

O PENSAMENTO JURÍDICO ATUAL

POSSIBLE LEGAL SOLUTIONS TO INTERNATIONAL TERRORISM

Ted Banks

Editor-in-Chief-Denver Journal of International Law
and Policy University of Denver College of Law.

An act of violence is labeled "terrorist" when its psychological effects are out of proportion with its purely physical result.¹

I. The Problem of Terrorism

Persons engage in acts of terrorism for diverse reasons. Any attempt to deal with terrorism will fail if it does not consider the various motives behind acts of terrorism. For example, the classical idea of a terrorist is the guerilla fighter, seeking to gain support for a political cause by engaging in criminal activities which have a shock value in addition to their direct effects. In the past, these activities were usually confined to one country, in a civil war-type operation, with perhaps some infiltration into neighboring states to avoid capture.

More recently the international terrorist has emerged, motivated by a political or ideological cause (which may or may not transcend national boundaries), using methods, such as aircraft hijacking, which may span the globe. The extreme type of the modern terrorist is the one with no stake in any existing state, but whose grievances are against an entire region (such as the Palestinians).

Another type of modern terrorist is the one who lacks a political justification for his act, the "mentally unbalanced". Their acts are not justifiable by any "normal" standards, but stem from family problems, hormonal imbalance, suicidal intent, pure criminal motives, etc. Any one solution will not deter all of these types of terrorists; each must be considered separately if a workable plan is to be formulated.

Terrorists cannot operate in a vacuum. They are able to function because there are states that either encourage, are apathetic about, or are unable to control them. The reasons behind the policies that serve to provide the terrorists with a base of operations are also diverse, and must be considered individually when attempting to design a solution.

A state may encourage terrorist activities against another country because it ideologically supports the political position of the terrorists. Or, a state may support terrorist activities for reasons of convenience, irrespective of ideology. In the Nineteenth Century, states were able to make an effective show of force, hopefully without starting a war, by using the symbol of the "gunboat in the harbor". The Twentieth Century's symbolic form of violence is sporadic or clandestine.² Many states find it easier to encourage a foreign group than to engage in their own terrorist activities, which would carry with it a risk of condemnation if their operations became known. As this process expands, the victimized state may resort to encouragement of other terrorist groups (or its own terrorist activities) to retaliate for the original activities. Obviously, unless checked, the terrorism can escalate into something more than "symbolic" force.

II. Attempted Solutions

Many writers have stated that the best deterrent to acts of terrorism is the knowledge, in the mind of the terrorist, of certain extradition or apprehended.³ As a practical matter, few requests for extradition have been made in the past

few years, relative to the number of terrorist incidents that have occurred.⁴ Even if such a request were made under existing treaties, provisions for extradition are emasculated by providing for exceptions in the case of a "political offense".⁵

A political crime has been defined thusly:

Crimes are political when they are crimes committed intentionally against the security of the state... as well as when directed against the head of a government and the political rights of citizens. The state is the passive object of all political crime... a simple violation of the political order is not in itself sufficient to constitute a political crime; there must be an intention to totally or partially destroy the political order.⁶

The distinction outlined above has often been blurred, especially by those who maintain that "the lawfulness of an act depends upon the actor's politics".⁷ It is for this reason that the extradition provisions, subject to an exception in the case of a "political" crime, have been rendered all but worthless as a deterrent to terrorism.⁸

The refusal to extradite for political reasons should not always be viewed in such a cynical light. In many cases, an act of terrorism has been committed in a legitimate attempt to topple an oppressive regime. As Falk has stated:

... the insurgent faction in an underdeveloped country has, at the beginning of its struggle for power, no alternative other than terror to mobilize an effective operation.⁹

Article Fourteen of the Universal Declaration of Human Rights provides that a country should give asylum to political refugees.¹⁰ Further, there is no customary rule of international law requiring a country to extradite a person to another state that alleges a violation of its law.¹¹ Thus, for one reason or another, the effectiveness of treaties providing for extradition has been drastically diluted.

