INTERNATIONAL TERRORISM: CRIMINAL OR POLITICAL?

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The problem posed to the international community by acts of terrorism is as complicated as it is contemporary. This essay will examine several of the difficulties facing the elimination of terrorist acts. This discussion will also analyze three specific types of terrorism in an effort to clarify the difficulties of technical semantics. These three areas involve acts committed on the land, sea, and in the air.

However, before examining the topic from a legal perspective, I feel it is necessary to briefly discuss two recent developments. These developments will make it quite clear that any solution to the problem cannot divorce international law from international politics.

The first development is the direct negotiations concerning extradition of hijackers between the United States and Cuba. Washington, evidently, weighed the possible political ramifications of a rapprochement with Havana and determined that the conceivable shock in Brasilia, Caracas, Buenos Aires, and Guatemala City could be counter-balanced by an effective anti-terrorist agreement. Some individuals will allege that the Havana-Washington talks were made possible only after Nixon's rapprochement with China. This is really of secondary interest to the present discussion. However, there can be no question but that any United States—Cuba discussions will have a tremendous effect within what Washington considers its primary sphere of influence. There are three conceivable possibilities that could help justify this overture towards Cuba. They are: (1) Whether it was the threat that terrorism posed to the United States that forced the United States to possibly upsetting its position in the hemisphere? (2) Whether the threat of terrorism was used as a justification to initiate an era of friendlier ties with Cuba? (3) Whether it was a combination of the two possibilities? In any event, this paper is concerned with the realization that this development demonstrated that Washington has given the curtailment of terrorism a high priority.

The second recent development also demonstrates the high priority the United States has given to curtailing international terrorism. Washington attempted to have the question considered in the General Assembly of the United Nations. A majority bloc of nations, made up of Arab-Afro-Asian states, voted against discussion of terrorism during the 1972 session.[1] The rationale of some of these states was the fear that any abridgment of terrorism would eliminate a powerful tool of national liberation movements. The United States had probably hoped to have some sanctions placed on countries which

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[1] *New York Times*, Sunday, December 17, 1972, Section 4, page 4.

grant sanctuary to these fugitives. An example of the type of sanctions could be the rescinding of air privileges to states granting sanctuary to air hijackers, i.e. Algeria. It is interesting to note that the Soviet Union, which has been faced with terrorist activities, has been less inclined to associate with the Afro-Asian bloc sentiments, than they have in the past.

These two developments may point out the lessening of the traditional dogmatic bi-polarity. This observer believes that these incidents point to the new politics which will not be bi-polar or tri-polar, but instead temporary pseudo-alliances to achieve very general policy objectives. However, of more relevance to the present topic are the following two observations. The first is that recent developments may illustrate that traditional adversaries may unite to combat terrorism. The second is that there is an opposition bloc to any anti-terrorism measures. These bloc states may provide at least sanctuaries for the terrorist fugitive.

The natural consequence of a stalemated political situation is a search for an alternative means to achieve the end. In the realm of international relations, when diplomatic attempts fail, one frequent consequence is the resort to armed force. This resort is the least desirable and would serve little purpose in the search for a solution to terrorism. Another alternative is a legal assessment.

The first step in a legal analysis of international terrorism should be defining the term "terrorism." John R. Stevenson advises that such an endeavor may be counter-productive because it tends to make the perimeter either too narrow or too wide, to allow for significant results.[2] However, some attempt, even inadequate, should be made. The definition which I have adopted is a compilation of several attempts and is as follows:

> "the systematic use of violence, by a faction or party, directed against a Government or individuals, intended to create a state of fear in the minds of particular persons, or groups of persons or the general public."

From this definition, there appears to be two forms of terrorism: the first being those directed against governments, the second being those directed against individuals. At first the separation appears simple; upon further inquiry it is realized that it is compounded by varying shades of interpretation. The separation of the two types is of paramount importance, because the distinction parallels the difference between a criminal and a political act. Although I will consider air hijacking later in this discussion, I will use an example to clarify this statement. Air hijacking, depending on the individuals involved, can be either for political reasons or for personal gain. If an airliner is hijacked to Algeria by three individuals who hold the passengers and the plane for ransom, it would appear to be a simple case of criminal hijacking. However, if the individuals claim to be separatists and claim to plan to use the ransom to finance their movement's activities against a constituted government, it then may be interpreted as a political action.

