Fordham International Law Journal

Volume 1, *Issue* 1 1977 *Article* 3

The Defection of Viktor Belenko: The Use of International Law to Justify Political Decisions

James P. Eyster, II*

*

The Defection of Viktor Belenko: The Use of International Law to Justify Political Decisions

James P. Eyster, II

Abstract

This article explores how Japan, the Soviet Union, and the United States, at the time of publication, had used international law to justify political decisions.

THE DEFECTION OF VIKTOR BELENKO: THE USE OF INTERNATIONAL LAW TO JUSTIFY POLITICAL DECISIONS

On September 6, 1976 Japanese Self-Defense Forces spotted an intruding aircraft on their radar screen. Despite a radio warning, the plane continued to approach the northern Japanese island of Hokkaido and then disappeared from radar. Twenty-four minutes later, the jet, a Russian MIG-25, circled the civilian airport at Hakodate and landed. Though two drag chutes were employed to aid in braking, the jet rolled past the end of the mile-long runway, knocking down two short antennae before coming to a halt. The pilot emerged from the cockpit, fired two warning pistol shots, and shouted his intentions: to defect from the U.S.S.R. and receive asylum in the United States.

Such was the unusual entrance of Viktor Ivanovich Belenko, a first lieutenant in the Russian Air Force, into the free world, an entrance which embarrassed the Soviet Union and strained that government's already tense relationship with Japan. In Russia's attempts to regain control over Belenko, in Japan's wish to maintain the friendship of both the United States, and the Soviets, and in the Pentagon's desire to learn more about the escaped pilot and his plane, the three countries looked to the tenets of international law for direction. Each analyzed prospective plans in view of the customs, general principles, and treaties which linked the nations together. Each State's defense of its subsequent actions on legal grounds

illustrates the increasing emphasis on legal solutions for political problems.

Japanese Measures

Officials and citizens of Japan were terrified by the ease with which Belenko eluded the national defense system. But beyond being frightened, officials were perplexed over what should be done with their uninvited guest. In arriving at an answer, the Japanese government considered legal practices, both municipal and international, as well as the extralegal implications of its actions.

The police immediately arrested Lieutenant Belenko. He was held in custody for six violations of Japanese law, including violation of Japanese airspace, abnormal low flying, damage to airport equipment, illegal entry, and illegal possession of a firearm.[1]

The treatment of this unusual situation as a routine criminal case possessed several advantages for the Japanese. First, it lodged the pilot safely away until the political arm of the government could decide on proper action. In addition to protecting him from the Soviet government, this move thwarted the intention of the United States to interrogate him. Both the armed forces and the Ministry of Foreign Affairs were able to deny requests made by the Soviet Union, the United States, and by four North Atlantic Treaty countries, explaining that the police had custody of both plane and pilot.[2] Not until municipal police had finished their investigation would the other governmental branches gain custody. By downplaying the incident, the government gained time for consideration of whether to return Belenko to Russia,

send him to the United States or keep him in Japan.

The Ministries of Justice and of Foreign Affairs did consider their options, notwithstanding the police investigation. Both Belenko and the aircraft were under the exclusive jurisdiction of the Japanese government.[3] Each could be handled by using a variety of legal tools. Any decision made would aggravate foreign relationships by forcing Japan to favor either the Soviet Union or the United States.

One method of disposition, that of criminal imprisonment, would have greatly alleviated Japan's international dilemna. The United States could not have pressed a claim for his release. Likewise, if Belenko were punished in Japan, the principle of double jeopardy would immunize him from certain Soviet criminal actions.[4] His sentence ended, the pilot would have been free to seek asylum in the United States. The time delay would have allowed the Russians to minimize the value of Belenko's confidential knowledge.

Deportation, following the procedures of the Japanese immigration law,[5] would have also solved the problem of the pilot's unwanted presence. Because Belenko entered Japan illegally he could have been denied permission to land by the immigration inspector at the port of entry.[6] He then would have been transferred to a special inquiry officer for a hearing.[7] If the officer had affirmed the inspector's finding, the alien could have filed an objection with the Ministry of Justice. (Despite a determination that the alien's objection was groundless, the Minister may grant special permission to land.[8] Otherwise, the alien would be returned to the country of which he is a national or, if this could not be effected, he would be deported to

any other country according to his wishes.)[9]

How would Belenko have fared under this procedure? Excluding a grant of citizenship or asylum from the United States, his probability of avoiding deportation would have been low. Japanese immigration authorities are generally harsh in application of the deportation rules. They have deported several aliens who would clearly have been persecuted by their nations for political crimes.[10] Indeed, Japanese officials, in general, have rarely shown much concern for political criminals or refugees[11] despite the declaration in the preamble to the Japanese constitution of the right of all peoples of the world "to live in peace, free from fear and want."[12] The discretion of the Minister of Justice to grant special landing permission is viewed by the Tokyo High Court as "an act of grace" by the State and hence, non-justiciable.[13] Without the protection of judicial review, the alien has no way of challenging an arbitrary order of deportation by the Minister of Justice. To date, the Minister has shown little mercy.[14]

