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# HIJACKING, FREEDOM, AND THE “AMERICAN WAY”

*Andreas F. Lowenfeld\**

JUDGMENT IN BERLIN. By *Herbert J. Stern*. New York: Universe Books. 1984. Pp. 384. \$15.95.

I enjoyed reading this book. I read it on a very long airplane ride (between Shanghai and New York), and it held my attention throughout. It reminded me, somehow, of Truman Capote's *In Cold Blood*,<sup>1</sup> in that it told a complicated legal story with fine attention to detail and with a detective thriller's technique of ending each chapter in a way that made me want to go right on to the next.

The story itself is a good one — not of a vicious murder, but of some quite unimportant people's flight to freedom. “Flight” in this context comes both from “flee” and from “fly,” and this is the source of the dilemma on which the plot depends. The hero of the story (to the extent it is not the author himself) is an East Berliner who cannot stand it any longer behind the Wall and (after other escape plans fail) hijacks a Polish airliner and brings it down in West Berlin.

Under the Hague Convention for the Suppression of Unlawful Seizure of Aircraft,<sup>2</sup> each landing state has an obligation to prosecute or extradite (*aut dedere, aut judicare*) anyone charged with unlawful seizure of an aircraft,<sup>3</sup> regardless of where the offense took place.<sup>4</sup> Moreover, just six weeks before LOT (Polish Airlines) Flight 165 bound from Gdansk to East Berlin was forced to land in West Berlin on August 30, 1978, the leaders of the major industrial nations, meeting at a summit conference in the West German capital, had issued the so-called Bonn Declaration, committing their nations to implement

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1. T. CAPOTE, *IN COLD BLOOD* (1965).

2. *Done* Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (entered into force Oct. 14, 1971) [hereinafter cited as Hague Convention].

3. See Hague Convention, *supra* note 2, arts. 7, 8, 22 U.S.T. at 1646.

4. This may be a slight, but only a slight overstatement, in that the idea of creating a truly universal crime, analogous to piracy or slavery, was rejected at the conference which adopted the Hague Convention. But the combination of articles 1, 3 and 4 creates a system of jurisdiction based on registration of the aircraft, the state of first landing, and the state where the alleged offender may be found, so that if all the relevant states are parties to the Convention, it is hard to imagine a situation in which the place where the offense was committed would affect the jurisdiction of states to prosecute the offender. For more on the Convention, see notes 44-48 *infra* and accompanying text.

sanctions — a civil aviation boycott — against any state that would not prosecute or extradite persons who have hijacked an aircraft.<sup>5</sup>

What to do then about the hijacker, one Hans Detlef Tiede, a waiter from East Berlin who had pointed the gun (it turned out to have been a toy gun) at the Polish crew of Flight 165, and his companion, Ingrid Ruske, a divorced woman with a twelve-year-old daughter and a lover whom she hoped to find in West Berlin, but who had meanwhile been arrested in the East for trying to arrange Ingrid's escape? Should Detlef and Ingrid be treated as heroes who risked their lives for freedom and love, or as dangerous criminals, as the Hague Convention provided and the Bonn Declaration reaffirmed? If the latter, should Tiede be extradited, whether to Poland or to East Germany, to face certain incarceration, or should he be tried in the West? And — now comes the extra ingredient around which this book is built — who should make the decisions in this case? For this plane came down in West Berlin, the city where World War II never quite ended, and the Cold War never thawed.

The Federal Republic of Germany apparently wanted no part of this case. There is no way to know what would have happened had LOT Flight 165 made it to Hamburg or Frankfurt or Munich. Luckily for the West German government, the plane did not stray that far off course, but landed at Tempelhof (West Berlin), just a few kilometers across town — but a world apart — from its intended destination in Schoenefeld (East Berlin). Though successive administrations in Bonn had kept up steady pressure since its inception in 1949 to integrate Land Berlin (*i.e.*, the three Western sectors of the city) into the Federal Republic,<sup>6</sup> here was one time when the West German government was pleased to say to the United States, "Herr Tiede landed in your sector of the occupied city — he's your problem." The U.S. government might well have responded, "No, thanks, we have no means to try Mr. Tiede, a civilian, and the obligation to try him rests with the Federal Republic." In fact, under the special procedure applicable to treaties concluded by the Federal Republic, West Germany had declared the Hague Convention applicable to West Berlin,<sup>7</sup> and that decision had been approved (by not being vetoed within twenty-one

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5. Joint Statement on International Terrorism, Bonn, July 17, 1978, *reprinted in* 1978-II PUB. PAPERS OF THE PRESIDENTS 1308-09; 78 DEPT. OF STATE BULL. No. 2018, Sept. 1978, at 5.

6. *See, e.g.*, Catudal, *The Berlin Agreement of 1971; Has It Worked?*, 25 INTL. & COMP. L. Q. 766 (1976); Lush, *The Relationship between Berlin and the Federal Republic of Germany*, 14 INTL. & COMP. L.Q. 742 (1965). For a historical overview of the legal aspects of the occupation of Germany and of Berlin since World War II, see also *United States v. Tiede*, 86 F.R.D. 227, 229-35 (U.S. Ct. Berlin 1979). This decision, by Judge Stern, is of course an important element of the story told in the book under review.

