# *TERRORISM AND THE COURTS*

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When considering any issue relating to the nature or control of terrorism, international or national, one is confronted at an early stage with the problem of definition. It would seem that the most simple process would be the tabulation of a series of types of activity which could be condemned as terrorist. Such a list, however, might rapidly come to be regarded by judicial bodies and others as exhaustive, so that any act not falling within the condemnatory list would be free of the odium of terrorism. Unfortunately, however, terrorists are inventive — prior to November 1979 no one would have anticipated the seizure of an embassy by a government-tolerated group and the holding of its personnel as hostages by that government for more than a year. Moreover, technological and scientific advances are not the monopoly of law-abiding organizations and may easily be made use of by terrorists for their purposes. As a result, any catalogue would rapidly become out of date and require constant, equally inadequate, amendment. Experience over the years leads one to the conclusion that terrorist acts have certain peculiarities that render them readily recognizable. For practical purposes, therefore, terrorism may be defined as the exercise of violence or the threat thereof against an innocent third party, property or institutions by an individual or organization seeking to secure concessions from some individual or organization other than the victim. For the purposes of this paper, only those acts of terrorism which have a political motive and are therefore directed against some government will be considered, and while the definition suggested is wide enough to apply to national terrorism — that is to say an act perpetrated by a national against his government, with the victim being within the territorial limits — for the main part only those acts which may be considered as international, in that they cross frontiers by involving the interests of a third country, will be considered. This means that, to some extent at least, violent crimes falling within the perspective of the law of extradition and involving the plea of political offence may also be relevant.

It must be recognized that there is a natural tendency on the part of the public at least to regard any assassination of the head of state as an act of political terrorism, even though it can happen that such an act is the private act of a single individual, as is the official view of the murder of President Kennedy. This attitude towards such assassination is to be seen in the Convention for the Prevention and Punishment of Terrorism drawn up under the auspices of the League of Nations in 1937[1], but it is also to be found in the treaties of 1661 and 1662 between England and Denmark and Holland respectively concerning the surrender of the English regicides[2]. However, by the nineteenth century it was generally accepted that offenders who had

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1. 7 Hudson, *International Legislation*, 1941, 862.

2. Treaty between Great Britain and Denmark, signed at Whitehall, February 13, 1661, 6 C.T.S. 233, Treaty of Peace and Alliance between England and The Netherlands, signed at Whitehall, September 4 (14), 1662, 7 C.T.S. 193.

committed their offences on the basis of political idealism should not be extradited, to the extent that, appearing before the 1868 Select Committee on Extradition, the Permanent Under Secretary of State for Foreign Affairs was able to state that:

> [Extradition] treaties were not contemplated to apply to a political offence in any shape whatever, and if an application were made in case of murder, with an intention of trying the person given up for treason, I should say that the application would not be made in good faith, and the Government would not be justified in giving him up.[3]

The general view of the situation at the time of the passage of the *The Extradition Act, 1870*[4], has been expressed by Lord Reid in his judgment in *Schtraks* v. *Government of Israel et al.:*

> Many people then regarded insurgents against continental governments as heroes intolerably provoked by tyranny who ought to have asylum here although they might have destroyed life and property in the course of their struggles.[5]

While the Act made no provision with regard to the assassination of a head of state, it was pointed out in the evidence before the Select Committee that France at least would regard an attack upon a member of the Royal Family as political and exempt from extradition, an approach which the then Chief Metropolitan Police Magistrate thought "goes rather too far".[5a] In his view the English Act should include provision to the effect that:

> No person shall be claimed or surrendered for a political offence; political offences shall be deemed to be such offences as are committed by persons who are engaged in insurrection or rebellion against a reigning Sovereign or Government; but any attempt against the life of any reigning Sovereign, or against the life of any member of his family, shall not be deemed a political offence within the words of the treaty.[6]

He claimed that this formulation was copied from a Franco-Belgian treaty, but it was not embodied in the English Act, although such an *attentat* clause does appear in a number of national statutes and in many extradition treaties[7], particularly after the assassination of President Garfield and "as offences of this class have become more common and have invaded the dominions of the most liberal governments, public opinion would seem to be undergoing a change in regard to them"[8]. Moreover, it is the essential basis of the 1937 Convention.

Apart from terrorist acts directed against a head of state, it is also necessary to note that often groups accused of having committed acts of violence amounting to terrorism claim that their acts were in fact political since they were committed on the orders or on behalf of a governmental

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3. 6 *Brit. Dig. Int'l Law* 651 at 654.
4. 33 & 34 Vict., c. 52 (U.K.).
5. [1964] A.C. 556 at 583 (H.L.).
5a. *Supra* n. 3, at 662.
6. *Ibid.*
7. *See eg.*, Harvard Research in Int'l Law, "Extradition" (1935), 29 Am. J. Int'l. Law Supp. 66 at 114 to 117.
8. Snow, *Cases and Opinions on International Law* (1893) 171, n.1. For comment on the position after the murder of Lincoln; *see* J.B. Moore, *Extradition and Interstate Rendition* (1891), vol. 1, 308, n. 4. Contrast S. Jägerskiold, "Tyrannicide and the Right of Resistance, 1792-1809" (1964), 8 Scandinavian Studies in Law 69.

authority, not necessarily one recognized *de jure*. Such was the position in 1864 concerning the St. Alban's raiders[9]. It was a fact that:

> [Lieutenant Benjamin Young led a] band, said to consist of twenty-five desparate men, clandestinely armed, . . . [across] the [Canadian] frontier . . . , and proceeded in several small parties, by stage coach, to St. Alban's, Vermont, in the customary way of travellers. At a concerted time they raised a scene of terror in the peaceful town, and broke into boarding-houses and other buildings, and carried off large amounts of treasure, said to be 325,000 dollars, together with other valuable property. As soon as the people recovered from their surprise they arose and hotly pursued the felons, who sought safety by returning on stolen horses across the frontier into Canada. The Canadian municipal agents seem to have co-operated with the pursuers from Vermont with alacrity and diligence. Twelve of the robbers were arrested, stripped of their plunder, and taken into custody by the Canadian authorities.[9a]

The Law Officers were asked to report on the instructions to be given to the Governor-General following the United States' demand for extradition:

> [They were] especially [asked to report] as to what course should be taken in the Colony if the Judges should determine against the extradition of the accused persons on the ground that they were acting as officers of the Confederate Government.[9b]

There was no provision for exempting political offenders in the Webster-Asburton Treaty[10] which then regulated extradition between Canada and the United States. In the view of the Law Officers:

> It is for the legal authorities of Canada to determine how far (if at all) the character of . . . acts . . . may be affected, in point of law, by evidence (if such evidence should be produced), that in so doing the perpetrators acted under orders from some military or other authority in the Confederate States. But, upon the information now before us, we are not prepared to say that a decision, holding such acts to be robbery and murder, . . . and not acts of war would be erroneous.[10a]

The Montreal Court freed the accused on the technical ground that they had been arrested without the Governor-General's warrant, as required by the statute implementing the Treaty[11]. After their release, the Law Officers reported:

> We cannot safely advise . . . that the persons termed the 'St. Alban's raiders', if they possessed (as they professed to do) commissions from the Confederate Government authorising what they did, could be legally treated as guilty of robbery and murder; but, as this is a question which must depend, in every particular case, upon the evidence which may be produced for the purpose of giving to the act done the character of warlike operations, we think it would scarcely be expedient . . . on the present occasion, to address a letter or remonstrance to [the Agent of the Confederate Government], founded upon the assumption that the recent outrage was perpetrated under the instructions of his Government.[11a]

Perhaps in the light of this report it is not surprising that the five marauders

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9. *Supra* n. 3, at 657 to 658. *See also* Benjamin, The St. Alban's Raid, 1865 — this is a verbatim record of the hearing before Coursol, J.S.P. and Smith, J.S.C.

9a. *Id.*, at 657.

9b. *Ibid.*

10. Webster-Ashburton Treaty, signed at Washington August 9, 1842, between Great Britian and the United States, 93 C.T.S. 415.

10a. *Supra* n. 3, at 658.

11. *An Act for giving effect to a Treaty between Her Majesty and the United States of America for the Apprehension of certain Offenders*, 1843, 6 & 7 Vict., c. 76 (U.K.).