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[2] John R. Stevenson, "International Law and the Export of Terrorism," Department of State Transcript of speech given 6:00 p.m. EST, Thursday, November 9, 1972, to the Association of the Bar of the City of New York and the American Society of International Law, page 4.

This attempt to clarify the distinction between the two types of terrorism is important, regardless if the offense occurred in the air, on the sea, or on the land. After the incident, the victim State's first legal concern is in apprehending the fugitive. It is in this first step (if the fugitive has fled into the territory of another state) that the distinction must be made. A victim State can ask for the return of the terrorist. The State of sanctuary decides whether the "fugitive criminal" shall be surrendered to the victim State. Assuming an extradition treaty exists between the States concerned, extradition procedures may be implemented. The *Extradition Act of 1870,* from which guidelines are adopted in most treaties, states "a fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded is one of a political character. . . ."[3] Obviously, every fugitive will attempt to convince the courts that he is a political fugitive and, thus, cannot be extradited. Fortunately, there have been other guidelines established to determine, if, indeed, a fugitive is a political fugitive — and thus exempt from extradition.

A classic case determining the status of a fugitive is *In re Castioni* (1890).[4] In this decision, the British court agreed to allow Castioni to be extradited to Switzerland. The circumstances of this case are what determined the ruling. It appears that Castioni was involved in an uprising in Switzerland and fired a shot which killed a member of the State Council. The determining testimony was made by a fellow insurgent who stated that "it was unfortunate that the man had been killed, because it was not necessary for the uprising."[5] The *stare decisis* of the Castioni case is that, to be determined as a political action the offense must demonstrate a direct correlation between the action and the objective. In other words, a common crime such as murder, unless it was a very necessary action in achieving the end, will be treated as a common crime.

Another guideline is the so-called "attentat" clause. This clause was initiated in the Belgian extradition treaty after an unsuccessful attempt to assassinate Emperor Napoleon III failed. The French request for the two individuals had to be refused by the Belgian Court of Appeal because the Belgian extradition treaty forbid the surrender of political fugitives. As a result of that decision (Jacquin Case, 1854), Belgium amended its extradition law to permit extradition in the case of murder of either the head of a foreign government or a member of his family.[6] This amendment was known as the "attentat" clause.

Those States which have adopted the attentat clause in their extradition treaties now have the right to release for extradition or prosecution a fugitive criminal who has murdered the head of a State or his family. This clause is of extreme importance as an effective measure against terrorism, because it allows for the extradition of a specific political crime, which could set a precedent to allow for future exceptions to non-extradition.

The United States has expanded the guidelines of the determination of fugitive status since World War II. In the *Eisler Extradition Case,* 1948, Ger-

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[3] Manley O. Hudson, editor, *Cases and Other Materials on International Law,* third edition, St. Paul, 1951, page 507.
[4] *Ibid.,* page 506.
[5] *Ibid.,* pages 506-508.
[6] L. Oppenheim, *International Law: A Treatise, Peace,* Volume I, edited by H. Lauterpacht, 8th edition, New York, 1955, page 709.

hart Eisler was accused of committing two crimes in the United States. The first was that he was in contempt of Congress for refusing to be sworn in or take the stand when he was called to testify before the House Committee on Un-American Activities. The other was that he knowingly perjured himself when he was seeking permission to leave the United States.[7] Eisler had fled to Great Britain where the United States attempted to invoke the extradition treaty. Great Britain refused to allow the extradition because British law did not consider false testimony to an administrator as perjury.[8] While this decision may not appear to be within the present topic, the principle that was advocated was that the crime the fugitive is to be extradited for must be a crime in both concerned states. It is quite conceivable for a terrorist to be given sanctuary in a country which does not consider that type of terrorism a crime.

