, no substantial deterrence to the commission of the offence.

V The Hague Convention – 1970

This Convention, (the scope of which is defined in Article 1 to 3), makes skyjacking a distinct offence and calls for severe punishment of any person found within the territory of a contracting state who skyjacked an aircraft *(p)*.

As one writer very concisely explains it: "This Convention was specifically aimed at air piracy. Its purpose is to provide sufficient deterrent force to reduce hijacking attempts. It is mandatory on a signatory state to either extradite an air pirate or to submit his case to the competent domestic authority for the purpose of prosecution. The Convention is limited in application against persons who unlawfully seize or exercise control of an aircraft, and those who attempt to do so. Such exercise of control must be made while the aircraft is in flight which is defined broadly, from the time the exterior doors are closed following embarkation, until they are reopened for disembarkation" *(q)*.

Article 1 specifies the acts constituting the offence to which the convention applies, stating that:

"Any person who on board an aircraft in flight –

"(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act; or

"(b) is an accomplice of a person who performs or attempts to perform any such act commits an offence" *(q)*.

We note that any mention of aircraft hijacking as international crime (discussed supra) is avoided by merely referring to the act as an "offence". This provision, however, does go further than the Tokyo Convention, since it designates what constitutes an offence for purposes of prosecution and extradition among contracting States to the Hague Convention. But safe havens are still open to hijackers as long as the state where he lands or to which he escapes is not a contracting party. Therefore, the deterrent effect of the Hague Convention is minimised by not making hijacking truly an international crime, ie, a crime in all states, regardless of whether or not they are contracting parties to the convention.

Article 2 mentions that "each contracting State undertakes to make the offence punishable by severe penalties". It does not list the exact penalties to be inflicted by contracting States, other than "severe penalties" *(r)*.

There are several limitations as expressed in the articles of the Convention. Under Article 1, the act must be committed by a person "on board an aircraft in flight", the Convention does not apply to an attempt to seize or exercise control of an aircraft by a person on the ground or on board another aircraft *(s)*. Similarly, the Convention only applies to accomplices who are on board an aircraft in flight, and not to those who may be on the ground aiding and abetting the unlawful act *(t)*.

In Article 3, an aircraft is deemed in flight from the moment the external doors are closed following embarkation, until the moment they are opened for disembarkation, *(u)*. Hence, any hijacking initiated or attempted before the closing or after the opening of the aircraft's doors is not covered within the scope of the Convention, as defined under Article 3. Therefore, such acts are only punishable according to the laws of the state where they are committed, and not under the jurisdictional provisions of the Hague Convention *(v)*.

As previously mentioned, Article 3 of the Tokyo Convention gave primary jurisdiction to the State of Registration of the aircraft, coupled with an obligation on all contracting states to take necessary, legislative measures to establish extraterritorial jurisdiction *(w)*. Beyond that, only customary international law and any municipal laws existing in the state of landing as to an offence would be applicable. Hence, a large amount of discretion is given to the state of landing in that it may do with the hijacker as it pleases, the usual result being political asylum and no punishment even if an extradition treaty exists between the states.

The jurisdiction sections pertaining to the Hague Convention try to ensure punishment of

(p) Supra note (j), at 97.

(q) Supra note (e), at 96–97.

(r) *Convention for the Suppression of Unlawful Seizure of Aircraft,* signed at The Hague, Dec 16, 1970.

(s) Supra note (d), at 85–86.

(t) Id at 85.

(u) Supra, note s.

(v) Id at 86.

(w) Id.

an offender by the proper jurisdiction. However, those sections serve only to bind the contracting parties, since "multilateral conventions, no matter how inclusive their language, are applicable only in states which have ratified them" *(x)*. Article 4 of the Hague Convention states that a contracting state is to establish necessary measures in order to take jurisdiction over an offence:

"(a) when the offence is committed on board an aircraft in that state;

"(b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;

"(c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessor has no such place of business, his permanent residence, in that state" *(y)*.