11a. *Supra* n. 3, at 658.

who were rearrested by the Canadian authorities were released on the ground that:

> . . . [T]he attack on St. Albans was a hostile expedition, authorized both expressly and impliedly by the Confederate States, and carried out by a commissioned officer of their army in command of a party of their soldiers. And therefore that no act committed in the course of, or as incident to, that attack can be made the ground of extradition under the Ashburton treaty.[12]

The view that acts committed by command of governmental authority during or connected with warlike activities cannot be considered as extraditable, even though they amount to terrorism, is confirmed in the decision in *In re Ezeta.* The Court said:

> The testimony shows that [the acts charged] were all committed during the progress of actual hostilities between the contending forces, wherein Gen. Ezeta and his companions were seeking to maintain the authority of the then existing government against the active operations of a revolutionary uprising. With the merits of this strife I have nothing to do. My duty will have been performed when I shall have determined the character of the crimes or offences charged against these defendants, with respect to that conflict. During its progress, crimes may have been committed by the contending forces of the most atrocious and inhuman character, and still the perpetrators of such crimes escape punishment as fugitives beyond the reach of extradition. I have no authority, in this examination, to determine what acts are within the rules of civilized warfare, and what are not.[13]

While it may be true that acts of terrorism committed during an armed conflict are 'beyond the reach of extradition' in accordance with ordinary bilateral extradition treaties, such acts may be tried as war crimes, as was the case of General List and others, the so-called *Hostages Case*[14], and it would appear from *The State* v. *Director of Prisons, ex parte Schumann*[15] that a war criminal cannot plead that because his acts were committed in accordance with the orders or the policy of his government he cannot be extradited since his offences were political in character.

Until comparatively recently most municipal courts in the Commonwealth, the United States, Europe and Latin America have tended to follow the English case of *In re Castioni*[16] in defining offences of a political character. On that occasion, Denman, J. stated that:

> [I]t must at least be shown that the act ['in the instant case murder'] is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political uprising, or a dispute between two parties in the State as to which is to have the Government in its hands.[16a] . . .
> The question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part.[b]

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12. *Ibid.*
13. (1894), 62 F. 972 at 997 (Cal. Dt. Ct.), *per* Judge Morrow.
14. (1948), U.N. War Crimes Comm'n., 8 *Law Reports of Trials of War Criminals,* 34.
15. *The State* v. *Director of Prisons, ex parte Schumann,* [1966] Ghana L.R. 703, 39 Int'l Law Rep. 433 (Ghana Ct. App.); *see also* L.C. Green, "Political Offences, War Crimes and Extradition" (1962), 11 Int'l & Comp. L.Q. 329. *See also, In re Gonzalez* (1963), 217 F. Supp. 717 (N.Y. Dt. Ct.).
16. [1891] 1 Q.B. 149 (Q.B.D.).
16a. *Id.,* at 156.
16b. *Supra* n. 16, at 159.

It is perhaps easy to make such a decision when the offence has been commited during political disturbances organised by one political movement with the aim of overthrowing a government so as to assume power for itself. But not all acts of violence or terrorism, even though they may be politically motivated, are so directed. At the end of the nineteenth century anarchism had a certain following in France, and the movement possessed its own newspaper committed to the 'reconstruction of society'. The anarchists were responsible for a number of explosions affecting restaurants as well as military barracks. In *In re Meunier*[17] the accused claimed, at least with regard to the attacks on the barracks, that his acts were political. Cave, J. held, however, that:

> . . . [I]n order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and . . . if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not. In the present case there are not two parties in the State, each seeking to impose the Government of their own choice on the other; for the party with whom the accused is identified by the evidence, and by his own voluntary statement, namely, the party of anarchy, is the enemy of all Governments. Their efforts are directed primarily against the general body of citizens. They may, secondarily and incidentally, commit offences against some particular Government; but anarchist offences are mainly directed against private citizens.[17a]

This approach to what may be described as acts of terrorism directed against ordinary citizens rather than against the government as such was considered by the Swiss Federal Court in *In re Vogt*[18]. The accused was a participant with others in food riots in Baden and had seized a number of tradesmen as hostages to secure the withdrawal of the police forces sent against them by the Baden Government and to ensure that those forces did not use their firearms. It was held, however, that:

> The movement which gave rise to the act of the accused was of a strictly local and economic character [which] . . . had nothing to do with an attempted general change of the social or economic order. Accordingly, the taking of hostages in the course of the riots which had taken place could not be regarded as an act of a political character. Possibly the taking of hostages could be described as partly of a political nature if it had aimed at curbing an illegal or partial attitude on the part of the police. There was, however, no evidence to show that this was the case in the course of the Baden riots. In any case, there must be preserved a certain proportion between the political object aimed at and the means adopted. To seize as hostages private persons who have no part in the quarrel between the authorities and the rioters cannot according to Swiss conceptions be regarded as a means justified by its political end.[18a]

Among acts of terrorism which have occurred in recent years have been many assassinations of agents belonging to political organizations, of *agents provocateurs* and of political opponents generally. Sometimes these acts take place abroad, while at others the alleged assassin seeks asylum and the avoidance of extradition. It is frequently contended that such acts, since

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17. [1874] 2 Q.B. 415 (Q.B.D.).
17a. *Supra* n. 17, at 419.
18. (1924), 2 Ann. Dig. 285 (Switzerland Fed. Ct.).
18a. *Ibid.*

they are not directed at the organized overthrow of a particular government, cannot be regarded as political offences, even though there can be little question that they were politically motivated. Such an approach reflects the decision of the Swiss Federal Court in *Pavan Case*[19], the accused being an Italian anti-fascist who shot and killed an Italian fascist in Paris, and whose extradition was sought by France. The Court pointed out that homicide is a crime at common law and not as such a political crime in the usual sense of the word:

> But it may also be a political crime in a relative sense if it is an act which, while presenting all the *indicia* of a common law crime, nevertheless assumes a political character through its motive, its object or the circumstances in which it is committed.
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> . . . According to precedents in the Federal Court, the crime is invested with a predominantly political character only where the criminal action is immediately connected with its political object. . . . Such a connection can only be predicated where the act is in itself an effective means of attaining this object . . . , or where at least it forms an integral part of acts leading to the end desired . . . , or where it is an incident in a general political struggle in which similar means are used by each side. . . . In the present case such a direct connection is lacking. The relation between the murder . . . and the reversal of political system in Italy is a distant one; nor can the death of the murdered spy or fascist *agent-provocateur,* if he really was such, be considered an appropriate means of attaining this end. Nor is this an incident in a wider anti-fascist campaign conducted in Italy, but rather a single act of personal terrorism, performed in a foreign country and directed only towards its immediate result. . . . Pavan's intention, . . . was to disorganise the fascist spy system in Belgium and France, by removing the chief of this system.
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> According to precedent, also, if the political character of the crime is to carry weight, the damages involved must not be out of proportion to the desired result, so that 'although the violation of private rights is strictly speaking, illegal, it need not be considered [as] inexcusable.' . . . Homicide — assassination and murder — is one of the most heinous crimes. It can only be justified where no other method exists of protecting the final rights of humanity. . . . But Pavan's action cannot be construed as the sole remaining means of protecting Italian . . . refugees and their families from the fascist spy service. In the present case, moreover, since the extradition is sought, not by Italy, where the anti-fascist views of Pavan would be weighed against him, but by France, where the courts afford a guarantee of impartiality and will be able to balance the disinterestedness of the political motives which, . . . led to the crime, this application should not be refused.[20]

It is perhaps in this last sentence that one of the most important principles with regard to the judicial approach to acts of terrorism is to be found. While, in accordance with the principle of *non-refoulement,* a case may be made for refusing to extradite terrorists to the country against which their act is directed, there is *prima facie* no political or humanitarian reason which might militate against their being returned to stand trial in the country in which the act was committed, particularly if that country is not an ally or sympathiser of the political objective of the crime. In the event of such

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19. (1928), 4 Ann. Dig. 347 (Switzerland Fed. Ct.); *see,* to same effect, *Re Kaphengst* (1930), 5 Ann. Dig. 292 (Switzerland Fed. Ct.).

20. *Id.,* at 348 to 49. A somewhat similar decision arising from the murder of an 'anti-rightist spy' was delivered by the Guatemala Supreme Court in *In re Richard Eckermann* (1929), 4 Ann. Dig. 293 at 295 (Guatemala, Supreme Ct. of Justice) — "The fact that E formed part of a patriotic society secretly organised to cooperate in the defence of his country, cannot in any way give the character of political crimes to those committed by its members . . . . Universal law qualifies as political crimes sedition, rebellion and other offences which tend to change the form of Government or the persons who compose it; but it cannot be admitted that ordering a man killed with treachery, unexpectedly and in an uninhabited place, without form of trial or authority to do it, constitutes a political crime."

being the case, recent events concerning the suppression of terrorism suggest that the country of 'asylum' is likely to allow political considerations to override legal concern.

