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Legislative Reform of U.S. Extradition Statutes: Plugging The Terrorist's Loophole

WILLIAM M. HANNAY*

The United States has been in the forefront of those nations advocating mandatory extradition or prosecution of terrorists, the concept embodied in the Convention for the Suppression of Unlawful Seizure of Aircraft¹ and in other multilateral agreements. Flaws in our own extradition procedures, however, make it difficult for us to practice what we preach. Indeed, recent U.S. court rulings have appeared to put the imprimatur of our judicial system on the violent acts of terrorists who have no respect for human life, for democratic process or for the Rule of Law. Extradition procedures that allow such dangerous precedents must be reformed as an essential step in improving U.S. antiterrorism efforts.

Legislation was almost enacted during the second session of the 97th Congress that would have recodified and modernized all U.S. extradition procedures. The Senate version of this legislation (S. 1940) was developed over a two-year period in cooperation with the Departments of State and Justice and was passed by the Senate with amendments in August of 1982.² In June of 1982, the House Judiciary Committee reported out its own version of the legislation, which was also based in large part on the executive branch's recommendations.³ Many of the proposed changes in

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1. Convention for the Suppression of Unlawful Seizure of Aircraft, *done* Dec. 16, 1970, *entered into force* Oct. 14, 1971, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105.

2. S. 1940 was first introduced by Senator Strom Thurmond, chairman of the Judiciary Committee, on December 11, 1981 after hearings. *See Extradition Act of 1981: Hearings on S. 1639 Before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess.* 334 (1981) [hereinafter cited as 1981 *Sen. Hearings*]. The text of the earlier bill (S. 1639), correspondence from the Departments of State and Justice, and a detailed Memorandum on Extradition Legislation were published in the Congressional Record. *See* 127 CONG. REC. S9952 (1981). Some changes were made in the "political offense" provisions of S. 1940 by the Senate Judiciary Committee in April of 1982. *See also Amendments to Title 18 of the United States Code Relating to International Extradition, S. REP. No. 331, 97th Cong., 2d Sess.* 2638 (1982) [hereinafter cited as S. REP. 331]. A different approach to the "political offense" determination, fundamentally changing the Judiciary Committee's approach, was recommended by the Senate Committee on Foreign Relations in June of 1982. *See Senate Comm. on Foreign Relations, Extradition Act of 1981, S. REP. No. 475, 97th Cong., 2d Sess.* 79 (1982) (adopted on the floor of the Senate without debate on Aug. 19, 1982) [hereinafter cited as S. REP. No. 475]. *See also* 128 CONG. REC. S10,884 (1982).

3. H.R. 5227 was introduced by Representative William J. Hughes, Chairman of the Subcommittee on Crime of the House Judiciary Committee on December 15, 1981. *See* 127 CONG. REC. E5877 (1981). The bill was subsequently reintroduced as H.R. 6046 on April 1,

the existing statutory scheme were similar in both the House and Senate versions.⁴ There were, however, significant differences in the two versions with respect to the "political offense" exception to extradition treaties. The controversy surrounding the varying approaches to the "political offense" issue effectively prevented floor action in the House. Thus, it remains for the 98th Congress to consider resubmitted extradition reform legislation.

I. BACKGROUND TO THE "POLITICAL OFFENSE" ISSUE

Extradition treaties universally contain a list of enumerated offenses for which extradition is authorized. Extradition treaties of the United States, like those of virtually all other nations, also incorporate an exception or exclusion prohibiting extradition in two circumstances related to politics: (1) where the offense for which extradition is requested is a "political offense" and (2) where the extradition request is politically motivated, even though the offense charged is not itself a "political offense."

Typical of the language of such an exclusion is that in the extradition treaty between Great Britain and the United States, which states:

1982 after the Subcommittee on Crime approved an amendment in the nature of a substitute and reported it as such to the House Judiciary Committee. The full committee ordered H.R. 6046 favorably reported on May 18, 1982; the accompanying report was printed on June 24, 1982. *See* HOUSE COMM. ON THE JUDICIARY, EXTRADITION ACT OF 1982, H.R. REP. NO. 627, Pt. 1, 97th Cong., 2d Sess. (1982) [hereinafter cited as H. Rep. 627, Pt. 1]. The bill was sequentially referred to the House Foreign Affairs Committee, which recommended passage on July 29, 1982 and reported it on August 3, 1982. *See* H.R. REP. NO. 627, Pt. 2, 97th Cong., 2d Sess. (1982) [hereinafter cited as H. Rep. 627, Pt. 2]. The House took no further action upon the bill. 2 CONG. INDEX (CCH) 34,519 (1981-82).

4. Section 3195 of both the House and Senate versions would correct a long-standing anomaly in extradition by creating a right of appeal for the government as well as the person faced with the extradition. Traditionally, the defendant could seek appellate review by habeas corpus, but the government had no means of review at all. Another curious procedural practice would also be changed in both versions. Under current law, extradition requests are heard by U.S. magistrates. Under § 3194(f)(1) of both the House and Senate versions, either party can have the political offense issue heard by a district judge instead of a magistrate due to the importance and complexity of that issue.

Other major changes in extradition procedures contained in S. 1940 include the following (the corresponding provisions of H.R. 6046 are noted in parentheses): § 3193 (§ 3191) recognizes that a U.S. obligation to extradite particular classes of offenders is created by certain multinational agreements, such as the Hague Convention, as well as by bilateral agreements; § 3192(d)(1) codifies existing standards for bail in extradition cases, permitting release only if the fugitive can demonstrate "special circumstances" warranting it (however, § 3192(d)(2) of H.R. 6046 takes a different approach, using the standards in the Bail Reform Act with slight modifications); § 3194(d) (§3194(g)(1)) simplifies procedures for the authentication of documents and also establishes that extraditability can be determined solely on hearsay or documentary evidence (§ 3194(g)(3) of H.R. 6046 only permits a court to "consider" such evidence); § 3196(a)(3) (§3196(a)) authorizes the Secretary of State to extradite U.S. nationals unless such surrender is expressly prohibited by the applicable treaty, thus reversing the effect of *Valentine v. U.S. ex rel. Neidecker*, 299 U.S. 5 (1936). Differences between the original Senate version and the House version were discussed by Rep. Hughes in the Congressional Record. 128 CONG. REC. E2241 (May 13, 1982).

(1) Extradition shall not be granted if . . . (c)(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or (ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character.⁵

For sound policy reasons, it has long been considered the exclusive province of the Secretary of State to determine whether the extradition request is politically motivated.⁶ On the other hand, for no particularly apparent reason, American courts have exercised jurisdiction over the "political offense" issue since the case of *In re Ezeta* in 1894.⁷

Congress is attempting to revise U.S. extradition laws, spurred in part by recent efforts of international terrorists to use the "political offense" exception as a loophole to avoid extradition. The decisions in several recent extradition cases involving terrorists illustrate the problem. These cases reveal serious flaws in the existing judicial test for determining what constitutes a "political offense" and make clear that such a determination involves foreign policy choices that should be made by Congress and the President, not the courts.

The traditional Anglo-American test for defining a "political offense," as reflected in these decisions, represents a grave danger to world order. It is not so much that the United States may well become a more

5. Treaty on Extradition, Oct. 21, 1976, United States-United Kingdom, art. V., 28 U.S.T. 227, T.I.A.S. No. 8468.

6. The rationale for deferring to the executive branch is described in the leading case on this point:

[I]t is not a part of the court proceedings . . . to exercise discretion as to whether the criminal charge is a cloak for political action, not whether the request is made in good faith. Such matters should be left to the Department of State.

. . . It is thought by the court that application to the Secretary of State of the United States will furnish full protection against the delivery of the accused to any government which will not live up to its treaty obligations, and that the Secretary of State will be fully satisfied (before delivering the accused to the demanding government) that he is wanted (in the legal sense of that term) upon a criminal charge, that it is not sought to secure him from a country upon which he is depending as an asylum because of political matters, and that the treaty is not actually used as a subterfuge.

In re Lincoln, 228 F. 70, 74 (E.D.N.Y. 1915), *aff'd per curiam sub nom.*, *Lincoln v. Power*, 241 U.S. 651 (1916). *Accord Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971); *In re Gonzalez*, 217 F. Supp. 717, 722 (S.D.N.Y. 1963).

7. 62 F. 972 (N.D. Cal. 1894). In *Ezeta*, the particular treaty specified that "the provisions of this treaty shall not apply to any crime or offense of a political character." *Id.* at 997. The district judge held that he could not leave it to the executive branch but rather had to determine the question, because the treaty "terminates [the magistrate's] jurisdiction when the political character of the crime or offense is established." *Id.* Until recently, the Government did not challenge the courts' exercise of jurisdiction over the political offense issue. When Government attorneys finally began to question jurisdiction, they were met with the courts' response that the practice was not too traditional to be changed without legislative approval. *In re Mackin*, 668 F. 2d 122, 13237 (2d Cir. 1981); *Eain v. Wilkes*, 641 F.2d 504, 51317 (7th Cir.) *cert. denied*, 454 U.S. 894 (1981).

attractive refuge for members of the Palestinian Liberation Organization (PLO), Provisional Irish Republican Army (PIRA), the Bader-Meinhoff gang, the Italian Red Brigade and other terrorists, though that is possible. Rather, the danger lies in the impact of these decisions overseas. Recent U.S. court decisions have sent out a message to the world that the American judicial system accepts the notion that the end justifies the means and that political violence is an acceptable method of accomplishing political goals. These decisions appear to place a stamp of approval on, and thereby sanctify, terrorist activities of all kinds. A legislative remedy to counter this danger is essential.