Another point was brought out by the United States Attorney General Edward Bates in his action in the *Lake Erie Pirates* case, 1864.[9] In this case, the United States claimed that these individuals fled to Canada after committing piracy on the Great Lake. There appeared to be a difficulty in terminology as to whether or not Lake Erie could be acceptable in a definition of piracy, for the word "sea."[10] Bates then suggested the United States attempt to extradite the fugitives on other grounds such as assault and robbery. The intent of Bates' suggestion, of course, was to first apprehend the fugitives and then be able to prosecute them for any crimes which they had committed.[11] This position would allow the victim State to fabricate or charge the fugitive with a common non-political crime which the fugitive could be extradited for. And, then, after he was in its custody, prosecute the fugitives for the political crime. No doubt this would be done versus terrorists or any political fugitive today if all other States agreed and if it had not been for the United States Supreme Court decision in *United States vs. Rauscher* (1886). In this case, the fugitive was given over to the United States on the charge of piracy on the high seas by Great Britain, but the United States attempted to indict him for a much more severe crime.[12] The Court's decision expressed the "principle of speciality." This principle means that an extradited individual can only be tried for the specific crime he was extradited for. Although the United States Supreme Court decision seems to be a guiding principle for United States' policy, Hudson points out that the United States has in practice acted differently. Hudson relates that the United States has "recognized by statute that persons surrendered from the Canal Zone to Panama may be prosecuted by Panama for other or graver offenses than those for which they were surrendered."[13]

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[7] Hans Kelsen, *Principles of International Law*, 2nd edition, edited by Robert W. Tucker, New York, 1966, pages 373-374.

[8] *Ibid.*

[9] David R. Deener, *The United States Attorney Generals and International Law*, Netherlands, 1957, page 239.

[10] See definition of "piracy" further in discussion, footnote 18.

[11] David R. Deener, *The United States Attorney Generals and International Law*, Netherlands, 1957, page 239.

[12] Manley O. Hudson, editor, *Cases and Other Materials on International Law*, third edition, St. Paul, 1951, page 516. It should be noted that Hudson does not inform the reader of what the "more severe crime" is.

[13] *Ibid.*, page 518, Act of July 5, 1932, 47 Stat. 574, 48 U.S.C.A. 1330a-1330j. For further inquiry along these lines see *Collins vs. O'Neil*, 1909, *Collins vs. Johnson*, 1915, *King vs. Corrigan*, 1931, and the *Lawrence Case*.

Another problem which may be encountered is the case in which an extradition treaty does not exist between the two states. The sanctuary state may always refuse to deport, expulse, exclude, or allow a special arrangement to regain a fugitive. However, the action is generally done out of courtesy. Since the *Webster-Ashburton Treaty of 1842,* the United States has concluded extradition treaties with practically every important country.[14] This point does not remedy the problem of terrorism, because in practice the United States does not have treaties with some of the sanctuary states, such as Cuba and Algeria. The talks between the United States and Cuba could alleviate part of the problem. However, apprehending the fugitive is still the primary concern. If there is no extradition treaty, the Unity States can ask the sanctuary State to return the individual, but that State is under no legal obligaion to do so. However, the power and influence the United States could assemble could very easily help the sanctuary state decide. The recent incident concerning Mayer Lansky is illustrative of the pressures that Israel felt, even if indirect or inferred. The American criminal fugitive was expulsed from Israel, and he offered any state one million dollars to accept him. He had a great deal of trouble, because few states could afford to alienate Washington.

In 1947, the United States Department of State refused to comply with a Soviet request to hand over a fugitive, who, while in their Mexican Embassy's employ, allegedly embezzled state funds.[15] The Department's refusal was based upon "a well-established principle of international law, that no right to extradition exists apart from treaty."[16] The State Department did not bother deciding whether or not the accused was a political or criminal fugitive. I would venture to guess, that since the embezzlement was not in direct motive and objective to overthrow (*In re Castioni* above) the Soviet government, the action was of a private nature, and, thus, not a political crime. Washington reacted to the non-treaty situation in this incident to deny the Soviet Union extradition request. The fact remains that a State is under no legal obligation to surrender a fugitive. In practice, states generally aid each other when a treaty of extradition does not exist. Some alternative methods of rendition are exclusion, expulsion, and special arrangements which have been mentioned above.

Hopefully, by examining three specific cases of terrorism, it may help clarify the status of a fugitive. The first specific area of terrorist activity is that on the sea.

A question which I hope will be clarified by the examination of terrorist acts at sea is the status of the acts of insurgents who are not yet recognized as belligerents. Typically, if it is left to the victim State's discretion, it would be to their advantage to treat unrecognized insurgents as if they were pirates or non-political criminals. A modern case dealing with this question was the 1961 case of the *Santa Maria.* This ship was seized at sea by some passengers and

