Combatting International Terrorism: Limiting the Political Exception Doctrine in Order to Prevent One Man's Terrorism from Becoming Another Man's Heroism

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COMBATTING INTERNATIONAL TERRORISM: LIMITING THE POLITICAL EXCEPTION DOCTRINE IN ORDER TO PREVENT "ONE MAN'S TERRORISM FROM BECOMING ANOTHER MAN'S HEROISM"

I. INTRODUCTION

Recent events have graphically illustrated that international terrorism has increased in frequency, intensity, and destructive effect. In

1. For purposes of this comment, the following definition of terrorism employed by the Federal Bureau of Investigation will be used:

Terrorism is defined as the unlawful use of force or violence against persons or property [in violation of the criminal laws of the United States or any other states done] to intimidate or coerce a government, the civilian population, or any other segment thereof, in furtherance of political or social objectives.


Currently, on both a national and international level, there is no common definition of terrorism. J. Murphy, Punishing International Terrorists The Legal Framework for Policy Initiatives 3 (1985). The lack of a generally acceptable definition is due, in part, to disagreement regarding the desirability and necessity of defining the term. Id. In addition, the ability to arrive at a common definition is complicated by the fact that the term is both emotionally and politically charged as is aptly demonstrated by the cliché, "one man's terrorism is another man's heroism." Id. at 4. As the International Law Association Committee on International Terrorism observed, "[t]raditions of political asylum and very strong national sympathies with the aims of some violent groups have made it impossible to get general international agreement that political violence by individuals and groups not crossing [over] the threshold of armed conflict . . . deserved in principle the condemnation of the international community." International Law Association Committee on International Terrorism, International Terrorism—Fourth Interim Report of the Committee, 7 TERRORISM INT'L J. 123, 125 (1984) [hereinafter cited as Report of the Committee].

There have been a multiplicity of attempts to define terrorism as an international crime subject to the existing international enforcement system for prosecution and punishment. Bassiouni, Methodological Options for International Legal Control of Terrorism, 7 AKRON L. REV. 388, 389 (1974). Professor Bassiouni has suggested that a common crime typically associated with a terrorist act could only become an international crime if one of the following five elements accompanied those of the crime:

(1) [t]he act or series of acts takes place in more than one state; (2) [t]he act or series of acts takes place wherein no state has exclusive national jurisdiction; (3) [t]he acts affect citizens of more than one state; (4) [t]he acts affect internationally protected persons (i.e., diplomats, personnel of international organizations), and (5) the acts affect internationally protected objects such as international civil aviation and international means of communication.

Id. at 389-90. If sufficiently codified or incorporated into a treaty, such terrorist acts could be termed international crimes and subject to the international system of prosecution and punishment. Id. at 390. Some consensus regarding the con-
addition to the traditional attacks on international businesses and busi-
demnable activities that fall within such an international crimes is evinced in
include treaty provisions for the suppression of aircraft hijacking, unlawful acts
against the safety of civil aviation, unlawful acts against internationally protected
persons, including diplomats, the taking of hostages, and the theft of nuclear
materials. J. Murphy, supra, at 4. As of this writing, however, no codification or
single treaty yet exists which clearly defines the international crime of terrorism.

Recent efforts to derive a definition of terrorism that is acceptable to the
international community have sought to induce countries to agree that certain
acts, such as the deliberate targeting of innocent civilians, are so heinous and
universally unacceptable that they should be regarded as criminal acts no matter
how just the cause the terrorists claim to be advancing. Statement by John F.
Murphy before the Subcommittee on the Constitution of the Senate Committee
on the Judiciary with Respect to the Advice and Consent to Ratification of the
United States—United Kingdom Supplementary Extradition Treaty in Washin-
gton, D.C. (Nov. 5, 1985) [hereinafter cited as Statement of J. Murphy]. For
example, the International Law Association recently defined terrorism as includ-
ing but not limited to “atrocities, wanton killing, hostage taking, hijacking, ex-
tortion or torture committed or threatened to be committed whether in
peacetime or in wartime for political purposes provided that an international
element is involved.” Id. at 11.

Other definitions of terrorism emphasize the phenomenon’s ultimately co-
ceptive goals. One writer asserted that terrorism involves:
the purposive use of violence or the threat of violence by the precipita-
tor(s) against an instrumental target in order to communicate to a pri-
mary target a threat of future violence so as to coerce the primary
target into behavior or attitudes through intense fear or anxiety in con-
nection with a demanded power (political) outcome.

2. B. Jenkins, Rand Corporation, The Future of International Terror-
ism 3 (Sept. 1985). Terrorist incidents have increased at a rate of 12 to 15% per
year in the last several years. Id. One noted writer reported in 1984 that there
have been 8,000 major terrorist incidents worldwide since 1968 wounding over
8,000 people and killing nearly 4,000. J. Murphy, supra note 1, at 118 (citing
Statement of Lord Chalfont at the opening session of the Jonathan Institute’s
Second Conference on International Terrorism, Washington, D.C., at 5-4 (June
24, 1984)). In the United States, the number of attacks rose from under 200 in
1968 to 800 in 1983; the number of attacks which caused injury or death rose
from about 25 in 1968 to over 200 in 1980 and continues to rise. Id. at 118-19.
United States Secretary of State George P. Schultz reported that more people
were killed or injured by international terrorists in 1983 than in any year since
governments began keeping records. Id. at 119 (citing Address by the Honora-
ble George P. Schultz to the Jonathan Institute’s Second Conference on Interna-
tional Terrorism, Washington, D.C., at 1 (June 24, 1984)).

According to the State Department, there were 860 international terrorist
incidents against United States citizens or property from 1980 to 1984. Office of
the Ambassador-at-large for Counter-Terrorism, Patterns of Global Terror-
ism: 1984 (1984), United States Department of State. Nearly half of the inci-
dents were bombings and the rest were a mixture of arsons, shootings,
hijackings, and kidnappings. Id. American citizens are now the target of about
35% of all international terrorist incidents, and attacks in 1985 left 23 Ameri-
cans dead and 160 wounded. See Public Report of the Vice President’s Task
Force on Combating Terrorism ii (Feb. 1986), Office of the Vice President
of the United States.

For an analysis of terrorist activities that have occurred within the United
nessmen, diplomats and diplomatic facilities, and the hijacking of planes and boats resulting in the taking of hostages, there appears to be a trend toward "large scale indiscriminate violence" in everyday locations resulting in multiple fatalities. As a result, it is evident that political and legal steps must be taken to end terrorist activity.

In order to combat terrorism, governments can intervene in the execution of a terrorist attack at three stages: before the terrorist attack.

Evidence is emerging regarding the existence of an institutionalized, "semi-permanent, sub-culture of terror." Some governments not only provide logistical backing including arms, training, personnel and sanctuary or "safe haven" to terrorists but also designate an agency to specifically oversee relations with the terrorists.

One commentator has suggested that terrorism is likely to increase in the future because of its success in attracting publicity, disrupting governments and businesses, and causing significant death and destruction. Moreover, terrorism is likely to become increasingly institutionalized because of the availability of arms, explosives, supplies and financing, facilitation of terrorist activities through international connections among states (particularly between the Soviet Union and the Third World), and the continuing weakness of international controls, coordination and cooperation geared towards combating international terrorism.

It is submitted that the main impediment to the success of the new Act is that the United States' court must first obtain jurisdiction over the terrorist. Senator Spector suggested that the United States could forcibly obtain such jurisdiction legally. In order to bring such an action, the Attorney General must provide written certification.
occurs through preventative measures; during its execution through such measures as negotiation or armed intervention; or after its completion through the apprehension, prosecution, and conviction of terrorists. This comment will focus upon the final stage of governmental intervention—the apprehension, prosecution, and conviction of terrorists—as a means of combatting international terrorism. Accordingly, this comment will first evaluate the ability of governments to prosecute terrorists effectively through the application of the international legal principle aut dedere, aut judicare, which has been defined as the legal duty of states to prosecute or extradite criminal offenders. In addition, the first portion of this comment will examine existing mechanisms for international judicial assistance and cooperation in the prosecution of terrorists.

The second part of this comment will focus upon the effectiveness of governments to prosecute terrorists effectively through the application of the international legal principle aut dedere, aut judicare, which has been defined as the legal duty of states to prosecute or extradite criminal offenders. In addition, the first portion of this comment will examine existing mechanisms for international judicial assistance and cooperation in the prosecution of terrorists.

6. See J. Murphy, supra note 1, at 1. Governments may take a variety of measures to prevent terrorist activities including: 1) conducting effective intelligence operations to identify attacks to be committed in the future and to apprehend their would-be perpetrators; 2) installing security devices at airports; 3) placing guards at sources of energy such as electrical plants or nuclear facilities and 4) conducting widespread public education programs aimed at minimizing public support for terrorist activities. Id.

In 1985, U.S. intelligence information has helped thwart 126 'terrorist missions' both within the United States and abroad. Reagan Imposes Sanctions on Libya, The Star Ledger, Jan. 8, 1986, at 1, col. 1. For a description of anti-terrorism training required of all United States diplomats and Foreign Service officers working abroad, see Governmental Lessons on Surviving Terrorism, N.Y. Times, Nov. 27, 1985, § 2, at 6, col. 3.

Intervention of the government during the actual execution of a terrorist act may involve negotiations with terrorists who have hijacked a train, boat or plane, or who have occupied an embassy. J. Murphy, supra note 1, at 1. Governments may also act to minimize damage to the public health in the event of a terrorist bomb explosion through use of the media to prevent widespread panic. Id.

7. M. Bassiouni, INTERNATIONAL EXTRADITION—UNITED STATES LAW AND PRACTICE, vol. 1, ch. 12 § 2-1 (1983). This maxim is attributed to Hugo Grotius. H. Grotius, De Jure Belli ac Pacis (1624). The principle is sometimes erroneously referred to as aut dedere, aut punire. Id. For a further discussion of aut dedere, aut judicare, see infra notes 10-14 and accompanying text.

8. Currently, international cooperation for the control and prevention of international criminal activity including terrorism is indirect. Bassiouni, An International Control Scheme for the Prosecution of International Terrorism: An Introduction, in LEGAL ASPECTS OF INTERNATIONAL TERRORISM 485 (A. Evans & J. Murphy eds. 1978). No international organization exists to promulgate or enforce laws against known international criminals. Id. at 485-86. Cooperation of states is voluntary and is secured primarily through multilateral or bilateral treaties in which a state pledges to prosecute criminal offenders in its own legal system or assist another state in prosecuting offenders by providing the extradition of an offender who has sought asylum in its country. Id. at 486. Aside from extradition, most treaties include only the most basic provisions for international judicial assistance and cooperation in the enforcement of criminal laws. Id. It has been suggested that cooperation could be enhanced through the employment of additional mechanisms such as the direct exchange of information (including evidence) between different national law enforcement agencies, the recognition
of the law of extradition as a legal means for apprehending terrorists in order to submit them to prosecution. The current law of extradition will be described as it exists in both multilateral and bilateral extradition treaties as well as in anti-terrorist treaties. The limitations upon the duty to extradite will be examined, with a particular focus on the political offense exception to extradition as interpreted by the courts of Switzerland, Great Britain and the United States and as codified in international treaties.

In the third part of this comment, past and present legislative attempts in the United States to reform the law of extradition and limit the scope of the political offense exception will be described. The "Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States and the Government of Great Britain and Northern Ireland" will constitute the primary focus of this description.

Finally, the fourth part of this comment will evaluate the impact of judicial, legislative and executive attempts to combat international terrorism by limiting the scope of the political offense exception. The potential effectiveness of the Supplementary Treaty between the United States and the United Kingdom in contributing to the apprehension and prosecution of terrorists will be evaluated as well as the treaty's legal and philosophical limitations.

II. APPREHENSION AND PROSECUTION OF TERRORISTS AS A MEANS OF COMBATTING INTERNATIONAL TERRORISM

A. PRINCIPLE OF AUT DEDERE, AUT JUDICARE

Although historically most states have been largely ineffectual in the prevention of terrorist acts, they still have the legal obligation under the principle of aut dedere, aut judicare to ensure that the perpetrators of such acts are apprehended and prosecuted. This legal duty to prosecute requires the initiation of criminal proceedings against an international terrorist either in the state in which the terrorist act was committed, in the state which has been legally harmed by the terrorist act, or in the state of which the terrorist is a citizen. The obligation of foreign penal judgments, the execution of sentences abroad and the supervision of the conditionally released abroad. Id.


10. See Lillach & Paxman, State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities, 26 AM. U.L. REV. 217, 278 (1977) (stating that the element of surprise, which characterizes most terrorist acts, keeps states from anticipating and preventing their occurrence).

11. Id. at 279. For a definition of the principle of aut dedere, aut judicare and an explanation of its legal origins, see supra note 7 and accompanying text.

12. Evans, The Apprehension and Prosecution of Offenders: Some Current Problems,
states to cooperate in the apprehension and prosecution of criminal offenders such as terrorists has been well documented in treaties. In addition, this obligation is reflected in the national law of states, and arguably is part of customary state practice finding its origin in the


Three early cases established the standard formula for testing a state's accountability for the apprehension and prosecution of international criminal offenders. A decision of the United States—Venezuelan Claims Commission—held that "Venezuela's responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties. If she did all that could reasonably be required in that behalf, she is to be held blameless; otherwise not." J. Moore, History and Digest of the International Arbitration to Which the United States Has Been a Party 2949, 2968 (1898).

In the Janes case, Janes, the American superintendent of the El Tigre mines near Sonora, was murdered in 1918 by a Mexican employee whom he had recently dismissed. Janes case (U.S. v. Mex.), Opinions 108, 4 R. Int'l Arb. Awards 89 (1927). The Mexican government did nothing about the apprehension and prosecution of the slayer even though it had eyewitness evidence of the murder. Id. The United States brought an action before the United States and Mexican General Claims Commission against the Mexican government claiming that Mexico had breached its duty to prosecute under international law. Lillach & Paxman, supra note 10, at 279.

The United States and Mexican General Claims Commission held that the Mexican government was liable for "not having measured up to its duty of diligently prosecuting and properly punishing the offender." Janes case, Opinions at 114, 4 R. Int'l Arb. Awards at 87. The decision also discussed levels of omission which may be treated as breaches of a state's duty to apprehend and prosecute: 1) no prosecution at all; 2) prosecution followed by release; 3) prosecution and inappropriately light punishment and 4) prosecution, imposition of punishment, then pardon. Id. at 116, 4 R. Int'l Arb. Awards at 88.

