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# Extradition and the Political Offense Exception in the Suppression of Terrorism

ANTJE C. PETERSEN\*

## INTRODUCTION

Combatting terrorism effectively within the confines of a democratic order has become one of the most urgent tasks for western governments. In Europe, violent terrorist incidents have been part of political reality for more than two decades. Americans have been relatively protected from attacks in their cities, yet now, more than ever, United States citizens face the possibility that terrorism will strike them at home as well as away from home.<sup>1</sup> In spite of the rarity of terrorist attacks on United States soil so far, however, the United States has for years actively pursued cooperation with western nations in attempting to suppress worldwide terrorism through nonviolent, legal means.

Extradition treaties play a particularly important role in the cooperative efforts to combat terrorism. Yet their effectiveness has been hampered by the fact that the political offense exception, contained in all extradition treaties, protects from extradition political offenders of all types, nonviolent and violent alike, including terrorists. In response to this dilemma, the United States and the United Kingdom recently signed a Supplementary Treaty exempting a number of violent crimes from the protection of the political offense exception.<sup>2</sup>

This treaty has been severely criticized for effectively abolishing the political offense exception and, with it, the values it embodies, such as protecting the right to political self-determination. The dilemma created is that between the proven effectiveness of extradition treaties in the suppression of terrorism and the desire to protect the venerable principle of the political offense exception.

In the following Part, this Note will sketch the general background to the role of extradition treaties in the suppression of terrorism. In Part II,

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1. In the past, political terrorism has only rarely occurred in the United States as *vigilantism* of the form practiced by the Ku Klux Klan. H. VETTER & G. PERLSTEIN, PERSPECTIVES ON TERRORISM 42 (1991). See also Address by Judge William Sessions, Director, FBI, B'Nai B'Rith Anti-Defamation League National Leadership Conference (March 25, 1991) (LEXIS, Nexis library, Omni file) (discussing FBI jurisdiction and procedures for combatting terrorism).

2. See *infra* text accompanying notes 49-53.

this Note will address the future role of the political offense exception in light of the need to find effective, legal, nonviolent means to combat terrorism. This Note will analyze various proposals to retain the political offense exception in one form or another while establishing safeguards outside of extradition treaties to ensure efficient prosecution of terrorists, such as an International Court of Terrorism or an International Criminal Code.

The final section of Part II will present a proposal to delete the political offense exception entirely. The proposal incorporates safeguards already inherent in extradition treaties, such as clauses that prohibit extradition in circumstances under which extradition would be inhumane or discriminatory. However, distilling the right to a fair trial and respect for other basic human rights in the requesting country as the most vital and surviving value of the original political offense exception, this Note will propose that all extradition treaties be evaluated on the basis of standards similar to those represented by human rights organizations such as Amnesty International. This should be done under the aegis of the executive branch, whose resources in evaluating conditions in other states are incomparably greater than those of the judiciary.

## I. THE ROLE OF EXTRADITION TREATIES IN COMBATting TERRORISM

Cooperation among states in an attempt to curb terrorism has moved to center stage in the foreign policy of many western nations. In the last twenty years, myriad extremist terrorist movements have developed in Europe and the Arab world. While each terrorist group and splinter group has its own, usually limited and geopolitically determined goals,<sup>3</sup> terrorist attacks resemble one another in structure: they are carefully orchestrated attacks on government buildings or on persons involved in government matters, but they may also be directed at wreaking havoc in public areas where victims are predominantly civilians who are detached completely from government functions.<sup>4</sup> The operations are clandestine in that they are mostly unannounced and often unattributable. It is not unusual for several terrorist groups to claim responsibility after an attack; ultimately, it may

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3. Intelligence services in Germany, for example, assume that Germany's Red Army Faction (Rote Armee Fraktion) works closely with similar factions in France (Action Directe) and Italy (Red Brigade). Their cooperation, interestingly, is not motivated to achieve some common goal within Europe, but rather to assist each other in committing local attacks to achieve national change. Likewise, there was considerable cooperation in the 1960s between the precursor of the Red Army Faction, the Baader-Meinhof Group, and Palestinian groups, such as the Abu Nidal group which trained members of the Baader-Meinhof group. DER BAADER-MEINHOF REPORT 41-43 (1972).

4. The attacks in the Rome and Vienna airports on December 27, 1985 exemplify this kind of attack. See *Airport Terrorists Kill 13 and Wound 113 at Israeli Counters in Rome and Vienna*, N.Y. Times, Dec. 28, 1985, at A1, col. 6.

never be possible to determine which group—or faction of a group—is responsible. A central tenet of terrorism, therefore, is that accurate attribution of a particular attack lies predominantly in the hands of the aggressors. The range of political goals pursued by terrorists and the equally broad range of both violent and nonviolent means used in terrorist attacks has made it virtually impossible to state with certainty what characterizes terrorism per se or how it can be defined.<sup>5</sup> If anything can be stated with any certainty about terrorism, however, it is that terror-violence represents a twofold problem: in pursuing political change, terrorism aims at non-traditional targets (civilians) and it evades open conflict.

### A. *Combatting Terrorism Through Treaties*

The particular nature of terrorist operations requires that policy makers seek imaginative solutions to the problem. Combatting terrorism means facing even more problems than those associated with terrorism's particularly violent and clandestine nature. Because terrorist fighting is not "traditional" armed conflict and because terrorist action is often directed at destroying the fundamental order of a nation, states defending against terrorism need to focus on appropriate methods to eradicate it.<sup>6</sup> This usually means—or should mean—that states refrain from taking measures that equal in reprehensibility those used by the terrorists themselves. This moral imperative is closely linked to the nature of terrorism: because terrorism is aimed at

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5. The magnitude of the problem of defining terrorism is illustrated by Ambassador Fields' statements before the Judiciary Committee:

[I]f you can define terrorism, you ought to win the Nobel Prize, because we have been grappling with this definition for the last dozen years, to my certain knowledge. I would think it would be extremely difficult to find a definition of terrorism that even the United States and Great Britain could agree to.

The problem with terrorism is that the cliché . . . about one man's heroism being another man's terrorism, is operative throughout this entire subject.

*Supplementary Extradition Treaty Between the United States and the United Kingdom of Great Britain and Northern Ireland: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 164 (1985) [hereinafter *Hearings*]; see also H. VETTER & G. PERLSTERN, *supra* note 1, at 3:*

It has almost become pro forma for writers on terrorism to begin by pointing out how hard it is to define the term *terrorism*. One author (Schmid, 1983) collected more than one hundred definitions of terrorism provided by writers between 1936 and 1983, and there is every reason to believe the number has increased since the year of Schmid's publication.

6. See M.C. BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: PROCEDURE* xiii (1986):

As [international] crimes increase more efforts will be needed in such areas as: codification of international and transnational crimes, international cooperation in procedural aspects (as one of the means of enforcement), and the eventual establishment of international machinery and of an international criminal jurisdiction to directly enforce certain types of violations and to protect and preserve fundamental rights against all forms of threat and violations from whatever source, be it public or private.

destroying democratic orders,<sup>7</sup> "the methods utilized by democratic societies to combat terrorism must also be legal in both their substance and procedure."<sup>8</sup>

Nations responding to the threat of terrorism seem indeed to have decided that their reactions must consist of largely nonviolent means. Efforts have centered on resolutions, conventions, and, in general, treaties, through both bilateral and multilateral channels. In the latter context, such umbrella groups as the United Nations (UN), the Organization of American States (OAS), and the European Community (EC), all of them uniting a great number of states, have played a particularly important role. Early treaties in these alliances centered on the most frequent kinds of terrorist crimes, such as hijacking of aircraft and attacks on civilians.<sup>9</sup> Together with other efforts, such as the regular resolutions on terrorism passed by the seven Economic Summit nations, these agreements document the world's willingness to take care of the terrorist problem through peaceful means and to

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7. Friedlander calls the relationship between terrorism and democracy "symbiotic." 5 R. FRIEDLANDER, *TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL* vii (1990).

8. *Id.* See also statements by the seven Economic Summit nations (the United States, Germany, Italy, Japan, Canada, France, and Great Britain): "[We] [c]ommit ourselves to support the rule of law in bringing terrorists to justice." *Venice Statements on East-West Relations, Terrorism and Persian Gulf*, N.Y. Times, June 10, 1987, at A10, col. 1, reprinted in *INTERNATIONAL TERRORISM: A COMPILATION OF MAJOR LAWS, TREATIES, AGREEMENTS, AND EXECUTIVE DOCUMENTS 207* (1987) [hereinafter *COMPILATION*] (report prepared for the Committee on Foreign Affairs). But compare this statement to the one issued by the same group only a year earlier (the year of the United States' raid on Libya): "[Terrorism] must be fought relentlessly and without compromise." Tokyo Statement on International Terrorism (May 5, 1986), reprinted in *id.* at 206.