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[14] Philip Q. Wright, *Enforcement of International Law Through Municipal Law in the United States,* 1916, Urbana, Illinois, page 90.
[15] Charles G. Fenwick, *International Law,* third edition, New York, 1962, page 331.
[16] *Ibid.*

crew members and the leader proclaimed they were Portuguese insurgents.[17] This case considers the status of individuals who participate in acts which would generally be considered as acts of piracy, except for their so-called political reasons. This case has aroused much discussion concerning whether it should be considered an act of piracy. The *Geneva Convention of the High Seas of 1958, sensu stricto,* suggests that it was not an act of piracy. Article 15 declares that piracy consists of:

> "Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed:
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> (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
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> (b) Against a ship, aircraft, persons or property, in a place outside the jurisdiction of any state."[18]

The section of this article which appears to make the case of the *Santa Maria* not an act of piracy is that phrase which says "for private ends." Captain Galvao, when he took control over the ship, not only declared that it was a political action, but also his crew did not acquire any personal gain.[19] The proof, then, in whether it was a political or criminal action is in what gains are to be made. If the gains serve to benefit individuals, it should be considered a criminal or piratical action. However, if the so-called purpose of the action does not benefit the individuals personally, but rather is done for the benefit of the society or "movement," it is deemed a political action. There can be no question that if Galvao's crew had received any personal gain from their actions, those actions would be considered piratical. The interesting note as regards the *Santa Maria* is that while the *Castioni* case advocates a definite relationship between the means and the object, this case differs for one thing in that the insurgents were acting at sea. In both cases, an individual was killed, but in the *Santa Maria* the question was not whether the murder was political, but was it rather an act of piracy? Professor Charles Fenwick feels that the seizing of the *Santa Maria* was an act of piracy because Galvao did not have a base of operations in Portugal and that violence was used against civilians and some third state nationals.[20] Professor L. C. Green, however, disagrees with Fenwick. Green adds that not only was there no violence against non-Portuguese, but also quotes a source as saying that the insurgents paid for their drinks at the bar.[21] Green alleges that Fenwick's query, "How could the offense be called 'political' when Galvao held no public office before starting his insurgent movement?" is somewhat lacking. He does this by questioning what public office was held before 1775 by Paul Revere, the Sons of Liberty,

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[17] Hans Kelsen, *Principles of International Law,* second edition, edited by Robert W. Tucker, New York, 1966, page 204.

[18] Max Sorensen, editor, *Manual of Public International Law,* New York, 1968, page 365, U.N. Doc. A/CONF. 13/L.53.

[19] L. C. Green, "Santa Maria: Rebels or Pirates," *British Yearbook of International Law,* 1961, Oxford, 1962, page 498.

[20] L. C. Green, "Santa Maria," *American Journal of International Law,* 1961, page 497, quotes Fenwick's article.

[21] *Ibid.,* page 498.

Ethan Allen, or the participants in the Boston Tea-Party?[22] The importance of this inquiry is that "terrorist" activities are relative depending on from which position the observer is looking. In the Arab nations, those that carry on "terrorist" activities are not called terrorists, but rather guerrillas, liberation armies, or even para-military forces. The *Santa Maria* is an important case to cite, because it examines the important question of when are individuals political insurgents and when are their actions piratical? Although scholars have disagreed, this case dramatizes the need for expanded classifications of political offenses.

Is there a point in an insurgency when the insurgents are or are not political actors? Do insurgents have to be recognized by the mother country or a third party? A case which helps clarify the second point, to an extent, is the *Ambrose Light* (1885). The Ambrose Light was seized by an American ship and brought for trial to New York. The Ambrose Light was heavily armed and was supposedly on its way to assist in an insurgent action against the government of Colombia.[23] In this case, the United States District Judge Brown held that unrecognized insurgents were pirates. This decision is somewhat inconsistent with the United States' Civil War recognition of the South as belligerents.[24]

The position of the United States has changed as can be witnessed by the *Harvard Law School Research in International Laws Draft Convention on Piracy*. In this study, the position seems clarified to the extent that it "excludes from its definition of piracy, all cases of wrongful attack on persons or property for political ends, whether they are made on behalf of states, or of recognized belligerents or organizations, or of unrecognized revolutionary bands."[25]

What this means to the international problem of terrorism is that insurgents, when taking over a ship, can be granted status as political criminals if they are recognized as acting out of political motives without involving non-involved states or nationals of those states. However, if their actions are deemed as acts of piracy, they are subjected to the jurisdiction of the capturing State to either try or extradite to the victim State. While few terrorist activities, today, involve the seizure of ships on he High Seas, the principles that these incidents review are of great importance when considering the overriding question of whether an act is criminal or political.

