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INTERNATIONAL EXTRADITION AND THE POLITICAL OFFENSE EXCEPTION: THE GRANTING OF POLITICAL OFFENDER STATUS TO TERRORISTS BY UNITED STATES COURTS

International cooperation in the return of fugitive offenders can be traced back some three thousand years.¹ Until the nineteenth century the main focus of formal extradition² proceedings was the return of political offenders.³ The economic changes and political upheavals of the late eighteenth and early nineteenth centuries, particularly the American and French revolutions, brought about a radical change in this practice.⁴ The newly developed liberal democracies, having a respect for individual freedoms and for the right of political dissent, were very willing to provide a safe haven for those fleeing the repression of less enlightened regimes.⁵ The improvements in modes of communica-

1. In 1280 B.C. a peace treaty between Rameses II of Egypt and the Hittite prince Hattusili III provided for the return of criminals of one state found in the territory of the other. I.A. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 5 (1971).

2. Extradition may be defined as the formal surrender by a state of a person found within its jurisdiction to another state for trial or punishment. See *Research in International Law Under the Auspices of the Faculty of the Harvard Law School*, 29 AM. J. INT'L L. 15, 21 (Supp. 1935) [hereinafter cited as *Harvard Research*].

3. The overwhelming concern of medieval states was with the preservation of their national sovereignty and their very insecure power structures. They feared that if dissidents or defeated rivals for power had the ability to regroup in neighboring states they would return and threaten the status quo. This common interest in self-preservation made the return of political refugees an acceptable practice. See Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 HARV. INT'L L. J. 61, 62 (1979). Until the nineteenth century, extradition treaties were entered into for the specific purpose of returning political offenders. See Deere, *Political Offenses in the Law and Practice of Extradition*, 27 AM. J. INT'L L. 247, 249 (1933).

4. *Harvard Research*, *supra* note 2, at 108.

5. McCall-Smith & Magee, *The Anglo-Irish Law Enforcement Report in Historical and Political Context*, 1975 CRIM. L. REV. 200.

The political tenor of that era is reflected in the following passage from John Stuart Mill's *On Liberty*:

The aim . . . of patriots was to set limits to the power which the ruler should be suffered to exercise over the community; and this limitation was what they meant by liberty. It was attempted in two ways. First, by obtaining a recognition of certain immunities, called political liberties or rights, which it was to be regarded as a breach of duty in the ruler to infringe, and which, if he did infringe, specific resistance, or general rebellion, was held to be justifiable.

J.S. MILL, *On Liberty*, in *THREE ESSAYS: ON LIBERTY, REPRESENTATIVE GOVERNMENT, THE SUBJECTION OF WOMEN* 6 (1975).

tion and transportation brought on by the Industrial Revolution facilitated not only the flight of the politically repressed but also the escape of common criminals.⁶ The growing awareness among states of the existence of an international community bound together in economic and social development led to the identification of a common interest in the suppression of crime.⁷ As a result, states began to focus their efforts and resources towards the extradition of those accused of criminal acts, and they began to incorporate an exception for those accused of political offenses into their municipal laws⁸ and international treaties.⁹

Typical of the framing of this exception is Article V of the extradition treaty between the United Kingdom and the United States.¹⁰ It provides that extradition shall not be granted if

- (i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or (ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character.¹¹

The absence in these laws and treaties of criteria by which the existence of a "political offense," as opposed to a criminal and, therefore, extraditable offense, could be determined has necessitated a case-by-

6. *Harvard Research*, *supra* note 2, at 109.

7. See García-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1228 (1962); Note, *American Courts and Modern Terrorism: The Politics of Extradition*, 13 N.Y.U. J. INT'L L. & POL. 617, 620 (1981).

8. In 1833 Belgium became the first country to incorporate this exception into its municipal law. Note, *supra* note 7, at 620.

9. The extradition treaty of 1834 between France and Belgium incorporated this exception and became the model for many subsequent treaties. Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 COLUM. J. TRANSNAT'L L. 381, 385 (1979).

10. Extradition Treaty, June 8, 1972–October 21, 1976, United States–United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468 [hereinafter cited as United States–United Kingdom Extradition Treaty].

11. *Id.* art. V, para. 1(c). For variations in the formulation of the exception in other bilateral treaties to which the United States is a party, see Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exception in Extradition—A Proposed Juridical Standard for an Unruly Problem*, 19 DE PAUL L. REV. 217, 260 (1969).

Although the United States will entertain extradition requests only where provided for by treaty obligations, see, e.g., *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933), other countries have frequently resorted to extradition based upon the principles of comity and reciprocity. See generally Evans, *Legal Bases of Extradition in the United States*, 16 N.Y.L.F. 525, 530 (1970). Abduction, kidnapping and deportation have also been resorted to on a number of occasions. See, e.g., *Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 I.L.R. 277, 305 (Israel Sup. Ct. 1962); O'Higgins, *Disguised Extradition: The Soblen Case*, 27 MOD. L. REV. 521 (1964).

case analysis of the circumstances of the accused's actions and of the motivations of the requesting state.¹² Because the nonextradition of political offenders is not accepted as a principle of international law,¹³ states have wide discretion in deciding under which circumstances and for which policy reasons they will apply or not apply the exception.¹⁴ Some countries, such as the United States and Great Britain, define the concept of a political offense broadly in deference to the claims of the individual while others, in the spirit of international cooperation, have favored a narrower interpretation.¹⁵ Of the two broad categories of political offenses, only in the area of "pure" political offenses has there been any uniform interpretation. A pure political offense is the "subjective threat to a political ideology or its supporting structures without any of the elements of a common crime. It is labeled a 'crime' because the interest sought to be protected is the sovereign."¹⁶ This class of political crime has been limited to acts of treason, sedition and espionage,¹⁷ and courts have consistently held that such offenses fall within the political offense exception.¹⁸

"Relative" political offenses have proven much more difficult for the courts to define.¹⁹ In this situation the offender is accused of committing one or more common crimes, but he makes the claim that they were committed in furtherance of political, not criminal, ends. The courts, in trying to reconcile political dissidents' claims for asylum with the international community's policy of cooperation in the suppression

12. See Note, *supra* note 7, at 618.

13. See, e.g., *Chandler v. United States*, 171 F.2d 921, 935 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949). See also *State (Duggan) v. Tapley*, 1951 Ir. R. 62, 18 I.L.R. 336 (Ir. Sup. Ct. 1951), where the Irish Supreme Court stated that:

The attempt . . . to establish that the non-surrender of political refugees is a generally recognized principle of international law fails. The farthest that the matter can be put is that international law permits and favours the refusal of extradition of persons accused or convicted of offenses of a political character but allows it to each State to exercise its own judgment as to whether it will grant or refuse extradition in such cases and also as to the limitations which it will impose upon such provisions as exempt from extradition.

