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COMMENTS

ABROGATING THE RELATIVE POLITICAL OFFENSE EXCEPTION TO EXTRADITION: THE UNITED STATES-UNITED KINGDOM SUPPLEMENTARY EXTRADITION TREATY

On July 20, 1986, President Reagan, with the advice and consent of the United States Senate,¹ ratified a Supplementary Extradition Treaty² with the United Kingdom, signed on June 25, 1985.³ The Supplementary Treaty modifies the existing extradition agreement⁴ between the countries by eliminating crimes of violence⁵ from

1. N.Y. Times, July 18, 1986, at A1, col. 6. The Constitution states that the President has the power to conclude treaties only with the advice and consent of the Senate. U.S. CONST. art 11, § 2, cl.2. Two-thirds of the Senate must approve the treaty for consent to be given. *Id.*

2. Supplementary Extradition Treaty, June 25, 1985, United States-United Kingdom, Tr. Doc. 99-8 (1986) [hereinafter Supplementary Treaty].

3. Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT'L L. 338 (1986). For provisions of the Supplementary Treaty, see *infra* note 89.

4. Treaty of Extradition, June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468 (entered into force Jan. 21, 1977). Extradition is "the process by which persons charged with or convicted of crime against the law of a State and found in a foreign State are returned by the latter to the former for trial or punishment." 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 727 (1968). See also *United States v. Godwin*, 97 F.Supp. 252, 255 (W.D.Ark. 1951)(extradition is the "demand by one sovereign upon another sovereign for the surrender of a fugitive for trial and the surrender of such person to the demanding sovereign.") The United States will not extradite without a treaty. J.B. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 3-5 (1891).

Proceedings for extradition begin when a requesting state files a complaint charging a fugitive with a crime. Then an authorized magistrate, federal, or state judge issues a warrant for the arrest of the fugitive. 18 U.S.C. §3184 (1982). When the accused is apprehended, a hearing is held to determine whether there is sufficient evidence to extradite. *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977). The court must find three things to extradite: that the extradition treaty is applicable, *Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir.), *cert. denied*, 348 U.S. 818 (1954); that the person named in the complaint is the accused, *id.*; and that the offense the individual is charged with is a crime in both countries, *Factor v. Laubenheimer*, 290 U.S. 276 (1933). At the hearing, the accused has the right to introduce evidence which is explanatory of the crime, *Benson v. McMahon*, 127 U.S. 457 (1888). It is at this time that the political offense exception can be raised, as a challenge to the application of the extradition treaty. *Lubet & Czakes, The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. &

the political offense exception to extradition.⁶ The extradition treaties of almost all nations except from extradition persons accused of political crimes.⁷ All extradition treaties to which the United States

CRIMINOLOGY 193, 198 (1980). The United States, representing the requesting country, must prove at the hearing that there is probable cause to believe the accused committed the crime. *United States ex rel. Sakaguchi v. Kaulukukui*, 520 F.2d 726, 729 (9th Cir. 1975)(language of §3184 of "evidence sufficient to sustain the charge" interpreted to require a showing of probable cause). However, the court will not allow a full trial on the merits of the case. *In re Extradition of Michele Sindora*, 450 F.Supp. 672 (S.D.N.Y.), *habeas corpus denied*, 461 F. Supp. 199 (S.D.N.Y. 1978). If the court is satisfied that probable cause is established, the Secretary of State issues a warrant for surrender of the fugitive to the requesting state. 18 U.S.C. § 3184 (1982). See Bassiouni, *International Extradition: A Summary of the Contemporary American Practice and a Proposed Formula*, 15 WAYNE L. REV. 733, 751 (1969).

The accused may appeal only through a habeas corpus proceeding to a federal district court or court of appeals. The appellate court is limited to reviewing only whether the lower court had jurisdiction; whether the offense was specified in the treaty; and whether the evidence presented was sufficient to show probable cause. *Quinn v. Robinson*, 783 F.2d 776 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986). See also *Jiminez v. Aristequieta*, 290 F.2d 106 (5th Cir. 1961)(magistrate's decision on extradition can only be appealed on limited issues). The Secretary of State has the final responsibility to deliver the fugitive to the requesting country. The accused may make a claim of political motivation to the Secretary of State, who may deny extradition based on humanitarian considerations or the decision that the treaty is not applicable. Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 COLUM. J. TRANSNAT'L L. 381, 384 (1979). See also Garcia-Guillern v. United States, 450 F.2d 1189 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972)(courts cannot consider requesting country's criminal procedure); *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977)(executive may deny extradition based on "strong humanitarian grounds"). However, the Secretary of State rarely uses this discretion to deny a court order of extradition. Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313 (1962).

If the magistrate rules that the accused is not extraditable, the proceeding is terminated and the government has no right of appeal. 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1013 (1968). The only recourse of the requesting country is to refile its request. 2 M. BASSIOUNI & V. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 367-70 (1973).

5. These crimes include murder, voluntary manslaughter, kidnapping, abduction, hostage taking, and the use of firearms. For the full text of the included crimes, see *infra* note 89.

6. Article V of the Extradition Treaty states:

Extradition shall not be granted if . . . the offense for which extradition is requested is regarded by the requested party as one of political character; or 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.

Treaty of Extradition, June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468 (*entered into force* Jan. 21, 1977).

7. See, e.g., Extradition Treaty Between the United States of America and the Federal Republic of Germany, June 20, 1978, 32 U.S.T. 1485, T.I.A.S. No. 9785 (extradition not granted when the offense in respect of which it was requested was regarded by the requested state as a political offense); Extradition Treaty of 1930, July 12, 1930 United States-Germany, 47 Stat. 1862, T.S. No. 836 (provisions of the treaty refuse a claim of extradition for any crime of a political character); Convention Between Italy and Israel Concerning Extradition and Judicial Assistance in Criminal Matters, Feb. 24, 1956, art. 4, 316 U.N.T.S. 97 (extradition refused for a political offense or an act connected with a political offense); Extradition Treaty, Nov. 22, 1834, Belgium-France, art. 5, 84 Parry's T.S. 457, 562 (extradition not granted for political offenses); Extradition Treaty of 1930 Between Germany and Turkey, Sept. 3,

is a party⁸ contain such provisions, but no American treaty defines the meaning of the term "political offense."⁹ Hence American courts have interpreted the term and applied the exception on a case-by-case basis.¹⁰ The Supplementary Treaty limits the discretion of the courts to decide what is a political offense by removing violent crimes from the scope of the exception.¹¹

The Supplementary Treaty is the result of increasing concern in both the world community and the United States government over the recent growth of terrorism.¹² According to Administration officials, the Supplementary Treaty's provisions will prevent terrorists from using the political offense exception to avoid extradition from the United States.¹³ It is aimed specifically at members of the Irish Republican Army.¹⁴ Four times in the past seven years American courts have refused British requests for extradition of members of the I.R.A.¹⁵ It was the United States' government's embarrassment

1930, 133 L.N.T.S. 321 (parties not bound to grant extradition for any offense of a political character).

In addition, many countries provide for refusal of the return of political offenders within their constitutions. See, e.g., CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (promulgated Sept. 20, 1954) art. 99, English translation in FUNDAMENTAL DOCUMENTS OF COMMUNIST CHINA 31 (A. Blaustein ed. 1962)(China "grants the right of asylum to any foreign national persecuted for supporting a just cause"); KONST. SSSR (Constitution) art. 12 (1924)(the USSR "grants the right of asylum to all foreigners persecuted for their political or religious offenses").

8. The United States is a party to over 90 bilateral extradition treaties. For a list of those treaties, see 18 U.S.C. § 3181 (Supp. II 1978)(Appendix C).

9. Hannay, *supra* note 4, at 385. See also Carbonneau, *The Political Offense Exception to Extradition and Transnational Terrorism*, 1 A. STUDENT INT'L L. SOC'Y INT'L L.J. 1 (1977).

10. See, e.g., *Ornelas v. Ruiz*, 161 U.S. 502 (1896)(Supreme Court held raids of Mexican and American nationals did not amount to political uprising); *Eain v. Wilkes*, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981)(member of the Palestinian Liberation Army extraditable to Israel because political offense test not met); *Escobedo v. United States*, 623 F.2d 1098 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980)(political offense exception did not apply to U.S. nationals extradited to Mexico for attempted kidnapping and murder); *In re Ezeta*, 62 F.2d 972 (N.D. Cal. 1894)(extradition of former president of Republic of Salvador denied on grounds of political offense exception); *In re Gonzalez*, 217 F. Supp. 717 (S.D.N.Y. 1963)(military prison guards extradited to the Dominican Republic because no political uprising occurred); *Ramos v. Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959)(Florida court denied extradition of Cuban nationals on basis of political offense exception).

11. For the full text of the exception, see *infra* note 89.

12. The Supplementary Treaty, according to President Reagan, "represents a significant step in improving law enforcement cooperation and combatting terrorism, . . ." Transmittal letter from President Ronald Reagan to the United States Senate (July 17, 1985), reprinted in 24 I.L.M. 1104 (1985).

13. *United States and United Kingdom Supplementary Extradition Treaty: Hearings Before the Committee on Foreign Relations, United States Senate*, 99th Cong., 1st Sess. 704 (1985)[hereinafter *Hearings*](responses from Department of State to questions from Committee Staff).

14. *Hearings, supra* note 13, at 4 (statement of Abraham Sofaer, Legal Advisor to the Department of State).

15. *McMullen v. I.N.S.*, 788 F.2d 591 (9th Cir. 1986); *United States v. Doherty*, 786 F.2d 491 (2d Cir.), *habeas corpus denied sub nom. Doherty v. Meese*, 808 F.2d

over these decisions which prompted the negotiations resulting in the Supplementary Treaty.¹⁶ The United States is currently renegotiating several of its bilateral extradition treaties with other nations to include similar provisions excepting violent crimes from the political offense exception.¹⁷ The Supplementary Treaty with the United Kingdom will probably serve as the prototype for future treaties. However, its history has been controversial, and the Senate gave its advice and consent to the Supplementary Treaty only after much debate and controversy.¹⁸

This Comment will briefly explain the history of the political offense exception in both international and American extradition law. Next, an analysis of the rationale behind the exception and its application to the Supplementary Treaty will be presented. This Comment will then argue that the Treaty is overbroad because, in effect, it eliminates the relative political offense exception for violent acts committed not only by terrorists, but by others. Such a doctrine is contrary to the traditional American policy of harboring political refugees and ignores the historic role of federal courts in defining political crimes. Finally, this Comment will present more effective and equitable alternatives to the Supplementary Treaty's approach.