The probability of deportation makes the possibility of asylum in Japan unlikely. Though early writers on international law considered the grant of political asylum to be an obligation of the State,[15] presently it is viewed merely as a legal power of the State.[16] The procedure for granting asylum is similar to that for deportation, and the determination of the Minister of Justice is nonreviewable by the judiciary. As in a deportation case, an alien can only depend upon his luck and the charity of an usually uncharitable administrator.[17]

The Japanese government had a choice of several established procedures for determining the future of Lieutenant Belenko. Few

international guidelines, however, aided the government in the disposition of the MIG-25 fighter plane. The Minister of Foreign Affairs asserted that when airplanes of one country made emergency landings in the territory of another, the aircraft and their pilots would usually be returned. However, he added, "There is no established international practice conerning what to do with the aircraft used by such defectors."[18] Unauthorized overflight by a foreign military aircraft represents an infringement of the sovereignty of the affected State.[19] It is generally admitted that the overflown country is free to deal as it wishes with both aircraft and crew.[20] Furthermore, it is common practice to confiscate a craft which has entered the country without going through customs procedure.[21]

The instant case was unfortunately complicated by the plane's novel status--a stolen foreign military aircraft. Such State craft are traditionally immune from confiscation. Some nations, including the United States, consider such immunity to exist only with the consent of the receiving government, viewing such consent as merely a voluntary waiver of the nation's exclusive and absolute territorial jurisdiction. As such, a waiver may be withdrawn at will by the nation.[22]

Other jurists and several States, including the Soviet Union, look upon the immunity of State property from security measures and from confiscation as an expression of a fundamental principle of international law--the sovereignty of States.[23] The Japanese government was understandably interested in examining a plane which had penetrated its air defense with such ease. With conflicting views on

the legality of inspecting or confiscating a foreign State aircraft, the Japanese unfortunately received little consel from international legal principles.

Soviet Measures

The Soviet Union had two courses of action open for its securing the return of Viktor Belenko. One such measure would have involved the criminal indictment of Belenko for stealing State property. By presenting Belenko as a criminal, a request for extradition would have been in order: The Soviet Union, however, perhaps too embarrassed to admit the truth, attempted to achieve his return in another manner.

The Soviet Embassy, upon discovery of Belenko's action asked the Japanese Foreign Ministry for permission to interview the pilot and for recognition of the Soviet government's "inviolable right to protect its military secrets" by returning the plane.[24] The Soviets based the first request on the Japan-U.S.S.R. Consular Convention,[25] which states, at Article 31:

> 1. A consular officer shall, within the consular district, be entitled to interview and communicate with any national of the sending State . . .
> 2. The receiving State may not in any way restrict the communication of a national of the sending State with the consulate, or his access thereto.[26]

The Japanese Foreign Ministry, first said it needed to investigate the incident before granting an interview,[27] then later refused. The Soviet Embassy argued that this violated the consular agreement. The ministry held, however, that Belenko had no desire for such a meeting. Therefore, the spirit of the agreement which was

aimed at "protecting humanitarian rights of Japanese and Soviet subjects in each country" was not contravened.[28]

After receiving four more demands for an interview, the Foreign Ministry persuaded Belenko to meet with a Russian embassy official to show that the pilot was not being kept against his will.[29] The official urged him to return to the Soviet Union, but the pilot refused.[30] The official Tass press agency characterized the short meeting as a "'farce' that showed the pilot had been drugged."[31]

The agency also stated that Belenko had lost his bearings during an ordinary training flight and been forced to land in Japan due to a lack of fuel.[32] The Soviets appeared to have had several reasons for assuming this position. Besides explaining away a most embarrassing incident, the Russians may have hoped to gain at least partial immunity from Japanese jurisdiction for both Belenko and the jet.

Regardless of Belenko's intent, all legal authorities and the Soviet Union itself would agree that he had violated Japan's airspace.[33] The Convention on International Civil Aviation (1944 Chicago Convention), to which both Japan and the U.S.S.R. are signatories, holds that "every State has complete and exclusive sovereignty over the airspace above its territory."[34] Furthermore, Soviet spokesmen often dwell on the respect accorded by the Soviet Union to the airspace sovereignty of other States.[35] And finally, the Soviet Union is extremely harsh in its punishment for unauthorized flight into the U.S.S.R.[36]

When entry is made by an aircraft in distress, however, it is

customary that both the plane and its crew are immune from prosecution.[37] Unfortunately, while a great amount of litigation and legislation has involved civil aircraft, little has been written about the rights and obligations of military aircraft in foreign territory.[38] Several authors have suggested the crew and aircraft may not be subjected to criminal penalties or unnecessary detention in the instance of a distress landing;[39] but, as yet no multi-lateral agreements have been spoken on the issue.[40] The Soviets may have expected the unsettled condition of the law to allow them to assert a right to Belenko's immunity from Japanese prosecution and his return.[41]

One path not taken by the U.S.S.R. was that of an extradition request.[42] Traditionally, extradition requests must be honored only if based on a treaty.[43] The Soviet Union and Japan, had, in fact, agreed to an extradition treaty.[44] But as it had been created before the Russian revolution, its present validity was doubtful.[45]

