

THE PRACTICE OF ANTI-HIJACKING CONVENTIONS IN MALAYSIA AND NIGERIA: A COMPARATIVE ANALYSIS

ISMAIL ADUA MUSTAPHA, PH.D*

Abstract

Aircraft hijacking is the committed civil aviation offence across the globe. No nation is free from this heinous act, the consequences of which have resulted in death, loss of properties and distortion of international peace and order. That is why the international community through International Civil Aviation Organization has positively responded in form of Anti-hijacking Conventions to suppress and prevent this offence. Both countries are signatories to these Conventions. The paper critically discusses a comparative analysis of the implementation of Anti-hijacking Conventions in Malaysia and Nigeria with a view to assess the difference and similarity, if any, in their implementation. The paper basically relied on qualitative method of legal research to achieve its aim and objective. It is found that there is slight difference in their application of the Conventions but with similar aim to prevent and suppress the offence within and beyond their boundaries. The paper concludes that both Malaysia and Nigeria are willing to prevent and suppress the offence by domesticating the provisions of the anti-hijacking Convention, but they differ in the area of application.

1.0 Introduction

Aircraft hijacking, sabotage and airport attack are the three prominent tools resorted to by the terrorists to attack civil aviation.¹ The reasons behind the adoption of these attacking strategies keep changing over the years. While some of these offences were committed to escape from the persecution of the opposing ruling government and the release of political prisoners, others were for the imposition of the terrorists' ideology on the government of the day.² Although, aircraft sabotage is more dangerous in terms of loss of lives and properties than the aircraft hijacking, the latter offence,

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¹P.C. Jefferey and S.F. Jefferey, *Practical Aviation Security: Predicting and Preventing Future Threats* (Netherland, Elsevier, 2009) p. 42.

²*Ibid*, 43.

constitution 90% of the offence against civil aviation, is more committed than the former.³

Many states of the world have suffered from the incidents of hijacking.⁴ There is, therefore, the need to prevent and suppress the offence in all ramifications. The International Civil Aviation Organization (ICAO),⁵ acting on the authority of the international community, has adopted anti-hijacking law, The Hague Convention on Unlawful Seizure of Aircraft 1970⁶ and 2010 Beijing Protocol to Supplement the Hague Convention 1970⁷ to deal with the incidents of aircraft hijackings. Nigeria and Malaysia are signatories to the Hague Convention 1970 and its Protocol.

The Hague Convention and its Protocol contain preventive and suppressive devices such as definition of the offence, jurisdiction to try the hijacker, extradition of the hijacker and penalties. It is not the purpose of this paper to examine the historical antecedent of the offence of aircraft hijacking and analyze the provisions of the Anti-hijacking Conventions. Instead, this article emphasizes significant similarity or otherwise in the implementation of anti-hijacking Conventions in Malaysia and Nigeria, since both countries have domesticated and are applying the provisions of these Conventions in their respective jurisdictions. It is on this note that the paper intends to critically analyse and make a comparison of the practice of Malaysia and Nigeria of the anti-hijacking Conventions. The paper ends with concluding remark consisting of finding(s) and recommendation(s).

³*Ibid*, 44.

⁴For example, the hijacking of United State of America on 11 November 2001 where four aircrafts were unlawfully seized and used as weapons of mass destruction. Also the hijacking of Nigerian Airways in 1993.

⁵The International Civil Aviation Organization established under section 43 of the Chicago Convention on International Civil Aviation 1944, is one of the United Nations Agencies saddled with the responsibility of securing the international civil aviation against the offence of aircraft hijacking and other related offences. This duty is being performed by virtue of articles 37 and 54 of the Convention. See Chicago Convention on International Civil Aviation 1944, adopted on 7 December 1944 and entered to force on 4 April 1947, ICAO Doc. 7300/9, ninth edition, 2006; articles 37 and 54 respectively. See I.R.A. Ruwantissa, *Aviation Security: Legal and Regulatory Aspects*(London: Ashgate Publishing Limited, 1998) p.7.

⁶The Hague Convention for the Suppression of Unlawful Seizure of Aircraft [herein referred to as the Hague Convention 1970] 80 U.N.T.S.105, 22 U.T.S 1641, T.I.A.S. No. 7192.