In each of these recent U.S. cases, the test of a "relative" political offense set forth in the nineteenth-century English case of *In re Castioni*⁸ was blindly accepted and mechanically applied. The court in *Castioni* stated that a political offense is a crime which is "incidental to and formed a part of political disturbances."⁹

In the *McMullen* case, Peter McMullen was charged with the bombing of a British army installation in England.¹⁰ In the *Mackin* case, Desmond Mackin was charged with the attempted murder of a British soldier dressed in civilian clothes who had been standing at a bus stop in Belfast.¹¹ In the *Quinn* case, William Quinn was charged with the murder of a London police officer and participating in at least eight bombing incidents.¹² Dutifully applying the *Castioni* test, the magistrates in both

8. [1891] 1 Q.B. 149. In *Castioni*, Switzerland sought the extradition of a man charged with murder. The death had occurred during a riot and appeared to have been more accidental than intentional. The court justified the decision not to extradite by stating that, after a civil war, "one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement." *Id.* at 167.

9. *Id.* at 153.

10. *In re the Extradition of McMullen*, No. 37-81-099 MG (N.D. Cal., filed May 11, 1979) (Woelffen, Magis.), reprinted in 1981 *Sen. Hearings*, supra note 2, at 294. See also *McMullen v. I.N.S.*, 658 F.2d 1312 (9th Cir. 1981) (deportation stayed on ground that the Provisional Irish Republican Army (PIRA) was likely to "persecute" him as a defector if he was returned to Ireland).

11. *In re Extradition of Desmond Mackin*, No. 80 Cr. Misc. 1 (S.D.N.Y., filed Aug. 13, 1981) (Buchald, Magis.), reprinted in 1981 *Sen. Hearings*, supra note 2, at 140, appeal dismissed *sub nom.* U.S. v. States v. Mackin, 668 F.2d 122 (2d Cir. 1981). The magistrate concluded that the PIRA, or "provos," were conducting a violent political uprising in one area of Belfast. The U.S. executive branch took the position that PIRA activity consisted of individual acts of violence aimed frequently at civilians and designed to destabilize society rather than overthrow the government directly and accordingly fell outside the political offense exception, but the magistrate rejected this sensible analysis. 1981 *Sen. Hearings*, supra note 2, at 214-22. The author has been informed by the prosecutor in this case that, in return for the government's agreement to drop any further extradition proceedings, Mackin consented to be deported to the Republic of Ireland in December, 1981.

12. *Quinn v. Robinson*, No. C-82-6688, slip op. (N.D. Cal., filed Oct. 3, 1983) (Aguilar, J.). The district court granted Quinn's petition for habeas corpus and set aside an earlier decision by a magistrate ordering extradition. Crim. No. CR-81-146 Misc. (N.D. Cal., filed Sept. 29, 1982) (Langford, Magis.). U.S. District Judge Robert Aguilar concluded that the conspiracy to cause explosions charge against Quinn was "incidental to and in the course of" a political uprising because the bombings were intended "to protest British rule in Northern

Mackin and *McMullen* and the district court in *Quinn* concluded that extradition was prohibited since a political "disturbance" or "uprising" was taking place in Northern Ireland and the attempts by Mackin, McMullen, and Quinn, as members of the outlawed Provisional Irish Republican Army, to kill British security personnel, were "incidental to" these disturbances.

In the *Abu Eain* case, Ziyad Abu Eain, an alleged member of the Palestinian Liberation Organization, was charged with planting a bomb which killed or injured several children in an Israeli resort town.¹³ On habeas corpus review, the U.S. Court of Appeals for the Seventh Circuit upheld the magistrate's original determination that the "political offense" exception was inapplicable, because the bombing was not "incidental to" the PLO's objectives and "solely implicates anarchist-like activity."¹⁴ While the result is entirely correct, the Seventh Circuit's application of the *Castioni* test in *Abu Eain* was ultimately just as mechanical as that in *Mackin*, *McMullen* and *Quinn*. Indeed, the court appeared to accept the proposition that "acts that disrupt the political structure of a State, and not the social structure" would be exempt.¹⁵

The absurdity and ultimate cruelty of the *Castioni* test is illustrated by the statement of the magistrate in *McMullen* that "[e]ven though the offense be deplorable and heinous, the criminal actor will be excluded from deportation [sic] if the crime is committed under these prerequisites."¹⁶

Ireland and to bring the British to the bargaining table." Slip op. at 36. Judge Aguilar added that "any violence coming to the general civilian population was incidental to the political goal of seeking an end to Northern Ireland". *Id.* In rejecting the applicability of *Abu Eain*, the district court criticized the Seventh Circuit as "emotion[al]," and stated that "liberal application of the *Eain* decision could result in the extradition court making judgments as to the goals of a particular uprising group and the appropriateness of the acts of the uprising group." *Id.* at 3739. The district court also attacked the magistrate's conclusion that Quinn, who is an American, had to be a member of the uprising group in order to gain the protection of the political offense exceptions. Judge Aguilar held this requirement to be without precedent and "unwarranted." *Id.* at 17.

13. *In re Extradition of Eain*, Magis. No. 79 M 175 (N.D. Ill., filed Dec. 18, 1979) (Jurco, Magis.), writ of habeas corpus denied sub nom. *Eain v. Wilkes*, note 7 *supra*. On Dec. 12, 1981, UnderSecretary of State William P. Clark signed a surrender warrant which was accompanied by a memorandum decision, which is reprinted in 1981 *Sen. Hearings*, *supra* note 2, at 133. After his return to Israel, Eain was found guilty of murder by a three-judge court and, in June of 1982, sentenced to life imprisonment. *Christian Sci. Monitor*, Aug. 18, 1982, at 13, col. 1.

14. 641 F.2d at 52021.

15. *Id.* Moreover, it is a measure of how far the "political offense" exception can be cut loose from ethical moorings that Abu Eain's defense team could argue in apparent good faith that terror bombing of civilians is a legitimate technique in an "insurrection-liberation" struggle and that the political offense exception prevents extradition for such a crime. The defense argued that for the PLO to achieve its political purpose in Israel, it is necessary for it to engage in acts of violence such as bombings in public places, since "an occupied people regards every occupier as part of the usurping state's political being." Petitioner's Brief in Support of Petition for Writ of Habeas Corpus at 9, *Eain*, 641 F.2d 504.

16. McMullen, No. 37-81-099 MG, reprinted in 1981 *Sen. Hearings*, *supra* note 2, at

The *Castioni* test used by the courts in the cases discussed above is seriously flawed. The courts in the relatively few English and American cases dealing with the "political offense" exception¹⁷ have repeated this test without once questioning its fundamental validity.

The unsettling results in *McMullen*, *Mackin* and *Quinn* and the implications of *Abu Eain* suggest that much of what has previously been written about the "political offense" exception by the courts is misleading or just plain wrong. The error may be accounted for because the "right" result in early cases seemed so obvious or was reached so intuitively that the courts were lulled into accepting the first "test" that fit the facts without giving much thought to its ramifications. Indeed, some of the cases suggest that the courts, despite their purported reliance on such a test, were actually engaged in making political judgments, not legal ones.¹⁸

No court has ever questioned whether an all-encompassing, objective "test" is appropriate, and yet the "test" formulated by Anglo-American courts in the 1890s is in fact based on assumptions which, when extended to their logical conclusion, seem fundamentally at odds with the likely intent of the treaty draftsmen and our present beliefs. As modern courts carefully and conscientiously have applied the letter of this earlier case law, absurd and dangerous results have become more frequent, and the divergencies from the probable intent of the treaty writers has become more and more apparent. Neither before, during nor after the decisions that run from *In re Ezeta* to *In re Quinn* have the considerations in making a "political offense" determination been as simplistic as these cases have indicated. Certainly, there has never been any intellectually-accepted definition for a "political offense." Other countries do not accept the mechanical *Castioni* test, either.¹⁹

294.

17. For a discussion of the older cases as well as of *McMullen* and *Abu Eain*, see Hanay, *International Terrorism and the Political Offense Exception to Extradition*, 18 COLUM. J. TRANSNAT'L L. 381 (1980).

18. See *United States ex rel. Karadzole v. Artukovic*, 170 F. Supp. 459 (S.D. Fla. 1959) and *Ramos v. Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959). These cases can only be explained as efforts by the courts to avoid cooperating in any way with Communist regimes of which they did not approve; indeed, the court in *Abu Eain* characterized *Artukovic*, in which a Croatian war criminal was judged immune from extradition to Yugoslavia on political offense grounds, as "one of the most roundly criticized cases in the history of American jurisprudence." 641 F.2d at 522.