Extradition is not limited to treaty situations, however. While the harboring State has no duty to return the fugitive, it sometimes possesses the right to do so.[46] Japan has, in similar situations, granted extradition requests which were independent of treaty. Under the Extradition Law of 1964, the Japanese Minister of Foreign Affairs sends the foreign request to the Minister of Justice. At his discretion, the request may be denied as inappropriate as a matter of law or it may be filed with the Tokyo High Court for examination. After offering the fugitive the opportunity to defend himself, the court may deliver a decision of extradition. The Minister of Justice again passes on the request, this time as to the weight of

the evidence, after which he either affirms or reverses the court's decision.[47]

Three barriers to extradition exist under this law. A determination of any one of them makes compliance with the extradition request unlikely. The first, common to many treaties and conventions is the refusal to extradite a political offender.[48] Besides examining the acts of the fugitive, the harboring State should give careful consideration to the motives of the requesting State. If the requesting State seeks the fugitive for reasons other than the ordinary enforcement of criminal law, or if the actor's purpose was protest against a policy of the State rather than furtherance of his own private interests, the requested State might well refuse to extradite the offender.[49]

The interpretation given to political crime in Japanese jurisprudence is a narrow one. Not only must the act be one committed for the purpose of violating the political order,[50] but also the requesting State must have instituted criminal proceedings against the perpetrator.[51] In the instant case Belenko's theft of the jet may not have been politically motivated.[52] Furthermore, he would qualify as a political criminal only if the U.S.S.R. had instituted action against him for crimes which were political in nature. If the U.S.S.R. limited itself to prosecution for the theft of a State sircraft while omitting charges of desertion or treason,[53] Japan might well have honored the Soviet extradition request. Thus, even if Belenko had been considered a political criminal, he would not have been absolutely protected from extradition.

The Tokyo High Court in 1971 and again in 1972 held that while the right of non-extradition is established in international law, the obligation of the State not to extradite is not generally established.[54] The court, basing its opinion on the writings of Japanese jurists and on the Harvard Draft Convention on Extradition,[55] stated that a sovereign has the discretion to extradite or not.[56] The policy of non-extradition, in short, is only a "humanitarian right" not a "legal obligation."

Despite the possibility that Japanese officials might have returned Belenko, the U.S.S.R. made no request for extradition.[57] Perhaps the Soviets were too embarrassed to admit formally that one of these top pilots had defected with one of their most advanced aircraft. Perhaps they despaired of being granted an extradition request in view of strong United States pressure. Whatever the reason, they chose not to use a potentially fruitful method for the return of Viktor Belenko.

The Soviet government did then have some support in international law for demanding the return of the pilot. They were less justified in ordering the return of the aircraft. According to several jurists, all proprietary rights in the plane were lost when it entered Japanese territory.[58] The Soviet Union, however, claimed immunity from security measures and confiscation on two grounds. First, the landing in Japan was necessary for the safety of the aircraft and pilot. They had entered in distress.[59] Even barring that admission, the Soviet jurists would contend that State property is always immune from inspection or execution.[60] Thus, with justifications based in international law theory, the Russians demanded the

return of Belenko and the MIG-25 jet aircraft.

The Japanese government, however, realized the shortcomings of the possible solutions. Political considerations prevented a grant of asylum; humanitarian reasons spoke against deportation; and legal principles foreclosed extradition. No course of action neatly resolved all the conflicting considerations. Yet the longer Belenko remained in Japan, the more embarrassing his presence became. Some determination had to be reached.

Happily for Belenko, the chosen course of action was just what he had hoped for. The pilot's first act upon landing had been to request asylum in the U.S.[61] Upon receipt of this news, President Ford personally granted the request.[62] Despite the President's willingness to accept Belenko, he could do nothing without Japan's consent to relinquishment of custody.

The Japanese foreign minister, eager to be rid of Belenko, agreed to transfer him to the United Stares,[63] an act accomplished soon after the pilot had finishing advising engineers on the dismantling of his aircraft.[64] Legally Belenko had not even entered Japan but rather reamined in custody at the border. Because he voluntarily agreed to immigrate to the U.S., no exclusion adjudication was necessary.[65] Thus, little legal machinery was in fact used by the Japanese in resolution of this extraordinary incident.

United States

But what of the methods used for immigrating a Russian military deserter into the United States? The laws on such actions

have varied considerably over the years due to a tug of war between Congress and the President. While Congress has usually sought to promote the economic well-being of its constitutents through alien exclusion, the President has supported the image of America as a haven for the world's oppressed.[66] Literacy tests, English language requirements, and even outright suspension of immigration were proposed; most of which were passed by the Congress and vetoed by the President.[67]

Under present immigration laws,[68] Belenko's admission could have been effected by any one of three procedures, each of which varied in requirements demanded and benefits conferred.

The first method, standard immigrant preference visa application,[69] would have been of little aid to the Russian pilot.[70] Due to normal processing delays, an alien outside the U.S. must often wait over two years before receiving a visa.[71]

Congress established two other means of entry specifically intended for refugees as a result of the backload of applications and the competition for entry among variously qualified aliens. They are the following: conditional entry under the Fair Share Act and parole.