7. [1972] II Bundesgesetzblatt [BGBl] 1505, 1505. For a parallel provision concerning Penal Code, art. 316c, adopted in implementation of the Hague Convention, see [1971] BGBl 1977, 1978.

days) by the *Kommandatura*, the occupying authority represented by the commandants for Berlin of the four victorious powers (the Soviet seat being vacant since 1948).<sup>8</sup> But placing the onus on West Germany could have complicated the life of the West German government, which was in the process of negotiating one of its periodic exchanges of refugees for cash with East Germany. The U.S. government, for its part, seems to have been anxious to do nothing that could worsen relations with the government of the Federal Republic, which for a variety of reasons, including a well-publicized antipathy between Chancellor Schmidt and President Carter, were none too good at the time.<sup>9</sup>

At all events, some time in the fall of 1978, after lengthy exchanges between Washington and Bonn, the decision was taken that the United States would prosecute Detlef Tiede and his associate in a civilian U.S. court.<sup>10</sup> The financial costs would be borne by the Federal Republic,<sup>11</sup> but the political costs would be borne by the United

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8. The *Kommandatura* (actually a Russian word that sounds German and is pronounceable in English) derives its existence from the Agreement on Control Machinery in Germany, United States-United Kingdom-U.S.S.R., Nov. 14, 1944, 5 U.S.T. 2062, T.I.A.S. No. 3070, 236 U.N.T.S. 359. France became a party to the agreement about six months later. Amendments to the Agreement on Control Machinery in Germany, May 1, 1945, 5 U.S.T. 2072, T.I.A.S. No. 3070, 236 U.N.T.S. 400. The statement concerning the right of veto by the Allied *Kommandatura*, like much of the legal situation concerning (West) Berlin, requires some explanation. Under the Declaration of the Allied *Kommandatura* of May 21, 1952, the Berlin Senate was to inform the *Kommandatura* of treaties concluded by the Federal Republic in which Berlin was to be included, subject to the right of the *Kommandatura* to raise objections within 21 days. The Declaration on Berlin Governing Relations between the Allied *Kommandatura* and Berlin of May 26, 1952 (which took effect on May 5, 1955, at the time of the so-called Bonn Conventions terminating the occupation regime in the Federal Republic of Germany, 6 U.S.T. 4117, T.I.A.S. No. 3425, 331 U.N.T.S. 253), included foreign relations among reserved fields, and an order of the Berlin *Kommandatura* of May 14, 1955, provided that Berlin's participation in treaties of the Federal Republic "remains as heretofore." BK/O (55) 10, reproduced in English in DOCUMENTS ON BERLIN 1943-1963 at 153 (W. Heidemeyer & G. Hindrichs eds. 1963). The Quadripartite Agreement on Berlin of Sept. 3, 1971, 24 U.S.T. 283, T.I.A.S. No. 7551, 880 U.N.T.S. 115, contained an exchange of communications between the Western Allies and the U.S.S.R., according to which the Allies "maintain their rights and responsibilities" relating to the international relations of the Western Sectors of Berlin and then delegate to the Federal Republic the authority to extend international agreements and arrangements to the Western Sectors of Berlin "[i]n accordance with established procedures." Annex IV, 24 U.S.T. at 297-301.

In a letter to the Chancellor of the Federal Republic formally transmitting the Quadripartite Agreement and Protocols, the three Western powers state that their rights and responsibilities with respect to Berlin

are not affected and remain unchanged. Our Governments will continue, as heretofore, to exercise supreme authority in the Western Sectors of Berlin, within the framework of the Four Power responsibility which we share for Berlin as a whole.

24 U.S.T. at 343. The letter expressly referred, *inter alia*, to the Declaration of May 26, 1952; it was acknowledged formally by the Chancellor of the Federal Republic. 24 U.S.T. at 345-46.

9. One major cause of the strains between Washington and Bonn was the decision by President Carter not to proceed with construction and deployment of the neutron bomb, after Chancellor Schmidt had gone out on a limb to persuade the German people to accept the bomb.

10. The decision was formally communicated by a letter of Nov. 1, 1978, from the United States Mission in Berlin to the member of the Berlin Senate in charge of Berlin's Department of Justice. See *United States v. Tiede*, 86 F.R.D. 227, 228, 237 (U.S. Ct. Berlin 1979).

11. An amusing consequence of the cost sharing arrangement was that the U.S. judge, other court officials and counsel had to fly across the Atlantic on Lufthansa, rather than on a U.S.-flag

States. Prosecution would be in the "United States Court for Berlin."

U.S. military government courts had existed from 1946 to 1955 under authority of the Allied High Commission in Germany, but these had been disbanded when the occupation of West Germany was formally terminated, effective May 5, 1955. However, Berlin had become the focal point of the Cold War, and because the presence of Allied troops in West Berlin, as well as access to those troops from the West, were justified on the basis of the earlier four-power occupation agreements,<sup>12</sup> the occupation of (West) Berlin was not terminated when occupation ended for the Federal Republic.<sup>13</sup> By then, West Berlin had its own constitution and its own system of courts, but one week before the occupation ended in the Western Zones and the Allied High Commission went out of existence, the U.S. High Commissioner for Germany had promulgated Law No. 46, establishing a "United States Court for Berlin."<sup>14</sup>

It is not clear what the authors of Law No. 46 had in mind, other than an uneasy feeling that a situation might arise in which the Allied *Kommandatura* might promulgate a law and no court would be available to hear charges of violation of that law.<sup>15</sup> According to Article 3 of Law No. 46,

the Court shall have original jurisdiction to hear and decide any criminal case arising under legislation in effect in the United States Sector of Berlin if the offense was committed within the area of Greater Berlin . . . [except if the accused was a member of the U.S. armed forces] and [t]he Court may impose any penalty which is authorized by any law under which the accused is convicted.