In addition, every contracting state must take measures to establish its jurisdiction over the offence where the offender is present in its territory, but the state does not extradite him. Thus, any alleged hijacker can be arrested no matter where the offence took place as long as he is present in a contracting state. This Article of the Convention has been interpreted to mean "universal jurisdiction", ie, a State has criminal jurisdiction over an alleged hijacker when he ". . . is present in its territory, regardless of where the hijacking takes place" *(aa)*. However, it is not "universal jurisdiction" in a true legal sense. Here, only a contracting state can exercise jurisdiction over an offender, and only if he is present in its territory. Nevertheless, the jurisdiction in the Hague Convention is a great improvement on the Tokyo Convention, but is "universal" only if the alleged hijacker is present in a contracting party state — a very critical limitation to keep in mind. In spite of the fact that there are sixty states to which the Convention applies *(ab)*, there are still many possible sanctuary states open for refuge seeking. Therefore, jurisdiction under the Hague is very effective in dealing with aircraft hijackers; but, that jurisdiction is only effective as it applies to States who are contracting parties to the Convention.

It must be underlined that of the three principal states which have acquired the reputation of being a "hijacker's paradise" (ie, Cuba, Algeria, and Libya), only Libya is bound by any of these multilateral conventions, the Tokyo Convention *(ac)*. Thus, unless bilateral agreements are enforced between these states and the state in which the offence takes place (as the 1973 Agreement between Cuba and the United States, discussed infra), there will always be "haven" states for hijackers.

VI The Montreal Convention – 1971

Since the Hague Convention dealt only with unlawful seizure committed on board aircraft, it did not cover sabotage committed on the ground, nor unlawful interferences with air navigation facilities and services *(ad)*. To cover these points, the Montreal Convention was drafted. Having the same provisions for penalties to be determined by each party as The Hague Convention, "its main purpose is to expand the scope of activity covered from "in flight" to "in service", expanding protection from the beginning of pre-flight preparation to 24 hours after landing, and, in addition, adding coverage to destruction or damage to air navigational facilities" *(ae)*. As of 31 May 1974, a total of 54 countries had ratified this Convention *(af)*.

Article 1 creates a new series of offences which may be committed without the offender being on board *(ag)*. The same definition as given in Article 3 of The Hague Convention for an "aircraft in flight" applies, but the Montreal Convention introduces a new provision, "aircraft in service", defined as follows:

"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 twenty-four hours after any landing; the period of service shall, in any event, extend for the entire period during which the aircraft is in flight . . ." *(ah)*.

The two offences which can be committed on board an aircraft in service are enclosed in Article 1 which states that any person commits an offence if he unlawfully and intentionally:

"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

(x) Boyle *Jurisdiction Over Crimes Committed in Flight: An International Convention*, 3 Am Crim LQ 68, 71–72 (1964–1965).

(y) Supra note (e), at 97.

(z) Supra note (r), at 441.

(aa) *Hearings on the Aircraft Hijacking Convention Before the Committee on Foreign Relations of the United States Senate*, 92d Congress, 1st Session 1 (1971) at 6.

(ab) Evans, *Aircraft Hijacking: What Is Being Done*, 67 Am J Int L 641, 667 (1973).

(ac) Id.

(ad) Supra note (d), at 89.

(ae) Supra note (y).

(af) Supra note (ad).

(ag) Id.

(ah) Id at 90.

"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 renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight" *(ai)*.

There is a great probability that an aircraft may be interfered with and placed in danger by offenders while still on the ground. Under the Montreal Convention, it is now possible for any state which can establish jurisdiction under Article 5 over an offender to prosecute, punish, and extradite those who unlawfully destroy an aircraft on the ground *(aj)*.

VII Searches and seizures

Between 1961 and 1973 the total number of hijackings showed 160 attempts, of which 98 were successful. The majority of these hijackings occurred between 1968 and the end of 1972 when 147 attempts were made, 91 of which were successful *(ak)*.