⁷2010 Beijing Protocol to Supplement the Hague Convention 1970, 50 ILM 141 (2011)+

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⁷2010 Beijing Protocol to Supplement the Hague Convention 1970, 50 ILM 141 (2011)+

2.0 Why Anti-Hijacking Conventions?

The concerns of the airlines operators and passengers are the skills and experience of the pilot; and soundness and fitness of the aircraft that will ply the designated routes.⁸ The Phenomenon 'aircraft hijacking' was not known until between 1930 and 1931 when the strategy was adopted to set the stage for evolution of the crime against civil aviation.⁹ The reason for its condemnation was as a result of its destructive nature. The peace and harmony of the international community distorted when a single aircraft is seized.¹⁰ From 1931 till date, over one thousand aircrafts have been hijacked.¹¹ At the early stage, 1931-1960, the reason for the commission of the act was to escape from the persecution and prosecution of the opposition government of the day, and to seek political asylum. No deadly incident was recorded.¹²

But as from 1961 to 1980 witnessed a high rate of hijacking of aircrafts where hijacking of aircraft turned bloody by the use of dangerous weaponries such as guns, explosives to mention a few, to hijack the aircrafts. For example, in 1977, a man shut the pilot, hijacked a Malaysian aircraft flight MH653, Boeing 73 and later shut himself. This led to a total destruction of the aircraft.¹³ Many times, the aircrafts were regarded as battle fields between the government and the hijackers.¹⁴ It was during this era that the international community coordinated by the International Civil Aviation Organization adopted three Conventions vis, the Tokyo Convention on

⁸P.S Demsey, *Aviation Security: The role of law in the war against terrorism*, Vol. 41 (3) *Columbia Journal of Transportation Law* (2003) p. 649.

⁹M.I. Ellahi, *Security in Airports: Design Conditions and Measures to Combat Airpiracy, Sabotage, Bomb Threats and Acts of Unlawful Interference*, (Riyad: The Arab Security and Training Center, 1982) p. 17; See also P.C. Jefferey and S.F. Jefferey, *op cit.*, p. 44.

¹⁰B.M Jenkins, *The Terrorist Threat To Commercial Aviations*, (Being a paper presented at the International Seminar on Aviation Security, Herzeliyya, Israel on 5th-6th February, 1989, 11-12. See also W. Rodney, *How Safe Are Our Skies? Assessing the Airlines Response to Terrorism*. (USA: Preager Publisher, USA, 2003) 1.

¹¹Flight Safety Foundation: Aviation Safety Network <<http://aviation-safety.net/statistics/period/stats.php?cat=H2>> accessed 10 March 2015.

¹²P.C Jefferey and S.F Jefferey, *Practical Aviation Security: Predicting and Preventing Future Threats* (USA: Elsevier Inc., 2009) p.46.

¹³Azuan, Remebering the 4th Dec. 1977 TanjungKupung Tragedy <<http://www.azuanzahdi.com/index.php/2010/12/04/remembering-the-4th-dec-1977-tangun-kupang-tragedy/>> accessed 10 March 2015. See also Ismail Adua, M. *International Law on Aircraft Hijacking: The Practice in Malaysia and Nigeria*, (Ph.D Thesis submitted to the Postgraduate School, International Islamic University Malaysia, 2014), 44.

¹⁴B. Elias, *Airport and Aviation Security: US Policy and Strategy in the Age of global Terrorism* (USA: Auerbach Publications, Taylor & Francis Group, 2010) P.7.

Offences Certain Other Acts Committed On Board Aircraft 1963;¹⁵ the Hague Convention for the Suppression of Unlawful Seizure of aircraft 1970;¹⁶ and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971;¹⁷ to control and suppress the offence of aircraft hijacking and other related offences such as sabotage of aircraft which may follow the incidence of aircraft hijacking.¹⁸

The application of the Hague Convention 1970 drastically reduced the rate of hijacking of aircrafts as contracting states deemed it fit to punish the hijacker severely. Thus, the rate at which the offence was committed between 1981-2000 was geometrically reduced. It was during this period, particularly in 1993, that the Nigeria witnessed her first ever hijacking of the Nigerian Airways to Niger Republic.¹⁹

From 2001 till date, the rate at which the offence of aircraft hijacking is being prevented and suppressed is encouraging. Even though, one of the unforgettable and regrettable incidences of hijackings was recorded in 2001 where four aircrafts of the United States of American were hijacked on the same date, September 9, 2001. Three of the aircrafts were used as missiles and weapon of mass destructions to destroy the two World Trade Center Towers in New York City; and Pentagon in Washington D.C, while the remaining one was destroyed in the Rural Pennsylvania.²⁰ The 9/11 event clearly shows that the hijackers had adopted a new tactics of hijacking the aircraft; and that aircraft could be used as weapon of mass destructions. Consequently, the international community began a search for the legal control to prevent a reoccurrence of such an event. Thus, in 2010, the International Diplomatic Conference on Aviation Security was held in Beijing and came up with a new and

¹⁵ The Tokyo Convention on Offences Certain Other Acts Committed On Board Aircraft 1963 [herein referred to as the Tokyo Convention 1963], 704 U.N.T.S 219, 20 U.T.S 2941, T.I.A.S. No. 6768.