1951 Ir. R. at 84, 18 I.L.R. at 343.

14. *García-Mora*, *supra* note 7, at 1227.

15. *Id.* at 1228.

16. *Bassiouni*, *supra* note 11, at 245.

17. *Harvard Research*, *supra* note 2, at 113. See generally *García-Mora*, *Treason, Sedition and Espionage as Political Offenses Under the Law of Extradition*, 26 U. PITT. L. REV. 65 (1964).

18. *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, 780 (1977).

19. Note, *Terrorist Extradition and the Political Offense Exception: An Administrative Solution*, 21 VA. J. INT'L L. 163, 164 (1980).

of crime and the punishment of criminals, have developed a confused "collection of principles, often dictated by political events and changing circumstances."²⁰ Commentators have justly criticized this situation because the subjective nature of the inquiry into the circumstances of the offense can lead to the protection of offenders whose acts are too tenuously related to their avowed political ends or can lead to the extradition of those to whom asylum ought to be granted.²¹ The decisions in this area have also been criticized for having been based too often on "politically orientated national interpretations and not on any sound juridical basis."²²

While it was not overly difficult to distinguish between "common crimes" and "political offenses" in the early part of this century,²³ the distinctions have been blurred by the increased tactical use in recent decades of urban terrorism by radicals who seek political and social change.²⁴ The targets of these urban guerrillas are frequently not just the military or government structures but, also, the civilian population and the social institutions of the state. In aiming to bring about the collapse of existing power structures such terrorists seek "to demonstrate that the state cannot protect its citizens, cannot enforce the rule of law and is, consequently, ungovernable."²⁵ The Irish Republican Army (I.R.A.) and the Palestinian Liberation Organization (P.L.O.) are typical of modern urban terrorist organizations in their use of random violence in an effort to destroy the existing social and political fabric of the state. Developments in technology have enabled them to operate on a transnational level and to escape into other jurisdictions when in danger of being captured.²⁶

This Note will examine the development of the political offense exception and its application in the United States courts to cases involving extradition requests for terrorists who have fled to these shores. The decisions in this area clearly demonstrate the lack of manageable judicial standards for determining the appropriateness of granting political offender status to members of a terrorist group given the contemporary community preference that political change be accomplished only through non-violent methods. The problems that exist

20. Cantrell, *supra* note 18, at 780.

21. Note, *supra* note 7, at 618.

22. Bassiouni, *supra* note 11, at 220.

23. *Id.* at 218.

24. *Id.*

25. Lowry, *Terrorism and Human Rights: Counter-Insurgency and Necessity at Common Law*, 53 NOTRE DAME LAW. 49, 50 (1977).

26. Carbonneau, *Terrorist Acts—Crimes or Political Infractions? An Appraisal of Recent French Extradition Cases*, 3 HASTINGS INT'L & COMP. L. REV. 265, 266 (1979).

and the factors that are considered were clearly demonstrated in four recent cases involving requests for the extradition of members of these two notorious terrorist groups—the I.R.A. and the P.L.O.

In *In re McMullen*,²⁷ *In re Mackin*²⁸ and *Quinn v. Robinson*,²⁹ requests for the extradition of I.R.A. members were denied when the courts, applying the traditional common law test, held that acts of terrorism were political offenses. In *Eain v. Wilkes*,³⁰ however, this traditional test was altered, and the court granted an Israeli request for the extradition of a Palestinian guerrilla accused of killing civilians in an Israeli town.

The reason for the disparate treatment afforded members of two equally despicable terrorist organizations lies not in the status of the victims but in the fact that the focus of the analysis used in the I.R.A. cases did not go beyond the narrow parameters laid out by British judges, in the context of nineteenth century political and social perspectives,³¹ in *In re Castioni*.³²

Castioni was the landmark English case that first construed the phrase "offense of a political character."³³ The *Castioni* court stated that "fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances."³⁴ *Castioni* laid down two conditions that must be met in order to bring an otherwise criminal act within the political offense exception: First, there must be "a political matter, a political rising, or a dispute between two parties in the State, as to which is to have the

27. No. 3-78-1099 MG (M.D. Cal. May 11, 1979).

28. No. 80 Cr. Misc. 1, p. 54 (S.D.N.Y. Aug. 13, 1981), *aff'd*, 668 F.2d 122 (2d Cir. 1981).

29. No. C-82-6688 RPA (N.D. Ca. 1983).

30. 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).

31. See SHEARER, *supra* note 1, at 180.

32. [1891] 1 Q.B. 149.

33. British extradition law is governed by The Extradition Act, 1870, 33 & 34 Vict., ch. 52, which provides in relevant part:

(1) A fugitive criminal shall not be surrendered if the offense to which his surrender is demanded is one of a political character or if he proves to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State that the requisition for his surrender has in fact been made with a view to try and punish him for an offense of a political character.

Id. at § 3(1).

As in most extradition laws and treaties, no legislative attempt was made to define the meaning, or provide the context of, the term "offense of a political character."

34. *Castioni*, [1891] 1 Q.B. at 166. This was the definition offered by Justice Stephen, a member of the *Castioni* court. See also 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 71 (1883).

government in its hands. . . ."³⁵ Second, it must be shown that the "act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of"³⁶ a political rising or dispute.³⁷

Angelo Castioni had fled to England from the Swiss canton of Ticino where he had shot and killed a member of the local government during an attack by the townspeople on the municipal palace. The attack was brought on by the refusal of the government to hold a referendum on a citizens' petition for a revision of the provincial Constitution.³⁸ The court found that because Castioni was "acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part,"³⁹ his act was "political" and, therefore, non-extraditable.⁴⁰

Three years later the British courts drew back from the broad sweep of *Castioni* and narrowed the definition of the term "relative" political offense. In *In re Meunier*,⁴¹ the French Government requested the extradition of an avowed anarchist who had been found guilty and sentenced to death *in absentia* by a French court for having set off explosions at a restaurant and a military barracks. The English court, in granting the request, stated that:

[I]n order to constitute an offense of a political character, there must be two or more parties in the State, each seeking to impose the government of their own choice on the other, and

35. *Castioni*, [1891] 1 Q.B. at 156.

36. *Id.*

37. The court rejected an interpretation of the phrase offered by John Stuart Mill that a political offense was any offense "committed in the course of or furthering a civil war, insurrection or riot." SHEARER, *supra* note 1, at 169-70.