19. See, e.g., *Ruling on the Requests for the Extradition of Tomas Linaza-Echevarria*, No. 57781 (Court of Appeals of Paris, filed June 3, 1981), reprinted in Dept. of State, Div. of Language Services, Translation No. 81/16601. There, the *Chambre d'Accusation* of the French Court of Appeals upheld the extradition of Linaza-Echevarria, a reputed Basque terrorist, for the murders of an alderman and six members of the Civil Guard in Spain. The fugitive claimed that the acts with which he was charged "were perpetrated as part of the struggle for political autonomy waged by a segment of the population in the Basque provinces of Spain." *Id.* at 8. The Court rejected this claim, stating:

Irrespective of the objective sought or possible context, most of these offenses are too serious to be regarded as having a political character or as being related

As extradition treaties became prevalent in the nineteenth century, democratic nations undoubtedly found themselves facing the unpleasant task of sending political dissenters or activists back to tyrannical regimes to stand trial for acts which democracies did not perceive as "criminal" in any ethical or moral sense. Through the mechanism of the "political offense" exception, a conflict between the affirmative obligation to extradite under a treaty and the desire to grant political asylum was avoided. The fugitive newspaper editor or political candidate charged with sedition or treason merely for expressing his opinions could be sheltered from extradition for such a "pure" political offense, the sort of offense directly implicating cherished democratic values. Similarly, the fugitive dissident charged with criminal trespass or property damage during a protest rally could be sheltered from unjust persecution for his "relative" political offense, the sort of offense that smacks of a "trumped up" charge.²⁰

In addition to, and wholly apart from, its function of sheltering those whose only crime is speaking out, the "political offense" exception functions as a useful mechanism by which states may avoid becoming entangled in the internal political upheaval of other nations.²¹ Through the exception, states may avoid being forced to favor one side over another during uncertain civil wars or being compelled to assist the winners wreak vengeance on the losers after a political coup.

It is important to keep in mind that we are not dealing with the substantive rights of a fugitive. The "political offense" exception, just as the concept of political asylum, is not a recognition of some inalienable right of the fugitive to commit crimes in another country and escape extradition merely because the offenses were committed with a political purpose. The right involved is that of the state which has an interest in being able, when the state deems it appropriate, to give political asylum for humanitarian reasons or simply to refuse to become involved in the domestic

to a political offense.

The less serious acts cannot be disassociated from others, for they either contributed to their perpetration or were the immediate consequence thereof.

By reason of the means employed, these acts are all too serious in nature to be covered by the nonextradition exception

Id. at 89.

20. See text at notes 49-52 *infra*. Purely political offenses "encompass acts directed against the state which contain none of the elements of ordinary crime." Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1230 (1963). The "pure" offenses have generally been thought to be treason, sedition, espionage, and the like. Cantrell, *The Political Offense Exception in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 MARQ. L. REV. 777, 780 (1977). A "relative" political offense is one "in which a common crime is so connected with a political act that the entire offense is regarded as political." Garcia-Mora, *supra*, at 1230-31.

21. See E. STOWELL, *INTERNATIONAL LAW: A RESTATEMENT OF PRINCIPLES* 272 (1931), cited in H.R. REP. NO. 627, PT. 1, *supra* note 3, at 23, who states: "The underlying rationale for the political offense exception is that the requested State should not be forced into a position of actively participating on one side or another of a country's political dispute."

political disputes of other states.

The "political offense" exception thus serves as a useful shorthand or euphemism for these concerns of the state. There is widespread agreement for the abstract proposition that a state should refuse to send a dissident back to unjust persecution or refuse to allow the mechanism of extradition to be used for mere vengeance. The difficulty comes in properly categorizing particular fact situations in such terms. The attempt to define what constitutes a "political offense" by using a single "test" has created problems and led to an unfortunate confusion between the two different purposes of the exception.

The *Castioni* test seems to imply acceptance of a "right to rebel." It is doubtful, however, that a study of nineteenth-century diplomatic sources would corroborate the notion that the "political offense" exception was intended as a recognition of such an absolute and unqualified "right." Despite broadly-phrased statements by philosophers such as John Stuart Mill²² and by some of our founding fathers,²³ democratic nations have never accepted the principle that any politically disaffected group anywhere can take up arms for the purpose of replacing the existing government and thereby be automatically protected from extradition for common crimes of violence. A situation in which "good" rebels are trying to overthrow "bad" rulers, such as the American Revolution, may be acceptable and even laudatory. But what about "bad" rebels and "good" governments? Do fair ends justify unfair means? And who is to judge? None of these questions can be thought to have been answered with unanimity in either the nineteenth or the twentieth century. The court in *Castioni* confused the two different purposes of the political offense exception and produced a "test" that, in the eyes of the later courts, appears to confer absolute and unqualified immunity from extradition on violent revolutionaries. Yet the judges who sat on the *Castioni* case would surely be shocked by the statement of the magistrate in *McMullen*, that their test precludes extradition "[e]ven though the offense be deplorable and heinous."²⁴

Such a conclusion could never have been intended by the diplomats

22. "Political liberties or rights which it was to be regarded as a breach of duty in the rule to infringe, and which, if he did infringe, specified resistance, or general rebellion, was to be held justifiable." J. MILL, ON LIBERTY 2 (1847). As the counsel for the defense in *Castioni* noted, Mill once suggested the following definition of a political offense: "Any offense committed in the course of or furthering of civil war, insurrection, or political commotion." *In re Castioni*, [1891] 1 Q.B. at 153.

23. *E.g.*, Letter from Thomas Jefferson to James Madison (Jan. 30, 1787) ("I hold it that a little rebellion, now and then, is a good thing, and as necessary in the political world as storms in the physical.") and First Inaugural Address by Abraham Lincoln (Mar. 4, 1861) ("Whenever [the people] shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it.")

24. *McMullen*, No. 37-81-099 MG, at 3, reprinted in 1981 *Sen. Hearings*, supra note 10, at 294.

who negotiated our extradition treaties or the Senators who consented to them. No possible value could be thought to accrue either to this country or to the international legal order from a rule that prevents the extradition of any and all who use political violence to achieve political ends.²⁵

The test applied by the magistrates in *McMullen* and *Mackin* and the district court in *Quinn* was the same as that applied by the Seventh Circuit in *Abu Eain* and by other courts reaching back to *Ezeta*. Yet the ramifications of this test have not been clearly seen until now. There is no good reason to continue the unquestioned repetition of the *Castioni* test, for it more often leads courts away from a just result rather than towards one. A better test must be fashioned.

II. EXECUTIVE DETERMINATION OF THE "POLITICAL OFFENSE" ISSUE: THE ROAD NOT TAKEN

The original version of S. 1940 prohibited the courts from exercising jurisdiction over the "political offense" issue²⁶ and provided that the Secretary of State alone shall determine the matter.²⁷ Although this approach was recommended by the administrations of both President Carter and President Reagan,²⁸ it was met by a barrage of criticism, par-

25. A recent student note suggests that "genuinely politically motivated terrorism can induce genuinely politically motivated prejudice at trial, so that asylum for the terrorist is not so clearly outside the purposes of the exception." Note, *American Courts and Modern Terrorism: The Politics of Extradition*, 13 N.Y.U. J. INT'L L. & POL. 617, 623 (1981). See also Cantrell, *supra* note 20, at 782. That possibility is no justification for imposing a blanket rule that prevents extradition of those perpetrating violence for political reasons in countries where the Rule of Law is strong enough to prevent public or governmental outrage from interfering with fair procedures. The Executive Branch of this country, for example, has shown itself perfectly capable of refusing extradition when a fair trial cannot be expected in the requesting state. See, e.g., M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 424 n.121 (1974), noting the refusal of the Department of State to extradite the fugitive General Huertas to Mexico because of both the political nature of the crimes with which he had been charged and "the lack of an orderly machinery of justice by which a fair trial could be accomplished."

26. Section 3194(a) of S. 1940, as introduced by Sen. Thurmond, states in part as follows:

The court does not have jurisdiction to determine the merits of the charge against the person by the foreign state or to determine whether the foreign state is seeking the extradition of the person for a political offense, for an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions.

1981 *Sen. Hearings*, *supra* note 2, at 340.

27. Section 3196(a) of S. 1940 as introduced by Sen. Thurmond provides: "The Secretary of State . . . (3) shall decline to order the surrender of the person if the Secretary is persuaded, by written evidence and argument submitted to him by the person sought, that the foreign state is seeking the person's extradition for a political offense." *Id.* at 346. Section 3196(a) of the bill also provides: "[a] decision of the Secretary of State under paragraph (3) . . . is final and not subject to judicial review." *Id.*

28. An identical version of S. 1639 had been introduced by Sen. Kennedy as a floor amendment to Chapter 32 of S. 1722, the 1980 version of the Criminal Code Reform Act, in the waning days of the 96th Congress. Correspondence supporting the changes from officials

ticularly from civil liberties groups who were generally suspicious of the executive branch and perceived the legislation as a direct assault on due process and other Constitutional protections for extradition targets.²⁹

Hearings were held by both Houses,³⁰ and battle lines were drawn on the issue of whether the executive "model" was superior to the judicial model.³¹ In reporting out a new version of S. 1940, the Senate Judiciary Committee rejected the criticism and recognized the strong and obvious policy considerations justifying the elimination of the courts' jurisdiction.³²

The *McMullen*, *Mackin*, *Abu Eain*, and *Quinn* cases have revealed something more than the flaws in the *Castioni* test. They have shown that the determination of the "political offense" issue is a major foreign policy determination which is ill-suited to the judiciary. The flaw permeating those cases cannot fully be corrected by drafting a statute to give courts more guidance. The "political offense" exception defies the creation of judicially manageable standards. The analysis called for, whatever the test, inevitably thrusts the courts into foreign waters, both literally

of the Carter administration accompanied the bill. See 126 CONG. REC. S. 13,233 (daily ed. Sept. 23, 1980).