¹⁶ The Hague Convention for the Suppression of Unlawful Seizure of aircraft [herein referred to as the Hague Convention 1970] 80 U.N.T.S 105, 22 U.T.S 1641, T.I.A.S. No. 7192.

¹⁷ The Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971, [herein referred to as the Montreal Convention 1971] U.N.T.S 177, 24 U.T.S 564, T.I.A.S. No. 7570.

¹⁸ See I.M. Adua, *The International Law on Aircraft Hijacking: The Practice in Malaysia and Nigeria* (Ph.D Thesis submitted to the Postgraduate School, International Islamic University Malaysia, 2014), 45.

¹⁹ A. Wale, The June 12 Nigeria Airways Plane hijack: The Untold Story. *The Nation* 22 June 2009.

²⁰ The Airplanes are American Airlines Flights 11; United Airlines Flight 175; American Airlines Flight 77; and the United Airlines Flight 93. See New World Encyclopaedia < <http://www.newworldencyclopedia.org/entry/hijacking> > accessed 10 March 2015. See also Elias at 49-50; and Jefferey and Jefferey, op cit., pp. 72-76.

detailed Protocol amending some provisions of the Hague Convention 1970 to address the underlying conduct of the September 11 2001 terrorist attacks.²¹ The destructive nature of the offence warrants the need to see how the contracting states have been responding to the Hague Convention and its 2010 Protocol to prevent and suppress the offence. Of course, many contracting states including Nigeria and Malaysia have adopted the suppressive means as contained in both the main Convention and its Protocol. Some of these suppressive and preventive means as adopted by Malaysia and Nigeria are hereunder analysed and compared.

3.0 Comparison of the Practice of Anti-Hijacking Convention by Malaysia and Nigeria

3.1 Definition of the Offence

Though both Malaysia and Nigeria are parties to the anti-hijacking Conventions, they still offered their local definition of the offence to suit their local circumstances. The Malaysian Aviation Offences Act²² describes the offence of Aircraft Hijacking as:

*"a person on board an aircraft in-flight who unlawfully, by the use of force or by threats of any kind, seizes the aircraft or exercises control of it commits the offence of hijacking, whatever his nationality or citizenship, whatever the state of registration of the aircraft and whether the aircraft is in Malaysia or elsewhere".*²³

The Act expressly adopts the word "Hijacking" instead of "Offence" as mentioned in Hague Convention 1970 and its 2010 Protocol.²⁴ By this description, the elements of the offence are: that the hijacker, must be on board aircraft in-flight; that he must unlawfully seizes the aircraft or exercises control of aircraft in-flight; that the hijacker needs not be a national or a citizen of Malaysia; that hijacked aircraft needs not be registered in Malaysia; and that whether the aircraft is in Malaysia or elsewhere is irrelevant.

It is submitted that under the Malaysian Act, hijacking by a person not on board aircraft in-flight is outside the scope of the offence. Also, the *mensrea* of the offence is irrelevant once the *actusreus* is present. Again, the clauses "*whatever his nationality or citizenship, whatever the state of registration of the aircraft and whether the*

²¹ M.W.Samuel, "Introductory Note On The Convention On The Suppression of Unlawful Acts Relating To International Civil Aviation And The Protocol Supplementary To The Convention For The Suppression Of Unlawful Seizure Of Aircraft", 50 *ILM* 141 (2011) +, 1.

²² Aviation Offences Act, Laws of Malaysia, Act No 307, 1984.

²³ *Ibid.*, art. 7.

²⁴ See 2010 Beijing Protocol to the Hague Convention 1970.

aircraft is in Malaysia or elsewhere" establishes a Universal jurisdiction. Universal jurisdiction has been defined to mean exercise of jurisdiction to prosecute and punish the offender irrespective of the nationality of the offender, the victim of the offence, and the place of commission of the offence.²⁵

It is further submitted that what constitutes hijacking in Malaysian suffers for not including circumstances where aircraft is hijacked on the ground or situation where the hijacker is not on board aircraft.

