TERRORISM: THE PROPOSED UNITED STATES DRAFT CONVENTION

In the wake of the recent General Assembly Resolution on Terrorism, the United States has introduced to the United Nations General Assembly a Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism. The Proposed Draft contains key provisions defining as unlawful offenses: killing, kidnapping, infliction of serious bodily harm, and attempting, or participating as an accomplice in, such acts, when such acts are internationally significant.

The United States has also called upon the nations of the world to ratify the three proposed hijacking conventions. These conventions and the body of international law relative to armed conflict will take precedence over the Proposed Draft, in event of conflict, as will the recent O.A.S. Convention. Taken together, these conventions in conjunction with the Proposed Draft are viewed by the United States as a joint attack on the increasing waves of terrorism.

PRIOR CONVENTIONS

An international convention on terrorism is hardly a new idea. The Proposed Draft has a precursor in the 1937 Geneva Convention. But this convention could not cope with the myriad acts of terrorism today. Conceived against the

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2U.S. Draft Convention for Prevention and Punishment of Terrorism Acts, 11 INT'L LEGAL MAT'LS 1382 (1972) [hereinafter referred to as Proposed Draft]. See N.Y. Times, Sept. 26, 1972, § 1, at 18, col. 3. The Proposed Draft was referred to the Sixth Committee under agenda item 92.
3Proposed Draft, id., art. 1 (1).
4N.Y. Times, Sept. 26, 1972, § 1, at 1, col. 5.
6Proposed Draft, supra note 2, art. 13, 14.
background of the assassination of King Alexander I of Yugoslavia in 1934, the draft was primarily concerned with the assassination and kidnapping of public officials and heads of state. However, it also included provisions on the destruction of public property and "[a]ny wilful act calculated to endanger the lives of members of the public." Presumably, this last provision, while it certainly would have covered the Lod massacre, would have been incapable of dealing with the Munich Olympics or much of the current wave of letter bombing, despite its emphasis on conspiracy and other forms of group criminality.

These previous conventions have suffered from an inability to keep pace with the ingenuity of terrorists, with hijacking cases being the most recent example. While the Geneva Convention on the High Seas visualized the possibility of "air pirates," it seems to have contemplated only acts by persons on board one aircraft against persons on board another. The possibility that an individual, claiming to be politically motivated, might interfere with the flight of an aircraft on which he was a passenger seems to have escaped the drafters of that convention.

The Tokyo Convention was the first to deal with hijacking realistically. But it considers only those acts committed while the aircraft is "in flight," a period defined as beginning with the moment that power is applied for take-off and ending the moment that the landing run ends. The prohibited acts, moreover, include only interference by persons on board the flight in the form of seizure or other wrongful exercise of control. The primary concern of the convention drafters was to fill in some gaps in jurisdiction over suspected offenders, to delineate the aircraft commander's authority to restrain suspects and to provide a means of restoring authority to the commander in the event of a hijacking. As hijackings became more and more spectacular, the defects of the Tokyo Convention became more apparent.

10HUDSON, supra note 9, ed. n. at 862.
11See Geneva Convention, supra note 9, art. 2(3).
12See N.Y. Times, Nov. 11, 1972, § 1 at 1, col. 1. Eighteen letter-bombs were mailed to prominent London Jews, primarily businessmen. See N.Y. Times, May 31, 1972, § 1, at 1, col. 6. Three terrorists at Lod (LYDDA) International Airport attacked a crowd of some 250-300 people, killing 25 and wounding 72.
13Geneva Convention, supra note 9, art. 3. Art. 14(1)(a) maintains this emphasis by calling for sanctions against that traditional pastime of underground organizations—forgery of, and other falsifications relative to, travel documents.
16Tokyo Convention, supra note 5.
17Id., art. 1.
18Id., art. 11(1).
19See id., ch. 3.
The Hague Convention, like its predecessor, considered only the possibility of attempts to seize control of the aircraft in flight, but it did slightly broaden the definition of "in flight" to include the closing and re-opening of the external doors of the airplane. Even before the completion of the drafting, the inadequacy of the "in flight" doctrine was revealed. A bomb placed on board a Swissair flight exploded killing 47 people and several jets were hijacked to Arab territory with ensuing destruction of aircraft, injury, and loss of life; but the Convention was inapplicable in both situations.

Against this background, the Montreal Convention came into being. It replaced the "in flight" concept with an "in service" concept. Aircraft in service include aircraft upon which preflight preparation has commenced and those which have landed within the last 24 hours. Punishable offenses were broadened to include placing on board an aircraft any destructive device which would endanger the plane's safety, the destruction of air navigation facilities, and the communication of false information which might endanger flight safety.

Once it became apparent that airline passengers could serve as hostages to ensure the diversion of a flight from a scheduled route to a supposed sanctuary, it was but a short step for hijackers to use passenger hostages to bargain for ransom or political concessions. In turn, it became apparent that hostages might be found on the ground, as well as in the air. Since hostages could be diverted to more than one landing city during the course of a single flight, and since it was possible to requisition other aircraft to continue these flights, it was also possible to requisition getaway planes for oneself and one's ground hostages. The potential of such a situation was first unveiled at the Munich Olympics. Thus, actual hijacking was no longer a necessity—planes could be extorted, rather than seized (it is apparently not even necessary to use planes, as the Lod massacre shows).

The O.A.S. Convention is likewise extremely limited, being concerned only with the protection of diplomats.