I. HISTORY OF THE POLITICAL OFFENSE EXCEPTION IN EXTRADITION LAW

A. *Origins of the Exception*

The ancient Egyptians and Chinese used extradition as a means of returning fugitives from one ruler to another.¹⁹ Classical legal au-

938 (2d Cir. 1986); *Quinn v. Robinson*, 783 F.2d 776 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986); *In re Mackin*, 668 F.2d 122 (2d Cir. 1981). All four men were members of the Provisional Irish Republican Army. The original Irish Republican Army has been splintered so many times that it is often difficult to distinguish between the many groups. For clarity all groups will be referred to as the I.R.A. For a history of the role of the I.R.A. in Northern Ireland, see J. BELL, *THE SECRET ARMY* (1970); T. COOGAN, *THE I.R.A.* (1970); M. FARRELL, *NORTHERN IRELAND: THE ORANGE STATE* (1976); S. MACSTIOFAIN, *MEMOIRS OF A REVOLUTIONARY* (1975); T.W. MOODY, *THE ULSTER QUESTION 1603-1973* (1974).

16. *Hearings*, *supra* note 13, at 4 (statement of A. Sofaer). Judge Sofaer stated, "We must remain credible in the fight against terrorism, and we simply cannot demand the surrender of terrorists abroad if we refuse to extradite to other nations as well." *Id.* at 6.

17. *Id.* at 20.

18. *N.Y. Times*, July 18, 1986, at A1, col. 6. Both the Senate Foreign Relations Committee and the Subcommittee on the Constitution of the Committee on the Judiciary held hearings to consider the Supplementary Treaty. See *Hearings, supra* note 13; *Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 99th Cong., 1st Sess.* 523 (1985).

19. Kutner, *World Habeas Corpus and International Extradition*, 41 *U. DET. L.J.* 525 (1964).

thorities such as Grotius²⁰ and Vattel²¹ wrote that even in the absence of a treaty, states should either prosecute a fugitive or surrender him to the requesting state.²² European rulers in the Middle Ages often agreed to return political dissidents to each other as a means of maintaining their power.²³ These fugitives were typically those who had committed acts in opposition to the sovereign, those which would now be called "political offenses."²⁴

The political offense exception arose during the eighteenth century, when the structures of governments shifted from autocratic to representative.²⁵ At the same time, civil libertarians such as John Locke²⁶ and John Stuart Mill²⁷ espoused the doctrine that dissidence was a legitimate means of attaining political change.²⁸ By the time of the American and French revolutions, an ideology had arisen which conceded the right to revolt, even violently, against tyranny.²⁹

20. H. GROTIUS, *DE JURE BELLI AC PACIS* 258-59 (1625).

21. E. DE VATTEL, *LAW OF NATIONS* 162 (J. Chitty ed. 1859).

22. Grotius stated that requests for extradition should "be understood not as strictly binding a Prince a people or sovereign to the actual surrender of the offenders, but allowing them the alternative of either punishing them or delivering them up." GROTIUS, *supra* note 20, at 259. This principle is known as *aut dedere aut judicare*, "extradite or prosecute," and has been used in many recent international conventions. *E.g.*, Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *done* Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570, 974 U.N.T.S. 177; Convention for the Suppression of Unlawful Seizure of Aircraft, *done* Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192; Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (*entered into force*, Jan. 12, 1951). For a discussion of the trend, see Costello, *International Terrorism and the Development of the Principle of Aut Dedere Aut Judicare*, 10 J. INT'L L. & ECON. 483 (1975).

23. *Harvard Research in International Law, Extradition*, 29 AM. J. INT'L L. SUPP. 35, 37 (1935). For a discussion of the history of extradition, see S. BEDI, *INTERNATIONAL EXTRADITION IN LAW AND PRACTICE* (1966); A. BILLOT, *TRAITE DE L'EXTRADITION* (1974); H. DONNEDIEU DE VABRES, *INTRODUCTION A L'ETUDE DE DROIT PENAL INTERNATIONAL* (1922); I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* (1971).

24. "[T]reaties very often stipulated for the extradition of individuals who had committed such deeds as are nowadays termed 'political crimes,' and such individuals were frequently extradited, even when no treaty stipulated to it." 1 L. OPPENHEIM, *INTERNATIONAL LAW* 644 (1948).

25. Lubet & Czakes, *supra* note 4, at 194.

26. J. LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* 77 (L. DeKoster ed. 1978).

27. J.S. MILL, *ON LIBERTY* 2-4 (E. Rapaport ed. 1978).

28. I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 166 (1971). *See also* Sutherland, *The Development of International Law of Extradition*, 28 ST. LOUIS U.L.J. 33, 35 (1984).

29. *See, e.g.*, Declaration of Independence, para. 1 (U.S. 1776) ("whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it. . ."); LA CONSTITUTION DE 1793 art. 120 (Fr.), *reprinted in* LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789 79 (S. Godechot ed. 1970) (France gave asylum to foreigners banished from their countries for the cause of liberty); Declaration des droits de l'homme et du Citoyen du 26 aout 1789 (Declaration of the Rights of Man and of the Citizen of 26 August 1789) art. 2 (Fr.), *reprinted in* LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789 33 (S. Godechot ed. 1970) (resistance to oppression is an inalienable right). *See also* C. VAN. DEN WIJNGAERT, *THE POLITICAL OFFENSE*

Extradition of political offenders was used with decreasing frequency in Europe.³⁰ Newly independent nations, such as the United States, held the view that giving asylum to political refugees was a duty, and refused to extradite at all, even for common crimes.³¹

B. Pure and Relative Political Offenses

With the widespread acceptance of the philosophy that the violent overthrow of a despotic government was a legitimate method of political change, two distinct types of political offenses arose.³² The first were the traditionally extraditable crimes such as treason, sedition, and espionage.³³ Attacks on the security of the sovereign characterized these "pure" political offenses, which were directed at the state's political organization rather than its individual citizens.³⁴ Following the French Revolution these offenses became non-extraditable.³⁵ Justification for refusing extradition lay in the theory that the elements of ordinary crime were lacking.³⁶ There has been little

EXCEPTION TO EXTRADITION 9 (1980).

30. *Harvard Research*, *supra* note 23, at 108. See also Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 CORNELL INT'L L.J. 71, 81 (1978).

31. Bassiouni, *International Extradition: A Summary of the Contemporary American Practice and a Proposed Formula*, 15 WAYNE L. REV. 733, 734 (1969). The American position was stated by the Supreme Court in *United States v. Rauscher*: [T]here [is] no well-defined obligation in one country to deliver up . . . fugitives to another, and though such delivery was often made, it was on the principle of comity. . . and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.

119 U.S. 407, 411-12 (1886).

32. 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 800 (1968). See generally M. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE ch. VIII, § 2-4 (1983) (discussion of the development of relative and pure political offenses); Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1230-39 (1962) (analysis of differences between pure and relative political offenses).

33. Gold, *Non-extradition for Political Offenses: The Communist Perspective*, 11 HARV. INT'L L.J. 191, 198 (1970). See, e.g., *Chandler v. United States*, 171 F.2d 921 (1st Cir.), cert. denied, 336 U.S. 918 (1948) (treason is a political offense); *Ex parte Kolczynski* [1955] 1 Q.B. 540 (treason is an offense of a political character); *In re De Bernoville*, 22 I.L.R. 527 (Brazil Supreme Court 1955) (treason is a political crime, and those accused of treason will not be extradited); *In re Ockert*, 7 Ann. Dig. 369, 370 (Switz. Fed. Trib. 1933) (political offenses include treason because the offense is against the State and its principal organs.)

34. The court in *In re Giovanni Gatti*, 14 Ann. Dig. 145 (Cour d'appel, Grenoble 1947) stated that political offenses were those which "injure the political organism, which are directed against the constitution of the Government and against sovereignty. . . ."

35. Lubet & Czakes, *supra* note 4, at 194.

36. M. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE ch. VIII, § 2-15. Generally, extradition treaties provide that extraditable offenses are only those which are crimes in both countries. This is the rule of double criminality. *Factor v. Laubheimer*, 290 U.S. 276 (1933). Treason, sedition and espionage are directed at a specific government. Hence they are nonextraditable because treason, sedition or espionage against the requesting state is not a crime in the requested

controversy over what constitutes a pure political offense and its character of non-extraditability has been firmly established among the Western democracies.³⁷

Not as easily defined were "relative" political offenses. These were acts which were ordinarily common crimes, but which were politically motivated or incident to a political insurrection.³⁸ Such acts were not limited to nonviolent dissent, but included crimes such as murder, manslaughter, and the use of firearms.³⁹ Attacks on individuals rather than the state differentiated relative from pure political offenses, although both were politically, rather than personally, motivated.⁴⁰ The definition of the relative political offense has been controversial since courts began to apply the exception.⁴¹

state.

In addition, common crimes injure private persons or property, while political crimes are public wrongs. M. BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* ch. VIII, § 2-15. Laws forbidding treason, sedition and espionage "exist solely because the very political entity, the state, criminalized such conduct for its self-preservation." *Id.* They are crimes because they "violate positive law, but. . . [do] not cause a private wrong." *Id.* Thus they are distinguishable from common crimes. See generally C. VAN DEN WIJNGAERT, *supra* note 29, at 106 (pure political crimes are directed against the state and the political organization, and do not injure private persons, property, or interests).

37. Garcia-Mora, *supra* note 32, at 1234-35. See, e.g., *Chandler v. United States*, 171 F.2d 921 (1st Cir.), cert. denied, 336 U.S. 918 (1948) (U.S. gave asylum to person charged with treason); *In re Barratini*, 9 Ann. Dig. 412 (Belg. 1936) (purely political offenses were nonextraditable); *In re Fabijan*, 7 Ann. Dig. 360, 363 (Ger. Supreme Court 1933) (political offenses included high treason and "acts against the external security of the State"). For a discussion of the pure political offense exception in Communist countries, see Gold, *supra* note 32, at 198.

38. They were also called "delits complexes." Garcia-Mora, *supra* note 32, at 1239.

39. Lubet & Czakes, *supra* note 4, at 194.

40. Targets of relative political offenses could be nongovernmental or governmental. Thompson, *The Evolution of the Political Offense Exception in an Age of Modern Political Violence*, 9 YALE J. WORLD PUB. ORD. 315, 317 (1983). See also Banoff & Pyle, "To Surrender Political Offenders": *The Political Offense Exception to Extradition in United States Law*, 16 N.Y.U.J. INT'L L. & POL. 169, 178 (1984).