On the other hand, the Nigerian Civil Aviation Act describes the offence of aircraft hijacking as:

*"Whosoever on board an aircraft either on the ground or in-flight unlawfully, by force or threat of force, or by any other form of intimidation, seizes or exercises control of that aircraft..."*²⁶

It is submitted that the elements of the offence are that: the hijacker must be on board aircraft in-flight or on the ground; and he must unlawfully, by use of force, or threat or any form of intimidation, seizes or exercises control of aircraft. It therefore means that if the hijacker is not on board, the offence is not committed. Also, the degree of threat, force or intimidation is not defined. It is therefore posited that a small degree of threat or force or intimidation that will endanger the safety and security of aircraft will suffice.

The prominent characteristic of all the definitions and descriptions of the offence of aircraft hijacking is "unlawful seizure of aircraft by force or threat". The element of seizure of aircraft in service, and the mode of commission of the offence by any technological means, distinguishes the description of the offence under the Protocol and the Malaysian Act. It is submitted that the definition of in service includes the word "in-flight". In this respect, definition of aircraft hijacking as contained in the Protocol is wider in scope than the definition of the offence as contained in the Malaysian Civil Aviation Offences Act.

²⁵D.V.Hoover, "Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court" (2011). Cornell Law School Inter-University Graduate Student Conference Paper 52 at 4 <http://scholarship.law.cornell.edu/lps_elacp/52> accessed 3 May 2012; O'Donnell, D., "International Treaties Against Terrorism During Armed Conflict and by Armed Forces", Vol. 88 No. 864, (2008), *International Review of the Red Cross*, 856-857; D.C Menthe, "Jurisdiction in Cyberspace: Theory of International Spaces" vol 4 (69) *MICH. TELCOMM. TECH.L.REV.* 71; Maeddo, S., "Princeton Project on Universal Jurisdiction", (USA: Programme in Law and Public Affairs, Princeton University, 2001) p.23.

²⁶Nigerian Civil Aviation Act No 6, 2006, s. 57(1).

The definition of the offence in the Protocol and Nigerian Civil Aviation Act look similar when the two definitions subscribe to the commission of the offence on the ground and in-flight. However, the major distinctions between the two definitions are: firstly, inclusion of "by technological means" in the Protocol is clearly missing in the Nigerian Act, and secondly the prosecution needs not prove *mens rea* under the Nigerian Act. It can be safely stated that description of the offence of aircraft hijacking in the Protocol is wider in scope than that of the Nigerian Act.

It is further submitted that under the Malaysian and the Nigerian Acts, the intention of the hijacker to commit the offence is irrelevant. However, the difference in the description of the offence of hijacking in the Nigerian Act and the Malaysian Act is that, while the Nigerian Act covers any act of hijacking on the ground, the Malaysian Act does not. In addition, nationality of the hijacker(s) and the registration of aircraft are irrelevant to the commission of the offence in Malaysia.

3.2 Jurisdiction to Try Alleged Hijacker

The Protocol obliged the contracting state to exercise jurisdiction in respect of the offence of aircraft hijacking.²⁷ In furtherance of this directive, both Malaysia and Nigeria are willing to establish and exercise jurisdiction in respect of the offence. Malaysian Civil Aviation Act (CAA) 1969 and the Aviation Offences Act (AOA) 1984 confer jurisdiction on the Malaysian court to try the hijackers. The Civil Aviation Act states:

*"Any act done by any person on Malaysian aircraft outside of Malaysia which, if it had been done by him in Malaysia, would have constituted an offence under the laws of Malaysia, shall, for the purposes of criminal proceedings in Malaysia against that person in respect of that act, be deemed to have been done by him in Malaysia."*²⁸

Again, the Aviation Offences Act 1984 provides in relation to the jurisdiction thus:

*"Any act or omission taking place on board a Malaysian-controlled aircraft while in-flight elsewhere than in or over Malaysia which, if taking place in force in Malaysia, constitutes that offence:"*²⁹

*"For the purpose of conferring jurisdiction, any offence under the law in force in Malaysia committed on board an aircraft in-flight shall be deemed to have been committed in Malaysia."*³⁰

²⁷ Protocol to the Hague Convention 1970, art. 4 (1)-(4).

²⁸ Civil Aviation Act (Act 3) 1969, s.26.