The nations of the world have become universally vulnerable to such tactics at any location. Therefore, the existing hijacking conventions have been superseded by the need for a convention applicable to all such acts of terror.
THE PROPOSED DRAFT CONVENTION

The Proposed Draft approaches the entire subject by focusing on the relationship between the offender, the victim, the forum state, and the state of custody. It operates when the act is committed outside the state of which the offender is a national, and outside the state against which the act is directed, or against a national from a different state than the forum state, and when the offender has reason to know that the person is not a national of that state. Murder, infliction of grievous bodily harm, and kidnapping are covered if the offense is "of international significance." International significance exists, in essence, when the nationality of the alleged offender, of the victim, and of the forum state of the act do not coincide. The act, moreover, must be intended to damage the interests of, or obtain concessions from, a state or international organization. Acts by or against members of armed forces in the course of military hostilities are excepted.

Falling under this description are acts intended to damage the interests of, or obtain concessions from, a state or an international organization, provided that the alleged offender is operating outside his own nation, or the act takes effect outside the target state. This last clause would therefore cover the letter bomber mailing from his national state.

Under the proposed convention a state has the duty to extradite or prosecute, without exception, any offender found within its territory. The Proposed Draft also requires a state to take measures to establish its jurisdiction when the offense is committed by one of its nationals or within its territory or when the alleged offender is present in its territory. The state's territory is defined as "all territory under the jurisdiction or administration of the state." All offenses listed in the Proposed Draft will be extraditable; by ratification of the Proposed Draft, a state shall have legal grounds for extradition in the absence of a treaty.

In the event of multiple requests for extradition, the state in which the offense was committed shall receive priority. The accused shall have the right to communicate immediately with the nearest appropriate representative of his nation; he must also be guaranteed "fair treatment in all stages of the proceedings." The Proposed Draft also contains numerous procedures for pool-

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1"Proposed Draft, supra note 2, art. 1.
2Id.
3Id., art. 1(1)(c)(d).
4Id.
5Id., art. 3.
6Id., art. 4.
7Id., art. 1(2)(c).
8Id., art. 7.
9Id., art. 7(5).
10Id., art. 6(2).
11Id., art. 8.
ing of information and for international cooperation as well as procedures for arbitration and conciliation. There are of course problems with the provisions of this convention as well.

Just as the Geneva Convention suffered from its preoccupation with the assassination of Alexander I, so the Proposed Draft suffers from a preoccupation with the Munich massacre. Terrorists would still have numerous opportunities to escape justice. Bank robbery and destruction of private and public property are two activities, which terrorists might see fit to employ for their various purposes.

To be effective this convention must attempt to deal with the shortcomings noticeable in its predecessors. For instance all previous conventions have suffered from a lack of effective sanctions. Under the Geneva Convention, it would appear that, extradition is not mandatory. The hijacking conventions have had numerous problems, the most basic of which is the inadequacies of all forms of jurisdiction.

**JURISDICTION**

To award jurisdiction to the flag state of an airplane overrides the legitimate interests of the subjacent state. Clearly territoriality concepts are problematic, because it may be difficult to determine, due to high jet speeds, the state in which the offense has occurred; moreover, that state may have no interest in, or connection with, the airline, the offender, or victim. To award jurisdiction to the state in which the first landing takes place may be unsatisfactory for the same reason; it may also be inconvenient to passengers who wish to continue on their journey, rather than be required to wait around to testify at trial.

The High Seas Convention did not provide for jurisdiction over domestic airspace, presumably because there would be no airborne crimes over domestic

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434 GA. J. INT’L & COMP. L. [Vol. 3: 430

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42 Id., arts. 5, 10, 11, 12.
43 Id., art. 16.
44 See supra note 35 and accompanying text.
45 Bank robbery was a favorite fund raising device for revolutionary parties in pre-1917 Russia.
See generally B. WOLFE, THREE WHO MADE A REVOLUTION (1948).
46 See N.Y. Times, July 29, 1969, § I, at 6, col. 1. Eight vehicles owned by American nationals were blown up in Greece by opponents of the junta, who felt that the United States could restore democracy if it chose to do so.
47 According to art. 8(4) of the Geneva Convention, supra note 9, “[t]he obligation to grant extradition under the present article shall be subject to any conditions and limitations recognized by the law or the practice of the country to which application is made.” (Emphasis added.)
49 Other criticism of the flag state theory: “The main difficulties include the danger of no punishment, its only partial acceptance in common law countries, the transitional relationship between aircraft and passengers and the jealous guarding of the right of sovereignty by States flown over.” Gutierrez, Should the Tokyo Convention of 1963 Be Ratified?, 31 J. AIR L. & COM. 1, 2-4 (1965).
50 For further criticism see id. 2-4.
51 See supra note 14.
airspace within the jurisdictional confines of that document.\textsuperscript{52} The Tokyo Convention was also without teeth, explicitly not obligating any nation party to extradite\textsuperscript{53} and, additionally, not requiring any state actually to prosecute the offender.\textsuperscript{54} The Montreal Convention,\textsuperscript{55} along with the Hague Convention,\textsuperscript{56} contained far stiffer provisions, requiring the state to take jurisdiction when the offense is committed in its territory or against or on board an airplane registered in that state, or where the lessee has his principal place of business in its territory, or when the plane lands in its territory with the alleged offender still on board, or where the alleged offender is present in its territory.\textsuperscript{57} In the words of one observer, "it seems preferable to stipulate more positively that any state that apprehends the hijacker has the right to punish him, no matter where the offense took place. It may also be asked whether the so-called duty to 'establish' jurisdiction should not be extended to other states."\textsuperscript{58}