By 1972, President Nixon directed the Administrator of the Federal Aviation Administration to commence a program of strict searches and seizures and to adopt security measures to deter possible future hijackings of United States aircraft. It was signed into law on 5 August 1974 *(al)*.

As stated in 49 USCA s 1356 (1974):

"Screening procedures for passengers; promulgation and amendment of regulations by administrator; reports to Congress; exempted air transportation operations

"(a) The Administrator shall prescribe or continue in effect reasonable regulations requiring that all passengers and all property intended to be carried in the aircraft cabin in air transportation or intrastate air transportation be screened by weapon-detecting procedures or facilities employed or operated by employees or agents of the air carrier, intrastate air carrier, or foreign air carrier prior to boarding the aircraft for such transportation. One year after August 5, 1974, or after the effective date of such regulations, whichever is later, the Administrator may alter or amend such regulations, requiring a continuation of such screening only to the extend deemed necessary to assure security against acts of criminal violence and aircraft piracy in air transportation and intrastate air transportation . . .

"(b) The Administrator may exempt from the provisions of this section, in whole or in part, air transportation operations, other than those scheduled passenger operations performed by air carriers engaging in interstate, overseas, or foreign transportation . . ."

The most relevant part of the directive, under 49 USCA s 1357 (1974) states:

"Air transportation security

"Rules and regulations; authority of Administrator to prescribe; purposes; consultations and criteria for promulgation and amendment.

"(a) (1) The Administrator of the Federal Aviation Administration shall prescribe such reasonable rules and regulations requiring such practices, methods, and procedures, or governing the design, materials, and construction of aircraft, as he may deem necessary to protect persons and property aboard aircraft operating in air transportation or intrastate air transportation against acts of criminal violence and aircraft piracy".

The above-mentioned directive requires the search by hand of all carry-on baggage. Such a search has been challenged as being unconstitutional, offensive, and intrusive. However, provided that the scope of an anti-hijack search is limited, courts have found it to be constitutional, thus rendering unjustified any intrusion by the authorities beyond the legitimate scope of a weapons search *(am)*.

Due to the alarming increase in air piracy, President Nixon's programme of searches and seizures is a must for air safety. However, "the fact that the anti-hijacking search is reasonable and necessary under the 'exigent circumstances' involved in protecting so large a number of persons from such grave dangers does not lessen the need for it to be carefully and narrowly drawn" *(an)*.

In spite of the decrease in hijackings between 1972 and 1973 (probably due to President Nixon's directive regarding searches and seizures), there were four of these during the summer of 1973 *(ao)*. They were conducted by Palestinian and Arab terrorists throughout different European airports. During this period (1972–73), it was established by means of a survey of the major

(ai) Id.

(aj) Id.

(ak) Foley, *The Anti-hijacking Act of 1974 – A Step Beyond The Hague Convention,* 16 South Texas LJ 356, 359–360 (1975).

(al) Id at 360.

(am) *United States v Lopez;* 328 F Supp 1077, 1098 (1971).

(an) Naw, *The Antiskyjack System: A Matter of Search Or Seizure,* 48 Notre Dame Lawyer, 1261, 1279 (1973).

(ao) Supra note (e), at 95.

European airports, that security checks were made only on "suspect flights" to the Middle East and Israel *(ap)*. One can only conclude that the above-mentioned hijackings were due to a lack of strict searches on all flights to the Middle East. Hence, a programme as the one proposed by President Nixon would probably have been an effective solution to curb the hijackings and terrorism evolving around Middle Eastern nations.

VIII The Anti-hijacking Act of 1974

The unprecedented number of hijackings reported during the decade of the 1960s and early 1970s, gave way to President Nixon's Anti-hijacking Act of 1974, signed into law on 5 August of that year *(aq)*.