The second specific type of terrorism, it is hoped, will help clarify the problem even further. Most of the contemporary terrorist actions involve the hijacking of aircraft. Some governing principles of international law which govern air hijacking are found in the *Tokyo Convention on Crimes and Certain Other Acts Committed on Board Aircraft of 1963*.[26] This convention was designed to answer questions regarding the regulations governing jurisdiction over crimes committed on board aircraft. This document apparently improves

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[22] *Ibid.*

[23] Manley O. Hudson, editor, *Cases and Other Materials on International Law*, third edition, St. Paul, 1951, pages 132-136.

[24] L. C. Green, "Santa Maria: Rebels or Pirates," *British Yearbook of International Law*, 1961, Oxford, 1962, page 501.

[25] *Ibid.*, page 502.

[26] Sorensen, page 350.

upon the *Geneva Conference of 1958's* provisions pertaining to jurisdiction over acts of individuals on board aircraft. The *Geneva* agreement states that piracy could be dealt with by any nation which could apprehend the pirate. The *Tokyo* agreement of 1963 provides in Article 4 for dual jurisdiction. These concurrent jurisdictions are: (1) State of registry of the aircraft; and (2) State over which aircraft is flying.[27] The question of jurisdiction over air hijackers depends upon whether the action can be rightfully deemed as an act of piracy or as a political action, because political actions are not subject to extradition.

A re-examination of the definition of piracy contained in Article 15 of the *Geneva Conference of 1958* clearly defines the two criteria for acts to be considered piratical.[28] If a literal interpretation of the *Toyko* agreement of 1963 is utilized, an aircraft must always be within the jurisdiction of a State, because the aircraft must be registered by a State. Thus, air hijacking cannot be strictly considered an act of piracy. Obviously, hijacking can occur within the jurisdiction of a State and not qualify as political either. The answer to this semantic problem, of course, is that when an act of hijacking occurs within the jurisdiction of a State, and is not political, it could be considered criminal while not piratical.

An illustration of hijacking which would have to be considered as criminal, would have to demonstrate the motivation of personal gain. This test of motivation is not always easily demonstrable, especially in the case of unrecognized belligerents.

Another international agreement was finalized in December, 1970, at the Hague. The *Hague Agreement,* which was signed by over fifty states, obligates a signatory State to make any unlawful seizure or intimidation of a civil aircraft severely punishable.[29] Under the Agreement, the State is obligated to either prosecute or grant extradition of the hijacker.[30] However, this type of non-universal convention has little effect on the curtailment of international terrorism, because the maverick State may still grant sanctuary to the fugitive.

Another convention dealing with this problem was the *Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.* This conference, which basically parallels the *Hague Convention,* met in September, 1971.[31] Article 5 of this convention expands a State's jurisdiction over hijackers to include not only the State of registry of the aircraft and the State over whose territory the action occurred, but also:

> "(c) when the aircraft on board which the offense is committed lands in its territory with the alleged offender still on board.
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> (d) when the offense is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business, his permanent residence, in that State."[32]

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[27] *Ibid.*

[28] These criteria are: (1) the act must occur outside the jurisdiction of a State; and (2) the act must be committed for private gain.

[29] *ICAO Bulletin,* August, 1970, page 13.

[30] Stevenson, page 7. It is interesting to note that Mr. Stevenson does not make a distinction between political and criminal hijacking.

[31] Stevenson, page 8.

[32] *ICAO Bulletin,* October, 1971, page 16.

This expansion of jurisdiction increases the possibilities of apprehending the fugitive and coupled with Article 8 of this convention obligates the contracting States to include in their extradition treaties provisions to insure that these offenses be included as extraditable offenses.[33] This article goes further by stating (paragraph 2) that in a situation where an extradition treaty does not exist, the Convention may be considered as the legal basis of extradition.[34]

Nevertheless, Article 8 of the *Montreal Convention* grants the requested State the option of extraditing the fugitive and, thus, determining the status of the fugitive.

The problem facing the international community in the elimination of hijacking of civil aircraft is exemplary of the problem of international terrorism. There exists today ample international agreements to curtail the unlawful seizure of civil aircraft; nonetheless, hijacking continues — in fact, it has increased. The major powers have demonstrated a mutual interest in the curtailment of hijacking, yet the problem continues.[35] In addition, the United States has clearly made a major effort to create and implement anti-hijacking procedures.