\textbf{ASYLUM}

All conventions against terrorist attacks inevitably must steer a course between the Scylla of the right to asylum and the Charybdis of the dictates of international co-operation to prevent crime. The twentieth century has witnessed a turnabout of traditional doctrines of extradition;\textsuperscript{59} the weight of au-

\textsuperscript{52}Id., arts. 14, 15.
\textsuperscript{53}Tokyo Convention, supra note 5, art. 16(2).
\textsuperscript{54}Id., art. 13(2) states: "Upon being satisfied that the circumstances so warrant, any Contracting State shall take custody or other measures to ensure the presence of any person suspected of an act contemplated in Article 11, paragraph 1 and of any person of whom it has taken delivery. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted." This provision is as close as the Tokyo Convention comes to indicating a requirement of prosecution. Another problem is raised in Denaro, In-Flight Crimes, The Tokyo Convention, and Federal Judicial Jurisdiction, 35 J. AIR L. & COM. 171, 181-82 (1969): "Though the Tokyo Convention adequately copes with a situation involving a nonresident alien, it accomplishes little where a citizen or a resident alien is concerned. The United States, as landing contractee, has the duty to take custody of those persons also. It cannot, however, deport them through operation of the Convention. As a result, it is confronted with three possibilities. One, it must extradite if there exists an appropriate extradition treaty with the flag States; two, it must free the alleged criminal if the custodial duty is deemed unpursuable; or, three, to avoid such release, it may look to itself as the proper authority for a prosecution. This last consideration raises a question most acute to the jurisdiction of the federal judiciary." (i.e. was the offense committed outside the national territory?)
\textsuperscript{55}Montreal Convention, supra note 5.
\textsuperscript{56}Hague Convention supra note 5. The Hague Convention's extradition procedures are almost identical, except that the jurisdiction can be established only if the aircraft is registered or chartered in that state, or if the plane lands in its territory with the alleged offender still on board, or if the lessee (i.e. one who charters a plane without a crew) has his principal place of business in that state. See Id., art. 4.
\textsuperscript{57}Montreal Convention, supra note 5, art. 5.
\textsuperscript{58}Van Panhuys, Aircraft Hijacking and International Law, 9 COLUM. J. TRANSNAT'L L. 1, 16-17 (1970).
\textsuperscript{59}See McMahon, Air Hijacking: Extradition as a Deterrent, 58 GEO. L.J. 1135, 1139 (1970).
authority now is that asylum should be granted to the political offender. Asylum is no longer a prerogative of the state but rather a right of the individual. The constitutions and internal laws of several states grant a specific right to asylum, and several United Nations resolutions reinforce this view; for example, the Universal Declaration on Human Rights declares that “[e]veryone has the right to seek and enjoy in other countries asylum from persecution.” Many states have further obligated themselves to grant asylum by ratifying one of the conventions relating to refugees.

The Proposed Draft would seem to curtail the right of asylum, by requiring that the detaining state either extradite the alleged offender, or else submit him to domestic prosecution, “without exception whatsoever.” Thus, the United States would now reverse the drift of international law toward generous asylum, even though every one of its own extradition treaties now in force expressly prohibits surrender of persons charged with “any crime or offense of a political character,” and some also prohibit surrender for “acts connected with such crimes or offenses.”

POLITICAL CRIMES EXCEPTIONS

The stand taken by the United States in the Proposed Draft would make no exception for politically motivated offenses, historically distinguished from other criminal activities. In defining political offenses a further distinction has

“Originally, political offenders were subject to extradition while the common criminals generally were not. The age of revolution and the rise of popular governments, however, resulted in numerous refugees and brought about a new attitude toward the political dissenter. This change in political philosophy was coupled with technological advances in transportation which gave the fugitive a greater opportunity to flee to a foreign state to avoid prosecution or persecution. As a result of these two developments, the original extradition practice in municipal laws and in bilateral treaties was reversed—political offenders were exempted from extradition while common criminals were not.” See also Garcia-Mora, The Present Status of Political Offenses in the Law of Extradition and Asylum, 14 U. Pitt. L. Rev. 371 n.3 (1953).

*Among those states adopting variations of the right of asylum are U.S.S.R., Federal Republic of Germany, Mexico, Brazil, and Costa Rica. L. Oppenheim, International Law, 677 n.2 (8th H. Lauterpacht ed. 1955); Bassiouni, Ideologically Motivated Offenses and the Political Offenses Exception in Extradition—A Proposed Judicial Standard for an Unruly Problem, 19 DePaul L. Rev. 217, 231 n.29, 236 n.38 (1969); Evans, Reflections Upon the Political Offense in International Practice, 57 A.J.I.L. 1, 2 (1963) (noting that, in general practice, the right to asylum is permissive for states).


*Proposed Draft, supra note 2, art. 3. For an argument suggesting that such a clause does not obligate a state to prosecute, see Mankeiwicz, The 1970 Hague Convention, 37 J. Air L. & Com. 195, 205 (1971).

*See Bassiouni, International Extradition in American Practice and World Public Order, 36 Tenn. L. Rev. 1, 16-17 (1968).
grown up between "purely political" and "relative political" offenses. Purely political offenses are those which injure only the political organization or government of a state and which contain no common crime element. But other than treason, sedition, or symbolic acts, it is almost impossible to commit an offense which does not somehow injure the interests of private citizens; thus, hijacking, no matter how laudable the motive might be, nonetheless is an assault on the individuals who are passengers or crew.