49 USCA s 1301 (34) (1974) states:

"The term 'special aircraft jurisdiction of the United States' includes:

"(a) civil aircraft of the United States;

"(b) aircraft of the national defence forces of the United States;

"(c) any other aircraft within the United States;

"(d) any other aircraft outside the United States –

"(i) that has its next scheduled destination or last point of departure in the United States, if that aircraft next actually lands in the United States; or

"(ii) having 'an offense', as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, committed aboard, if that aircraft lands in the United States with the alleged offender still aboard; and

"(e) other aircraft leased without crew to a lessee who has his principal place of business in the United States, or if none, who has his permanent residence in the United States; while that aircraft is in flight, which is from the moment when all external doors are closed following embarkation until the moment when one such door is opened for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the aircraft and for the persons and property aboard"

Provisions (a) through (d) (i) of the above are the original provisions of the Federal Aviation Act of 1958. Therefore, provisions (d) (ii) and (e) are the amendments to the Federal Aviation Act, which constitute the two new categories of aircraft appearing in Section 102 of title 1 of the Anti-hijacking Act of 1974 *(ar)*.

The definition of when an aircraft is "in flight" is the same as that which previously is found in the Hague Convention (discussed above). However, there is a new clause in this definition explaining when an aircraft is deemed "in flight" in case of a forced landing.

This new definition of when an aircraft is "in flight" together with a new paragraph added in s 104 (b) stating that attempts at hijacking are within the special aircraft jurisdiction, although the aircraft is not in flight when the attempt is made, so long as it would have been within that jurisdiction had the offence been completed, does not allow a case to be thrown out of Court because the aircraft was not in flight at the time of the attempt.

Thus, before the new definition of when an aircraft is in flight came into effect under the Anti-hijacking Act, a defendant was not prosecuted in spite of the fact that he boarded a plane with dynamite, a gun, and notes showing intent to hijack the aircraft, because he was captured before the aircraft left the terminal and started the engine *(as)*. The aircraft was not in flight as was previously defined, ie, "from the moment power is applied for the purpose of takeoff until the moment when the landing roll ends" *(at)*.

The act, under s 103 (b), adds the concept of jurisdiction outside the United States. It covers all hijackings occurring outside the United States' special jurisdiction, but not those where the place of takeoff and landing is within the State of registration of the aircraft. Jurisdiction is had over any person in the United States who committed an "offence" as defined by the Hague Convention, outside the special aircraft jurisdiction of the United States *(au)*. Let us view this more clearly by means of a hypothetical example: an Italian national who hijacks a plane of French registry flying from Paris to London, changes its route to Israel, and is later found in the United States, can be convicted or acquitted there, *(av)*. This notion of "expanded jurisdiction", is of all the provisions of the Act, the most likely to be effective in prosecuting offenders in the future *(aw)*.

Supposing that the hijacker is found guilty, he

(ap) Id.

(aq) Supra note (al).

(ar) Supra note (ak), at 361.

(as) *United States v Pliskow*, D C Mich 1973, 354 F Supp 369, affirmed 480 F 2d 927 (6th Cir 1973).

(at) Supra note (ak), at 361–362.

(au) Id at 362.

(av) Id at 363.

(aw) Id at 370.

will serve a minimum sentence of 20 years' imprisonment and if his act caused the death of another, the United States authorities have the power to execute him. These penalties are the same for both crimes committed inside or outside the special aircraft jurisdiction of the United States *(ax)*.

As stated in 49 USCA s 1472 (1974):

"Aircraft Piracy

"(i) (1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished –

"(A) by imprisonment for not less than 20 years; or

"(B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.

"(2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence, or by any other form of intimidation, and with wrongful intent, of an aircraft within the special aircraft jurisdiction of the United States.

"(3) An attempt to commit aircraft piracy shall be within the special aircraft jurisdiction of the United States even though the aircraft is not in flight at the time of such attempt if the aircraft would have been within the special aircraft jurisdiction of the United States had the offense of air piracy been completed.

"Aircraft piracy outside special aircraft jurisdiction of the United States

"(n)(1) Whoever aboard an aircraft in flight outside the special aircraft jurisdiction of the United States commits 'an offense', as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, and is afterward found in the United States shall be punished –

"(A) by imprisonment for not less than 20 years; or

"(B) if the death of another person results from the commission or attempted commission of the offenses, by death or by imprisonment for life".