There is no doubt that it is necessary to implement strong measures to counter the hijacking of civil aircraft. However, a case could be made that strong provisions to combat hijacking could easily be utilized to impede national liberation movements, especially unrecognized belligerents.

The other main area of terrorist activity is that involving armed bands. This realm of inquiry will have to deal with interrelated problems of State responsibility and victim State recourse. Armed bands differ considerably from hostile military expeditions in that in the former there is no formal organization, nor do they exhibit a strictly military character.[36] Armed bands have been referred to as "para-military" forces, "guerrilla," "liberation," or "freedom" fighters. It has been argued, that to a very real extent, the labeling of such forces depends not only on "political values,"[37] but one's ideological position. However, the characteristics of armed band conflict remain basically the same. Their operation does not require the existence of a state of war nor any internal strift in the victim State. Their activities include any action by small groups of individuals from crossing frontiers for purposes of private forays or raids to incursions into foreign territory with political designs.[38] This inquiry is again faced with the haunting question: Are these activities criminal or political?

There have been a few cases where armed bands have been motivated solely by the desire of personal gain. These bands have always been considered as marauders and criminals and, thus, subject to arrest, extradition, and punishment. Marauders have used the refuge of borders to escape criminal prosecution. The history of United States-Mexican relations is characterized by

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[33] *Ibid.*

[34] *Ibid.*

[35] This is demonstrated by the fact that the U.S.S.R., the United States, and the United Kingdom are all Depository Governments of the Montreal Convention, Article 15.

[36] Manuel R. Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons Against Foreign States*, the Hague, 1962, page 109.

[37] Richard A. Falk, "The Beirut Raid and the International Law of Retaliation," 63 *American Journal of International Law*, page 415.

[38] Garcia, page 109.

agreements which permit the authorities of each State the right of "hot pursuit."[39] While some raids by armed bands are easily distinguishable as either criminal or political attacks (the Jesse James Gang and Viet Cong attacks are examples respectively) others can be almost indistinguishable. An example of a raid by an armed band which is difficult to characterize as either political or criminal could be the incident of Chinese Nationalist troop raids in Burma. The determination in this particular case would have to be the motivation of Chinese troops; if they acted independently, or were they following orders?

Most of the publicity given armed band activities by the news media is for those which are politically motivated. These bands require the "sensational" names of "guerrilla," "liberation," "freedom fighters," or "terrorists." These bands usually attempt to justify their use of force as counter measures to fight the oppression and suffering placed upon their peoples by "imperialists" and/or "colonialists," or as the Algerian National Liberation Front (FLN) have justified it — "fighting a war of self-defense."[40]

Traditional international law legitimizes the use of force by insurgents only when their activities are successful.[41] However, the *Jus Gentium* allows a separatist group two procedural *modus operandi* for the legitimization of the use of force. The first method is if outside States recognize the insurgents as belligerents, thus, granting them belligerent status. The other way is if outside States grant the insurgents the status of a government.[42] It is for these reasons that liberation and revolution movements attempt to receive recognition.

It is in the realm of incursions by armed bands that victim States can exert pressure, influence, and even force to combat terrorist attacks. Obviously, the victim State will attempt to repel the attack (assuming the attack is in the form of a skirmish, shelling, or assault). The victim State will, usually, chase the "guerrillas" to at least its frontiers. The traditional right of self-defense allows a response, under certain conditions of this nature.[43] However, once the pursuit crosses a political boundary the victim State is violating the territorial integrity of that State.

The actual crossing of a political boundary is usually avoided, because it could produce severe ramifications — including war. However, State practice reveals two instances of when such an action is deemed fairly safe. The first time is when the otherwise violated State has given explicit permission (such as the United States' and South Vietnamese invasion into Cambodia of 1970) or treaty provisions to pursue marauders. The other safe instance of pursuit into a foreign territory occurs when the victim State feels it is militarily far superior to the violated State and fails to ask or receive permission to enter the

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[39] Ibid., page 121. The principle of "hot pursuit" usually applies to the law of the Sea of self-defense; however, it is used on land as a justification to pursue fugitives across frontiers. In *International Law and the Use of Force by States,* Ian Brownlie, page 372, voices the traditional view, that the "right of hot pursuit" has no real support in State practice for the alleged right across frontiers.

[40] Arnold Fraleigh, "The Algerian Revolution as a Case Study in International Law," *International Law of Civil War,* Richard A. Falk, editor, American Society for International Law, 1971, page 190.