29. See, e.g., Letter from American Civil Liberties Union to Sen. Thurmond, dated December 8, 1982, reprinted in 1981 *Sen. Hearings*, *supra* note 2, at 80. The ACLU expressed the following fear:

With regard to extradition, the exigencies of diplomatic relations render the exclusive determination of the political offense exception particularly unsuited to the executive branch; conflicting interests would undoubtedly result in an inconsistent and unfair application of standards. The integrity of such a process would be difficult, if not impossible, to preserve.

1981 *Sen. Hearings*, *supra* note 2, at 90.

Far from being confined to mere paper-shuffling, as some critics think, our courts would have continued to play a central role in the extradition process. Under S. 1940, as in current practice, a judicial hearing before a neutral magistrate must be held to determine whether there was evidence establishing probable cause to believe that an offense had been committed and that the person sought had committed it. Compare 18 U.S.C. § 3184 with § 3194 of S. 1940. Thus, the most basic protection from spurious or "trumped up" charges would have remained intact.

30. The Senate hearings were published (See 1981 *Sen. Hearings*, note 2 *supra*), but the House hearings were not.

31. Professor Steven Lubet of Northwestern University, who testified at House hearings on extradition reform, has usefully analyzed the debate in terms of "executive, judicial, and synthesis models" of deciding the political offense question. See Lubet, *Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists*, 15 CORNELL INT'L L.J. 247 (1982).

32. The Senate Judiciary Committee concluded that the Executive Branch should make such a determination because 1) most modern United States extradition treaties specify that the Executive Branch of the requested country shall decide the applicability of the political offense exception (e.g., Extradition Treaty, United States-Mexico, May 4, 1978, entered into force Jan. 25, 1980, art. 5(1), 31 U.S.T. 5059), 2) such decisions do not lend themselves to resolution through the judicial process, and 3) the U.S. government needs to take a public position on the applicability of the political offense exception before all the evidence and arguments are in to avoid a "devastating impact" and a "potentially crippling effect on the nation's foreign relations." S. REP. No. 331 at 1415.

and figuratively. In order to apply the "political offense" exception, courts have been increasingly drawn into the most searching analyses of the social, political and economic histories of the foreign countries requesting extradition. Such analyses lead to lengthy and time consuming proceedings which delay extradition for months and even years. Moreover, the process creates a dangerous interference with the conduct of our foreign policy, as judges, distant from the diplomatic and political arena, make findings on political situations in foreign countries which are subject to misinterpretation and misuse abroad.

In the *Mackin* case, for example, the magistrate went far beyond the facts surrounding the alleged shooting incident and received lengthy testimony and elaborate documentary evidence bearing on the entire history of Anglo-Irish relations.³³ After reviewing this evidence the magistrate concluded that "there was a political conflict in Andersontown, Belfast, Northern Ireland in March of 1978 which was part of an ongoing political uprising."³⁴ The magistrate in *Quinn* went through a similar historical odyssey and was even more sweeping in his conclusions. In analyzing whether the political offense exception applied to Quinn's alleged crimes in London, the magistrate concluded that the element of a "violent political uprising" was satisfied, even by isolated incidents of violence in London, reasoning as follows:

[I]n a constitutional sense Northern Ireland is a part of the United Kingdom, and offenses committed in Northern Ireland are offenses against the same sovereign, though the Court notes that different sets of laws apply. In Northern Ireland, before, during, and after the period in question, there was what can only be described as a severe armed insurrection with a political basis . . . [T]he violence was of such intensity that it brought down one government and forced its replacement to impose severe curbs on personal liberty.³⁵

The potential detriment to our relations with the United Kingdom as well as the danger of interference in the domestic political affairs of another country from this sort of pronouncement is very real.³⁶ Indeed, it

33. After hearings on the "political offense" issue lasting seven days and consuming more than a thousand pages of transcript, the magistrate issued a 100-page opinion that discussed the political and historical heritage of Northern Ireland, a treatment of the religious underpinnings of the past and present disturbances there, references to supposed abuses by various governmental authorities, a lengthy discussion of the general level of violence in Northern Ireland, a description of British legal procedures for the prosecution of suspected terrorists, and an assessment of the support for IRA activities within the Catholic community at large. See Magistrate's Opinion, No. 80 Cr. Misc. at 40, reprinted in 1981 *Sen. Hearings*, supra note 2, at 188-218.

34. *Id.* at 83, reprinted in 1981 *Sen. Hearings*, supra note 2, at 222.

35. Magistrate's Opinion, Crim. No. CR81146 Misc. (N.D. Cal., filed Oct. 3, 1983).

36. "Finally, a decision on the political offense exception can have a devastating impact on United States relations with the requesting country. The potentially crippling effect of such decisions on foreign affairs is particularly great where it could compromise United States efforts to combat international terrorism." S. REP. No. 331, supra note 2, at 15.

appears that the magistrate's opinion in *Mackin* was widely circulated in Northern Ireland on behalf of the hunger strikers in British custody who sought to be recognized and treated as "political" offenders, thus inflaming an already tense situation.³⁷

The flaw in the present approach is precisely illustrated by testimony during hearings in the House on H.R. 5227. Arguing that the new legislation should not flatly exclude murder or other violent crimes from the "political offense" exception, one scholar pointed out to a Congressional committee: "We may not now wish to extend [political offense] protection to factions such as the Red Brigades of Italy, but we should not fashion a definition which also serves to exclude rebels such as the anti-Soviet partisans currently fighting in Afghanistan."³⁸ The witness went on to suggest that a definition should be devised which "[t]he courts would maintain . . . the ability to extend the protection of the exception to those whom we might wish to call legitimate rebels or actual contenders in a national struggle for power."³⁹ The United States should certainly be able to distinguish between "legitimate" rebels and "bad" ones and to grant asylum when appropriate, but judges should not be the ones to make that sort of political choice.

Any approach to the "political offense" exception which leaves to courts the determination of whether we extradite Red Brigadiers or Afghan guerrillas perpetuates a serious misalignment of responsibility. For example, the United States magistrates in the *Mackin* and *McMullen* cases and the district court in *Quinn* held that an unprovoked attack on British security personnel or installations by IRA gunmen constitutes a "political offense" and hence an act worthy of immunity from extradition. If such a dangerous policy is to be adopted, judges should not be the ones to do it. As the *New York Times* said in an editorial favoring the elimination of court jurisdiction, "Leaving diplomacy to diplomats provides better and speedier justice."⁴⁰

The question of whether an improper political motivation underlies an extradition request has always been decided by the Executive Branch.⁴¹ No critic of the Senate approach has offered a single instance in which a Secretary of State has unjustly exercised his discretion over the

37. See Brief for Appellant at 32, *United States v. Mackin*, 668 F.2d 122 (2d Cir. 1981).

38. Lubet, Statement before the House Comm. on the Judiciary, Subcomm. on Crime, reprinted in S. REP. No. 475, *supra* note 2, at 10.

39. *Id.* at 11.

40. *New York Times*, Dec. 29, 1981, at A14, col. 1. As Professor Lubet points out, "[t]here is no uniform international practice regarding the procedure for applying the political offense exception." Lubet, *supra* note 31, at 290 n.251. *E.g.*, Canada, Australia, and West Germany follow a strictly executive approach. *Id.*; accord S. REP. No. 331, *supra* note 2, at 1415. *But see* H.R. REP. No. 627, *supra* note 3, Pt. 1 at 22 n.52, citing an unpublished Library of Congress report which asserts that the courts in all countries surveyed except Canada and Australia play at least some part in determining whether a person is extraditable or not because of the political or nonpolitical nature of his offense.

41. See text accompanying note 6 *supra*.

political motivation question.⁴² There is no good reason not to entrust to executive discretion the equally "political" question of the nature of the offense.