In connection with acts committed by Arab residents of Israel-occupied territory or committed therein by persons attached to various elements of the Palestine Liberation Organization, it is often claimed that since they are directed against an occupying power they are political and not criminal. In this regard it is interesting to pay attention to the decision of the German Supreme Court in *In re Fabijan*[21], concerning the murder of an Italian policeman in formerly Austrian territory which had come under Italian sovereignty by the Treaty of St. Germain.[22] The accused was Austrian by birth and his conviction was based on an Ordinance of November 1918 promulgated by the local Governor to preserve order in the occupied territory, and thus not on the normal criminal law. In the Court's view:

> The penal provisions in the Decree were apprently designed primarily to punish more severely than the ordinary law would do breaches of the peace which were in themselves already punishable and were naturally specially dangerous to the occupant. These provisions of course applied to crimes against the State as well, for *a fortiori* they were dangerous to the occupant. The provisions in question did not have the effect of converting every criminal act to which they applied into an offence against the State. Breaches of the peace not directed against the entire political organisation of the State, or against its integrity and, in particular, its territorial integrity, did not become in virtue of the Decree 'political' offences merely because they prejudiced the political or military interests of the occupant. . . . Had the Decree been intended merely to prevent attacks on the occupying authorities, the elements of a political offence would have existed in the present case. But . . . [i]t did not merely strike at attempts to prevent the annexation of the territory in question to the Italian State, but also, and indeed primarily, at breaches of the peace within the territory.
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> . . . According to the laws of war, the Power which occupies foreign territory in the course of warlike operations exercises State authority over the population of the occupied territory. In the present case the state of enmity between the two Powers was suspended at the time of the act in question and the occupation had been recognized as an armistice. Indeed, a treaty had been concluded, although it had not come into force, which definitively assigned the occupied territory to the occupying Power.In these circumstances there can be no doubt that, from the point of view of the civil population, the occupying Power was lawfully wielding the State authority and, with it, the authority of the criminal law. . . .[22a]

Such inhabitants were rendered subject to extradition in accordance with treaties to which Italy was a party.

A somewhat similar view of the rights of an authority holding enemy territory and of the law applied there is to be found in the decision of the Military Court sitting at Schechem, Israel[23], and the decision of the Military Court at Ramallah in *Military Prosecutor* v. *Kassem*[24] is illustrative of the fact that those indulging in violent acts amounting, if not legitimated by the law of armed conflict, to terrorism, would be treated in accordance with the

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21. (1933), 7 Ann. Dig. 360 (Germany, Supreme Ct.).
22. (1919), 112 B.S.F.P. 317.
22a. *Supra* n. 21, at 367 to 368.
23. *Military Prosecutor* v. *Nassar* (1969), 48 I.L.R. 486 at 490.
24. (1969), 42 I.L.R. 470 at 474 and 483; see also: 1 Israel Yearbook on Human Rights, 1971, 460.

criminal law and not entitled to any privileged status. The accused were Arabs charged, among other things, with throwing grenades at civilians and civilian establishments, which acts were described as 'wanton acts of terrorism', and one of the prime questions before the court was their claim to be members of the Palestine Front for the Liberation of Palestine and, as such, entitled to the status and treatment of prisoners of war[25]. Even though the accused were picked up while wearing what might have been described as a type of uniform and carrying papers intimating their membership of the P.F.L.P., the Court pointed out that:

> (1) The aim of the Organization is to operate by way of sabotage . . . including the attack on persons by every means, to strike at the foundation of the State of Israel and to destroy it. (2) The Organization not only exists in Jordan but has leaders in other countries of our region as well. (3) The Organization operates independently in Jordan under instructions of its leaders, without any connection with the Jordan Government. . . . It operates on underground lines, without any approval from the Jordan authorities. The Jordan Government has sometimes taken action against it to prevent it from operating in Jordan territory, in the West Bank and in Israel territory across the Jordan border. There have been instances in which the Jordan Army has acted against its bases with heavy weapons. (4) The Organization is not a part of the Jordan Army and is considered an illegal organization in Jordan itself. (5) The Organization is not part of any organization having regular legal status in the Kingdom of Jordan. (6) The Organization's approach is the same to civilian as to military objectives, and one of its principal methods of solving any problems is armed struggle, *i.e.*, the use of force, including terrorism, murder and sabotage. (7) Kalatchinkov assault rifles [with which the accused were armed] are not standard weapons in the Jordan Army. They are found chiefly among saboteurs, who receive them from countries which support them and their sabotage activities. . . . [T]he body which calls itself the Popular Front for the Liberation of Palestine acts in complete disregard of customary International Law accepted by civilized nations. The attack[s] upon civilian objectives and the murder of civilians . . . were all wanton acts of terrorism aimed at men, women and children who were certainly not lawful military objectives. They are utterly repugnant to the principles of International Law and . . . are crimes for which their perpetrators must pay the penalty. . . . The presence of civilian clothes among the effects of the defendants is, in the absence of any reasonable explanation, indicative of their intent to switch from the role of unprotected combatants to that of common criminals. Acts involving the murder of innocent people . . . are abundant testimony of this. International Law is not designed to protect and grant rights to saboteurs and criminals. The defendants have no right to stand trial in court and to be tried other than in accordance with the law and with the facts established by the evidence, in proceedings consonant with the requirements of ethics and International Law.[25a]

It is, of course, not surprising that an Israeli court was not concerned with the political purpose motivating the accused seeking "to strike at the foundations of the State of Israel and to destroy it", but a United States court when faced with similar problems concerning the status of the P.F.L.P. appears to have been equally unimpressed by the political motivations underlying their terrorist acts. In *Pan American World Airways, Inc.* v. *The Aetna Casualty & Surety Co. et al.*[26], which arose from the destruc-

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25. For a similar problem concerning the status of infiltrators into Malaysia during Indonesia's 'confrontation', see *The Public Prosecutor* v. *Koi*, [1968] A.C. 829 (P.C.), and *Osman Bin Haji Mohamed Ali et al.* v. *The Public Prosecutor*, [1969] 1 A.C. 430 (P.C.).

25a. *Supra* n. 24.

26. *(1974), 505 F. 2d 989 (2nd Cir.). See, also, Ziyad Abu Eain* v. *Wilkes* (1981) 641 F. 2d 504 (7th Cir) in which the U.S. Ct. of App. allowed the extradition to Israel of a member of the P.L.O. for an act of terrorism in Israel, denying the pleas of political offence and act of war.

tion of a Pan American aircraft by members of the P.F.L.P., the point in issue was the liability for insurance and the relevance of war and insurrection exception clauses. The United States Court of Appeals referred to the findings of the District Court[27] to the effect that the PFLP was a militant Marxist-Leninist-Maoist organization, which received financial support and arms from China and North Korea. The PFLP had approximately 600 to 1200 members, 150 of whom constituted a permanent core. Though the PFLP's primary enemy was Israel, it also condemned 'reactionary' Arab regimes, 'universal capitalism' and the United States as its enemies. The purpose of the 'external operations' was to bolster the morale of the Palestinians, to aggrandize the PFLP's position in relation to the other Fedayeen [Palestinian] groups, and to call world attention to the plight of the Palestinian refugees. The PFLP was a small isolated group pursuing its own long term objectives. The hijacking [which preceded the aircraft's destruction] was not 'due to or resulting from' the violent events of 1970 in Jordan. 'War' means a conflict between governments, not political groups like the PFLP. The loss was not due to a PFLP 'warlike operation' because that term does not include the inflicting of damage on the civilian property of non-beligerents by political groups far from the site of warfare, particularly when the purpose is propaganda. The loss was not due to the acts of the PFLP as a 'military or usurped power'. First, the PFLP did not qualify as such a power since it held territory only at the sufferance of the Jordanian government, the *de jure* sovereign. Second, even if the PFLP was a 'power' in Jordan, it did not act as such when it hijacked a plane over London. In addition . . . the PFLP activity was not part of an 'insurrection' since there was insufficient evidence that an insurrection against the Jordanian government was in progress at that time, and even if there was insurrection, the hijacking in question was not primarily caused by it. The loss was not due to 'riot' because the hijacking was not accompanied by the sort of uproar or disorder that riot connotes in current usage. Finally, . . . the phrase 'civil commotion' comprehends a local disorder rather than a hijacking occurring in the skies over two continents. After a very careful analysis of the District Court's judgment, of the meaning of the specific words in the exception clauses and of the relationship between the PFLP, the Fedayeen and other Palestinian anti-Israel groups, the Court of Appeals stated that the PFLP was a small political force that most often acted independently from other Palestinian entities. The PFLP boycotted the PLO during 1969. The PFLP refused to join the Palestine Armed Struggle Command or the United Command, successive military branches of the PLO. The all risk insurers concede that there were vast philosophical differences between the PFLP, which fought 'world imperialism', and the other more moderate Fedayeen groups, which sought only to destroy Israel. A PFLP propaganda statement . . . stated that the PFLP did not act on behalf of the PLO when it hijacked the Pan American 747 and the various other aircraft to Dawson's field where the destruction took place. Other major Fedayeen groups uniformly condemned hijacking as a tactic. As a result of the hijackings, the Central

27. (1973), 368 F. Supp. 1098, at 1107 to 1109 (N.Y. Dt. Ct.).
See, also, *Eain* v. *Wilkes*, *supra* n.26.