Consequently, jurists and writers have conceived of the relative political offense—a common crime connected to a political act, either directly or implicitly. The relative political offense has been of practical concern to numerous states, which have been forced to decide whether to grant asylum to an offender or to extradite him. This decision, in turn, requires that the offender's political motives be weighed against his crimes. Three tests have been created to guide this determination: the "incidence" test of Anglo-American law, the "political objective" test in French law, and the "political motive" test of Swiss law, the last one being followed by the majority of states which have dealt with the problem.


The problem is highlighted in Evans, supra note 60, at 21:

[The concept of the political offense is ambiguous: treason may be justified in terms of high principles of patriotism or condemned as a despicable attack upon the commonweal itself. 'Les conspirateurs vaincus sont des brigands, victorieux ils sont des heros.' There is no doubt that in periods of political stress in a country or where political opposition is denied or prosecuted, acts, which in the ordinary terms of criminal law are punishable as common crimes, will be committed for political ends.

Deere, supra note 65, at 248 n.32; Garcia-Mora, supra note 65, at 1239; McMahon, supra note 59, at 1140.

There are several exceptions, however. Anarchists receive no consideration under these tests, e.g. In re Meunier, [1894] 2 Q.B. 415; In re Kaphengst, 56 R.O. 457, [1930] Ann. Dig. 292 (No. 188) (Fed. Trib. Switz. 1930). See also Evans, supra note 60, at 12-13; Garcia-Mora, supra note 65, at 1241. As a result of anarchist activity in the nineteenth century, the so-called attentat exception arose. See generally Deere, supra note 65; Garcia-Mora, supra note 59. Assassination of a head of state or members of his family is excluded from the political offense exception in extradition treaties. Some treaties go so far as to include ministers of state, or even lesser state functionaries. Garcia-Mora criticizes these treaties, because, under certain circumstances, assassination may be the only possible means of changing an oppressive political system. Id. at 385. A more recent exception is genocide, which cannot be considered a political crime for purposes of refusal to grant extradition. See Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 278. See generally Garcia-Mora, Crimes Against Humanity and the Principle of Nonextraditability of Political Offenders, 62 MICH. L. REV. 927 (1964).

See McMahon, supra note 59, at 1143: "The political motivation test has been endorsed by the courts of other countries and incorporated into treaties and statutes. Commentators regard the test, tempered by the theory of predominance, as the most desirable method of determining the character of an offense for extradition purposes and as best attuned to contemporary political realities and regard for human rights. See also Garcia-Mora, supra note 65, at 1255-56 and cases cited therein: Evans, supra note 60, at 21-4.
Under the incidence test, the offense must be incidental to, and form a part of, political disturbances resulting from the power struggle within a state between two or more parties. The political objective test looks to the nature of the rights violated by the offender. Only offenses directly injuring the rights of a state are regarded as falling under the test; therefore, offenses committed against private persons do not satisfy the test, even though the offense is committed in furtherance of political ends. The Swiss test requires a direct connection between common crime and intent to modify the state's political organization. An inquiry is made as to whether the political goal could have been achieved through noncriminal means. After all of these factors have been considered, the offense must be determined to be predominantly political in character. However, if the offense is of an atrocious character, the common crime element of the offense will predominate over the political element, and extradition will be granted.

In practice, however, all three tests have been modified. The incidence test developed in an era when political conflicts took place within the framework of rival party organizations; thus, the individual offender might be regarded as the agent of a political party. As such, this analysis is inapplicable to many of the opponents of totalitarian regimes. A British court refused to apply the test to a group of Polish seamen who seized a fishing vessel on the high seas to escape from their homeland. The court concluded there that the political character of the offense must be determined in light of circumstances existing at the time of its perpetration. Thus, individual action within a totalitarian regime can be political in character, despite the fact that the offense is not incidental to a power struggle.

The United States broadened the incidence test to deny extradition in almost any situation where a link could be shown, however tenuous, between the crime and political activity; often, a common crime can become a political offense simply because it took place during times of turbulent political conditions. Thus, a Peruvian was declared to be a political offender because the murder and robbery he allegedly committed took place during the course of a revolution. A decade later, the State Department declined to extradite to Russia a

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28See In re Castioni, [1891] 1 Q.B. 149 (1890) (refusal to extradite the alleged murderer of a Swiss political leaders whose assassination occurred during political disturbances); McMahon, supra note 59, at 1140-42; Garcia-Mora, supra note 65, at 1240-49.
29See Garcia-Mora, supra note 65, at 1249-51. He suggests that, not only does the political objective test fail to distinguish between pure and relative political offenses, but that such per se purely political offenses as treason and espionage are likely to be regarded as ordinary crimes. Id. at 1251, citing I Podesta Costa, Derecho Internacional Publico (3d ed. 1955).
30See Evans, supra note 60, at 18-21; Garcia-Mora, supra note 65, at 1251-56; McMahon, supra note 59, at 1142; Comment, 3 Int'l & Compar. L.Q. 97 (1954).
31Garcia-Mora, supra note 65, at 1242.
33See Garcia-Mora, supra note 65, at 1246.
34In re Ezeta, 62 F. 972 (N.D. Cal. 1894).
member of the Social Democratic Labor Party who was charged with murder, arson, and robbery. It found the acts to be "clearly political in their nature," with the robbery being "a natural incident to executing the resolutions of the revolutionary group," which therefore could not be treated as a separate offense.\textsuperscript{77}

In litigation to extradite a wartime minister of the Croatian government to Yugoslavia to stand trial for war crimes, United States courts propounded what is probably the most extreme position ever taken on behalf of the political offense exception.\textsuperscript{78} The District Court dismissed an indictment which charged the defendant with organizing numerous massacres, executions, and mass murders, alleged to embrace some two hundred thousand victims. The court said, "[T]he plain reading of the Indictment here makes it immediately apparent that the offenses for which the surrender of the petitioner is sought, were offenses of a political character."\textsuperscript{79} On appeal, the Yugoslav government invoked against this statement the several U.N. resolutions on genocide calling for the trial of war criminals,\textsuperscript{80} and alleged the defendant to be such a war criminal. The Ninth Circuit, however, concluded that the resolutions lacked sufficient international force to modify long standing judicial interpretation of extradition treaties.\textsuperscript{81} It ignored the fact that the resolutions were directed at fascist officials and that ministers of a Nazi puppet state, such as Croatia, were certainly subject to prosecution.