In 1960 the United States, as its contribution to the solution of the European refugee problem, signed the Fair Share Act which was incorporated into the Immigration and Nationality Act in 1962.[72] This allows the Attorney General to grant conditional entry to those aliens who have fled their own nations because of racial, religious, or political persecution or who have been "uprooted by catastrophic natural calamity."[73] This procedure is severely limited in three

respects. First, only 10,200 refugees may be admitted in one year. Secondly, the alien makes his application in only eight specified countries.[74] And third, the applicant must present an assurance form from a U.S. citizen.[75]

Because of these restrictions most refugees have entered by parole,[76] § 212(d)5 of the Immigration Act which grants the Attorney General free discretion:

> to parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission.[77]

As with conditional entry under § 203(a)7, this gives the accepted alien limited rights. He is, as it were, "standing at the waters' edge" and subject to non-appealable exclusion hearings if either the conditions for his grant of entry end or he commits a criminal offense.

Unlike entry under § 203(a)7, however, the Attorney General may grant entry to those who are not true refugees. Under the former provision, an alien bears the burden of proving refugee status. In Belenko's case this might have been difficult. Both the Board of Immigration Appeals[78] and the director of the Immigration Service[79] have stated that not all escapees from Communist countries should be considered refugees. Belenko's defection, as we have seen, may have been economically and emotionally motivated rather than due to political persecution. No requirement of refugee status lurks in § 212(d)5. Thus this provision has allowed the Attorney General to parole into the country 15,000 Hungarians,[80] over 400,000 Cubans,[81] 150,000 Vietnamese[82] and recently 1,000 stateless Uganda Asians.[83]

Under both these plans, nonetheless, the alien has few procedural safeguards. Though he has the right to inspect and rebut any derogatory evidence[84] he has no right to appeal an adverse decision. At most he may ask for a reopening or reconsideration of his case.[85]

Because of the lack of protection afforded political escapees, several have suffered unjust refoulment.[86] The most celebrated case was that of Simas Kudirka, a Lithuanian seaman, who jumped from his own Russian ship to a U.S. Coast Guard cutter and requested asylum.[87] Instead of contacting the State Department or placing the escapee in protective custody, the U.S. captain allowed other Soviet sailors to capture Kudirka. They beat him unconscious and returned him to their craft.

President Nixon and members of Congress expressed their shock and disappointment over the incident, which generated guidelines to protect those requesting asylum.[88] Though nowhere defined in United States regulations, asylum appears to be the political counterpart to parole.[89] The distinction between the two is not based on any qualitative differences, but merely on the political nature of the alien's request.

Thus in 1972, in response to both the Kudirka incident and to the Protocol Relating to the Status of Refugees,[90] the State Department issued guidelines for response to asylum requests. All such requests were to receive careful scrutiny "taking into account humanitarian principles, applicable laws, and other factors."[91]

Two years later the Immigration and Naturalization Service itself issued application and decision rules for persons seeking

asylum.[92] Of particular interest is the rule for decision. This requires that the INS officer involved request the views of the State Department before making his decision unless the application appears to him clearly meritorious or clearly lacking in substance.[93] Even in that situation, the State Department must be notified. A rejected alien has no right of appeal. Nonetheless, if he receives a favorable statement from the State Department, his case automatically goes to the regional commissioner of INS for final decision. Although the State Department finds most such requests frivolous, Belenko had little to fear. President Ford's need for publicity in a campaign year and the importance of Belenko's gift to the United States, knowledge of the MIG-25, assured the pilot's grant of asylum into the United States.

The United States government had a strong interest in inspecting the MIG-25 as well as its pilot.[94] Despite the technical, as well as political, importance of such an inspection, the United States quietly awaited Japan's permission. To openly advise the Japanese, though permissible under the U.S.-Japan Mutual Defense Treaty,[95] would have strained the already weak bonds between Tokyo and the Kremlin. Beyond this, the United States feared the protest of left-wing Japanese which could adversely affect America's own relationship with that country.[96] Permission to inspect the aircraft, though at first denied,[97] eventually was granted due to Japanese engineering ignorance[98] as much as to covert pressure by the United States.

In retrospect, the influence of international law on each country's decision-making is difficult to evaluate. Most of the decisions were guided by political considerations. Nonetheless,

principles of international law appear to have been used to give credence and justification to political determinations. While nations may continue to do as they please, it is probable that the tenets of international law may serve more frequently as guidelines for action and this incident is one more piece of evidence of the continuing presence of international law in the world community.