Committee of the PLO suspended the PFLP from membership. . . . The fact that King Hussein negotiated with the PFLP for the release of hostages does not establish that the PFLP was being dealt with as a government. Officials may negotiate with individuals who hold hostages without according such individuals governmental status. The only power that these events reflect is the power of the PFLP to hold hostages which, though the very essence of hijacking, is surely not an incident of quasi-government. There was no 'war' in the Middle East on September 6 when the hijacking occurred. A cease fire had been negotiated early in August, and was being observed at the time of the loss. The all risk insurers' claim that the loss was due to a 'war' stands or falls on the proposition that it was caused by a PFLP 'guerrilla war' waged against either or both Israel and the United States. War can exist between quasi-sovereign entities. And of course an undeclared *de facto* war may exist between sovereign states. But the all risk insurers propose to push the meaning of war much further. Central to their argument is the proposition that war as it is used in property insurance policies includes conflicts waged by guerrilla groups regardless of such groups' lack of sovereignty. . . . The evidence shows that Middle Eastern states did not accord the PFLP the rights of a government. Jordan and Lebanon 'negotiated' with the PFLP only in the sense that any government 'negotiates' with a terrorist who holds hostages. The claim by the insurers that the loss resulted from a guerrilla war between the PFLP and the United States is wholly untenable. The only evidence that the PFLP and the United States were at war consists of the PFLP's self-serving propaganda, propaganda claiming that the PFLP was effectively at war with the entire Western World. Such radical rhetoric cannot affect the outcome of this insurance case. The loss of the Pan American 747 was not caused by any act that is recognized as a warlike act. The hijackers did not wear insignia. They did not openly carry arms. Their acts had criminal rather than military overtones. They were the agents of a radical political group, rather than a sovereign government. The hijacking was designed to attract world attention to the Palestinian cause and to accumulate 'victories' as an example to other groups. . . .

The Court of Appeals similarly dismissed the other contentions by the insurers that the PFLP was engaged in insurrection or riot, and held, like the District Court, that the hijacking and destruction of the aircraft were ordinary acts of criminal terrorism, outside the scope of the exception clauses. The political motivations of the PFLP, although clearly recognized, were not even taken into consideration as affecting this assessment.

This attitude of civil courts towards such terrorist acts is also seen in the decision of the District Court of the Southern District, New York, in *Day et al.* v. *Trans World Airlines, Inc.*[28], a claim for damages arising from an attack by the Black September Group — a Palestinian terrorist group — upon the passengers lined up to board a TWA flight at Hellenikon Airport, Athens. On this occasion, the Court was not primarily concerned with the question of the terrorist attack or the political motivation of those involved.

28. (1975), 393 F. Supp. 217 (N.Y. Dt. Ct.); aff'd by (1975), 528 F. 2d 31 (2nd Cir.).

It held that under the Warsaw Convention on International Carriage by Air, 1929[29], the carrier was liable for all mishaps suffered by passengers during the 'operations of embarking or disembarking'. On the other hand, in *Hermandez et al.* v. *Air France*[30] it was held that an attack upon disembarking passengers collecting luggage in the airport baggage area did not occur during the disembarkation process in the Convention meaning of the term. Despite the fact that terrorist activities had become varied, so that attacks on airports[31] or aircraft on the ground were almost as common as hijacks, the Court distinguished between the two, stating that:

> Unlike the risk of hijacking, . . . where the aircraft and the fact of air travel are prerequisites to the crime, we think the risk of a random attack such as that which gave rise to this litigation is not a risk characteristic of travel by aircraft, but rather is a risk of living in a world such as ours.[31a]

This selective attitude resulting in a denial of damages for injury suffered after the disembarkation process had been completed, which ran counter to the view of the experts who drafted the relevant article (17) of the Convention[32], should be compared with *Krystal et al.* v. *British Overseas Airways Corporation*[33], in which damages were awarded for mental distress arising from the hijack of an aircraft proceeding from London to Bombay. Yet a new development in the tort relationships connected with aerial terrorism may be expected as the result of the decision of Judge Greenfield of the Supreme Court of New York[34] that suit could be brought by passengers and surviving relatives of passengers from Israel, France, the United States and Canada against Singapore Airlines and Gulf Airlines for their negligence in allowing heavily armed pro-Palestine terrorists on to their aircraft and permitting them to enter the transit lounge at Athens Airport without searching them, such terrorists having subsequently hijacked the Air France aircraft that was the occasion of the Entebbe rescue[35].

Before leaving the subject of Arab terrorism, it is perhaps necessary to point out that it not only United States courts which have treated such persons as ordinary criminals. Both Turkey and Italy have had to deal with inter-Arab terrorism and have done so on the basis that the terrorist acts involved were simple acts of a criminal character, although in both cases the question of classification was not strictly necessary, since the acts in question had been committed locally and there was no way in which the accused could seek to evade the local criminal law. In the Turkish case[36] Palestinian guerrillas were sentenced to death for an assault against the Egyptian Embassy in Ankara during which two Turkish guards were killed, while the Italian decision[37], awarding terms of fifteen years imprisonment, arose

29. 137 L.N.T.S. 11.
30. (1976), 545 F. 2d 279 (1st Cir.).
31. *See e.g.*, the attack at San Juan, Puerto Rico, in January 1981.
31a. *Supra* n. 30, at 284.
32. *See, Digest of U.S. Practice in International Law 1976* 405 — the Experts wished to protect passengers from the moment they entered the airport of embarkation until they left the airport of disembarkation.
33. (1975), 403 F. Supp. 1322 (Cal. Dt. Ct.).
34. *The Times*, January 8, 1981, at 4, col. 4.
35. *See e.g.*, Green, "Rescue at Entebbe — Legal Aspects" (1976), 6 Israel Y.B. on Human Rights 96.
36. *The Times*, December 24, 1980, at 4, col. 8.
37. *The Times*, November 8, 1976, at 5, col. 6.

from an assault by Arab terrorists against the Syrian Embassy in Rome in the course of which a Syrian diplomat was wounded, the aim of the attack apparently being to kidnap the ambassador in order to hold him hostage for the release of 100 prisoners held in Syrian jails.

France, on the other hand, has taken a more lenient view of Arab terrorists. Abu Daoud, a participant in the massacre of Israeli athletes at the Munich Olympic Games, was held by the French police and extradition requests were submitted by both the German Federal Republic and Israel. Shortly before the hearing was scheduled, Abu Daoud was called to the Court, the initial international arrest warrant sent by Germany was discharged on the ground that since it had not yet been validated by the requisite extradition papers it lacked validity. The Israeli request was rejected even more peremptorily, the Court saying "it could not handle a request involving a non-Israeli citizen suspected of committing a crime in West Germany in 1972. It was only in 1975 that France acquired a law permitting it to pursue such crimes." Abu Daoud was freed to board a plane for Algiers. Even if the ground for dismissing the Israeli claim had been valid, it cannot be denied that the German request was dismissed on an "apparent legal technicality"[38]. There is little doubt that the French decision, although this may not have been expressed in the judgment, was politically motivated.

On another occasion, the judge faced with the problem of dealing with terrorists was not so circumspect. In 1970 a British diplomat was kidnapped in Canada by members of the Front de Libération du Quebec, and he was released in return for a promise to his kidnappers that they would not be prosecuted if they left Canada. Some eight years later, in breach of this undertaking, some of the kidnappers returned and were charged. The judge showed his awareness of the gravity of the crime, but there is little doubt that his judgment reflected political rather than legal considerations[39]. He pointed out that:

> [I]t is essential that Canada's international partners know that their resident diplomats are adequately protected, and that those kidnapping diplomats are properly punished.[40]
>
> Acts of terrorism are crimes of *lese-humanite* constituting an attack on human rights and fundamental freedoms, and when committed against diplomatic personnel they also strike at the harmony of international relations[41].
>
> When faced with such a situation, subjective considerations become secondary, and the inconvenience of imprisonment suffered by an accused are necessarily reduced in significance.

While he pointed out that the normal sentence for such an offence might well be ten years imprisonment and that the lapse of time was irrelevant, he,

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38. *U.S. Practice 1977, 205 and 206; see also* T.E. Carbonneau, "The Provisional Arrest and Subsequent Release of Abu Daoud by French Authorities" (1977), 17 Virginia J. Int'l Law 495.

39. *R. v. Cossette-Trudel et al.* (1979), 11 C.R. 1, at 9, 11, 14 (Que. Ct. of Sessions of the Peace), (our translation).

39a. *Id.*, at 14.

40. *Id.*, at 14. Canada ratified the Vienna Convention on Diplomatic Relations in 1966, acceded to that on Consular Relations in 1974, and ratified the Convention on the Prevention of Crimes to Internationally Protected Persons, including Diplomats in 1976.

41. See the discussion of the Tehran embassy incident below.

nevertheless, referred to the accused's absence abroad for so many years[41a] — at their own choice — and the impact that a severe sentence might have. He sentenced them to two years less a day to be served in a provincial institution. In fact, because of the Canadian parole legislation, they served a mere six months.