The French, applying the political objective test,\textsuperscript{82} theoretically should be unable to refuse extradition of a hijacker, since the rights of crew and passengers are inevitably violated. Nevertheless, the French government refused to extradite two Polish hijackers, who forced a Polish plane to land in the French sector of West Berlin in an effort to gain asylum.\textsuperscript{83} One observer has charged that French decisions on such matters are motivated by expediency, rather than legal considerations.\textsuperscript{84}

\textsuperscript{77}Note from Secretary of State Root to the Russian Ambassador Rosen, Jan. 26, 1909, Department of State, file 16649/9, reprinted in 4 HACKWORTH, DIGEST OF INTERNATIONAL LAW 49 (1942).
\textsuperscript{79}140 F. Supp. at 247.
\textsuperscript{80}247 F.2d at 205 n.11. See also note 68 supra.
\textsuperscript{81}247 F.2d at 205. The Court did, however, cite with approval a suggestion that an international criminal tribunal try such cases.
\textsuperscript{82}See note 71 supra.
\textsuperscript{83}N.Y. Times, Oct. 20, 1969, § I at I, col. 5. The two hijackers were initially turned over to West German authorities for processing as refugees.
\textsuperscript{84}Garcia-Mora, supra note 65, at 1250. But he adds: "It must be carefully noted, however, that in granting the extradition of persons charged with connected crimes, the French courts have strictly demanded that the political motive of the crime not be regarded as an aggravation of the offense. . . . " Garcia-Mora also noted at 1251 that the political objective test is less subject to
The Swiss test\textsuperscript{85} has similarly been stretched to accommodate hijackers from totalitarian regimes. In the \textit{Kavic} case,\textsuperscript{86} involving a Yugoslav hijacker, the court concluded that, for those who refuse to submit to the authority of a totalitarian government, there is virtually no alternative but to try to escape abroad. Such an escape is no less worthy of asylum than an active fight for political power. The court considered the common crime element of the offense against the crew to be minimal for the political freedom and the very existence of the accused, depended upon the commission of the offense.\textsuperscript{87}

Some support for the United States position to reverse these trends is contained in a recent document prepared by the U.N. Secretariat in accordance with a decision of the Sixth Committee.\textsuperscript{88} It declares, "the legitimacy of a cause does not in itself legitimize the use of certain forms of violence, especially against the innocent,"\textsuperscript{89} particularly since "the terrorist act usually lacks any immediate possibility of achieving its proclaimed ultimate purpose."\textsuperscript{90} The document states that, very often, the terrorist act is the result of blind fanaticism, or the adoption of an extremist ideology which subordinates morality and all other human values to a single aim. In either case, the result is the same; modern life and modern weapons bring more and more strangers and foreigners within the reach of the terrorist, and he uses them as instruments for his purpose. As violence breeds violence, so terrorism begets counter-terrorism, which, in turn, leads to more terrorism in an ever-increasing spiral.\textsuperscript{91}

Furthermore, in some cases, there is no genuine grievance at all, and "a violent crime affecting more than one country seems to have been committed from mere cupidity, or a desire to escape criminal prosecution."\textsuperscript{92}

**Practical Difficulties**

Legally, a state has complete control over the decision whether to extradite
an offender or to grant him asylum under the political offense exception. Practical political considerations do, however, heavily influence the decision. Primary factors include the state's evaluation of the likely effect on political relations with the requesting state if the request is denied, the political worth of the refugee, the degree of national commitment to the values involved in the refugee's conduct, and the extent to which he is likely to present a domestic political problem. Consequently, "the ideological and political proximity of the respective states is directly proportional to the likelihood that asylum will be denied." Naturally, a state will not eagerly extradite a refugee back to a state controlled by a rival ideology. Whoever, to one country, is a hero may well be, to another, an immoral villain.

The Proposed Draft, with its requirement to either extradite or prosecute offenders, will inevitably spark a hostile response from those nations which feel a condemnation is thus directed at their brand of politics. The Arab states regard Western pressure against terrorism as pro-Israeli and therefore directed against the Arabs. Likewise, the Africans resist such moves: "Nothing, not even exemption for black African independence struggles, seems to remove the fear that anti-terrorism talk . . . implies repudiation of the struggle of African peoples to be free of white colonialism." While Communist backing for such opposition may be anticipated, division and "side-taking" with respect to the Resolution on Terrorism was not so clear cut as might have been expected.