Footnotes

1. N.Y. Times, Sept. 22, 1976, at 2 col. 5. The Daily Yomiuri (Tokyo), Sept. 8, 1976, at 1, col. 3.

2. N.Y. Times, Sept. 8, 1976, at 7, col. 1.

3. In 1954, Japanese officials arrested a Russian patrol-boat captain for illegal entry. The Soviet Union demanded his return pursuant to Paragraph 6 of the Instrument of Surrender by Japan which required Japan to carry out in good faith any directive issued by a designated representative of the Allied Powers. As the U.S.S.R. was a designated representative, the Japanese were bound to obey the request. Insturment of Surrender, Sept. 2, 1945, 59 Stat. 1733 (1945). Though the Soviet Union had not and has not yet agreed to a peace treaty, the Japanese courts stated that all duties to the Allies had been discharged prior to the instigation of this claim. Japan v. Kulikov (Ashikawa District Court) [no official cite given], in 1 JAP. ANN'L. INT'L. L. 66 (Japan 1957).

4. Code of Criminal Procedure of the R.S.F.S.R., art. 5.
   "A criminal case may not be initiated, and if initiated shall be subject to termination: . . . (9) with respect to a person concerning whom under the same accusation there is a judgment of a court which has taken legal effect . . ."
   Soviet Criminal Code and Procedure 126 (H. Berman, transl. 1972)
   Because an extradition request would be honored only with respect to non-political crimes, the Soviets could not assert any political charges such as treason or desertion as reasons for extradition. Nevertheless, the Soviet Union could still demand extradition for the theft of the MIG-25.

5. Oda, Admission, Deportation and Extradition of Aliens under the Japanese Laws, 10 JAP. ANN'L. INT'L. L. 23, 34-36 (Japan 1966). The admission of aliens into Japan is regulated by the Immigration Control Order [hereinafter cited as ICO], which, enacted in 1951 as a Cabinet Order, has since 1952 been in effect as a law. Cabinet Order 319 of Oct. 4, 1951, as amended by Law 126 of 1952, Law 268 of 1952, Law 214 of 1953, Law 71 of 1954, Law 163 of 1954, Law 164 of 1954, Law 66 of 1955, Law 6 of 1958, Law 17 of 1958, Law 154 of 1958, Law 140 of 1962, Law 161 of 1962, and Law 47 of 1965.

6. Id. ICO art. 6 (2).

7. Id. ICO art. 9 (3).

8. Id. ICO art. 50 (3).

9. Id. ICO art. 53 (1, 2).

10. Yoon Soo Kill v. Tokyo Immigration Control Office, 543 Hanreijiho (Judicial Reports) 18 (Tokyo District Ct. 1969), transl. in 14 JAP. ANN'L. INT'L L. 147 (Japan 1970); rev'd 664 Hanreijiho 3 (Tokyo High Ct. 1972), transl. in 18 JAP ANN'L. INT'L L. 170 (Japan 1974). Kill, a Korean national, appealed a disposition order for illegal entry. A resident of Japan for nine years he had become actively engaged in a campaign to save the life of a certain political criminal imprisoned by the Park regime in Korea. The Tokyo District Court held that this was the type of movement declared illegal under The Special Law for Punishment of Particular Crimes of the Republic of Korea. 14 JAP. ANN'L. INT'L L. at 184. From these facts, the Court found that Kill would be subject to political persecution if deported. Therefore, he was granted relief as a political criminal. Id. at 189.

The Tokyo High Court, however, reversed, declaring that absent a formal extradition request from Korea or proof of intended prosecution (for example, evidence of an ROK arrest warrant), the principles of non-extradition do not apply. Thus an alien cannot claim political persecution as a defense against deportation unless he has concrete proof. 18 JAP. ANN'L. INT'L L. at 170, 175.

11. Japan refuses to sign the Protocol Relating to the Status of Refugees, done Jan. 31, 1967, [1968] 5 U.S.T. 6223, T.I.A.S. 6577. According to Immigration Bureau officials, the admission of a mass of refugees might cause serious population and labor problems. Oda, supra note 15, at 30.

12. Ko Lin-mai v. Tokyo Nyukoku Kanri Kyoku Shunin Shinsakan (Chief Inspector of the Tokyo Immigration Control Bureau) (Tokyo High Court, Oct. 31, 1957) partially transl. in Hashimoto, The Rule of Law: Some Aspects of Judicial Review of Administrative Action, in Law in Japan 239, 255 (A. von Mehren ed. 1963). "[D]iscussion as to the merits of the Minister of Justice's discretionary judgment on this point constitutes an unwarranted interference with executive power that ought not to be performed by the courts." Id. at 257.

14. Id. at 257-258.

15. Sinha, Asylum and International Law 19 (1971).

16. Judgment of Jan. 27, 1954, 29 Koto-saibansho Keiji-hanreishu (High Ct. Crim. Reports) 29 (Fukuoka High Court), reported in Oda, supra note 5, at 31. There the court held that Japan had no obligation to permit the entry of Koreans, whether or not Korea was in a state of disturbance that would force people to seek asylum in other countries.

17. Oda, supra note 5, at 30.

18. Asahi Daily (Tokyo), Sept. 8, 1976, at 1, col. 4.

19. Convention on International Civil Aviation, Dec. 7, 1944, art. III, para. (b), (c), 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295; Whiteman, 9 Digest of International Law 310-317 (1968); Lissitzyn, Aerial Intruders and International Law, 47 AM. J. INT'L L. 559-563 (1953).

