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# The Case of Zhang Zhenhai: Reconciling the International Responsibilities of Punishing Air Hijacking and Protecting Refugees

ARTHUR C. HELTON\*

## I. INTRODUCTION

Concern over the dangers posed by aircraft hijacking has led the international community to address and specifically prohibit such acts.<sup>1</sup> At the same time, the international community has long sought to ensure the protection of displaced refugees who have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion upon return to their countries.<sup>2</sup> Conflicts between these two international responsibilities are relatively rare. However, the celebrated case of Zhang Zhenhai<sup>3</sup> presents such a situation. The case involved a request by the People's Republic of China to Japan for the extradition of a Chinese national who hijacked an aircraft and requested asylum in Japan.<sup>4</sup>

This Article discusses the circumstances of the case of Zhang Zhenhai, the decision of the Japanese High Court on the extradition request, and the Japanese law relating to extradition and refugee pro-

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1. See Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Jan. 26, 1973, 24 U.S.T. 564, T.I.A.S. No. 7570.

2. See Convention relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, U.N.T.S. 2545 [hereinafter Refugee Convention]; Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, U.N.T.S. 8791 [hereinafter Protocol].

3. Decision of Apr. 20, 1990, (Kosai) (High Court), Tokyo, Japan [hereinafter Decision]. A translated summary of the decision is on file with the Loyola of Los Angeles International and Comparative Law Journal. The case received considerable attention in the Japanese press. See, e.g., *Hijack Suspect Sent Back Despite Activists' Protests*, Japan Times, Apr. 29, 1990, at F6.

4. Decision, *supra* note 3.

tection. The Article analyzes the relevant law and discusses how the Japanese court should have resolved the case.

## II. STATEMENT OF THE CASE

### A. *The Hijacking*

Zhang Zhenhai, a 36-year-old Chinese citizen and manager of a textile machinery factory in Hubei Province,<sup>5</sup> participated in the recent pro-democracy activities in China.<sup>6</sup> Specifically, Zhang Zhenhai demonstrated in Tiananmen Square in June of 1989.<sup>7</sup> While Zhang was arrested and detained by the Chinese police on unrelated charges,<sup>8</sup> the Chinese police interrogated him about his involvement in Tiananmen Square. After bribing government officials, Zhang was released and sought to leave China.<sup>9</sup>

After an unsuccessful land escape, Zhang resorted to hijacking an Air China jetliner bound for New York through Shanghai and San Francisco on December 16, 1989.<sup>10</sup> His wife and 13-year-old son accompanied him. The hijacking began when Zhang handed over a piece of Chinese paper money to a stewardess on which he had written: "Please go to South Korea. If my request is not accepted in three minutes, I will blow up the airplane."<sup>11</sup> The South Korean authorities denied permission to land, and the plane subsequently landed at Fukuoka Airport in Japan.<sup>12</sup> Zhang had no weapons, nor did he commit any act of violence in connection with the hijacking.<sup>13</sup>

After landing, a flight attendant led Zhang to a door at the rear

5. *Hijacking Sought Support for Movement, Suspect Says*, Japan Times, Apr. 3, 1990, at F2; *Court Turns Down Hijacker's Asylum Plea*, Mainichi Daily News, Apr. 28, 1990, at F4.

6. *Japan Civil Liberties Union, The Political Asylum Case of Zhang Zhenhai: Report Submitted to United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities 2* (Aug. 10, 1990) [hereinafter *Japanese Civil Liberties Union Report*].

7. *Exile Backs China Skyjack Suspect's Claim*, Japan Times, Apr. 5, 1990, at F3. At the hearing of the case in the Tokyo High Court, Yue We, a Chinese dissident in exile in France who fled China after the crackdown, testified that he had met Zhang on the west side of Tiananmen Square on May 29, 1989. *Id.*

8. Decision, *supra* note 3, at 7. In its decision of April 20, 1990, the Tokyo High Court found that Zhang fled to avoid punishment for the "offense of embezzlement of public money" or "other alleged political activities." *Id.*

9. *Japanese Civil Liberties Union Report, supra* note 6, at 2.

10. The Daily Yomiuri, Apr. 29, 1990, at F7.

11. *Japanese Civil Liberties Union Report, supra* note 6, at 2.