In another attempt at deterrence of would-be terrorists, some countries have adopted harsh penalties for crimes such as hijacking.¹² The rationale is that a person would not risk the chance of being caught as a result of such strong punitive measures. This type of approach is actually counterproductive since it deters, at best, only a few would-be terrorists. The prospect of the death penalty helps to promote the notion that one is "gambling with fate", and to certain disturbed persons this is an inducement, not a deterrent.¹³ The existence of harsh penalties contributes to the difficulty in obtaining extradition from countries that take a more civilized approach to punishment for such crimes.

For crimes such as hijacking, non-legal deterrents such as universal electronic screening at airports, can be effective. This system, or a body search, cannot eliminate all hijackers, since a determined person can manage to "fool" the machine or hide a weapon.¹⁴

In the case of hijacking, many other methods of prevention have been suggested and tried. Patrol flights along commercial aviation routes have been tried, but they are ineffective since "buzzing" a plane will not stop a hijacker, and shooting it down is out of the question.¹⁵ The use of armed guards aboard a flight has the same effect as the existence of the death penalty; it serves as an inducement to the suicidal. Also, unless every flight is covered, the odds of encountering (and stopping) a hijacker are very slim. Other methods, including the use of police dogs, trap doors through which a hijacker could fall, and spraying hijackers with mace have all been suggested, with little chance of success if they were implemented.¹⁶

More as punishment than deterrent, Israel has used retaliatory raids as a response to acts of terrorism. While there may have been some room for retaliation as self-defense under the older "Law of the Hague",¹⁷ the current views of

many writers, and the position of the U.N. Security Council condemn this type of self-help.¹⁸ Even if these objections did not exist, the efficacy of retaliation as a deterrent is questionable. It is difficult to limit a retaliatory action to "terrorists only", and by the very act of retaliation, the originally attacked country may lose any sympathy and international support that it derived from the original terrorism.

Another response to countries that harbor or encourage terrorists has been the boycott. The threat of cutting off all air traffic to a country has been used with some effect by the International Federation of Airline Pilots Association, but the actual boycott staged in 1972 did not seem to have any immediate effect.¹⁹ In spite of this, Secretary of State Rogers has urged the suspension of air service to countries that harbor hijackers.²⁰

It would seem that the use of sanctions, such as a boycott, against a country that does not prosecute or extradite terrorists would, in the long run, be counter-productive to the goal of world order.²¹ Attempting to punish a country by isolating it from world activity in one form or another would out of necessity make that country even more firmly committed to its original position. The American-led attempt at isolation of the People's Republic of China did not result in any moderation of China's politics. It was only when actual communications began that some progress was made at narrowing the political gulf that separated these two countries.

The time-honored method of quiet pressure (i.e., negotiations) has been utilized with some success in arranging the release of hostages and the creation of extradition agreements (as between the United States and Cuba). Negotiations have the advantage of bringing tacit pressure on another country without necessarily doing the damage to relations that some type of punitive action would accomplish.

III. Ideas for Immediate Implementation

As has been stated previously, the knowledge of certain extradition for a terrorist act is a powerful deterrent. Unfortunately, in the past states have been somewhat reluctant to allow the partial encroachment on their sovereignty that comes with adherence to a mandatory extradition agreement. The treaties that have been negotiated in the areas of hijacking and terrorism are evidence of this.²²

If the theory is followed that states encourage acts of terrorism as a symbolic war by proxy, then they certainly would have no interest in seeing any preventative measures such as mandatory extradition agreements for certain enumerated acts.

As a somewhat more palatable alternative, the possibility of international agreements specifying local prosecution (instead of extradition) has been attempted. This may have a certain amount of deterrent effect, but once again the political views of the country where refuge is sought are an important consideration. Persons sufficiently frustrated with one political system may be willing to risk a nominal period in jail (or perhaps even extensive incarceration) as the price to pay obtaining their freedom.

A solution to this situation would be the establishment of an international right to travel, which presently does not exist.²³ This would eliminate one major source of air piracy.

In the past, the United States encouraged persons to flee from communist regimes in whatever manner possible. This policy seemed to be aimed more at damaging communist regimes than to strongly support individual rights of freedom. In any case, the advocacy of this policy (especially during 1959-60) is at least partially responsible for the round of hijackings between the United States and Cuba.²⁴

There is an obvious need to balance an act of terrorism with the political justification offered. A pragmatic ba-

lancing of the means and ends would seem to be manner in which the 1970 Hague Convention will be applied.²⁵ However, this "balancing act" by each country is still unsatisfactory, for truly objective standards are needed to determine if a person should be given asylum (or a reduced sentence), or if the crime committed was so heinous that no political justification should be available.