38. *Castioni*, [1891] 1 Q.B. at 150. Following the takeover of the palace, a provisional government was formed and remained in power until ousted by the forces of the federal government. *Id.* at 151.

39. *Id.* at 159.

40. *Id.* at 160. In the second of the three separate opinions in this case, Mr. Justice Hawkins stated that:

I cannot help thinking that everybody knows there are many acts of a political character done without reason, done against all reason; but at the same time one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are contrary to reason; but nonetheless an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over.

Id. at 167.

41. [1894] 2 Q.B. 415, 419.

that, if the offense is committed by one side or the other in pursuance of that object, it is a political offense, otherwise not.⁴²

The court concluded that "the party of anarchy is the enemy of all Governments" and because their "efforts are directed primarily against the general body of citizens" they cannot avail themselves of the political offense exception.⁴³ This was an implicit policy-oriented application of the *Castioni* definition and set the stage for future case-by-case applications of this political incidence test.

The political offense exception was initially incorporated to protect an individual's right to rebel against tyrannical government. The "political incidence" test came into being in an era when the individual activist was perceived as being merely an agent of a political movement or party.⁴⁴ Despite the fact that contemporary political activism in general, and terrorism in particular, is often characterized by individuals or small groups acting alone without any connection with an established political party or movement,⁴⁵ the political incidence test continues to be applied by United States courts as the controlling definition of what constitutes a non-extraditable offense.

The first United States judicial analysis of the political offense exception occurred in the case of *In re Ezeta*.⁴⁶ The Republic of Salvador had requested the extradition of its former President, Ezeta, and four of his officers who were accused of murder and bank robbery during their unsuccessful attempts to suppress revolutionary forces. Stressing the existence of a state of armed conflict, the court applied the *Castioni* political incidence test and held that, even though the acts were committed by government officials attempting to maintain their authority,⁴⁷ they came within the exception because "the crimes charged here, associated as they are with the actual conflict of armed forces, are of a political character."⁴⁸

The adaptation of the political incidence test into United States case law occurred in the Supreme Court's only opinion on the political

42. *Id.*

43. *Id.* One commentator cited the wave of anarchist violence which swept Western Europe between the years 1842 and 1894 as the reason for the English court's decision to exclude anarchists from the political offense exception. See Hannay, *supra* note 9, at 388-89.

44. See Garcia-Mora, *supra* note 7, at 1242.

45. See *id.*

46. 62 F. 972 (N.D. Cal. 1894).

47. *Id.* at 1002.

48. *Id.* at 999.

offense exception. In *Ornelas v. Ruiz*⁴⁹ Mexico requested the extradition of three members of an anti-government group who had entered Mexico from Texas and attacked a small garrison of Mexican soldiers stationed near the border. Before returning to the United States, they assaulted and robbed some local villagers. In applying the political incidence test to the facts before it, the Court found that the offenses were not of a political character because the revolutionaries had not been in contact with government forces at the time they attacked the villagers.⁵⁰

The political offense exception next appeared in United States courts some fifty years later in a series of cases involving war-time atrocities carried out pursuant to the orders of the Interior Minister in the Nazi-dominated Croatian Government. In *Artukovic v. Boyle*⁵¹ the communist government of Yugoslavia requested the extradition of Artukovic for having ordered the executions of tens of thousands of people.⁵²

The district court, noting the state of hostilities that existed in the area at that time, concluded that extradition should be denied because the offenses were of a political character.⁵³ On appeal, the Ninth Circuit applied the *Castioni* incidence test and affirmed the decision, noting "that various factions representing different theories of government were struggling for power during this period in Croatia."⁵⁴ In reaching its decision the Ninth Circuit had rejected the argument that the exception did not apply to war crimes or other crimes against humanity.⁵⁵ It had held that the United Nations resolutions of 1946 and 1947 relating to the surrender of war criminals did not have "sufficient force

49. 161 U.S. 502, 510 (1896).

50. *Id.* at 511. The court used this opportunity to narrow the scope of appellate review in a habeas corpus petition by holding that the question was whether, on the facts, the initial fact-finder had "no choice" but to find that the petitioner's acts were part of a "movement in aid of a revolt, an insurrection, or a civil war." *Id.*

51. 140 F. Supp. 245 (S.D. Cal. 1956). This case led an up and down life in the United States court system for seven years before it was finally decided. *See Artukovic v. Boyle*, 107 F. Supp. 11 (S.D. Cal. 1952) (habeas corpus petition granted), *rev'd sub nom. Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir.) (reversal based on interpretation of treaty between United States and Yugoslavia), *cert. denied*, 348 U.S. 818, *reh'g denied*, 348 U.S. 889 (1954); *Artukovic v. Boyle*, 140 F. Supp. 245 (S.D. Cal. 1956) (extradition denied because acts found to be of a political character), *aff'd sub nom. Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957), *vacated and remanded*, 355 U.S. 393 (1958). Ultimately this case was reversed on procedural grounds, *United States v. Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959).

52. *Artukovic v. Boyle*, 140 F. Supp. 245, 246-47 (S.D. Cal. 1956).

53. *Id.* at 247.

54. *Karadzole v. Artukovic*, 247 F.2d 198, 204 (9th Cir. 1957).

55. 247 F.2d at 205.

of law to modify long standing judicial interpretations of similar treaty provisions."⁵⁶ After the trial court's judgment was vacated by the Supreme Court on procedural grounds,⁵⁷ the lower court again found the offenses to have been political within the meaning of the *Castioni* test.⁵⁸

Some commentators have suggested that the political philosophy of the requesting state in *Artukovic* was more influential than were the merits of the case.⁵⁹ The result was a perversion of the policies that led to the adaptation of the exception and was a totally unwarranted application of the *Castioni* test. As one commentator noted,

[t]he connection existing between Artukovic's common offense and his alleged political act is so feeble that the political character of the crime has accordingly disappeared. It requires little effort to realize that the thousands of killings attributed to him have absolutely nothing to do with an offense against the state. . . .⁶⁰

Another instance of the expansive use of the political offense exception to deny extradition of an offender to a communist country was *Ramos v. Diaz*.⁶¹ In this case, the Castro Government requested the return of two Cubans who had been convicted in Cuba of the murder of a prisoner they had been guarding while in the service of Castro's army. Despite the fact that the incident had occurred three days after the fall of the Batista Government on January 7, 1959, the court applied the *Castioni* test. It found the offenses were incidental to and formed part of a political disturbance and, thus, denied the request.⁶²

56. *Id.*

57. *Karadzole v. Artukovic*, 355 U.S. 393 (1958).

58. 170 F. Supp. at 392-93.

59. *See Epps, supra* note 3, at 72.