The French and Canadian attitudes should be compared with that taken by courts elsewhere. In 1979 a Swedish court sentenced a German terrorist to fifteen years for the part he had played during the seizure and holding of hostages in the German embassy in Stockholm four years earlier[42]. More striking is the decision of the Greek Supreme Court in *Germany* v. *Pohle*[43]. P. had been convicted in Germany of terrorist acts connected with the Baader-Meinhof gang and was released as part of a bargain with other gang members to secure the release of a kidnapped West Berlin politician. The Athenian High Court refused extradition on the ground that P's offences were political. This decision was overruled by the Supreme Court on the ground that two of the counts on which he had been convicted, namely membership of a gang and forgery, were not political. Further, it decided that the West German Government's release of P. under blackmail did not forfeit its claim that he should serve the balance of his prison sentence. On his return to Germany, P. maintained that his surrender was illegal as his offences had been political, and further contended that his surrender in return for the politician amounted to a remission and was not invalidated by coercion, since what had taken place was an exchange of prisoners. The Federal Constitutional Court of Germany upheld his further imprisonment[44]. In so far as the extradition was concerned, the Court reminded P. that extradition treaties gave no subjective right to fugitives, but only affected the contracting states and a decision by the receiving state cannot be examined by courts in the requesting state. As regards the constitutional argument, the comments of the Court are of wider than mere German interest:

> The German authorities did not renounce execution of the sentence, and P's release cannot be considered an act of clemency, for the will requisite for such an act was lacking on the part of the authorities. Further, judicial authorities cannot be bound by a release resulting from the taking of hostages. . . .
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> . . . .
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> . . . P's contention that he was convicted . . . of a political crime as defined by Article 6 [of the Federal Constitution] . . . is patently untenable in the context of German jurisprudence, regardless of the definition of 'political offence' in the law of extradition. . . . P was convicted of, *inter alia,* murder, arson and other serious crimes, and it is completely misguided to consider such a crime 'political' because political motivation may have played a part in its commission. . . .
>
> . . . .

41a. In February 1981 West German justice officials favoured a lenient sentence for Michael Baumann, author of *How It All Began,* since he had voluntarily surrendered and called on former comrades to do likewise — "Judges are obliged to consider not only the crime itself, but other factors, such as whether the person has repented", *The Times,* February 13, 1981.

42. *The Times,* 21 Dec. 1979.

43. *The Times,* 2 Oct. 1977.

44. *Germany* v. *Pohle* (1977), summarised in Green, *International Law Through the Cases* (1978) at p. 383.

> . . . When a hostage has been taken, the demands of kidnappers that accused persons or convicts be freed should be conceded in order to save the life of the hostage, is a decision for the constitutionally competent state organs to make and for which they are responsible . . . . If, as is in this case, they decide on the release of the prisoners, they are nonetheless duty bound by the Constitution to make every reasonable effort to recapture those who have been freed by coercion, in order that proceedings may continue or that they complete their sentence. The forced freeing of prisoners constitutes neither an act of clemency nor an effective renunciation of further prosecution or completion of a lawfully imposed sentence.
>
> The assumption that a release in such circumstances takes place within the framework of an 'exchange of prisoners' is completely false.[44a]

A number of those accused of hijacking aircraft have claimed that they did so in order to escape from a country whose policies they opposed and as a result that they were motivated politically, even though the defence might not satisfy the traditional concept as expounded in *Castioni*. The earliest case was heard by the Swiss Federal Tribunal in 1952, the accused having been charged by Yugoslavia with unlawful constraint of the crew, endangering the safety of public transport and wrongful appropriation of property[45]. The court held that the reservation concerning political offences in the Swiss Extradition Law applied,

> . . . [N]ot only to offences directed against the State, which are described as purely political offences . . . but also to so-called relative political offences, which consist in the commission of a common offence, but which, by virtue of the circumstances and, in particular, the motive, of their commission, acquire a political colouring. . . .
>
> . . . .
>
> The purpose and motive of the acts with which the accused are charged was to enable them to flee from a country with whose regime they were not in agreement and where they felt themselves to be watched and repressed. . . . This fact gives both the flight and the offences committed to make it possible a distinctively political colouring.[46]
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> . . . .
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> . . . This more passive attitude [as distinct from an attempt at violent overthrow of a regime] for the purpose of escaping political constraint is no less worthy of asylum than active participation in the fight for political power used to be in what were earlier considered to be normal circumstances. The spirit of justice undoubtedly ascribes a political character to such a flight abroad, and a liberalization of the practice of the Court, with a view to adjusting it to recent developments, appears justified. In matters of extradition in particular, the Court must not abandon the spirit in favour of legalistic constructions, and must take account of historical and political developments . . . . Recent practice has been too restrictive in making the relative political character of an offence dependent on its commission in the framework of a fight for power. Such a character must also be attributed to offences which were committed in order to escape the constraint of a State which makes all opposition and, therefore the fight for power impossible.
>
> In this connection there can also be applied the principle that the relation between the purpose and the means adopted for its achievement must be such that the ideals connected with the purpose are sufficiently strong to excuse, if not justify, the injury to private property, and to make the offender appear worthy of asylum. . . . Freedom from the constraint of a totalitarian State must be regarded as an ideal in this sense. In the present case the required relationship undoubtedly exists; for, on the one hand, the offences against the other members of the crew were not very

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44a. *Ibid.* at pp. 384-385.

45. *Re Kavic, Bijelanovic and Arsenijevic* (1952), 19 Ann. Dig. 371.

46. *Cp. Ex. p. Kolczynski,* [1955] 1 Q.B. 540.

serious, and, on the other, the political freedom and even existence of the accused was at stake, and could only be achieved through the commission of these offences."[46a]

It may be argued that, since no attempt was made to exercise pressure against any government and since no real act of violence was committed against any innocent person, this particular hijacking does not constitute an act of terrorism as that word is normally understood. Where acts of undue violence are involved, courts of reception have not been so tolerant and, while they may have avoided extradition, they have themselves exercised criminal jurisdiction. This is exemplified by *Re Lam Van Tu*[47], who, with others, seized an Air Vietnam aircraft on a domestic flight and forced it, after killing two members of the crew, to fly to Singapore. They were charged with armed robbery, dishonestly retaining stolen property, wrongfully confining passengers and crew, as well as being in illegal possession of arms and ammunition. They pleaded guilty to the latter charge and contended that they staged the hijack in order to flee from suffering in their communist homeland. The High Court sentenced them to fourteen years and ordered them to be caned.

Even where no violence against passengers or crew has been used, other than that of temporary constraint, due to the increase in the incidence of hijacking and the provisions of the Tokyo, Hague and Montreal Conventions[48], making hijacking extraditable in accordance with the local procedures, but avoiding acquittal on political grounds by embodying the *aut dedere aut punire* principle, courts have increasingly regarded hijacking as an offence warranting punishment, taking the political motivation of escape or protest into consideration only by way of mitigation[49], although France appears to regard hijacking as *ipso facto* political and denies extradition accordingly.[50] When, however, the alleged offence has involved an attack against life, it may well be that the approach of the German Federal Supreme Court should be the guiding principle and should be extended to all cases of terrorism, despite the fact that many states, of which perhaps the worst offender is Libya, lend their support to those terrorists whose political ideals they profess to support.[51] In the *Extradition of Greek National (Germany) Case*[52] the Court said

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46a. *Supra*. n. 45 at pp. 372-4.

47. *The Times*, 16 Dec. 1977.

48. Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963), 2 Int'l Legal Materials 1042 (Tokyo); Convention for the Suppression of Unlawful Seizure of Aircraft (1970), 10 Int'l Legal Materials 133 (Hague); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1970), 10 Int'l Legal Materials 1151 (Montreal).

49. E.g., Spanish trial of *Preskolo et al.* — Crotians hijacked a Scandinavian plane and secured release of compatriots from Swedish jails, together with ransom money, *The Times*, 12 Jun. 1974; *Re Perka*, German trial of Pole for hijacking Polish aircraft to escape Poland, *Ibid.*, 12 Jun 1980 and trial by West Berlin court of Pole who diverted a Lot aircraft to escape from Poland using a grenade to effect his hijack, he was sentenced to 4 years, *Edmonton Journal*. March 9, 1981; *Re Nuri*, Dutch trial of Palestinian for hijacking British aircraft to Lebanon and destroying it there, *The Times*, 7 Jun. 1974; while Iran executed 2 Kurds for hijacking Irani Airways plane to Tehran, *Ibid.*, 8 April, 1975; *Hungarian Deserter (Austria) Case* (1958) 28 I.L.R., 241, in which Austrian Supreme Court held desertion was a common crime subject to universal jurisdiction, and that escape for political reasons did not prevent trial for manslaughter by Austrian court.

50. *The Times*, 15 Aug. 1974.

51. *Re Holder and Kerkow*, U.S. Practice 1975, 168.

52. (1955) 22 I.L.R. 520 (Germany). See also *Ktir* v. *Ministère Publique Fédérale* (1961), 34 I.L.R. 143 (Switzerland).