To apply objective standards, some type of international court must be used. Morgenthau²⁶ and others have argued that political disputes cannot be settled by judicial methods. According to Morgenthau, the only time two nations will agree to arbitrate a dispute is when conflicts involving the over all distribution of power between those two countries are virtually impossible. The limitations of "power" (i.e. realist) theories of international relations notwithstanding, he fails to adequately explain his assertion in terms of his own theory. International adjudication of disputes can be in the self-interest of the parties, even if the dispute is of a political nature. As shown by the recent agreement between the United States and Cuba, the sting of unrestrained terrorism cuts both ways. A state that encourages terrorism will have terrorism encouraged against it. Therefore, it is prudent to place limitation on a policy of encouraging terrorism, if not abolishing it altogether.

The use of an international court to decide when extradition should occur (or what penalties should be imposed), would be an easy way for an "ideological" state to escape the onus of having to rationalize its "defection from the cause" by allowing a "heroic" terrorist to be extradited. Most states today are not as ideological as they are pragmatic, and their primary interest lies in preserving their national security; advancing world causes would have to come second.

Extradition treaties recently negotiated by the United States (e.g. with New Zealand) have attempted to clarify the political crimes exception. Whether done on a bilateral

or multilateral basis, some set of uniform and objective standards, such as those suggested by Bassiouni²⁷ are needed to establish a definite pattern to determine when an act is justified for political reasons.

IV. Suggestions for Future Implementation

The role of an international organization like Interpol should be expanded to provide faster and more accurate data on the location and methods of known terrorists.²⁸ Further exchange of ideas concerning the control of psychologically or physiologically induced crime is needed.²⁹ International agreements should take into consideration the medical aspects of terrorism, and extradition should not signify only a return for punishment, but, if indicated, medical treatment and study.

In order to adjudicate the problems raised by international terrorism more effectively, either the role of the International Court of Justice must be expanded, or a new International Court of Criminal Justice must be established.³⁰ Through a multilateral treaty objective standards for dealing with acts of terrorism by the court would be enumerated, and the list of crimes for which there is no political justification would be clearly stated.³¹ While the establishment of a new court is still well off into the future, the fact that diverse states are recognizing a common interest in limiting terrorism indicates the foundation of a desire for such a body.

The role of a new court (or an expanded International Court of Justice) could also be made to encompass the grievances that lead to acts of terrorism. Despotic government, unfulfilled political aspirations, and poverty will continue to lay the seeds for international insurgency. As political awareness of the present continues to leap ahead of social and economic progress, frustrated persons will continue to turn to violence to achieve their goals.

The standards listed by Bassiouni³² would be a good starting point for the operation of this new court. A problem is presented in securing enforcement of decisions against a despotic government, but the interest in world order would seem to call for some type of objective and fair settlement. This type of court might be able to arbitrate the dispute between the Israelis, the Arab governments, and the Palestinians. A common interest in securing some measure of peace for the region could override the militancy adopted by all the parties. Use of an international court could also serve to save face for the various parties, by not making a settlement look like a defeat by a bitter enemy.

International cooperation is needed to eliminate the poverty that still exists in much of the world. The activities of U.N. organs working along these lines must be expanded many times. Until basic political, social, and economic needs are satisfied, the problem of terrorism will still exist.

Only when a valid world juridical system has been established, and socioeconomic development is generalized will it be possible to achieve the implantation of world order.³³

FOOTNOTES

1. R. Aron, **Peace and War**, 170 (1966).
2. *Id.*, at 60
3. Hirsch and Fuller, "Aircraft Piracy and Extradition", 16 **New York Law Forum** 292.
4. Bassiouni, "Ideologically Motivated Offenses and the Political Offense Exception in Extradition", 19 **De Paul Law Review** 217, 219.
5. *Id.*
6. Szabo, "Political Crimes: A Historical Perspective", 2 **Denver Journal of International Law and Policy** 7, 18.
7. Bishop, "Letters to the Editor, "Commentary, April, 1973 at 30.