Law No. 46 stated that judges and other officers of the court were to be appointed by the chief of the U.S. Mission to the Federal Republic

airline. Because Lufthansa is not permitted to serve Berlin — another of the surviving restraints of the occupation — the last leg of the journey, usually from Frankfurt to Berlin, had to be made on Pan American.

12. See, for example, the following statement in a note of July 17, 1961, from the United States to the Soviet Union:

With regard to Berlin, the United States is not insisting upon the maintenance of its legal rights because of any desire merely to perpetuate its presence there. It is insisting on, and will defend, its legal rights against attempts at unilateral abrogation because the freedom of the people of West Berlin depends on the maintenance of those rights. . . .

*Reprinted in U.S. SENATE COMM. ON FOREIGN RELATIONS, 92D CONG., 1ST SESS., DOCUMENTS ON GERMANY, 1944-1970, 546, 547 (Comm. Print 1971).*

13. See notes 6, 8 *supra* and accompanying text.

14. The law is listed in the Index of the Official Gazette of the Allied High Commission for Germany, dated May 5, 1955 (the last day of the occupation), as "to be published in Official Gazette of the Allied Kommandatura, Berlin." It is reproduced as an appendix to *United States v. Tiede*, 86 F.R.D. 227, 261-65 (U.S. Ct. Berlin 1979). The law begins, "The United States High Commissioner enacts as follows . . ."

15. For the most part, the laws applicable in Berlin were the laws of the Federal Republic. Formally, laws of the Federal Republic were enacted into law in Berlin pursuant to a so-called *Mantelgesetz* (cover law), which stated that provisions of a specified law of the Federal Republic were valid in West Berlin. The *Mantelgesetz* in turn was subject to being suspended by the Allied *Kommandatura*. See generally Lush, *supra* note 6, at 757-71 and documents cited therein.

(not, like other U.S. judges, by the President), but it did not specify any qualifications for a judge, for example whether he should be a judge in the United States. Decisions of the U.S. Court for Berlin were subject, upon petition of the defendant, to review by the Chief of Mission, but not, apparently, by any court.<sup>16</sup>

No judge had ever been appointed pursuant to Law No. 46, and no case had ever come before the U.S. Court for Berlin. But if that court had no judges, clerks, marshals, or courtrooms — let alone rules of procedure or precedents — it did exist on paper. In November 1978, in contemplation of the *Tiede* case, the court was given a judge, appointed by the U.S. ambassador to the Federal Republic of Germany on recommendation of the Office of Legal Adviser of the State Department. After a couple of false starts,<sup>17</sup> Judge Herbert J. Stern of the U.S. District Court for the District of New Jersey (and, of course, the author of the book under review) was chosen as the United States Judge for Berlin. By the time Judge Stern arrived in Berlin, it had been decided that the complaint against Mr. Tiede and his companion would be tried under American *procedure* — *i.e.*, essentially the Federal Rules of Criminal Procedure and of Evidence — but under the *substantive law* of the Federal Republic — *i.e.*, the German Criminal Code of 1871, as amended.

Could this combination work at all? It seems to me an interesting question — and not just for professors — whether the substantive and procedural aspects of a legal system are really independent of each other, so that one can plug the substance of one system into the procedure of the other, as one might plug in one's electric razor or hair dryer on a trip abroad, needing only an adapter or at most a transformer (read interpreter) to make the whole unit function. I would have liked to see Judge Stern reflect on that question, and on what it tells us about the use of the comparative method in law reform. I think the conclusion to be drawn from Judge Stern's tale is that the answer is yes, that the combination of one system's procedure and the other system's substance can work, at least if administered by those familiar with the procedure.<sup>18</sup> But reflection about such subjects

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16. Law No. 46, art. 5. It seems that review is different from appeal, and that the procedure was modelled after review by a commanding or convening officer of the decision of a court-martial. Cf. UNIF. CODE OF MILITARY JUSTICE arts. 64-66 (current version at 10 U.S.C. §§ 864-866 (1982)).

17. The first appointee, Judge Dudley B. Bonsal of the U.S. District Court for the Southern District of New York, spent only a few days on the job before withdrawing. Judge Bonsal was succeeded by a former judge in the military government courts, Leo M. Goodman, but he withdrew at the end of December. See pp. 44-49.

18. That conclusion would be consistent with the experience of civil courts in cases where the law of another jurisdiction is applied under conflict of laws rules. I can think of no analogy in criminal cases, however; extradition, which comes to mind, avoids the problem by requiring that the procedure of the requested state apply, and that the act for which a person is sought to be extradited constitute a crime in both the requesting and the requested state.

would be out of character with this book, the thrust of which is much more direct and intense. Judge Stern focuses on what is "essential," for the Rules for the U.S. Court for Berlin, promulgated before he arrived, had excluded the provision for indictment and trial by jury.<sup>19</sup> To Judge Stern, the jury was essential, a requirement of the United States Constitution unless waived by the accused (p. 63).

Evidently, the U.S. Mission in Berlin believed that a jury trial would be impossible to conduct in Berlin, which had no jury roll, no tradition of jury trials, and no way to assemble a group of the peers of Detlef Tiede.<sup>20</sup> More serious, the Mission seems to have feared that even if these obstacles could be overcome, no jury of West Berliners would convict a person who had risked his life to escape from behind the Wall, and who had not in fact caused injury to anyone. If a jury acquitted Tiede notwithstanding clear proof that he had forcibly diverted an airliner in contravention of numerous laws, as well as the Hague Convention, the whole reason for holding the trial would be frustrated, the campaign against hijacking and terrorism would be set back, and the Hague Convention would be dealt a serious blow.