In the Neer case, the United States and Mexican General Claims Commission further refined its definitions of lack of due diligence in prosecuting an offender amounting to a breach of international law. Neer case (U.S. v. Mex.), Opinions 71, 4 R. Int'l Arb. Awards 60 (1926). The Commission held that in order to be liable, the behavior of the government "should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of the international standard that every reasonable and impartial man would readily recognize its insufficiency." Id. at 73, 4 R. Int'l Arb. Awards at 61-62. Thus, the Janes and Neer cases established that a duty exists to apprehend and punish individuals who commit crimes that injure foreigners but that states may satisfy this duty by displaying "diligence" or demonstrating that they have done what was "reasonably required." Lillach & Paxman, supra note 10, at 280. Whether this duty has been met will be decided after the consideration of the specific circumstances of each case. Id. Where there is a failure to apprehend or prosecute based upon either negligence or inattention, the state will generally be held responsible. Id. at 284. If reasonable, bona fide steps to catch (and prosecute) the culprits have been taken, a state will not be responsible for its inability to apprehend or its inefficiency in prosecution. Id. at 287.

maxim aut dedere, aut punire.\textsuperscript{14}

Various attempts have been made to codify the legally recognized duty of states to apprehend and punish individuals who engage in terrorist acts.\textsuperscript{15} A number of “anti-terrorist” conventions that are global in scope have been adopted by the United Nations or United Nations related agencies.\textsuperscript{16} Each requires that any state which is a party to the convention and which apprehends an alleged terrorist in its territory must either surrender the offender to the state in which the act occurred for prosecution, or submit his case to domestic authorities for purpose of prosecution.\textsuperscript{17}

These “anti-terrorist” conventions do not, however, legally require a state to extradite an offender. Instead, a state party is induced “to extradite by requiring the submission of alleged offenders [to the authorities] for prosecution if extradition fails.”\textsuperscript{18} Although the conventions seek ultimately to ensure that an offender is prosecuted, state parties are not required to actually prosecute and punish but are merely required to submit the case for consideration for prosecution.\textsuperscript{19} As a re-
result of domestic and foreign political pressures or procedural hazards, this discretion often results in the prevention of the actual prosecution and conviction of terrorists.

Three regional conventions which include the obligation to extradite or domestically prosecute terrorists also have been adopted. In addition, several bilateral conventions (two-party treaties) exist which incorporate the obligation to extradite or domestically prosecute terrorists who hijack planes or boats.

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20. J. Murphy, supra note 1, at 10; see also Evans, supra note 12, at 504 (decision to prosecute subject to influence of political pressures arising from domestic and foreign policy decisions, often compounded by international terrorist’s resort to the political offense doctrine or extortionate demands made by terrorist’s sympathizers).

An example of the impact of domestic and foreign policy pressures upon a state’s discretion to prosecute and punish international terrorists is found in the case of the German terrorist, Rolf Pohle. Greece extradited Pohle, a member of the Baader-Meinhof terrorist group, to the Federal Republic of Germany for completion of his 6.5 year sentence. N.Y. Times, July 23, 1976, at 10, col. 5. Pohle’s sentence was interrupted when he was released in 1975 as one of the extortionate demands made in connection with the kidnapping of Peter Lorenz, Christian Democratic candidate for mayor of West Berlin. N.Y. Times, Aug. 21, 1976, at 11, col. 2.

21. Evans, supra note 12, at 506. For example, in the United States, the prosecutor and the court have prosecutorial discretion which “dominates the criminal justice system from arraignment through sentencing.” Id. Not only may the difficulty of obtaining witnesses or evidence prompt a prosecutor to drop a case, but the accused may also plea bargain for a lesser charge. Id. The further difficulty of obtaining evidence necessary to convict also contributes to the procedural hazards that arise in prosecuting an alleged terrorist. J. Murphy, supra note 1, at 10.


23. J. Murphy, supra note 1, at 16. Cuba has agreements with the United States, Canada, Venezuela, Mexico and Colombia which specifically address the hijacking of airplanes and boats. Id. at 34, n. 42 (citing Evans, LEGAL ASPECTS OF INTERNATIONAL TERRORISM, 20, 21, 25 (A. Evans & J. Murphy eds. 1978)). The Soviet Union has similar agreements with Iran, Finland, and Afghanistan. Id.
Even if an alleged terrorist is tried in the courts of a prosecuting state, an examination of actual state practice shows that in many cases, the prosecution is merely *pro forma*.\(^{24}\) For example, in the *Holder Kerkow* case, the French court refused the United States' request for extradition of several United States nationals and prosecuted the American hijackers for the relatively minor charge of passport fraud.\(^{25}\) On the other hand, there is also concern that terrorists may receive overly harsh or unfair treatment when submitted to a given country's criminal justice system.\(^{26}\)

### B. Extradition as a Means of Combatting International Terrorism

Because one state may not commit a sovereign act upon the territory of another state without its permission, an alleged terrorist can often avoid prosecution by the authorities of the state where he committed the terrorist act by escaping to the territory of another state.\(^{27}\) In order to avoid this unjust result, the law of extradition\(^{28}\) was established rendered to the state whose aircraft or vessel was hijacked, the hijacker must actually be tried in the domestic courts rather than merely being submitted to the authorities, "for purposes of prosecution." See Memorandum of Understanding on the Hijacking of Aircraft and Vessels and Other Offenses, *entered into force*, Feb. 15, 1973, Cuba—United States, 24 U.S.T. 737, T.I.A.S. No. 7579, art. 1 (reprinted in 12 I.L.M. 370 (1973)).


25. William Holder and Katherine Kerkow hijacked a Western Air Lines airplane from Los Angeles to Algiers on June 2, 1972. N.Y. Times, June 4, 1972, at 1, col. 8. In 1975 they went to France. The United States requested their extradition which France denied on the ground that the hijacking had been politically motivated. N.Y. Times, Jan. 26, 1975, at 48, col. 4. France prosecuted and convicted the hijackers on charges of using false passports. Both Holder and Kerkow received sentences of several months imprisonment and small monetary fines. N.Y. Times, May 21, 1975, at 48, col. 1.

26. Evans, *supra* note 12, at 505. In response to the threat of terrorism, several countries have instituted stringent measures that arguably single out terrorists for harsher treatment in detention or in the judicial system than that which may be given to ordinary criminal offenders. *Id.* Examples include measures taken by the United Kingdom to control the terrorism instituted by the Irish Republican Army (IRA), such as extending police powers with respect to the apprehension of suspects and extending the jurisdictional authority of the courts of Northern Ireland in order to enable them to prosecute terrorists accused of offenses committed in the Republic of Ireland. *Id.* In addition, several countries—including the Republic of Ireland, Yemen and Syria—have created special courts for the prosecution of terrorists. *Id.* at 506. Other states, including Israel, Iran, Egypt, the Philippines and Argentina, employ special military tribunals for proceedings involving terrorists. *Id.* Evans suggests that "[i]nternational cooperation looking to the establishment of an international minimum standard of criminal justice is needed before 'extradite or submit to prosecution' becomes a widely meaningful formula for the legal control of international terrorism." *Id.* at 508.


28. Extradition is the process by which the asylum state surrenders to the requesting state an individual accused or convicted in the requesting state of a crime for which the requesting state is attempting to subject the accused either
based upon the principle that "it is to the interest of civilized communities, that crimes . . . should not go unpunished, and it is part of the comity of nations that one state should afford to another every assistance towards bringing persons guilty of such crimes to justice." 29

Extradition is classically defined as "the process by which one state (the state of refuge or asylum) surrenders to another (the requesting state) an individual . . . accused or convicted in the requesting state of an offense for which the requesting state is seeking to subject the [individual] to trial or punishment." 30 Although there is a basic proposition that states have the legal obligation to either extradite or prosecute international offenders, 31 a legal duty to extradite has never been adopted


29. Id. at 407 (quoting the former English Lord Chief Justice Russell in In Re Arton, [1896] 1 Q.B. 108, 111). It is submitted that the extradition of terrorists particularly promotes world order in that terrorism threatens world order and all civilized nations. See Cong. Rec., supra note 3, at S13201.

30. Bassiouni, supra note 28, at 221-22. The principal rules and practices of international extradition constitute a significant body of international law. Outlined in treaties, statutes or codes of criminal procedure, the process of extradition operates within a framework of customary rules which address substantive conditions for extradition. M. Bassiouni, supra note 7, vol. 1, ch. 7 § 5-1. Substantive conditions for extradition may include: 1) double criminality (the accused may not be extradited unless the offense for which he is charged is criminal in both the requesting and requested states); 2) specialty (the requesting state which secures the extradition of an individual can prosecute that person only for the offense(s) for which he or she was extradited by the requested state); 3) offenses for which an accused may be extradited (offenses which are specifically listed or designated by a formula in an extradition treaty); 4) reciprocity (mutuality of obligations and undertakings of the requested and requesting states) and 5) non-inquiry (the refusal of the courts of the requested state to inquire into the processes by which the requesting state secures evidence of 'probable cause' to request extradition, or the means by which a criminal conviction is obtained in the requesting state, or the penal treatment to which an offender may be subjected upon extradition). For a discussion of these conditions of extradition, see M. Bassiouni, supra note 7, vol. 1, ch. 7 §§ 2-1, 4-1 to 7-1. For a discussion of double criminality, see infra note 54. Substantive conditions of extradition also include evidentiary requirements, prescription, expenses and exemptions. Evans, supra note 12, at 498.

31. For a discussion of this proposition—otherwise known as aut dedere, aut judicare—see supra notes 7 & 10-14 and accompanying text. According to M. Cherif Bassiouni, the conceptual framework for extradition should be based on five interdependent factors which include:

1) the recognition of the 'national interest' of the states who are parties to the extradition proceedings;
2) the existence of an international duty to preserve and maintain world public order;
3) the effective application of minimum standards of fairness and justice to the [accused] in the extradition process;
4) a collective duty on the part of all states to combat criminality; and
5) the balancing of these factors within the juridical framework of the 'Rule of Law.'
by customary international law. Rather, "extradition is the preroga-
tive of the requested state, and, in the absence of a . . . treaty between
the requesting and the requested state, there is no international legal
duty to extradite."

Therefore, the law of extradition today is almost entirely derived
from international treaties. These treaties can be either bilateral or
multilateral; however, most extradition takes place in accordance with
bilateral treaties.

1. Multilateral Extradition Treaties

There exist today a variety of regional multilateral extradition
treaties, usually based upon geographical proximity or political affinity of
state parties. Two of the more significant multilateral treaties are the

Bassiouni, supra note 28, at 222.
32. D. GRIEG, supra note 27, at 408.
33. Murphy, Protected Persons and Diplomatic Facilities, in LEGAL ASPECTS
OF INTERNATIONAL TERRORISM 299 (A. Evans & J. Murphy eds. 1978). Furthermore,
in both the United States and Great Britain, the executive has no authority to
extradite in the absence of a treaty. D. GRIEG, supra note 25, at 408.
34. The definition of a treaty, as set forth by the International Law
Commission in a provisional draft is:

any international agreement in written form, whether embodied in a
single instrument or in two or more related instruments and whatever
its particular designation (treaty, convention, protocol, covenant, char-
ter, statute, act, declaration, concordat, exchange of notes, agreed min-
ute, memorandum of agreement, modus vivendi or any other
appellation), concluded between two or more States or other subjects
of international law and governed by international law.

I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 601 (3d ed. 1979), (cit-
ing INTERNATIONAL LAW COMMISSION, YRBK., I.L.C., 1962, ii. 161).

It has been stated that regardless of the descriptive term chosen, in order to
qualify as a "treaty," the agreement concerned must be measured against the
following criteria: 1) it should be a written instrument or instruments between
two or more parties; 2) those parties must be entities endowed with interna-
tional personality; 3) it must be governed by international law; and 4) it should
create a legal obligation. D. GRIEG, supra note 27, at 451. The legal principle
that describes the legal obligation of states arising under a treaty is pacta sunt
servanda. I. BROWNLIE, supra, at 613. Under this general principle of interna-
tional law, "a treaty in force is binding upon the parties and must be performed
by them in good faith." Id.

35. For a discussion of bilateral treaties, see supra notes 47-56 and accom-
panying text.
36. For a discussion of multilateral treaties, see supra notes 38-46 and accom-
panying text.
37. J. MURPHY, supra note 1, at 42-43.
38. Id. at 37. These multilateral extradition treaties include: 1) the Scheme
Relating to the Rendition of Fugitive Offenders Within the Commonwealth,
H.M.S.O. London (Cmd. 3008) (for a description of the Commonwealth Scheme
and other regional agreements, see Shearer, The Current Framework of Interna-
tional Extradition: A Brief Study of Regional Arrangements and Multilateral Treaties, in 2 A
TREATISE ON INTERNATIONAL CRIMINAL LAW, 328-30 (M. Bassiouni & V. Nanda
eds. 1973); 2) the Nordic Treaty of 1962, May 22, 1963, Eur. T.S. No. 98 (for a
European Convention on Extradition and the Inter-American Convention on Extradition. The European Convention on Extradition was concluded in 1957 under the direction of the Council of Europe and, as of 1982, was ratified by all but three member states of the Council. The purpose of this treaty is to create uniform extradition rules between members of the Council and thereby contribute indirectly to the political unity of the members. The Inter-American Convention on Extradition was adopted by the Organization of American States on February 25, 1981 in Caracas, Venezuela. However, the convention has still not come into effect. The United States has never signed it and has not made a decision whether to submit it to the Senate for advice or consent to ratification. Parties to the Inter-American Convention on


41. European Convention on Extradition, Dec. 13, 1957, Council of Europe, Eur. T.S., No. 24, 359 U.N.T.S. 273 (1957). Ratifying member states include Austria, Cyprus, Denmark, Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Sweden, Switzerland, and Turkey. J. Murphy, supra note 1, at 38. Belgium, France, Spain, and Portugal had signed but not ratified the treaty by May 1982. Id. Iceland, Malta, and the United Kingdom had not signed the treaty at that time. Id. Finland and Israel have also signed the treaty although they are not members of the Council of Europe. Id.

42. J. Murphy, supra note 1, at 38.


44. J. Murphy, supra note 1, at 42. In the United States, the authority to conclude extradition treaties and to request or grant extradition lies exclusively with the executive branch of the federal government by virtue of its constitutional power to conduct foreign affairs. See U.S. Const. art. II, § 2. The power of the executive branch to enter into treaties is limited by the Senate's power to "advise and consent" to treaties and by the authority of Congress to enact legislation defining the substantive procedures to be followed by the United States courts. J. Bassiouni, supra note 7, chap. 2 § 1-1; see U.S. Const. art. 2, § 2; United States v. Curtiss-Wright Export Co., 299 U.S. 304, 318-21 (1936) (emphasizing role of the President, beyond the Senate or Congress, as the sole negotiator with foreign powers). Although the executive branch makes the
Extradition obligate themselves to extradite "persons who are judicially required for prosecution, are being tried, have been convicted, or have been sentenced to a penalty involving deprivation of liberty."45 If a requesting state has jurisdiction to try an offense, extradition will be granted under the convention even if the extraditable offense was not committed within the requesting state's territory.46

2. Bilateral Extradition Treaties

Most extradition takes place in accordance with the terms of bilateral extradition treaties, despite the fact that the terms of such treaties are often cumbersome, time-consuming and politically motivated.47 The United States has professed exclusive adherence to bilateral treaties as a legal basis of extradition for reasons of political and procedural expediency,48 although reliance upon multilateral treaties is equally valid.49 Under United States law, extradition is granted to a requesting state only if the United States has an extradition treaty with that state.50

ultimate decision regarding the surrender of an accused to extradition, the judiciary does have the authority to enjoin extradition in the absence of an adequate legal basis. Evans, supra note 11, at 495. The federal judiciary has power to interpret and apply treaties and federal legislation in accordance with the applicable portions of the United States Constitution. 1 M. BASSIOUNI, supra note 7, chap. 2 § 1-2. The judiciary may not "enjoin, prohibit, or mandate the executive's negotiation or agreement to a treaty, nor can it enjoin or mandate the executive's exercise of discretion to request [an offender's] extradition or to refuse to grant extradition although the terms of the applicable treaty have been satisfied." Id. (footnote omitted).