The death penalty has been severely opposed since it is allegedly unconstitutional and constitutes cruel and unusual punishment *(ay)*. Thus, it will probably not be imposed with frequency. Nevertheless, it exists and may be upheld at the Supreme Court's discretion, ie, if the crime committed is so atrocious that it would seem "unjust" to convict the offender only with imprisonment. The trend in the United States has been toward increasing the severity of the sentence, although to this date the maximum penalty has not been imposed *(az)*.

Section 1114 of title I of the Act enables the President of the United States authority to suspend air commerce to or from any foreign nation he deems is acting in a manner contrary to the Hague Convention.

As found in 49 USCA s 1514 (1974):

"Suspension of air services by President; grounds; authority of President deemed condition to issuance of certificate of public convenience and necessity, etc; unlawful activities.

"(a) Whenever the President determines that a foreign nation acting in a manner inconsistent with the Convention for the Suppression of Unlawful Seizure of Aircraft, or if he determines that a foreign nation permits the use of territory under its jurisdiction as a base of operations or training or as a sanctuary for, or in any way arms, aids, or abets, any terrorist organisation which knowingly uses the illegal seizure of aircraft or the threat thereof as an instrument of policy, he may, without notice or hearing and for as long as he determines necessary to assure the security of aircraft against unlawful seizure, suspend (1) the right of any air carrier or foreign air carrier to engage in foreign air transportation, and the right of any person to operate aircraft in foreign air commerce, to and from that foreign nation, and (2) the right of any foreign air carrier to engage in foreign air transportation, and the right of any foreign person to operate aircraft in foreign air commerce, between the United States and any foreign nation which maintains air service between itself and that foreign nation . . .

"(b) It shall be unlawful for any air carrier to engage in foreign air transportation, or for any person to operate aircraft in foreign air commerce, in violation of the suspension of rights by the President under this section".

By boycotting and retaining operating authority, this section seeks to ultimately deter potential hijackers and to deny sanctuaries which were formerly available to these offenders *(ba)*. This method of control is by means of unilateral state action, available only to a country with

(ax) Supra note (at).
(ay) *Furman v Georgia*, 408 US 238 (1972).
(az) Supra note (ab), at 657.
(ba) Supra note (ak), at 368.

massive air transport *(bb)*, as is the United States.

Section 1115 of title I of the Act entitled "Security Standards in Foreign Air Transportation", gives the necessary authority to the Secretary of Transportation to withhold the operating of any airline that falls short of maintaining the minimum standards for security measures set by the Convention on International Civil Aviation. The need for such authority was clearly shown when only one month after the signing of the bill on 8 September 1974, a TWA jet crashed in the Ionian Sea en route to Rome from Tel Aviv and Athens. It was determined that the crash was due to one of two bombs which had been successfully smuggled in the baggage compartment within the past few months, *(bc)*.

One may be sure that sections 1114 and 1115 of title I of the Anti-hijacking Act of 1974, will have a great practical and political effect in decreasing the number of aircraft hijackings in the future.

IX Extradition

After jurisdiction over an alleged hijacker is established and he is in custody, the problem becomes one of whether he is to be extradited or prosecuted, who should prosecute him, and most important, is a State obligated to grant political asylum to a hijacker who was politically motivated to commit the hijacking. Essentially, any efforts to deter hijacking cannot be fulfilled unless extradition is available to those states harmed. Without extradition, a hijacker goes unpunished because refuge is given him in a friendly or lenient state where there is no extradition agreement in force. Therefore, the danger to international air transportation continues to go unabated.

From the past World War II years through the 1960s, the basic motivation for air piracy has been political asylum, the second has been escape and mental cases.

The scope of extradition is further limited in that "... states extradite only for serious crimes and these crimes must be punishable according to the law both of the state of refuge and the requesting state. Political crimes, military and religious offences are not subject to extradition proceedings" *(bd)*.