60. *Garcia-Mora, supra* note 7, at 1248. Apparently Artukovic was not the only war criminal to receive sympathetic treatment by the United States. The extradition of Klaus Barbie from Bolivia to France to face charges of "crimes against humanity" for his role in the murders of thousands of French Resistance leaders and Jews brought to light the fact that the United States had blocked French attempts to bring him to trial in return for his having supplied United States intelligence with information. Dionne, *Klaus Barbie's Return Awakens a Bitter Past*, N.Y. Times, Feb. 13, 1983, at E3, col. 1.

61. 179 F. Supp. 459 (S.D. Fla. 1959).

62. *Id.* at 463. The court noted that at the time of the murder "there existed much turmoil and excitement with remnants of the Batista regime fighting with the victorious Castro troops and arrests and executions were commonplace." *Id.*

In re Gonzales, 217 F. Supp. 717 (S.D.N.Y. 1963) also involved the murder of prisoners. This time the requesting party was the Dominican Republic and the court was willing to admit that the exception is applied "with greater liberality where the demanding state is a totalitarian regime seeking the extradition of one who has opposed the regime in the cause of freedom." *Id.* at 721 n.9.

*In re Mylonas*⁶³ provides yet another example of judicial manipulation of the exception to deny the extradition of an anti-communist political leader. Mylonas was charged with embezzling funds while acting as a city councilman in Greece prior to his ouster from office by the Communist Party. Although there was no evidence that the alleged crime was committed for any political purpose, the court concluded that the exception applied because the crime "was incidental to, formed a part, and was the aftermath of political disturbances."⁶⁴

The existence of political upheavals at the time of the crime proved determinative in *In re McMullen*,⁶⁵ the first United States extradition case to involve a member of a modern urban terrorist organization.

In 1976 the extradition of Peter McMullen was requested by the United Kingdom on the basis of an arrest warrant charging him with attempted murder. The charges arose out of the bombing of a British army barracks at Yorkshire, England in March 1974. McMullen, a Catholic from Northern Ireland, had deserted the British army in 1972 to join up with the Provisional Irish Republican Army (P.I.R.A.).⁶⁶ In the following two years, McMullen allegedly took part in a number of terrorist bomb attacks, including the one on the Yorkshire army barracks.

McMullen was arrested in the Republic of Ireland where he was sentenced to a prison term of three years for membership in an illegal organization—the I.R.A.⁶⁷ After his release from jail, McMullen is alleged to have had a falling out with his former comrades and to have tried to sever his connections with them. Fearing that McMullen might cooperate with authorities and reveal the names of other members, the P.I.R.A. sentenced him to death,⁶⁸ but McMullen fled to the United States before the sentence could be carried out.

McMullen was subsequently arrested and brought before a United

63. 187 F. Supp. 716 (N.D. Ala. 1960).

64. *Id.* at 721.

65. No. 3-78-1099 MG (N.D. Cal. May 11, 1979).

66. The Provisional Irish Republican Army, more commonly called the provos, is a radical branch of the I.R.A. They claim that the British rule in Northern Ireland can only be ended through the use of violence. Preaching a blend of Irish nationalism and marxist ideology, they demand the ouster of not only the British from Northern Ireland, but also of the democratically elected government of the Republic of Ireland. See generally T. COOGAN, *THE I.R.A.* (8th ed. 1982).

67. *Id.*

68. The I.R.A. and the provos are notorious for knee capping and, in more serious cases, for killing informers and former members who cooperate with the authorities. See generally *id.*

States magistrate for a hearing on the request for his extradition. The magistrate applied the *Castioni* test and denied extradition on the grounds that the criteria necessary for the political offense exception had been satisfied.⁶⁹ The magistrate took judicial notice of the fact that "an insurrection and a disruptive uprising of political nature did in fact exist" in Northern Ireland at the time of the offense⁷⁰ and concluded that the accused had acted as a member of "an organization existing in an era of political upheaval, which was engaged in and conducted political violence, of the most extreme nature with a solely political objective."⁷¹ These factors alone were sufficient for the magistrate to hold that McMullen's act was a political offense within the meaning of the exception.

A somewhat different result was reached in *Abu Eain v. Wilkes*,⁷² where the Court of Appeals for the Seventh Circuit applied a test significantly different from that laid down in *Castioni* and concluded that the bombing of civilians in Israel does not come within the scope of the political offense exception contained in the treaty of extradition between the United States and Israel.⁷³

On May 14, 1979 the Israeli resort town of Tiberias, near the Sea of Galilee, was crowded with people celebrating the anniversary of Israel's independence. On that afternoon a bomb which had been planted in a refuse bin at the marketplace in the center of town exploded, killing two teenagers and leaving thirty other people maimed or seriously injured.⁷⁴

After months of investigation the Israeli police obtained a confession from Jamil Yasin, a resident of the West Bank, which implicated Ziyad Abu Eain in the crime. According to Yasin's statement, both Eain and himself were active in the Al Fatah branch of the P.L.O., and as members of this "liberation" movement they had gone to Tiberias on May 11, 1979 to find a suitable location in which to plant an explosive device.⁷⁵ On the day of the explosion Yasin gave Eain the device with instructions as to its placement and location. Yasin did not accompany Eain out of fear of being recognized but learned of the "success" of the operation from a news report later that day.

69. *In re McMullen*, slip op. at 3.

70. *Id.* at 4.

71. *Id.* at 4-5.

72. 641 F.2d 504 (7th Cir.), cert. denied, 454 U.S. 894 (1981).

73. United States-Israel Extradition Convention, Dec. 5, 1963, 14 U.S.T. 1707, T.I.A.S. No. 5476. Extradition will not be granted when the "offense is regarded by the requested party as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with a view to trying him or punishing him for an offense of a political character." *Id.* art. VI.

74. 641 F.2d at 507.

75. *Id.* at 509.

After the Israeli police had rounded up a number of P.L.O. suspects, Yasin warned Eain that he might be in danger. Eain, fearing that the investigators were closing in on him, fled to the United States via Jordan.⁷⁶ He took up residence in Chicago with his sister and remained there until his arrest by F.B.I. agents on August 22, 1979.⁷⁷

At his extradition hearing in the Northern District of Illinois, the magistrate found that the statements made by his accomplice, Yasin, the substance of which was corroborated by an Israeli police officer, together with self-incriminating statements made by Eain to the F.B.I. agents at the time of his arrest, were sufficient to establish probable cause.⁷⁸ Upon finding that Eain had not sustained his burden of proof on the question of the political offense exception, the magistrate determined that the petitioner should be extradited back to Israel to face the criminal charges against him. Eain's petition to the district court for a writ of habeas corpus to prevent his extradition was equally unsuccessful.⁷⁹

On appeal to the Seventh Circuit, Eain's principle claim was that his crimes were relative political offenses and, therefore, he should be exempt from extradition.⁸⁰ Before proceeding to the merits of the petitioner's claim, the court rejected the government's argument that the court lacked authority to apply the political offense exception because it was "a political question which should be the sole responsibility of the 'political branches' to decide. . . ."⁸¹ Noting that the courts of the United States had never "declined to consider the applicability of the political offense exception when it was squarely presented,"⁸² the court held that the political offense exception did not involve "an initial policy determination of a kind clearly for non-judicial discretion."⁸³

76. *Id.*

77. *Id.* at 510.