9. See, for example, treaties on the protection of civil aviation: Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219 (signed at Tokyo; entered into force Dec. 4, 1969); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570 (signed at Montreal; entered into force Jan. 26, 1973); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, S. TREATY DOC. No. 19, 100th Cong., 1st Sess. (1988) (signed at Montreal, Feb. 24, 1988; not yet in force); and Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192 (signed at The Hague; entered into force Oct. 14, 1971). And see treaties specifically designed to protect civilians and internationally protected persons: The OAS 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, 27 U.S.T. 3949, T.I.A.S. No. 8413 (signed at Washington; entered into force Oct. 16, 1973; for the United States Oct. 20, 1976); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167 (signed at New York; entered into force Feb. 20, 1977); International Convention Against the Taking of Hostages, S. EXEC. DOC. N, 96th Cong., 2d Sess. (1979) (signed at New York, Dec. 17, 1979; entered into force June 3, 1983; for the United States Jan. 6, 1985), reprinted in 2 *EXTRADITION LAWS AND TREATIES: UNITED STATES 965.1-965.2* (I. Kavass & A. Sprudz eds. 1980) (in two regularly updated volumes) [hereinafter *EXTRADITION LAWS*]. Other treaties, to which the United States is not a party, include the European Convention on the Suppression of Terrorism, Jan. 27, 1977, Europ. T.S. No. 90 (signed at Strasbourg).

strengthen cooperation among states through treaties. Nations rejecting terrorism as a means of political change seem to agree that the "war against terrorism" should not be a war at all. The appropriate way to cope with the threat, then, seems to be through peaceful means such as cooperation and diplomacy between victim states.<sup>10</sup>

### *B. Facilitating Cooperation Through Extradition Treaties*

Extradition treaties are based on the principle of mutuality: With every offender extradited to a requesting state, the requested state's chances grow that when the roles are reversed one hand will wash the other. A desirable "by-product" of extraditing offenders is that doing so reduces international tensions; the requested state acknowledges the high stake the requesting state has in prosecuting an offender whose victims presumably live or lived within the borders of the requesting state's territory.<sup>11</sup>

Extradition treaties function significantly in the suppression of terrorism but do not receive a great deal of publicity as antiterrorist measures. They play a more covert role within the grand scheme of international cooperation in combatting terrorism. Their advantages, however, seem all too obvious. Extradition treaties signal that the contracting states accept each other's sovereign right to prosecute offenders accused of crimes committed against the requesting state or in its territory. Parties to extradition treaties document loyalty to each other; such loyalty expresses itself in the refusal to grant refuge to an alleged offender wanted by the other signatory. Extradition treaties cannot be overestimated both as symbols and as effective measures for cooperation among nations.

The concept of extradition has a venerable tradition in the relationship between states. It dates back to circa 1280 b.c., to a clause in the peace treaty between Pharaoh Ramses II and King Hattusili III that provided for the return of fugitive criminals.<sup>12</sup> In the age of terrorism, extradition treaties have gained new importance and vigor without essentially changing their character. Particularly, the principle of loyalty inherent in such agreements has worked for enhanced cooperation—it underscores the spirit of bilateral unity against terrorist aggressors.

By extension, extradition treaties further international cooperation in reducing the number of safe harbor states to which a terrorist can retreat

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10. Generally, no actual force is used to strike terrorist targets (training sites, for example)—with the exception of the United States' air attack on Tripoli and Bengasi, Libya, in 1986, an attack whose legality under international law and the UN Charter is not entirely certain. See generally, Intocchia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177 (1987).

11. See 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, 173-74 (1984).

12. M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 3-4 (1974).

after an attack. As long as terrorists, by simply leaving the state with jurisdiction over their crimes, can escape prosecution or move across borders to cultivate connections with terrorist groups in other countries, terrorist violence will be neither prevented nor penalized. Extradition treaties are no flashy weapon in the fight against terrorism. They do not even attack the problem at its roots. But on a very practical level, extradition treaties eliminate a number of alternatives for terrorists who have completed or aborted attacks. Based as these treaties are on the principle of "aut dedere aut judicare,"<sup>13</sup> extradition treaties assure that terrorist offenders are accountable for their acts either in the country where the terrorist act occurred or in the country that arrested them.<sup>14</sup>

In recent years, some changes made in treaties between the United States and other nations have attracted a great deal of attention. To highlight these changes, it is necessary to sketch out some provisions commonly found in extradition treaties.

A "generic" extradition treaty<sup>15</sup> contains: a list enumerating crimes for which both states agree to extradite offenders to each other; a clause that determines whether a requested state will extradite its own nationals; double criminality and prior jeopardy clauses (safeguarding the offender's right not to be extradited if the crime alleged would not be prosecutable in the requested state or if the offender had already been found guilty or discharged in a proceeding for the same crime); and a so-called political offense exception that often also includes a "political protection clause."

Together, these political clauses provide for two eventualities: first, that an offender will not be extradited for offenses of a political character or for offenses committed in the context of a political incident; and second, that extradition will not be granted "if the Requested State has substantial grounds for believing that the request for extradition has, in fact, been

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13. "Either extradite or adjudicate." This principle figures prominently in multilateral conventions on extradition.

14. This ideal scenario, of course, only works if the contracting partners follow the provisions of and take seriously their responsibility under the treaty. Germany, when still divided, ironically exemplified the best and the worst of all possible worlds in using extradition for protection against terrorism: In spite of a treaty between the Federal Republic of Germany (FRG) and the German Democratic Republic (GDR), the latter had knowingly served as an asylum for and would not extradite a number of Red Army Faction terrorists wanted by the Federal Republic during the 1980s. Within months of the political uprising in the GDR, the de Maizière administration, in June of 1990, exposed and, as a substantial gesture of good will, delivered the former Baader-Meinhof Group members to the FRG (the exchange was in fact so rapid that not even a formal request for extradition was presented to the GDR government). Oral communication from the Ministry of Justice, FRG, Dec. 1990.

15. See, e.g., Extradition Treaty, June 20, 1978, United States-Federal Republic of Germany, 32 U.S.T. 1485, T.I.A.S. No. 9785, reprinted in 1 EXTRADITION LAWS, *supra* note 9, at 300.5 [hereinafter Extradition Treaty between the United States and Germany] (signed at Bonn; entered into force Aug. 29, 1980) (subsequent page references are to EXTRADITION LAWS). The United States currently is a party to some 100 extradition treaties, most of which incorporate the elements mentioned.

made with a view to try or punish the person sought for an offense"<sup>16</sup> of a political character. This latter provision of the political offense exception is often mirrored by a separate clause containing a "humanitarian exception" that holds that an offender shall not be extradited if there is reason to believe that such "special circumstances" as his "age, health or other personal conditions" will make extradition "incompatible with humanitarian considerations."<sup>17</sup> Often, the humanitarian exception in a slightly different version functions as the "equal protection clause" of the treaty, prohibiting extradition when an offender would be put on trial or punished on account of his "race, religion, nationality, or political opinion,"<sup>18</sup> partially overlapping at this point with the political protection clause. The clauses just described have remained virtually unaltered since the first extradition treaties were signed. Recently, however, radical changes have occurred in extradition treaties in order to adapt them to their novel task of suppressing terrorism. These changes are almost exclusively located in the area of the political offense exception/political protection clause,<sup>19</sup> which is discussed next.

### C. *The Political Offense Exception*

The two prongs usually found in the political offense exception<sup>20</sup> protect the offender from prosecution for political crimes and from prosecution for purely political motivation in and by the requesting state. Other than extradition treaties themselves, the exception exempting political crimes from the agreed-upon list of extraditable offenses is of very recent origin—it is roughly 160 years old. It came into existence not long after the French Revolution, in the wake of which the increasing preoccupation of Europe's citizenry with political autonomy laid the ideological groundwork for this

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16. *Id.* at 300.10.

17. Extradition Treaty, June 22, 1972, United States-Denmark, 25 U.S.T. 1293, T.I.A.S. 7864, reprinted in 1 EXTRADITION LAWS, *supra* note 9, at 200.11 [hereinafter Extradition Treaty between the United States and Denmark]. The same provision exists in the Extradition Treaty between the United States and Norway. *Id.* at 660.10.

18. Supplementary Extradition Treaty, June 25, 1985, United States-United Kingdom, S. EXEC. DOC. 17, 99th Cong., 2d Sess. 15 (1985), reprinted in 2 EXTRADITION LAWS, *supra* note 9, at 920.1 [hereinafter Supplementary Treaty] (subsequent page references are to EXTRADITION LAWS).

19. Unless otherwise noted, I will use the term "political offense exception" to include the "political protection clause." This parallels the actual appearance of the two provisions in extradition treaties: often together, at times the first without the latter, and occasionally separated (where the political protection clause appears in the context of an "equal protection clause").

20. For an important treatise on extradition law in general and the political offense exception in particular, see G. GILBERT, ASPECTS OF EXTRADITION LAW (1991), especially Chapter Six ("The Political Offense Exemption"). Unfortunately, the book appeared too recently to be incorporated adequately into this discussion.



restriction of extradition treaties.<sup>21</sup> The first provision to protect political offenders appeared in a Belgian extradition act in 1833<sup>22</sup> and has since been incorporated into most Western extradition treaties. Since then, the political offense exception has stood for two main principles: that the freedom of speech of the emerging Western democracies should be acknowledged outside of their boundaries and that an attitude of noninterference in political struggles abroad would best serve the goals of diplomacy and international cooperation.