20. Missoffe, The Juridical Status of Military Aircraft in L'AERONEF MILITAIRE ET LE DROIT DES GENS 52 (1963).
> "[This country] should even be allowed to fire at such a plane, after proper summons. In fact, the behavior [sic] the foreign country towards such aircraft, depends essentially upon the more or less friendly relations it maintains with the country this aircraft belongs to."

21. This is codified in ICO, art. 78, supra note 5. A Japanese court did not confiscate a Soviet vessel used for smuggling in a 1957 case. This leniency appears to have had primarily political motive. See note 3 supra.

22. These principles were firmly established by the U.S. Supreme Court, Chief Justice John Marshall. Schooner Exchange v. M'faddon, 11 U.S. (7 Cranch) 116 (1812).

23. See INTERNATIONAL LAW 653-4 (W. Friedman, ed., 1969).

24. N.Y. Times, Sept. 8, 1976, at 7, col. 1.

25. July 29, 1966, 608 U.N.T.S. 93, 158.

26. Id. at 176.

27. N.Y. Times, Sept. 7, 1976, at 1, col. 6.

28. The Daily Yomiuri (Tokyo), Sept. 8, 1976, at 1, col. 3.

29. Time Magazine, Sept. 20, 1976, at 24.

30. Compare the successful persuasion of musician Georgi Ermelenko, a would-be defector in Australia. See 26 NATIONAL REV. 1105 (1974).

31. N.Y. Times, Sept. 15, 1976, at 8, col. 3.

32. Id.

33. Convention on International Civil Aviation, Dec. 7, 1944, art.

III, para. (b), (c), Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295. Whiteman, 9 Digest of International Law 310-317 (1968); Lissitzyn, Aerial Intruders and International Law, 47 AM. J. INT'L L. 559-563 (1953).

34. Id. at art. I. See also, art. 3(c), "No State aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise . . ."

35. Lissitzyn, International Law--Today and Tomorrow 136 n. 84 (1965); Tunkin, Theory of International Law 36 (1974).

36. U.S.S.R.-Law on Criminal Responsibility for Crimes against the State--§ 21 in THE AIR CODE OF THE U.S.S.R.§ 80 n. 14 (Cooper, ed., 1966).

37. Whiteman, 9 Digest of International Law 337 (1968); Restatement of Foreign Relations Law § 48 (1965).

38. Asahi Daily News (Tokyo), Sept. 8, 1976, at 1, col. 4. Defections in military planes frequently occur in Europe. In 1967 a MIG-17 was flown from East Germany to West Germany and in May 1973, a Soviet SU-7 fighter plane also landed in West Germany. The instant case, however appears to be the first in which the Soviet Union has taken strong measures in protecting the plane from disclosure. Id.

39. Lissitzyn, 47 AM. J. INT'L L., supra note 33, at 588; Taylor, International Flight of Military Aircraft in Peacetime: A Legal Analysis, 28 FED. B.J. 36, 58 (1968).

40. Conventions on aerial piracy have required contracting States to return the aircraft and cargo to the persons entitled to possession if the hi-jacked plane lands in that State, e.g., Tokyo Convention, 1963, art. II (1) and (a). Sept. 14, 1963, 20 U.S.T. 2941; 704 U.N.T.S. 219. These codes, however, specifically concern only civil aircraft and are thus distinguishable. A similar practice, useful by an analogy, is the grant of immunity given foreign vessels entering the port of another country, in distress. McWhinney, Aerialpiracy and International Law 21 (1971).

41. Though the Soviet Union expected cooperation from the Japanese government, the Soviets themselves have a reputation for destruction of aircraft and imprisonment of crewmen that enter Soviet airspace. Supra note 36 and Taylor, supra note 39, at 54.

42. The practice of extradition, the formal surrender of an individual accused of an offense within the jurisdiction of the

requesting State, has an unusual history. Originally, States granted such requests only out of friendship and often for political fugitives. As international relations progressed, however, States became concerned with concerted efforts for the suppression of common crimes. They also began to protect those who had fled for solely political reasons. Shearer, Extradition In International Law 1-11 (1971).

43. Id. at 22.

44. Treaty of Extradition Between Japan and Russia, June 1, 1911, 6 Martens Nouveau Recueil 109 (ser. 3).

45. Tunkin, Theory of International Law 11 (W. Butler, transl., 1974). "The Soviet State broke completely and immediately with the colonial policy of tsarism and repudiated all treaties of Tsarist Russia having a colonial, annexationist, unequal character." Id. No mention is made of the current status of the treaty by Tunkin. The Japanese writer Dando however states its enforcement has been suspended. Dando, Japanese Criminal Procedure 44 (1965).

46. Shearer, supra note 42, at 28. Common Law countries usually do not extradite absent a treaty. U.S. law, for example, demands the existence of a "treaty or convention for extradition." 18 U.S.C. § 3184 (1964); see also, Valentine v. U.S. ex rel. Neidecker, 299 U.S. 5 (1936). There the court challenged the power of the President to extradite U.S. citizens to France, due to a treaty provision barring extradition of nationals. In contrast, countries outside the Common Law tradition often grant non-treaty extradition requests.