45. J. MURPHY, supra, note 1, at 42.
46. Id.
47. See J. MURPHY, supra note 1, at 42-43. Bilateral treaty practice in extradition is very unmanageable. 1 M. BASSIOUNI, supra note 7, chap. 1 § 5-1. In addition to the enormous number of treaties necessary to establish agreements between all the sovereign nations of the world, states are constantly engaging in diplomatic negotiations to amend the treaties, and national legislatures are continually engaging in the processes of treaty signature and ratification and the enactment of implementing legislation. Id.
48. 1 M. BASSIOUNI, supra note 7, chap. 2, §§ 3-1, 3-2.
49. Id.
50. Id., § 3-1; see 18 U.S.C. §§ 3184-3195 (1982). In Valentine v. United States, the Neideckers were United States citizens who were charged with the commission of crimes in France and sought for extradition by the French authorities after they sought asylum in the United States. Valentine v. United States, 299 U.S. 5, 6 (1936). Although they had allegedly committed extraditable offenses under the French—United States Extradition Treaty, the treaty contained a provision for the exemption of nationals from extradition. Id. at 7-8. The court denied France's request for extradition, holding that the legal power to extradite must be affirmatively conferred in a treaty or statute, and that the terms of the treaty failed to affirmatively grant the United States the necessary authority to extradite the Neideckers. Id. at 9, 18; see also Factor v. Laubenheimer, 290 U.S. 276 (1933) (legal right to demand extradition of fugitives and correlative duty to surrender exist only when created by treaty); United States v. Rauscher, 119 U.S. 407 (1886) (apart from treaty provisions, no legal obligation of one independent nation to deliver to another a fugitive).
although, on occasion, the United States has granted extradition on the
basis of comity.\footnote{1. M. Bassionu, supra note 7, chap. 2, § 3-1. Comity is courtesy be-
tween nations or the respect shown by one country for the laws, judicial deci-
sions and institutions of another. I. Brownlie, supra note 32, at 51.}

Under a traditional model of extradition, an accused offender can
only be extradited if he has allegedly committed a crime specifically des-
ignated in the treaty as subject to extradition.\footnote{52. J. Murphy, supra note 1, at 43.}
Extradition treaties usually list the offenses for which extradition will be granted or desig-
nate a formula by which to determine extraditable offenses.\footnote{53. Id. § 4-1. Under a system of reciproc-
ity between respective states, extraditable offenses are those which consti-
tute an offense in both states and for which there is mutual recognition. Id. § 4-
2. Extradition based upon comity arises only in those exceptional cases where
the respective states are not parties to a mutual treaty or where there is no sys-
tem of reciprocity between them. Id. In these cases “the requesting state does
not rely on any definition or method of designating extraditable offenses, and
the requested state can grant or deny the request irrespective of the offense
charged or its designation [as extraditable].” Id. §§ 4-2 to 4-3.}
Traditionally, United States treaties contained a list of offenses for which one
may be extradited in the text or in an appendix and required satisfaction
of the condition of double criminality.\footnote{54. Id., § 4-11. For a brief discussion of double criminality, see supra note
30. In Collins v. Loisel, Justice Brandeis delineated the parameters of the prin-
offense to be extraditable under this principle, the particular act charged must
be criminal under the laws of both jurisdictions but need not be described by the
same name nor have the same scope of liability. Id.; see also Glucksman v. Hen-
kel, 221 U.S. 508 (1911) (treaty requiring offense to be extraditable in both
countries must be adhered to); Wright v. Henkel, 190 U.S. 40, 58-63 (1903)
(discussing meaning of “made criminal by the laws of both states”); Caplan v.
Vokes, 649 F.2d 1336, 1343 (9th Cir. 1981) (under the “principle of dual crimi-
nality” no offense is extraditable unless it is criminal in both jurisdictions);
Cucuzella v. Keliikoa, 638 F.2d 105 (9th Cir. 1981) (to be extraditable, offense
must be punishable in both jurisdictions).
For an interrelation of the concepts of “specialty” and dual criminality, see
supra note 35 and accompanying text. Compare Brauch v. Raiche, 618 F.2d 843, 847-51
(1st Cir. 1980) (to be extraditable under the principle of specialty, an act
must be proscribed by the laws of both the requesting and the requested state)
with Shapiro v. Ferrandina, 478 F.2d 894, 905-09 (2d Cir.), cert. denied, 414 U.S.
884 (1973) (extradition may be based only upon the comparability of the crimes
rather than the mutual criminality of the acts upon which they are based).
55. J. Murphy, supra note 1, at 43. An example of a treaty that designates
offenses of a certain level of severity as extraditable offenses is the extradition
treaty between the United States and Costa Rica. The treaty states in Article 2:
1) An offense shall be an extraditable offense if it may be punished
under the laws of both Contracting Parties by deprivation of liberty for
a maximum period of more than one year or by any greater punish-
ment.\ldots

http://digitalcommons.law.villanova.edu/vlr/vol31/iss5/7
number of crimes for which extradition can be sought by increasing the annexed list of extraditable crimes with specifically described crimes such as terrorism, drug trafficking, aircraft hijacking, obstruction of justice, and the international transfer of funds.56

C. Defenses to Extradition

In all international treaties in force today that provide for the extradition of criminal offenders, the duty to extradite is limited by provisions contained in the law and practices of the requested state.57 These limitations include: the prohibition of the extradition of an alleged criminal unless “there is sufficient cause to suspect . . . that the person sought has committed the offense for which extradition is requested or that the person sought is the person convicted by a court of the requesting [p]arty;”58 the prohibition of the extradition of nationals;59 the prohibition of extradition where the requesting state could impose the death penalty upon the extradited criminal;60 the requirement of “double
criminality;"61 and the political offense exception.62 For purposes of this comment, only the political offense exception will be addressed in detail.

1. The Political Offense Exception

Under the political offense exception, an offender will be exempt from extradition if he has committed a grossly political act, or an act that was politically motivated but appears to be nothing more than a common crime, or if the accused can show that, in fact, he will be tried for his political beliefs in the requesting state rather than for the common crime he allegedly committed.63 Virtually every “anti-terrorist” convention and extradition treaty in force today contains a political offense exception to extradition.64 Therefore, when a country makes an extradition request, the asylum state must face the difficult problem of determining whether the fugitive is charged with an extraditable offense or a “political” offense.65 It has been argued that because, in practice, the liberal application of the political offense exception allows the state such wide discretion to refuse extradition, the exception is consequentially the main impediment to the fulfillment of relevant treaty obligations and the duty to extradite violators of international criminal law.66

61. J. Murphy, supra note 1, at 44. For a description of the principle of double criminality, see supra note 54 and accompanying text.

62. Evans, supra note 12, at 497. An accused can avoid extradition under the political offense exception if he has committed a grossly political act, or an act that was politically motivated but appears to be nothing more than a common crime, or if the accused can show that in fact he will be tried for his political beliefs rather than for the common crime he allegedly committed. Id. For a discussion of the political offense exception, see Note, Eliminating the Political Offense Exception for Violent Crimes: The Proposed United States—United Kingdom Supplementary Treaty, 26 Va. J. Int’l’ L. 755 (1986).

63. Evans, supra note 12, at 497.

64. Id.

65. Even though widely recognized, the term “political offense” has not been affirmatively defined by the international law community. J. Murphy, supra note 1, at 45. In practice, treaties, statutory provisions and judicial interpretations have usually defined the exception negatively by “declaring that certain offenses cannot be classified as ‘political offenses.’ ” Evans, supra note 12, at 497.

66. M. Bassiouni, supra note 8, at 487.

The alleged criminal who most often claims the political offense exception from extradition has been described as an “ideologically motivated offender”—a
Despite this criticism, the continuing existence of the political offense exception has been justified for a number of reasons. One rationale for the existence of the political offense violation has a humanitarian basis: the requested state denies extradition for fear that the accused (particularly an unsuccessful rebel) will be subject to an unfair trial in the requesting state and face punishment for his political opinions rather than for the crime allegedly committed. A second rationale for the political offense exception is based upon the principle of political neutrality which addresses the fact that governments—particularly their nonpolitical branches—should not intervene in the internal political struggles of other nations by inquiring into the extraditability of a political crime. Under a third rationale for the political offense exception, political crimes are thought to be directed against the domestic public order of the requesting state. Because the subject of their attack is believed to be localized, it is maintained that the criminal acts do not affect the international public order and therefore should not engender the participation of many states in their suppression through such actions as extradition. Underlying all the rationales for the exception, however, is the basic premise that individuals have a "right to resort to political activism to foster political change."
Not every offense that is politically motivated, however, falls within the political offense exception. In determining what offenses fall within the scope of the exception, courts often distinguish between pure political offenses and relative political offenses. Pure political offenses are directed against the government and are designed to threaten the existence, welfare and security of the state. Pure political offenses are consistently held to be political crimes within the exception.

In contrast, the relative political offense is an act done for the purpose of achieving some political goal, but also involves the commission of a common crime such as murder, arson, or the infliction of serious bodily harm. Although there is little uniformity among nation states regarding what constitutes a relative political offense, most courts require that the political element dominate over the intent to commit the common crime in order for a relative political offense to fall within the political offense exception.

versaries of the requested state? And finally, is the relative antisocial character of political crimes to be taken for granted?

72. J. Murphy, supra note 1, at 47.

73. M. Bassiouuni, supra note 7, chap. 8 § 2-15. Examples of pure political offenses include treason, sedition, and espionage; these crimes are directed against the state itself and, therefore, threaten the existence, welfare and security of the state. It has been suggested that treason, sedition and espionage may be regarded as purely political offenses for several reasons. Garcia-Mora, The Nature of Political Offenses: A Knotty Problem of Extradition Law, 48 Va. L. Rev. 1226, 1237 (1962). First, these crimes lack the essential elements (such as) malice of ordinary crimes. Instead, the individual perpetrator is largely motivated by the altruistic political conviction that an unjust political situation must be changed. Second, there is no violation of the private rights of individuals through the commission of such crimes since their underlying purpose is to change a given political situation by illegal means, thereby injuring the public rights of the government. Id.

74. Cantrell, supra note 65, at 780; see e.g., Chandler v. United States, 171 F.2d 921, 935 (1st Cir. 1948), cert. denied, 336 U.S. 918 (1949) (involving an American citizen accused of treason for broadcasting information hostile to the United States from Germany during World War II, court recognized the general practice of states which finds that persons charged with treason are political offenders who should be granted asylum); Ex parte Kolczynski [1955], 2 Q.B. 540 (British court held treason is offense of political character); In re Fabijan, [1933-34] Ann. Dig. 360, 363 (1933) (No. 156) (Ger.) (German Supreme Court held political offense includes high treason, capital treason, acts against external security of state, rebellion and incitement to civil war); In re Ockert, [1933] 59 BG I, 136-37, [1933-34] Ann. Dig. 369, 370 (1933) (No. 157) (Swit.) (Swiss Federal Tribunal classified high and capital treason as purely political offenses).

75. L. Oppenheimer, supra note 14, at 708. The two forms of political offenses have also been distinguished because the purely political offense exclusively affects the public interest and causes only a public wrong. See Garcia-Mora, supra note 73, at 1237. The relative political offense, however, constitutes a private wrong done in furtherance of a political purpose. 2 M. Bassiouuni, supra note 7, chap. 8 §§ 2-19 to 2-20.

76. J. Murphy, supra note 1, at 47.

77. Cantrell, supra note 65, at 781 (citing Bassiouuni, supra note 28, at 250).
The courts in Europe have developed two specific tests in an attempt to clarify the definition of a nonextraditable relative political offense. Under the proportionality test, if the court finds the motivation of the offender in committing the criminal act was predominantly political, then the offense falls within the political offense exception.78

The Swiss court applied the proportionality test in In re Ockert,79 a case involving the extradition of a German national accused of murdering a member of the National-Socialist Party. In denying the extradition, the court held that the case was essentially one of political conflict and defined relative political offenses as acts having the character of an ordinary crime but which, because of the motive and the object, are predominantly political in nature.80

Subsequently, the Swiss courts have somewhat limited the proportionality test through the addition of a further requirement that there be a direct connection between the common crime and the goal of the alleged offender to change the political organization of the state.81 Interestingly, the Swiss courts have concluded that terrorist acts are extraditable offenses under this narrower version of the proportionality test because, "they serve merely terroristic aims."82

In comparison to the Swiss proportionality or political motivation test, the British have developed the political incidence test.83 In the

There are three factors which courts consider when determining whether an offense is political. Bassiouni, supra note 28, at 250. The first factor is the alleged offender’s involvement with the political movement and his personal conviction with regard to the political objective. Id. The second factor is the existence of a 'nexus' between the political motive and the crime committed. Id. Third, an examination is made of the 'proportionality' between the crime and its method of commission and its political objective. Id. Professor Bassiouni has suggested that "the first of these factors is wholly subjective, the second can be evaluated objectively, and the last is sui generis." Id.

78. Garcia-Mora, supra note 73, at 1251-52. For example, under the Federal Extradition Act of January 22, 1892, still in force today:

Extradition is not granted for political offenses. It is granted, however, even when the guilty person alleges a political motive or end, if the act for which it has been requested constitutes primarily a common offense. The Federal Tribunal decides liberally in each particular instance upon the character of the infraction according to the facts of the case.

Federal Extradition Act of Jan. 22, 1892, art. 10, Harvard Research 423 (Swit.).


80. Id. at 158, [1933-34] Ann. Dig. at 370.

81. Garcia-Mora, supra note 73, at 1253.

82. See In re Kaphengst, [1929-30] Ann. Dig. 292 (1930) (No. 188) (Swit.). In Kaphengst, which is the leading Swiss case which rejects acts of terrorism as political offenses under the proportionality test, a German national charged with a bombing in Prussia was extradited even though the accused claimed a political motivation for his act. Id. The court stated that purely terrorist acts were not political offenses because they were not an essential part of a general movement directed towards obtaining a particular object but rather serve merely terroristic ends. Id.

83. Wortley, Political Crime in English Law and in International Law, 45 Brit. Y.
landmark case of *In re Castioni* in which there was a request for the extradition of an individual who allegedly had murdered a government official during the course of a political riot, the British court set forth a two part "political incidence" test: first, there must be a political disturbance and second, the political offense must be incidental to and form part of that disturbance.

The British court in *Ex parte Kolczynski* further expanded the criteria to be considered in determining whether an offense constitutes a political offense. Noting that such offenses must be evaluated in light of the political circumstance existing at the time of the offense, the Kolczynski court refused to extradite mutinous Polish sailors because they would be prosecuted upon their return to Poland for the political offense of treason. Thus, the court enlarged the scope of offenses that would fall within the political offense exception by holding that there was no requirement of a political disturbance at the time of the commiss-

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84. *In re Castioni*, [1891] 1 Q.B. 149. In *In re Castioni*, the Swiss government requested the extradition of a Swiss citizen who was charged with the murder of a member of the State Council of a Swiss canton during the heat of a political riot. *Id.* at 149-50. The British court refused extradition, holding that the murder of a government official during a political riot was an offense of a political character within the intended meaning of the phrase. *Id.* at 149. For a further discussion of *Castioni*, see Note, *Extradition Reform and the Statutory Definition of Political Offenses*, 24 VA. J. INT'L L. 419, 429-37 (1984).