12. *Id.*

13. Zhang had a handmade bomb prior to boarding the airplane, but did not bring it aboard because he got the bomb wet in a bathroom before boarding the plane. Decision, *supra* note 3, at 7.

of the airplane. When Zhang looked outside through the open door, he was pushed out of the plane and seriously injured, requiring his hospitalization.<sup>14</sup>

The same day, December 16, 1989, the hijacked airplane flew back to China with Zhang's wife and son aboard. Shortly thereafter, the Japanese government announced that it would extradite Zhang to China at a later time.<sup>15</sup> The Japanese government transferred Zhang from the hospital to a prison in Fukuoka and then to the Tokyo Detention House on January 11, 1990.<sup>16</sup> He was extradited to China on April 28, 1990, after the Chinese government assured Japanese authorities that Zhang would not receive the death penalty.<sup>17</sup> Upon extradition on July 18, 1990, a Chinese court in Beijing, after a one-day trial, sentenced Zhang to a term of eight years imprisonment and a two-year suspension of civil rights.<sup>18</sup>

### B. *The Tokyo High Court Decision*

While in Japan, Zhang applied for asylum as a refugee.<sup>19</sup> With the assistance of counsel, he also sought to avoid extradition through a judicial challenge, *inter alia*, on the grounds that the offense he had committed was political in nature.<sup>20</sup> On April 20, 1990, the Tokyo High Court upheld the extradition.<sup>21</sup>

The Tokyo High Court recognized that extradition decisions are the responsibility of the Japanese Minister of Justice, but held that such decisions are subject "to judicial evaluation by the Court as to the question of whether there is a contradiction to the prohibitive clause of the Law."<sup>22</sup> It explained:

When the Court entertains this question, it is only concerned with the judgment as to whether the case under consideration falls within the range of protection clauses of Article 2 of the Law of Extradition . . . or not, hence it does not include the decision with

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14. *Japanese Civil Liberties Union Report*, *supra* note 6, at 2-3.

15. *Id.* at 3.

16. *Id.*

17. *Hijack Suspect's Extradition Favored*, *Japan Times*, Apr. 21, 1990, at F5.

18. *Japanese Civil Liberties Union Report*, *supra* note 6, at 3; *Chinese Who Hijacked Airliner Receives Eight Year Sentence*, *Japan Times*, July 19, 1990, at F8.

19. A copy of Zhang's asylum application is on file with the Loyola of Los Angeles International and Comparative Law Journal.

20. *Court Turns Down Hijacker's Asylum Plea*, *Mainichi Daily News*, Apr. 28, 1990, at F4.

21. *Decision*, *supra* note 3, at 12.

22. *Id.* at 4.

regard to the appropriateness of the extradition.<sup>23</sup>

The court next addressed the question of whether the offense in question was political in nature, thus exempting the offender from extradition. It held:

Generally speaking, a political offence is defined as a crime which aims at changing the political regime of a State, or a crime which tries to influence on [sic] the internal and external policy of a State, and also is in contravention to the penal law of the State concerned. As to the question of whether a relative political crime, namely those cases in which the political offence comprises at the same time an ordinary crime that is socially and morally culpable, should be recognized as a political offence or not, must be decided by the case-by-case principle. However on deciding this question, there should be some measuring-rods such as, whether or not it has a direct and important relationship to the achievement of political purposes, and whether or not the nature of the offence, the seriousness of the offence are disproportionate to the intended purposes, and lastly, whether or not as a whole it deserves protection.<sup>24</sup>

The court then examined Zhang's specific situation. The court stated that it could not overlook the "fundamental character of the present case as a crime of hijacking against a civil aircraft."<sup>25</sup> Even if the court believed Zhang was involved in the demonstrations in Tiananmen Square, it stated that it could not consider his role as anything other than a "mere passive participant."<sup>26</sup>

The court also discussed the general policy question of whether air hijacking could constitute a "political offense" so as to render an offender exempt from return. It explained:

This case is an offence in which the suspect hijacked a civil aircraft and exposed more than 220 passengers to risk. The Air China jetliner could not obtain permission to land from any airports in the Republic of Korea to which it requested permission, was driven away by four Korean jet fighters and was forced to make an emergency landing at Fukuoka Airport, fac[ed] with the danger of running out of fuel. These facts should not be overlooked. Moreover

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23. *Id.* at 4. "Article 2 of the Law of Extradition provides that a fugitive may not be extradited in cases (1) when an offence is a political one, and (2) a request for extradition is recognized to be made in order to examine or to carry out a penalty for a political offence." *Id.* n.2.

24. *Id.* at 6.

25. *Id.* at 4.

26. Decision, *supra* note 3, at 4.

the Court must take into account . . . passengers who were terrified and felt their lives were in danger.