41. Courts have developed three different tests to determine whether an act is a relative political offense. The first is the French objective test, which focuses on the act alone, ignoring the motive of the offender. The French-Belgian Extradition Treaty of 1834 was the first incorporation of the political offense exception into a treaty. Treaty of Extradition, Nov. 22, 1834, France-Belgium, Parry's T.S. 457, 462. The leading French decision interpreting the treaty was *In re Giovanni Gatti*, 14 Ann. Dig. 145 (Cour d'appel, Grenoble 1947), in which the French court held that a political offense is determined by the nature of the rights which the accused violates, and that the offender's motives are irrelevant. The court distinguished political and common crimes and stated that political crimes are directed against the political organization or structure of the state. *Id.* Since *Gatti*, French courts have applied the test inconsistently. Compare *In re Hennin*, *Juris-Classeur, Periodique (J.C.P. II) No. 15274* (Cour d'appel, Paris 1967) (extradition refused because of political climate in Switzerland) with *In re Spiessens*, 16 Ann. Dig. 275 (Fr. 1949) (political considerations prevented application of political offense exception) and *In re Colman*, 14 Ann. Dig. 139 (Fr. 1947) (political offense exception not applicable in time of war).

The second test, the political motivation test, was developed in Switzerland. Swiss courts must consider the political motives of the accused, as well as the circum-

C. Application of the Doctrine in American Law

Because of the violent origins of the United States government, it has always been reluctant to return political fugitives,⁴² and the political offense exception has always been included in its extradition treaties.⁴³ The first international extradition agreement to which the United States was a party was included in the Jay Treaty of 1794.⁴⁴ In 1799, under the provisions of that treaty, Great Britain requested the return of Jonathon Robins, an American accused of

stances surrounding the act, such as the target and seriousness of the crime, to determine if an offense is political. *In re Ockert*, 7 Ann. Dig. 369 (Switz. Fed. Trib. 1933). There must be a direct connection between the crime and the purpose sought to be achieved; and the political motivation must outweigh the common law elements for the offense to be nonextraditable. *Id.* The more serious crimes such as murder and kidnapping do not usually meet the criteria of the test. See, e.g., *In re Ficorelli*, 18 I.L.R. 345 (Switz. Fed. Trib. 1951); *In re Ockert*, 7 Ann. Dig. 369 (Switz. Fed. Trib. 1933); *In re Vogt*, 2 Ann. Dig. 285 (Switz. Fed. Trib. 1925); *In re Caponini*, 2 Ann. Dig. 283 (Switz. Fed. Trib. 1924); *In re Rogni*, 2 Ann. Dig. 286 (Switz. Fed. Trib. 1923).

The final approach to defining a relative political offense is the Anglo-American incidence test. In Great Britain, the exception was included in the Extradition Act of 1870, 33 & 34 Vict. c.52, and interpreted 20 years later in *In re Castioni*, [1891] 2 Q.B. 149. *Castioni* established the guidelines that were followed in English and American courts ever since. The court set up a two part test to find a political offense. First, there must be a political disturbance. Second, the crime must be a part of or incidental to that disturbance. *Id.* The English courts modified the doctrine four years after *Castioni* in *In re Meunier*, [1894] 2 Q.B. 415. The *Meunier* court refused to allow an anarchist who had blown up a cafe and army barracks in Paris to invoke the political offense exception to avoid extradition to France. *Id.* The court applied the *Castioni* test, but went further by implying that the crime must bear a reasonable relation to and be proportionate to the political goal sought. *Id.* at 419. In *Regina v. Governor of Brixton Prison, ex parte Kolczynski* [1955] 1 Q.B. 540, the English court further refined the test by allowing an examination of all the circumstances surrounding the offense, including the motives of the requesting state. The court stated that "the words 'offense of a political character' must always be considered according to the circumstances existing at the time when they have to be considered." *Id.* at 549 (Cas-sels, J.). See also Cantrell, *The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 MARQ. L. REV. 777, 784-86 (1977); Green, *Political Offenses, War Crimes and Extradition*, 11 INT'L & COMP. L.Q. 329, 331 (1962).

For a discussion of the American test, see *infra* notes 51-53 and accompanying text. For a general discussion of the different tests, see *Quinn v. Robinson*, 783 F.2d 776, 794-96 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986); I. SHEARER, *supra* note 28, at 168; Carboneau, *supra* note 9, at 11-31; Thompson, *supra* note 40, at 318-22; Recent Decisions, *The Political Offense Exception to Extradition: A 19th Century British Standard in 20th Century American Courts*, 59 NOTRE DAME L. REV. 1005, 1009-14 (1984).

42. Bassiouni, *International Extradition: A Summary of the Contemporary American Practice and a Proposed Formula*, 15 WAYNE L. REV. 733, 734 (1969). See also *United States v. Rauscher*, 119 U.S. 407 (1886) (explaining American policy on extradition).

43. Bassiouni, *International Extradition: A Summary of the Contemporary American Practice and a Proposed Formula*, 15 WAYNE L. REV. 733, 735 (1969).

44. Jay Treaty, Nov. 19, 1794, United States-Great Britain, 8 Stat. 116, T.S. No. 105.

committing murder while he served in the Royal Navy.⁴⁵ For political reasons, President John Adams ordered the presiding magistrate to grant extradition, and Robins was returned to England where he was hanged.⁴⁶ Most Americans believed that Robins' actions were excusable, and the case caused considerable controversy.⁴⁷ As a result of public opinion surrounding the *Robins* case, the United States refused to extradite anyone for almost fifty years,⁴⁸ until the Webster-Ashburton Treaty of 1842.⁴⁹ Six years later, Congress passed the 1848 Extradition Act, which reflected public concern over *Robins* by leaving to the judiciary rather than the executive the initial decision of whether to grant extradition.⁵⁰

The judiciary first performed this role in 1894 in *In re Ezeta*,⁵¹ when the Republic of Salvador requested the return of its deposed ruler, General Antonio Ezeta.⁵² The *Ezeta* court denied extradition, applying the British incidence test to determine a political offense.⁵³ This test consisted of two parts: first, a finding that there was a political disturbance in the requesting state; and second, a finding that the crime was a part of or incident to that disturbance.⁵⁴ American courts have utilized this approach with little modification up to the present time.⁵⁵

The American test has been criticized for being too rigid, and for not taking into account circumstances surrounding the crimes of the accused.⁵⁶ It was attacked most strongly when a federal district

45. *United States v. Robins*, 27 F. Cas. 825 (No. 16,175)(D.S.C. 1799). Robins' defense was that he had been press-ganged into service with the Royal Navy and that he had killed an officer while escaping. *Id.* at 832.

46. *Robins*, 27 F. Cas. at 870.

47. See 10 ANNALS OF CONGRESS 580-640 (1800). The unpopularity of the decision was one of the causes of President Adams' defeat in the 1800 election. 1 J. MOORE, EXTRADITION AND INTERSTATE RENDITION 550-51 (1891).

48. *Hearings*, *supra* note 13, at 101-102 (statement of Professor Christopher Pyle.)

49. Webster-Ashburton Treaty, Aug. 9, 1842, United States-Great Britain, 8 Stat. 572, T.S. No. 119.

50. *In re Kaine*, 55 U.S. (14 How.) 103 (1853). In *Kaine*, the Court stated: "That the eventful history of Robbins's [sic] case had a controlling influence on . . . Congress, when it passed the act of 1848, is, as I suppose, free from doubt. . . . [E]xtradition without an unbiased hearing before an independent judiciary, is highly dangerous to liberty. . . ." *Id.* at 112.

51. 62 F. 964 (N.D. Cal. 1894).

52. *Id.*

53. *Id.* at 998. For the British test, see *supra* note 41.

54. *Ezeta*, 62 F. at 998. See also *In re Castioni* [1891] 1 Q.B. 149.

55. Compare *Ornelas v. Ruiz*, 161 U.S. 502 (1896) with *Quinn v. Robinson*, 783 F.2d 776 (9th Cir.), cert. denied, 107 S.Ct. 271 (1986) (test applied is identical over 90 year period).

56. *Hearings*, *supra* note 13, at 227 (statement of Arthur C. Helton, Lawyers' Committee for International Human Rights). Critics also contend that the test is underinclusive because it "exempts from judicially guaranteed protection all offenses that are not contemporaneous with an uprising even though the acts may represent legitimate political resistance." *Quinn v. Robinson*, 783 F.2d 776, 797-98 (9th Cir.),

court allowed an accused war criminal from Yugoslavia to use the exception to escape extradition.⁵⁷ The use of the exception was condemned more recently when four federal courts refused to return Irish Republican Army members to the United Kingdom.⁵⁸ Critics of

cert. denied, 107 S. Ct. 271 (1986); and that it is overinclusive because it "makes non extraditable some offenses that are not of a political character merely because the crimes took place contemporaneously with an uprising." *Quinn*, 783 F.2d at 798. See also Garcia-Mora, *supra* note 32, at 1246; Lubet & Czakes, *supra* note 4, at 205.

57. *United States v. Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959). The government of Yugoslavia requested the extradition of Andrija Artukovic, whom it accused of directing the murder of civilians in concentration camps, in 1951. Artukovic was the Minister of the Interior of the Nazi-directed Croatian government in Yugoslavia after the German invasion in 1941. He was arrested in California pursuant to a warrant issued on the extradition request. Artukovic filed for habeas corpus relief and the case went up and down the federal court system for seven years. The Ninth Circuit Court of Appeals, using the *Castioni* test, held that Artukovic's crimes were political offenses and that he could not be extradited. The Supreme Court vacated per curiam and remanded the case for an extradition hearing. Eventually, the magistrate refused extradition, holding that Yugoslavia had not established probable cause of Artukovic's guilt. *Artukovic v. Boyle*, 107 F. Supp. 11 (S.D. Cal. 1952), *rev'd sub nom. Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir.), *cert. denied*, 348 U.S. 818, *reh. denied*, 348 U.S. 889 (1954), *on remand sub nom. Artukovic v. Boyle*, 140 F. Supp. 245 (S.D. Cal. 1956), *aff'd sub nom. Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957), *vacated and remanded*, 355 U.S. 393 (1958)(mem.), *surrender denied on remand sub nom. United States v. Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959). In 1982 Congress removed protection from accused war criminals through the Immigration and Nationality Act—Nazi Germany, 8 U.S.C. §§ 1251, 1253-54 (1982). In 1984 Yugoslavia refiled its extradition request, and Artukovic was extradited in 1986. *Extradition of Artukovic*, CV 84-8743-R(8) (C.D. Cal. May 1, 1985), *vacated*, 693 F.2d 894 (9th Cir. 1984), *aff'd sub nom. Artukovic v. United States*, 628 F. Supp. 1370 (C.D. Cal.), *stay denied sub nom. Artukovic v. Rison*, 784 F.2d 1354 (9th Cir. 1986). For criticism of the Artukovic decision, see Cantrell, *supra* note 41, at 795-96.