85. *In re Castioni*, [1891] 1 Q.B. at 150; M. BASSIOUNI, supra note 7, at 388-89. The British court asserted that "the question really is whether... the man acted as one of a number of persons engaged in acts of violence of a political character with a political object, and part of the political movement and rising in which he was taking place." *In re Castioni*, 1 Q.B. at 159.

The *Castioni* court further explained this test in *In re Meunier*, [1894] 2 Q.B. 415. In that case, Meunier, a French anarchist, was sought by the French government on charges of causing explosions in a cafe and army barracks. *Meunier*, 2 Q.B. at 415-16. The British government held that Meunier should be extradited back to France. *Id.* The British court stated that in order for an action to fall within the political offense exception, the party must show that the action was committed in the context of a struggle between political parties which were seeking control of the government. *Id.* at 419. The court concluded that since anarchists' crimes are committed against all governments rather than any one particular regime, Meunier's acts were not political in character. *Id.* For a further discussion of the *Castioni* approach, see Note, supra note 84, at 427-37.

86. Regina v. Governor of Brixton Prison, *ex parte Kolczynski*, [1955] 2 Q.B. 540. In this case, the crew of a Polish ship committed mutiny against their captain for the purpose of gaining asylum in England. *Id.* at 541. Although the extradition request included five different nonpolitical offenses, the crew insisted that they had committed the alleged acts solely to escape from potential persecution in their homeland. *Id.* at 542.

87. *Id.* at 548.

88. *Id.* at 549. Under Polish law at the time, an individual committed the crime of treason if he left Poland in order to settle in another country. *Id.*
sion of the act if the requesting country had a totalitarian government. 89

The British court added the consideration of political motive of the offender to the political incidence test for a “relative” political offense in Regina v. Governor of Brixton Prison, ex parte Schtraks. 90 In that case, the court rejected the fugitive’s assertion that his act in refusing to return a child to his parents was a political offense because his reasons for refusal were related to the political and religious struggle taking place in Israel at that time. 91 Instead, the court found that the fugitive’s act was committed primarily for personal reasons and not in order to further the goals of any political group that was acting out against the government of Israel. 92

a. The Political Offense Exception in International Treaties

Virtually all counter-terrorist conventions and extradition treaties in force today contain a provision which permits the denial of the extradition of an alleged criminal offender if he has committed a political offense. 93 With the exception of the European Convention on the Suppression of Terrorism, 94 none of the counter-terrorist conventions limits the discretion of the requested state to invoke the political offense exception in response to a request for extradition. 95

The European Convention on the Suppression of Terrorism at
tempts to eliminate a variety of common crimes as well as terrorism from the political offense exception. In Article 1, the convention provides that certain specific criminal acts will not be regarded as political offenses for the purposes of extradition.\textsuperscript{97} Additional provisions are included in the convention, however, that permit a requested state to refuse the extradition of an alleged criminal accused of committing a political offense as long as certain aspects of the act are considered.\textsuperscript{98} In addition, a party to the treaty may refuse extradition if it finds that an alleged criminal will be discriminated against or unfairly prosecuted or punished.\textsuperscript{99}

By contrast, in the European Convention on Extradition\textsuperscript{100} and the Inter-American Convention on Extradition,\textsuperscript{101} limitations upon the obligation of a member state to extradite a fugitive are numerous. In the European Convention on Extradition, an exemption to extradition is allowed for political or military offenses, where the fugitive is a national of the requested state, or where the offense for which extradition is requested involves the death penalty under the law of the requesting state.\textsuperscript{102} The right to refuse the extradition of a fugitive under the political offense exception is denied, however, where both the requesting

\textsuperscript{97} European Convention on the Suppression of Terrorism, Jan. 27, 1977, Gr. Brit. T.S. No. 93 (Cmd. 7390), Eur. T.S. No. 90 art. 1, \textit{(reprinted in} 15 I.L.M. \textit{1272). Criminal acts not regarded as political offenses in this treaty include: hijacking, kidnapping, attacking the life, physical integrity or liberty of diplomats, and bombing. \textit{Id.}

\textsuperscript{98} \textit{Id.}, art. 13, 15 I.L.M. at 1274. State parties may refuse to extradite on the grounds that the offense is political in character notwithstanding the fact that a listed offense is involved as long as it considers the character of the offense including:

(a) that it created a collective danger to the life, physical integrity or liberty of persons; or
(b) that it affected persons foreign to the motives behind it; or
(c) that cruel or viscous (sic) means had been used in the commission of the offence.

\textit{Id.}

\textsuperscript{99} \textit{Id.}

\textsuperscript{100} Dec. 13, 1957, Council of Europe, Eur. T.S. No. 24, 359 U.N.T.S. 273. For a discussion of the treaty's purpose and procedural history, see \textit{supra} notes 41-42 and accompanying text.

\textsuperscript{101} Inter-American Convention on Extradition, Feb. 25, 1981, Organization of American States, 20 I.L.M. 723. For a discussion of the purpose and contents of the treaty, see \textit{supra} notes 43-46 and accompanying text.

\textsuperscript{102} J. Murphy, \textit{supra} note 1, at 38. Under this treaty, political offenses, the determination of which is left to the discretion of the requested state, are excluded from extraditable offenses. European Convention on Extradition, \textit{supra} note 96, at art. 3. The treaty does contain a "Belgian" clause, however, which states that the taking or attempted taking of the life of a head of state or a member of his family is not a political offense. \textit{Id.} Extradition of a state's own nationals is discretionary. \textit{Id.} at art. 6.
state and the requested states are also parties to the European Convention on the Suppression of Terrorism.\textsuperscript{103}

The Inter-American Convention on Extradition\textsuperscript{104} also includes a number of grounds for denying extradition including the political offense exception and the right of asylum.\textsuperscript{105} Similarly, the Convention provides for the retention of the right of asylum "when its exercise is appropriate" in the face of a request for extradition.\textsuperscript{106}

Most bilateral extradition treaties, including those between the United States and other nations, also contain a provision for the political offense exception.\textsuperscript{107} Although none of the bilateral treaties explicitly defines the term "political offense," there is a trend to include provisions which declare that certain offenses cannot be classified as "political" offenses no matter what their political motivation.\textsuperscript{108} These "exceptions to the political offense exception" include attempts on the life of a head of state,\textsuperscript{109} willful crimes against human life,\textsuperscript{110} geno-

\textsuperscript{103} J. MURPHY, \textit{supra} note 1, at 38. The European Convention on Extradition has been superseded with regard to provisions governing the extradition of terrorists by the European Convention on the Suppression of Terrorism (ECST). R. LILICH, \textit{TRANSONAL TERRORISM: CONVENTIONS AND COMMENTARY} 143 (1982). A party to both conventions may still refuse the extradition of a fugitive under the political offense exception as long as it has reserved the right to retain the exception under its extradition law and practice. \textit{Id.}

\textsuperscript{104} Inter-American Convention on Extradition, \textit{supra} note 101.

\textsuperscript{105} Inter-American Convention on Extradition, \textit{supra} note 101, at art. 4(4). According to the treaty, extradition may not be granted:

\[\text{when, as determined by the requested State, the offense for which the person is sought is a political offense, an offense related thereto, or an ordinary criminal offense prosecuted for political reasons. The requested state may decide that the fact that the victim of the punishable act in question performed political functions does not in itself justify the designation of the offense as political.}\]

\textit{Id.}

\textsuperscript{106} Inter-American Convention on Extradition, \textit{supra} note 101, at art. 6. For a discussion of the impact of the doctrine of asylum upon the successful prosecution of international terrorists, see J. MURPHY, \textit{supra} note 1, at 40-41.

\textsuperscript{107} J. MURPHY, \textit{supra} note 1, at 45. The Treaty on Extradition Between the United States and Japan states that extradition will not be granted

\[\text{when} the offense for which extradition is requested is a political offense or when it appears that the request for extradition is made with a view to prosecuting, trying, or punishing the person sought for a political offense. If any question arises as to the application of this provision, the decision of the requested Party shall prevail.}\]


\textsuperscript{108} Evans, \textit{supra} note 12, at 497.

\textsuperscript{109} \textit{See} Treaty on Extradition, Oct. 29, 1883, United States-Luxembourg, art. IV, 23 Stat. 808, 811. Belgium amended its extradition law in 1856 when it
cide, attacks on internationally protected persons, aircraft hijacking, and violations of the laws of war. Despite the many examples of treaties that circumscribe the ability of politically motivated offenders to use the political offense exception to avoid extradition, the majority of bilateral extradition treaties do not specifically limit the acts that come under the rubric of the political offense exception. Because states have virtually unrestricted discretion to refuse the extradition of a political offender, it has been argued that the political offense exception prevents a significant number of international terrorists from being prosecuted and punished.

b. The Political Offense Exception in United States Law and Practice

In the absence of an explicit definition of a political offense in "anti-terrorist" and extradition treaties, the American judiciary has adopted, without substantial deviation in any case, the Castioni political incidence test in determining the existence of a political offense. In adopting this test, the American courts have specifically chosen not to follow the more recent approach of the British courts which has expanded the application of the political offense exception to situations where the defendant's acts were politically motivated and directed towards political ends, but were not part of an overall political disturbance in the requesting country.

found that the alleged criminal who had attempted to assassinate Napoleon III could not be extradited to France because his act constituted a political offense. Evans, supra note 12, at 514 n.34.


113. Id. at art. 4(2)(ii).


115. J. Murphy, supra note 1, at 45.

116. Id.

117. For a discussion of the lack of definition of a political offense in "anti-terrorist" treaties and extradition treaties, see supra note 65 and accompanying text.

118. Cantrell, supra note 65, at 795 (citing In re Castioni, [1891] 1 Q.B. 1492). Thus, in the United States, the term political offense has uniformly been construed to encompass those offenses committed in the course of a political disturbance which are "incidental to" and part of the political disturbance. Id. For a discussion of this approach, see supra notes 84-85 and accompanying text.

119. For a discussion of Ex parte Kolczynski, see supra notes 86-88 and accompanying text. In Ex parte Kolczynski, the court eliminated the absolute requirement that the political offense occur in the course of a political uprising. Cantrell, supra note 65, at 786-87.
In re Ezeta was the first judicial opinion in the United States to consider the political offense exception. In that case, the Republic of Salvador sought the extradition of General Antonio Ezeta, the former commander-in-chief of the army of the Republic of Salvador, and four of his five military officers. Five individuals had sought asylum in the United States in order to avoid prosecution for the robbing and murdering of several men during their unsuccessful effort to suppress a revolution which deposed Ezeta in 1894. Relying upon the holding and analysis of Castioni, the court refused to extradite the alleged criminals because the crimes charged were of a political character. In reaching this conclusion the court relied upon a draft of a treaty on International Penal Law recommended by the International American Conference in 1890.

Several years later in Ornelas v. Ruiz, the Supreme Court of the United States, in its only consideration of the political offense exception, adopted the political incidence test as defined in Ezeta. In Ornelas, the Mexican government requested the extradition of Ruiz and several

120. 62 F. 972 (N.D. Cal. 1894).
121. Id. at 977-79.
122. Id. In 1890, Antonio Ezeta and his brother Carlos had led a successful revolt against the existing government in Salvador. Id. at 977. Later, they had themselves elected to the positions of vice-president and president, respectively. Id. Antonio then became commander and chief of the army. Id. He proceeded to use his power to suppress any opposition to the Ezeta government. Id.
123. For a discussion of the court's holding and analysis in the Castioni case, see supra notes 84-85 and accompanying text.
124. In re Ezeta, 62 F. at 999. The court determined that the crimes were of a political character because they were associated with the actual conflict of armed forces. Id.
125. Id. The court relied upon the following provision of the draft treaty: Political offenses, offenses subversive of the internal and external safety of a state, or common offenses connected with these, shall not warrant extradition. The determination of the character of the offense is incumbent upon the nations upon which the demand for extradition is made; and its decision shall be made under and according to the provisions of the law which shall prove to be most favorable to the accused. Id. (citing article 23 of the draft of a Treaty on International Penal Law recommended by the International American Conference to Latin American Governments in 1890).

The court also noted the remarks of one of the conferees as follows:

In the revolutions, as we conduct them in our countries, the common offenses are necessarily mixed up with the political in many cases. A revolutionist has no resources. . . . A revolutionist needs horses for moving, beef to feed his troops, etc.; and since he does not go into the public markets to purchase those horses and that beef, nor the arms and saddles to mount and equip his forces, he takes them from the first pasture or shop he finds at hand. This is called robbery everywhere, and is a common offense in time of peace, but in time of war it is a circumstance closely allied to the manner of waging it.

other men for the crimes of murder, arson, robbery, and kidnapping.\footnote{127} The Court denied that the offenses committed were political in nature reasoning that the crimes were not part of a "movement in aid of a political revolt, an insurrection, or a civil war."\footnote{128}

In the series of cases considering the Yugoslavian government’s request for the extradition of Andrija Artukovic, a Nazi leader in Croatia during World War II, the American courts reaffirmed their commitment to a strict interpretation of the "political incidence" test.\footnote{129} In 1951, the Yugoslavian government sought the extradition of Artukovic on charges that he directed the murder of thousands of innocent civilians in concentration camps during 1941 and 1942 while he was Minister of the Interior of the pro-Hitler Pavelic government in Croatia.\footnote{130} The appellate court\footnote{131} affirmed the decision of the district court\footnote{132} denying the extradition of Artukovic on the grounds that the offenses committed by the accused were of a political character within the meaning of the extradition treaty between the United States and Yugoslavia.\footnote{133} In reviewing

\footnote{127. Id. at 503. Ruiz was a member of a band of approximately 140 men, under the leadership of one Francisco Benevides, who crossed the border from Texas to Mexico and attacked 40 Mexican soldiers stationed at the village of San Ygnacio. \textit{Id.} at 510. In the attack, a number of soldiers were killed and wounded, their horses and equipment removed, and their barracks burned. \textit{Id.} They also burned the homes and stole the personal property of private citizens. \textit{Id.} The band of self-styled soldiers remained in the vicinity of the village for six hours before returning to Texas. \textit{Id.}}\footnote{128. Id. at 511. Ruiz claimed that his actions were part of a revolutionary movement in the border region that was fighting against the Mexican government. \textit{Id.} The Supreme Court rejected Ruiz’s assertions explaining that immediately after the incident in question, Ruiz and the other bandits had retreated across the river into Texas despite the fact that no armed force of the Mexican government was in the vicinity to hinder their advance into the country. \textit{Id.}}\footnote{129. Artukovic v. Boyle, 107 F. Supp. 11, 33 (S.D. Cal. 1952) (held no extradition treaty existed between the United States and Yugoslavia), \textit{rev’d, sub nom.} Ivancevic v. Artukovic, 211 F.2d 565, 575 (9th Cir. 1954) (held that valid extradition treaty existed), \textit{on remand,} Artukovic v. Boyle, 140 F. Supp. 245, 247 (S.D. Cal. 1956) (held that applicability of the political offense exception precluded the extradition of the accused), \textit{aff’d sub nom.} Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), \textit{vacated by} 355 U.S. 393 (1958) (held that full hearing on political offense exception was required), \textit{on remand, sub nom.} U.S. v. Artukovic, 170 F. Supp. 383, 392-94 (S.D. Cal. 1959) (political offense exception precluded extradition).}
the appellate court's decision, the Supreme Court vacated the court of appeals' decision and remanded the case for an extradition hearing on the issue of the political offense. In the final disposition of the case, the United States Commissioner denied extradition in part due to insufficient evidence to establish probable cause to believe Artukovic guilty of the crimes charged, and in part because the crimes charged were political in character under the political incidence test of the political offense exception.