**TERRORIST OR LEGITIMATE COMBATANT**

Few problems facing the resolution's adoption seem as troublesome as trying

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64See Bassiouni, supra note 60, at 234. See also Garcia-Mora, supra note 65, at 1227-30, as to problems associated with extradition.
65Bassiouni, supra note 60, at 232.
66A hero of a different sort was Raffaele Minichiello, the Marine who hijacked a jetliner from Los Angeles to Rome to escape court-martial proceedings on a charge of breaking and entering. In Italy, where he had been born, he attracted widespread popular sympathy. Plans have been afoot to make a movie about his life. Newsweek, March 9, 1970, at 35, 36. At his trial, "it was difficult to distinguish the prosecution from the defense. Both sides in a torrent of rhetoric, apparently considered the U.S. the real culprit. . . ." Raffaele Minichiello is a good, hard-working boy, a frightened boy," said Prosecutor Antonio Scopelliti. 'Life took him from the small, calm town of Melito Irpino, where he was born, to the inferno of Vietnam, and from the fields of Melito to the chaotic city of New York.' "The defense attorney compared him to Don Quixote. Time, Nov. 23, 1970, at 32, 34. Although he was eligible for 32 years' imprisonment, Minichiello, after several reductions of sentence, served only 18 months, and is free today. Id., May 3, 1971, at 34.
68Appearances may be deceiving. The General Assembly passed the Resolution on Terrorism, supra note 1, by a vote of 66-27-33. Among the Arab nations, Jordan voted with the majority, as did six African states. Lebanon, having just sustained sharp Israeli attacks, abstained along with Bahrein and Saudi Arabia. Thirteen African states followed suit, while six more abstained themselves. The East European states, having now experienced both hijackings and harassment by the Jewish Defense League, abstained. Yugoslavia, beset with Croatian terrorists, supported the resolution. See id., Sept. 25, 1972, at 2, col. 1.
to define the line between terrorism and belligerency. For example, the Geneva Convention on Prisoners of War sets up four conditions for defining a belligerent who must, upon capture, be accorded prisoner of war status: 1) He must be commanded by someone personally responsible for his subordinates. 2) He must carry arms openly. 3) He must conduct operations in accordance with the laws and customs of war. 4) He must wear fixed, distinctive signs recognizable at a distance. However, "it is difficult for any armed forces to comply with all four conditions...." Few armed forces, including the American, are willing to comply with the fourth condition. The third condition, after decades of counterinsurgency and the various forms of wars of liberation, is at best an ambiguous concept. As for the first two conditions, there are several terrorist organizations which would appear to comply with them.

Several differences between the terrorist and the guerrilla have been noted; the guerrilla thinks primarily in military terms and is concerned with how to allocate his slender resources; while the terrorist seeks to create widespread fear, his actions are often indiscriminate and excessive. Secondly, guerrillas customarily operate in groups, while terrorists may be isolated. Finally, terrorists (unlike guerrilla forces whose existence tends to create armed conflict) can conduct their operations in the absence of armed conflict. On the other hand, there are also several similarities between the two groups. The acts of both may be considered war crimes; they will almost certainly be regarded by the domestic government as criminal. Finally, both the guerrilla and the terrorist may resort to irregular fighting. In the context of current national liberation struggles, the two may be closely intertwined. A militarily powerless group may find terrorism to be its only recourse; the terrorism may be a stage

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100Schwarzenberger, Terrorists, Guerrilleros, and Mercenaries, 1971 Toledo L. Rev. 71, 79.
101Also, the drafters of the Convention apparently did not anticipate the sartorial etiquette of today's "counterculture."
102Schwarzenberger, supra note 100, at 79.
103Id. at 71-2. See Bond Application of the Law of War to Internal Conflicts at 47.
104Cf. U.N. Doc. A/C.6/L867 (1972). Ambassador Soweidi of the United Arab Emirates: "The people of Palestine have waited in vain for a quarter of a century for some redress of the grave injustice inflicted upon them. . . . Israel was founded and has maintained itself by the systematic and ruthless practice of terror: terror which drove the majority of Palestinians out of their homeland, terror which deprived them of freedom and dignity, terror which made the remnants who stayed behind second-class citizens in their own country, terror which pursued them in their unhappy exile, in their wretched refugee camps, and slaughtered them by the hundred. We do not and cannot condone the killing of innocent people, but how can we equate the desperate acts of a few individuals driven by 'misery, frustration, grievance, and despair', to quote the Secretary-General's words, with the brutal, deliberate and cold-blooded acts of indiscriminate killing perpetrated by the armed forces of a State? Let us not make the mistake of thinking that these are acts of revenge. They are concerned primarily with the achievement of long-standing strategic and political aims." Id. at 25, A/PV.2043.
of the war itself.\textsuperscript{105}

It may be difficult to determine just precisely when a war is taking place;\textsuperscript{106} Secretary Rogers, speaking to the U.N. at the opening of the current session, referred to the "no-peace/no-war situation in the mideast."\textsuperscript{107} The results of terrorist activity, on the one hand, and of insurgency or counterinsurgency tactics, on the other, may be difficult to distinguish, both factually and ethically.\textsuperscript{108} Despite Secretary Rogers' references to the importance of the proposal to \textit{all} states,\textsuperscript{109} the Proposed Draft appears to stack the deck against wars of liberation, not only for the above reasons, but also by its definition of the territory of the state having jurisdiction as comprising all territory under that state's administration;\textsuperscript{110} thus, the Proposed Draft recognizes Israeli jurisdiction over Palestine and South African jurisdiction over Namibia.

\textbf{Difficulties of the Proposal for U.S. Law}

Although the possibility may be remote, the United States could be seriously embarrassed by the application of this draft to its domestic law. The draft expressly requires that the offender either be extradited or prosecuted "without exception whatsoever."\textsuperscript{111} The state is further required to take appropriate measures to ensure the presence of the accused for prosecution or extradition.\textsuperscript{112} These strong provisions, however, could, under certain circumstances, be frustrated by the operation of the American law of criminal procedure. Assume, for example, that a letter bomber operates out of an American city. If police authorities searched his apartment under an invalid search warrant, or obtained incriminating evidence without a warrant, his conviction would be unobtainable.