78. *Id.* at 510-11.

79. *In re Abu Eain*, No. 79-175 (N.D. Ill. Dec. 18, 1979), *aff'd sub nom. Ziyad Abu Eain v. Wilkes*, No. 80-1487 (N.D. Ill. 1980).

80. *Eain v. Wilkes*, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981). In addition to the political offense claim, Eain argued that there was no basis for a finding of probable cause and that even if probable cause could be found the charges were merely a subterfuge to enable Israel to try him for the political offense of being a member of the P.L.O. The court found no merit in either argument.

Eain's subterfuge claim was held to be a matter for the executive branch because "political questions would permeate any judgement on the motivation of a foreign government." *Id.* at 516-17.

81. *Id.* at 512. The government was relying on the political question doctrine as set forth in *Baker v. Carr*, 369 U.S. 186 (1962).

82. 641 F.2d at 513.

83. *Id.* at 514. The need for an initial policy determination is one of the six criteria

Having concluded that it was the proper forum to decide the petitioner's claim, the court stated that the petitioner's action would be considered political for the purposes of the exception if there were "violent political disturbances" at the time of their occurrence and if they were "incidental" to that disturbance.⁸⁴

Although the court was willing to accept that there may have been a political conflict in Israel at the time that Eain was accused of planting the bomb,⁸⁵ it held that his act was not incidental to the P.L.O.'s objectives but, rather, was a random act of violence perpetrated against innocent civilians for the sole purpose of destroying the social fabric of the community. "The exception," the court stated, "does not make a random bombing intended to result in the cold-blooded murder of civilians incidental to a purpose of toppling a government, absent a direct link between the perpetrator, a political organization's political goals, and the specific act."⁸⁶ The court agreed with the magistrate's findings that Eain had failed to establish a direct link between these three criteria and likened his actions, and the political goals and methods of the P.L.O. in general, to those of anarchists who, the court said, had been consistently denied the protection of the political offense exception by the United States and other nations since the decision in *Meunier*.⁸⁷

The vagueness of the term "political disturbance" and the inherent subjectivity in analyzing "incidental" acts to that disturbance enabled the court to deny the claim of a member of a political movement for which there is little sympathy in this country. This case, laudable in that it did not offer protection to a member of a violent terrorist organization, nonetheless exemplifies the arbitrariness of decisions in extradition cases because they are based on an implicit, subjective value judgement and not on explicit, objective criteria.

Even though the P.L.O. and the I.R.A. are indistinguishable in both methods and goals, the *Eain* court showed an obvious reluctance to grant political status to a member of an organization which the Executive branch has refused to recognize even though many other governments and international organizations have recognized the P.L.O. as the political representatives of the Palestinian people. The court

under *Baker* for holding a claim non-justiciable. The court also rejected the application of the political question doctrine on the grounds that it had "discoverable and manageable standards," another of the *Baker* criteria, upon which to construe the exception. *Id.* at 515.

84. *Id.* at 516.

85. *Id.* at 519.

86. *Id.* at 521.

87. *Id.*

avoided having to reach a conclusion similar to the one reached in *McMullen* by excluding from the ambit of the political offense exception acts aimed at destroying the social fabric of a society. The court added, by implication, another element to the *Castioni* test: the act must be reasonably designed to achieve the goal of political turmoil.⁸⁸ However, the court laid down no guidelines that would enable this factor to be evaluated in a predictable fashion in future cases. For example, how could it be determined that the shooting of a British soldier in Belfast, in and of itself, could further the I.R.A.'s ultimate goals or be reasonably designed to bring these goals to fruition?

In *Matter of Mackin*,⁸⁹ the Court of Appeals for the Second Circuit returned to the analysis set forth in *McMullen* and upheld a magistrate's findings⁹⁰ that the offenses for which a P.I.R.A. member's extradition was sought were within the political offense exception contained in the extradition treaty between the United Kingdom and the United States.⁹¹

Mackin was indicted in Northern Ireland on March 16, 1978, on charges of attempted murder of a British soldier. While out on bail he fled to the United States where on October 6, 1980, he was arrested by F.B.I. agents.⁹² At his extradition hearing, Mackin admitted being a

88. *Id.* This element is, in fact, an adaptation of the Swiss theory of "predominance" which limits the political offense exception to acts of a "predominantly political character." See Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 CORNELL INT'L L.J. 71, 82 (1978). See also Garcia-Mora, *supra* note 7, at 1251-56.

89. 668 F.2d 122 (2d Cir. 1981). The actual holding of the appeals court was that the magistrate's decision denying the extradition request of the United Kingdom was not directly appealable. *Id.* at 130.

90. In the *Matter of the Requested Extradition of Dermond Mackin*, No. 80 Cr. Misc. 1, p. 54 (S.D.N.Y. Aug. 13, 1981), *aff'd*, 668 F.2d 122 (2d Cir. 1981).

91. United States-United Kingdom Extradition Treaty, *supra* note 10.

92. 668 F.2d at 124. Mackin was detained pursuant to a provisional arrest warrant issued under the provisions of the United States-United Kingdom Extradition Treaty, *supra* note 10, which provides:

In urgent cases the person sought may, in accordance with the law of the requested party, be provisionally arrested on application through the diplomatic channel by the competent authorities of the requesting Party. The application shall contain an indication of intention to request the extradition of the person sought and . . . such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought had been convicted, in the territory of the requested Party.

Id. art. VIII.

Extradition procedures in the United States are governed by 18 U.S.C. § 3184 (1976). This section provides that:

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge

member of the P.I.R.A., a group committed to the use of violence to remove the British presence from Northern Ireland. Although there was conflicting evidence at the hearing as to the exact chain of events that had occurred and resulted in an injury to a British soldier, the magistrate held that the United Kingdom had demonstrated probable cause⁹³ on the issue of Mackin's possession and firing of a gun at the scene.⁹⁴

The magistrate went on to say that there was no dispute,⁹⁵ but that the test set forth by the English Court in *In re Castioni*⁹⁶ was the proper framework for determining whether the offense should be considered a non-extraditable, relative⁹⁷ political offense.⁹⁸ In applying the

of a court of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or magistrate, to the end that the evidence of his criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention . . . he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until surrender shall be made.