United States extradition treaties before 1986 contained political offense exceptions whose structures varied only insignificantly from treaty to treaty. They protected offenders from extradition if the crimes of which the offenders were accused were "regarded by the Requested State as a political offense, an offense of a political character or as an offense connected with such an offense."<sup>23</sup> This description of political crimes, as will be discussed, leaves a broad spectrum of offenses open for interpretation as political offenses. The field, however, broadens even more because a presumably ordinary extraditable offense (and enumerated in the treaty as such) can attain the status of a political crime by mere association, by being "connected with such a [political] offense."<sup>24</sup>

The second clause found frequently within the political offense exception, the political protection clause, is in fact an acknowledgment that an element of mistrust may remain between treaty partners. It addresses the possibility of political motivation behind a requesting state's demand for extradition and attempts to safeguard against requests that are based on fictional charges in order to try the offender for political offenses.<sup>25</sup>

The political offense exception is itself, however, not immune to exceptions. The so-called *clause Belge* (or "clause d'attentat")<sup>26</sup> shows just where

21. Other commentators link the political offense exception with the appearance of governments based on constitutional power. See Littenberg, *The Political Offense Exception: An Historical Analysis and Model for the Future*, 64 *TUL. L. REV.* 1196, 1198 (1990).

22. Groarke, Comment, *Revolutionaries Beware: The Erosion of the Political Offense Exception Under the 1986 United States-United Kingdom Supplementary Extradition Treaty*, 136 *U. PA. L. REV.* 1515, 1520 (1988); Littenberg, *supra* note 21, at 1197.

23. Extradition Treaty between the United States and Germany, *supra* note 15, art. 4, at 300.9.

24. This formulation in fact relates to the test commonly used in American courts to determine whether an offense merits the status of political offense, the so-called "incidence test" which this Note will discuss later. See *infra* notes 31-35 and accompanying text.

25. The extradition treaty between Denmark and the United States contains a "liberal" version of this clause: "if the requested State has *reason to assume* that the requisition for [the offender's] surrender has, in fact, been made with a view to try or punish him for a political offense or an offense connected with a political offense." Extradition Treaty between United States and Denmark, *supra* note 17, at 200.11 (emphasis added). The German counterpart to this provision, for example, is somewhat stricter, requiring "substantial grounds for believing" that political motivation may be behind the extradition request. Extradition Treaty between the United States and Germany, *supra* note 15, at 300.10.

26. See Lubet, *Extradition Unbound: A Reply to Professors Blakesley and Bassiouni*, 24 *TEX. INT'L L.J.* 47, 58 (1989).

the limits of a political offense classification are: any crime committed against the "life or physical integrity of a Head of State or Head of Government of one of the Contracting Parties or of a member of his family"<sup>27</sup> will never qualify as a political offense. To a degree, this exception to the exception already gravely undermines the purported *raison d'être* of the political offense exception.

One more exception to the political offense exception in many treaties, and one of more recent origin, provides that the requested state shall not refuse extradition in cases where the crime is one "which the Contracting Parties or the Requesting State have the obligation to prosecute by reason of a multi-lateral international agreement."<sup>28</sup> Examples of such multilateral treaties are the Geneva Conventions or, among others, any of the treaties mentioned before that were signed to combat terrorism.<sup>29</sup> In reality, this exception simply codifies a concept that has existed almost as long as the political offense exception itself: certain crimes, such as war crimes, slavery, genocide, and air and sea piracy, will always be denied the benefits of political offense status.<sup>30</sup>

One of the most difficult questions connected to the political offense exception is how to determine what crimes actually are considered to be political offenses. Political offenses are generally divided into two kinds: "pure" political offenses (treason, sedition, and espionage), for which a political offense exception appears most sensible; and "relative" political offenses. Relative political offenses are "ordinary," often violent crimes that occur in connection with political uprisings.<sup>31</sup> In the United States, these latter crimes are determined to be political offenses according to the so-called "incidence test." The incidence test, established in *In re Ezeta*,<sup>32</sup> weighs the circumstances in which the offense occurs. If the violence was committed in furtherance of a political aim or uprising, protection from the political offense exception will be granted.<sup>33</sup> Therefore, ordinary crimes that may actually be on the list of enumerated crimes for which extradition shall take place can attain the status of political offenses under this test.

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27. Extradition Treaty between the United States and Germany, *supra* note 15, at 300.10.

28. *Id.*

29. See *supra* note 9.

30. Littenberg, *supra* note 21, at 1200. See also M.C. BASSIOUNI, *The Political Offense Exception in Extradition Law and Practice*, in *TERRORISM AND POLITICAL CRIMES* 398, 434-43 (1975) (pointing out that the lack of codification of crimes against the Law of Nations has hampered the practical application of this doctrine and pointing to the case of the German emperor Wilhelm II, who had been accused, in the Versailles Treaty, of international law violations, but who nevertheless was not extradited by the Dutch to the Allies.).

31. Banoff & Pyle, *supra* note 11, at 170.

32. 62 F. 972 (N.D. Cal. 1894).

33. See Kelly, Note, *The Political Offense Exemption to Extradition: Protecting the Right of Rebellion in an Era of International Political Violence*, 66 OR. L. REV. 405, 411-13 (1987).

In *Ornelas v. Ruiz*,<sup>34</sup> the Court did, however, underscore that the offense has to occur *incidental* to, not merely simultaneous with, a political uprising.<sup>35</sup>

While the pure political offenses are clearly defined, ample room for interpretation is left in determining what makes a crime a relative political offense. The phrasing of the political offense exception is broad and flexible enough to leave room for changing attitudes toward the value or appreciation of a political act. This flexibility, however, makes the concept susceptible to manipulation and creates some of the problems which, as this Note will show, suggest that the political offense exception and the inconsistent way in which it has been applied may actually be a liability both to the humanitarian principles it was designed to further and to the interests of international cooperation it has come to represent.

In defining relative political offenses, decision makers should at all times take into consideration the reasons for having a political offense exception. Such motivations range from humanitarian and fairness concerns to foreign policy considerations.<sup>36</sup> One of the most frequently mentioned reasons for not extraditing persons accused of political crimes is the fear that the requesting state's judicial system will be incapable of treating justly those who have shown their disregard for or distrust of their government. Requested states may also fear that political offenders will be subjected to torture and other inhumane treatment in the requesting country.

Jurisprudential explanations for the political offense exception imply that political crimes are, after all, not real crimes at all. This latter reason, however, should theoretically only apply to the pure political offenses of treason, sedition, and espionage, which are generally victimless acts directed not at persons but at the structure of government. The same explanation does not hold true with respect to relative political offenses, because these include such ordinary crimes as murder or assault committed in the context of a political incident.

A final reason mentioned for the political offense exception concerns foreign policy. The requested state preserves its neutrality toward the internal struggle in the requesting state.<sup>37</sup> Such reasoning suggests that political crimes differ from ordinary crimes, that they are somehow augmented by the political motivation underlying them. But more importantly, this reason may also focus in a rather cynical way on the offender herself and the possibility that the tides might turn and she could become part of a legitimate government with which the requested state would eventually like to be able to interact diplomatically.

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34. 161 U.S. 502 (1896).

35. *Id.* at 511-12; *see also* Kelly, *supra* note 33, at 412.

36. Groarke, *supra* note 22, at 1519.

37. *Id.*

Laudable as some of the motivations behind refusing to extradite political offenders are, the very existence of this exception seems to undo the value of extradition treaties in combatting terrorism. If terrorists can use the intentionally flexible and loose definition of political offenses to avoid being extradited, extradition treaties have lost all value in combatting terrorism. Worse yet, they can become tools for supporting one kind of terrorism while condemning others, depending on the political perspective of the respective interpreter responsible for determining whether an offender shall have the benefit of the political offense exception.<sup>38</sup>

Regrettably, during the last eleven years this seems to be what has happened in American case law on the political offense exception. In a series of proceedings against Irish Republican Army (IRA) terrorists whose extradition Great Britain had requested, the courts held that the political offense exception protected their acts. In *McMullen v. I.N.S.*,<sup>39</sup> the court applied the political offense exception in ruling under the incidence test that McMullen's membership in the Provisional IRA and repeated bombing of British barracks had to be seen in the context of a political uprising. Political offender status was also granted in *United States v. Mackin*,<sup>40</sup> where Mackin was charged with murdering a British soldier, and in *In re Doherty*,<sup>41</sup> where Doherty had actually been convicted of murdering a British soldier but had managed to flee to the United States. The tide seemed to turn somewhat in *Quinn v. Robinson*,<sup>42</sup> where the Ninth Circuit reversed the district court's ruling that the political offense exception prohibited an IRA member's extradition. The Ninth Circuit held that when Quinn shot a constable during a chase in London he was literally too far removed from the locus of the political uprising. Nevertheless, *Quinn* did not deviate radically from the general rule that IRA terrorists have a good chance of finding a safe haven in the United States under the protection of the political offense exception.

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38. A famous remark by the historian Theodor Mommsen captures this dilemma perfectly: "Impartiality in political trials is about on the level with the Immaculate Conception: one can wish for it but one cannot produce it." Littenberg, *supra* note 21, at 1237.