\textsuperscript{105}Arab speakers, during the course of the U.N. debate, argued that Israel itself was founded through the acts of terrorists such as the Stern Gang. \textit{See especially} the speeches by Ambassador Baroody of Saudi Arabia, \textit{id.} at 41, A/PV.2045; by Ambassador Al-Jaber of Kuwait, \textit{id.} at 112, A/PV.2057; by Ambassador Khaddam of Syria, \textit{id.} at 119, A/PV.2058.


\[\begin{quote}
(O)n\text{e} author identifies thirty-two 'unequivocal cases of internal war' in Guatemala from 1946 to 1959. According to the definition employed in the present analysis, however, only the Guatemalan Civil War of 1954 is of direct concern.
\end{quote}\]

\textsuperscript{107}Address by the Honorable William P. Rogers before the 27th United Nations General Assembly, Sept. 25, 1972, in United States Mission to the United Nations, Press Release USUN-104(72) at 4, 63 \textit{Dep't. State Bull.} 425 (1972); \textit{see} \textit{N.Y. Times}, Sept. 26, 1972, \$ 1, at 1, col. 5.


\textit{"Is it more terrible when one bomb is delivered by mail than when hundreds are delivered by military aircraft?" \textit{See also} Speech by Amb. Abouhamad of Lebanon, \textit{id.} at 12, A/PV.2041, protesting Israeli retortion, the primary burden of which, he indicated, was borne by civilians.}

\textsuperscript{109}\textit{See} USUN-104(72), \textit{supra} note 107, at 9; \textit{see also} Statements by Ambassador George Bush, Before the United Nations, Sept. 22, 1972, Press Release USUN-98(72) at 2; Sept. 23, 1972, Press Release USUN-103(72).

\textsuperscript{110}\textit{Proposed Draft,} \textit{supra} note 2, art. 1(2)(c).

\textsuperscript{111}\textit{See} note 63, \textit{supra}.

\textsuperscript{112}\textit{Proposed Draft,} \textit{supra} note 2, art. 6.
because such evidence would be inadmissible under the exclusionary rule.  

Thus, the offender could not be domestically convicted, despite his obvious guilt; the United States might then be ridiculed by the rest of the world (whose procedural safeguards do not include the exclusionary rule) for proposing a strong treaty, which it then was unable itself to enforce. Although the Proposed Draft, in delineating the responsibilities of the custodial state, does contain the phrase "under its internal law," the wording could be considerably strengthened. The Geneva Convention provided (albeit in regard to extradition proceedings) that extradition "could not be granted for a reason not connected with the offense itself." The Montreal Convention allows the prosecuting authorities to make their decision "in the same manner as in the case of any ordinary offense of a serious nature under the law of that State."  

In the hypothetical situation presented, it is also uncertain whether the offender could be extradited. (Alternatively, he could be deported, as deportation hearings may be conducted without regard to fourth amendment standards.) An international extradition hearing requires that the accused be brought before a judge or magistrate to determine under the provisions of the proper treaty whether the evidence is sufficient to sustain the charge, and, upon so determining, to certify to the Secretary of State that the warrant may issue.  

The treaty may, however, provide for very loose standards. Thus, while under interstate extradition procedure, the requesting state is supposed to supply a quantum of evidence sufficient under the law of the extraditing state to bind the alleged offender over for trial in that state. A recent complaint which stated only that the fugitive was accused of murder was held sufficient, under the terms of an extradition treaty with Mexico. The courts, moreover, have on several occasions reaffirmed the lower standards allowed in international extradition. Mr. Justice Holmes, in Glucksman v. Henkel, referred to "the factitious niceties of a criminal trial at common law" as a "waste of time" when the existence of an extradition treaty binds us to the assumption that the

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114 Proposed Draft, supra note 2, art. 6.
115 Geneva Convention, supra note 9, art. 10(a).
116 Montreal Convention, supra note 5, art. 7.
117 But see O'Higgins, Disguised Extradition: The Stolen Case, 27 MOD. L. REV. 521 (1964), showing how three governments connived to evade their extradition laws, which would have prevented the accused's rendition. Other "self-help" remedies (particularly forcible abduction) have been examined in Ker v. Illinois, 119 U.S. 436, 444 (1886); Frisbie v. Collins, 342 U.S. 519 (1952).
121 United States v. Marasco, 325 F.2d 562, 564 (2d Cir. 1963).
122 221 U.S. 508 (1911).
accused will receive fair trial in the requesting state. In *Fernandez v. Phillips*, he also said: "Form is not to be insisted upon beyond the requirements of safety and justice." This dictum formed the basis for the holding in *United States v. Mulligan* that evidence to establish reasonable grounds to believe the accused guilty (and therefore extraditable) need not be sufficient to convict nor satisfy technical rules governing admissibility in criminal trials.

In *United States v. Marasco*, the District Court declared that this relaxed evidentiary standard had been consistently upheld, but it could cite only *Mulligan* in support. Thus, the weight of authority for this rule is slender, and a future case could easily be distinguished from, or result in, the overruling of the *Marasco* line of cases. This view is reinforced by the fact that all the relevant cases, except *Marasco*, predate the judicial revolutions of the 1930's and the 1960's, which so substantially upgraded the content of due process.