[41] *Ibid.*

[42] *Ibid.*

[43] For further explanation of "certain conditions," see discussion below on the *Caroline Case,* notes 51 and 52.

State (such as the South Vitenamese and United States' attacks into Sihanouck's Cambodia of April and May, 1964).[44] These types of actions are usually justified through the "right of hot pursuit."

Another justification for the victim State to actually invade the neighboring State is if that State can be shown responsible for the acts of guerrillas. Several individuals have claimed that it is a State's responsibility "as far as possible to prevent its own subjects, and such foreign subjects as live within its territory, from committing injurious acts against other States."[45] A State could be held responsible for acts of insurgents only if they did not exercise "due diligence."[46] Oppenheim feels that when a State does not do all that could be reasonably done to prevent the misuse of its territory "either intentionally (or) maliciously or through culpable negligence does not comply with this duty commits an international delinquency for which it has to bear original responsibility."[47] A situation which exemplifies armed band activity practicing its activities from sanctuary States is that of the Palestinian Liberation Movement.[48] If these "guerrillas" use Syria as a sanctuary for its attacks upon Israeli settlements, Israel could claim that Syria has the capability to suppress the "terrorists" but has not done so. Israel could then declare Syria responsible for the acts of the "guerrillas" and threaten to carry out reprisals. This type of situation was paralleled in Jordan with King Hussein and the guerrillas, but the monarch decided to act with due diligence.

A different situation exists if the Palestinian "para-military" forces use Lebanon as a sanctuary. Lebanon with its small army would be endangering its existence as a State to attempt to take measures against the Palestinians. In this case, Israel would have to resort to different tactics,[49] unless Israel decides to ignore this type of interpretation and decides to take a more military course of action.

Some States have gone as far as to justify the invasion into a sanctuary State to state that they regard "as an aggressor in an international conflict the State which gives support to armed bands formed on its territory, which has invaded the territory of another State, or has refused to take in its own territory, not withstanding the request of the invaded State, all the measures in its power to deprive those bands of all assistance or protection."[50] This statement reflects the sentiment of the principle of "due diligence."

Assuming then that a convincing case could be made that the sanctuary State could be held responsible for the actions of the armed bands, the logical question arises — What would be the proper recourse for the victim State? Traditional international law bases the recourse on the right of "self-defense."

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[44] P. E. Corbett, "The Vietnam Struggle and International Law," *International Law of Civil War*, edited by Richard A. Falk, American Society for International Law, 1971, page 398.

[45] Most notable of these being L. Oppenheim, Oppenheim, page 365.

[46] *Ibid.*, page 366.

[47] *Ibid.*, page 365.

[48] I use this term as a blanket phrase to cover all of the organizations of this movement.

[49] Fraleigh (op. cit., page 206) relates an alternative tactic employed by the French in the Algerian Revolution, which is the "right of riposte" or the right to return, in like, across a border. In this case, from Algeria into Tunisia.

[50] Julius Stone, *Legal Controls of International Conflict*, New York, 1959, page 332.

The guidelines for the conditions for the exercise of self-defense were illustrated in the *Caroline Case* (1837). The *Caroline* was a vessel chartered by Canadian insurgents to carry arms from the American side of the Niagara River to the Canadian side. The Canadian Government crossed the River to the American side and seized and burned the *Caroline,* in the process killing two Americans. The United States charged that the Canadian Government violated its territorial integrity in the seizure. The British defended their actions as necessary to their self-preservation, because there was no time to petition the United States Government.[51] Daniel Webster, the United States' Secretary of State, offered two very important conditions, which have been universally adopted. Webster relates that there must exist the "necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation." Webster also feels that the recourse must be proportionate to the original offense.[52] This "doctrine of proportionality" is a difficult principle to apply to several types of terrorist activities. While frontier skirmishes and raids fairly well determine the type of defense mechanism which will be employed, it is much more difficult to determine what kind of recourse the victim State should utilize against activities such as attacks or bombings directed against civilian shopping centers, villages, and local transportation.

Prior to the United Nations Charter and the *Treaty for the Renunciation of War of 1928* a State could make any of the customary forms of reprisals against any international delict. The usually accepted definition, according to Hans Kelsen, is:

> "Reprisals are acts which, although normally illegal, are exceptionally permitted as (a) reaction of one State against a violation of its rights by another State."[53]

Reprisals can take the form of either an embargo, a seizure of property on the high seas, a pacific blockade, or the use of force.