39. 788 F.2d 591 (9th Cir. 1986); see also Fuller, Note, *Extradition of Terrorists: An Executive Solution to the Limitations of the Political Offense Exception in the Context of Contemporary Judicial Interpretations of American Extradition Law*, 11 SUFFOLK TRANSNAT'L L.J. 351, 367-71 (1987).

40. 668 F.2d 122 (2d Cir. 1981).

41. 599 F. Supp. 270 (S.D.N.Y. 1984). For a detailed discussion of *Doherty's* subsequent history, see the case note *Extradition-Denial of Asylum-Withholding Deportation-Different Tactics Used by the Attorney General to Deliver Provisional Irish Republican Army Members to the British: Doherty v. U.S.*, 908 F.2d 1108 (2d Cir. 1990), 20 GA. J. INT'L & COMP. L. 665 (1990). The case was subsequently granted certiorari, and, according to the Supreme Court's decision of Jan 15, 1992, *Doherty* will now be extradited to the United Kingdom. *INS v. Doherty*, 112 S. Ct. 719 (1992).

42. 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

In contrast, Palestinian terrorists have fared worse in American courts. In *Eain v. Wilkes*,<sup>43</sup> Eain was denied a writ of habeas corpus and his extradition was ordered because he could not establish a sufficient connection between his bombing of a market area in the Israeli city of Tiberias (in which two youths were killed) and the political goals of the PLO.<sup>44</sup> The court analyzed the legitimacy of the tactics used and the motive for the act and determined that the bombing of civilians did not constitute a political offense.<sup>45</sup> Likewise, in *Ahmad v. Wigen*,<sup>46</sup> the petitioner, who had allegedly firebombed and attacked a Tel Aviv bus with machine guns, was denied the protection of the political offense exception because he failed to show that there was an actual political uprising in the context of which he could place his acts.<sup>47</sup>

The difficult task for policy makers then seems to be to retain the value of extradition treaties in combatting terrorism and dealing out justice evenhandedly, without depriving "true" political offenders of the benefits of the political offense exception. This task has been hampered extensively by the fact that highly emotional responses to violent terrorist attacks have made it seemingly easy to decide that it would be a solution to render the political offense exception inapplicable to such acts; yet the question remains where one should draw the line between "legitimate violence" in connection with a political uprising (the traditional view of a relative political offense) and the new form of late twentieth-century terrorism. In 1985, the United States and the United Kingdom, in their mutual extradition treaty,<sup>48</sup> attempted a solution by restricting the political offense exception to nonviolent political acts—an attempt that was met with tremendous criticism.

#### D. The "Supplementary Treaty" Between the United States and the United Kingdom

The structure of political offense exceptions had remained virtually unchanged until 1986. Then, during the Reagan administration, an essentially local conflict triggered fundamental changes in the concept and interpretation of the political offense exception. The British government had become increasingly worried about the escape of IRA terrorists to the United States

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43. 641 F.2d 504 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981).

44. *Id.* at 520.

45. *Id.* at 518-23; *see also* Petkunas, *The United States, Israel and Their Extradition Dilemma*, 12 MICH. J. OF INT'L L. 204, 210-11 (1990) (pointing out that the subjective test embodied in *Eain* runs the danger of legitimizing some methods of revolt while rejecting others, thereby undermining the policy underlying the political offense exception).

46. 726 F. Supp. 389 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir. 1990).

47. *Id.* at 409 ("Sporadic acts of violence cannot justify deliberately waylaying a civilian bus operating on a regularly scheduled run . . .").

48. Extradition Treaty, June 8, 1972, United States-United Kingdom-Northern Ireland, 28 U.S.T. 227, T.I.A.S. No. 8468; Supplementary Treaty, *supra* note 18, at 920.5.

where the IRA terrorists could count on strong support for their cause from Irish immigrants and where the political offense exception sheltered them from extradition. In 1986, the two countries entered into a supplementary treaty<sup>49</sup> that drastically changed the character and makeup of the political offense exception.<sup>50</sup> Article 1 categorically excepted from the list of possible political offenses the following crimes:

- (a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;
- (b) murder, voluntary manslaughter, and assault causing grievous bodily harm;
- (c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;
- (d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person; and
- (e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense.<sup>51</sup>

It is highly unlikely that McMullen, Mackin, or Doherty would have escaped extradition under these new provisions.<sup>52</sup> The rephrased exception has had a potentially dramatic impact on the ability of terrorists to claim immunity from extradition under a political offense exception. Article 1 targeted means of operation frequently employed by terrorists (bombings and hijackings, for example) and effectively eliminated all relative political crimes from the political offense exception. It also reaffirmed that the requesting state has the duty to adhere to multilateral treaties. It did not, however, omit the humanitarian exception, which holds that extradition shall not be granted if there is reason to believe that the requesting country is seeking extradition on account of the "race, religion, nationality, or political opinions" of the offender.<sup>53</sup>

## II. THE FUTURE ROLE OF THE POLITICAL OFFENSE EXCEPTION IN THE SUPPRESSION OF TERRORISM

Critics of the Supplementary Treaty between the United States and the United Kingdom point out that depriving those who commit relative political crimes of any protection entails more than the Supplementary Treaty may

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49. Supplementary Treaty, *supra* note 18, at 920.20e.

50. Following the U.S.-U.K. Supplementary Treaty, the United States renegotiated a number of extradition treaties that contained the new version of the political offense exception. *See, e.g.,* Supplementary Treaty on Extradition, Mar. 17, 1987, United States-Belgium, *reprinted in* COMPILATION, *supra* note 8, at 313.

51. Supplementary Treaty, *supra* note 18, at 920.20e.

52. The provisions are "new" with the exception of article 1(a), versions of which are commonly found in extradition treaties predating the U.S.-U.K. Supplementary Treaty.

53. The "humanitarian exception" can be found in article 3 of the Supplementary Treaty, *supra* note 18, at 920.20f.

have openly bargained for: it equals a de facto abolition of the political offense exception. It can also be attacked for hiding behind the façade of practicality and justice the unresolved problem that subjectivity will always be the key factor in determining whose political acts should be protected. The restriction created in the Supplementary Treaty appears to be a curious hybrid of foreign policy goals and an accepted concept of international relations—a hybrid that ultimately accomplishes little, or nothing.

This Part will explore the tension between protecting “justifiable” political offenses and making progress in combatting terrorism. The discussion will first focus on problematic aspects of the restricted political offense exception and other suggestions that have been made, such as leaving the political offense exception intact or inventing separate means of combatting terrorism within extradition treaties. This Note will then analyze whether the opposite approach, namely deleting the political offense exception altogether, could present a feasible solution.

### A. *The Restricted Political Offense Exception*

The rewording of the political offense exception triggered a fervent debate about the repercussions of delimiting the means allowable in political uprisings to qualify as a political offender.<sup>54</sup> Commentators have raised issues such as unfairness, danger, and even unconstitutionality of restricting political offender status to those who commit political acts through nonviolent means.<sup>55</sup> The intensity of the criticism levelled against the new and “compromised” version of the political offense exception in the Supplementary Treaty equals the outcries heard whenever the right to political autonomy or free expression is threatened. That should not be surprising: the political offense exception is the “First Amendment” of extradition treaties and stands for an individual’s right to be protected against harmful consequences incurred for expressing political opinions or acting on political beliefs.

Here, however, the similarities end. No basic constitutional right is abolished or even curbed by restricting the political offense exception. The reactions to the Supplementary Treaty illustrate in fact what one could call an “overvaluation” of the principle itself and of the magnitude of the

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54. See, e.g., Groarke, *supra* note 22; Simon, Note, *The Political Offense Exception: Recent Changes in Extradition Law Appertaining to the Northern Ireland Conflict*, 1988 ARIZ. J. INT’L & COMP. L. 244 (focusing on the particular nature of Northern Ireland’s Diplock courts).

55. Blakesley, *The Evisceration of the Political Offense Exception to Extradition*, 15 DEN. J. INT’L L. & POL’Y 109 (1986-87); Bassiouni, *The “Political Offense Exception” Revisited: Extradition Between the U.S. and the U.K.—A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy*, 15 DEN. J. INT’L L. & POL’Y 255 (1986-87). See Lubet, *supra* note 26, for a reaction to such criticisms.

changes that have affected it since 1986. In an era of increasing and ever more violent terrorist incidents, the political offense exception itself became a battleground on which the desire to grant the freedom to protest for political reasons was at odds with the practical implications of granting political offender status to terrorists who, many seemed to agree, did not deserve such beneficial treatment. Under the earlier formulation of the exception, terrorists and nonviolent political activists alike were declared political offenders for fear that the exception might otherwise be abolished altogether.

The Supplementary Treaty addressed that very tension by reformulating the political offense exception; it attempted to retain the principle of protected political activity for which extradition would be denied and, at the same time, to close the loophole<sup>56</sup> through which terrorists had escaped prosecution.<sup>57</sup> But in the criticism of the Supplementary Treaty, two basic fears converged: that the new version, a mere empty shell, was a radical break with the fundamental concept underlying the political offense exception and that this radical reformulation indicated that soon, without regard for the historical and ideological value of the political offender status, the exception would be extinct.