The rationale for the political exception is that though the political offender is in some eyes a criminal, others look upon him as a defender of liberty. Implicit in this is the fear that a political offender will not get an impartial hearing in the requesting state *(be)*. However, in the case of aircraft hijacking, it seems the danger of the offence should overshadow the political exception, even if the motive to hijack is connected with political or religious persecution. We are talking about weighing one or two lives (the hijackers) against the lives of several hundred persons, thereby creating too great an improportionate risk to justify letting a hijacker go free *(bf)*.

Since almost all hijackings have some political motivation overtone, the political motivation exception to extradition is probably the most controversial aspect of international legal efforts to deal with and deter aircraft hijacking. Extradition is refused and political asylum granted to the hijacker in most cases.

One solution suggested by a court twenty five years ago dealt with the case where Yugoslav crew members hijacked a plane to Switzerland. The court denied extradition and granted political asylum to the offenders because minimal harm resulted, reaching the decision by striking "a balance between the motivations of hijackers and what it considered to be the effects of their actions" *(bg)*. However, such balancing of harm against motivation for the hijacking does not deter hijacking but only encourages hijacking as a means of escape.

Professor Van Panhuys' argument is against the granting of asylum to hijackers who were politically motivated in committing the unlawful act, thus granting extradition to the appropriate requesting state *(bh)*. "His argument is that enormous risks are brought upon the crew and passengers during a hijacking attempt, and hence it is difficult to maintain that the political freedom of one or two individuals should be held to outweigh the risk to the lives of sometimes a very large number of persons travelling in today's commercial airlines" *(bi)*. However, there is a problem with such a proposal. As the motivation will be taken into consideration when the hijacker is brought to trial, the result would probably be too mild a punishment in the courts of the state of landing or too severe a punishment in the requesting state if extradition is granted. Therefore, when the offence occurs with political overtones, Van Panhuys suggests to prosecute the offender in a third state which is considered by the other two states to be neutral

(bb) Supra note (ab), at 670.

(bc) Id at 369.

(bd) Note, *Development of International Legal Rules for the Repression of the Unlawful Seizure of Aircraft*, 7 Can Y B of Int'l L 269, 277 (1969).

(be) Supra note (o), at 13.

(bf) Id at 15.

(bg) Comment, *Prospects for the Prevention of Aircraft Hijacking Through Law*, 9 Col J Trans L 60, 71 (1970).

(bh) Supra note (d), at 95.

(bi) Id.

in relevant political issue *(bj)*. This seems to be the most effective solution for, if the intended hijacker knows he will be prosecuted regardless of where he lands, the deterent effect is maximised as no sanctuary for refuge would be available to the hijacker. However, such a solution is only attainable through total cooperation of the international aviation community – something which seems far from possible in the near future.

The Hague included mandatory provisions, though binding only on contracting parties, for extraditing the offender or prosecuting him. Article 7, provides in part that:

"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 offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution" *(bk)*.

The deterrent effect of this provision is to eliminate any sanctions for hijackers, but only as long as the state in which the hijacker is present is a contracting state to the Convention. As a necessary part of the Convention and to strengthen Article 7, Article 8 provides that the offense is to be "included as an extraditable offense in any extradition treaty existing between Contracting States" and is to be recognised as an extraditable offence between Contracting States who don't have any extradition treaties *(bl)*.

The Hague Convention does not eliminate the political motivation exception to extradition between contracting parties, but then the only alternative open to contracting states refusing extradition is submission of the offender to proper authorities for adjudication.

X The 1973 bilateral executive agreement between the United States and Cuba

In spite of the fact that most of the hijacking occurring during the 1960s were directed towards Cuba, Cuba had consistently refused to become a party to any multilateral agreement or Convention concerning air piracy. However, Castro was reported to have changed his mind and hence been willing to enter into a bilateral agreement with the United States as early as 1971, for he did not want to see Cuba become a "sanctuary" for air pirates throughout the world *(bm)*. This, coupled with a strong Soviet pressure motivated the negotiation of a bilateral executive agreement between the two countries signed in February 1973 *(bn)*. Basically, "this agreement provides for extradition in cases of air piracy, while leaving sufficient room in the agreement for interpretation to allow either state to accept political refugees, each of whom will be determined by the receiving state" *(bo)*.