These seem to me serious concerns, and I think Judge Stern does not give them due respect. Moreover, it was not clear to me before I read this book, and it is still not clear to me, that the right to a jury trial applies to a case of this kind. After all, the jury trial provision in the Constitution says:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.<sup>21</sup>

It is far from self-evident that this clause, or the comparable provision

19. Cf. FED. R. CRIM. P. 6, 7, 23, 24. Actually, Judge Stern is concerned only about trial by jury, and does not write about the indictment. The charge in the Tiede case was made by complaint prepared by the U.S. Attorney for Berlin, supported by an affidavit of an investigating officer of the U.S. Air Force.

20. I think the belief that there is no tradition of jury trials in Germany, repeated by Judge Stern at p. 85, is exaggerated. I myself remember attending a trial in Berlin in 1952 of a man accused of kidnapping persons from West Berlin to East Berlin, at which a group of lay men and women sat with three professional judges. Both in France and in Germany, the use of laypersons as "judges" in serious cases has been known since at least the middle of the nineteenth century. While there are differences between those systems and American-style juries, notably that in the former jurors and judges often sit together, the distinction is not as great as is often believed in the United States. Recall, for example, the French film, *Justice est Faite* (1950), released in the United States in 1953 as *Justice is Done* (and reviewed in N.Y. Times, Mar. 3, 1953, at 23, col. 2), which is in many ways comparable to the American film, *Twelve Angry Men* (1957) (reviewed in N.Y. Times, Apr. 15, 1957, at 24, col. 1), in that both explore the workings of the respective jury systems. It is also true that in West Germany (and therefore in West Berlin) since 1975, the role of juries has been reduced by virtue of the repeal of Articles 79-92 of the Law on the Constitution of Courts (GVERFG).

21. U.S. CONST. art. III, § 2.

in the sixth amendment,<sup>22</sup> contemplated the situation of a U.S. court trying an alien abroad for a crime committed abroad.<sup>23</sup>

I think one might have made a respectable argument that while, of course, the *essential* features of fair legal procedure were applicable — for instance the presumption of innocence, protection against police brutality, and the right to counsel — not every aspect of U.S. criminal procedure as it had developed over the years need be applied — for instance all the latest refinements on the privilege against self-incrimination, the precise last word on search and seizure, and, the crux of the case before Judge Stern, the right to a jury trial. In retrospect such an argument would probably have failed, but it would not have set the judge off on his extraordinary campaign, both in his formal decision and in his book, to depict the U.S. government attorneys as scheming bureaucrats wholly out of touch with the Values of American Justice, and himself as Valiant Defender of those values in the beleaguered outpost of freedom, the city from which Hitler initiated history's most brutal war, and the city now divided by the cruel wall that separates the free from the oppressed.

In the event, when American counsel appointed to defend Mr. Tiede and his companion moved for a jury trial, the attorneys for the U.S. government led off with a very different argument, or rather two related arguments. First, the U.S. Constitution did not apply at all to this case; and second, the decision whether the Constitution applies and whether it affords a jury trial was not for the court, and indeed had already been made by the political officers charged with making that decision:

Berlin is an occupied city. It is not United States territory. The United States presence there grows out of conquest, not the consent of the governed. . . .

The basic point is this: a defendant tried in the United States Court for Berlin is afforded certain rights found in the Constitution, but he receives these rights not by force of the Constitution itself . . ., but because the Secretary of State has made the determination that these certain rights should be provided. . . .

. . . [T]he assumptions and values which underlie the great common law conception of trial by jury do not necessarily have a place in the

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22. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .  
U.S. CONST. amend. VI.

23. *Cf.* *Dorr v. United States*, 195 U.S. 138, 144 (1904) (quoting *Hawaii v. Mankichi*, 190 U.S. 197, 218 (1903)) (holding that the right to trial by jury and to presentment by grand jury "are not fundamental in their nature"); *accord*, *Balzac v. Porto Rico*, 258 U.S. 298 (1922). These cases are criticized in the plurality opinion in *Reid v. Covert*, 354 U.S. 1 (1957) (holding that a U.S. civilian accompanying American armed forces abroad cannot be tried by a (nonjury) military court), but it was not clear whether *Reid* would or should be applied to aliens tried abroad under U.S. authority. In his decision, Judge Stern discusses these cases, *Tiede*, 86 F.R.D. at 247-51; in the book he does not.



conduct of an occupation. Whether it does in a particular situation is quintessentially a political question, to be determined by the officers responsible for the United States conduct of this occupation, and not by this Court.<sup>24</sup>

Tactically, it is clear that this argument was a blunder. One ought on principle to avoid telling a judge sitting on a motion that the motion has already been decided. The point about right of conquest, while technically defensible, did not ring true with respect to a garrison designed to protect, not subjugate, the citizens of West Berlin. And calling the right to jury trial in this case "quintessentially a political question"<sup>25</sup> is unpersuasive as well as provocative. Judge Stern, who refers to himself throughout the book in the third person, describes his reaction:

At first reading . . . he was incredulous, later furious. The brief announced the prosecution's thesis that the defendants had no right to trial by jury in Berlin because in Berlin *they had no rights at all!*

It was astounding. The theory of the prosecution — as he preferred to call it, rather than the United States — was that he presided in an occupation court, . . . a territory in which the defeated inhabitants had no rights, and their conquerors no legal restraint.