**Assessment**

While the Proposed Draft represents a major effort to deal with the problem of terrorism, it contains three shortcomings: First, the number of offenses covered should be expanded, lest it suffer the fate of the hijacking treaties and be outstripped by new techniques of terror. Second, it should more clearly allow for deference to national criminal procedural law; as the matter stands, the United States itself could be placed in an embarrassing position. Third, it is questionable whether any good will be served by calling for the passage of the conflicting, overlapping hijacking treaties, and, moreover, to allow them to take precedence over the Proposed Draft. This would lead to anomalies in the law against terrorist activities; with the Tokyo Convention in force, the

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123 Id. at 512.
125 Id. at 312 (citing Glucksman v. Henkel).
126 50 F.2d 687 (2d Cir. 1931), cert. denied, 284 U.S. 665 (1931).
127 50 F.2d at 688.
129 See Note, *Interstate Rendition and the Fourth Amendment*, 24 Rutgers L. Rev. 551, 577-79 (1970). An analogy might be found in the fact that a sizeable number of state courts have disregarded fourth amendment considerations in extradition hearings. Rationales include: 1) The fourth amendment was never intended to apply to extradition hearings. 2) The conflict between effective law enforcement and individual rights requires that there be a lesser standard of justification for extradition hearings. 3) The fourth amendment is irrelevant in extradition hearings, since judgment on legality of the arrest is properly the responsibility of the requesting state. 4) The decision to extradite properly, belongs within the sphere of the Executive. 5) The extraditing court should not make an inquiry into the issue of guilt or innocence. (Possible support for this view stems from the fact that extradition is generally termed a civil, rather than a criminal, proceeding.) 6) Some courts apparently are willing to disregard technical defects in the warrant entirely.
130 In re Extradition of D'Amico, 185 F. Supp. 925 (S.D.N.Y. 1960), might be noted in passing. The court, by finding a search and seizure inside a home to be legal, avoided passing on whether the same Constitutional standards apply to extradition proceedings and to trials.
131 See text at note 112 supra.
hijacker of an airplane might even go free, but the hijacker of a boat, being covered by the Proposed Draft, would almost certainly be imprisoned.

Even without these shortcomings, however, the Proposed Draft will probably not be ratified. It would too drastically reverse the almost universal trend of national and international policy toward leniency. This trend is the result of the increased stress on asylum, the broadening of the political offense exception, and the unworkability of standards purporting to classify such concepts as belligerency and guerrilla warfare. Above all, this trend is the result of pure political expediency, which promotes terrorist activities from behind the shield of an ideologically sympathetic state. Consequently, the international community has resisted the imposition of strong conventions on terrorism. The toothless Tokyo Convention was ratified but the far stronger Montreal Convention has been approved by only twelve states. The Geneva Convention was ratified by only one state. The O.A.S. Convention, in order to win approval, was subjected to a lessening of the potential impact of extradition provisions by addition of a guarantee of the right of states to grant asylum.

There are two possible solutions to this impasse. The first is that nations could undertake to provide minimum sanctions against violators for whom ideological sympathy exists (although Article Two of the Proposed Draft calls for severe penalties.) This approach is exemplified by the French sentencing of two Polish hijackers to two years imprisonment. Also, Austria sentenced two other hijackers from Poland to 27 and 24 months, respectively, and then had them deported. This approach would, among other advantages, soften the sting of a hypothetical decision by a Federal court to sentence refugees from the Iron Curtain to prison.

Alternatively, recognizing that political realities militate against acceptance of the Proposed Draft, a new clause might be inserted providing that a state need not extradite or prosecute for acts committed against nationals or instrumentalities (e.g. aircraft) of the state against which the act is directed. While

123See text at note 14 supra.
124See pp. 431-32 supra.
126Hudson, supra note 10.
128N.Y. Times, Nov. 21, 1969, § 1, at 3, col. 7.
130The suggestion advanced by this Note is closely analogous to the passive personality jurisdictional principle, which allows a state to assert jurisdiction over an offender against one of its nationals. It has been successfully invoked in only two cases—the Cutting Case (conviction by
this proposal seems callous, and possibly even subversive of the purpose of the Proposed Draft, it might secure the protection of innocent third parties. Universally applicable provisions will be unacceptable, thus dooming third parties as well as the real targets of the terror. Although a state could deny extradition of its ideological allies, it would have greater difficulty in justifying a refusal to extradite to a neutral third party state, whose citizens have been needlessly victimized. A state would be justified in refusing to extradite in a Munich type situation\textsuperscript{140} (where no outsiders were affected; the airport shootout can be justified as self-defense\textsuperscript{141}) but extradition would still be mandatory in a Lod-type situation\textsuperscript{142} (where Puerto Ricans were killed in addition to Israelis). With this modification the use of terror would at least have to be exercised with restraint, rather than employed indiscriminately by those wishing to avoid punishment.\textsuperscript{143} Terrorists would be forced to reconsider their objectives and tactics; even this should ameliorate the present situation.

B.B.

\textsuperscript{140}Supra note 27.

\textsuperscript{141}Of course, if terrorists were to escape to a nation which was not in ideological sympathy, such a defense would probably not be recognized, and they would still be extradited, either under the Proposed Draft or under some other extradition agreement.\textsuperscript{142} Supra note 26.

\textsuperscript{142}It is, of course, recognized that the possibility of avoiding punishment is not a determinative planning factor in some cases. Members of certain radical groups apparently are not overly concerned with the possibility of punishment or even death. As an example, the lone surviving perpetrator of the Lod massacre reportedly stated: "I'm waiting for the Israelis to execute me. I'm sorry I didn't die at the airport." N.Y. Times, June 2, 1972, § 1, at 4, col. 2.