58. *Hearings*, *supra* note 13, at 4 (statement of A. Sofaer). In 1979 the United Kingdom requested the extradition of Peter McMullen, whom it accused of murder in connection with the bombing of a military barracks in England. McMullen was a former soldier in the British Army, who deserted to join the I.R.A. in 1972. *Hearings*, *supra* note 13, at 130 (statement of C. Pyle). The United States federal magistrate denied the extradition request, applying the incidence test, and holding that McMullen's crime was a political offense. *In re McMullen*, No. 3-78-1099 MG (N.D. Cal. May 11, 1979). After the United States sought to deport McMullen because of his violation of immigration laws, *In re McMullen* 17 I & N Dec. 542 (B.I.A. 1980), the Ninth Circuit held that since McMullen had deserted the I.R.A. and his life would be threatened if he returned to Northern Ireland, deportation should be withheld. *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981). The court returned the case to the Board of Immigration Appeals (B.I.A.). The B.I.A. found that McMullen's potential persecution was not based on his political opinion and thus not protected by the United Nations Convention Protocol and § 243(h) of 8 U.S.C. § 1253(h), which prohibit deportation if the deportee will suffer persecution. *In re McMullen*, I & N Interim Decision No. 2967 (B.I.A. 1984). The Ninth Circuit Court of Appeals upheld the decision on appeal. 788 F.2d 591 (9th Cir. 1986). McMullen was not deported, but was granted asylum in exchange for information about I.R.A. activities. *N.Y. Times*, July 18, 1986, at A1, col. 6. However, pursuant to the provisions of the Supplementary Treaty, the United Kingdom in 1987 refiled its extradition request for McMullen. The entire case will be relitigated. Address by Nigel Sheinwald, British Embassy, at the American Society of International Law, 51st Annual Meeting, Panel on Extradition and the Political Exception, in Boston, Mass. (April 10, 1987).

In 1981 the United Kingdom requested the extradition of another I.R.A. member, Desmond Mackin, accused of killing a British soldier in Northern Ireland. The

the test contend that it does not take into account the heinousness of the crimes excused under the political offense doctrine,⁵⁹ and that it ignores the modern development of terrorism and its methods.⁶⁰ It

federal magistrate held that at the time of the offense, a political uprising was occurring in Belfast, and that Mackin's crime was incident to that uprising. Extradition was denied. *In re Mackin*, No. 80 Cr. Misc. 1 (S.D.N.Y. Aug. 13, 1981). The Second Circuit Court of Appeals dismissed the appeal. 668 F.2d 122 (2d Cir. 1981). Mackin was subsequently deported to Ireland for violation of immigration laws. *N.Y. Times*, July 18, 1986, at A1, col. 6.

In 1983, Joseph Patrick Thomas Doherty, another member of the I.R.A., was arrested in New York pursuant to a deportation warrant. Ten days later, the United Kingdom requested his extradition, based on Doherty's conviction for murder and attempted murder in the killing of a British Army officer in Belfast. The federal district court of the southern district of New York held that Doherty's crimes constituted a political offense and denied extradition. *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984). The Second Circuit Court of Appeals upheld the judgment. 786 F.2d 491 (2d Cir. 1986). Doherty was then returned to the custody of the Immigration and Naturalization Service (INS), and he consented to deportation. He requested that he be returned to Ireland rather than the United Kingdom, because he faced a ten-year prison term in Ireland, but life imprisonment in the United Kingdom. The INS opposed Doherty's request, but the district court granted it. The INS appealed the decision of the B.I.A. Meanwhile, Doherty filed a petition for a writ of habeas corpus releasing him and allowing immediate deportation to Ireland. His petition was denied, and the decision was upheld on appeal. *Doherty v. Meese*, 808 F.2d 938 (2d Cir. 1986). As of April, 1987, the B.I.A. had not ruled on the country to which Doherty would be deported. Address by Thomas Mosley, Office of the U.S. Attorney, New York, at the American Society of International Law, 81st Annual Meeting, Panel on Extradition and the Political Exception in Boston, Mass. (April 10, 1987).

The United Kingdom requested the extradition of William Joseph Quinn in 1981. Quinn was an American citizen and member of the I.R.A. charged with the murder of a police constable in London and conspiracy to cause explosions in London in 1975. A United States magistrate found Quinn extraditable, rejecting Quinn's claim that his crime was a political offense. Quinn then filed a petition for a writ of habeas corpus. The district court held that Quinn's offenses were within the political offense exception and denied extradition. The United States government appealed to the Ninth Circuit Court of Appeals, which reversed the finding of the district court. 783 F.2d 776 (9th Cir. 1986). In his opinion, Judge Reinhardt reaffirmed the use of the incidence test, stating, "[W]e believe that the incidence test, when properly applied, has served the purposes and objectives of the political offense exception well." *Id.* at 801. He held, however, that Quinn's offenses did not fall within the protection of the exception because they occurred in England. "The crimes did not take place within a territorial entity in which a group of nationals were seeking to change the form of government under which they live, rather the offenses took place in a different geographical location." *Id.* at 818. The court remanded the case to the district court to determine whether the conspiracy charge was time-barred. *Id.* Quinn appealed the decision to the Supreme Court, which refused certiorari, 107 S.Ct. 271 (1986).

59. Professor Ruth Wedgwood of the Yale Law School stated that the test reflected a "nihilist attitude" toward modern revolutionary violence, and excused "any violence for any reason." American Society of International Law, 81st Annual Meeting, Panel on Extradition and the Offense Exception, in Boston, Mass. (April 10, 1987). For additional criticism of the test, see Note, *Extradition Reform and the Statutory Definition of Political Offenses*, 24 VA. J. INT'L L. 419, 435 (1984) [hereinafter *Extradition Reform*].

60. Critics contend that while the nature of political opposition has changed, the incidence test has not. Thompson, *supra* note 40, at 316. The traditional forms of open military rebellion have been replaced by individual attacks on nongovernmental targets. They argue that since tactics and methods of opposition are different, the political offense exception is no longer applicable to modern violent rebellion because

was this concern which led to the restrictions on the courts' discretion contained in the Supplementary Treaty.⁶¹

II. JUSTIFICATIONS FOR THE POLITICAL OFFENSE EXCEPTION

Historically there have been three justifications for the inclusion of the political offense exception in extradition treaties. The first is predicated on the judgment that both peaceful and violent political revolts are legitimate methods of achieving political change.⁶² Nations such as the United States and France, whose governments were established only because of violent revolutions, have recognized the right of other political dissidents to similar rebellions.⁶³ These judgments are based on an eighteenth century political philosophy which focused on the rights of individuals within the state, rather than the rights of sovereigns over their citizens.⁶⁴ At the same time, the idea that all people have the inherent right to self-determination⁶⁵ gained acceptance and by the twentieth century had become a well-established goal of international law.⁶⁶ The

the historic justification for the exception does not apply to such attacks. *Id.*

61. *Hearings*, *supra* note 13, at 4 (statement of A. Sofaer). Judge Sofaer stated: "This treaty is aimed directly at terrorists. . . . In recent years the exception has resulted in refusals by U.S. courts to extradite persons suspected or convicted of committing heinous crimes that are not, by their nature, political acts." *Id.* at 2-3.

62. "[R]evolution and rebellion are recognized remedies in customary international law." R. FRIEDLANDER, *TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL* 44 (1979). *See also* Lubet & Czakes, *supra* note 4, at 194; Note, *American Courts and Modern Terrorism: The Politics of Extradition*, 13 N.Y.U.J. INT'L L. & POL. 617, 622 (1981).

63. Cantrell, *supra* note 41, at 782. *See also* Quinn, 783 F.2d at 792-93. The doctrine was generally accepted throughout Europe as well. It arose "during an era when there was much concern for and sympathy in England for the cause of liberation for subjugated peoples." *In re Doherty*, 599 F. Supp. 270, 275 n.4 (S.D.N.Y. 1984).

64. *See supra* notes 26-30 and accompanying text.

65. Self-determination is defined as the right of peoples to "freely determine their political status and freely pursue their economic, social and cultural development." *Declaration of the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514(XV), 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1961).

66. *See, e.g.*, U.N. CHARTER art. 1, para. 2 (one of the purposes of the United Nations is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"); G.A. Res. 3103, U.N. GAOR Supp. (No. 30) 142, U.N. Doc. A/9030 (1974) (armed rebellion for self-determination is in accordance with the principles of international law); *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), 25 U.N. GAOR Supp. (No. 28) 121, U.N. Doc. A/8028 (1971) ("the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law"); *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) 49, U.N. Doc. A/6316 (1967) (all people have the right of self-determination); Charter of the Organization of African Unity, May 25, 1963, 479 U.N.T.S. 39 (every nation has the inalienable right to control its destiny); *Declaration on the Granting of Independence to*

countless colonial rebellions within the last 200 years are evidence of the widespread acceptance of the view that armed revolt is often a necessary means of achieving a representative government.⁶⁷

Closely related to this concern for individual rights is the idea that those who engage in rebellions should not be returned to the place of rebellion to be tried by vengeful political enemies.⁶⁸ According to this rationale, it is inequitable to extradite and subject to punishment a rebel merely because his rebellion failed.⁶⁹ The victor in an internal struggle determines the criminality of political offenses, and it is assumed that such a government cannot conduct a fair trial.⁷⁰ To protect the accused from victor's justice, extradition is refused.⁷¹

A second rationale for the political offense exception is the duty of states to remain neutral in internal conflicts.⁷² Civil strife is seen as a domestic problem,⁷³ and states to which fugitives flee are unwilling to become involved in those problems.⁷⁴ According to this theory, a granting of extradition for a political offender is tantamount to siding with the requesting government and denying the legitimacy of the dissident's claims.⁷⁵ Without the political offense

Colonial Countries and Peoples, G.A. Res. 1514 (XV), 15 U.N. GAOR Supp. (No. 16) 66, U.N. Doc. A/4684 (1961) (all peoples have the right to self determination).

67. *C.f. Quinn*, 783 F.2d at 792 (colonial rebellions advanced the legitimacy of armed political resistance).

68. "Humane considerations dictate that the political offender should be spared the inequities that would almost certainly result if he were surrendered to trial in the requesting state." M. DEFENSOR-SANTIAGO, *POLITICAL OFFENSES IN INTERNATIONAL LAW* 28 (1977).

69. 2 C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 1019 (2d ed. 1947).

70. See M. BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 425 (1974); C. VAN DEN WIJNGAERT, *supra* note 29, at 3; Garcia-Mora, *supra* note 32, at 1226.

71. Cantrell, *supra* note 41, at 782.

72. *Hearings*, *supra* note 13, at 137 (statement of Professor M. Cherif Bassiouni).

73. The British have maintained for years that the conflict in Northern Ireland is a domestic disturbance in which the world community should have no voice. See *Hearings*, *supra* note 13, at 151 (statement of Raymond Flynn, Mayor of Boston).

74. "Where there is a 'contest' between the government and a segment of the population, extradition of the political offender would be tantamount to intervention in the internal political affairs of that state." M. DEFENSOR-SANTIAGO, *supra* note 68, at 34.