In 1986, no other extradition treaty to which the United States was a signatory seemed to contain a political offense exception quite like the one that appeared in the Supplementary Treaty with Great Britain and Northern Ireland. The United Kingdom, however, had agreed to a similar provision eight years earlier when it became a signatory to the European Convention on the Suppression of Terrorism.<sup>58</sup> This Convention was the first major

56. Terrorism was the major (and acknowledged) reason for creating the new type of political offense exception. The Letter of Transmittal to the U.S. Senate regarding the Supplementary Extradition Treaty with the Federal Republic of Germany, for example, states expressly:

[The Supplementary Treaty] represents an important step in improving law enforcement cooperation and combatting terrorism by excluding from the scope of the political offense exception serious offenses *typically committed by terrorists*, e.g., murder, manslaughter, kidnapping, use of a destructive device capable of endangering life or causing grievous bodily harm, and attempt or conspiracy to commit the foregoing offenses.

1 EXTRADITION LAWS, *supra* note 9, at 300.67 (emphasis added).

57. While no one agrees on a precise definition of terrorism, the *name* given to the phenomenon evokes its violent and victimizing character. Violent means and instilling fear were exactly what article 1 of the Supplementary Treaty addressed. *See, e.g.*, article 1(d) of the Supplementary Treaty, *supra* note 18, at 920.20e (“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.” (emphasis added)).

58. European Convention on the Suppression of Terrorism (Convention européenne pour la répression du terrorisme; Europäisches Übereinkommen zur Bekämpfung des Terrorismus), Bundesgesetzblatt (BGB), 1978, II, 322-27, *reprinted in* I. LACOSTE, DIE EUROPÄISCHE TERRORISMUS-KONVENTION 201-25 (1982) [hereinafter European Convention] (includes letters of “Reservation and Declaration” by signatories).



group effort to deal transnationally with the problem of terrorism through heightened cooperation among member states.<sup>59</sup> The member states' idea of creating "greater unity" and combatting terrorism with "effective measures" centered as its first goal on "suppression," not prevention, on "ensur[ing] that the perpetrators of [terrorist] acts do not escape prosecution and punishment."<sup>60</sup> Consequently, the European Convention on the Suppression of Terrorism became, first and foremost, a multilateral extradition treaty based on the parties' belief that "extradition is a particularly effective measure for achieving [prosecution and punishment]."<sup>61</sup>

It is therefore no surprise that article 1 of the Convention all but extinguishes the traditional political offense exception. While article 1(a) and (b) reiterate the multilateral treaty responsibility for all member states, article 1(c) through (f) remove from the exception most relative political offenses:

#### Article 1

For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:

- . . .
- (c) a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
  - (d) an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
  - (e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
  - (f) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.<sup>62</sup>

Article 2 of the Convention expands, for signatory states, the reach of article 1. Under article 2, signatories "may" additionally exclude from political offenses "a serious offence involving an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person."<sup>63</sup>

When comparing the United States-United Kingdom Supplementary Treaty to the European Convention, it becomes apparent that the former is a

59. The first extradition test case between the Republic of Ireland and the United Kingdom (for suspected IRA bomber Dessie Ellis) is currently being heard before the Supreme Court in Dublin. "Terror Suspect 'Should Not Be Extradited,'" Press Assoc. Newsfile, Nov. 8, 1990 (LEXIS, Nexis library). Ellis went on a hunger strike to prevent his extradition to the United Kingdom.

60. European Convention, *supra* note 58, at 322.

61. *Id.*

62. *Id.* at 322-23.

63. *Id.* at 323.

mirror image of the latter with one important exception. While the Supplementary Treaty categorically excepts from political offense status crimes such as "murder, voluntary manslaughter, and assault causing grievous bodily harm,"<sup>64</sup> the European Convention omits these crimes originally from article 1 but includes them as an exception in article 2<sup>65</sup> whose signing is *optional* for the signatories of the Convention.<sup>66</sup>

It is entirely in keeping with the United Kingdom's stance toward the European Convention, however, that this optional provision was to become an intricate and mandatory part of the Supplementary Treaty with the United States. Article 13 of the Convention, mindful of the fact that the political offense exception has a different status in different countries, provides that "[a]ny state may . . . declare that it reserves the right to refuse extradition in respect of any offence mentioned in Article 1 which it considers to be a political offence, an offence connected with a political offence or an offence inspired by political motives."<sup>67</sup> The United Kingdom elected not to register reservations under article 13 concerning the enumerated offenses in article 1.<sup>68</sup>

The unequivocal attitude that the terrorist-stricken United Kingdom has shown toward limiting the political offense exception no doubt found resonance in the Reagan administration's own stance toward the phenomenon. The United Kingdom could make a strong case that the United States had to put their treaties where their rhetoric was with respect to terrorism.<sup>69</sup>

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64. Supplementary Treaty, *supra* note 18, at 920.20e.

65. See *supra* text accompanying note 63.

66. European Convention, *supra* note 58, at 323.

67. *Id.* at 326. The Convention goes on to provide that in making that decision, a state shall judge the seriousness of the offense and take into account "(a) that it created a collective danger to the life, physical integrity or liberty of persons; or (b) that it affected persons foreign to the motives behind it; or (c) that cruel or vicious means have been used in the commission of the offence." *Id.*

68. Seven countries, however, did: the Scandinavian countries (Denmark, Iceland, Sweden, and Norway) and Italy all reserved the right to declare any of the enumerated article 1 offenses to be political offenses (with the exception, presumably, of those covered by multilateral treaties) but agreed to adhere to the provisions of article 13—that is, to include in their determination the "vicious" character of the offense and its repercussions for uninvolved persons. European Convention, *supra* note 58, at 207-25. Portugal reserved the right of determination without reference to the article 13 factors. France's declaration, the lengthiest of all, emphasized France's commitment to the values of political self-determination embodied in the French Constitution and its intent to "subject the application of the Convention to certain conditions. On ratification [France] will make the reservations necessary to ensure that . . . human rights will at no time be endangered." *Id.* at 214. Only the declarations of Cyprus, the Federal Republic of Germany, and the United Kingdom elected not to take advantage of the article 13 options. *Id.* at 207, 210, 225. It is therefore hardly surprising that the United States' first supplementary treaty to follow the model of the supplementary treaty with the United Kingdom was with the Federal Republic of Germany.

69. See Letter by the British Embassy to Sen. Orrin Hatch:

We see this new Treaty as a significant, practical contribution to the fight against international terrorism. Stable and reliable extradition arrangements have long

But it is well worth noting that the provisions adopted in that treaty had been created and ratified by the European Council eight years earlier expressly to suppress terrorism.<sup>70</sup> The Supplementary Treaty was therefore preceded in kind by a highly acclaimed Convention whose restriction of the political offense exception, rather than being criticized, had been applauded because of the very context in which it appeared.

The restricted political offense exception has played a vital role in United States antiterrorism policy. In the updated treaties that followed the Supplementary Treaty, the United States emphasized, in preambles and letters of transmittal, the close link between the new versions of the political offense exception in supplementary treaties and the goal of suppressing terrorism.<sup>71</sup> After 1986, therefore, the administration opted to subordinate the acknowledged values of a political offense exception per se to the interest of fighting terrorism with procedural means.

While the link between more easily facilitated extradition and the policy of suppressing terrorism moved openly to the forefront after the U.K.-U.S. Supplementary Treaty, the link had actually been established a few years earlier. The United States, of course, was not a signatory to the European Council's Convention on the Suppression of Terrorism, yet that Convention's provisions did not suddenly "invade" U.S. extradition law in the Supplementary Treaty with the United Kingdom. In 1984, the United States signed an extradition treaty with Italy,<sup>72</sup> in which the formulation of the

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been regarded by the Western democracies as an important part of our defence against terrorists. Unfortunately in recent years terrorist fugitives from UK justice have been able to find safe haven in the United States. . . . [T]he courts accepted that . . . the offences were "political" . . . .

*Hearings*, *supra* note 5, at 167.

70. The preamble to the Supplementary Treaty does not state expressly that the treaty was revised to combat terrorism more effectively; the hearings before passage of the treaty, however, amply attest to this goal. *See, e.g., Hearings*, *supra* note 5, at 1, 52, 53-54 (statements of Senators Hatch, Thurmond, and DeConcini).

71. *See*, for example, the preamble to the Supplementary Treaty with Belgium: "The United States of America and the Kingdom of Belgium, Concerned about the growing danger caused by the increase of terrorist acts, Convinced that extradition is an effective means to combat these acts, Agree to the following . . . ."; COMPILATION, *supra* note 8; Letter of Transmittal from President Reagan to the U.S. Senate regarding the Supplementary Treaty with the Federal Republic of Germany:

[The treaty] represents an important step in improving law enforcement cooperation and combatting terrorism by excluding from the scope of the political offense exception serious offenses typically committed by terrorists, e.g., murder, manslaughter, kidnapping, use of a destructive device capable of endangering life or causing grievous bodily harm, and attempt or conspiracy to commit the foregoing offenses.