> Notwithstanding that treaties do not always agree on this matter and that there is no general rule of international law governing it, we can infer from such treaties, as well as from the objects pursued by Contracting Parties thereto, that there is a general principle to the effect that asylum is to be refused to political offenders who have committed crimes against human life.[52a]

This view of the law has been extended by the Federal Supreme Court of Germany to allow the extradition of a member of a national liberation movement — and modern terrorists, especially those supporting the Palestinian cause, frequently claim to be members of such movements — charged with the death of an opponent otherwise than in open combat: the court

> which has to determine whether a person shall be extradited who has committed a political crime against life and limb otherwise than in open combat must make its decision dependent on whether or not there is any guarantee that after his extradition, the person to be extradited will or will not be exposed — whether in the course of, or apart from, the criminal proceedings — to measures dangerous to life and limb or restriction of personal liberty for political reasons.
>
> This guarantee can be provided by an adequate assurance on the part of the foreign Government which requests a person's extradition,[53]

and this may involve the requested court examining the integrity of such an assurance.

The adoption in 1977 of Protocol I additional to the Geneva Convention sof 12 August 1949 concerning the role of humanitarian law in international armed conflicts[54] has provided terrorists with a new plea to present to a court before which they might appear. By Article 1 of the Protocol "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" constitute international armed conflicts governed by the international law of war so that personnel would be prisoners of war. In 1977 the District Court of Utrecht was faced with such a contention in the *Folkerts Case*[55]. The Federal German Republic sought the extradition of the accused as a member of the Baader-Meinhof group, officially known as the Rote Armee Fraktion. The accused contested the jurisdiction of the Dutch court on the ground that the RAF was engaged in a class war, not only with the Federal Republic but in every state in the world where such a class war exists. On this basis, he argued that the RAF was engaged in an international armed conflict protected by the Geneva Convention on Prisoners of War and Protocol I. The Court rejected this, first on the ground that the Protocol had not yet come into force, but more importantly because the RAF is not a movement which, in the exercise of its right of self-determination, is fighting against colonial domination, alien occupation or

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52a. *Extradition of Greek National, Supra* n. 52 at pp. 523-4.

53. *Extradition of Member of Algerian Irregular Army Case* (1961), 32 I.L.R. 394 at 296.

54. (1977), 16 Int'l. Legal Materials, 1391.

55. 20 Dec. 1977, Rolno 3853/77. I am grateful to Mr. Sam Bloembergen, Legal Adviser, Netherlands Ministry of Foreign Affairs, for providing the text and a summarized translation of the judgement; see, also, *The Times*, 24 Sept. 1977. See, also, Order by U.S. District Court, Eastern District of New York, in *U.S.* v. *Morales* (1979), 78 *CR* 414, denying claim by member of Puerto Rican F.A.L.N. charged with causing an explosion in New York in 1978, to be a prisoner of war under the Geneva Prisoners of War Convention, 1949, or as one fighting "against colonialism and foreign domination" protected by Art. 1(4) of Protocol I, 1977, which has in any case not been ratified by the U.S. A similar claim was put forward by another group of F.A.L.N. prisoners in February 1981, *The New York Times*, February 4, 1981, at A8. and by a group of German terrorists jailed in the Federal Republic, *The Times* February 10, 1981.

racist regimes, nor had Folkerts been able to prove that at the time of his arrest he was engaged in such a conflict. It only requires a change of venue with the application for extradition coming before a court in a country sympathetic to the particular organization involved, for a contrary decision to be reached and for it to be held that the accused belongs to an organization which the receiving state regards as a national liberation movement seeking self-determination.

Although terrorism is frequently of a transnational character, either because the alleged terrorist seeks asylum from extradition in a third state, or because the victims of the act are alien to the dispute between the terrorist and the authority against whom the act is really directed, international law has only rarely sought to play any role in so far as the control of such acts is concerned. It first became a matter of international interest after the assassination at Marseilles in October 1934 of King Alexander of Yugoslavia and M. Barthou, French Foreign Minister. The assassins were Croatian terrorists/'patriots', acting, it was believed, with the complicity of Hungary and perhaps also of Italy. Yugoslavia sought their extradition from Italy, but this was denied on the ground that the crime was of a political nature[56]. Impelled by this assassination, the League of Nations in 1937 adopted two conventions. The Convention for the Prevention and Punishment of Terrorism[57] true to its provenance adopted a definition of terrorism which condemned attacks upon heads of state or their spouses, as well as those holding public office so long as the attack was directed against them in their public capacity. In addition, it condemned the destruction of public property as well as any wilful act calculated to endanger the lives of members of the public. Further, manufacture, possession or the supplying of arms and explosives for the purpose of committing such acts equally constituted terrorism. In so far as enforcement measures were concerned, each party was required to amend its criminal law to give effect to the provisions of the treaty, and articles were included providing for the extradition of offenders, although nothing was said about the 'political' nature of such offences, but it was provided that "the obligation to grant extradition . . . shall be subject to any conditions and limitations recognised by the law or the practice of the country to which application is made",[57a] thus impliedly recognising the possibility of the political exception plea being made. However, the treaty went on to provide that foreigners charged with such an offence and present in the territory of a party to the treaty could be tried if extradition could not be granted "for a reason not connected with the offence itself"[57b] — which would not be true if the political plea were involved, or if the local law permitted trial of foreigners for offences committed abroad, or if the accused was a national of a country possessing such jurisdiction.[58] Recognizing, perhaps, the inadequacy of these proposals for

56. *In re Pavelic and Kwaternik* (1934), 7 Ann. Dig. 372.

57. 7 Hudson, *Int'l Legislation*, 862.

57a. *Id.*, at 868.

57b. *Ibid.*

58. It is perhaps of interest to point out that the treaty also forbade fraudulent manufacture or use of forged passports, and sought to impose an international obligation to regulate the manufacture and possession of "fire-arms, other than small-bore sporting-guns."

effectively dealing with terrorism, a small group of the parties entered into a further Convention for the Creation of an International Criminal Court[59]. This Convention was primarily concerned with details as to the creation and composition of the Court, though it provided for the possible imposition of the death penalty, imprisonment or fines. Neither of these Conventions was of any practical significance, since the Terrorism Convention was ratified by only three states, while the Convention for the Court received no ratification at all.

Despite the assassinations of heads of state or politicians that have taken place since 1937, this has not proved to be the most significant activity of a terrorist nature. In recent years terrorism has involved aerial hijacking, the despatch of letter bombs, the kidnapping of senior industrialists, attacks on government buildings, and acts of violence against embassies and diplomats. Although efforts have been made through the medium of international organisations, including the United Nations, to deal with these problems, effective enforcement measures have proved difficult of achievement because of the political attitudes of some member states sympathetic to one or other terrorist organization, particularly those purporting to operate with a view to achieving national liberation or self-determination. Bilateral arrangements are not so prone to this political obstacle. As has been noted, there are in existence three anti-hijacking conventions which have led to amendment of a number of national systems of criminal law, but no attempt has been made by them to establish any international criminal tribunal, nor has there been any effort to assert that terrorism, like piracy, should constitute any offence susceptible to universal criminal jurisdiction.

Perhaps the Convention which has proved of most importance is that concerning the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomats[60], which should be read in conjunction with the Vienna Conventions on Diplomatic and Consular Relations and the Optional Protocols attached hereto[61]. In accordance with the Vienna Conventions, parties are required to protect the premises of the mission and its documents, and "to take all appropriate steps to prevent any attack on [the representative's] person, freedom or dignity", but there is no obligation to amend the national law to ensure such protection, although by the Optional Protocol disputes concerning the interpretation of application of the Convention are subject to the compulsory jurisdiction of the World Court. The 1973 Convention requires the parties thereto to ensure that it is criminal in accordance with their municipal criminal law to attack in any way an internationally protected person, or the official premises, accommodation or transport of such a person, or any threat or attempt so to do. Such crimes are to be penalised in accordance with their 'grave nature'. The jurisdiction is to extend to any offender found in a party's territory and if the offender is not extradited. Since the "extradition shall be subject to the

59. 7 Hudson, *op. cit., 878.*

60. (1974), 13 Int'l Legal Materials, 41.

61. 500 U.N.T.S. 95, Protocol, 241; 596 U.N.T.S. 261, Protocol, 487, respectively.

procedural provisions and the other conditions of the law of the requested State", it remains open to the offender to plead the political exception. Moreover, although it is not included in the text of the Convention which itself is an annex to a General Assembly Resolution, the Convention which, in accordance with the text of the Resolution, "shall always be published together with" the Resolution, does not "in any way prejudice the exercise of the legitimate right of self-determination and independence . . . by people struggling against colonialism, alien domination, foreign occupation, racial discrimination and *apartheid*", thus opening the door to almost any act of terrorism, transnational or otherwise, which is likely to occur. Since the victim of such an act of terrorism is likely to react strongly against the offender should he fall into its hands, the Convention provides that "any person regarding whom proceedings are being carried out . . . shall be guaranteed fair treatment at all stages of the proceedings", and this may be considered as a sort of guarantee against some measures of state terrorism.