Despite these strong arguments, the House Judiciary Committee opted to retain court jurisdiction over the political offense determination in reporting out its extradition reform bill.⁴³ The House committee identified four reasons for this decision:

- (1) It accords with the "statutory and administrative practices of the past one hundred and forty years in the United States";
- (2) The Department of State can always "share" with the courts its unique expertise and specialized knowledge about conditions in the requesting country;
- (3) Extradition matters generally, and the political offense determination specifically, should take place before an independent judiciary because to do otherwise would be "highly dangerous to liberty"; and
- (4) Having the initial determination made by the judiciary allows our diplomats to "avoid . . . embarrassment" and, in effect, blame the courts when an ally's extradition request is denied.⁴⁴

The Senate Committee on Foreign Relations, which acted essentially contemporaneously with the House Committee, also adopted the judicial "model," recommending fundamental changes in the original version of S. 1940.⁴⁵ The Senate adopted these amendments without any floor debate.⁴⁶

While this writer testified in support of the original version of S. 1940

42. If anything, political pressure is more often brought to bear on the Secretary of State *not* to grant extradition than to grant it. For example, a number of Arab ambassadors unsuccessfully pressured Secretary Haig to harbor PLO terrorist Ziyad Abu Eain after the courts in Chicago ordered him extradited to Israel. *Washington Post*, Dec. 13, 1981, at A8, col. 1. Under such pressure, other countries may be less willing than the United States to honor their international commitment to extradite terrorists, even where courts have ruled that their crimes are not "political offenses." For example, despite the French Court of Appeals decision in the *Linaza-Echevarria* case, the Socialist government of President Francois Mitterand announced its refusal to extradite any Basque terrorists. Note 19 *supra*. See also *The Economist*, June 20, 1981, at 53. There is no more basis for the fear that our diplomats will capitulate to requests from authoritarian regimes for extradition of their political opponents than there is for a fear that judges will be bribed by the accused fugitive. Loose speculation about public officials' motivation is no good ground for opposition to a useful and needed piece of legislation.

43. See H.R. 6046, reprinted in H. R. REP. No. 627, Pt. 1, *supra* note 3, at 48.

44. H.R. REP. No. 627, Pt. 1, *supra* note 3, at 21-22.

45. The Senate Foreign Relations Committee expressed similar reasoning:

Most countries with whom the U.S. has extradition agreements permit the courts to make such determinations. Moreover, American courts have reviewed political offense questions for nearly one hundred years. Preserving limited court jurisdiction to interpret the exception pursuant to legislative guidelines would continue this well-established tradition. It would also provide a check against an executive authority that could, depending upon the political sensitivities involved in a given case, result in inconsistent and unsound application of the political offense exception.

S. REP. No. 475, *supra* note 2, at 7.

46. 128 CONG. REC. S10,884 (1982).

at hearings in October of 1981⁴⁷ and continues to believe that the executive model is the best approach to the "political offense" determination, it is unlikely that Congress will reconsider this fundamental issue. The central issue, therefore, is what legislative guidance should be given to the courts in exercising jurisdiction.

III. REPLACING THE *Castioni* TEST WITH NEW GUIDELINES

Both S. 1940 (the extradition reform bill passed by the Senate) and H.R. 6046 (the House Judiciary Committee version) set forth "negative" guidelines for the courts to use in determining what is not a "political offense." The Senate version identified certain crimes that could never be political offenses and certain other crimes that could only be political offenses "in extraordinary circumstances." Section 3194(e) of S. 1940 provides in pertinent part as follows:

- (1) For purposes of this section a political offense does not include:
 - (A) an offense within the scope of the [Hague] Convention . . . ;
 - (B) an offense within the scope of the [Montreal] Convention . . . ;
 - (C) a serious offense involving an attack against the life, physical integrity, or liberty of internationally protected persons . . . , including diplomatic agents;
 - (D) an offense with respect to which a . . . multilateral treaty obligates the United States either extradite or . . . prosecute a person accused of the offense;
 - (E) [a narcotics] offense . . . ;
 - (F) an attempt or conspiracy to commit an offense described [in A through E . . . above];
- (2) For the purposes of this section a political offense, except in extraordinary circumstances, does not include:
 - (A) an offense that consists of homicide, assault with intent to commit . . . serious bodily injury, rape, kidnapping, the taking of a hostage, or a . . . serious unlawful detention;
 - (B) an offense involving the use of a firearm . . . if such use endangers a . . . person other than the offender . . . ;
 - (C) an attempt or conspiracy to commit an offense described [in A or B . . . above].

If an extradition bill had been passed in the 97th Congress, it would most likely have included a "political offense" provision in the form set forth above.⁴⁸ The question then becomes whether these guidelines would do

47. See Testimony of William M. Hannay, 1981 *Sen. Hearings, supra* note 2, at 25-64.

48. H.R. 6046 had the same list of crimes quoted in the text, but applied the "extraordinary circumstances" concept to all of them. The sponsor of the House bill subsequently agreed that the Senate's language was preferable. See Letter from William J. Hughes, Chairman, House Subcomm. on Crime, to Clement J. Zablocki, Chairman, House

the job.

At this stage, both Houses have rejected the approach of enunciating a new, positive definition of what constitutes a "political offense." This makes sense. First, the "pure" political offenses, such as advocating the overthrow of a government and other conduct punishable as seditious or treasonous, so implicate free speech and other democratic ideals that no extradition treaty to which the United States is a party even includes them as extraditable offenses. Moreover, any attempt to list or define such "pure" offenses runs the risk of quickly becoming overbroad, as the House Judiciary Committee has concluded.⁴⁹ Similar problems of overbreadth afflict any attempt to define "relative" political offense. Indeed, it is the overbreadth inherent in the *Castioni* test that produced the furor that, in large measure, produced the impetus for new legislation.

Even in eschewing a positive definition of political offense, Congress is making one thing clear: the traditional *Castioni* test is no longer to be viewed as the only (or even the best) guide to what a political offense is. Regardless of their views on which particular crimes should be excluded from the political offense exception, the Congressmen involved in the drafting process are unanimous in their desire for courts to apply the concepts of "predominance" and "proportionality" in deciding whether a crime is a political offense. These concepts were developed in the legislative history, as follows.

While the Senate Committee on Foreign Relations "recognizes that current case law continues to apply" to crimes not specified on the list of nonpolitical offenses, the Committee took pains to draw attention to the "commonly-used standard" that bars extradition "when the state from which extradition is sought determines that the political content of the act outweighs the harm that may have been done in committing the offense."⁵⁰ Similarly, the House Judiciary Committee stated its expectation

Comm. on Foreign Affairs, (July 23, 1982), reprinted in H.R. Rep. No 627, *supra* note 3, Pt. 2 at 45. Rep. Hughes adopted the Senate language in H.R. 2643, which was introduced in the House of Representatives on April 20, 1982.

49. A predecessor version of H.R. 6046 listed certain acts which would "normally" constitute political offenses. See H.R. 5227, 96th Cong., 2d Sess. § 3194(e)(2) (1981). The list included "sedition," "treason," and "unlawful political advocacy, but only if the advocacy is not to engage imminently in violence under circumstances in which it is likely that such advocacy will imminently incite such violence." These positive definitions were eliminated by the House Judiciary Committee as overbroad, stating that "although treason and espionage have traditionally been considered as political offenses, some conduct that is encompassed within these types of crimes will also constitute a violation of generally recognized international law, and therefore not be appropriate to always treat as a political offense." H. R. REP. NO. 627, Pt. 1 *supra* note 3, at 24.

50. S. REP. NO. 475, *supra* note 2, at 3 & 8. The Committee also quoted with approval the testimony of Professor Lubet, who explained that "[a] broad definition need not be a mechanistic or all-inclusive one. The word 'political' may have different meanings in different contexts, and the United States is under no legal or moral obligation to shelter a fugitive from extradition simply because he claims a political motive for his crime." Lubet, Statement before the House Comm. on the Judiciary, Subcomm. on Crime, *supra* note 38, re-

that, except for the enumerated offenses, "courts will continue to apply the traditional political offense test as enunciated in *In re Castioni*," but the Committee prefaced this statement by pointing out that:

[T]he traditional definition of political offenses encompasses too many crimes. In the nearly one hundred years since the first political offense cases were decided, the international legal community has come to recognize that certain offenses, even if they involve an offense of a political character, are too heinous to escape prosecution and punishment. Recognized examples of these offenses include killing a head of state.⁵¹

In addition, the House Judiciary Committee expressly stated its expectation that courts will "examine existing French and Swiss motivation precedents in this area" in determining whether crimes not listed in the new legislation are to be deemed "political."⁵²

Turning to the approach of enumerating crimes that are not political offenses, the first question is whether there are crimes that should never be considered political offenses. For several reasons, the answer to that is certainly "yes." As the Senate Foreign Relations Committee has recognized, "it is inappropriate to apply the political offense exception to conduct that the international community has taken formal steps to prohibit and punish."⁵³ Thus the political offense exception should not even be considered by the court if applying it would have the effect of protecting behavior that is specifically outlawed by international treaties, such as the Tokyo,⁵⁴ Hague,⁵⁵ and Montreal⁵⁶ conventions with respect to aircraft

printed in S. REP. No. 475, *supra* note 2, at 3.

51. H. R. REP. No. 627, Pt. 1, *supra* note 3, at 23-24.

52. *Id.* at 26. The Committee specifically referred courts to the discussion of those precedents discussed in a seminal article by Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1249-57 (1962). There, Professor Garcia-Mora quoted the rule in *In re Giovanni Gatti*, [1947] Ann. Dig. 145 (No. 70) (Fr.): "The offense does not derive its political character from the motive of the offender but from the nature of the rights it injures." *Id.* at 145-46. He also described "the celebrated Swiss theory of predominance, which essentially means that . . . the political element must predominate over the common crime," i.e., must not be out of proportion to the end sought. Garcia-Mora, *supra*, at 1249-50. In discussing the Swiss proportionality test the author relied on the *Wassilieff* case, where the murder of a police chief was held *not* to be a political offense "since other means of redress were available." *Id.* at 1254. For further discussion of the Swiss proportionality test, see generally Abu Eain, 641 F.2d at 521 n.21 ("proportionality and predominance may be unarticulated concepts in the existing Anglo-American framework of extradition") and Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 CORNELL INT'L L.J. 71, 82-83 (1978).