In order to eradicate the occurrence of future hijackings, which exposed [innocent] civil passengers . . . to terror, and which was attempted by an individual for his personal gain—fleeing from his country—there should be established an international agreement for the punishment of an act of hijacking. Moreover in order to justify non-extradition at the sacrifice of this requirement, there need[s] to be a recognition of the public good which deserves better protection at the cost of any inconveniences experienced by passengers. In the present case, the suspect did not try to change the political regime or to influence internal and external policy of the State by his offence. The direct aim of the offence was to escape from his country. Hence it does not bear any special resemblance [sic] as a political offence, which is committed against the State.<sup>27</sup>

The court also briefly addressed the question of return under international refugee law. It stated that “Article 1F(b) of the Convention relating to the Status of Refugees provides as follows; . . . ‘the provisions of this Convention shall not apply to any person . . . [who] has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.’”<sup>28</sup> The court once again noted that the present case is a case of hijacking a civil aircraft, and this is not considered to be a political offense.<sup>29</sup> Hence the court found that the provision of article 1F(b) of the Convention could not be applied.<sup>30</sup>

### III. REFUGEE AND EXTRADITION LAW IN JAPAN

#### A. *Refugee Law*

On January 1, 1982, Japan acceded to two multilateral United Nations treaties, the 1951 Convention relating to the Status of Refugees (“Refugee Convention”) and the 1967 Protocol relating to the Status of Refugees (“Protocol”).<sup>31</sup>

Article 33 of the 1951 Convention, as amended by the 1967 Protocol, provides: “No Contracting State shall expel or return

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27. *Id.* at 7-8.

28. *Id.* at 11.

29. *Id.*

30. *Id.*

31. See Refugee Convention, *supra* note 2; Protocol, *supra* note 2; see also IMMIGRATION BUREAU, MINISTRY OF JUSTICE, A GUIDE TO THE PROCEDURE FOR RECOGNITION OF REFUGEE STATUS (preface) (1982) [hereinafter GUIDE] (on file with the Loyola of Los Angeles International and Comparative Law Journal).

(‘refouler’) a refugee in any manner whatsoever to the frontiers of territory where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>32</sup> However, as the High Court in Zhang’s case recognized, article 1F(b) of the same convention states that the provisions of the Refugee Convention do not apply to a person if there are serious reasons to believe that, prior to admission as a refugee, that person committed a serious non-political crime outside the country of refuge.<sup>33</sup>

The Immigration-Control and Refugee-Recognition Act in Japan incorporates by reference criteria set forth in the Refugee Convention and Protocol regarding the recognition of refugee status.<sup>34</sup> The Immigration Bureau of the Ministry of Justice has established procedures to determine refugee status.<sup>35</sup>

The Office of the United Nations High Commissioner for Refugees (“UNHCR”) oversees the Refugee Convention’s administration.<sup>36</sup> The Executive Committee of the High Commissioner’s Programme, a committee of governments that oversees the work of UNHCR, examined the problem of extradition as it affected refugees in 1980. In response, the Executive Committee adopted Conclusion No. 17 (XXXI) which emphasized the fundamental character of the *non-refoulement* principle and recognized the need to protect refugees from extradition to a country where they have a well-founded reason to fear persecution.<sup>37</sup> In 1977, the Executive Committee, in Conclusion No. 6 (XXVIII) on *non-refoulement*, reaffirmed the fundamental importance of the observance of this principle irrespective of whether or not the individuals in question have been formally recognized as refugees.<sup>38</sup> The Executive Committee’s Conclusion No. 8 (XXVIII), promulgated that same year, recognized that it was essential that an applicant for refugee status “be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.”<sup>39</sup>

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32. See Refugee Convention, *supra* note 2, art. 33.

33. *Id.* art. 1F(b).

34. A copy of the relevant provisions of the statute is on file with the Loyola of Los Angeles International and Comparative Law Journal.

35. See GUIDE, *supra* note 31.

36. Refugee Convention, *supra* note 2, art. 35(1); Protocol, *supra* note 2, art. II(1).

37. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, CONCLUSIONS ON THE INTERNATIONAL PROTECTION OF REFUGEES 37-38 (Geneva 1980).

38. *Id.* at 14.

39. *Id.* at 17.

### B. Extradition Law

As the Tokyo High Court recognized, a person against whom extradition is requested is generally permitted to defend against extradition on the ground that the offense in question was political in character.<sup>40</sup> No precise definition of what constitutes a political offense exists. In legal theory, however, a political offense generally has been characterized as either a "pure political offense" or a "relative political offense."<sup>41</sup> A pure political offense is an act that is "directed against the state [but which] contains none of the elements of ordinary crime,"<sup>42</sup> such as sedition, treason, and espionage. A relative political offense is one in which "a common crime is so connected with a political act that the entire offense is regarded as political."<sup>43</sup> Either type of political offense can be raised as a defense to extradition.