²⁹ Aviation Offences Act 1984, s.3(1)

A combined reading of the provisions of section 26 of the Civil Aviation Act and section 3 (1) and (4) of the Aviation Offences Act implies that Malaysia will exercise jurisdiction to try the hijackers if: the act of hijacking is committed against a Malaysian aircraft in or outside Malaysia; the act is committed on board aircraft in-flight; and that the hijacking of aircraft is an offence under the Malaysian law. It is submitted that Malaysia court has both territorial and extra-territorial jurisdiction.³¹

Nigeria shall establish and exercise jurisdiction to try the hijacker when: the offence is committed on board an aircraft registered in Nigeria; the aircraft on board which the offence is committed lands in Nigeria with the alleged offender(s) still on board; the offence is committed on board aircraft leased without crew to a lessee who has his principal place of business in Nigeria or if he has no principal place of business, his permanent residence is in Nigeria; and the offence is committed on board a non-Nigerian registered aircraft whilst such an aircraft is within the territory of the Federal Republic of Nigeria.³²

The practice of exercise of criminal jurisdiction in relation to the offence of aircraft hijacking as provided in section 56 (6) (a) – (d) of the Act is extraterritorial in nature. Extraterritorial jurisdiction is a jurisdiction exercised over extraterritorial crimes such as aircraft hijacking. Therefore, the Nigerian courts may exercise extraterritorial jurisdiction based on the territorial³³, passive personality and nationality principles.³⁴ Section 56 (6) (a) affirms the application of the principle of passive

³⁰ *Ibid.*, s.3(4).

³¹ See also Aviation Offences Act 1984, s.3 (5).

³² Nigerian Civil Aviation Act No 6 2006, s. 56 (6) (a)-(d).

³³ A jurisdiction is said to be territorial when a state can exercise jurisdictional power over a person, object or any event within its territory. See Hoover D.V., "Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court" (2011), Cornell Law School Inter-University Graduate Student Conference Paper 52,4 <http://scholarship.law.cornell.edu/lps_clacp/> accessed on 3/5/2012; D.O'Donnell, "International Treaties Against Terrorism During Armed Conflict and by Armed Forces", Vol. 88 No. 864, (2008), *International Review of the Redcross*, 856-857; Mente, D.C., "Jurisdiction in Cyberspace: Theory of International Spaces" vol. 4 (69), *MICH. TELCOM. M. TECH. L. REV.*, 71; S. Macedo, *Princeton Project on Universal Jurisdiction*, (USA: Programme in Law and Public Affairs, Princeton University, 2011)p.23; A.J Colangelo, "Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of national and International Law", Vol. 48 (1), (2007), *Harv. Int'l Law Journal*, 126; Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach*, 3rd edition, Malaysia: Sweet and Maxwell Asia, 2011)p. 128, Y. Kraytman, "Universal Jurisdiction-Historical Roots and Modern Implications", Vol. 2, (2005), *BSI Journal of International Studies*, 94.

³⁴ Jurisdiction on nationality is to the effect that sovereign state is allowed to establish and exercise jurisdiction over the offence committed by its national anywhere. See United Nations Legislative

personality jurisdiction when it states that the court shall exercise jurisdiction to try the offence of aircraft hijacking committed on board aircraft registered in Nigeria.³⁵ This is because aircraft registered in Nigeria bears nationality of Nigeria as a sovereign state.³⁶ A registered aircraft in Nigeria is a Nigerian national. Hence, the Nigerian courts will exercise criminal jurisdiction on ground of passive personality principle, because the offence is committed against a Nigerian registered aircraft.

Section 56 (6) (b) authorises the court to try the hijacker even if the offence is not committed in Nigeria. The presence of the offender and aircraft in Nigeria is a legal ground to exercise the jurisdiction. This is known as territorial principle. Furthermore, section 56 (c) empowers the courts to exercise jurisdiction based on nationality principle of criminal jurisdiction if the offence of aircraft hijacking is committed against an aircraft leased out without crew to a lessee who has his principal place of business in Nigeria or he is permanently residence in Nigeria.

Finally, the assertion of territorial principle of jurisdiction is confirmed by the Nigerian Civil Aviation Act 2006 in section 56 (6) (d) when it states that the court shall exercise criminal jurisdiction against the hijackers who commit offence of hijacking on board non-Nigeria registered aircraft within Nigeria territory.³⁷ The legal ground for the exercise of this jurisdiction is that the offence is committed in Nigeria territory.

From the foregoing, Nigeria has domesticated the theory of traditional methods of exercising criminal jurisdiction in the Hague Convention 1970 through the Nigerian Civil Aviation Act 2006. It is submitted that the rationale behind the exercise of criminal jurisdiction is to serve as a warning to the hijacker that Nigeria is not a safe haven. It is also to prosecute the alleged hijackers with a view to punish them severely. If however, Nigeria is unwilling to prosecute, it must extradite the alleged hijackers to an interested state.