In two additional cases decided in the 1960's, U.S. courts continued to apply variations of the political incidence theory first developed in Castioni. In Jiminez v. Aristequieta the Fifth Circuit held that a former United Nations General Assembly resolutions stating that war criminals should not be exempt from extradition. Id. at 205.


135. Karadzole v. Artukovic, 355 U.S. 393 (1958). The Court vacated the opinion of the Ninth Circuit in a one paragraph per curiam opinion without discussing the merits of the case. Id. The case was remanded pursuant to 18 U.S.C. § 3184. The Supreme Court heard argument from the Department of State, representing the executive branch's view of the extradition issue, that murder in the form of genocide is still murder within the meaning of the extradition treaty and therefore, does not qualify as a political offense. 2 M. BassiouNi, supra note 7, chap. 8 §§ 2-36 to 2-37 (citing letter from the Legal Advisor of the Department of State to the Acting Assistant Attorney General McLean, M.S. Dept. of State, Dec. 16, 1957, file 611.6926/11-57; "memorandum for the United States," submitted in Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), appended to the opinion).

136. United States v. Artukovic, 170 F. Supp. 383, 392-93 (S.D. Cal. 1959). The Commissioner who decided the case defined a political offense as follows: Generally speaking it is an offense against the government itself or incident to political uprisings. It is not a political offense because the crime was committed by a politician. The crime must be incidental to and form a part of political disturbances. It must be in furtherance of one side or another of a bona fide struggle for political power. Id. at 392.

In 1984, Yugoslavia filed a new extradition request; a magistrate determined that there was probable cause to believe Artukovic committed the charged offenses. See Extradition of Artukovic, 628 F. Supp. 1370 (S.D. Cal. 1985). The district court denied the habeas petition, and Artukovic was extradited a few days later. See Artukovic v. Risen, 284 F.2d 1554 (9th Cir. 1986).

The Ninth Circuit reconsidered its decision in Karadzole in dicta in Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986). Referring to the Supreme Court's vacation of its judgment in Karadzole, the Ninth Circuit stated that "it is clear that our opinion has no precedential value." Id. Judge Reinhardt emphasized that the crimes against humanity with which Artukovic was charged are not protected by the political offense exception. Id.

137. 311 F.2d 547 (5th Cir. 1962), cert. denied, 373 U.S. 914 (1963). Venezuela charged the defendant with two distinct groups of crimes committed in Venezuela during the years 1948 to 1958 while he served as a member of a three-man junta, as provisional President and later as President. 311 F.2d at 552. The first group of crimes included four charges of murder and participation in murder as an accessory before the fact; the second group comprised financial crimes for his own personal gain. Id. Venezuela sought the extradition of the defendant from the United States alleging that all the crimes constituted
Venezuelan president was extraditable because the alleged financial crimes he had committed did not qualify as political offenses.138

One year after the decision in Jiminez, a United States court in In re Gonzalez139 extradited a Dominican Republic national who allegedly tortured and killed two prisoners because the charges did not fall within the political offense exception.140 The court held that in order for a crime to constitute a political offense, there must be an “up-rising” and the acts in question must be incidental to it.141 The court concluded that there was no uprising or political disturbance in the Dominican Republic at the time of the defendant’s actions.142 Likewise, in addressing the issue of whether the actions were “politically motivated and directed towards political ends,”143 the court concluded that the acts in question were not taken in order to seek freedom against a repressive totalitarian regime,144 but were merely acts of a military subordinate obeying the orders of a superior.145

A United States court was first confronted with the request for the extraditable offenses under the extradition treaty between the United States and Venezuela. Id. at 552, 558-62.

138. 311 F.2d at 562. In reaching this conclusion, the court found “no evidence that the financial crimes charged were committed in the course of, and incidental to, a revolutionary uprising or other violent political disturbance.” Id. at 566. The court also found insufficient evidence to establish probable cause with respect to the crimes of murder and attempted murder. Id. at 559. The court declined to evaluate the application of the political offense exception to the crimes of murder since the defendant was not found guilty of those crimes. Id.


140. Id. at 719-21. Gonzalez was accused of torturing and killing two prisoners in a house of detention while acting in a military or quasi-military capacity under the regime of Generalissimo Rafael Trujillo in 1960. Id. at 719. Gonzalez sought to avoid extradition by claiming that his actions fell within the political offense exception. Id. at 720.

141. Id. at 721 (citing In re Castioni, [1891] 1 Q.B. 149, 155). The court also noted “that the political offense exception is applicable to acts of government agents seeking to suppress an uprising, as well as to the acts of those participating in the uprising.” 217 F. Supp. at 721 (citing In re Ezeta, 62 F. 972, 1002 (N.D. Cal. 1894); Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), vacated, 355 U.S. 393 (1958)).

In dicta, the court emphasized that the Castioni rule with regard to the political offense exception was intended to be flexible. 217 F. Supp. at 721, n.9.

142. Id. at 721.

143. Id. at 721, n.9 (citing Ex parte Kolczynski [1955] 2 Q.B. 540, 550). Referring to the Kolczynski decision, the court pointed out in dicta that in order for the political offense exception to be applicable, the only indispensable ingredient is that the acts be politically motivated and directed toward political ends. Id. at 721 n.9.

144. Id. The court stated in dicta that the political offense exception “can be applied with greater liberality where the demanding state is a totalitarian regime seeking the extradition of one who has opposed that regime in the cause of freedom.” Id.

145. Id. at 721.
extradition of an individual accused of political terrorism in In re McMullen. In this case, Great Britain sought the extradition of a member of the Provisional Irish Republican Army ("PIRA") for the alleged bombing attack of a British Army installation resulting in the death of an innocent civilian. McMullen claimed that his actions constituted a political offense under the provisions of the United States - United Kingdom Extradition Treaty and therefore the court should deny his extradition. The magistrate denied McMullen's extradition on the basis of the political offense exception. He found that even though the offense was deplorable and heinous, a disruptive uprising of a political nature existed in Northern Ireland at the time Mr. McMullen committed the alleged crimes, that McMullen's activities were directed by the PIRA, and that the bombing was a crime incidental to, and formed part of, that political disturbance. In contrast, in the case of Abu Eain, the magistrate refused to

146. In re McMullen, Mag. No. 3-78-1099 M G (N.D. Cal. May 11, 1979) (unreported), aff'd, 668 F.2d 122 (2d Cir. 1980).
147. In re McMullen, Mag. No. 3-78-1099 M G at 2. The record was clear that the PIRA was a political terrorist group with the objective of nationalizing Northern Ireland, and that prior to and during 1974, McMullen had been a member of the PIRA, described as "an organization existing in an era of political upheaval which was engaged in and conducted political violence, of the most extreme nature with a solely political objective." Id. Additionally, there was no doubt that the British Army and its facilities were prime targets for the PIRA's terrorist activities. Id.
148. Id. According to the Extradition Treaty between the United States and the United Kingdom, extradition may be denied where:
(c)(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or
(c)(ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character.
149. In re McMullen, Mag. No. 3-78-1099 M G at 3. The magistrate defined the political offense exception as a crime that "must be incidental to or formed part of a political disturbance and committed as furthering a political uprising." Id. The court further stated that even though the offense might be deplorable and heinous, the person will still be excluded from deportation if the crime is committed under these prerequisites. Id.
150. Id. at 4. One commentator, Professor Bassiouni, has observed that the court found that McMullen's actions fell within the political offense exception because they occurred within the larger political conflict between the PIRA and the British government over the nationalism of Northern Ireland. M. Bassiouni, supra note 7, chap. 8 § 2-42. He further observed that in order to constitute a political offense, the court found that McMullen's actions need not occur as an immediate and direct incidence of the political conflict. Id. According to Professor Bassiouni, the court also found a "rational nexus between the political objective and the act of violence," and that the killing of a civilian was "unintended and incidental to the permissible target which is a military barracks." Id.
exclude from extradition any crime of violence, no matter how senseless or heinous, simply because it was carried out with some political motive. In this case, Israel sought the extradition of Abu Eain under the United States-Israel Extradition Treaty.\footnote{152} Abu Eain was sought for allegedly killing and wounding individuals by the delayed detonation of a bomb in a trash bin of a public market place in Tiberius, Israel, on May 14, 1979.\footnote{153} In support of the applicability of the political offense exception, the defense argued that bombing public places where military personnel of the enemy congregate should be viewed as a political and military necessity in the ongoing struggle for insurrection and liberation between the PLO and Israel.\footnote{154}

The court rejected Abu Eain’s argument, finding that there was no link between the act of bombing, which was an act of violence directed at society at large, and the political objective of the PLO to overthrow the government of Israel.\footnote{155} As a result, the court held that Abu Eain’s actions did not constitute a political offense, and thus granted his extradition.\footnote{156} The district court affirmed the decision of the magistrate concluding that the political offense doctrine should not be interpreted to legitimize anarchistic activities which, by their nature, impact upon the citizenry and not directly upon the government.\footnote{157}

In accordance with McMullen, the magistrate in \textit{In re Mackin} held that Mackin’s shooting of a British policeman in Northern Ireland constituted a political offense within the meaning of the United States-United Kingdom Extradition Treaty, and, therefore, denied Mackin’s ex-
tradition. The *Mackin* court distinguished its holdings from the holding in *Abu Eain* by pointing out that Abu Eain’s acts were acts of random terrorism as compared to Mackin’s acts, which were free from personal motivation and part of a confrontation for control of the government.

Subsequently, in 1983, the British government requested the extradition of yet another alleged PIRA member, William Joseph Quinn, for allegedly committing a variety of violent acts causing injury and death and also for conspiracy. The U.S. magistrate granted the request for

158. *In re Mackin*, Mag. No. 80 Cr. Misc. 1 (S.D. N.Y. Aug. 13, 1981) (unreported). In *Mackin*, the magistrate relied upon the definition of a political offense as outlined in *Castioni* and *Abu Eain* stating that the political offense definition requires that “the act be ‘incidental to’ a severe political disturbance” and that “the act be committed in furtherance of the political uprising: there must be a substantial tie between the specific act and the political activity and goals of the uprising group.” *Id.* at 95-96.

In applying the test for a political offense, the magistrate found that:
(1) at the time of the offenses charged against Mackin the Provisional Irish Republican Army (PIRA) was conducting a political uprising in the portion of Belfast where the offenses were committed; (2) that Mackin was an active member of PIRA; and (3) that the offenses committed against the British soldier were incidental to Mackin’s role in the PIRA’s political uprising in Belfast.

*In re Mackin*, 668 F.2d 122, 125 (2d Cir. 1981). Accordingly, the magistrate concluded that the crimes were “of a political character within the meaning of the Article V(1)(c)(1) of the Treaty.” *Id.*

159. *In re Mackin*, Mag. No. 80 Cr. Misc. at 98 (citing *In re Castioni*, [1891] 1 Q.B. 149, 156). On appeal to the Second Circuit, the executive branch argued that the magistrate had no jurisdiction to decide the political offense question because such decisions were committed to the executive branch. *Id.* at 125, 132. The executive branch argued that the question at issue in the case was based upon the language of the extradition treaty which speaks of an offense which “is regarded by the requested Party as one of a political character.” *In re Mackin*, 668 F.2d at 132 (citing Treaty on Extradition, June 8, 1972, United States-United Kingdom, art. V(1)(c)(1), 28 U.S.T. 227, T.I.A.S. 8486 (entered into force on Jan. 21, 1977)). The executive branch argued that “the requested Party” in this case was the Government of the United States, represented on matters of foreign relations by the President, and not by a judicial officer. *Id.* at 132 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936)). The court rejected the government’s argument, finding that the magistrate had jurisdiction to consider the political offense question. *Id.* at 133. The court based its decision on the existence of numerous treaties “whose language explicitly envisions that courts will decide the political offense question,” the potential difficulties that could arise in this country’s foreign relations if the decisions regarding the political offense exception were placed solely in the executive branch, and the long-standing recognition and practice that courts shall determine whether a particular offense comes within the exception. *Id.* at 133-34.

160. *Quinn v. Robinson*, No. C-82-6688 R.P.A. (N.D. Cal. Oct. 3, 1983) (unreported). Specifically, Quinn was charged with shooting a London policeman to death in 1975; conspiring to send letter bombs to a Catholic bishop, a British judge and a newspaper executive in 1974 and 1975 and placing bombs in a railroad station and two restaurants in 1974 and 1975 which, upon explosion, caused serious injuries. *Id.* Before the alleged murder which gave rise to England’s request for Quinn’s extradition, Quinn was charged, tried and convicted of membership in the outlawed IRA. *Quinn v. Robinson*, 783 F.2d 776, 783 (9th
extradition holding that Quinn's actions did not fall within the political offense exception.\textsuperscript{161}

In \textit{Quinn v. Robinson}, the district court reversed, and denied Quinn's extradition.\textsuperscript{162} The court ruled that all of the alleged crimes constituted political offenses because the violence directed against the civilian population was incidental "to the political goals of seeking an end to British rule in Northern Ireland."\textsuperscript{163}

The Court of Appeals for the Ninth Circuit reversed the district court's decision, granted Britain's request for extradition of Quinn on the murder charge, but remanded the request for extradition on the conspiracy charge to the district court.\textsuperscript{164} In determining whether the charges of conspiracy and murder were extraditable offenses, the court applied its own interpretation of the traditional two-prong political inci-
The court concluded that the test was not met because Quinn's alleged actions did not take place in Northern Ireland where there was a political uprising, but in England where no political uprising existed. The court acknowledged that if there had been an uprising in England at the time of the offenses, then the actions would have been committed "in furtherance of the up-rising." Because the incidence test was not met, the court concluded that neither the bombing nor the murder was a non-extraditable offense under the political offense exception to the extradition treaty between the United States and Great Britain.

The most recent case in which a domestic court applied the political

165. Id. at 817.

166. Id. The court asserted that the uprising component of the political incidence test plays a "key role in ensuring that the incidence test protects only those activities that the political offense doctrine was designed to protect." Id. at 806. The court defined "uprising" as a "revolt by indigenous people against their own government or an occupying power" and specified characteristics of the revolt that must be satisfied before it could constitute an uprising. Id. at 807. Such characteristics include: 1) a certain level of violence through which the participants are seeking to accomplish a fundamental change; 2) a sufficient number of adherents to create the requisite amount of turmoil; 3) that the revolt occur only within the country or territory in which those rising up reside and not extend beyond the borders of the territory in which the change of governmental structure is sought and 4) the revolt must be created by nationals of the land in which the disturbance is occurring. Id.