Id. This section only applies when there is an extradition treaty between the United States and the requesting state. 18 U.S.C. § 3181 (Supp. V 1981).

Extradition hearings merely determine whether there is sufficient evidence to justify the accused's extradition. *Collins v. Loisel*, 259 U.S. 309, 316-7 (1922). The evidentiary standard is one of probable cause. The accused may not proffer evidence relating to his innocence or even to rebut the existence of probable cause, but he may offer evidence to "clarify" evidence of probable cause introduced by the requesting state. *Shapiro v. Ferrandina*, 478 F.2d 894, 905 (2d Cir. 1973), *cert. denied*, 414 U.S. 884 (1973). See generally M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 511-37 (1974).

If the court grants the extradition request it is then up to the secretary of state, under 18 U.S.C. § 3186 (1976), to decide whether or not to surrender the accused to the requesting state. He may decline to surrender the accused for a number of reasons, including lack of sufficient evidence to support the charges or because the crime does not fall within the provisions of the treaty. See 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 3134, at 174 (1942). He may also consider the political climate in the requesting state and deny access to the accused on humanitarian grounds. See *In re Sindona*, 450 F. Supp. 672, 694 (S.D.N.Y. 1978), *habeas corpus denied sub nom.* *Sindona v. Grant*, 461 F. Supp. 199 (S.D.N.Y. 1978), *aff'd*, 619 F.2d 167, 173-74 (2d Cir. 1980).

93. Article IX(1) of the extradition treaty states: "Extradition shall be granted only if the evidence be found sufficient according to the law of the requested Party . . . to justify the committal for trial of the person sought if the offenses of which he is accused has been committed in the territory of the requested Party." United States-United Kingdom Extradition Treaty, *supra* note 10.

94. *In re Mackin*, slip op. at 21.

95. *But see, e.g.*, SHEARER, *supra* note 1, at 180.

96. [1891] 1 Q.B. 149.

97. The "political offense" concept has traditionally been applied to two different

test enunciated in *Castioni* to the facts of the case before her, the magistrate mechanically applied the three factors that lie at the heart of the test: "(1) whether there was a war, rebellion, revolution or political uprising at the time and site of the commission of the offense; (2) whether Mackin was a member of the uprising group; and (3) whether the offense was 'incidental to' and 'in furtherance of' the political uprising."⁹⁹

In a detailed discussion of both the historical and more recent violence that has occurred in Ireland,¹⁰⁰ the magistrate noted the long standing social, economic and political discrimination inflicted upon the Nationalist minority in Northern Ireland by the Loyalist majority.¹⁰¹ Given the violent methods used by the I.R.A. in response, the magistrate had little difficulty finding that there was a political uprising at the time and site of the offense.¹⁰² Likewise, the magistrate had little difficulty in finding that Mackin's active membership in the P.I.R.A. satisfied the second part of the test.¹⁰³

The third, and possibly weakest, link in this chain is the requirement that the act be committed "incidental to" and "in furtherance of" a political disturbance. There must be substantial connection between the specific act and the political activity and goals of the uprising group.¹⁰⁴ *Eain*¹⁰⁵ was cited¹⁰⁶ for the proposition that this direct

types of criminal acts, "purely political offenses" and "relative political offense(s)." Garcia-Mora, *supra* note 7, at 1230. Pure political offenses are acts directed against the state, such as treason, sedition and espionage and contain none of the elements of ordinary crime. Cantrell, *supra* note 17, at 780. A relative political offense is one "in which a common crime is so connected with a political act that the entire offense is regarded as political." Garcia-Mora, *supra* note 7, at 1230-31.

98. *In re Mackin*, slip op. at 24.

99. *Id.* at 47.

100. *Id.* at 49-84.

101. *See id.* at 54. The term Loyalist refers to those who are "loyal" to the concept of a United Kingdom of Great Britain and Northern Ireland.

102. *See id.* at 57. One reason for this lack of difficulty was the simplistic and rule-oriented approach employed. In order to ascertain the level of violence necessary to constitute a political rising, thereby satisfying the first element of the political offense exception, the magistrate said that "we look to the language in *In re Castioni* for guidance in determining the level of violence required." *In re Mackin*, slip op. at 77. She went on to say that "the level of violence . . . was of sufficient severity and in the nature of the political uprising as contemplated by *In re Castioni*." *Id.* at 78. This type of analysis will not generate a standard capable of producing predictable results or reflecting community policies.

103. *Id.* at 85.

104. *See Castioni*, [1891] 1 Q.B. at 166.

105. *Abu Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981).

106. *In re Mackin*, slip op. at 96.

link is necessary to prevent "isolated acts of social violence undertaken for personal reasons"¹⁰⁷ from being protected simply because they occurred during a political uprising.¹⁰⁸ While Mackin's act of shooting at a member of the British army could not possibly bring to fruition the goals of his organization,¹⁰⁹ the fact that the act occurred in the context of a confrontation between "two parties in the State as to which is to have the government in its hands"¹¹⁰ and was devoid of personal malice enabled the magistrate to find that the third part of the test was satisfied.

Although the magistrate expressed concern that "the political offense exception should not be applied so as to create a safe haven for terrorists in the United States,"¹¹¹ Mackin's actions were held to have fallen within the political offense exception and the extradition request was denied.¹¹²

The analyses in *Mackin* and in *McMullen* did not depart from the precedent set down in United States and British extradition case law over the last hundred years. Consequently, there was no discussion of the public policy and the community expectations existing in the United States, the United Kingdom and the Republic of Ireland that political change be accomplished by peaceful, non-violent means.

The results in these cases, which were almost mandated by judicial precedent, give the appearance of official United States sanction to the I.R.A. and frustrates the efforts of two friendly, democratic governments to stamp out the use of violence by fringe elements in their societies. The decisions put much weight on the fact that the violence was directed against the British army and not against innocent civilians as was the case in *Eain*. In terms of the preferences and the expectations of the communities involved, this is a totally irrelevant consideration. The activities of the I.R.A. are condemned not only in the United Kingdom but in the Republic of Ireland—the country with which the I.R.A. wishes to have Northern Ireland politically united. The Irish Times¹¹³ published an editorial the day after a police reservist and a postman, who had no connection with the security forces but who was

107. 641 F.2d at 521.