3.3 Extradition of the Hijacker

Both Nigeria and Malaysia are willing to apply and practice extradition provision as contained in the Protocol. The applicable law in Nigeria is Extradition Act,

Guide to the Universal Anti-Terrorism Convention and Protocols, United Nations on Drug and Crime, New York, 2003, 25; Abdul Chafur, *op cit.* P.130.

³⁵ Nigerian Civil Aviation Act No 6 2006, s 56 (6) (a).

³⁶ See Chicago Convention, 1944, art 17.

³⁷ Nigerian Civil Aviation Act, s 56 (6) (d).

2006.³⁸ while in Malaysia; the Extradition Act 1992³⁹ is the applicable law. The two Acts apply to states with or without the extradition agreement with the two states.⁴⁰ An extradition offence according to Malaysian Extradition Act includes an offence or attempt or conspiracy to commit or abetment of the offence punishable by the law of Malaysia and that of requesting state for not less than one year or with death.⁴¹ The presence of hijacker(s) in Malaysia and the nature of punishment, which is life imprisonment in Malaysia,⁴² constitute a legal ground for the commencement of extradition procedure in Malaysia. On the other hand, according to Nigeria Extradition Act, any offence that is categorized as a returnable offence is referred to as an extradition offence. A returnable offence is "an offence however, described which is punishable by imprisonment for two years or a greater penalty both in Nigeria as well as the Commonwealth country seeking his surrender."⁴³

One of the distinguishing factors between the practice of extradition of hijacker in Malaysia and Nigeria is the nature of punishment. Malaysia will only extradite an offender if the punishment for the offence is not less than one year, or with death. On the other hand, Nigeria will grant an extradition request if the punishment for such offence is two years imprisonment or a greater punishment. Even though greater punishment is not defined in the Act, it is therefore submitted that the offence of aircraft hijacking qualifies as one of the extraditable offences in the two states.

By way of similarity, Malaysia and Nigeria are willing not to extradite an offender if the offence is of political nature;⁴⁴ or on the ground of discrimination;⁴⁵ or lapse of time;⁴⁶ and where the offender raises a defence of '*autrefois acquit*' or '*autrefois convict*'.⁴⁷ What amounts to discrimination includes extradition made for the purpose of prosecuting or punishing the offender(s) because of his race, religion, nationality, or political opinions.⁴⁸ Refusing extradition of offender(s) on ground of

³⁸ Extradition Act, Cap E25, LFN 2004.

³⁹ Extradition Act 1992 (Act 479) Laws of Malaysia.

⁴⁰ Extradition Act, 1992, ss 1 (2) (a) and (b); and 2 and 3; and Extradition Act, 2004, ss 1 and 2.

⁴¹ *Ibid*, s 6 (2).

⁴² See Aviation Offences Act 1984, s14.

⁴³ *Ibid*, s 20 (2).

⁴⁴ Extradition Act 1992, s 6 (8) (a) and Extradition Act, 2004, s 3 (a).

⁴⁵ Extradition Act, 1992 s 8 (b) and (c) and Extradition Act, 2004 s 3 (b) sub-paragraph (a) and (b).

⁴⁶ Extradition Act, 1992 s 8 (d) and Extradition Act, 2004, s 3 (a) and (b).

⁴⁷ Extradition Act, 1992 s19 (h) and Extradition Act, 2004 s 3 (d) sub-paragraph (a) and (b). This is referring to principle of double jeopardy.

⁴⁸ Extradition Act, 1992, s 8 (b) and (c)

mandatory nature of extradition of a Nigerian criminal has its authority from the use of the word “may” in the provision of section 6 (c) of the Extradition Act 2004. Therefore, in the absence of any extradition agreement to the contrary, the Attorney-General of the Federation is at liberty to either grant or refuse an order of extradition to the requesting state.

3.4 Option to Prosecute Hijacker

It is a discretionary international duty on the part of Malaysia and Nigeria to either extradite or prosecute the hijacker(s). For the purpose of prosecution, an intending private prosecutor is obliged to seek and obtain a written consent of the public prosecutor.⁵² However, the alleged hijacker(s) may be arrested, remanded in custody and granted bail before the consent of the public prosecutor is granted.⁵³ It is submitted that the provision relating to the consent of the public prosecutor in the Malaysian Aviation Offences Act reflects the criminal policy of Malaysia based on fundamental principle of the Criminal Procedural Code. This is from the fact that the criminal proceedings are entrusted to the public prosecutor and without his consent no criminal proceeding can be brought to court. The consent provision as stated in the Aviation Offences Act is not stated as a condition under the Nigerian Civil Aviation Act. However, it is submitted that in Nigeria, as a matter of law, a private prosecution must seek and obtain the consent of the attorney General of the Federation or of a State before a private prosecution would be allowed to prosecute the offender. Therefore, offence of aircraft hijacking is an offence against the Federation; hence the “fiat”⁵⁴ of the Attorney General of a State or Federation must be sought and granted before the hijacker(s) could be prosecuted.⁵⁵

⁵² Aviation Offences Act, 1984, Laws of Malaysia, s 15 (1).