The Convention on Acts of Violence against Internationally Protected Persons is not the only one that seeks to guarantee observance of the minimal requirements of the rule of law on behalf of accused persons, regardless of the nature of the crime. The European Convention on Human Rights[62] forbids torture, inhuman or degrading treatment or punishment and deprivation of liberty save in accordance with a procedure prescribed by law. However, it recognizes that in time of war or "other public emergency threatening the life of the nation" derogations may become necessary[63]. Even so, the ban on torture and degrading treatment or punishment remains, as does the principle that no one may be tried for an act that was not a crime under international or national law at the time of its commission. In *Ireland* v. *United Kingdom*[64] the European Court of Human Rights was concerned not with the acts of terrorism committed by members of the Irish Republican Army, but with the legality of measures taken by the United Kingdom in response. In its approach to this matter and its interpretation of what constitutes an emergency and the permitted measures taken in relation thereto, it is submitted that, with the exception of those rights clearly reserved under the Convention, the Court virtually gave the country concerned a free hand. The Court stated

> It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation' to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogation necessary to avert it. In this matter Article 15(1) [the derogation provision] leaves the authorities a wide margin of appreciation.
>
> Nevertheless, the States do not enjoy an unlimited power in this respect. The Court which, with the [European] Commission [on Human Rights], is responsible for ensuring the observance of the States' engagements . . ., is empowered to rule on

62. 213 *ibid.*, 222.

63. See L.C. Green, "Derogation of Human Rights in Emergency Situations", (1978), 16 Can. Y.B. Int'l Law 92.

64. (1978), 17 Int'l Legal Materials 680 (58 I.L.R. 188).

> whether the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. . . .[64a]
>
> . . . .
>
> It is certainly not the Court's function to substitute for the British Government's assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism. . . . For this purpose the Court must arrive at its decision in the light, not of a purely retrospective examination of the efficacy of those measures, but of the conditions and circumstances reigning when they were originally taken and subsequently applied.[64b] . . .
>
> An overall examination of the legislation and practice at issue reveals that they evolved in the direction of increasing respect for individual liberty. . . . When a State is struggling against a public emergency threatening the life of the nation, it would be rendered defenceless if it were required to accomplish everything at once, to furnish from the outset each of its chosen means of action with each of the safeguards reconcilable with the priority requirements of the proper functioning of the authorities and for restoring peace within the community."[64c]

The European Court is as yet the only Court able to condemn a state for what might appear to be a resort to terrorist actions under the guise of emergency measures, but even that Court lacks any real force to ensure compliance. In fact, given a green light of this character, a state, under the guise of emergency measures, may be able to introduce a system which leaves little to distinguish it from the terror of the Nazi regime, and some writers are highly conscious of this and warn against such acts of state terrorism[65].

The only instance to date in which it may be said that an international tribunal has been called upon to examine an act of terrorism has been that arising from the seizure by Iranian militants of the United States embassy in Tehran, and the consequent detention of American personnel by or with the connivance of the Iranian authorities[66]. The United States submitted a claim to the World Court which was not concerned directly with the punishment of the terrorists, but with securing a condemnation of the Iranian role. To this end, the United States asked the Court for statements declaring Iran's liability for breach of the rights of diplomats an order directing their release and providing for their departure from Iran in safety and dignity, the clearance of the embassy premises, a ban on any trial of any of the persons involved, an undertaking that any diplomatic personnel of the United States remaining in Tehran be enabled to fulfil their functions properly and with full diplomatic rights and immunities, an order for compensation, and a guarantee that nothing be done to prejudice the rights of the United States in respect of the observance of any judgment rendered by the Court. As an interim measure, the United States sought a provisional judgment seeking virtually all its substantive claims, except the declaration of illegality and the award of compensation which were to be dealt with subsequently. This

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64a. *Id.*, at 707 (para. 207).

64b. *Id.*, at 708 (para. 214).

64c. *Id.*, at 709 (para. 220).

65. *Eg.*, Wilkinson, *Terrorism and the Liberal State* (1977); Eveleigh, *Peace-Keeping in a Democratic Society*, (1978).

66. For background see L.C. Green, "The Tehran Embassy Incident and International Law," (1980), 38 Behind the Headlines; "Niceties and Necessities — The Case for Diplomatic Immunity", International Perspectives (March/April, 1980), 19; "The Tehran Embassy Incident — Legal Aspects" (1980), 19 Archiv des Volkerrechts 1.

is not the place to examine whether the United States decision to approach the Court was in the interests of the international rule of law or not, for it was known in advance that Iran would not appear before the Court since it contended that the issues were inextricably interwoven with its own allegations concerning the United States role in Iran during the Shah's regime and that the measures in dispute related to the fulfilment of the Islamic revolution and, as such, were domestic in character and beyond the Court's jurisdiction. Moreover, it was equally well known that should a judgment be rendered against Iran there was little or no likelihood of the Security Council giving effect to that judgment in accordance with Article 94 of the Charter of the United Nations. In its Order concerning provisional measures[67] the Court upheld its jurisdiction. While the Court did not in fact deal in any direct way with the issue of terrorism, it did confirm the inviolability of diplomatic envoys and embassies and pointed out that

> the obligations thus assumed, notably those for assuring the personal safety of diplomats and their freedom from prosecution, are essential, unqualified and inherent in their respective character and their diplomatic function . . .[67a]
>
> . . . [and] continuance of the [present] situation exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm.[67b]

In the light of this reasoning, the Court ordered Iran to ensure immediate restoration of the embassy to the United States and the release of all those being held in the embassy or the Iranian Foreign Office buildings — clear recognition that the Iranian authorities themselves were involved in these acts of terrorism — and ordered that the personnel involved be afforded complete protection, privileges and immunities and freedom and facilities to depart Iran. Finally, perhaps in accordance with a normal approach to a provisional decision, the Court stated that

> The Government of the United States of America and the Government of the Islamic Republic of Iran should not take any action and should ensure that no action is taken which may aggravate the tension between the two countries or render the existing dispute more difficult of solution.[67c]

This last instruction is reasonable in normal circumstances, that is to say when there is some likelihood that the interim order would be obeyed. In the instant case, however, Iran made it clear that it had no intention of carrying out the Order and one could hardly expect the United States to stand idly by watching a situation which, as the Court itself pointed out, "exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm." It was perhaps not surprising, therefore, that as the situation continued with further threats against the lives of the hostages — hostages since Iran demanded certain political and monetary concessions from the United States in return for freeing the individuals concerned — and as it was clear that Iran was unwilling or unable to carry out the judgment, the United States decided to resort to measures of self-help and endeavour to rescue

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67. *U.S. Diplomatic and Consular Staff in Tehran (Provisional Measures)*, [1979] I.C.J. 7.

67a. *Id.* at 19.

67b. *Id.* at 20.

67c. *Id.* at p. 21.

their personnel. When the World Court came to deliver its substantive judgment in this case[68], although conceding that the American action and its legality and consequential possible liability of the United States were not before it, the Court somewhat gratuitously considered it necessary "to express its concern in regard to the United States' incursion into Iran", especially as this was done while the Court was considering its final judgment, with the consequence that

> the Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations . . . [especially as] the Court had indicated [in its earlier Order] that no action was to be taken by either party which might aggravate the tension between the two parties.

One might question whether it is the Court, with its apparent tendency to equate an attempt to preserve the lives of those threatened and give effect to rules of international law and a judgment that were being disregarded by the guilty party, with acts of terrorism committed by that party or hallowed by it, which is undermining respect for the judicial process.

On this occasion the Court did examine the factual situation and referred to the terrorist acts of the militants involved, although it abstained from describing them by this term. It is unnecessary to comment on the Court's finding that the militants did not operate as 'agents' of the authorities, even though it referred to statements by the Ayatollah Khomeini which could have been construed as incitements and also to the congratulations expressed by the Ayatollah after the event. On the other hand, the Court recognized that Iran had failed in its obligations concerning protection, which failure was "due to more than mere negligence or lack of appropriate means". Moreover, after the occupation had taken place and the personnel taken hostage, the

> plain duty [of the Iranian Government] was at once to make every effort and to take every appropriate step, to bring these flagrant infringements of the inviolability of the premises, archives and diplomatic and consular staff of the United States Embassy to a speedy end . . . and in general to re-establish the status quo and to offer reparation for the damages

and the subsequent attitude of the authorities merely served to increase the gravity and number of Iranian breaches of its international obligations. These references to the judgment are sufficient to indicate that the Court was not really concerned with condemning the original acts of terrorism against the United States Embassy or its personnel, but only with the liability of the Iranian authorities. While it is true that the United States sought condemnation of, and a remedy from Iran, and while it is true that the Court could only direct its judgment towards Iran, nevertheless one might have expected that the Court would have made more direct criticisms and condemnation of the terrorist acts, particularly in view of its criticism of the United States rescue attempt. In fact, however, despite the nature of the Application submitted by the United States, the Court in its final judgment did not even call upon Iran to take steps to prosecute or punish the perpetrators of the terrorist acts.