108. *Id.*

109. This is hardly a revealing insight, considering the fact that similar acts have been, and still are being committed, without achieving the I.R.A.'s ultimate goals.

110. *In re Mackin*, slip op. at 98 (quoting *In re Castioni*, [1891] 1 Q.B. at 156).

111. *In re Mackin*, slip op. at 99.

112. It should be noted that Mackin, because he had entered the country illegally, was subsequently deported to the Republic of Ireland. Irish Independent, Dec. 30, 1981, at 16, col. 7.

113. The Irish Times, Feb. 21, 1983, at 9, col. 1.

temporarily filling in for another postman who was a part-time police reservist, were killed,¹¹⁴ and succinctly summed up the perspectives of the people in the south of Ireland towards the I.R.A.:

It was the wrong postman, they say. Will they one day realize that all the shootings have been wrong? Wrong and anti-national? The litany of murders around the Border has been of people of a modest position in life—bread-servers, milkmen and the like. Yesterday they killed a police reservist. The grief among the families of the dead, the resolution which such crimes instill into their fellow-Unionists make talk of a United Ireland a sad, sick joke.

. . . .
 . . . [I]f the North drags on its bloody course much longer, the whole country may become one that will not be worth living in.¹¹⁵

In *Quinn v. Robinson*,¹¹⁶ the third in the recent trilogy of P.I.R.A. extradition cases, the district court refused to consider the methods employed by this terrorist group to achieve its goals in the application of the political offense exception. In reversing a magistrate's determination that Quinn, a member of the P.I.R.A., was subject to extradition, the district court stated that "[i]nherent in any situation where political change is sought are conflicting opinions on the merits of the sought-after change and the methods being used to seek the change. Extradition courts must void [sic] becoming caught up in such controversy."¹¹⁷

The United Kingdom had requested that Quinn return to stand trial on charges of conspiracy and murder. The conspiracy charge arose out of his involvement with an active service unit of the P.I.R.A. that had committed numerous bombings in the London area in 1974 and 1975.¹¹⁸ Quinn was wanted on a murder charge for killing a police of-

114. The 20-year-old reserve policeman was shot in the back as he left a store after buying cigarettes and sweets. *Id.* at 1, col. 5. The three gunmen were reported to have fired more than 50 shots using two submachine guns and a shotgun. The report went on to point out that "The Provisional I.R.A. later admitted responsibility." *Id.* The slain postman "was shot dead by Provisional I.R.A. members who apparently mistook him for another postman who is a part-time member of the security forces" but who was on leave that day to attend a funeral. *Id.* The postman was shot dead as he delivered a letter to an isolated cottage by three gunmen who had earlier taken over the house. The gunmen lured the postman to their ambush by posting a letter to that house the day before. *Id.*

115. *Id.* at 9, col. 1.

116. No. C-82-6688 RPA (N.D. Cal. 1983).

117. *Id.* at 38.

118. *Id.* at 5. Quinn had been implicated through fingerprints found on the incendi-

ficer in 1975 in an incident unrelated to his activities with the P.I.R.A.¹¹⁹

In September 1981, Quinn was arrested in California. At his extradition hearing, the magistrate found that Quinn had not established the criteria necessary to invoke the political offense exception and ordered his extradition to the United Kingdom.¹²⁰ The district court, on a petition by Quinn for a writ of habeas corpus, reversed the magistrate's decision and held that Quinn's extradition was barred on both the conspiracy and murder charges.¹²¹

In reaching this decision, the court rejected a significant portion of the analysis employed by the magistrate. First, the court rejected the requirement that the accused prove his membership in the uprising group, which the magistrate had adopted from the *Mackin* decision.¹²² The court reasoned that this "membership" requirement would have placed the accused in the untenable position of having to waive his fifth amendment rights against self-incrimination in order to invoke the political offense exception. This, the court concluded, would have been an unreasonable burden given that membership in a group committed to violence was, at most, "circumstantial evidence of his guilt on the charged offense."¹²³ Secondly, the court rejected the magistrate's application of the incidence test in evaluating the offenses in terms of their effectiveness in achieving the political goals of the accused,¹²⁴ noting that the "choices of action by an uprising group are not proper considerations for the extradition court when considering

ary devices in at least six bombing incidents, including a letter bomb sent to the Roman Catholic Bishop to the British Armed Forces in a hollowed-out Bible. *Id.* at 6-8. Quinn's fingerprints were also found on letter bombs which injured a judge and a security guard at the offices of a daily newspaper, and on bombs planted at a railway station, a pub and a restaurant. *Id.* Quinn's co-conspirators were arrested in December 1975 following a six-day siege in a flat in Balcombe Street, London. The "Balcombe Street Four," as they became known, were later tried and convicted under the British Prevention of Terrorism Act. *Id.* at 10-11.

119. *Id.* at 8-10. In February 1975, Quinn had been stopped for questioning by a police officer on routine patrol in search of burglary suspects. When Quinn began to act suspiciously, the officer attempted to search him. At that, Quinn began to flee. Another officer, dressed in civilian clothes, observed the chase and tried to block Quinn's path. Quinn shot him and made good his escape. *Id.* Neither officer had known that Quinn was a member of the P.I.R.A.

120. *Id.* at 2.

121. *Id.* at 40, 44.

122. *Id.* at 16-17. See *supra* text accompanying note 99.

123. *Quinn v. Robinson*, slip op. at 20.

124. This was a factor that had been implicitly added to the *Castioni* test by the Seventh Circuit in *Eain*. See *supra* text accompanying note 88.

the applicability of the political offense exception."¹²⁵

The court refused to extend the rationale of *Eain*—that the bombing of civilians was anarchist-like activity not covered by the political offense exception¹²⁶—to the facts in *Quinn*. The court reasoned that because the terrorist activity in *Eain* was aimed at “the expulsion of a certain population from the country,”¹²⁷ while the violence perpetrated by the P.I.R.A. was “to protest British rule in Northern Ireland, and to bring the British to the bargaining table,”¹²⁸ the two cases were clearly distinguishable.¹²⁹

In applying the traditional “incidence” test to the conspiracy charge against Quinn, the court found that there existed a political uprising in the United Kingdom at the time of the offense and, because “bombing incidents by those opposed to British rule are the historical form of violent expression in the long controversy over such rule,”¹³⁰ the conspiracy was incidental to that political uprising.¹³¹

Even more troublesome was the court’s willingness to find that the murder of the police officer fell within the political offense exception. The court rejected the magistrate’s conclusion that the murder was a purely criminal act.¹³² According to the court, the “evidence showed that the killer’s capture would lead, because of interrogation and possibly torture, to the discovery of the bomb factory, and that the killer shot the only man who had a chance of stopping his flight from the police.”¹³³ The court concluded that the murder was, therefore, incidental to and in the course of the political uprising.¹³⁴

Decisions such as those in *Quinn*, *Mackin* and *McMullen* have given rise to the claim that the political offense exception, as it has been defined and applied within the parameters of the *Castioni* test,

125. *Quinn v. Robinson*, slip op. at 29-30.