⁵³ *Ibid.*, s 12.

⁵⁴ In the case of *Commissioner of Police v Tobin* (2009) 10 NWLR (Pt. 1148), 71, the Nigerian Court of Appeal interpreted “Fiat” to mean “a Latin word, meaning let it be done, especially arbitrary one as in judicial fiat, a court decree, etc”.

⁵⁵ See J.Daudu, “The Imperative of a reformed prosecutorial system in Nigeria’s criminal justice machinery” (Paper presented at 2nd Criminal Justice Reform Conference, Asaba, Delta State, n.d). The Daily Independent, 10 December, 2013. However, the Supreme Court of Nigeria in the case of *Osahon v FRN* ruled that by virtue of section 174 of the Nigerian 1999 Constitution, the Attorney General has impliedly granted *Fiat* to the private legal practitioners to prosecute state offences. Thus, his express consent is no more necessary. See the case of *Osahon v FRN* (2003) 16 NWLR (Pt. 845) 120-121; *DPP v Akozor* (1983) 1 SCNJ 94; *Tukur v Gongola State* (1988) 1 NLR (pt.68), 78. See generally A. A. Lanre, Prosecutorial Power of the Attorney General. In Abdullateef as-Sudaisiy, *Articles on matters of Islamic teachings, Law and Politics*, 10 April, 2012.

3.5 Punishment of the Hijacker

According to 2010 Protocol, "each State Party undertakes to make the offence.....punishable by severe penalties"⁵⁶ what constitutes 'severe penalties' is neither defined nor stated in The Hague Convention and its Protocol. It therefore leaves the definition or nature of punishment for the offence of aircraft hijacking to the discretion of each contracting state. It is submitted that by way of defining the offence and punishing the hijacker, a contracting state shall have, in their national anti-hijacking law, punishment(s) to be imposed on the hijacker(s).

Malaysia and Nigeria are willing to punish the offenders. However the nature of punishment differs. In the light of the section 14 of the Aviation Offences Act,⁵⁷ the practice in Malaysia is to sentence the hijackers, upon proof of their guilt, to life imprisonment.⁵⁸ Nigeria adopts the penalties of life imprisonment and a fine of ten million naira.⁵⁹ Even though, life imprisonment is the next most severe punishment after death sentence and addition of ten million naira is a huge amount of money in Nigeria.⁶⁰ It is submitted that these penalties should be for hijacking not resulting to death. Thus, where death is recorded, the offender should be sentenced to death. This will serve as deterrence to potential hijackers.

3.6 Regulation of Civil Aviation

Each Member State to The Hague Convention and its 2010 Protocol regulates civil aviation within its jurisdiction. In Malaysia, the Ministry of Transport (MOT) and the Department of Civil Aviation (DCA) are the bodies responsible for the regulation of civil aviation.⁶¹ The Ministry of Transport is the highest decision-making organ in respect of all the means of transportation in Malaysia including but not limited to air transportation.⁶² The Malaysian Civil Aviation Act empowers the Minister of

⁵⁶ 2010 Protocol to the Hague Convention, 1970, art. 2.

⁵⁷ Aviation Offences Act, 1984, s. 14.

⁵⁸ *Ibid.*

⁵⁹ See Nigerian Civil Aviation Act, 2004, s. 56 (4).

⁶⁰ According to a Financial reports, about 90 million Nigerians out of the 170 million live below 2 US Dollars (that is RM 6.44) per day. See Expat Arrivals, "Cost of living in Nigeria" <http://www.expattarrivals.com/nigeria/cost-of-living-in-nigeria> > accessed 5 December 2013; Daily Trust, "Nigeria: High cost of living affects pensioners", Daily Trust, 25 September, 2009, <allafrica.com/stories/200909250147.html> accessed 5 December 2013.

⁶¹ Civil Aviation Act 1969, ss. 2 and 3 respectively.

⁶² Ministry of Transport Malaysian Government

Guide <http://www.lav.berment.com/guide/gov/Federal_Government/Road_and_Transport/> accessed 7 May 2013.