Thus, if a hijacker diverts a plane to the United States, and upon his arrival is classified as a political refugee, the United States does not have to grant extradition of such an individual to the Cuban authorities. This agreement, therefore, does not have any effect in cases in which the hijackers are classified by the receiving state (ie, the United States) as political refugees with a right to political asylum. Since neither Cuba nor the United States have any intentions of extraditing what each considers political refugees, such agreement would probably be of value in only a small number of cases. Nevertheless, if such is the case, it would be still worthwhile *(bp)*.

Since the overwhelming majority of hijackings are motivated by political overtones, as discussed in the previous section, the United States must carefully ascertain whether or not an alleged hijacker's act is a "genuine" politically motivated offence, thus classifying him as a political refugee with the right to asylum. On the contrary, the United States would undoubtedly become a "haven" for skyjackers who merely declared themselves to be political refugees upon arrival at this country.

Similarly, it is not certain that Cuba will recognize the particular reasons of any given hijacker to grant him asylum. Hence, "the mere possibility that any given air pirate, rather than being provided with political asylum, will be extradited to the United States, is sufficient to at least put a 'chill' into air piracy" *(bq)*.

The doctrine of non-refoulement prohibits the state of entry from returning a refugee to a territory where his life or freedom would be threatened because of his race, religion, nationality or political opinions. However, non-refoulement cannot be demanded by a refugee who constitutes a threat to the security of the State of landing, or a danger to the community of that state *(br)*. Nevertheless, extradition may be demanded by the skyjacker's home country (Cuba) provided that such country has an extradition treaty (the bilateral agreement) with the United

(bj) Id at 95–96.
(bk) Supra note (r), at 442.
(bl) Id.
(bm) Supra note (e), at 102.
(bn) Id (For text, see the New York Times, Feb 14, 1973; p 1, col 1).
(bo) Id.
(bp) Id at 102–103.
(bq) Id at 103.
(br) Supra note (j), at 101.

States covering the offence of skyjacking *(bs)*.

In line with the doctrine of non-refoulement, "if the skyjacker is legitimately fleeing prosecution rather than committing terrorism or extortion, the question thus becomes: Can the United States recognise him as a refugee under the international legal regime governing asylum?" *(bt)*. Thus, non-refoulement is the background for the grant of asylum and the political motivation exception to extradition of an offender, provided of course that he is not otherwise a threat to the landing state.

The United States can resolve the refugee skyjacker problem by entering into bilateral agreements with the necessary states as the 1973 executive agreement with Cuba, or by retaining the Hague prescription and thus refusing the grant of asylum to the refugee-skyjacker *(bu)*. the second alternative seems a bit harsh in light of the traditional United States policy, which has been to protect and recognise the individual's rights and liberties.

XI Punishment

Both the Tokyo and Hague Conventions leave punishment of a hijacker up to the determination of the contracting states. The Hague Convention (Article 2) is more critical as it requires the establishing of "severe penalties" by contracting states (mainly for the deterrent effect thereof) *(bv)*. However, what is severe by one state's standards may be lenient or excessive by anothers. For example, the United States prescribes the death penalty as a maximum punishment for a convicted hijacker. On the other hand, France, Israel, and the Federal Republic of Germany impose a more lenient penalty by providing for a maximum sentence of life imprisonment if a fatality occurs during the hijacking *(bw)*. Australia, Japan, and the Soviet Union impose the death penalty only if the death of an individual occurred during the hijacking or if there had been a reckless disregard to safety by the hijacker or perpetration of severe bodily injury in the course of the act *(bx)*. The United States also imposes the death penalty as maximum sentence to a hijacker, but only if his act caused the death of another.