126. *See supra* text accompanying notes 85-87.

127. *Quinn v. Robinson*, slip op. at 36.

128. *Id.*

129. *Id.* The court went so far as to criticize the *Eain* decision for endangering the role of the judiciary as unbiased factfinders.

The [*Eain*] court’s emotion in dealing with the case is reflected in its discussion regarding terrorists who commit barbarous acts and its conclusion that the political offense exception “should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere.” . . . Such expressions of emotion have not been part of the historic function of the extradition court while determining the applicability of the political offense exception. *Id.* at 37, quoting *Eain v. Wilkes*, 641 F.2d at 520.

130. *Quinn v. Robinson*, slip op. at 40.

131. *Id.* at 39.

132. *Id.* at 43.

133. *Id.*

134. *Id.* at 44.

has outlived its usefulness.¹³⁵ Admittedly, one of the principal reasons for the judicial system's inability to deal with the dilemma posed by requests for the extradition of terrorists has been the failure of nations to revise their extradition laws and bilateral treaties.¹³⁶ Although some nations have entered into multilateral treaties and international conventions that specifically exempt certain acts of terrorism from the protections of the political offense exception,¹³⁷ these efforts have, up to now, proven to be insufficient. However, it is not necessary to eliminate the exception, which, when properly applied, can afford protection to political dissidents from repression by tyrannical governments, in order to bring I.R.A. terrorists and their like to justice. The holding in *Eain*, with its focus on the accused's purpose, the degree of connection between the nature of the crime and the ultimate ends sought, and the overall modus operandi of the terrorist group, provides an example of how the political offense exception can be effectively applied in this age of modern terrorism.

The judgment of the Irish Supreme Court in *McGlinchey v. Wren*¹³⁸ provides a further example of enlightened application of the political offense exception. McGlinchey had been sought by the authorities in Northern Ireland to stand trial for the murder of an elderly woman during a raid on a post office. Although he contended that during the relevant time period he had been active in the P.I.R.A. and that the murder was connected with that activity, the lower courts rejected McGlinchey's claim that the crime was a political offense.¹³⁹

In denying McGlinchey's appeal, the Irish Supreme Court took the opportunity to distinguish between terrorist acts and political activity

135. As one commentator has argued:

The right not to extradite those who are being sought merely for their acts of conscience can be preserved through existing mechanisms of judicial approval and executive authority to grant asylum. There is no good reason to preserve the exception and there are many excellent reasons for concluding that the exception has outlived its usefulness and has needlessly hampered harmonious and pragmatic international relations.

Epps, supra note 3, at 88.

136. See Cantrell, *supra* note 18, at 777.

137. See, e.g., The European Extradition Convention, Council of Europe, 359 U.N.T.S. 273, Europ. T.S. No. 24; Tokyo Convention on Aviation: Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768 (effective Dec. 4, 1969); Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, Sept. 25, 1972, U.N. Doc. A/C.6/L.85.

138. [1982] Ir. R. 154.

139. *Id.* at 158. In his appeal to the Supreme Court, McGlinchey no longer contended that his crime was a political offense, but instead claimed as a separate ground that he believed that if removed from the state he would be prosecuted for a political offense or an offense connected with a political offense. *Id.* at 159.

which, even if formally criminal, was exempt from extradition:

It appears from the material exhibited in the plaintiff's affidavit that the victim of the murder for which delivery to Northern Ireland is sought was an elderly grandmother. She was riddled with bullets in the early hours of the morning, when her house was attacked, front and rear, by a gang firing Armalite rifles from a moving car. Other members of her family including her aged husband and a daughter narrowly escaped death. This revolting and cowardly crime is one which should readily shock the conscience of any normal person and which assuredly dishonours any cause that might have been espoused by its perpetrators. . . .

Because of the particular circumstances of the offence charged in the warrant, and, especially, because of the concessions made on behalf of the plaintiff, it is unnecessary to seek to draw a line of demarcation between an ordinary criminal offence and one which falls to be classified as a political offence or an offence connected with a political offence. I would wish to point out, however, that it should not be deduced that if the victim were someone other than a civilian who was killed or injured as a result of violent criminal conduct chosen in lieu of what would fall directly or indirectly within the ordinary scope of political activity, the offence would necessarily be classified as a political offence or an offence connected with a political offence.

The judicial authorities on the scope of such offences have in many respects been rendered obsolete by the fact that modern terrorist violence, whether undertaken by military or paramilitary organisations, or by individuals or groups of individuals, is often the antithesis of what could reasonably be regarded as political, either in itself or in its connections. All that can be said with authority in this case is that, with or without the concession made on behalf of the plaintiff, this offence could not be said to be either a political offence or an offence connected with a political offence. Whether a contrary conclusion would be reached in different circumstances must depend on the particular circumstances and on whether those particular circumstances showed that the person charged was at the relevant time engaged, either directly or indirectly, in what reasonable, civilized people would regard as political.

. . . .
. . . This Court is invited to assume that because of the existence of widespread violence organised by paramilitary

groups in Northern Ireland, any charge associated with terrorist activity should be regarded as a charge in respect of a political offence or an offence connected with a political offence. I am not prepared to make any such assumption.¹⁴⁰

The *McGlinchey* and *Eain* cases are part of an evolving process of interpretation and clarification of extradition law. The judgments handed down by American courts in the P.I.R.A. extradition cases clearly demonstrate that further development in this area of the law is needed. Given that the decision as to whether a person should be extradited is in the final analysis a matter of judicial policy and not of legal definition, such courts must develop a focus of inquiry which rejects the use violence unless, and only unless, the political institutions of a given state do not permit other avenues for the expression of political dissent.

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140. *Id.* at 159-60. McGlinchey, who was free on bail at the time, absconded before the decision was handed down. He evaded capture until March, 1984 when, following a shootout with Irish police, he was taken into custody. That same evening, he was driven to the border and handed over to the Northern Ireland authorities. See N.Y. Times, March 19, 1984, at A3, col. 4. McGlinchey, who had formed the Irish National Liberation Army, a Marxist offshoot of the P.I.R.A., had claimed in an interview given while he was on the run "that he had taken part in 30 killings and at least 200 acts of terrorism." *Id.*