This was a doctrine worthy of Adolf Hitler himself. Not since the "Peoples' Court" of the Nazi era had Berlin heard of such a thing in a "court of law."<sup>26</sup>

Do the U.S. government lawyers (I will use that term, even if it offends Judge Stern) deserve this kind of attack? Tactics aside, was their argument so unworthy, so contrary to the values of Western Civilization to justify Judge Stern's reaction, which appears not only in the passage quoted, but throughout the book, and in somewhat (but not much) milder tone in the formal opinion as well?<sup>27</sup>

Surely the comparison with Hitler is bizarre. Even if it were correct that the judge functioned at the sufferance of the Secretary of State, that doesn't make the Secretary a vicious tyrant, or the judge a helpless puppet.<sup>28</sup>

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24. Memorandum of the Dept. of State to the Court, Mar. 6, 1979 (footnotes omitted), quoted in *United States v. Tiede*, 86 F.R.D. 227, 239, 241 (U.S. Ct. Berlin 1979). The Memorandum is also quoted, in slightly different form, at p. 94.

25. Quintessence:

The fifth essence or element of ancient or medieval philosophy (in addition to earth, water, air, and fire), supposed to constitute the heavenly bodies, to permeate the material world, and to be capable of extraction; also an extract from anything, containing its virtues or most essential part in concentrated form; hence, the purest form or most perfect embodiment of something immaterial, (as . . . "the *quintessence* of fashion.")

NEW CENTURY DICTIONARY 1453 (1942).

26. Pp. 95-96 (emphasis in original).

27. See *United States v. Tiede*, 86 F.R.D. 227, 238-44 (U.S. Ct. Berlin 1979).

28. Since Judge Stern mentions him by name in his opinion, it is worth recalling that the Secretary of State at the time was Cyrus R. Vance, who (whatever his strengths and weaknesses as foreign minister) is regarded by everyone who knows him as one of the most fair-minded and judicious persons in public life. I have no reason to believe that Mr. Vance was ever personally

The arguments into which, one suspects, defense counsel and the judge goaded counsel for the United States, were, as already noted, poor advocacy. An exchange such as the following could not advance the cause for which the U.S. Mission in Berlin was arguing:

THE COURT: Is that what you are telling me, that you may do whatever you wish, and whenever you decide to withdraw your grace, you may do it, at will?

THE COURT: Therefore, you are saying, are you not, that there is no right to due process in this court?

MR. SURENA [U.S. Attorney for Berlin]: That is correct.

THE COURT: [I]f the plane . . . had been hijacked by two Americans, the same procedures, the same proceedings and the same briefs could have been filed; is that not so?

MR. SURENA: Essentially, yes.<sup>29</sup>

The position taken by the U.S. attorneys affected not only the question of trial by jury, but also a number of other issues, such as the consequence of the fact that Detlef Tiede and Ingrid Ruske had been detained without charges for several months while the authorities tried to figure out what to do with them, and that U.S. Air Force Intelligence had apparently opened their mail and had conducted interrogations in circumstances that would not meet the *Miranda* standards. All of these points were questionable, but not wholly indefensible within a basic standard of due process. The contention that questions about these points were not even admissible, because the Constitution did not apply at all, was bound to undermine the argument that what the government had done was fair and reasonable: if the government attorneys were confident of the latter contention, why make the former one?<sup>30</sup>

In any event, the judge bristled at the suggestion that the rights of the defendants depended on the grace of the prosecution. In an opinion delivered orally in the English manner (and subsequently ex-

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involved in the *Tiede* case, but the Deputy Secretary, Warren Christopher, seems to have been brought in from time to time, and he too is a careful lawyer and very far from the kind of arbitrary actor that Judge Stern conjures up.

29. Transcript of Proceedings, Mar. 13, 1979, *quoted in* United States v. Tiede, 86 F.R.D. 227, 243 (U.S. Ct. Berlin 1979). A longer excerpt, interspersed with comment and stage directions by Judge Stern, appears at pp. 102-19.

30. An analogy that comes to mind was the argument made by plaintiffs in *Shaffer v. Heitner*, 433 U.S. 186 (1977), and accepted by the Supreme Court of Delaware, that there was no need to show that their effort to challenge in Delaware the conduct of directors of a Delaware corporation was fair and reasonable, since quasi in rem actions were based on power and not fairness. Whatever historical support that position might have had, it was to me the nadir of advocacy, and invited the overreaction of the U.S. Supreme Court. Had plaintiffs argued, "Of course all actions, whether in personam, in rem, or in between, must meet the requirements of due process; in this case those requirements have been met," it seems to me there is a good chance that the Court would have come out the other way in *Shaffer*, and that at least some jurisdiction on the basis of assets in the forum state would have been preserved.

panded for the federal reports), he decided (1) that the U.S. Constitution applied to the U.S. Court for Berlin, and (2) that the Constitution required a jury trial for Detlef Tiede. It proved possible to assemble a jury list from identity cards drawn at random from each of the twenty-two police stations in the American sector (pp. 190-91, 195-201). A jury box was built into the makeshift courtroom at the U.S. airbase, and eventually twelve citizens of Berlin (plus six alternates) were chosen to sit as jurors in *United States v. Tiede*.<sup>31</sup> The case against Ingrid Ruske was dismissed.

As befits the review of a thriller, I will not disclose the verdict of the jury here, nor the outcome of further confrontations between the U.S. government and the judge. As befits a law professor, however, I want to think out loud (or rather in print) about some of the questions that occurred to me while reading Judge Stern's book.