A country which does not impose upon the criminal a harsh penalty will be classified as a "safe" state, to where more hijackings will likely occur. Italy classifies as one of such states, where a TWA plane was hijacked from Los Angeles to Rome in 1969. The hijacker was convicted to seven and a half years in prison, which sentence was reduced to three years, and after serving 18 months he was granted amnesty *(by)*.

In contrast, a nation which imposes severe punishment on the offender will probably deter future incidents of hijackings to such nation. An example of this is Libya, where it was announced that the offenders who hijacked a Japanese airliner on 20 July 1973 would be tried under Islamic law *(bz)*. In essence, this means that the arm found to have committed the offence (or both arms if such was the case) would be chopped off.

Because of the various degrees of punishment in different states, an international agreement is needed to lay down legal guidelines for punishment of an offender, which would uniformally and effectively deter future incidents of air piracy.

XII Sanctions and methods of enforcement through private organisations: IFALPA

Let us suppose that such an agreement is attained, but states refuse to comply with them. The problem then becomes one of enforcing the law.

There might be instances in which a state, party to a convention, will ignore the provisions to which they are bound. But worse still, there might be instances where states not party to any multilateral convention (such as Cuba and Algeria) continue to ignore the international threat to aviation presented by hijacking by granting sanctuary to hijackers. In other words, there are still safe havens available to hijackers.

Though the ultimate problem with any convention is to get a sufficient number of states to become parties to it to make it effective, there are legal means of "encouraging" joinder. Even some private organisations have available to them extra legal procedures by which cooperation can be encouraged. The most influential group has been IFALPA. (The International Federation of Air Line Pilots Association), with over 44,000 members flying to 34 countries *(ca)*, which has shown that private pressure group tactics may supply incentive to activity *(cb)*. On 19 June, 1972 there was a full day boycott of civil air transportation, which was motivated by 34 successful international and domestic hijackings from 1 January 1972 through

(bs) Id at 102.
(bt) Id.
(bu) Id at 108.
(bv) Supra note (r), at 440.
(bw) Supra note (ab), at 656.
(bx) Id at 656.

(by) Supra note (e), at 99.
(bz) Id.
(ca) Stephen, *Going South – Air Piracy and Unlawful Interference With Air Commerce,* 4 Int'l Lawyer 433, 442 (1970).
(cb) Supra note (ab), at 670.

the first week of June. The boycott was aimed against those countries which had failed to ratify the three hijacking conventions, related United Nations resolutions, or did not extradite or punish hijackers *(cc)*. Algeria was asked to extradite or punish the two hijackers of United States aircraft deviated to that country on 3 June *(cd)*. IFALPA was basically demanding for urgent attention to a sanctions convention. The result was that the boycott was more comprehensive and effective than what was anticipated: air service substantially decreased in the greatest part of Europe, various Middle Eastern and African states, in Latin America, and Canada *(ce)*.

This result clearly shows that private organisations may effectively deter aircraft piracy, in spite of the fact that this is an issue of public responsibility and of nations at large.

XIII. Conclusion

Due to the jet's potential ability of covering long distances in a relatively short period of time, not only the State in which the hijacking occurred is involved in the hijacking incident but other States as well, such as the State of registration of the aircraft, state of nationality of the crew and passengers, state to which the aircraft is deviated to, etc. Clearly, we see that international cooperation is a must if the problem of air piracy is to be solved. As one writer explains, "so long as there are weak links, in terms of states where hijackers may start their criminal act, and states where the hijackers may land without penalty, the world will continue to see examples of air piracy, regardless of the efforts of any one state" *(cf)*.

Undoubtedly, the main conventions presently dealing with the problem of aircraft hijacking should effectively minimise and deter this threat. However, such conventions only apply to contracting states, a main problem when one realises that the states defined as "havens" for hijackers are not party to any of these conventions.

Thus, a convention is needed which specifically defines aircraft hijacking as an international criminal offence, punishable and extraditable by all nations of the world, regardless of whether or not they are party to the convention.

(cc) Id at 670.
(cd) Id.
(ce) Id at 670–671.
(cf) Supra note (e), at 105.

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