75. *Hearings*, *supra* note 13, at 137 (statement of M. Bassiouni), at 49 (statement of Rep. Mario Blaggi). While Secretary of State, Thomas Jefferson refused the extradition of four Frenchmen to the new French Republic. He stated, "The evil of protecting malefactors of every dye is sensibly felt here as in other nations, but until a reformation of the criminal codes of most nations, to deliver fugitives from them would be to become their accomplice." T. JEFFERSON, *WRITINGS* 462 (Ford. ed. 1894). However, some scholars argue that refusal to extradite is as much a violation of neutrality as extradition of political offenders. C. VAN DEN WIJNGAERT, *supra* note 29, at 204 ("both the granting and the denial of an extradition request can be considered as taking a political position concerning the conflict situation in the requesting state.")

exception, the requested state would violate its duty of neutrality.⁷⁶

The third justification for the exception is that political crimes create less of a world order problem than common crimes.⁷⁷ Because these acts are targeted at the specific government structure of the requesting state, in response to that state's policies, those who commit the acts are not considered a threat to other governments.⁷⁸ Thus, there is less of a common interest between the requested and requesting states in suppressing the crime. Political offenders theoretically act not for personal gain, but for what they conceive as a greater societal good.⁷⁹ According to this rationale, once these individuals are removed from the political situation which induced their crimes, they have no reason to act criminally again and, in theory, they will not.⁸⁰ They therefore are neither a threat to the public safety of the asylum⁸¹ country, nor to world order, and the requested country has little interest in removing them from its jurisdiction through extradition.⁸²

Concerns of humanitarianism, neutrality, and public order are the historic bases for the political offense exception and the justifi-

Supporters of this position claim that American refusal to extradite I.R.A. members implies support of their political movement. *Hearings, supra* note 13, at 220 (statement of Senator Thomas Eagleton). See also N.Y. Times, March 17, 1985, at A41, col. 1.

76. Neutrality is defined as "an attitude of impartiality." 2 L. OPPENHEIM, INTERNATIONAL LAW 654 (H. Lauterpacht 7th ed. 1952). The duty of neutrality is regarded as customary international law. G. VON GAHN, LAW AMONG NATIONS 85-86 (3d ed. 1976). Customary international law is established by constant and uniform state practice and the *opinio juris* that such practice is obligatory under international law. Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 29-30 (Judgment of June 3); Asylum Case (Colom. v. Peru), 1950 I.C.J. 26 (Judgment of Nov. 20). International law imposes on neutral states "the duty of abstaining from assisting either belligerent" in a civil war or rebellion. 2 L. OPPENHEIM, *supra* at 659.

77. O'Higgins, *Extradition: Offenses of a Political Character—Terrorism*, 32 CAME. L.J. 181 (1973).

78. See Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exception in Extradition—A Proposed Juridical Standard for an Unruly Problem*, 19 DEPAUL L. REV. 217, 231 (1969)

79. "This justification is consistent with the modern consensus that political crimes have greater legitimacy than common crimes." *Quinn*, 783 F.2d at 793.

80. See C. VAN DEN WIJNGAERT, *supra* note 29, at 205.

81. The granting of asylum is a legal process separate from a determination of extradition. However, the terms have often been used interchangeably. M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 89 (1974). The United Nations has recognized an individual's right to territorial asylum. *Declaration of Territorial Asylum*, G.A. Res. 2312 (XXII), 22 U.N. GAOR Supp. (No. 16) 81, U.N. Doc. A/6716 (1968); *Universal Declaration of Human Rights*, G.A. Res. 217 A. (III), U.N. Doc. A/810, at 71 (1948). See generally S. SINDHA, ASYLUM AND INTERNATIONAL LAW 50 (1971) (the granting of asylum is a sovereign, not individual, right); Deere, *Political Offenses in the Law and Practice of Extradition*, 27 AM. J. INT'L L. 247, 249 (1933)(states have a duty to grant asylum to political offenders).

82. J. SCHREIBER, THE ULTIMATE WEAPON 153 (1978). For a refutation of this rationale, see Cantrell, *supra* note 41, at 782-83.

cation for its inclusion in extradition treaties in the 1980's.⁸³ Some critics of the doctrine claim that it has outlived its purposes and the need to control terrorism outweighs the benefits conferred by the exception.⁸⁴ Backers of the Supplementary Treaty, however, do not argue that the exception should be abolished outright.⁸⁵ Instead they contend that certain violent crimes should be eliminated from the exception, but that the doctrine should remain intact.⁸⁶

III. WEAKNESSES OF THE SUPPLEMENTARY TREATY

The primary flaw in the Supplementary Extradition Treaty is that its provisions are overbroad.⁸⁷ The Supplementary Treaty virtually eliminates the relative political offense exception to extradition.⁸⁸ Article 1 states that none of the following can be considered a political offense: murder, voluntary manslaughter, assault causing grievous bodily harm, kidnapping, abduction, illegal use of a bomb, grenade, rocket, firearm, letter or parcel bomb which endangers any person, or the attempt or complicity to commit any of those offenses.⁸⁹ Thus, almost all violent common crimes are eliminated

83. *Quinn*, 783 F.2d at 793.

84. Opponents of the political offense exception argue that it can be replaced with the humanitarian defense, which allows the Secretary of State to refuse extradition based on humanitarian grounds. Address by Nigel Scheinwald, British Embassy, at the American Society of International Law, 81st Annual Meeting, Panel on Extradition and the Political Exception, in Boston, Mass. (April 10, 1987). For a discussion of the humanitarian defense, see *supra* note 4; *Peroff v. Hylton*, 542 F.2d 1247 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977). Scheinwald stated that there is "no clear line" between the political offense exception and the humanitarian defense and that political motives are considered by the Secretary of State in the decision whether to grant extradition. However, the humanitarian exception is determined solely by one branch of the government, is rarely used, and is susceptible to decisions based on politics and foreign policy. Hence it is as likely that individual rights will be denied with use of the humanitarian defense as it is with the use of Supplementary Treaty. See also Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313 (1962).

85. *Hearings*, *supra* note 13, at 3 (statement of A. Sofaer).

86. *Id.* at 5. Judge Sofaer stated: "The treaty does not eliminate the political offense exception, but only removes from its scope certain specified violent crimes." However, he later stated, "The political offense exception has no place in extradition treaties between stable democracies, in which the political system is available to redress legitimate grievances and the judicial process provides fair treatment." *Id.* at 4.

87. See *Hearings*, *supra* note 13, at 137 (statement of Professor Charles E. Rice).

88. *Id.* at 99 (statement of C. Pyle) ("The treaty would . . . effectively [abolish] the political crimes defense to extradition for anyone who raised arms against British rule anywhere in the world").

89. The relevant text of the Supplementary Treaty as amended by the Senate is:

Article 1

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

from consideration as political offenses.⁹⁰ If abolition of the political offense exception were the purpose of the drafters of the Supplementary Treaty, it would be an effective method of achieving that goal. However, it is not the stated intention of the United States government to eliminate the relative political offense.⁹¹

The objective of the Administration in drafting the Supplementary Treaty was to combat terrorism by refusing terrorists the right to invoke the exception in order to avoid extradition.⁹² Yet nowhere in the Supplementary Treaty is the word "terrorist" used, and nowhere are the acts of terrorist distinguished from those of nonterrorists. The implications are that only terrorists commit acts of violence, and that all armed rebellion is terrorism.⁹³ However, in all violent revolutions, whether terrorist, guerilla, or traditional military methods are used, firearms and explosives are utilized and killing takes place.⁹⁴ This violence occurred in the American, Russian, and

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 if this use endangers any person;

(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.

Article 3

(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 trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions.

Tr. Doc. 99-8. Article 3 was added by the Senate in an attempt to salvage part of the relative political offense exception. SENATE COMMITTEE ON FOREIGN RELATIONS: SUPPLEMENTARY TREATY WITH THE UNITED KINGDOM, S. REP. No. 797, 99th Cong., 1st Sess. (1986).

90. Robbery, burglary and rape are not included within the Supplementary Treaty, but such crimes are rarely considered political offenses.

91. See *supra* notes 85-86 and accompanying text.

92. *Hearings, supra* note 13, at 2 (statement of A. Sofaer). See also Transmittal Letter from President Ronald Reagan to the United States Senate (July 17, 1985), reprinted in 24 I.L.M. 1104 (1985).

93. "In this treaty, abolition is effected by declaring, in effect, that all forms of violence necessary to the conduct of a revolution are terroristic, and therefore not entitled to the protection of the political crimes defense." *Hearings, supra* note 13, at 99 (statement of C. Pyle).

94. Thompson, *supra* note 40, at 335 n.93. The Supplementary Treaty limits application of the political offense exception to pure political offenses and nonviolent crimes. "[It cannot] be seriously contended that everything that does not fit into these categories is an international terrorist offense." *Hearings, supra* note 13, at 169 (statement of C. Rice).

French revolutions, in the English civil wars, and in the Irish uprisings of 1916 and 1919. It continues to occur in the Phillipines, Nicaragua, El Salvador, the Middle East, Northern Ireland, and many other nations.⁹⁵ Since the Supplementary Treaty does not distinguish between terrorist and non-terrorist violence, it depoliticizes all forceful means of political change.⁹⁶

Part of the problem with the goal of the Administration and the provisions of the Supplementary Treaty is the imprecise meaning of the word "terrorism."⁹⁷ However, there are workable definitions of the term,⁹⁸ and Administrative spokesmen have distinguished between "freedom fighters" and "terrorists."⁹⁹ Secretary of State George Schultz defined terrorism as "the use or threat of violence for political purposes to create a state of fear which will cause individuals, groups or governments to alter their behavior or policies."¹⁰⁰ Mr. Schultz noted that the difference between terrorist and nonterrorist acts is that "[terrorism's] targets are civilians, non-combatants, bystanders or symbolic persons or places,"¹⁰¹ while "[a]n insurgent is in revolt against an established government,"¹⁰² his objective is political, his methods are military or paramilitary, and "[h]e actively seeks support, usually within one country."¹⁰³ Clearly, then, a

95. For a list of revolutionaries who would have been extraditable under a similar treaty, see *Hearings, supra* note 13, at 102-03 (statement of C. Pyle). This list includes Simon Bolivar, Eamon de Valera, Golda Meir, Benigno Aquino, Jr., and Kim Dae Jung. *Id.*

96. "If this treaty had been in effect in 1776, or even after the Treaty of Paris in 1783, this language would have labeled the boys who fought at Lexington and Concord as terrorists." SENATE COMMITTEE ON FOREIGN RELATIONS, SUPPLEMENTARY EXTRADITION TREATY WITH THE UNITED KINGDOM, S. REP. No. 797, 99th Cong., 1st Sess. at 12 (1986). See also *Hearings, supra* note 13, at 96 (statement of C. Pyle).