*First*, what about the application of the U.S. Constitution beyond the frontiers of the United States? Is this simply a subset of the problem of extraterritorial jurisdiction, so that if U.S. jurisdiction reaches an activity or person located abroad, so does the Constitution? Or is the standard different, so that even if there is involvement of the U.S. government in a given activity abroad, not all of the constraints of U.S. constitutional law are applicable or relevant? I recall, for example, a debate with one of my colleagues in the Office of Legal Adviser of the State Department in the 1960's about the lawfulness of sending a Peace Corps team to Nigeria to serve as teachers in village schools run by Anglican missionaries. Assuming — as we then did — that U.S. government officials could not serve as teachers in parochial schools in the United States,<sup>32</sup> did that restraint apply to persons on a U.S. government payroll teaching in Africa? Or would that be transplanting American values to situations to which they had no real application?<sup>33</sup>

To take another example, suppose U.S. law enforcement officers are collaborating with police in another country — say in trying to break up a narcotics ring. Certain behavior, it is clear to me, should

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31. An amusing incident (at least in retrospect) was that the Soviet Union sent a delegation to the U.S. Mission in Berlin to remind the United States about its obligations with respect to the hijacking and inquiring, "What about this jury trial business?" The irony of the U.S. attorney who had fought against his decision by all possible means now having to explain that decision to the Russians does not, of course, escape the judge-turned-author. See pp. 190, 194-95.

32. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1 (1947); and for later confirmation, see *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Meek v. Pittenger*, 421 U.S. 349 (1975).

33. My recollection is that we (*i.e.*, two middle-level executive branch lawyers) solved the problem by drafting a directive that the Peace Corps volunteers not take part in any chapel or prayer sessions, and teach only clearly secular subjects. Whether such a compromise can pass muster under U.S. domestic law is the issue raised in *Felton v. Secretary, United States Dept. of Educ.*, 739 F.2d 48 (2d Cir. 1984), *affid.* *Aguilar v. Felton*, 53 U.S.L.W. 5013 (June 25, 1985). My suggestion is that *Felton* may well be correct for New York City, but not dispositive (or even relevant) for Nigeria.

be forbidden to all persons operating on behalf of the United States: stomach pumps, torture, kidnapping, and similar acts that shock the conscience. It is not just the victim that is protected: the Constitution prohibits cruel or vicious action by anyone operating under authority of the United States. These issues, as I see it, do not involve drawing lines and balancing interests. Other issues in the administration of justice or in government generally do involve drawing lines and balancing interests, and different states can remain decent and civilized while drawing the lines in different ways, for instance on exclusion of evidence, on (noncorrupt) interrogation by police, on wiretaps, and on testimonial privileges.<sup>34</sup>

If the distinction I suggest has merit, it makes sense in the present context to ask with respect to the second category with what aim the lines are drawn, say between an individual's right to privacy and the police's duty to investigate crime, or between promoting education for all and keeping the state from becoming entangled with religion. Whether the lines were drawn by the framers of the Constitution, by Congress, or by the Supreme Court, it is pretty clear that they were drawn with the territory of the United States in mind, plus (in some instances) U.S. nationals residing abroad. The United States has no legitimate interest in whether Nigeria's schools do or do not observe separation of church and state, American style, but the U.S. government could not oblige an American citizen as part of his official duties to participate, anywhere in the world, in a religious service against his will, whether that American was in the Peace Corps, the Army, or the Foreign Service. I think the U.S. government could make use of evidence obtained in Patria by Patrian police as the results of interrogations not preceded by *Miranda* warnings — even if U.S. officers helped the Patrian police — because the United States has no interest in deterring or reforming the police in Patria, unless the participation of U.S. law enforcement officers was so great as to make the action that of the United States.<sup>35</sup> If instead of an interrogation the example were changed to stomach pumping or the use of electric prods, still involving the United States in a supporting but not a principal role, the answer should come out the other way.<sup>36</sup>

In the *Tiede* case, of course, the United States did have a principal role, but the additional connecting factor — U.S. citizenship of the

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34. It is of course true that if I propose two categories, one of which involves drawing lines and another which does not, it may at some point be necessary to draw a line between the two categories. But I see no reason to be denied the chance to distinguish red from blue just because I cannot pass a test on every shade of purple.

35. See *Rosado v. Civiletti*, 621 F.2d 1179 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980); *United States v. Marzano*, 537 F.2d 257 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). See generally RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 433 (Tent. Draft No. 6, 1985), and cases cited in the Reporters' Notes thereto.

36. See *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

person sought to be protected — was absent.<sup>37</sup> By the criteria here suggested, I think the United States was not obliged to afford a jury trial to an East German citizen being tried in West Berlin, though the Constitution did impose some restraints on action taken under authority of the United States.<sup>38</sup>

*Second*, a quite different subject (though related to the question of who makes the decision): How do we really feel about the act of a person who diverts a ship or plane to escape from tyranny?

In the early years of the cold war, as the Iron Curtain (in Churchill's phrase) descended over eastern Europe, the Western democracies tended to regard persons who risked their lives to flee from tyranny as heroes, and rejected demands to return them to the states from whose bonds they had escaped. The fact that in some of these escapes unwilling participants such as passengers or crew members were put in jeopardy did not override the welcome of those who had chosen freedom and thereby confirmed the superiority of Western values.

For example, on March 25, 1950, three Czechoslovak airliners with eighty-five persons aboard landed near Munich in the American zone of occupation of Germany. The government of Czechoslovakia demanded extradition of the members of this "terrorist group of marauders," who, it said, had used loaded revolvers to force the pilots (former members of the RAF) to fly to Germany, thereby violating at least four sections of the Czech penal code. The United States declined to surrender the perpetrators or any others on the plane who chose to remain in the West. Apart from the question of whether the extradition treaty between the United States and Czechoslovakia applied to German territory under U.S. occupation, the United States said: "To surrender political offenders . . . is not a duty; but, on the

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37. The *Restatement of Foreign Relations Law of the United States (Revised)* takes no position on the issue of applicability of the Constitution to noncitizens outside U.S. territory, but says in Comment:

Although the matter has not been definitively adjudicated, the Constitution probably governs also at least some exercises of authority by the United States in respect of some aliens abroad.