53. S. REP. No. 475, *supra* note 2, at 7.

54. Convention on Offenses Aboard Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 220.

55. Convention for the Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105.

56. Convention on Civil Aviation Safety, Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570.

hijacking, the Internationally Protected Persons (IPP) Convention,⁵⁷ the Hostage Convention,⁵⁸ and any future multilateral treaties obligating the United States either to extradite or prosecute. The absolute prohibition approach is also appropriate for crimes such as rape and narcotics violations, which could never have any meaningful nexus to a political controversy.⁵⁹

An absolute prohibition, of course, has the procedural advantage of sure and quick application, for courts can decide the political offense issue "on the pleadings," as it were. It would be a great boon to prosecutors and defendants alike if time-consuming exercises in history, sociology, and philosophy, such as those conducted in *Mackin*, *McMullen*, *Abu Eain*, and *Quinn*, could be avoided and the time devoted to reviewing these complex issues on appeal reduced.⁶⁰ Unfortunately, Congress has been unable to devise either an all-encompassing positive definition or a complete list of negatives that will relieve courts of that burden. Some flexibility in the area of "relative" political offenses seems necessary, and the approach excluding crimes of violence or the use of firearms except "in extraordinary circumstances" is acceptable when read in light of the legislative history.

The Senate Foreign Relations Committee, which amended the original version of S. 1940 to include the "extraordinary circumstances" concept, makes clear that the burden of demonstrating such circumstances is on the person resisting extradition and that this burden is "a considerable one."⁶¹ The Committee explained the criteria for applying the concept as follows:

It should not be the policy of the United States to encourage or condone violent or other criminal behavior simply because it is the view of the persons committing such acts that they are somehow connected with a political activity or have an ostensible [sic] political purpose or justification. However, it should also not be the policy of the United States to render up automatically to foreign authorities an individual who, in the course of seeking to exercise legitimate civil or

57. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted Dec. 14, 1973, entered into force Feb. 20, 1977, 28 U.S.T. 1975, T.I.A.S. No. 8532. This convention has been implemented in the U.S. by the enactment of 18 U.S.C. §§ 878, 1116-1117, & 1201.

58. International Convention against the Taking of Hostages, U.N. Doc. A/RES/34/146 (1979), ratified by the United States July 30, 1981. See 127 CONG. REC. S8808-09 (daily ed. July 30, 1981).

59. In S. 1940, rape was unintentionally listed among the crimes that could be deemed a political offense "in extraordinary circumstances." That error has been corrected in the version of the legislation now pending in the 98th Congress. See S. 220, 98th Cong., 1st Sess. § 3194(e)(1)(F), introduced by Sen. Strom Thurmond on Jan. 27, 1983.

60. See, e.g., note 34 *supra*. Each of the trials in these cases lasted more than a week and produced some two thousand pages of transcripts and documents. The possibility of delay is great. For example, Ziyad Abu Eain was arrested on August 21, 1979 and finally extradited to Israel on December 12, 1981. Wash. Post., Dec. 13, 1981, at A8, col. 3.

61. S. REP. NO. 475, *supra* note 2, at 8.

political rights in a nonviolent manner, is placed in such a position that he has no reasonable choice except to commit an otherwise criminal act. For the court to make such a determination the test should be focused upon the individual and whether the offense for which he is sought was a consequence of the violation of his internationally recognized civil or political rights by the state requesting extradition. Acts of indiscriminate or excessive violence or acts of deliberate brutality would presumably never fall within the exception.⁶²

The Senate Committee's focus on the lack of any "reasonable choice," i.e., any alternative means of redress, is the correct focus for what constitutes an "extraordinary" circumstance. It has also been urged by an influential voice on the House side.⁶³

In reporting out H.R. 6046, the House Judiciary Committee suggested that courts should "evaluate a large number of factors" when applying the "extraordinary circumstances" language.⁶⁴ These factors include whether the victim is "civilian, governmental or military," what relationship exists between the person whose extradition is being sought and any political organization, whether the crime allegedly committed was done in furtherance of such organization's political goals, and what the relative seriousness of the offense is.⁶⁵ The House Committee's suggestion, however, leaves the matter too open-ended and fails to provide courts with sufficient guidance at the very point they most need it.

The critical question is what kind of conduct is being protected by the use of the "extraordinary circumstances" language. The Senate Committee protects one kind of conduct—unavoidable violence occasioned by a violation of civil or political rights—and gives adequate guidance to courts as to when to invoke the political offense exception. The House Committee is obviously trying to protect, or at least to keep, the U.S. from becoming embroiled in another kind of conduct: civil war.⁶⁶ More precision in defining the intended result can be achieved without the risk of courts sweeping too much into the political offense exception or excluding too much from its protection. This can be accomplished by two steps: first, by creating an additional absolute prohibition and, second, by clarifying the circumstances in which the *Castioni* test should apply.

As explained above, both Houses appear to agree that violence out of proportion to the political end sought cannot be defined as a "political

62. *Id.*

63. Rep. Paul Findley has suggested that "extraordinary circumstances" include "acts committed as a last resort by a person who has been subjected, in the state where such acts occurred, to serious violations of internationally protected human rights and for whom such acts are the only reasonable means of protection or flight from such conditions." H.R. REP. No. 627, Pt. 2, *supra* note 3, at 7. (Statement of Hon. Paul Findley).

64. H.R. REP. No. 627, Pt. 1, *supra* note 3, at 24.

65. *Id.* at 2425.

66. The House Committee defined the "underlying rationale" of the political offense exception as keeping out of "another country's political dispute." H.R. REP. No. 627, Pt. 1, *supra* note 3, at 23. *See also* note 22 *supra*.

offense." Therefore, a new provision should be added to the absolute prohibitions in Section 3194(e)(1) of S. 1940, such as the following: "An offense that consists of intentional, direct participation in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily injury to persons not taking part in armed hostilities." This provision would draw a sharp line between hostile acts against a state and mere terrorism.⁶⁷ Such a salutary rule would plainly have covered the situation in *Abu Eain* and eliminated the drawnout efforts of apologists for the PLO to characterize "a random bombing intended to result in the cold-blooded murder of civilians" as a political offense.⁶⁸ It would also cover cases in which the victims include civilians even though the targets are governmental facilities or officials. This new exclusion alone, however, is not enough.

The second step to improving the legislative guidelines contained in S. 1940 involves clarifying the circumstances in which the *Castioni* test should be applied. This in turn involves a clarification of two factors: the type of behavior that is not to be protected even in an armed conflict, and the type of armed conflict that should trigger the *Castioni* test at all. Recent work in this area by the American Bar Association is enormously helpful and points the way to the correct resolution of the problem.

At its 1983 Annual Meeting in Atlanta, Georgia, the House of Delegates of the American Bar Association adopted a resolution "strongly recommend[ing]" that extradition legislation be passed which will:

exclude all acts of terrorist violence from the application of the political offense exception . . . [and] preclude the application of the political offense exception to offenses which constitute serious breaches of the norms established under international humanitarian law applicable in international and noninternational armed conflicts, without subjecting to extradition combatants for warlike acts which do not transgress those norms."⁶⁹

67. Such a provision embodies the rationale of the Seventh Circuit's decision in *Abu Eain*, 641 F.2d at 521 ("an offense having its impact on the citizenry, but not directly upon the government, does not fall within the political offense exception") and responds to the well-founded belief of many Congressmen that attacks on civilians can never be justified; see, e.g., H.R. REP. NO. 627, Pt. 2, *supra* note 3, at 8 (Statement of Hon. A. Erdahl) ("political offense does not include acts of violence involving wanton, indiscriminate, or reckless bodily injury to persons in order to generate terror within a civilian population").

68. *Abu Eain*, 641 F.2d at 521. The proposed amendment would also slam shut the loophole that the Seventh Circuit arguably left open in *Abu Eain* when it held that the bombing was not "incidental to" the political conflict in Israel because there was no "direct tie between the PLO and the specific violence alleged." *Id.* at 520. Though the court quoted with approval a United Nations Secretariat study which stated that "the legitimacy of a cause does not in itself legitimize the use of certain forms of violence especially against the innocent," *id.* at 521, it left unclear what result would follow if the evidence *had* established such a "direct tie." The correct answer is, of course, that the crime would still not be a political offense because it fails the "proportionality" test. See note 53 *supra*. See also *In re Meunier*, [1894] 2 Q.B. 415, discussed in Hannay, *supra* note 17, at 388-90.