97. There is considerable controversy over the definition of terrorism. Thompson, *supra* note 40, at 316 n.6. See also Schwarzenberger, *Terrorist, Guerillas, and Mercenaries*, 1971 TOLEDO L. REV. 71, 72 (1971).

98. For example, the elements of international terrorism have been defined as: "(1) the involvement of citizenry of 2 or more countries or of acts occurring in one country committed by nationals of another country; (2) the involvement of a violent criminal act, and (3) the aim of creating overwhelming fear for politically coercive purposes within a country." Lubet & Czakes, *supra* note 4, at 195 n.17. See also Lowry, *Terrorism and Human Rights: Counter Insurgency and Necessity at Common Law*, 53 NOTRE DAME LAW 49 (1977).

99. Abraham Sofaer of the State Department distinguished between terrorists and nonterrorists at the Senate Hearings. He stated:

I would say that people who fight repressive regimes that do not give them a chance to change things through the political process at least are eligible to be called freedom fighters; and those who seek violence to seek political change, where they cannot win it at the ballot box, . . . are terrorists.

Hearings, supra note 13, at 42.

100. Quoted in SENATE COMMITTEE ON FOREIGN RELATIONS, SUPPLEMENTARY EXTRADITION TREATY WITH THE UNITED KINGDOM, S. REP. No. 797, 99th Cong., 1st Sess. at 13 (1986).

101. *Id.*

102. *Id.*

103. *Id.*

general lumping of all violent acts under the rubric "terrorism" is an overbroad interpretation of the term, even by the Administration's standards. Yet this is exactly what the Supplementary Treaty does.

By implication the Supplementary Treaty stands for the proposition that the United States will not continue its traditional role as a refuge for political dissidents. It denies the legitimacy of all means of violent political change,¹⁰⁴ ignoring the United State's own revolutionary origins.¹⁰⁵ It disregards the justification for the political offense exception, and in doing so, violates the United State's duty of neutrality,¹⁰⁶ and its traditional concern for individual rights.¹⁰⁷ While combatting terrorism is a necessary and admirable goal, ignoring the traditions of the United States by entirely eliminating the relative political offense exception is an overreaction.¹⁰⁸ The Senate Foreign Relations Committee, in recommending the Supplementary Treaty to the Senate, cautioned: "It is very tempting to abrogate the political offense exception in order to help a long-time ally that is faced with violent insurrection. But we should not give up the principles which have been ingrained in our legal system since the founding of our constitutional republic."¹⁰⁹ The sweeping provisions of the Supplementary Treaty are not necessary to suppress terrorism, when other more effective means are available.¹¹⁰

The second major problem with the Supplementary Treaty is that it takes away the courts' traditional role in defining a political offense.¹¹¹ In entering into the Supplementary Treaty, the executive, with the consent of the legislature, has eliminated violent crimes from consideration by the judiciary as political offenses. Except for pure political crimes, the Department of State, not the American courts, has decided what constitutes a political offense.¹¹² Since similar provisions are being negotiated in other treaties,¹¹³ the executive

104. Judge Sofaer stated the Administration's opinion: "We do not approve of violent efforts against a government in a nation where you can use peaceful political means to achieve those results." These "peaceful means," Sofaer stated, are elections. The theory implies that in countries in which elections are held, violent overthrow of the government is not a legitimate means of political change. *Hearings, supra* note 13, at 36.

105. *See supra* notes 29-31 and accompanying text for a discussion of American and French revolutionary ideology.

106. For a discussion of the duty of neutrality, see *supra* notes 72-76 and accompanying text.

107. *See supra* notes 68-71 and accompanying text for an analysis of the humane considerations of the political offense exception.

108. *See Hearings, supra* note 13, at 136 (statement of M. Bassiouni).

109. SENATE COMMITTEE ON FOREIGN RELATIONS, SUPPLEMENTARY EXTRADITION TREATY WITH THE UNITED KINGDOM, S REP. NO. 797, 99th Cong., 1st Sess. at 14 (1986).

110. *See infra* notes 139-85 and accompanying text.

111. *See supra* note 50. *See also Hearings, supra* note 13, at 150 (statement of R. Flynn).

112. *Hearings, supra* note 13, at 239 (statement of Judge Eugene E.J. Maier).

113. *Hearings, supra* note 13, at 704 (responses from Department of State to

will continue in this role. This is a dangerous approach for several reasons.

First, courts have historically been more neutral than administrators regarding political issues.¹¹⁴ The executive is the political branch of the government, and it is subject to partisan administrators, as well as diplomatic and military pressures from other governments.¹¹⁵ This is the necessary way to conduct foreign affairs, but it does not lend itself to neutrality in deciding political offenses.¹¹⁶ With almost complete control of such definitions in the executive, an individual's freedom may be decided on the basis of political expediency.¹¹⁷ It was to counteract this bias that the role of deciding what offenses were political was given to the courts.¹¹⁸

Second, when treaties with similar provisions are made in the future, courts will be required, in effect, to aid foreign governments in suppressing all rebellions against their authority in perpetuity.¹¹⁹ The courts' discretion to determine a political offense will be so limited that it will be required by treaty to extradite all those accused of violent crimes.¹²⁰ When the United States signs a treaty similar to the Supplementary Treaty with an ally,¹²¹ courts must deny the use of the political offense exception to those who seek refuge in this country. This refusal may be justifiable at the time such a treaty is signed, but all too frequently democratic allies of the United States become nondemocratic enemies.¹²² Yet American courts will be forced to continue to extradite those fleeing such regimes, unless a

questions from Committee Staff).

114. In *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952), the Supreme Court stated: "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations. . . Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."

115. Judge Maier at the Senate Hearings stated that a decision made by the executive would be made by "a political appointee without tenure." He also stated, "That raises a question of political consideration, employment consideration, and those things lead somebody to believe that either possible, actual bias, or at least perceived bias can occur." *Hearings, supra* note 13, at 239-40.

116. *Id.*

117. An example of the danger of political bias determining the fate of a political offender was President Adams' decision in *United States v. Robins*, 27 F. Cas. 825 (No. 16,175)(D.S.C. 1799). See *supra* notes 45-48 and accompanying text for a discussion of that case.

118. *In re Kaine*, 55 U.S. (14 How.) 103 (1852).

119. *Hearings, supra* note 13, at 100 (statement of C. Pyle).

120. *Id.* at 101.

121. Judge Sofaer stated that the Administration is currently negotiating similar treaties with U.S. allies. *Hearings, supra* note 13, at 20.

122. *Hearings, supra* note 13, at 105-06 (statement of C. Pyle). In addition, not all United States allies have what Americans consider fair legal systems. For example, Amnesty International found that Turkey, a member of NATO, systematically tortured political prisoners. *N.Y. Times*, July 24, 1985, at A10. See also *Hearings, supra* note 13, at 73 (statement of W. Hughes).

successive United States politician decides to abrogate the treaty.¹²³ In this way American courts will be subjected not only to the changing political expediencies of American administrations, but to those of foreign governments as well. Without their traditional discretion in determining political offenses, the courts will be forced to act as rubber stamps for the decisions of politicians.¹²⁴

American courts have developed a test which is politically neutral.¹²⁵ It does not involve a judgment about whether a revolution is legitimate or justifiable.¹²⁶ The court simply decides whether an insurrection occurred, and whether the accused's actions were incidental to that insurrection.¹²⁷ This test has remained the same for over 100 years, as the American government has changed its foreign policy and other nations have changed governments.¹²⁸ A consistently neutral standard protects individual rights more effectively than the exigencies of the domestic and international political environment.¹²⁹ Thus, it is clearly preferable that the discretion to decide political offenses remains in the hands of the judiciary, rather than entirely in those of the executive.

The claim that the courts allow terrorists to go free under the incidence test¹³⁰ is unfounded. In the last twenty years the United

123. Extradition treaties are abrogated only rarely. The United States still has in effect an extradition treaty with Albania which is over 70 years old, but neither country has requested extradition since Albania changed to a Communist government following World War II. Gold, *supra* note 33, at 191. It is a slow process to amend a treaty. Negotiations for the Supplementary Treaty began in the early 1980's. *Hearings, supra* note 13, at 711 (responses from Department of State to questions from Committee Staff).

124. The danger was illustrated in 1981 when the United States signed an extradition treaty with the Philippines similar to the Supplementary Treaty. According to the provisions of that treaty, Senator Benigno Aquino, Jr. could have been extradited to face trial for "conspiracy to bomb" in the Philippines by the government of President Ferdinand Marcos. The treaty was never submitted to the Senate, but the incident clearly shows the danger of removing discretion to determine the limits of the political offense exception from the courts. For a discussion of the proposed Philippine treaty, see *Hearings, supra* note 13, at 119-21 (statement of C. Pyle).

125. *Quinn*, 783 F.2d at 804 ("The political offense test traditionally articulated by American courts. . . is ideologically neutral.") (citations omitted).

126. *Id. Accord In re Doherty*, 599 F. Supp. 270, 277 (S.D.N.Y. 1984).

127. *In re Ezeta*, 62 F. 964 (N.D. Cal. 1894).

128. *Compare In re Ezeta*, 62 F. 964 (N.D. Cal. 1894) with *Eain v. Wilkes*, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981) (different results with use of same incidence test).

129. See *Hearings, supra* note 13, at 136-37 (statement of M. Bassiouni). The *Quinn* court stated: "By assigning the initial determination of when the exception applies to the impartial judiciary. . . Congress has substantially lessened the risk that majoritarian consensus or favor due or not due to the country seeking extradition will interfere with individual liberty." 783 F.2d at 789.

130. See *e.g.*, *Eain v. Wilkes*, 641 F.2d 504, 520 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981)(without restrictions, the test allows "an influx of terrorists seeking a safe haven in America"); *Hearings supra* note 13, at 3 (statement of A. Sofaer)(application of the test allows the U.S. "to serve as a sanctuary for terrorists who attack democratic governments").

Kingdom has requested extradition sixty-four times,¹³¹ and in only four of those cases has it been denied on the basis of the political offense exception.¹³² One of those cases, *Quinn v. Robinson*,¹³³ was reversed by the Ninth Circuit Court of Appeals.¹³⁴ The *Quinn* court stated: "Acts of international terrorism do not meet the incidence test and are thus not covered by the political offense exception."¹³⁵ The court also stated that the American test had served the purposes of the political offense exception, and despite criticism of the test, it should not be changed.¹³⁶

The Supplementary Treaty's major weaknesses are its overinclusiveness and its denial of the traditional role of the judiciary in determining political offenses.¹³⁷ The Supplementary Treaty ignores

131. *Hearings*, *supra* note 13, at 193 (statement of William M. Hannay).