Transport to make regulation in respect of aviation matters in Malaysia.⁶³ Pursuant to its power under the Act, the Minister has made the Malaysian Civil Aviation Regulations 1996 and 2011 respectively. The importance of these Regulations is to secure civil aviation against the offence of aircraft hijacking and other related aviation offences. On the other hand, the DGCA is to ensure full implementation of such regulations made by the Minister.⁶⁴ Therefore the practical implementation of such Regulations made by the Minister squarely rested on the DGCA, which he does through a directive.

In Nigeria, the Nigeria Civil Aviation Act empowers the Nigeria Civil Aviation Authority (NCAA), an autonomous body,⁶⁵ to regulate the civil aviation in all its ramifications.⁶⁶ The contribution of the Aviation Minister to secure air transport is only to issue directive(s) in cases of emergency matters.⁶⁷ For instance, The NCAA has adopted the Nigerian Civil Aviation Regulations 2006, 2009 and 2012 to give effect to the provision of section 30 of the Act.

It is submitted that in Malaysia, the MOT issues Aviation Regulations while DGCA issues directives, while in Nigeria, The NCAA issues Aviation Regulations while the MOA issues directives in case of any emergency. It is further submitted that DCA in Malaysia is not an autonomous body like its counterpart in Nigeria who can decide on aviation matters on its own, and sue and be sued in its corporate name.

4.0 Conclusion

Malaysia and Nigeria are willing to prevent and suppress the heinous act of hijacking. Their intention is known through the adoption of anti-hijacking Convention 1970 and its 2010 Protocol. The practice, therefore, is to define the offence to suit the jurisdiction in which they found themselves. The definition of the offence as contained in the Nigerian Act is similar to the one contained in the Protocol. In fact, two types of unlawful seizure *viz*; the ground and in-flight seizure of aircraft were revealed from the Protocol and the Nigerian definition of the offence as opposed to an in-flight hijacking in the Malaysian definition of the offence. It is concluded that the

⁶³ See Malaysian Civil Aviation, s. 3.

⁶⁴ Civil Aviation Regulations 1996, Regulation 201; Civil Aviation (Amendment) Regulations, 2011, Regulations 198 (1)-(3).

⁶⁵ Nigerian Civil Aviation, 2006, s. 2.

⁶⁶ Nigerian Civil Aviation, 2006, section 30. For example, NCAA has made Nigeria Civil Aviation Regulations 2006, 2009 and 2012.

⁶⁷ Nigerian Civil Aviation, 2006, ss. 28, 38 and 66.

Nigerian definition of the offence is wider in scope than the Malaysian definition of the offence. It is suggested that Malaysia should include 'hijacking committed on the ground while the aircraft in service' as an offence. It is further suggested that the two states should, as a matter of urgency, amend their definitive section of the offence to include commission of the offence by any technological means. This will allow the Acts to meet the test of time where technological instrument may be used to commit the offence.

Malaysia and Nigeria will be willing to establish and exercise both territorial and extra-territorial jurisdiction to try the hijacker. It is found that the jurisdictional provision contained in the Nigerian Act shares the same characteristics with that of the Protocol. Conversely, the provisions differ from the Malaysian Act. It is also found that Malaysia and Nigeria are ready to return the hijackers provided the requesting state satisfies all the requirements of the two states. However, it is revealed that while Malaysia will be willing to extradite its national to any requesting state, Nigeria will be unwilling to extradite her national. The two states recognise offence aircraft hijacking as an extraditable offence.

It is also revealing that under the Nigerian Act, the punishment for the hijacker is more severe than that contained under the Malaysian Act. This is due to the fact that the Protocol allows each state party to use her discretion to determine the nature of severity of the punishment. The two states do not consider hijacking that result in death of passenger to fix the penalties for the offence. This is a serious omission in the two States laws. It is recommended that the hijacker should be sentenced to death in case of any hijacking that result in death of any person.

Civil aviation is a special entity that needs adequate security from the professionals who are well acquainted with the system. In this respect, the system where the Minister of Transport is being authorised to make regulations for civil aviation is condemned. The Malaysian Minister of Transport is in charge of all mode of transportation. The required attention needed to secure aviation will be lacking. Thus, the DGCA who is to issue directive should be allowed to make security regulations for air transport in Malaysia. Beside, DGCA should be an aviation expert. This suggestion is obtainable in Nigeria.

It is finally conclude that both Malaysia and Nigeria are willing to prevent and suppress the offence by domesticating the provisions of the anti-hijacking Convention, but they differ in the area of application.