1 EXTRADITION LAWS, *supra* note 9, at 300.67.

72. Extradition Treaty, Oct. 13, 1983, United States-Italy, T.I.A.S. No. 10837, *reprinted in* 2 EXTRADITION LAWS, *supra* note 9, at 450.1 [hereinafter Extradition Treaty with Italy] (signed at Rome; entered into force Sept. 24, 1984) (subsequent page references are to EXTRADITION LAWS).

political offense exception marked a thin line between a traditional version, leaving room both for pure and relative political offenses, and the restricted version that appears both in the European Convention and in the Supplementary Treaty with the U.K., which was entered into force two years after the Italian treaty.

The political offense exception (article V) in the Italian treaty includes the two-fold provision not to extradite for political offenses and in situations when extradition is sought for political reasons. It also includes the multi-lateral treaty provision and a Head of State exception. Within these very clauses, however, the first restrictions of the political offense exception at large become apparent. The treaty provides that political offense status will *not* be granted if the crime's "consequences were or could have been grave."<sup>73</sup> Gravity, both of the act itself and of its consequences, is determined by taking into account "the fact that the offense endangered public safety, harmed persons unrelated to the political purpose of the offender, or was committed with ruthlessness."<sup>74</sup>

The focus on the safety of those persons incapable of changing the political reality to which the offender objects encompasses in a nutshell all those crimes enumerated in both the subsequent U.K. Supplementary Treaty and the European Convention: violent acts that, in the context of a political uprising, might have attained relative political offense status in earlier treaties. And in the factors it mentions for determining gravity, the Italian Treaty traces almost verbatim the provisions of article 13 of the European Convention: creating a danger for persons uninvolved in the political motives behind the act and the vicious or ruthless character of its execution. Taking into account the implications of the Italian Treaty's "exception to the exception," one therefore cannot argue that the Supplementary Treaty between the United States and the United Kingdom represented a radical departure from principles held inviolate in extradition treaties until 1986.<sup>75</sup>

If the historical context of the restricted political offense exception is taken into consideration, it becomes clear that the new clause is far from being a radical innovation. Not only can the criticism of unsettling American law not be levelled against it, but it also has some distinct advantages. Under the restricted political offense exception, only persons having allegedly committed pure political crimes such as treason, espionage, and sedition,

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73. *Id.* at 450.9.

74. *Id.*

75. A parallel in case law to this softening of the political offense exception can be found in *Eain v. Wilkes*, 641 F.2d 504 (1981), *cert. denied*, 454 U.S. 894 (1981). In *Eain*, the court essentially created a "wanton crime" exception to the political offense exception: "The [political offense] exception 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." *Id.* at 521.

and *nonviolent* relative political acts are protected from extradition to the requesting state. The undeniable advantage of the new version lies in limiting subjective evaluation of the offender's act, in reducing the danger that the political ideology of the decision maker will influence the outcome of the extradition hearing, and in underwriting enhanced cooperation among nations in prosecuting terrorists. In this way, the political offense exception becomes as certain in the crimes to which it applies as the extradition treaty at large, which applies to enumerated crimes agreed on by the signatory states. By listing a variety of crimes to which the political offense exception must not apply, the margin of error or dispute has clearly been lowered. For the sake of combatting terrorism, an attempt has been made at defining political crime—and defining it *narrowly*—an idea that seems to contradict the concept of the political offense exception.

Yet this seems like a Pyrrhic victory. Flexibility was given up for certainty, and protection of the individual was traded for protection of the group. The motivations which animated the original political offense exception—fairness toward those desiring political change or the desire to remain neutral towards such struggles<sup>76</sup>—have all but disappeared. They now apply to a political offense principle limited to predominantly subversive (treason, for example) and, presumably, less effective (nonviolent only?) political struggle.

Additional concerns have been raised about the prototype of the restricted political offense exception in the Supplementary Treaty between the United States and the United Kingdom. Terrorists extradited by the United States face a special court system in the United Kingdom that lacks some of the protections a defendant could ordinarily expect to have in an American court. Under emergency provisions enacted in reaction to the wave of terrorism in Northern Ireland in the 1970s, so-called Diplock courts (named after Lord Diplock, who recommended their installation) were empowered to try offenders accused of a number of crimes typically committed by terrorists.<sup>77</sup> One major aspect in which Diplock courts differ from other courts is that they adjudicate without a jury. This seemed warranted because empirical studies of juries in Northern Ireland had shown that there existed both political and religious bias by juries against defendants and potential danger of retribution to juries.<sup>78</sup> The European Court of Human Rights has evaluated the fairness of the Diplock court system and found that it did not practice torture but that some techniques used amount to inhumane

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76. Fuller, *supra* note 39, at 363.

77. See generally Groarke, *supra* note 22, at 1535. Crimes over which a Diplock court has jurisdiction are, among others, murder, assault, kidnapping, and any offense involving the use of explosives. *Id.* The offenses essentially equal those mentioned in the European Convention on the Suppression of Terrorism.

78. *Id.* at 1536.

and degrading treatment (such as hooding the prisoners and depriving them of sleep).<sup>79</sup>

The restricted political offense exception represents an attempt at suppressing terrorism by restructuring bilateral extradition treaties. The new provision is consistent with other attempts to combat terrorism through changed extradition concepts, such as the European Convention on the Suppression of Terrorism. Its main drawback, however, lies in its character as a halfway solution. The restricted political offense exception's acknowledged goal of suppressing violent political struggle is at odds with the original protective goals inherent in the political offense exception. As such, the Supplementary Treaty fails to signal to terrorists that *all* terrorist crimes involving violence will be treated as common crimes subject to extradition. As a symbol, therefore, the Supplementary Treaty fails its mission while, on the other hand, managing to remove considerable practical barriers in prosecuting terrorists. This largely unacknowledged and unresolved tension inherent in the restricted political offense exception suggests that other means may be more appropriate in dealing legally with terrorists.

### *B. Keeping the Political Offense Exception Unchanged: Adding Other Safeguards*

In response to the Supplementary Treaty between the United States and the United Kingdom, many critics have suggested that the political offense exception should be left intact and that other means of separating serious terrorist offenses from the realm of protected political activism should instead be created.<sup>80</sup> Such suggestions are animated by the desire to protect the very values the political offense exception has traditionally stood for and by the simultaneous admission that in its traditional formulation the exclusion is susceptible to biased interpretation. In the context of United States adjudication, one could argue that such bias emerges in the decision to shelter IRA terrorists while extraditing members of the PLO accused of terrorist acts. Likewise, there is, for example, great uncertainty whether the protection of the political offense exception applies only to violent "political" acts directed at and involving military and governmental personnel or whether it applies to all kinds of political uprising, even those harming civilians either intentionally or unintentionally. Without implying that those

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79. *Id.* at 1536-37; see also Judge Sprizzio's comments on the fairness of the Diplock courts in *In re Doherty*, 599 F. Supp. 270, 276 (S.D.N.Y. 1984). It should be pointed out that the European Court of Human Rights did not find fault with the *legislation* underlying the Diplock courts, but with the application as practiced until August 1971. *Ireland v. United Kingdom*, 2 EHRR 25, Para. 241 (1979-80).

80. See Blakesley, *supra* note 55; Kinneally, *The Political Offense Exception: Is the United States-United Kingdom Supplementary Extradition Treaty the Beginning of the End?*, 2 AM. U.J. INT'L L. & POL'Y 203 (1987).

who decide on the applicability of the political offense exception consciously favor one kind of political struggle over another, the provision nevertheless remains a very loosely circumscribed set of terms open to radically conflicting interpretations. Because the same deficiency of definition exists with respect to terrorism, uncertainty clashes with uncertainty when terrorism has to be located on a scale of acceptable political struggle in the context of deciding on protection from extradition.

As a result, alternatives have been suggested to rationalize the continued existence of the political offense exception or to bolster the fairness of decisions in the context of a dwindling political offense exception: prosecuting all terrorists before an international court specializing in terrorist crimes and creating an international criminal statute.

### 1. An International Court of Terrorism

Supporters and critics of the political offense exception share two fears: that an undeserving offender might obtain the shelter of the exclusion and, conversely, that an offender deserving of political offender status might be extradited to a country with an unfair judicial system. This latter fear is addressed in the suggestion that an international court of justice that has jurisdiction over those accused of terrorist offenses be created.<sup>81</sup>

According to Groarke, such an International Court of Terrorism could, for example, be created in Europe where the danger of terrorism is pervasive. It would operate under the auspices of the Council of Europe and would be modelled after the European Court of Human Rights, a court that has proven effective, not the least for its symbolism.<sup>82</sup> Although the United States might not be able to participate in such a court by dispatching its own judges or prosecutors, it should feel more comfortable extraditing an accused to a tribunal consisting of representatives of a variety of nations than to a requesting state against whose regime an alleged offender has fought. The highest possible degree of impartiality would be attained by such a measure. At the same time, at least two more goals could be realized by such a court: it would attract attention to the fact that nations are cooperating to combat terrorism through nonviolent means, namely adjudication; and a clearer understanding of the phenomenon of terrorism and the tolerable limits of political conflict within democratic states would emerge.

Yet creating a court devoted to the prosecution of alleged terrorists is a solution very much tailored to the European community and to the close relationship the United States cultivates with it. In Europe, both the will to

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81. See Groarke, *supra* note 22, at 1543.