132. The four cases are *United States v. Doherty*, 786 F.2d 491 (2d Cir. 1986), *habeas corpus denied sub nom. Doherty v. Meese*, 808 F.2d 938 (2d Cir. 1986); *Quinn v. Robinson*, 783 F.2d 776 (9th Cir.), *cert. denied*, 107 S.Ct. 271 (1986); *In re Mackin*, 668 F.2d 122 (2d Cir. 1981); *In re Extradition of McMullen*, No. 3-78-1099 MG (N.D. Cal. 1979). For a discussion of these cases, see *supra* note 58. As of April, 1987, Doherty was in jail in New York, facing deportation for violation of American immigration laws, and Mackin was deported to Ireland for entering the United States illegally. *Hearings*, *supra* note 13, at 236 (statement of Frank Durkan). The United States granted asylum to McMullen, but in 1987 the United Kingdom refiled its extradition request, pursuant to the provisions of the Supplementary Treaty. Address by Nigel Sheinwald, British Embassy, at the American Society of International Law, 81st Annual Meeting, Panel on Extradition and the Political Exception, in Boston, Mass. (April 10, 1987). *Quinn* is facing extradition, after the Ninth Circuit Court of Appeals held that the political offense exception did not apply to his crime. 783 F.2d 776, (9th Cir.), *cert. denied*, 107 S.Ct. 271 (1986). These cases do not indicate that the United States is becoming a haven for terrorists, as Administration officials fear. *Hearings*, *supra* note 13, at 4 (statement of A. Sofaer). More credible is the contention of critics of the Supplementary Treaty that "hard cases make bad law;" that the approach of the Supplementary Treaty is an overreaction to a few very limited cases. *Hearings*, *supra* note 13, at 81 (statement of Senator Joseph Biden).

133. 783 F.2d 776 (9th Cir.), *cert. denied*, 107 S.Ct. 271 (1986).

134. *Id.* See *supra* note 58 for a discussion of the court's holding. If *Quinn* is extradited, he will be the first Irish insurgent that the United States has extradited to England since the 1860's. *Hearings*, *supra* note 13, at 99 (statement of C. Pyle).

135. *Quinn*, 783 F.2d at 817.

136. *Id.*

137. Opponents of the Supplementary Treaty also contend that it presupposes that the system of justice in Northern Ireland is fair. *Hearings*, *supra* note 13, at 138 (statement of C. Rice). Although Judge Sofaer stated that "the British system of justice provides fundamentally fair treatment to all." *Hearings*, *supra* note 13, at 5, opponents of the Supplementary Treaty distinguished between the administration of justice in England and that in Northern Ireland. "Northern Ireland is not Great Britain. Its politics have never been democratic; its legal system has no heritage of respect for political dissent, equality of rights, or due process in the interrogation, prosecution, and punishment of persons alleged to have committed crimes for political purposes." *Id.* at 121 (statement of C. Pyle). Northern Ireland has been governed since its inception in 1922 by emergency powers acts, which provided for internment without trial, searches without warrants by the British Army, trial without jury, and arrests without warrants for up to 48 hours. *Id.* at 122. Temporary emergency provisions have become a permanent part of the governing of the province and have been revived as recently as 1984 in the Prevention of Terrorism Act. *Id.* For various views on the system of justice in Northern Ireland, see *Ireland v. The United Kingdom*,

the rationales behind the development of the political offense exception, and in doing so, disregards the American tradition of harboring political fugitives and protecting human rights. The Supplementary Treaty denies to others the right this country was founded on; that is, the right to overthrow an undemocratic government.¹³⁸

IV. ALTERNATIVES TO THE APPROACH OF THE SUPPLEMENTARY TREATY

A. Legislation

There are several methods of denying terrorists the use of the political offense exception which are more reasonable and equitable than the approach taken by the drafters of the Supplementary Treaty. Probably the most effective is the reform of extradition law in Congress.¹³⁹ Both the House of Representatives and the Senate attempted reforms in extradition law in 1981,¹⁴⁰ but neither was successful.¹⁴¹ Both these bills codified American extradition law by establishing a bilevel system in which the judiciary and the executive participated in determining political offenses.¹⁴² The House bill listed a number of extraditable crimes,¹⁴³ as did the Supplementary

Application No. 5310/71, REPORT OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS 151-220 (1977); *Hearings, supra* note 13, at 121 (statement of C. Pyle); at 142 (statement of Rep. Hamilton Fish), at 234-35 (statement of F. Durkan); K. BOYLE, T. HADDEN & P. HILLYARD, TEN YEARS ON IN NORTHERN IRELAND: THE LEGAL CONTROL OF POLITICAL VIOLENCE (1980); M. FARRELL, NORTHERN IRELAND: THE ORANGE STATE 93 (1976); REPORT OF AN AMNESTY INTERNATIONAL MISSION TO NORTHERN IRELAND (1978); REPORT OF THE COMMITTEE OF INQUIRY INTO POLICE INTERROGATION PROCEDURES IN NORTHERN IRELAND (BENNETT REPORT), Cmd. No. 7497 (1979); REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND (DIPLOCK REPORT), Cmd. No. 5185 (1972); Carroll, *The Search for Justice in Northern Ireland*, 6 INT'L L. & POL. 28 (1973); Lowry, *Terrorism and Human Rights: Counter Insurgency and Necessity at Common Law*, 53 NOTRE DAME LAW. 49 (1977); O'Boyle, *Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. The United Kingdom*, 71 AM. J. INT'L L. 674 (1977); Rauch, *The Compatibility of the Detention of Terrorists Order (Northern Ireland) with the European Convention for the Protection of Human Rights*, 6 INT'L L. & POL. 1 (1973).

138. "The right of political dissent is the bedrock of the American democratic experiment." *Hearings, supra* note 13, at 16 (statement of Senator Christopher Dodd).

139. Representatives Mario Biaggi, William Hughes, Hamilton Fish, Benjamin Gilman, as well as Professor Christopher Pyle, Morton Halperin of the American Civil Liberties Union, and David Carliner of the International Human Rights Law Group testified at the Senate Hearings on the Supplementary Treaty that Congressional reform of the extradition process was a preferable method to the country-by-country approach embodied by the Supplementary Treaty. *Hearings, supra* note 13, at 49, 71, 95, 144, 222, 224, 233.

140. H.R. 3347, 98th Cong., 1st Sess.; S. 220, 98th Cong., 1st Sess.

141. *Hearings, supra* note 13, at 71-72 (statement of W. Hughes).

142. For a discussion of both bills, see *Extradition Reform, supra* note 59.

143. *Extradition Reform, supra* note 59, at 453.

Treaty, but left the judiciary with substantial discretion in determining political crimes.¹⁴⁴ The Senate bill attempted to define exceptions to the political offense exception by listing a larger number of depoliticized crimes, as the Supplementary Treaty did.¹⁴⁵ It is likely that similar bills will be enacted by Congress in the future.¹⁴⁶

The advantages of legislation over the Supplementary Treaty are threefold. First, legislation provides for the participation of all three branches of government in the determination of political offenses. Hence, there is less likely to be a decision made solely for political reasons.¹⁴⁷ Thus, the political exigencies of foreign policy will not decide the fate of a fugitive, as they will with the Supplementary Treaty.¹⁴⁸

Second, the legislative attempts to codify the political offense exception allows courts to consider the accused's methods, targets, and motives.¹⁴⁹ They differentiate between terrorist and nonterrorist activities, allowing the former to be extraditable.¹⁵⁰ They protect the rights of the individual by retaining judicial discretion, but give the courts substantive criteria for finding terrorist activity.¹⁵¹ This is exactly what the Supplementary Treaty should do, but does not. Legislative methods narrow the political offense exception without eliminating it completely.

Third, legislation provides a uniform practice of extradition for all countries with which the United States has an extradition treaty.¹⁵² Such an approach ensures consistent application of the law for all those accused of political crimes.¹⁵³ It also prevents the development of a double standard under which those accused of political offenses by the allies of the United States would be extradited, while those accused of similar crimes by other nations would not.¹⁵⁴ Legis-

144. For a discussion of the bill by one of its drafters, Rep. William J. Hughes, see *Hearings, supra* note 13, at 71.

145. For the text of the Senate bill and the excluded crimes, see *Extradition Reform, supra* note 59, at 447.

146. *Hearings, supra* note 13, at 73 (statement of W. Hughes).

147. The purpose of the three independent branches of government is, *inter alia*, to prevent government action which is purely political. THE FEDERALIST No. 47 (J. Madison).

148. See *Hearings, supra* note 13, at 274 (statement of Dante Simbulan, Executive Director of the Church Coalition for Human Rights in the Phillipines)(the extradition process "should not be converted into a foreign policy tool where one can be 'selective' in its operation, depending on the political preferences or whims of executive officials").

149. H.R. 3347, 98th Cong., 1st Sess. § 3194(e)(3)(A)-(F).

150. See *Extradition Reform, supra* note 59, at 454.

151. *Id.*

152. *Hearings, supra* note 13, at 71 (statement by W. Hughes).

153. *Id.*

154. Rep. Hughes stated, "Americans, both within our national boundaries and outside them would be subject to differing laws depending upon the particular treaty that encompassed their alleged actions." He used as an example the fact that under

lation thus insures equal treatment for all political offenders regardless of where the offense took place.¹⁵⁵

B. Multilateral Treaties

Another alternative to the Supplementary Treaty is further American participation in multilateral treaties which make terrorist acts international crimes.¹⁵⁶ According to these treaties, a terrorist act, no matter where it is committed, is a crime against all nations, and the terrorist can be tried and punished in the domestic courts of any country in which he is arrested.¹⁵⁷ The United States and the United Kingdom both are parties to four of these conventions.¹⁵⁸ These treaties specifically define terrorist acts by the nature and seriousness of the crimes, the targets, and the motives of the perpetrators.¹⁵⁹ Thus, they are not overinclusive, as is the Supplementary Treaty. In addition, some multilateral treaties contain provisions which provide that a state may refuse extradition if the accused can prove that he is being sought for racial, religious, national or politi-

the Supplementary Treaty, an American citizen charged with conspiring to commit acts of violence in Northern Ireland would be extraditable, but an American charged with the same offense in Afghanistan or Nicaragua would not. *Hearings, supra* note 13, at 73.

155. *Hearings, supra* note 13, at 137 (statement of M. Bassiouni).

156. See, e.g., Convention on Offenses and Certain Other Acts Committed on Board Aircraft, done Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219; Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, O.A.S. Doc. OEA/Ser.A/17 (1971).

157. See, e.g., Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570, 974 U.N.T.S. 177 art. 5 (entered into force Jan. 26, 1973) ("Each Contracting State shall . . . take such measures as may be necessary to establish jurisdiction . . . in the case where the alleged offender is present in its territory and it does not extradite him.").