8. See note 22, *infra*.

9. Falk, "Six Legal Dimensions of the U.S. Involvement in Viet Nam" in R. Falk, 2 **The Vietnam War and International Law**, 240 (1969).

10. Universal Declaration of Human Rights, Article 14, adopted by the General Assembly of the United Nations Dec. 10, 1948. Bassiouni, *supra* note 4 at 233. See also 8 U.S.C. § 1153, 1253.

11. Green, "Piracy of Aircraft and the law", 10 **Alberta Law Review** 72.

12. 49 U.S.C. § 1472 (i) makes it a crime punishable by death or imprisonment for not less than twenty years for hijacking an aircraft. Hijacking will be used frequently in this paper as the most common example of international terrorism.

13. D. Hubbard, **The Skyjacker**, 230 (1971).

14. Extensive use of electronic screening devices in the U.S. has reduced airplane hijackings in this country. But, in some cases electronic screening or body searches will not turn up weapons. In September, 1970, El Al officials refused to let two men board flight number 219 from Amsterdam. The two men then boarded Pan Am flight number 93. El Al warned Pan Am about the two men, and the captain of the plane searched them and found nothing. Forty-five minutes later they had produced concealed guns and taken over the plane, and eventually destroyed it with explosives. Meanwhile, El Al did not stop a man and a woman from boarding flight 219, even though the woman was Laliah Khaled, a hijacker whose picture had been circulated to all airlines. When the two attempted to take over the plane while in flight the man was killed and Khaled was prevented from activating the grenades she carried in her bra. When the plane landed in London to obtain medical treatment for a wounded steward, Khaled was taken into custody by British authorities. Later she was returned in an exchange to the Palestinians.

E. Rich, **Flying Scared**, 34-37 (1972).

15. Sundberg, "Piracy: Air and Sea", in M. Bassiouni and V. Nanda, I **A Treatise on International Criminal Law**, 468 (1973); Evans, "Aircraft Hijacking: Its Cause and Cure", 63 **American Journal of International Law** 695, 704-705.

16. Evans, *Id.*

17. Kalshoven: **Belligerent Reprisals** (1971).

18. Taulbee, "Retaliation and Irregular Warfare in Contemporary International Law", 7 **International Lawyer** 195, 197, 202.

19. Threat of boy IFALPA aided the release of passengers from a hijacked plane in Algeria (9/22/67) and Syria (8/68). July, 1972 strik by IFALPA estimated 50% effective in Europe, prevented by Supreme Court injunction in U.S. Rich, **Flying Scared**, 192 (1973).

20. Statement by U.S. Secretary of State Rogers to U.N. General Asseby on 9/25/72. **Department of State Bulletin**, October 16, 1972, at 430.

21. Arey, **The Sky Pirates** 310 (1972).

22. The Convention on Offenses and Certain Other Acts Committed on Board Aircraft, done at Tokyo, September 14, 1963 by I.C.A.O. 2 **International Legal Materials** 1042. This convention failed to specify punishment for a hijacker and left prosecution up to the state where the plane landed. Even with such a loose wording, the reluctance of states to become signatories resulted in the treaty not becoming effective until December 4, 1969. Mc Whinney, **Aerial Piracy and International Law**, 20-22 (1971) and Mc Whinney, **Hijacking of Aircraft, Final Report to Institut du Droit International**, 10 (1971).

The Convention of the Suppression of Unlawful Seizure of Aircraft, done at The Hague, September 16, 1970 by I.C.A.O. provided that each state should make hijacking punishable by severe penalties (Art. 2). If a state does not extradite a hijacker, it should punish him (Art. 7). Disputes about this treaty are to be submitted to arbitration, and then to the International Court of Justice, but if a state wishes, it need not abide by this provision (Art. 14). 10 **International Legal Materials** 13.

The Convention for the Supression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal. September 23. 1971, by I.C.A.O. is basically the same. 10 **International Legal Materials** 1151.