69. American Bar Association, *Report No. 104A* (1983) (adopted as a resolution by the

To accomplish these goals, the ABA's Section of International Law and Practice proposed certain amendments to Section 3194(e) of S. 1940.⁷⁰ The ABA's proposed amendments would first of all delete "the taking of a hostage" from the offenses subject to the "extraordinary circumstances" test and add it to the list of absolute prohibitions in Section 3194(e)(1). This change makes sense because such conduct is now expressly forbidden by the 1979 Hostage Convention⁷¹ and because, as the ABA points out, "[i]t is difficult to conceive of any circumstance which would justify this offense."⁷²

Second, the ABA's proposed amendments would specifically incorporate into the political offense definition the international laws of war which have "developed limitations on the methods, means, and measures of coercion and violence which may be used by the parties in any armed conflict."⁷³ The ABA's proposed amendment would retain the prefatory language in Section 3194(e)(2) of S. 1940, "[f]or the purposes of this section a political offense, except in extraordinary circumstances, does not include . . . ," but would substitute the following in place of Section 3194(e)(2)(A) and (B):

(A) except for acts [that are] committed in the course of a non-international armed conflict in furtherance of the objectives of the party to the conflict to which the person belongs and [that] do not violate the norms referred to in subparagraph (B), an offense that consists of homicide, assault with intent to commit serious bodily injury, kidnapping, serious unlawful detention, or an offense involving the use of firearms . . . if such use endangers a person other than the offender;

(B)(i) an offense consisting of conduct which violates the provisions of subparagraph (1) of Article 3 Common to the Geneva Conventions of 12 August 1949 and any Protocol additional thereto Relating to the Protection of Victims of Non-international Armed Conflict to which the United States is a party.⁷⁴

This approach is first-rate. Subsection (B)(i), of course, should logically

House of Delegates of the American Bar Association on Aug. 3, 1983).

70. See American Bar Association, *Report of the Section of International Law and Practice, appended to ABA Report No. 104A (1983)* [hereinafter cited as ABA Section Report]. The Proposed Amendments are set forth in Inclosure 4 to the Section Report (Incl. 4). The report was drafted by the Section's International Criminal Law Committee under the co-chairmanship of Waldemar A. Solf and James D. Clause.

71. ABA Section Report, *supra* note 70, at 6, para. c.

72. *Id.* at 12 n.6.

73. *Id.* at 78.

74. *Id.* at Incl. 4. See, e.g., Geneva Convention for the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, *reprinted in* 72 AM. J. INT'L L. 457 (1978). A detailed discussion of the standards of international humanitarian law applicable in armed conflict, including the 1949 Geneva Conventions and their relationship to the political offense exception, was attached to the ABA Section Report as a separate inclosure (Incl. 3). That portion of the report is reprinted as Appendix A to this article.

be listed among the "absolute prohibitions" of Section 3194(e)(1), but the idea is right on the mark. When combined with one other piece of the definitional puzzle and with the Senate Foreign Relations Committee's interpretation of "extraordinary circumstances," the ABA proposal accounts for all of the situations that present hard cases or produce bad results under the *Castioni* test.

Importantly, the ABA report recognizes the absence of a proportionality dimension to the *Castioni* test, stating:

The difficulty with the simple formula of the *Castioni* case is that it did not recognize that there are limitations on the conduct of internal armed conflict and that revolutionary violence which transgresses these limitations is not tolerable under the political offenses exception. Moreover, every political disturbance does not provide justification for violent criminal acts.⁷⁵

This fundamental flaw in the prevailing test of a "relative" political offense would be remedied by reference to the normative humanitarian rules established by 1949 Geneva Conventions and the 1977 Protocol II, which prohibit murder, cruel or degrading treatment, hostage-taking, terrorism, and pillage directed at persons not, or no longer, taking an active part in hostilities.⁷⁶

With the outer limit of conduct permissible under the political exception established by the first part of the ABA's proposed amendment, there remains one other piece of the puzzle necessary for an acceptable guideline: a definition of "non-international armed conflict" establishing the lower limit or threshold for invoking the exception. The ABA's proposed amendment sets forth such a definition, and it is generally a satisfactory one. The ABA definition has two parts. First, it expressly excludes certain situations from the definition stating that the term "armed conflict" does not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."⁷⁷ This aspect of the definition is eminently correct, for the purposes behind the political offense exception are not achieved by applying the *Castioni* test to such situations. As the ABA report accom-

75. ABA Section Report, *supra* note 70, at Incl. 3.

76. *Id.* In support of its approach, the ABA quotes with approval the French extradition treaty which excludes from the political offense exception "acts committed in the course of an insurrection or a civil war" that constitute "acts of odious barbarism and vandalism prohibited by the laws of war." *Id.* at 9. See also German Extradition Law of Dec. 23, 1929, which provides in part, "Extradition is permissible if the act constitutes a deliberate offense against life, unless committed in open combat." *Harvard Research in Int'l. Law*, 29 AM. J. INT'L L. 385 (Supp. 1935).

77. ABA Section Report, *supra* note 70, at Incl. 4. This provision is taken directly from Article 1.2 of the 1977 Protocol II, 72 Am. J. Int'l L. 502, 503 (1978). The ABA explained that the proposed amendment "uses the negative provisions of Protocol II to make certain that acts of violence against the police of a State in situations falling short of 'armed conflict' do not benefit from the political offenses exception." ABA Section Report, *supra* note 70, at 7.

panying the proposed amendment recognizes: "[T]errorist acts of violence in situations falling short of armed conflict even when directed against the security forces of a state, such as those perpetrated by the Red Brigade of Italy or the Bader-Meinhoff gang of Germany and similar groups should . . . be excluded [from the exception]."⁷⁸

The second and most critical part of the definition in the ABA's proposed amendment is the positive portion defining the threshold for what constitutes a "noninternational armed conflict." The model for the ABA's definition is contained in article 1.1 of the 1977 Protocol II to the 1949 Geneva Conventions, which states:

This Protocol . . . shall apply to all armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.⁷⁹

The ABA essentially adopted this definition but modified it slightly in the proposed amendment, omitting the latter part which refers to dissident armed forces exercising "such control over a part of [the State's] territory as to enable them to carry out sustained and concerted military operations."⁸⁰ For the sake of consistency and clarity, the entire definition from Protocol II should be built into the legislative guidelines. However, even if the ABA's definition is adopted *in haec verba*, the effect is the same, for the proposed definition, just as the language in Protocol II, plainly contemplates: "[s]ufficient statelike characteristics on the part of the rebels, as to suggest a level of organization and violence to be found in a classical civil war, where one might expect international armed conflict rules to apply, either under recognized belligerence or a prudent expectation of reciprocity."⁸¹ It is in precisely the circumstances of a "classical civil war," and only in those circumstances, that the theory of the political offense exception embodied in *Castioni* and in the *Ezeta* decision in the U.S. should come into play. In such circumstances, and only therein, does the rationale of those cases have validity. During a "classical

78. ABA Section Report, *supra* note 70, at 8.

79. 72 AM. J. INT'L L. 502, 502-03 (1978).

80. Including the excerpt set forth in the text at note 76, the ABA definition in its entirety states as follows:

(ii) for purposes of this subparagraph a non-international armed conflict within the meaning of Common Article 3 to the 1949 Geneva Convention shall be an armed conflict which takes place within the territory of a foreign state between its armed forces and dissident armed forces or other armed groups which are under a command responsible to a party to the conflict for the conduct of its subordinates. The term "armed conflict" does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.

ABA Section Report, *supra* note 70, at Incl. 4.

81. *Id.* at 10.

civil war” or revolution (such as in Lebanon, El Salvador, or Afghanistan), other nations should be able to avoid becoming embroiled in an unstable internal dispute by extraditing combatants, no matter whether revolutionaries or tyrants, who have not breached the 1949 Geneva Conventions or the 1977 Protocol II. At the other end of the spectrum, where no such condition pertains and where the forms of meaningful democratic process exist, other nations should remain free to extradite those who use violence to try to gain their goals despite the existence of other means of redress. In the absence of civil war, political violence directed at governmental officials or security personnel should be deemed a “political offense” only in the “extraordinary circumstance” that no other means of political redress is available. By enacting S. 1940 with the Senate Foreign Relations Committee’s view of “extraordinary circumstances,” with the new absolute prohibition suggested above, and with the ABA’s proposed amendment, combatants in armed conflicts would be protected; mere terrorists would not.

The measure of the effect of this approach is to ask what would have happened in *McMullen* and *Mackin* if the ABA amendments had been in place. The answer is that the opposite results would have obtained, and properly so. Much as the PIRA would like it otherwise, the “troubles” in Northern Ireland do not constitute a civil war and do not justify invoking the exception.

The political offense exception could never have been intended to provide blanket immunity and asylum to every politically disaffected individual who in the company of a few others of like mind wishes to take the law—and a gun—into his own hands. Where the institutions of democratic governance exist as they do, for example, in Northern Ireland, it ill-serves the interests of those who live in a free and open society to cast a cloak of protection over impatient extremists who demand their own way now and will kill anyone who stands in their way—whether policeman, politician, soldier, or civilian. There is no rule of international law that sanctifies political murder merely because the victim wears a uniform. There is no open season on soldiers or policemen, nor should the city streets and village lanes of a democratic nation be considered a war zone merely because there are a hundred terrorists at large rather than one.