158. International Convention Against the Taking of Hostages, opened for signature Dec. 18, 1979, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 39) 10, U.N. Doc. A/34/PV.105 (1980)(entered into force June 3, 1983); New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167 (entered into force Feb. 20, 1977); Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, 974 U.N.T.S. 177 (entered into force, Jan. 26, 1973); Hague Convention for the Suppression of Unlawful Seizure of Aircraft, done Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (entered into force Oct. 14, 1971). For an analysis of the Hague Convention, see Abramovsky, *Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft, Part I: The Hague Convention*, 13 COLUM. J. TRANSNAT'L L. 381 (1974). The Supplementary Treaty specifically exempts from the political offense exception crimes covered by these multilateral treaties. Tr. Doc. 99-8 art. 1(a).

159. For example, the Hague Convention states that any person who "unlawfully, by force or threat thereof, or by any other form of intimidation, seizures, or exercises control of, that aircraft, or attempts to perform any such act" will be guilty of an international crime. Hague Convention, *supra* note 158, at art. 1.

cal persecution.¹⁶⁰ This provision preserves a limited discretion in the requested country to deny extradition for political offenders.¹⁶¹

The adoption of multilateral treaties is superior to the method of the Supplementary Treaty because these treaties' scopes are not overbroad and they preserve limited discretion in the courts of the requested countries to deny extradition. Most multilateral treaties distinguish terrorist from nonterrorist acts,¹⁶² and are better suited to the goal of combatting international terrorism. At the same time, they preserve the respect for individual human rights and the right of self-determination. The use of such treaties is also a further step in the development of a supranational criminal law, which many international legal scholars consider to be a more effective way of eliminating international crime.¹⁶³ Finally, American participation in multilateral treaties covering specific terrorist crimes would eliminate the need for hundreds of bilateral treaties with similar goals.¹⁶⁴

C. *Bilateral Treaties*

If the United States intends to continue to use bilateral treaties to fight terrorism, it should better define in these treaties what it means by terrorist crimes. Instead of discarding the entire relative political offense exception,¹⁶⁵ it should follow the example of the House of Representatives¹⁶⁶ and make exceptions to the exception narrow. This is necessary in order to avoid the overbreadth of the Supplementary Treaty, and could be done in a number of ways.

First, the extradition treaties could contain the usual political offense exception,¹⁶⁷ but in addition, define the term "political offense." This would give the courts more criteria for determining political offenses and limit their discretion. It would also be a positive definitional approach rather than a negative one.¹⁶⁸ For example, a treaty could state: "A political offense is one in which, in the opinion of the requested state, the accused has committed a common law crime, with political motivation, in furtherance or incident to a po-

160. See, e.g., European Convention on the Suppression of Terrorism, opened for signature Jan. 27, 1977, 1978 Gr. Brit. T.S. No. 93 (Cmd. 7380).

161. *Id.*

162. See *supra* note 159 and accompanying text.

163. Milte, *Prevention of Terrorism Through the Development of Supra-National Criminology*, 10 J. INT'L L. & ECON. 519 (1975).

164. This approach would also assure consistent application of extradition laws. See *supra* notes 153-55 and accompanying text.

165. "The principal effect of the Supplementary Treaty would be the derogation from over 100 years of American extradition practice and case law by virtually destroying the so-called political offense exception to extradition law." *Hearings*, *supra* note 13, at 71 (statement of W. Hughes).

166. See *supra* notes 143-44 and accompanying text.

167. For an example of the language of the exception, see *supra* note 6.

168. See *Extradition Reform*, *supra* note 59, at 448.

litical uprising; and the direct target of the crime is the political structure of the government."¹⁶⁹ This definition would eliminate terrorist crimes directed against civilian targets. In this way, courts would retain discretion in deciding political offenses, and nonterrorists would not be subjected to sweeping provisions allowing extradition for all violent crimes.

A second way to draft a new extradition treaty is to eliminate only a few crimes from consideration as political offenses, and still allow the courts latitude in refusing extradition. An example would be to specifically list murder, voluntary manslaughter, kidnapping, abduction, and the use of certain explosives¹⁷⁰ as crimes which are not political, but allow the courts to consider the circumstances surrounding the commission of the crime in determining whether to extradite. These circumstances could include the traditional incidence test,¹⁷¹ in addition to facts such as the target, method and heinousness of the crime.¹⁷² This approach would narrow the use of the exception by terrorists, yet protect others from extradition for political crimes. It would preserve the courts' traditional role, while giving them more guidelines to follow. Finally, it would enable the courts to maintain their neutrality, and save them from acting as rubber stamps for executive determinations of political offenses.¹⁷³

A third possibility is to draft bilateral treaties containing provisions similar to the House extradition reform bill.¹⁷⁴ This draft would not contain a list of specific crimes which could not be political, but would give a set of standards for determining those crimes. For example, it could state that offenses which are "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"¹⁷⁵ would not be considered political offenses. This approach is less restrictive than the Supplementary Treaty's approach. It differentiates between terrorist and nonterrorist acts. Courts would retain limited

169. For a list of criteria to be included in a draft of a political offense exception, see *Hearings, supra* note 13, at 164 (statement of C. Pyle).

170. This is a narrower range of crimes than those listed in the Supplementary Treaty. See *supra* note 89.

171. See *supra* notes 40, 51-55 and accompanying text.

172. Terrorism is distinguished from other acts of violence by these criteria. "[T]errorism may be characterized as a form of 'psychological warfare' directed against non-combatants and carried out by such means as the mailing of letter bombs, the killing of innocent travellers at airports, or the bombing of civilian airliners while in flight." *Hearings, supra* note 13, at 127 (statement of C. Pyle).

173. For a discussion of the courts' role in determining political offenses, see *supra* notes 111-24 and accompanying text.

174. H.R. 3347, 98th Cong., 1st Sess. For a discussion of these bills, see *supra* notes 140-46.

175. H.R. 3347, 98th Cong. 1st Sess. § 3194.

discretion in interpreting the clause, thus preserving their traditional role.¹⁷⁶

Any of these drafts would be preferable to the provisions of the Supplementary Treaty. They better effect the Administration's goal of combatting terrorism by carefully defining what acts are terrorist. At the same time, they protect the discretion of the courts, and preserve the humanitarian and neutrality aims of the political offense exception.

D. *Judicial Interpretation*

The final alternative to the Supplementary Treaty lies with the federal courts, which have traditionally defined political offenses.¹⁷⁷ The application of the incidence test has led to much criticism,¹⁷⁸ and a modification of the test would lead to an alternative which is not as overbroad as the provisions of the Supplementary Treaty. Critics of the test argue that once courts determine that a political uprising has taken place, they are too quick to find a political offense, no matter how tenuous the link between the crime and the revolt.¹⁷⁹ The use of the test and interpretation of the term "political offense" has led to several highly criticized decisions.¹⁸⁰

Federal courts could modify their incidence test, as the British courts have,¹⁸¹ so that its application would take into account the circumstances surrounding the offense as well as the existence of a political uprising. Factors they should consider in determining a political offense are the identity of the victim as civilian, governmental, or military; the connection of the accused to a political organiza-

176. The drawback to any bilateral treaty method is that it would result in an inconsistent standard of applying the political offense exception. Unless all 90 of the extradition treaties to which the United States is a party are renegotiated and concluded with exactly the same language, courts will be forced to apply the political offense exception differently, according to the treaty with the country which requested extradition. See *supra* notes 153-55 and accompanying text.

177. See *supra* note 50 and accompanying text.

178. See, e.g., *Hearings*, *supra* note 13, at 227 (statement of A. Helton)(courts applying the test have "engaged in a somewhat antique, mechanistic situational analysis"); Garcia-Mora, *supra* note 32, at 1246 (the American test is overbroad); Lubet & Czakes, *supra* note 4, at 203 (American courts' interpretation of the political offense is underinclusive and overinclusive); Thompson, *supra* note 40, at 332 (the test is "an incomplete analytical framework for application of the political offense exception in the context of modern political violence.").

179. Garcia-Mora, *supra* note 32, at 1246. See also Thompson, *supra* note 40, at 325 ("Failure to distinguish between violence that is in furtherance of, rather than merely contemporaneous with, a political uprising transforms the incidence test into a license for gratuitous killing.").

180. *United States v. Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959) is "one of the most roundly criticized cases in the history of American extradition jurisprudence." *Eain v. Wilkes*, 641 F.2d 504, 522 (7th Cir.), cert. denied, 454 U.S. 894 (1981).

181. *In re Meunier*, [1894] 2 Q.B. 415.

tion; the motive of the offender; the seriousness of the offense; and the relation of the goals of the political organization to the crime.¹⁸² These are factors which identify terrorist behavior, and the closer the crime of the accused fits the terrorist pattern, the less likely the court should be to deny extradition. Alternatively, federal judges and magistrates could adopt the Swiss political motivation test¹⁸³ and weigh the political motivation of the accused with the common law elements of the crime.¹⁸⁴ Only if the former outweighs the latter should the courts allow the political offense exception to be invoked.

Adopting a modified incidence test which does not allow terrorists to escape extradition would eliminate the need for executive action like that taken in the Supplementary Treaty.¹⁸⁵ The United States' adoption of any of these alternatives would effectively balance the need to fight international terrorism with the American concern for individual liberty. Each would deny terrorists the use of the United States as a haven without jeopardizing that same use by true political dissidents.

V. CONCLUSION

The Supplementary Extradition Treaty between the United States and the United Kingdom is a dangerous precedent for the negotiation of future extradition treaties. It ignores the philosophy on which the United States was founded, that of the legitimacy of armed insurrection to achieve political change. By excluding from the political offense exception to extradition crimes such as murder, manslaughter, and the use of firearms, it has eliminated the relative political offense and taken away the traditional discretion of the federal courts in determining those offenses. This indifference to the traditional rationale behind the exception is neither an effective nor a just means of controlling terrorism. It will encourage abuse of the limitation by nondemocratic allies of the United States, who will seek similar treaties in order to persecute their political enemies.¹⁸⁶ Thus the Supplementary Treaty will undermine the democratic

182. Some American courts have modified the incidence test to include some of these factors. In *Eain*, the Seventh Circuit Court of Appeals considered the legitimacy of the political objectives of the accused as well as whether the target of the crime was military or civilian. 641 F.2d at 521-22. The District Court for the Southern District of New York, in *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984), also considered the targets and methods used by the accused. It stated that the traditional test is "hardly consistent with . . . the realities of the modern world." *Id.* at 274.

183. See *supra* note 41.

184. The courts in the *Eain* and *Doherty* cases, according to the *Quinn* court, "incorporated significant aspects of the Swiss ends-means or proportionality test into Anglo-American jurisprudence." 783 F.2d at 803.

185. For a defense of the American test without modification, see *Quinn*, 783 F.2d at 803-05.

186. See *Hearings*, *supra* note 13, at 137 (statement of M. Bassiouni).

principles which it should protect. Reasonable alternatives exist, and they should be the methods used in the future to combat international terrorism while preserving individual human rights.

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