47. Oda, supra note 5, at 35.

48. This is particularly true of Latin American treaties. Some authors view this as contingency planning by governmental heads in case of their own need to flee to another jurisdiction. Bolesta-Koziebrodzki, Le Droit D'Asile 256-8 (1962).

49. In re Castioni, [1891] 1 Q.B. 149; ex parte Kolczynski, [1955] 1 Q.B. 540. These British cases contain the most widely accepted interpretations of "political offense" in the context of extradition. The court in Castioni defined a political offense as "acts of violence of a political character with a political object and as part of the political movement." Supra at 159. Sixty years later, the court gace a more liberal interpretation in the case of certain Polish mutineers who feared that extradition to Poland would subject them to political persecution. Here, Lord Goddard C.J., after considering the repressive control of the Communist government in Poland, felt that it was "necessary if only for reasons of humanity, to give a wider and

more generous meaning to the words we are now construing . . ." Kolczynski, supra at 551. The defendants had not acted with prominently political intent, nor as part of a political movement. They were, however, motivated to mutiny from fear of prosecution for observations of a political nature made in conversation on shipboard. This was deemed sufficient for refusing Poland's extradition request. Id. at 544, 550.

50. Yoon Soo Kill v. Tokyo Immigration Control Office, 542 Hanreijiho (Judicial Reports) 18 (Tokyo District Ct. 1969) trans'l in 14 JAP. ANN'L. INT'L L. 147 (Japan 1970); rev'd 664 Hanreijiho 3 (Tokyo High Ct. 1972) trans'l in 18 JAP. ANN'L. INT'L L. 170 (Japan 1974).

51. Mitsuyo Kono v. Japan, 573 Hanreijiho (Judicial Reports) 28 (Tokyo District Ct. 1969) trans'l in 15 JAP. ANN'L. INT'L L. 188 (Japan 1971); rev'd (Tokyo High Ct. 1971) trans'l in 16 JAP. ANN'L. INT'L L. 87 (Japan 1972). The High Court held that an informal extradition request which omits mention of criminal charges does not give an alien rights of non-refoulment as a political criminal (see infra note 86). In fact, the court allowed the Immigration authorities to rely on the word of Taiwanese officials that the deported alien, an anti-Chiang political leader, would not be punished if deported. Id. at 92, 94.

52. N.Y. Times, Sept. 22, 1976, at 2, col. 4. The pilot was allegedly suffering from an unhappy marriage.

53. For an extradition request to be granted, the requesting State must show that it has jurisdiction, that the act of the alien is considered criminal in both States, and that the alien will not be persecuted for political crimes. See Oda, supra note 5, at 30. For the Soviet's claim of extraterritorial jurisdiction over nationals, see Code of Criminal Procedure of the R.S.F.S.R., art. 5, in SOVIET CRIMINAL CODE AND PROCEDURE 126 (H. Berman, transl. 1972).

54. Kill v. Tokyo Immigration Control Office, 543 Hanreijiho 18 (Tokyo District Ct. 1969), rev'd 664 Hanreijiho 3 (Tokyo High Ct. 1972); Konov. Japan 573 Hanreijiho 28 (Tokyo District Ct. 1969), rev'd [no official cite given] (Tokyo High Ct. 1971).

55. Mitsuyo Kono v. Japan (Tokyo High Court 1971) trans'l in 16 JAP. ANN'L. INT'L L. 87 (Japan 1972).

> "According to the [sic] Article 5 of Harvard Draft Convention on Extradition . . . 'It may well be that some States, because of close association or because of the close similarity of their political institutions, would find the extradition of political criminals desirable.'" Id. at 90.

56. Id. at 90. "The Universal Declaration of Human Rights (Article 14) and relevant provisions of the Charter of the United Nations have no binding force in law."

Article 14 states "(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution." Universal Declaration of Human Rights, Dec. 6, 1948, U.N. General Assembly, 2d sess., Doc. A/811.

The United States shares the Japanese view of the Declaration. "It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation." XIX Dep't. of State Bulletin No. 494, at 751 (Dec. 19, 1948).

57. Though the Soviet Embassy demanded the return of the plane, they only asked to interview the pilot. N.Y. Times, Sept. 8, 1976, at 7, col. 1.

58. See note 22 supra.

59. See note 37 supra.

60. See note 23 supra and accompanying text.

61. N.Y. Times, Sept. 7, 1976, at 1, col. 6.

62. "[W]e have decided to grant asylum if the Soviet pilot asks for it. This is a tradition in the United States and as long as he wants such asylum, he will be granted it in the United States." News Conference of President Ford, 12 WEEKLY COMP. OF PRES. DOC. 1318 (Sept. 13, 1976).

63. Asahi Evening News (Tokyo), Sept. 8, 1976, at 1, col. 5.

64. "The continued presence of the pilot in Japan was believed needed in connection with the examination of the plane. If the pilot left for the United States, it is reasoned, the Japanese might lose the basis for their contention that the plane was being kept for the time being in connection with an investigation of the incident." N.Y. Times, Sept. 9, 1976, at 5, col. 1.