The court applied a liberal standard when determining whether the "incidental to" component of the political incidence test was met, examining all the circumstances surrounding the commission of the crime. Id. at 809. The court noted that the acts that may be incidental to an uprising are necessarily limited by the geographic and temporal limitations of an uprising found in the first prong of the test, as well as by the requirement for a causal or ideological relationship between the act and the uprising. Id. In applying a liberal nexus or causation standard, the court rejected the need for proof of effectiveness of the actions in accomplishing the goal, motive of the accused, or membership of the accused in an uprising group. Id. Finally, the court rejected the judiciary's role in evaluating the means utilized by those uprising to accomplish their political goal. Id. at 810.

167. Id. Although the court agreed with the conclusion that an uprising existed in Northern Ireland at the time of the offenses in question, it concluded that the uprising did not extend to England due to the insufficient level of violence in England and the lack of English nationals seeking to alter their government. Id. In support of this conclusion the court stated:

The critical factor is that nationals of Northern Ireland, seeking to alter the government in that territorial entity, exported their struggle for political change across the seas to a separate geographical entity... we do not believe it would be proper to stretch the term "uprising" to include acts that took place in England as a part of a struggle by nationals of Northern Ireland to change the form of government in their own land. Id. at 813-14 (emphasis added). The court did not rely on the fact that England and Northern Ireland are one political entity. For a discussion of this point, see supra notes 166-67 and infra notes 223-24 and accompanying text.

168. Quinn, 783 F.2d at 814.
In Doherty, the District Court for the Southern District of New York denied the United Kingdom's request that a PIRA member accused of attacking a convoy of British soldiers in Northern Ireland be extradited. The district court accepted Doherty's assertions that his involvement with the death of a British soldier, the illegal possession of firearms and ammunition, as well as his membership in the Irish Republican Army, constituted political offenses. Although the court was reluctant to "extend the benefit of the political offense exception to every fanatic group or individual with loosely defined political objectives who commit acts of violence in the name of so called political objectives," it determined that the PIRA has "an organization, discipline, and command structure that distinguishes it from more amorphous groups . . . ." The Doherty court concluded that it would "consider the nature of an organization, its structure, and its mode of internal discipline, in deciding whether the acts of its members can constitute political conduct under an appropriate interpretation of the treaty." In United States v. Doherty, the United States, on behalf of the Government of the United Kingdom, sought by the vehicle of declaratory judgment, collateral review of the order denying extradition. The District Court for the Southern District of New York granted Doherty's

169. 599 F. Supp. 270 (S.D.N.Y. 1984). In Doherty, the accused was a member of the PIRA group that attacked a group of British soldiers in Northern Ireland causing the death of one of the soldiers. Id. at 272. After the attack, Doherty was arrested, charged with murder and held in prison before, during, and after the completion of the trial. Id. He escaped from prison and sought asylum in the United States during which time he was convicted in absentia of murder, attempted murder, illegal possession of firearms and ammunition, and membership in the Irish Republican Army. Id. For a further discussion of the background of the Doherty case, see J. Murphy, supra note 1, at 52.

171. Id. In support of its conclusion, the court asserted: [T]he facts of this case present the assertion of the political offense exception in its most classic form. The death of [the British soldier], while a most tragic event, occurred in the context of an attempted ambush of a British army patrol. It was the British Army's response to that action that gave rise to [the British soldier's] death. Had this conduct occurred during the course of more traditional military hostilities there could be little doubt that it would fall within the political offense exception.

172. Id. at 276. In dicta, the district court in Doherty would exclude, however, the application of the political offense exception to "a situation in which a bomb was detonated in a department store, public tavern, or a resort hotel, causing indiscriminate personal injury, death, and property damage" or "where violence was directed against civilian representatives of the government" or "where the alleged political conduct was committed in a place other than the territory where political change was to be effected" or where "hostages were killed or injured."

173. Id. at 275-76 (emphasis added).

motion to dismiss for failure to state a claim upon which relief could be granted, and the United States appealed. The United States Court of Appeals for the Second Circuit affirmed the district court's order, holding that the government could not bring an action for declaratory judgment, but instead should submit a request for extradition on behalf of the United Kingdom to another extradition magistrate instead.

III. LEGISLATIVE AND EXECUTIVE ATTEMPTS IN THE UNITED STATES TO LIMIT THE SCOPE OF THE POLITICAL OFFENSE EXCEPTION

A. Legislative Attempts

In response to the situation where alleged terrorists flee to the United States and avoid extradition and prosecution if the political incidence test is met, two bills were introduced in Congress in 1983 and 1984. These bills sought to clearly define and limit the scope of the political offense exception and thereby enhance international cooperation in combating international terrorism. Unfortunately, one of these bills has been rejected by the House, while the future of another is still uncertain.

The first of these bills, the Comprehensive Crime Control Act of 1983, was introduced in the Senate in 1983 but has not been adopted by Congress. The bill sets forth an “exception to the exception” in attempting to limit the scope of the political offense exception and enhance the ability to combat international terrorism. The “exception to the exception” is provided for in Section 3194(e) of the bill which states that, except in extraordinary circumstances, the term ‘political offense’ does not include the attempt, conspiracy to commit, or commission of homicide, assault with intent to commit serious bodily harm, kidnapping, hostage-taking, serious unlawful detention, or an offense involving the use of a firearm which endangers the life of another.
Subsequently, in 1984, the Extradition Act of 1984\textsuperscript{181} was introduced into the House of Representatives by the House Committee on the Judiciary. This bill was similar to the 1983 bill in that it, too, provided for an exception to the political offense exception, but the 1984 bill went even further than the 1983 bill by stating that certain crimes could \textit{never} constitute political offenses.\textsuperscript{182} The 1984 bill stated that intentional, wanton, or reckless acts against persons not taking part in

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\begin{itemize}
\item[(A)] a serious offense involving an attack against the life, physical integrity, or liberty of an internationally protected person (as defined in section 1116 of this title), including a diplomatic agent;
\item[(D)] an offense with respect to which a multilateral treaty obligates the United States to either extradite or submit for the purposes of prosecution a person accused of the offense;
\item[(E)] an offense that consists of the manufacture, importation, distribution, or sale of narcotics or dangerous drugs;
\item[(G)] an attempt or conspiracy to commit an offense described in subparagraphs (A) through (F) of this paragraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense; and
\end{itemize}

except in extraordinary circumstances, do not include—

1. a serious offense involving an attack against the life, physical integrity, or liberty of internationally protected persons (as defined in section 1116 of this title), including diplomatic agents;
2. an offense with respect to which a multilateral treaty obligates the United States to either extradite or submit for prosecution a person accused of the offense;
3. an offense that consists of forcible sexual assaults;
4. an attempt or conspiracy to commit an offense described in subparagraphs (A) through (F) of this paragraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.

The court shall not take evidence with respect to, or otherwise consider, an issue under this subsection until the court determines the person is otherwise extraditable. Upon motion of the Attorney General or the person sought to be extradited, the United States district court may order the determination of any issue under this subsection by a judge of such court.

\textit{Id.} On October 5, 1984, the section of the bill relating to international extradition was dropped from the Act in response to a threat of a filibuster. J. MURPHY, \textit{supra} note 1, at 63.

\textsuperscript{182} \textit{Id.} § 3194 (emphasis added). Section 3194(e) of House Report 3347 provides:

2. For the purposes of this section, a political offense does not include—

1. a serious offense involving an attack against the life, physical integrity, or liberty of internationally protected persons (as defined in section 1116 of this title), including diplomatic agents;
2. an offense with respect to which a multilateral treaty obligates the United States to either extradite or submit for prosecution a person accused of the offense;

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armed hostilities cannot be characterized as political offenses. The Extradition Act of 1984 also included a formulation of the factors that courts should consider in determining whether acts, other than those specifically excluded, constituted political offenses. The bill listed the factors to be considered, however, and did not specify how the court was to apply the factors or how much weight should have been given to each. The bill was rejected by the House at the end of the 98th Congress in 1984.

B. Executive Attempts

Since legislative attempts to provide guidance to the courts regarding the definition and scope of nonextraditable political offenses have not been enacted, the executive branch of the United States government has attempted to renegotiate several bilateral extradition treaties. Although the term "political offense" is retained in these renegotiated

(C) an offense that consists of the manufacture, importation, distribution, or sale of narcotics or dangerous drugs;
(D) forcible sexual assault; or
(E) an offense that consists of intentional, direct participation in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily injury to persons not taking part in armed hostilities;
(F) an attempt to commit an offense described in subparagraphs (A) through (E) of this paragraph, or participation as an accomplice of a person who commits or attempts to commit such an offense.

Id.


The inclusion in paragraph (2) of this subsection of certain offenses does not preclude the exclusion of other offenses from the political offense category. In determining whether an offense is a political offense the court shall consider, as of the time of the offense—

(A) the status (whether civilian, governmental, or military) of any victims of the alleged offense;
(B) the relationship of the alleged offender to a political organization;
(C) the existence of a civil uprising, rebellion, widespread civil unrest, or insurrection within the State requesting extradition;
(D) the motive of the alleged offender for the conduct alleged to constitute the offense;
(E) the nexus of such alleged conduct to the goals of a political organization; and
(F) the seriousness of the offense.

Id.

185. J. MURPHY, supra note 1, at 71. One commentator has rejected this formulation of factors as ambiguous and lacking in precision amounting "to an attempt to introduce rigid parameters to a doctrine that, courts around the world have discovered, demands flexible boundaries to reflect complex political and social variables." Id.

186. Id. at 64. H.R. Rep. No. 998, the Extradition Act of 1984, had been approved by the House Committee on the Judiciary in June 1984. Id.
extradition treaties, it still remains undefined. Instead, the treaties add specific major crimes to a list which sets forth extraditable offenses. In most cases, the political offense exception can be applied to the newly listed crimes as long as the alleged criminal can show that his acts fit into the scheme of a "relative" political offense.

Several recently enacted United States extradition treaties specifically exclude crimes covered by global antiterrorist conventions from the political offense exception. Most recently, the executive branch of the United States has sought to eliminate the political offense exception entirely, at least with respect to crimes of violence other than treason, through the conclusion of supplementary bilateral extradition treaties with allied nations. One example is the Supplementary Extradition Treaty with the United Kingdom.

a. Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States and the Government of the United Kingdom of Great Britain and Northern Ireland

In response to what has been perceived by the executive branch of the United States and the government of Great Britain as the overly broad application of the political offense exception in recent decisions by United States courts in response to the British request for extradition of PIRA members, the United States renegotiated its extradition treaty with Great Britain. As a result, the Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States and the Government of the United Kingdom of Great Britain and Northern Ireland (Supplementary Treaty) was signed at Washington on June 25, 1985. It was transmitted to the Senate for advice and consent to ratification on July 17, 1985, revised while pending before the
The Supplementary Treaty amends the current extradition treaty between the United States and the United Kingdom, signed at London on June 8, 1972. In its transmittal of the original version of the Sup-


Generally, the original Supplementary Treaty contained four substantive articles addressing the following areas: Article 1, the political offense exception (discussed infra); Article 2, the statute of limitations; Article 3, the time limit within which documents had to be submitted in support of an extradition request following a provisional arrest; and Article 4, retroactive application of the treaty. Supplementary Treaty, supra note 190.

Article 2 of the original Supplementary Treaty amended the current extradition treaty by providing that extradition should be denied if prosecution would be barred by the statute of limitations of the requesting state. Id. art. 2. The current extradition treaty provision permitted the application of the statute of limitations of either the requesting or requested state to bar extradition. Extradition Treaty, United States—United Kingdom, supra, art. V(1)(b). The purpose of this change was to ensure that a criminal cannot avoid prosecution by fleeing to a country which has a shorter statute of limitations than the country in which the crime was committed. Statement of A.D. Sofaer, supra note 191, at 6-7. Mr. Sofaer also asserted that the "interests of justice are better served by applying the law of the requesting state—the place where the fugitive committed his crime—in determining whether his trial is time-barred." Id.

Article 3 of the Supplementary Treaty amended the current extradition treaty to provide that the requesting state should have up to 60 days, after the arrest of the criminal, to submit evidence in support of its request for extradition. Supplementary Treaty, supra note 190, art. 3. If the evidence was not received within that time frame, the alleged criminal would be set free. Id. The current treaty provision allows 45 days for the submission of evidence. Extradition Treaty, United States—United Kingdom, supra, art. VII. The purpose of this change was to enable a requesting state to gather sufficient evidence within a reasonable time frame, considering the complexity and volume of evidence that is required under current extradition practice. Statement of A.D. Sofaer, supra note 191, at 7-8. Although a requested state may provisionally arrest a fugitive from a foreign jurisdiction who may otherwise continue to avoid capture, extradition treaties commonly require the requesting state to substantiate its request for extradition within a reasonable time after arrest. Id.

Article 4 of the Supplementary Treaty provided that the terms of the treaty would apply to any offense committed before or after it comes into force. Supplementary Treaty, supra note 190, art. 4. However, in order for the Supplementary Treaty to apply to offenses committed before the treaty was enacted, the offense must be a crime under both the law of the requesting and requested states. Id. The purpose of the retroactive application of these procedural provisions was "to facilitate application of the changes effected by the Supplementary Treaty to prospective extradition requests for offenses committed in the past." Statement of A.D. Sofaer, supra note 191, at 8.

Articles 5 and 6 of the Treaty included technical provisions that provide for its incorporation into the current extradition treaty, and provide for its territorial application, ratification, and entry into force. Supplementary Treaty, supra note 190, arts. 5 and 6.
plementary Treaty to the Senate for ratification in 1985, the executive branch represented that the Supplementary Treaty provided "a significant step in improving law enforcement cooperation and combatting terrorism, by excluding from the scope of the political offense exception serious offenses typically committed by terrorists." In excluding specified crimes of violence from the scope of the political offense exception, the original Supplementary Treaty formalized the proposition that "terrorists who commit the specified, wanton acts of violence and destruction should not be immune from extradition merely because they believe they were acting to advance a political objective."