68. [1980] I.C.J. 3, 42, 31, 33.

The attitude of the World Court in the Tehran embassy case serves to emphasize that the existing judicial processes of an international character are inadequate to deal with any terrorist act in an effective way. The attitude of Iran merely moves to the judicial field the political obstacles that confront the United Nations in any attempt at dealing with terrorism[69]. Unfortunately, the prospects of establishing an international tribunal with criminal jurisdiction over individual terrorists or over rulers and politicians alleged, as was the Shah, to have actively ordered or connived at terrorist acts against their own people, are as remote as they have ever been.[70] As a result, enforcement of the law against terrorists remains with national tribunals and these, normally, are only concerned with the acts of individual terrorists, especially as heads of state would enjoy immunity from the criminal process while politicians would claim immunity either on political grounds or as agents of their governments, and as such equally immune from criminal prosecution outside of their own country. However, there has recently been a decision by the United States Court of Appeal for the Second Circuit which holds out some promise whereby the victims of terrorism, even when it is state inspired and organized, might be able to recover damages in a civil suit in the same way as the victims of an aerial hijacking might recover from airlines failing to apply effective safety measures[71]. *Filatiga* v. *Pena-Irala*[72] arose from the death of a relative of the plaintiffs allegedly as a result of torture by the Paraguayan police because of his father's political opposition to President Stoessner. The defendant was the Inspector General of Police who, like the plaintiffs, arrived in the United States on a visitor's permit in 1978. The defendant was, however, ordered to be deported and while awaiting deportation was served with a summons instituting proceedings on account of the above mentioned death and claiming punitive damages of $10 million. It was claimed that the cause of action arose under

> wrongful death statutes; the UN Charter; the Universal Declaration on (*sic*) Human Rights; the UN Declaration Against Torture[73]; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations,

as well as under United States legislation, namely the Alien Tort Statute[74],

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69. See, e.g., L.C. Green, "The Nature and Control of International Terrorism" (1974), 4 Israel Y.B. on Human Rights, 134; "Double Standards in the United Nations: The Legalization of Terrorism" (1979), 18 Archiv des Volkerrechts, 129, "International Crimes and the Legal Process" (1980) 29 Int'l & Comp. L.Q. 567; Finger, "International Terrorism and the United Nations", in Alexander, *International Terrorism: National, Regional and Global Perspectives*, (1976), 323.

70. See, L.C. Green, "An International Penal Code — Now?" (1976), 3 Dalhousie Law Journal, 560; B.B. Ferencz, *An International Criminal Court*, 1980; Bassiouni, *International Criminal Law*, 1980.

71. See text to n. 34 above.

72. 630 F. 2d 876 (1980); See also *Letelier* v. *Republic of Chile*, 488 F. Supp. 665 (1980).

72a. *Filatiga* v. *Pena Irala*, *supra* n. 72 at 879.

73. GA Res. 3452 (XXX-1975) — this called upon states to take measures to prevent torture occurring within their jurisdiction and to declare it a crime under municipal law. There is no suggestion in the Resolution that a third state might be able to exercise such jurisdiction.

74. 28 USC S. 1350 — "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

and on the basis of the defendant's presence in the United States. In the view of the Circuit Court

> In light of the universal comdemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (*in principle if not in practice*), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.[74a]

One is inclined to comment that the Court appears to have made too much of non-binding declarations, many of which were never intended to impose international obligations, ignoring the fact that what is important in the development of international law is not the empty ideological pronouncements made by states, but their actual practice. In fact, the Court said

> The requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law,[74b]

which is exactly what some critics might suggest the Court was itself doing. The situation is not altered by the mere assertion that

> there are few, if any, issues in international law today on which opinion seems to be so united as the limitation on a state's power to torture persons held in its custody[74c]

even though the Court recognized this was probably only "in principle". It would also appear that the Court was probably reaching the limits of inventive interpretation when it declared that

> although there is no universal agreement as to the precise extent of the 'human rights and fundamental freedoms' guaranteed by the Charter, there is at present no dissent from the view that the guaranties include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, which states, in the plainest of terms 'no one shall be subjected to torture'.[74d]

But the Universal Declaration is not and was not intended to be a legally binding document creative of law or of rights. It was merely declaratory of a hoped-for standard, and this status is not changed by a further Resolution cited by the Court declaring that "the Charter precepts embodied in this Universal Declaration 'constitute basic principles of international law'."[75] Since the Declaration on the Protection of All Persons from Being Subjected to Torture is equally only a Resolution of the General Assembly it too does not create positive international law — and even if it did it would be to the effect of imposing an obligation upon states to regard torture as a crime and punish it when occurring within their jurisdiction. This is not the place to analyze the significance of General Assembly Resolutions whether in the form of Declarations or not. It suffices to comment that the Court was

74a. *Supra* n. 72 at 880.

74b. *Id.*, at 881.

74c. *Ibid.*

74d. *Id.* at 882.

75. GA Res. 2625 (XXV-1970).

somewhat eclectic in its selection of comments as to the legal effect of such votes. In the light of its selection, the Court found it possible to assert that

> . . . official torture is not prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens. Accordingly, we must conclude that the dictum in *Dreyfus* v. *von Finck*[75a] to the effect that 'violations of international law do not occur when the aggrieved parties are nationals of the acting state', is clearly out of tune with the current usage and practice of international law [— a controversial statement if ever there was one]. The treaties and accords cited above, *as well as the express foreign policy of our own government,* all make it clear that international law confers fundamental rights upon all people vis-a-vis their own governments. While the ultimate scope of these rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them. . . .[76]

In the light of this decision it is difficult to appreciate how the executive authority in the United States has found it possible to include in its "hostage-freedom" agreement with Iran[77] that it will prevent private claims by any of the hostages arising out of the seizure. While it is true that the *Filatiga* decision relates to the Alien Tort Statute, it can hardly be the case that United States citizens enjoy less rights than aliens.

While one might wish to sustain the Filatiga view of a new international law, which could be applied to cover, with even more obligatory authority, almost any act of terrorism, it may be questioned whether a judgment which really lacks true substance from the point of view of international law as generally understood does not in fact do harm to the cause of the rule of law and the suppression of terrorism on the international level. If those states which were like-minded agreed to adopt similar legislation or to enter into a non-universal treaty granting to each the right to exercise civil, even it not criminal jurisdiction in this type of action, a major blow in the cause of the rule or law might be struck. So long, however, as individual national tribunals give vent to their ideologies and find new rules of law in non-binding statements, including declarations of their own government's foreign policy, this is far from being the case. Unfortunately, there is little evidence of such a development taking place. Even the members of the European Communities are finding it difficult to give full effect to their Convention on the Suppression of Terrorism[78] or the later Agreement of their Ministers of Justice concerning the application of this Convention[78a], under the combined effect of which all member states will have the right to try terrorists present in their territory regardless of the *locus actus.* Perhaps it might be easier to obtain agreement on the definition of political offences and to apply this to the acts of terrorists as well as other criminals. Moreover, if the rule of law is to be upheld or advanced, then, regardless of one's sympathies for any particular terrorist movement, it should be recognized that the law should deal equally with all, both friend and foe alike, and that while political motivations may be of importance, they

75a. 534 F. 2d 24 (1976) at 31.

76. *Supra* n. 72 at 884.

77. (1981) 20 Int'l Legal Materials 224 at 226.

78. (1977), 15 Int'l Legal Materials; (1979).

78a. (1980), 19 Int'l. Legal Materials 325.

should only be regarded as grounds for mitigating penalties and not for excusing guilt. When innocent victims are the sufferers of acts of terrorism, it is all the more important to bear in mind the fundamental distinction between common and political crimes, for humanitarian law is as important in time of peace as it is in time of armed conflict. With this in view, it might be suggested that the words of the Court of Appeal at Grenoble, France, might be writ large in the chambers of the United Nations and the court rooms of the world:

> . . . what distinguishes the political crime from the common crime is the fact that the former only affects the political organisation of the state, the proper rights of the state, while the latter exclusively affects rights other than those of the state. The fact that the reasons of sentiment which prompted the offender to commit the offence belong to the realm of politics does not itself create a political offence. The offence does not derive its political character from the motive of the offender but from the nature of the rights it injures.[79]

If such a distinction were drawn, the number of terrorists evading justice, either at the hands of a requesting or a requested stated, or of the state from which asylum is being sought, might well be reduced, and we might find that the problems of suppression and control become somewhat less intractible than they now appear.

79. *In re Giovanni Gatti* (1947), 14 Ann. Dig. 145.