82. *Id.* at 1542-44.

cooperate and the procedures necessary for actual cooperation already exist. The problem remains, however, with respect to all non-European treaty partners with whom the United States already has or will establish extradition treaties. It is unlikely that other nations would be able to cooperate in similar fashion to establish international courts with jurisdiction over terrorists<sup>83</sup>—not least because of widely varying state ideologies that make the interpretation and application of the political offense exception such a problem in the first place.

## 2. An International Criminal Code

The problem of differentiating between nonprotected terrorist crimes and protected political activity could most ideally be solved within the context of an international criminal code that sets clear substantive and procedural standards. The UN has attempted to create a draft for such a code, but since first undertaking the task in 1949, it has made very little progress.<sup>84</sup> Professor Bassiouni, however, has recently filled this void by outlining an impressive and comprehensive model code.<sup>85</sup> For the suppression of terrorism, Professor Bassiouni's code would be effective on two levels: it incorporates into the list of international delicts most crimes characteristic of terrorist activity,<sup>86</sup> and it establishes in its procedural part detailed extradition provisions that attempt to address the dilemma of the political offense exception.

Article VI of the Procedural Enforcement Part sketches out the extradition provisions for the draft code.<sup>87</sup> As Professor Bassiouni notes, this part is particularly specific; he thereby acknowledges the important role that extradition plays in the context of international cooperation and, at the same time, the host of practical problems associated with it.<sup>88</sup> Two clauses are particularly noteworthy with respect to the suppression of terrorism. Section I exempts from political offense status all crimes contained in the "Special Part" of the Code, among them offenses typically committed by terrorists, such as hijacking, the use of force against protected persons, and the taking

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83. Such a court *could* be established under the auspices of the United Nations; it would, however, be the first UN court with special jurisdiction and the first such court addressing the claims of individuals rather than states.

84. M.C. BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 3-11 (1987) (also pointing out the UN's equally fruitless efforts in proposing the institution of an international criminal court to the member states).

85. *Id.*

86. *Id.* at 157-62 (Aircraft Hijacking (article IX); Threat and Use of Force Against Internationally Protected Persons (article XII); Taking of Civilian Hostages (article XIII)).

87. *Id.* at 193-96.

88. *Id.* at 195.



of civilian hostages.<sup>89</sup> Section IV delineates the exceptions to extradition that survive section I. Notably, the political offense exception has virtually disappeared and been replaced with an amalgamation of the humanitarian and the political protection clauses:

1.3. Extradition may be denied to a requesting Party if the requested Party has good reason to believe that the request for extradition has been made for purposes of prosecuting or punishing that person on account of his race, religion, nationality, political opinion or belief, or that that person's position may be prejudiced, or that the criminal procedures to which he will be subjected may not be impartial, or that he would be discriminated against for any of the above-stated reasons.<sup>90</sup>

Professor Bassiouni's approach to the political offense exception combines two characteristics that could ensure the fairness of extradition with respect to political offenders and yet act as a tool in the suppression of terrorism: his Code relies on the certainty of enumerated offenses and, at the same time, takes into account the fairness of the judicial system of the requesting state. This approach virtually deletes the political offense exception but safeguards the values it represents in protective clauses.

Unfortunately, Professor Bassiouni's model is plagued with practical drawbacks similar to those in the UN's ill-fated attempts at creating an international criminal code. Whatever the form of an international code and whatever the date on which it could be presented for ratification, its success rests entirely on the requirement that a substantial number of nations become signatories. The possibility that this could happen lies, at best, far in the future; it is at worst illusory. As Hans-Heinrich Jescheck has noted in the context of establishing an international criminal court: "[This] would presuppose a properly functioning system of collective security, which cannot be achieved as long as the world situation is marked by the exigencies of Great Power politics."<sup>91</sup> An international code requires a magnitude of international cooperation that cannot be achieved at this time. An international criminal code can therefore not yet solve the very real problems of heightened international collaboration in the face of rising terrorism.

But Professor Bassiouni's suggestions on extradition in his model Code can fruitfully be incorporated into an alternative solution until an international criminal code is widely ratified. Currently, in U.S. law, the political offense exception is stripped, in the interest of combatting terrorism, of its

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89. See *id.* at 195. In his commentary on section I, Professor Bassiouni also refers to various conventions for an understanding of the international crimes exempted from the political offense exception: the 1948 Genocide Convention (article VII); the European Convention on the Suppression of Terrorism; and the Additional Protocol Amending the Geneva Conventions of August 12, 1949 (Protocol I). *Id.*

90. *Id.* at 194.

91. Jescheck, *Codification: Development and Future Prospects*, in M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: CRIMES 99-100 (1986).

original meaning and values. Professor Bassiouni's approach underscores the point that a traditional political offense exception is dispensable in extradition treaties as long as important safeguards, such as humanitarian and political protection clauses, are retained. The next section explores how the Bassiouni model can serve as a solution for bilateral United States extradition treaties.

### *C. Deleting the Political Offense Exception: A Proposal*

Would deleting entirely the political offense exception be a feasible solution to the interpretational problems that have plagued the provision or would eliminating essential values underlying the concept be too dear a price to pay for clarity? International efforts to collaborate on suppressing terrorism, as discussed previously, have focused on using nonviolent means and, in particular, extradition agreements that contain the restricted political offense exception. In limiting political offender status only to those who attempt to bring about political change through nonviolent means, the political offense exception in its recent form exemplifies the nonviolent, cooperative approach that has now taken hold in the international community in the fight against terrorism. A traditional political offense exception contradicts the international, nonviolent approach by sanctioning violence as a means to bring about political change.

In its traditional form, the political offense exception cannot serve as a tool in suppressing terrorism because it does not differentiate between political activism and terrorism. Yet in its restricted, Supplementary Treaty form, it tacitly erodes its own *raison d'être* with the goal of combatting all forms of terrorism by exempting from the exemption all violent political activism, by sacrificing some forms of violent political struggle that the political offense exception might originally have been meant to protect, such as a true, yet violent political uprising, perhaps in the context of a failed revolution directed at eliminating a ruling government. This might mean that the political offense exception has become expendable—as long as the values of fairness and neutrality it embodied are retained in other provisions.

Yet today, how valid are the values that underlie the original political offense exception and that, critics claim, were essentially eroded in the restricted political offense exception? In its original form, the political offense exception protected all political struggle, be it violent or nonviolent. Common violent offenses attained the protected status of a relative political offense as long as they occurred incidental to a political uprising. At the end of our century, this attitude has dramatically changed in the community of democratic nations who believe in political change through the ballot rather than the bomb.<sup>92</sup> The European Convention on the Suppression of

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92. *Hearings*, *supra* note 5, at 63.

Terrorism categorically rejected protection of violent political struggle. Among those nations that have promoted the steady rise of democratization and that have, at the same time, experienced rising repulsion toward terrorist activity, it should be inconceivable to sanction terrorist violence with the political offense exception.

Eliminating the political offense exception would send a strong signal to terrorists that nations will consider it their foremost duty to combat crime; thus, supporting struggle, even democratic struggle, in other countries becomes subordinate to that goal. Therefore, while the Supplementary Treaty can be seen as an important step in achieving this goal, it lacks the symbolic and deterrent impact on terrorist activity by pretending to leave the essential nature of the political offense exception intact. Professor Bassiouni's Criminal Code, of course, would achieve such symbolic effect, but, as we have seen, it is unlikely that his concepts will reach the mainstream of international law enforcement in the near future.

Unaffected by antiterrorism concerns, however, is the political offense exception's goal of fair treatment for the accused in the requesting state. The criminal should not receive unduly harsh treatment in the requesting state based on his or her particular political beliefs. This consideration applies as much to the "legitimate" political revolutionary as to the terrorist—an idea very much in keeping with a fair system. In eliminating the political offense exception, it is this particular value that has to be safeguarded.

Several kinds of exclusionary provisions in most extradition treaties already fulfill this function and could continue to do so.<sup>93</sup> For example, a "humanitarian exception" protects all those who might suffer disproportionately from extradition. The provision in the United States' extradition treaty with Denmark is typical:

Extradition shall not be granted in any of the following circumstances:

- . . . . .
5. If in special circumstances, having particular regard to the age, health or other personal conditions of the person concerned, the requested State has reason to believe that extradition will be incompatible with humanitarian considerations.<sup>94</sup>

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We are not seeking to negotiate treaties [of the Supplementary Treaty kind] with nations that do not have democratic systems and that do not have fundamentally fair judicial systems.

What we are saying here . . . is that with respect to those sorts of nations, where you have the option of the ballot box, you cannot resort to the bullet and the bomb.

*Id.* (statement of Abraham Sofaer, Legal Advisor, Department of State).

93. A similar solution of relying predominantly on other safeguarding provisions typically present in extradition treaties has been advocated before by Sapiro, Note, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U. L. REV. 654, 700-01 (1986).