65. See Oda, supra note 5, at 32.

66. See generally, Evans, The Political Refugee in U.S. Immigration Law and Practice, 2 INT'L LAWYER 204 (1969); Konvitz, Civil Rights in Immigration (1963).

67. Id. Konitz at 4, 10-17.

68. 26-1 Immigration and Nationality Act of 1952, as amended, 8 U.S.C. [hereinafter cited as INA]. Today applications are classified

as either preference or non-preference. The preference visa categories are based on certain relationships to persons in the U.S.; certain professions and skills; and refugee status. INA § 203, 8 U.S.C. § 1153 (as amended 1965). Immigrants not entitled to classification in the above groups are non-preference and receive only visa numbers not needed by preference applicants, absent special authorization by the U.S. Attorney General. INA § 212, U.S.C. § 1182 (1952).

69. Id.

70. Belenko does not fit any of the preference categories.

71. Hearings on H.R. 9112 Before a Subcomm. of the House Comm. on the Judiciary, 91st Cong., 2nd Sess., ser. 32, at 156 (1970).

72. INA § 203 a 7; 8 U.S.C. § 1153 a (1965).

73. "For all practical purposes, the term 'conditional entry' is nothing more than parole. Parole is a statutory provision for indulging in the legal fiction that an applicant for admission who is allowed to be physically within the United States although not admitted, stands at the water's edge and takes the shoreline with him wherever he goes in the interior." Bernsen, Rights of Refuggees, 52 INTERPRETER RELEASES 407 (1975).

74. The program is currently in operation in Austria, Belguim, France, Germany, Greece, Hong Kong, Italy, and Lebanon. Greene, Refugees: Recent Developments, 51 INTERPRETER RELEASES 208 (1974).

75. Id. at 211.

76. See note 73 supra.

77. INA § 212, 8 U.S.C. § 1182 (1952).

78. Matter of Janue and Janek, 12 I. & N. Dec. 866 (1968). In deportation proceedings against two Czechoslavakians, the Board stated:

> "We are not convinced that every travel restriction imposed by an Iron Curtain country and punished, in the breach, by imprisonment is political persecution; nor that every person who leaves such a country . . . is a bona fide refugee." Id. at 876.

79. At a recent oversight hearing, INS Director Leonard Chapman stated that many Yugoslav refugees requesting entry were seeking to imprive themselves economically rather than to escape political persecution. Only those cases where there was clear political persecution were to be granted refugee status under

§ 203 a 7. Hearings on INS Oversight Before a Subcomm. of the House Comm. on the Judiciary, 93rd Cong., 2nd Sess., ser. 37, at 28 (1974).

80. 35 U.S. Dep't. of State Bull. 913 (1956).

81. See 47 INTERPRETER RELEASES 193 (1970).

82. See Hearings on Indochina Refugees Before a Subcomm. of the House Comm. on the Judiciary, 94th Cong., 1st Sess., ser. 4, (1975).

83. Greene, supra note 27-3, at 209.

84. 8 C.F.R. § 103.2.

85. 8 C.F.R. § 103.5.

86. Refoulment refers to the immediate return of refugee to his own State without considering his right to asylum.

87. Hearings on Attempted Defection by Lithuanian Seaman Simas Kudirka Before a Subcomm. of the House Comm. on Foreign Affairs, 91st Cong., 2nd Sess., (1970); see also Washburn, Revelations of the Lithuanian Defector Episode, 6 INT'L LAWYER 1 (1972).

88. 66 Dep't, of State Bull. 124-127 (1972).

89. "[If an alien is found eligible for asylum], we now have to use some legal method for allowing him to come into the United States. And the legal device we use for letting him come in is parole." Remark of Sam Bersen, General Counsel, INS at a hearing on Indochina Refugees. Supra note 82, at 86.

90. Done Jan. 31, 1967 [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577. The agreement commits signatories to granting at least temporary asylum [non-refoulment] when the escapee's life is actually endangered.

91. See note 88 supra.

92. 8 C.F.R. 108 (1974).

93. Id.

94. N.Y. Times, Sept. 8, 1976, at 1, col. 5. United States intelligence sources considered the MIG-25 to be the most advanced Soviet interceptor-reconnaissance aircraft and the fastest plane deployed by either side.

These beliefs turned out to be empty ones. Examination of the plane revealed that the craft was "no match for American

fighters." Its electronic system, in fact, was found to be a generation or two behind American technology. N.Y. Times, Oct. 7, 1976, at 6, col. 1.

95. Mutual Defense Assistance Agreement between the United States and Japan, March 1, 1954, 5 U.S.T. 661, T.I.A.S. 2957.

96. For a full discussion of the bloody student riots protesting renewal of the United States-Japan Treaty in 1960, see Packard, PROTEST IN TOKYO (1966). Packard concludes that the same tensions still exist, making the United States' bond with Japan a fragile one.

97. The Daily Yomiuri (Tokyo), Sept. 8, 1976, at 2, col. 3.

98. N.Y. Times, Sept. 22, 1976, at 2, col. 4. "'Frankly, this MIG-25 was way beyond us,' said a Japanese official. 'We had to have help.'" Id.