One commentator has stated that air hijacking is an international offense that constitutes a categorical exception to the political offense exception to extradition.<sup>44</sup> Another, however, has argued that the political offense exception may still be available to forestall the return of a refugee who has committed air hijacking to flee persecution, depending upon the particular circumstances of an individual's case.<sup>45</sup>

## IV. ANALYSIS

Standards of international refugee law should govern extradition decisions. The 1979 Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees ("Handbook"),<sup>46</sup> sets forth relevant criteria for determining when an individual claiming refugee status may be subject to extradition. The Handbook, in explicating the "serious non-political crime" exclusionary language of article 1F(b) of the Refugee Convention, states:

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40. See generally Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962).

41. *Id.* at 1231, 1239.

42. *Id.* at 1230, 1237.

43. *Id.* at 1230-31.

44. M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* VIII § 2-86 (1983).

45. Helton, *Harmonizing Political Asylum and International Extradition: Avoiding Analytical Cacophony*, 1 GEO. IMMIGR. L.J. 457, 475-80 (1986).

46. 1979 HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES [hereinafter HANDBOOK].

it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has a well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him.<sup>47</sup>

The Handbook adds that in evaluating the nature of the alleged crime, all relevant factors, including mitigating circumstances, must be considered.<sup>48</sup> Specifically addressing the issue of the refugee status of individuals accused of hijacking, the Handbook refers to two reports leading to the adoption of international treaties concerning the unlawful seizure of aircraft.<sup>49</sup> These reports state that "the adoption of the draft Resolution cannot prejudice any international legal rights or duties of States under instruments relating to the status of refugees and stateless person[s]," and "the adoption of the draft Resolution cannot prejudice any international legal rights or duties of States with respect to asylum."<sup>50</sup>

The Handbook further specifies that:

[t]he various conventions adopted in this connection deal mainly with the manner in which the perpetrators of such acts have to be treated. They invariably give Contracting States the alternative of extraditing such persons or instituting penal proceedings for the act on their own territory, *which implies the right to grant asylum*.<sup>51</sup>

The Handbook concludes:

[w]hile there is thus a possibility of granting asylum, the gravity of the persecution of which the offender may have been in fear, and the extent to which such fear is well-founded, will have to be duly considered in determining his possible refugee status under the 1951 Convention. The question of the exclusion under Article 1F(b) of an applicant who has committed an unlawful seizure of an aircraft will also have to be carefully examined in each individual case.<sup>52</sup>

An individual should not be extradited to a country where he will face serious persecution, if the individual's only crime is that he hijacked an airplane in order to escape persecution, and the actions

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47. *Id.* ¶ 156.

48. *Id.* ¶ 157.

49. *Id.* ¶ 159. See sources cited *supra* note 1.

50. HANDBOOK, *supra* note 46, ¶ 159.

51. *Id.* ¶ 160 (emphasis added).

52. *Id.* ¶ 161.

taken were proportionate to those ends. In essence, a balancing of aggravating, mitigating, and persecutory circumstances is required. The determination of whether there is a possibility of persecution upon his return and other factors affecting the individual's asylum status are governed by the standards set forth under the Refugee Convention and Protocol.<sup>53</sup> The methods of flight condemned under international law, absent aggravating circumstances, do not preclude granting asylum to deserving individuals. Thus, the execution of an extradition order must be suspended until a final decision on refugee status is made. This is necessary because after the application has been examined, the individual may prove to be a refugee entitled to benefit from the principle of *non-refoulement*.

## V. CONCLUSION

There is an undeniable international consensus against air hijacking. There is also a well-established legal principle to protect refugees and not return them to places where they may face persecution.<sup>54</sup> The Japanese court in the case of Zhang Zhenhai was highly solicitous of the former principle, but gave insufficient consideration to the latter. It found Zhang undeserving of protection under extradition law, but failed to fully appreciate the nature of his claim under refugee law. That he utilized air hijacking in his flight from persecution did not preclude his recognition as a refugee. This merely begins the inquiry. The court's failure to inquire further deprived Zhang of the individualized justice to which refugee law entitles him. Zhang's claim for protection should have been fully addressed under the relevant asylum procedures and criteria. Had such an analysis occurred, Zhang most likely would have been declared a refugee and granted asylum.

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53. See Refugee Convention, *supra* note 2; Protocol, *supra* note 2.

54. Extradition is by no means an inevitable outcome under current state practice when these principles conflict. See *India Won't Extradite Hijackers to Burma*, The Nation (Bangkok), Nov. 13, 1990, at A2.