§ 721 comment b (Tent. Draft No. 6, 1985).

38. I do not mean to suggest that the U.S. attorneys were wise to resist a jury trial as fiercely as they did, or even that I would have ruled differently from the way Judge Stern did. I suggest only that it may not be correct to say, as he does, that if the sixth amendment does not apply in toto, then the U.S. authorities could act free of *all* constitutional restraints. See *Tiede*, 86 F.R.D. at 242-43; pp. 120-30. Put another way, I think Judge Stern's reliance on *Duncan v. Louisiana*, 391 U.S. 145 (1968), which held that the sixth amendment guarantee of a jury trial was applicable to the states of the United States, is misplaced or at least overdrawn. Calling a right "fundamental" within the United States, 391 U.S. at 149, is not conclusive of the issue in an international context. Indeed the adjective "fundamental" appears several times in the majority's opinion in *Duncan*, first in the phrase "fundamental to the American scheme of justice," 391 U.S. at 149, and later in the phrase "fundamental in the context of the criminal processes maintained by the American States." 391 U.S. at 150 n.14. Judge Stern quotes the first phrase and omits Justice White's statement that "[a] criminal process which was fair and equitable but used no juries is easy to imagine." 391 U.S. at 150 n.14.

contrary, compliance with such a demand would be considered a dishonorable subserviency to a foreign power, and an act meriting the reprobation of mankind."<sup>39</sup> Similar episodes occurred in connection with a locomotive engineer who drove a Czech train through a barrier into West Germany in 1951, and was not only not returned but was given a hero's welcome in New York.<sup>40</sup> The Swiss Federal (Supreme) Court refused to approve extradition of three Yugoslav airmen who diverted a plane of the Yugoslavian airline to Zurich in 1951,<sup>41</sup> and the English Court of Queen's Bench refused to approve the return of a Polish fisherman who locked up the captain and other members of the crew of a Polish ship in the North Sea and put into an English port.<sup>42</sup>

After Fidel Castro came to power in Cuba in 1959, hijacking of aircraft from the United States to Havana became a major problem, and (though no grave air disaster took place as a result of hijacking), the United States changed its view. For a decade, successive U.S. administrations conducted an international campaign to secure cooperation of all states to deter and punish aircraft hijacking. The campaign progressed slowly until the Labor Day weekend in 1970 (later known as Black September), when four airliners bound from different cities in Europe to New York were assaulted almost simultaneously by a Palestinian Arab commando group, with three planes (plus another flight a few days later) diverted to the Middle East and a fourth able to make an emergency landing in London after an in-flight gun battle.<sup>43</sup>

Black September, 1970, galvanized the world into action, and by the end of the year it was possible to conclude the Hague Convention for the Suppression of Unlawful Seizure of Aircraft.<sup>44</sup> All contracting

39. Exchange of Notes between Czechoslovakian Ministry of Foreign Affairs and American Embassy, Prague, Mar. 30, 1950, and Apr. 6, 1950, *reprinted in* 22 DEPT. OF STATE BULL. 595 (1950); 6 M. WHITEMAN, DIGEST OF INTL. L. 810-11 (1968).

40. See 6 M. WHITEMAN, *supra* note 39, at 811-13; N.Y. Times, Nov. 24, 1951, at 18, col. 4.

41. Judgment of April 30, 1952, Bundesgericht, Switz., 78 Entscheidungen des Bundesgerichts I, 39, *reproduced in English in* A. LOWENFELD, AVIATION LAW § 3.1 (2d ed. 1981) (and digested in 19 I.L.R. 371 (1952)).

42. Reg. v. Governor of Buxton Prison [*Ex parte* Kolczynski], [1955] 1 Q.B. 540, [1955] 1 All E.R. 31.

43. See *4 Jets Hijacked; One, a 747, Is Blown Up*, N.Y. Times, Sept. 7, 1970, at 1, col. 4; *Negotiations With Red Cross Official Are Awaited Today*, N.Y. Times, Sept. 10, 1970, at 1, col. 7. The planes belonged respectively to Pan American, TWA, Swissair, El Al (the one that made it to London) and British Overseas Airways. Following the hijackings, hostilities broke out in Jordan between the Popular Front for the Liberation of Palestine, who claimed credit for the hijackings, and forces loyal to King Hussein of Jordan. Subsequently armored units from Syria intervened, and for a time it appeared that a general Middle East war might break out. For a digest of subsequent events, including various exchanges of hostages and the death of President Nasser of Egypt, see A. LOWENFELD, *supra* note 41, at 8-15, 8-16.