In customary international law, a State must satisfy the conditions set down in the *Naulilaa Arbitration of 1928*[54] to legally use reprisals. The Court set forward the following conditions: (1) There must have been a previous illegal act on the part of the other party; (2) the reprisal must be preceded by an unsuccessful redress of the wrong committed; and (3) the measures adopted must not be excessive, that is, the principle of proportionality must be demonstrable.[55]

Derek Bowett presents a convincing case, that it has become extremely difficult to justify a reprisal which uses force, especially since the inception of the United Nations Charter.[56] One difficulty facing the justification of the use of force for reprisals, since the inception of the United Nations Charter

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[51] Oppenheim, pages 300-301.
[52] Sorensen, page 761.
[53] Kelsen, page 21.
[54] This case involves a Portuguese claim that German reprisals were unjustified. The Germans felt that their reprisals were justified, because a German official and two German South West African Germans were killed by a group of Portuguese troops in Angola. The governor of German South West Africa ordered German troops to attack Portuguese outposts and sent a military force into Portuguese territory in Angola. The Court held that Germany was responsible.
[55] Bishop, page 748, *International Law: Cases and Materials.*
[56] Derek Bowett, "Reprisals Involving Recourse to Armed Force," 66 *American Journal of International Law,* page 1-36, 1972.

is that the "use of force" is prohibited without Security Council determination as to force as the only recourse. Professor N. G. Onuf suggests that Bowett awkwardly infers that any action taken by the Security Council should be considered as having a "legal significance."[57] While the Charter is supreme in contemporary international law is unquestionable. This observer cannot agree with Dr. Onuf in granting the organs of the United Nations that same supreme authority. The organ of this reference, the Security Council, constantly demonstrates its innate political nature. If a political organ would or could determine legal questions, these decisions could not be unequivocal.

Nevertheless, the present international legal system, as regards reprisals and especially those used as retaliation for terrorist activities, appears to necessitate a new set of criteria for the use of force in the time of peace. Both the *Naulilaa* and the *Caroline* arbitration cannot deal with the present stage of international law.[58]

Richard Falk suggests just such a framework. He establishes a set of twelve criteria for the use of this type of force.[59] While Falk's points are excellent conditions to be complied with before reprisals can be applied, these points are not sufficient to deal with terrorism. As this essay has attempted to point out, the problems facing the elimination of international terrorism are compounded by differing perspectives, interpretations, and definitions. As long as States disagree as to the desirability of eliminating all acts of terrorism, there can be no universal termination of the enigma. However, a partial curtailment of these activities is possible.

This paper has attempted to survey several of the legal problems facing the eradication of terrorism. This essay has intentionally avoided the actual elimination of these type actions, but has instead concentrated on the problems of apprehending the fugitive. In this discussion, I have attempted to clarify the situation by examining three different types of terrorist activities, i.e., on land, on sea, and in the air. By approaching the problem in this way, the paper directs the reader to the fundamental question arising in every case; that is, whether the offense in question is political or criminal. In the present legal system, the offender does not have to be extradited, if the offense in question is deemed political. Nevertheless, new provisions which would allow for extradition of political offenders would hamper the activities of national liberation movements and should, therefore, not be implemented.

However, acts of terrorism should be controlled somewhat. A possibility to alleviate the problem to an extent would be to establish an International Criminal Court. This Court could have jurisdiction over all acts by individuals. The Court would determine the status of the fugitive and/or his movement.

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[57] A working paper by N. G. Onuf, "The Current Legal Status of Reprisals," Panel on Reprisals in International Law, American Society of International Law, page 1.

[58] In fact, if it were not for Charter's explicit prohibition against preemptive attacks, a State could probably justify anticipatory attacks on "guerrilla" camps, using the Canadian argument in the *Caroline* case that its actions were necessitated.

[59] See Richard A. Falk, "The Beirut Raid and the International Law of Retaliation," 63 *American Journal of International Law*, pages 441-442, 1969.

Once the status was determined, the individual could be prosecuted as a criminal or decisions could be made to deal with any punishment which might be warranted even though the offense was deemed political. This court would also be in authority to find a State responsible for activities by private persons and then declare the proper recourse for the victim State. While this court would not be the ultimate answer to the enigma of terrorism, it does establish possibilities which could prove equitable to both insurgent and victim State.