94. Extradition Treaty between the United States and Denmark, *supra* note 17, at 200.11.

A similar function is fulfilled by nondiscrimination clauses. The European Convention version prohibits extradition where

the requested State has substantial grounds for believing that the request for extradition . . . has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.<sup>95</sup>

This particular clause links the nondiscrimination clause with the "political protection provision." The latter clause vitally protects the right to a fair trial. It appears frequently in United States extradition treaties, often linked to the political offense exception proper, but independently as well:

Extradition shall not be granted . . . if the person whose surrender is sought proves that the request for surrender has been made in order to try or punish him or her for a political offense.<sup>96</sup>

Unlike the political offense exception proper, this clause is aimed exclusively at granting fair treatment and allows extradition where no showing is made that the offender might be treated unfairly. (In comparison, the political offense exception proper exempts from extradition whether or not a fair trial is possible in the requesting country.)

Finally, protection comes from the "double criminality clause."<sup>97</sup> This provision limits extraditable offenses to those "described in the Appendix to this Treaty which are punishable under the laws of both Contracting Parties."<sup>98</sup>

While all of these provisions provide some assurance that an offender will be extradited only if he can get a fair trial, the assurance is not complete. In deleting the political offense exception, means must be sought to ascertain the fairness of the judicial and law enforcement systems in the requesting state. If the aim is fairness, the efforts to ascertain fairness should be located at the origin of the extradition treaty, not in case-by-case adjudications of the judiciary. The injustices that can occur in that instance are shown by the case law on the IRA terrorists and the Palestinians,<sup>99</sup> notably the *Ahmad* case.<sup>100</sup>

In *Ahmad*, the petitioner had argued that even if he could not be protected under a political offense exception the court should deny his extradition to Israel on the basis of a political protection clause. Ahmad had introduced

95. European Convention, *supra* note 58, art. 8(2), at 324.

96. Extradition Treaty with Italy, *supra* note 72, art. 5, para. 1, at 450.9.

97. This clause can only be an efficient safeguard, however, if it can be raised as a bar to extradition during the extradition hearing itself—rather than at the trial.

98. Extradition Treaty between the United States and Germany, *supra* note 15, art. 2(1)(a), at 300.7.

99. See *supra* text accompanying notes 39-47.

100. *Ahmad v. Wigen*, 726 F. Supp. 389 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir. 1990).

evidence that, as a PLO member accused of violence against Israelis in West Bank territory, he would not receive a fair trial in Israel. While there is usually a presumption of fairness in favor of the requesting country if the State Department approves of the extradition, in this case even the State Department's own report on human rights conditions in Israel noted that torture and other human rights violations occurred in Israel's justice system.<sup>101</sup> Nevertheless, the court found that Ahmad had not made a "clear and convincing showing" that he would be discriminated against upon arrival in Israel.<sup>102</sup> The underlying reason for this decision seemed to be that the court feared it would get involved in forging foreign policy if it were to declare Israel *natio non grata* with respect to extradition.

*Ahmad* illustrates the danger of case-by-case adjudication of circumstances outside of the expertise of the judiciary, such as the fairness of a foreign judicial system.<sup>103</sup> Instead, the requisite condition for enacting any extradition treaty should be a finding by the executive that the state with which an extradition treaty is sought is not accused of judicial unfairness or human rights violations. (Indeed, one has to wonder why the United States—quite apart from any considerations with respect to the political offense exception—would want to enter into extradition treaties with any countries accused of human rights violations.)<sup>104</sup>

An acceptable standard for fairness is not hard to find: it should be measured against the principles embraced by such organizations as Amnesty International or the Helsinki Reports on Human Rights. Under this standard, 34 of the current 104 extradition treaties to which the U.S. is a signatory would today no longer be defensible.<sup>105</sup> Amnesty International's

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101. *Id.* at 415-16.

102. *Id.* at 416.

103. While initial decisions on extradition are made by the executive branch, courts, through the procedural device of writ of habeas corpus, control the fair execution of extradition decisions. For a description of the process and an analysis of "due process" limitations placed on denials or grants of extradition, see Wellington, *Extradition: A Fair and Effective Weapon in the War on Terrorism*, 51 OHIO ST. L.J. 1447 (1990). Wellington suggests that judicial evaluation of foreign judicial and executive systems be handled in a "diplomatic and prudent fashion so as to preserve fairness" and to ensure preservation of friendly relations with the requesting state. *Id.* at 1455 n.59. Common sense would suggest that, in general, the executive branch would be in a position more suited to judging foreign systems on a regular and timely basis, and have better access to resources, than the judiciary.

104. This approach is in keeping with the increased role that individual human rights law has played in the adjudication of extradition issues in federal courts. See generally Quigley, *The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law*, 15 N.C.J. INT'L L. & COM. REG. 401 (1990).

105. The following 32 countries with whom the U.S. has extradition treaties are mentioned in Amnesty International's Report on countries that have exercised some kind of torture on prisoners in the recent past: Argentina, Bolivia, Brazil, Chile, Colombia, the Congo, Egypt, El Salvador, Ghana, Guyana, Haiti, Honduras, India, Iraq, Israel, Italy, Kenya, Lesotho, Mexico, Pakistan, Paraguay, Peru, Poland, Romania, South Africa, Spain, Sri Lanka, Surinam, Turkey, Uruguay, Yugoslavia and Zambia. AMNESTY INTERNATIONAL, TORTURE IN THE EIGHTIES: AN AMNESTY INTERNATIONAL REPORT (1984).

findings could be supplemented with the United States' own findings embodied in the Country Reports on Human Rights Practices that are collected for those countries receiving United States aid and for all member states of the UN.<sup>106</sup> Such a prerequisite for extradition treaties would avoid not only seemingly unjust decisions on extradition, but also results of cases such as *Ahmad*. Particularized findings, rather than, for example, "blank extradition checks" to democratically governed states, are also imperative in light of the fact that democracy does not by definition, or in practice, mean that methods applied in the judiciary and executive process are necessarily fair.<sup>107</sup>

A system of protective clauses and prerequisite findings on the fairness of the requesting state's judicial system benefits in equal measure offenders accused of pure and of relative political crimes—an important consideration, since deleting entirely the political offense exception actually affects both the treatment of pure and relative political offenses. The system's safety for pure political offenses can be tested against a controversial provision in the German Criminal Code,<sup>108</sup> section 129a, which prohibits participation in organizations formed in order to plan or commit terrorist attacks.<sup>109</sup> Were Germany to request extradition of a would-be terrorist from the United States, one clause preventing such extradition would be the double criminality clause. Under American constitutional law, participation in a group advocating the overthrow of the government or other violent change

106. See, for example, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990: REPORT SUBMITTED TO THE COMMITTEE ON FOREIGN RELATIONS U.S. SENATE AND THE COMMITTEE ON FOREIGN AFFAIRS HOUSE OF REPRESENTATIVES BY THE DEPARTMENT OF STATE, FEB. 1991.

107. For example, Amnesty International reported for a date as late as October 1989 that detention without charge of peace activists and others was possible in Czechoslovakia and East Germany. "Amnesty Says Violations Persist Despite East Bloc Improvements," Reuter Library Report, Oct. 24, 1989 (LEXIS, Nexis library, Lbyrpt file). The detention methods in (West) German prisons—complete isolation for example—have also been cited as inhuman. *Id.*

108. See Schueler, *Strafverfolgung ohne Tat: Der Paragraph 129a: ein Anschlag auf den Rechtsstaat*, *Die Zeit*, Nov. 16, 1990, at 17, col. 1. See also Baker's discussion of this section and its repercussions for the *Rechtsstaat*. Baker, *The Western European Legal Response to Terrorism*, 13 BROOKLYN J. INT'L L. 1, 20-21 (1987).

109. Bildung terroristischer Vereinigungen

(1) Wer eine Vereinigung gründet, deren Zweck oder deren Tätigkeit darauf gerichtet sind,

1. Mord, Totschlag oder Völkermord . . .

2. Straftaten gegen die persönliche Freiheit . . . zu begehen, oder wer sich an einer solchen Vereinigung als Mitglied beteiligt, wird mit Freiheitsstrafe von einem Jahr bis zu zehn Jahren bestraft.

German Criminal Code (StGB) § 129(a):

Formation of a Terrorist Association:

(1) Whoever founds an association whose goal or activity is directed at

1. murder, manslaughter or genocide . . .

2. crimes against the personal freedom [or any other commonly dangerous crimes] or whoever participates in such an association as a member shall be punished by a sentence of one year to ten years.

Even an *attempt* to commit this felony is punishable under § 23(1).

is not punishable, unless the participant's aim is to incite "imminent lawless action" and his activity is "likely to incite or produce such action."<sup>110</sup> In addition, the absence of the felony "Membership in a Terrorist Organization" in the list of enumerated offenses for which extradition is mandatory protects the offender. Lastly, a political protection clause would prevent extradition in this situation, although in general the justice system of the Federal Republic is regarded as fair.

### CONCLUSION

The political offense exception is marred by the tension between its values of political self-determination and the discomfort in applying its protection to acts committed by terrorists. Taking also into consideration the need for strong cooperation between nations in light of increasing terrorist violence, this Note suggests that the political offense exception, both in its traditional and in its restricted Supplementary Treaty version, has outlived its time. In its stead, a system of safeguards should become mandatory to ensure that offenders will receive a fair trial if extradited. Such a system, and any extradition treaty per se, should be based on regular executive findings evaluating the general fairness of the judicial system of a requesting country.

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110. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). This case would still protect the German would-be terrorist, because *Brandenburg* does not take into account the seriousness of the act advocated.