44. The Convention was negotiated and concluded under the auspices of the International Civil Aviation Organization, and it is interesting that the Soviet Union, which had declined to join that organization for a quarter century, did so in the fall of 1970 in order to be able to participate in the final drafting and negotiation of the Hague Hijacking Convention. See 2 INTERNATIONAL CIVIL AVIATION ORG., INTERNATIONAL CONFERENCE ON AIR LAW, THE

states — eventually some 115 countries — were required to arrest persons suspected of hijacking or attempting to hijack an airplane, and to treat them like persons charged with a serious crime, regardless of where the act had been committed.<sup>45</sup> The United States, supported by the Soviet Union, urged adoption of a provision that would say:

For the purposes of [the articles requiring states to prosecute or extradite], the offense, whatever its motivation, shall be considered to be a serious common crime and not a political offense,<sup>46</sup>

but it proved impossible to secure agreement on this wording. A compromise formulation that would have imposed the obligation to prosecute or extradite "whatever the motive for the offense" was first accepted, but ultimately rejected<sup>47</sup> in favor of what is now the actual text of the Convention:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, *without exception whatsoever* and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state.<sup>48</sup>

Clearly the thrust of the Hague Convention was to remove considerations of politics, sympathy, or asylum from the Convention to the extent the nations could agree, and to place maximum emphasis on deterrence and punishment. Still, I think sympathy toward persons like Detlef Tiede cannot be removed by legislation or treaty, as this book illustrates throughout. Tiede himself was at first treated like a hero, though that treatment did not last long. Judge Stern describes the scene at Tempelhof Airport:

Hans Detlef Alexander Tiede, a resident of East Berlin, holding his arms raised with his fingers showing "V" for victory, came through the hatch. He grinned at the American armada and threw his pistol to one of the colonels. "Welcome to free Berlin," said a colonel, with a smile.

A beautiful blonde woman, holding the hand of a twelve-year-old girl, stepped into the doorway. The other colonel roundly kissed her, as she and her daughter alighted from the plane. Eight of the other passengers immediately defected to the West.

It was, obviously, another daring act of piracy by desperate East Berliners to win their freedom. [P. 4.]

A few hours later, Tiede and his companion were arrested. Judge Stern, it is clear, is rooting for Tiede from the moment he arrives,

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HAGUE, DEC. 1970, ICAO Doc. 8979-LC/165-1 & -2, at ix (1972) [hereinafter cited as HAGUE PROCEEDINGS].

45. See note 4 *supra* and accompanying text.

46. 2 HAGUE PROCEEDINGS, *supra* note 44, at 69.

47. 1 HAGUE PROCEEDINGS, *supra* note 44, at 130-77, 177-80.

48. 2 HAGUE PROCEEDINGS, *supra* note 44, at 174 (emphasis added).

though he understands that his role is to apply a prescribed law to proven facts. That, in a real sense, is why the jury is important, because it can apply contemporary values to temper the strictness of legal rules.<sup>49</sup>

My question is whether society is prepared to confirm the choice, made by governments in 1970, to prefer security of civil aviation over the tradition of sanctuary for political refugees. The experience with attempts to extradite actual terrorists, such as members of the Provisional Irish Republican Army accused (and in many instances, convicted) of bombings, ambushes, and the like — *i.e.*, of actual, not just potential destruction of life and property — suggests skepticism.<sup>50</sup> It is clear that no one was prepared to extradite Detlef Tiede to East Germany or Poland. As for prosecuting him, there may have been a range of views, from acquittal on the ground of justification, to imposing a nominal sentence, to imposing a sentence just long enough to deter the next person. Punishment for an evil deed seems hardly to have entered into the discussion. I think there is good reason to doubt the resolve expressed by states in the Hague Convention.

*Finally*, what about Berlin itself? Is it under an indefinite sentence to remain partitioned, to serve as a reminder to a forgetful world that neither détente nor cold war, neither freeze nor thaw between the super powers, can be permitted to go too far? The answer to that question, I fear, is yes, and the legal issues — whether the Allied troops are in West Berlin as occupiers or protectors, to what extent West Berlin is or may be integrated into the Federal Republic, and a host of intricate sub-issues such as those surrounding the United States Court for Berlin<sup>51</sup> — should not obscure the underlying reality

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49. A subplot in the trial involved a lengthy argument among learned professors about whether under German law the defenses of justification and excuse raised on behalf of the defendant (German Penal Code arts. 34, 35) are to be submitted to the judge or to the jury. Pp. 296-301. Judge Stern decided the issue was for the jury, evidently on the basis that the American approach prevailed over the German one. The outcome, as I have already said, will not be disclosed here.

50. See, e.g., *In re McMullen*, Mag. No. 3-78-1899 MG (N.D. Cal. 1979), reprinted in EXTRADITION ACT OF 1981: HEARINGS BEFORE THE SENATE COMM. ON JUDICIARY, 97th Cong., 1st Sess. 294 (1981); *In re Mackin*, Mag. No. 80 Cr. Misc. (S.D.N.Y. 1981), reprinted in *id.* at 140, appeal dismissed *sub nom.* United States v. Mackin, 668 F.2d 122 (2d Cir. 1981); but see *McGlinchey v. Wren*, [1982] I.R. 154 (Ireland); Appeal of Garcia-Ramirez, Lujambio Galdeano & Martinez-Beiztegui, 1984 Bulletin des arrêts de la Cour de cassation, chambre criminelle 727, 732-37 (decision of the French Supreme Court approving extradition of members of the Basque terrorist group E.T.A. accused of nine murders and rejecting the contention that they were political refugees); *French High Court Supports Basques' Extradition*, N.Y. Times, Sept. 23, 1984, at A23, col. 1. The latter decision was carried out by the French court. See *France to Extradite Three Basques to Spain*, N.Y. Times, Sept. 24, 1984, at A3, col. 2; *French Court Rejects Basque Appeal*, N.Y. Times, Sept. 27, 1984, at A3, col. 3; *3 Basques Hospitalized On Arrival in Spain*, N.Y. Times, Sept. 28, 1984, at A7, col. 2; see also Lewis, *A Move against Terrorists*, N.Y. Times, Oct. 5, 1984, at A31, col. 2.

51. See sources cited at note 6 *supra*.



of a divided city and a divided world. That depressing truth, and the desperate measures to which it drives ordinary men and women, are the real message, the real Judgment in Berlin.