The Convention to Present and Punish Acts of Terrorism by the O.A.S., seems to allow too much leeway for refusal to punish or extradite for political reasons. O.A.S. Doc. AG/doc. 88 rev/1 arr 1 of Feb. 2, 1971; 10 **International Legal Materials** 255.

In spite of the fact that two I.C.A.O. conventions made hijacking an extraditable offense, it remained a voluntary extradition with no real constraints on the political desires of a signatory.

23. Nanda, "The Right to Travel: An International Human Right?," 1 **Denver Journal of International Law and Policy** 109.

24. Hubbard, *supra* note 13 at 228; Mc Whinney, **Aerial Piracy**, *supra* note 22 at 16.

25. Mc Whinney, *id.* at 25.

26. H. Morgenthau, **Politics Among Nations**, 415 (4th Ed. 1967).

27. Bassiouni, *supra*, note 4 a 222-257. The following a summary of the theory enumerated by Professor Bassiouni. The conceptual framework for extradition involves:

1. recognition by each country of the self-interest of other states.
2. an international duty to preserve order.
3. application of minimum standards of justice.
4. Collective duty to reduce criminality.
5. a balancing of actions within the "rule of law".

The framework is rationalized by the following:

1. a duty to preserve the public order does not destroy national sovereignty.
2. the individual is accountable for his violations of international law.
3. cooperation in penal matters leads to a better order in states, without a need to compromise individual rights.
4. application of the "rule of law" lends credence to the procedures used.

In determining extradition the following should be considered:

1. degree of political involvement.
2. link between political motive and crime.
3. proportionality considerations between means used and political purposes.

There should be an allowance made for the right to "Ideological Self-Preservation".

1. The nature of the rights violated give rise to a right of ideological self-defense

- a) nature of the rights, and source
- b) are rights indispensable?
- c) historical existence of rights
- d) extent of reliance as fundamental part of life
- e) duration of abridgement
- f) foreseeable end to abridgement
- g) existence of available legal remedy

2. Factors bearing upon the conduct of the state which violated the fundamental right

- a) nature of transgression
- b) evaluation of violation
- c) manner, extent, duration, frequency of violation
- d) foreseeability of extended violation
- e) justification of violation
- f) methods of re-dress (legal)
- g) repulsive action taken against those seeking re-dress

3. Factors bearing upon the conduct of the individual who violated the law of the state in defense of the "fundamental human right".

a) exhaustion of local and international remedies short of generating repression

b) understanding of a reasonable man that re-dress not available (i.e. no alternative)

c) was conduct proportional to the right violated?

d) was conduct negative (revenge) or positive (to terminate violation of rights)?

e) were means used limited to those purposes with no unnecessary violations?

f) would risks fall on perpetrator, or would they affect others?

28. Sweden requested the criminal record of a hijacker on November 11, 1969, but the information did not arrive until May 5, 1970. Sundberg, *supra* note 15, at 487-487. Obviously a more efficient method of exchanging information is called for.

29. Many hijackers have chosen Cuba as a "land of no return" because of its political isolation from the United States, and western world generally. These hijackers are usually suicidal, and like most suicides wish to call attention to their plight. Frequently they have problems of physical disequilibrium that lead to mental disturbances. Sexual inadequacy is often noted, and hijacking is often chosen because of the masculine overtones of aviation. It is suggested that the addition of women to the space program could serve as a symbol that flight is not a male prerogative. The above material was obtained by interviews with hijackers, in Hubbard, *supra*, note 13 at 230.

30. Kutner: "Politicide: The Necessity for an International Court of Criminal Justice", 2 *Denver Journal of International Law and Policy* 55; the failure of the U.N. project, in this area is noted as the basis for some legitimate pessimism as to the creation of an international criminal court, Mc Whinney. *Hijacking of Aircraft. Provisional Report to Institut du Droit International*, 44 (1970)

31. Bassiouni suggests that treason, sedition, espionage are types of crimes that should come under the political offenses exception. Offenses against the law of nations (*Jure Gentium*) should not come under the political exception doctrine. *Supra*, note 4.

32. *Id.*

33. Jaguaribe, "World Order. Rationality and Socioeconomic Developmente" in S. Hoffman, *Conditions of World Order*, 209 (1966); cf A. Etzioni, *The Hard Way to Peace*, 202 (1962).