The stated rationale for the Supplementary Treaty was that with respect to violent crimes, the political offense exception has no place in extradition treaties between stable democracies, in which the political system and judicial process are available to redress legitimate grievances in a fair manner. To further this rationale, Article 1 of the original Supplementary Treaty limited the scope of the political offense exception in the current Extradition Treaty by identifying particular crimes that will not be regarded as crimes of a political character. The full text of Article 1 of the original Supplementary Treaty provided:

For the purposes of the Extradition Treaty, none of the following offenses shall be regarded as an offense of a political character:
(a) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at The Hague on 16 December 1970;
(b) an offense within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature at Montreal on 23 September 1971;
(c) an offense within the scope of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature at New York on 18 December 1973;
(d) an offense within the scope of the International Convention against the Taking of Hostages, opened for signature at New York on 18 December 1979;
(e) murder;
(f) manslaughter;
(g) maliciously wounding or inflicting grievous bodily harm;
(h) kidnapping, abduction, false imprisonment or unlawful detention, including the taking of a hostage;
(i) the following offenses relating to explosives:

[195. Letter of Transmittal from Ronald Reagan to the Senate of the United States (July 17, 1985). Examples given of serious offenses typically committed by terrorists included “aircraft hijacking and sabotage, crime against diplomats, hostage taking, and other heinous acts such as murder, manslaughter, malicious assault, and certain serious offenses involving firearms, explosives and damage to property.” Id.]
[196. Statement by A.D. Sofaer, supra note 191, at 3.]
[197. Id. at 22.]
[198. Extradition Treaty, United States—United Kingdom, supra note 194, at art. V (1)(c)(i).]
[199. Supplementary Treaty, supra note 190, at art. 1. The full text of Article 1 of the original Supplementary Treaty provided:]

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tion to listing crimes previously excluded from the exception under earlier anti-terrorist conventions, such as aircraft hijacking and sabotage, crimes against internationally protected persons, including diplomats, and hostage taking. Article 1 also included the crimes of murder, manslaughter, malicious assault, kidnapping, and specific firearms, explosives, and serious property damages offenses as extraditable offenses regardless of their political motivation.

After extensive hearings on the initial draft of the Supplementary Treaty, the Senate Committee on Foreign Relations amended the treaty after negotiations with members of the Committee, representatives of the executive branch and representatives of the British government. In its amended format Article 1 retains a list of serious violent crimes which can never be considered political offenses; however, the crimes of possession of firearms and conspiracy to commit any of the other offenses were omitted.

(1) the causing of an explosion likely to endanger life or cause serious damage to property; or
(2) conspiracy to cause such an explosion; or
(3) the making possession of an explosive substance by a person who intends either himself or through another person to endanger life or cause serious damage to property;
(j) the following offenses relating to firearms or ammunition:
  (1) the possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life; or
  (2) the use of a firearm by a person with intent to resist or prevent the arrest or detention of himself or another person;
  (k) damaging property with intent to endanger life or with reckless disregard as to whether the life of another would thereby be endangered;
  (1) an attempt to commit any of the foregoing offenses.

Id.

200. For a discussion of specific anti-terrorist treaties that exclude certain acts from the political offense exception, see supra notes 93-116 and accompanying text.

201. See Supplementary Treaty, supra notes 190 & 199, at art. 1(e)-(k).


For the purposes of the Extradition Treaty, none of the following shall be regarded as an offense of a political character:

(a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;
(b) murder, voluntary manslaughter, and assault causing grievous bodily harm;
(c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;
(d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device of this use endangers any person; and
(e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense.

Id. Article 2 was included in the Supplementary Treaty in order to permit
Most significantly, a new article was added to the treaty giving the courts the opportunity to deny extradition to the United Kingdom for humanitarian reasons if the accused can establish by a preponderance of the evidence that he is being sought not for the crime he allegedly committed, but because of his race, religion, nationality or political opinions, or can establish that he will be denied a fair trial because of any of these factors. In addition to the humanitarian exception, Article 3 also judges to deny extradition if the evidence of criminality presented is insufficient to sustain the charge under the treaty’s provisions and would not justify commitment for trial if the offense had been committed in the requested party’s territory.

Amended Article 2 now reads:

Nothing in this Supplementary Treaty shall be interpreted as imposing the obligation to extradite if the judicial authority of the requested party determines that the evidence of criminality presented is not sufficient to sustain the charge under the provisions of the treaty. The evidence of criminality must be such as, according to the law of the requested party, would justify commitment for trial if the offense had been committed in the territory of the requested party.

In determining whether an individual is extraditable from the United States, the judicial authority of the United States shall permit the individual sought to present evidence on the questions of whether:

1. there is probable cause;
2. a defense to extradition specified in the Extradition Treaty or this Supplementary Treaty, and within the jurisdiction of the court, exists; and
3. that act upon which the request for extradition is based would constitute an offense punishable under the laws of the United States.

Probable cause means whether there is sufficient evidence to warrant a man of reasonable caution in the belief that:

1. the person arrested or summoned to appear is the person sought;
2. in the case of a person accused of having committed a crime, an offense has been committed by the accused; and
3. in the case of a person alleged to have been convicted of an offense, a certificate of conviction or other evidence of conviction or criminality exists.

The Supplementary Treaty was amended to include Article 2 in order to ensure that no individual is extradited without a fair hearing based upon all competent evidence. Id. at § 9148.

203. Id. at § 9120. The full text of Article 3 is as follows:

(a) Notwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions.

(b) In the United States, the competent judicial authority shall only consider the defense to extradition set forth in paragraph (a) for offenses listed in Article 1 of this Supplementary Treaty. A finding under paragraph (a) shall be immediately appealable by either party to the United States district court, or court of appeals, as appropriate. The appeal shall receive expedited consideration at every stage. The time
gives to either party the right to appeal the court’s decision in either a United States district court or court of appeals.

IV. ANALYSIS OF THE IMPACT OF JUDICIAL, LEGISLATIVE AND EXECUTIVE ATTEMPTS TO COMBAT INTERNATIONAL TERRORISM BY LIMITING THE SCOPE OF THE POLITICAL OFFENSE EXCEPTION AND RECOMMENDATIONS FOR CHANGE

A review of the law and practice of extradition and the application of the political offense exception has revealed that the political offense exception constitutes a major impediment to combating international terrorism through the apprehension, prosecution and punishment of international terrorists. The liberal application of the “political incidence” test by American courts has resulted in the repeated denial of extradition of individuals who have allegedly committed terrorist acts in furtherance of some political cause. In light of the dramatic increase for filing a notice of appeal shall be 30 days from the date of the filing of the decision. In all other respects, the applicable provisions of the Federal Rules of Appellate Procedure or Civil Procedure, as appropriate, shall govern the appeals process.

Id. The humanitarian exception in Article 3 was included in order to protect the traditional American concept of the right to political sanctuary and to ensure that the executive branch of the United States government was not given sole discretion to determine whether to prosecute when political issues were involved. Id. at § 9148.

204. Id. at § 9120. Because an accused who successfully invokes the humanitarian exception in Article 3(a) of the Supplementary Treaty will most likely escape prosecution for his acts, the government of the United States was given a right to appeal under Article 3(b), a right it does not have under current extradition law. Id. at § 9148.

205. See J. Murphy, supra note 1, at 120; Bassiouni, supra note 8, at 487. For a discussion of the impact of the political offense exception upon a nation’s duty to fulfill relevant treaty obligations, see supra note 62 and accompanying text.

206. See, e.g., In re McMullen, Mag. No. 3-78-1099 M G (N.D. Cal. May 11, 1979) (unreported); In re Mackin, 668 F.2d 122 (2d Cir. 1981); In re Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984). But see Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986) (Ninth Circuit applied the political incidence test but found no application of the political offense exception to the charge of murder due to the lack of an “uprising” in the country where the act took place). For a description of these cases, see supra notes 146-50 & 158-76 and accompanying text.

Concern about the ability of alleged terrorists to avoid extradition and prosecution for terrorist acts has risen sharply in response to the recent court decisions noted above refusing the extradition of alleged IRA and PIRA members based upon satisfaction of the political incidence test for political offenses. See Statement of A.D. Sofaer, supra note 191, at 21. Mr. Sofaer, Legal Advisor to the State Department, asserted before the Senate Committee on Foreign Relations that the “overbroad” application of the political offense exception has come to produce “foolish and antisocial results.” Id. at 9. He concluded that one result is that “the United States has become a sanctuary for terrorist murderers.” Id. at 21. Mr. Sofaer further emphasized that just as the United States expects foreign governments not to harbor terrorists who commit violent acts against Americans, the United States must work to prevent becoming a haven for terrorists who use indiscriminate violence against citizens of other countries. Id.
in terrorism in the last few years and the consistent application of a broad interpretation of the political offense exception by United States courts, it is probable that more alleged terrorists will seek asylum in the United States in an attempt to avoid prosecution and punishment for their acts.207 Although the political offense exception remains valid and necessary, the scope of the acts that fall within the exception must be limited so that terrorists may not successfully avoid the legal consequences of their actions.

It is submitted that random, violent acts of terrorism should not be a form of political expression that falls under the protective mantle of the political offense exception.208 The political offense exception is based primarily upon the premise that individuals have a "right to resort to political activism in order to foster political change."209 Although the political offense exception is not limited to nonviolent dissent,210 it is submitted that the political offense exception should protect only those violent acts which are a necessary outgrowth of political activity designed to change or modify a particular government. The political offense exception should not be used to protect those who commit indiscriminate violent attacks against innocent individuals.211 It is suggested that random, violent terrorist activity which is designed to disrupt or destroy the social structure of a state,212 is generally not designed to "foster political change." Instead, such activity poses a seri-

207. See Eain v. Wilkes, 641 F.2d 504 (7th Cir.), cert. denied, 454 U.S. 894 (1981). The Eain court stated that if the "existence of a violent political disturbance was all that was necessary in order to prevent extradition under the political offense exception nothing would prevent an influx of terrorists seeking a safe haven in America." Id. at 520.

208. See, e.g., R. FRIEDLANDER, TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 3-4, 44 (1979) (distinguishing between different goals and impact of terrorist activity as compared to legitimate political activity designed to change governmental system).


210. Lubet & Czackles, The Role of the American Judiciary in the Extradition of Political Terrorists, 71 J. OF CRIM. L. & CRIMINOLOGY 193, 194 (1980). Revolutionary violence may also be protected from extradition. Id.

211. In re Abu Eain, Mag. No. 79 M 175 (N.D. Ill. Dec. 18, 1979) (statement of policy submitted by the State Department). The State Department has stated that "[m]urder and causing serious bodily harm are patently not political offenses but common crimes. . . . [W]hatever the motivation, planting and exploding a bomb with intent and result of killing and wounding civilians indiscriminately is not an offense of a political character but an act of terrorism, pure and simple." Id. n. 175, 945 (statement of policy submitted by the State Department); see also view presented by the United States to the United Nations Ad Hoc Committee on International Terrorism, U.N. Doc. A/C 6/418 (1979) (long recognized under United Nations Charter and declarations of United Nations organizations as well as under general international law and customary law of war that legitimacy of a cause does not in itself legitimize use of certain forms of violence especially against the innocent).

212. See Abu Eain, 641 F.2d at 519. In Abu Eain, the Seventh Circuit stated, "[t]errorist activity seeks to promote social chaos." Id.
ous threat to world order and stability, and should fall outside the purview of the political offense exception.

Moreover, it is submitted that the application of the political offense exception to acts of terrorism does not comport with the rationales given for the continued existence of the exception. First, under the political neutrality rationale, it is suggested that a government will not interfere with the internal political struggles of a state by inquiring into the extraditability of the crime of terrorism which is per se criminal and non-political. Secondly, with regard to the humanitarian rationale, it can be argued that a terrorist will not be subject to an unfair trial in the country to which he is extradited because he will be tried like any other common criminal for a criminal act that by definition does not have a political motive designed to overthrow an existing government. Finally, in contrast to a political offense such as treason, it is submitted that while terrorist acts usually are directed against the domestic social order of only one state, the disruptive impact of such acts is felt throughout the international public order. As a consequence, many states have an interest in their suppression through such actions as extradition.

Recent court decisions addressing the requests for extradition of alleged IRA and PIRA members exhibit the difficulty that American courts have found in applying the political offense exception to terrorist acts. For example, in Quinn v. Robinson, the Ninth Circuit Court of

213. Lubet & Czackles, supra note 210, at 195. For a discussion of the different goals and impact of terrorist activity as compared to legitimate political activity designed to change a governmental system, see R. Friedlander, supra note 208, at 3-4.

214. For a discussion of the rationales underlying the political offense exception, see supra notes 67-71 and accompanying text.

215. For a discussion of the principle of political neutrality and its application to the political offense exception, see supra note 68 and accompanying text. In Quinn v. Robinson, the Ninth Circuit noted that extradition of an individual accused of international terrorism will not interfere with any internal struggle because "it is the international terrorist who has interfered with the rights of others to exist peacefully under their chosen form of government." 783 F.2d at 806.

216. For a discussion of the humanitarian rationale for the continued existence of the political offense exception, see supra note 67 and accompanying text. In discussing the humanitarian rationale for the political offense exception, the Ninth Circuit in Quinn v. Robinson noted that there is less risk of the accused being subjected to an unfair trial because of his political opinion when he is extradited to the country where he committed the act versus the country whose government he sought to change. 783 F.2d at 806.

217. For a discussion of the impact of most political offenses upon the domestic public order of a nation as compared to the international public order, see supra notes 69-70 and accompanying text.

218. For a discussion of the cases involving extradition requests of alleged IRA and PIRA members, see supra notes 146-150 & 158-76 and accompanying text.

219. 783 F.2d 776 (9th Cir. 1986). For a discussion of the Quinn case, see supra notes 160-68 and accompanying text.
Appeals initially suggested that terrorist acts should be excluded from the political offense exception. In reaching its decision that the political offense exception did not preclude Robinson's extradition, however, the court did not rely on this strict approach. Instead, the court concluded that the charges of murder and conspiracy to bomb were extraditable offenses because of the lack of an uprising in the geographical area where the act was committed. It is submitted that although the Quinn court initially asserted that terrorist acts should not fall within the protection of the political offense exception, it failed to analyze whether Quinn's acts constituted terrorist acts and were, therefore, prima facie extraditable under its interpretation of the political incidence test. Rather, the court chose to exclude terrorist acts from the exception by limiting the geographical area in which a political offense can take place.

The analysis of the Quinn court is problematic, however, because Northern Ireland and England are constitutionally and politically the same entity even though they occupy separate geographical sites. Therefore, it is suggested that an uprising existed in both geographical locations at the time Quinn allegedly committed the terrorist acts in question. Because of the existence of an uprising in Northern Ireland and the commission of the terrorist acts incidental to that uprising within the same political entity, it is submitted that Quinn's actions should have fallen under the protection of the political offense exception under the court's analysis of the political incidence test. Therefore, carried to its logical conclusion, application of the court's interpretation of the political incidence test should result in the protection of all terror-

220. 783 F.2d at 805-06. The court asserted that terrorist acts cannot satisfy the dual requirements of the traditional political incidence test because they do not satisfy the geographical and temporal requirements for an "uprising" and because they do not satisfy the "incidental to" requirement due to a lack of cause or ideological relationship between the act and the uprising. Id. The court noted, however, that not all such acts should be excluded from the exception. Id. at 805.

221. Id. at 805-10.

222. Id. at 814. The court also refused to evaluate the legitimacy of the means (bombing and murder) used by Quinn to accomplish his alleged political goal. Id. at 810. The court stated that "[i]t is for the revolutionaries, not the courts, to determine what tactics may help further their chances of bringing down or changing the government. All that the courts should do is determine whether the conduct is related to or connected with the insurgent activity." Id. Under this analysis, it is submitted that the court would allow the protection of indiscriminate acts of violence against civilians under the political offense exception as long as there was an uprising and actions were related to and took place incidental to that uprising.

223. Id. at 813. The Quinn court asserted that an uprising is limited to the geographical area "within a territorial entity in which a group of nationals were seeking to change the form of government under which they live; rather, the offense [in this case] took place in a different geographical location." Id.
ist acts committed by the IRA and PIRA in Great Britain.\textsuperscript{224}

It is submitted that only through an evaluation of the legitimacy of the means used by the IRA or any other terrorist or terrorist organization, to accomplish their political goals can the court avoid granting the protection of the political offense exception to terrorist acts. Those tactics which utilize indiscriminate attacks against innocent civilians should never fall under the political offense exception even if the court finds that an uprising existed and that the acts occurred incidentally to the uprising. In applying this analysis to the facts of \textit{Quinn}, only the charges relating to the conspiracy to bomb should have been extraditable offenses because they were directed at innocent civilians—action that is specifically outlawed under international law.\textsuperscript{225}

As in the \textit{Quinn} case, the court in \textit{Abu Eain}\textsuperscript{226} emphatically asserted that terrorist acts do not fall within the political offense exception\textsuperscript{227} and discussed the need for caution in applying the political incidence test to alleged terrorist acts.\textsuperscript{228} It is submitted, however, that the \textit{Eain} court nevertheless mechanically applied the political incidence test in a manner that would allow a terrorist to escape prosecution and punishment for his acts as long as he could prove: 1) the existence of a violent political disturbance which exhibits organized forms of aggression such as war, revolution or rebellion,\textsuperscript{229} and 2) the existence of a "direct link between the perpetrator, a political organization's political goals, and

\begin{itemize}
\item \textsuperscript{224} See Statement of W. Hannay before the Committee on the Judiciary, United States Senate, Hearings on the Extradition Act of 1981, 97th Cong., 1st Sess. (1981) at 14 (quoting the magistrate in \textit{In re McMullen}, Mag. No. 3-78-1099 M G (N.D. Cal. May 11, 1979). Professor Hannay, in commenting upon the difficulties produced by current judicial interpretations of the political offense exception noted that the courts' mechanical application of the political incidence test often resulted in the insane but logical conclusion that "[e]ven though the offense be deplorable and heinous, the criminal action will be excluded from deportation if the crime is committed under these pre-requisites." \textit{Id.} It is submitted that the Quinn court's limitation of an uprising under the political incidence test to a particular geographical location without recognition of the ability to have one uprising in separate geographical entities subject to common political rule, results in a similar conclusion to the one noted by Professor Hanney.
\item \textsuperscript{225} See comments made by the Senate Committee on Foreign Relations when proposing Part M of the Title X of the Comprehensive Crime Control Act of 1984, C. PERCY, \textsc{Senate Committee on Foreign Relations, Extradition Act of 1981}, S. REP. No. 475, 97th Cong., 2d Sess. 7-8 (1982). The Senate Committee determined that the political offense exception should not be applied to conduct that the international community has specifically outlawed. \textit{Id.} It urged the adoption of this prohibition in order to "deter international terrorists and other criminals from using the United States as a safehaven from prosecution for crimes they claim to be political but whose characteristics violate overriding international legal standards." \textit{Id.}
\item \textsuperscript{226} 641 F.2d 504 (2d Cir. 1981). For a discussion of \textit{Abu Eain}, see supra notes 151-57 and accompanying text.
\item \textsuperscript{227} \textit{Id.} at 519-21, 523.
\item \textsuperscript{228} \textit{Id.} at 520.
\item \textsuperscript{229} \textit{Id.} at 518-19.
\end{itemize}
the specific act."230 If these two factors were met, the Abu Eain court would apply the political offense exception even if the acts entailed the random attack upon civilians incidental to a purpose of toppling a government.231 It is submitted that under the Eain court’s analysis, members of the IRA, PIRA, or any other terrorist group could also avoid prosecution and punishment for random, indiscriminate terrorist acts directed at the civilian population.

In contrast to the above-mentioned cases, the Doherty court clearly distinguished protected political activity from extraditable terrorist acts in its classic application of the political incidence theory to Doherty’s involvement with the death of a British soldier.232 It is submitted, however, that in holding that Doherty could not be extradited the Doherty court’s strict application of the political incidence test did not further the humanitarian and political neutrality goals of the political offense exception.233

With regard to humanitarian considerations, the Doherty court in dicta clearly rejected the contention that Doherty would not be able to get a fair trial in Northern Ireland.234 Thus, it is submitted that granting Doherty the protection of the political offense exception did nothing to further the humanitarian rationale for the exception in this case.

Likewise it is submitted that the Doherty court’s application of the classic political incidence test to Doherty’s actions did not further the principle of neutrality underlying the political offense exception.235 In deciding to deny the extradition of Doherty,236 the United States judiciary impliedly reached a judgment in favor of the IRA with respect to the political conflict between the IRA and Great Britain. Such a judgment, it is submitted, can be construed as an intervention in the internal affairs of Great Britain.

Therefore, in view of the lack of a clear statement from the judiciary regarding what constitutes terrorist activity as well as the absence of a

230. Id. at 521.
231. Id. (emphasis added).
232. In re Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984). The Doherty court held that Doherty’s actions constituted non-extraditable political offenses because they were committed during the course of a political uprising by a member of an organized, disciplined group and were incidental to and part of that uprising. Id. at 276. The court distinguished Doherty’s actions from such extraditable acts as indiscriminate violence directed at civilians in public places, violence against civilian representatives of the government, violence conducted in a territory where no political change was to be effected, or violence against hostages. Id. at 275-76. For a discussion of the Doherty case, see supra notes 169-76 and accompanying text.
233. For a discussion of the primary goals and underlying rationales of the political offense exception, see supra notes 67-71 and accompanying text.
235. For a discussion of the principle of neutrality and its relationship to the political offense exception, see supra note 68 and accompanying text.
test that furthers the objectives of the political offense exception and ensures the extraditability of terrorists who engage in terrorist activity directed at innocent individuals, extradition treaties must be drafted to provide guidance to nations faced with extradition requests for alleged terrorists. Such treaties should include specific language that clearly defines the parameters of extraditable terrorism and specifies the proper test to be applied to extradition requests. Proponents of the Supplementary Extradition Treaty between the United States and Great Britain have asserted that the treaty will greatly enhance the ability of nations to combat international terrorism by eliminating terrorist acts from the scope of the political offense exception. As such, they urged the Senate to ratify the treaty in order to prevent the United States from becoming a "sanctuary for terrorist murderers."  

Although the Supplementary Treaty is an example of a potentially effective device in securing the extradition of members of the IRA and PIRA who have sought asylum in the United States, it is submitted that it is not a major anti-terrorism device that will prevent the United States from becoming a haven for international terrorists. The Supplementary Treaty affects the provisions of only one bilateral extradition treaty between two close allies. In order to have impact as a major anti-terrorism device, acting to deter terrorism as well as to facilitate the prosecution and punishment of terrorists, the provisions in the Supplementary Treaty limiting the scope of the political offense exception must be incorporated into a broad range of new and existing extradition and anti-terrorist treaties. The scope of impact of the Supplementary Treaty will be limited as well to addressing only Great Britain's requests for the extradition of criminal offenders including alleged terrorist members of the IRA and PIRA. These individuals will constitute only a small percentage of the terrorists who will avoid prosecution for their actions in the future under the political incidence test as applied by United States courts today.

237. For the opinion of the executive branch of the United States regarding the ability of the Supplementary Treaty to combat international terrorism, see supra note 195 and accompanying text.


239. Negotiations are currently underway between the United States and West Germany, Belgium, Italy, France and Spain to incorporate extradition treaties similar in nature to the Supplementary Treaty. 132 CONG. REC. § 9159 (daily ed. July 16, 1986) (statement of Sen. Hatch).

240. Id. A review of the case law has shown that only three alleged terrorists, members of the IRA and PIRA, have successfully avoided extradition and prosecution for criminal acts during the past thirty years by asserting the political offense exception in United States courts. Id. For a discussion of the cases of these three individuals, see supra notes 146-50, 158-59 & 169-76 and accompanying text. The small number who have avoided extradition belies the implication that the United States has already become a sanctuary for large numbers of terrorists who successfully manipulate our judicial system to further their political goals. See 132 CONG. REC. § 9159 (daily ed. July 16, 1986) (statement of
It is submitted that the Supplementary Treaty's exclusion of specific violent acts committed by terrorists against civilian and government representatives from the protection of the political offense exception comport with international law. 241 The minimum level of behavior tolerable in international society forbids all acts which are beyond the class of acts which a government or a belligerent has the legal authority under national and international law to commit no matter what the political motivation such as certain acts of war. 242 Thus, it is submitted that even under the international laws of war, a member of the PIRA such as Quinn or Doherty would not have a combatant's privilege to kill British soldiers, policemen or civilians or attack other military targets in Great Britain.

It has been asserted that the virtual elimination of the political offense exception from the Supplementary Extradition Treaty and other extradition treaties through the broad categorization of violent terrorist acts as extraditable offenses would remove the protection which most people who fled tyranny in other countries had when they came and settled in the United States. 243 In light of this fear, it is emphasized that

Sen. Hatch). However, as previously stated, it is submitted that it is likely that the numbers of terrorists who seek asylum in the United States will increase in the future in light of the increase in terrorism and the United States courts, strict application of the political incidence test.

241. For the full text of the amended Article 1 of the Supplementary Treaty which specifically lists those violent crimes that may not be regarded as offenses of a political character, see supra note 202 and accompanying text.

242. Statement of J.F. Murphy, supra note 1, at 17-18. The combatant's privilege is a law of war governed by the Geneva Convention of 1949. Id. at 18. Under Article 1(2) of the 1977 Protocol II of the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), international legal norms regulating non-international armed conflict, such as the combatant's privilege, do not apply to "situations of internal disturbance and tension such as riots, isolated and sporadic acts of violence and other acts of a similar nature." Id. For the full text of Protocol II, see 16 I.L.M. 1442 (1977). Furthermore, the terms of Protocol II are limited to:

armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Id. Under the terms of the 1977 Protocol II, members of the PIRA would not have combatant's privilege to attack and kill British military and police officers because such attacks in the absence of armed conflict between two parties seeking military and political control over a region constitute isolated and sporadic acts of violence. Id. Protocol II is not yet in force as a treaty but is the most authoritative statement of law on the subject of non-international armed conflict. Id.


It is submitted that the American Bar Association's recommendation regarding the scope of the political offense exception contains a proposal that is
certain reservations should be included which preserve the humanitarian and neutrality rationales of the exception as well as the basic premise that individuals have a right to pursue political change through political activism. 244

It is submitted that the amended version of the Supplementary Treaty ratified by the Senate in July 1986 provides an example of how an extradition treaty may preserve the humanitarian principles underlying the political offense exception. 245 Article 3 ensures a fair trial by giving the courts the opportunity to refuse extradition when the accused has shown that he cannot get a fair trial because of his race, religion, nationality or political opinions. 246 Moreover, a court may exercise its Article 3 power, despite the fact that alleged terrorists allegedly committed one of the serious offenses listed in Article I (1) of the treaty. 247 In addition, the revised treaty gives both the accused and the government the right to appeal a court's decision under Article 3 to a United States district court or court of appeals thus ensuring that the decision regarding an accused's ability to obtain a fair trial is not made solely at a lower court's level. 248 It is submitted that all extradition treaties should include reservations similar to those included in Article 3 of the Supplementary Treaty in order to effectively preserve in general extradition practice be-

reflective of international law and the basic underlying rationales for the exception. American Bar Association, Report No. 104A, (approved by the House of Delegates in August 1983). In relevant part, the ABA strongly recommends that such legislation:

(b) exclude all acts of terrorist violence from the application of the political offense exception, particularly those denounced by multilateral conventions to prevent and punish acts of international terrorism.
(c) preclude the application of the political offense exception from offenses which constitute serious breaches of the norms established under international humanitarian law applicable in international and non-international armed conflicts, without subjecting to extradition combatants for warlike acts which do not transgress those norms.

Id.

244. See Statement of J.F. Murphy, supra note 1, at 19-20.
245. For a discussion of the amended version of the Supplementary Treaty, see supra notes 202-04 and accompanying text. For a discussion of the humanitarian rationale underlying the political offense exception, see supra note 67 and accompanying text.
247. For a discussion of Article 3 in the amended version of the Supplementary Treaty, see supra notes 203-04 and accompanying text. It is submitted that the original version of the Supplementary Treaty denied the validity of the humanitarian rationale of the political offense exception by failing to protect the traditional American concept of the right to political sanctuary and by giving the executive branch of the United States the exclusive right to decide when to extradite when political issues were involved. 132 CONG. REC. § 9148 (daily ed. July 16, 1986) (statement of Sen. Lugar).
248. For a discussion of the right to appeal included in the amended version of Article 3, see supra note 204 and accompanying text.
tween states and the humanitarian principles underlying the political offense exception.

Moreover, it is submitted that the basic purpose of the political offense exception would be protected if the requesting state could reserve the right to consider one of the offenses listed in Article 1 of the amended Supplementary Treaty a political offense as long as stringent criteria are met. It is submitted that the inclusion of such a reservation would facilitate the extradition of terrorists who are attempting to avoid prosecution for terrorist acts directed at innocent parties, but will preserve the combatant’s privilege to use deadly force against military targets in situations where the law of armed conflict permits.

CONCLUSION

Although most states have little opportunity to prevent the occurrence of terrorist acts, they still possess the legal obligation to insure that the perpetrators of the acts are apprehended and prosecution initiated. While this legal obligation can be fulfilled through the extradition of terrorists, a review of the law and practice of extradition has shown that the political offense exception constitutes a major impediment to combatting international terrorism through the apprehension, prosecution and punishment of international terrorists.

It is clear that the political offense exception does serve a valid purpose in affording individuals the fundamental right to seek political change through political activism including, if no alternative means are available, recourse to revolutionary force. It is submitted that the scope of the exception must be limited so that terrorists cannot avoid prosecution and punishment for offenses that violate both domestic and international law. Terrorist acts which involve violent, random, indiscriminate

249. For a discussion of the basic premise underlying the political offense exception, see supra note 71 and accompanying text.

250. See Statement of J.F. Murphy, supra note 1 at 19-20. It is submitted that a draft resolution of the International Criminal Law Committee of the American Bar Association contains the provisions and reservations required in order to protect the basic purpose of the political offense exception. Id. The draft resolution recommends that the ratification of the Supplementary Treaty be subject to:

a. a reservation of the right to consider as a political offense any act listed under subsections (e) to (k) of Article I if the Act was committed in the course of a non-international armed conflict in furtherance of the objectives of the party to the conflict to which the person belongs and which does not violate the norms of international law applicable in non-international armed conflicts; and

b. a declaration that it is the understanding of the United States that the term “armed conflict” does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.

Id.

251. For a discussion of the combatant’s privilege, see supra note 242.
attacks upon innocent individuals should fall outside the scope of the political offense exception, and, therefore, constitute extraditable offenses.

It is further submitted that the Supplementary Extradition Treaty between the United States and the United Kingdom which severely limits the scope of the political offense exception effectively addresses the ability of terrorists to avoid prosecution and punishment for terrorist activity. Moreover, the recent amendments made to the Treaty preserve the basic purpose and rationales of the political offense exception. Such amendments should be included in all extradition treaties. The amended Supplementary Treaty provides the courts with much needed guidance regarding the scope of the exception and the best available means to ensure prosecution of terrorists.

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