CONCLUSION

While the best approach is to defer to the Secretary of State in determining whether or not a particular crime is a “political offense” under our extradition treaties, it appears that Congress has moved past this stage of the argument. The decision to leave the matter in the courts’ hands seems irreversible; the task that is left is to provide more detailed guidance to the courts in their interpretive task.

Section 3194(e) of S. 1940, as passed by the Senate in 1982, provides excellent guidance and would be entirely satisfactory if it is recognized that the Senate Foreign Relations Committee has set forth the correct

standard for interpreting "extraordinary circumstances," if a new prohibition excluding terrorist attacks on civilians is added, and if the American Bar Association's proposed amendment is adopted. Such a statute will give courts the necessary tools with which to separate the truly downtrodden from the merely dissatisfied, to distinguish the rebel from the terrorist. By enacting such legislation, Congress will ensure that the balancing of interests inherent in the political offense determination will be made with a sense of proportion and in a manner consistent with our democratic notions of decency, world order, and the Rule of Law.

Appendix A**AMERICAN BAR ASSOCIATION SECTION
OF INTERNATIONAL LAW AND
PRACTICE:*****Report to the House of Delegates/Inclosure 3.*****EXTRADITION IN RELATION TO INTERNATIONAL LAW
APPLICABLE IN ARMED CONFLICT**

1. The International Law rules applicable in armed conflict consist of restraints formulated to prevent, or at least to mitigate, the destruction of shared values occasioned by armed conflict. The underlying stimulus for the development has been the realization that violence and destruction which is unnecessary to actual military requirements is not only immoral and wasteful of scarce resources, but also counterproductive to the attainment of the political objectives for which military force is used.

2. Breaches of the norms developed under customary and Conventional International Law are war crimes. The 1949 Geneva Conventions designate certain aggravated breaches as universal and extraditable offenses within the criminal jurisdiction of each contracting party. As of January 1, 1983, 152 nations are parties to those conventions.

Each of the four 1949 Geneva Conventions obliges the contracting parties:

a. To enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches defined therein.

b. To search for alleged offenders of such grave breaches, and to submit them for prosecution before its own courts, regardless of their nationality; or, in accordance with its own legislation, to extradite them to another contracting party concerned, provided the requesting party has made out a prima facie case. (Common Articles 49/50/129/146).

As there are now 152 parties to the 1949 Geneva Conventions, grave breaches denounced therein are universal crimes subject to the jurisdiction of each party to the conventions. They would be extraditable offenses, not subject to the political offenses exception, under the proposed standard of S. 220(e)(1)(D) and H.R. 2643, Section 3194(e)(2)(D) which prescribe that an offense with respect to which a treaty obligates the United States to either extradite or prosecute a person accused of an offense is not a political offense.

c. The grave breaches defined in the 1949 Geneva Conventions are the following, if committed in an international armed conflict against protected persons and objects:

in the case of all four Conventions: willful killing, torturing or inhuman treatment, including biological experiments, willfully causing great

suffering or serious injury to body or health;

in the case of the First, Second and Fourth Conventions: extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

in the case of the Third Convention: compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving him of the rights of fair and regular trial prescribed in the Convention;

in the case of the Fourth Convention: unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed by the Convention; taking of hostages.

(Common Articles 50/51/130/147).

"Protected persons" within the meaning of the 1949 Geneva Convention are the wounded, sick and shipwrecked persons of the armed forces, medical personnel, prisoners of war and civilians in the power of a party to the conflict of which they are not nationals. (Fourth Convention, Art. 4).

3. The 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflict (Protocol I), adds several new offenses as grave breaches including:

willful and unjustified acts of omissions which seriously endanger the physical or mental health or persons in the power of an adverse party, by medical procedures not indicated by the medical needs of that person, or not consistent with generally accepted medical standards, including mutilations, medical experiments, and removal of organs for transplantation (Protocol I, Art. 11(4));

willfully causing death or seriously injury to body or health by:

making the civilian population the object of attack;

launching an indiscriminate attack or an attack against works or installations containing dangerous forces (dams, dykes, nuclear electric power generating stations), knowing that it will cause civilian casualties, excessive in relation to the concrete and direct military advantage anticipated;

making nondefended localities or demilitarized zones the object of attack and;

the perfidious use of the Red Cross emblem. (Protocol I, Art. 85).

The United States has signed, but not ratified, the 1977 Protocols. Protocol I is now effective as to twenty-seven states.

4. In international armed conflicts, prisoner of war status flows from the combatants' privilege. Those who are entitled to the juridical status of "privileged combatant" are immune from criminal prosecution for those warlike acts which do not violate the laws and customs of war but

which might otherwise be common crimes under municipal law. This is a concept recognized by the classic publicists, including Belli, Grotius, Pufendorf, and Vattel. It was recognized in Article 57 of the Lieber Instructions of 1863, which states that "[s]o soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses." Under the law of the United States, any killing while on combat operations which is not violative of the laws of war is recognized to be justifiable homicide. Civil law courts recognized this concept in the post-World War II trials when they provided immunity to those defendants charged with violations of domestic criminal law if it was established that their acts were privileged under international law.

In view of the clear distinction between grave breaches of the Geneva Conventions and legitimate acts of combat by privileged combatants, the standards developed in S. 220 and H.R. 2643 can be applied without difficulty as to acts of violence performed in the course of an international armed conflict. Grave breaches are not political offenses; legitimate acts of combat are not offenses at all and thus do not come within the scope of extradition treaties.

5. Acts of violence occurring in the course of a non-international armed conflict (insurrection, rebellion or civil war) pose a more difficult problem. Although the 1949 Geneva Conventions and the 1977 Protocol II establish normative humanitarian rules applicable in non-international armed conflict, they do not provide for any enforcement measures. Moreover, they do not oblige states affected by an internal armed conflict to recognize the combatants' privilege or to accord prisoner of war treatment to captured combatants of the other side. For self-evident reasons, governments (particularly those which may be affected by an emerging dissident or separatist movement) are unwilling to concur in any international law which would, in effect, repeal its treason laws and confer on its domestic enemies a license to kill, maim or kidnap its security personnel and destroy its security installations subject only to honorable detention as prisoners of war until the conclusion of the internal armed conflict. They fear that any international rule establishing the combatants' privilege and prisoner of war status in internal armed conflicts would tend to encourage insurrection by reducing the personal risks of rebels. It follows that within the scope of the domestic law of a country affected by such an armed conflict, the rebels have committed treason and their acts of violence may be punished as common criminal offenses. As a matter of policy, States sometimes apply international armed conflict practices to a civil war and are generous with amnesty in order to facilitate a restoration of peace, or in a prudent expectation of reciprocity, but international law does not require such a policy except with respect to recognized belligerency, a rare event in this century.

6. Without affecting the legal status of the parties to a noninternational armed conflict, Common Article 3 of the 1949 Geneva Convention applies certain minimum human rights standards applicable to persons

not, or no longer, taking an active part in the hostilities as follows:

ARTICLE 3.

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the abovementioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded, sick and shipwrecked shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

These standards have been extensively elaborated and particularized in the 1977 Protocol II to the 1949 Geneva Conventions. Relevant portions provide:

Article 4 — Fundamental guarantees

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall

remain prohibited at any time and in any place whatsoever;

(a) violence to the life, health and physical or mental wellbeing of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishments;

(c) taking of hostages;

(d) acts of terrorism;

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) slavery and the slave trade in all their forms;

(g) pillage;

(h) threats to commit any of the foregoing acts.

Article 6 — Penal prosecutions

1. This Article applies to the prosecution and punishment of criminal offenses related to the armed conflict.

2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offense except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offense alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) no one shall be convicted of an offense except on the basis of individual penal responsibility;

(c) no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offense was committed; if, after the commission of the offense, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offense is presumed innocent until proved guilty according to law;

(e) anyone charged with an offense shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt.

In addition to the foregoing, Protocol II includes standards for humane treatment of persons deprived of their liberty for reasons related to the armed conflict (Art. 5); the care of the wounded, sick and shipwrecked, (Arts. 7-12); and the protection of the civilian population against direct attack and other effects of hostilities (Arts. 13-18).

7. Because common Article 3 of the 1949 Geneva Conventions are the Conventions' only articles relating to non-international armed conflicts,

none of the provisions of the conventions relating to the enforcement, including the prosecute or extradite provisions are applicable to the norms of Article 3. It follows that the only basis for extradition under U.S. law for offenses violative of Art. 3 are the various bilateral extradition treaties relevant to common crimes. These are subject to the political offenses exception. Indeed the political offenses exception was invented in 1840 for the purpose of shielding from extradition the participants in the liberal and nationalistic revolutions which occurred in mid-nineteenth century Europe and the Americas.

8. Although there is no mandatory combatants' privilege and prisoner of war status or treatment in internal armed conflicts within the scope of any nation's municipal law, a qualified combatants' privilege has been recognized by third states in matters relating to asylum and extradition. The dichotomy between the state of municipal law and transnational practice in this regard was vividly expressed by Sir James Stephen in his explanation of the British Extradition Act of 1870:

[I]f a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Whenever a house was burnt for military purposes arson would be committed. To take cattle . . . by requisition would be robbery. According to the common use of language, however, all such acts would be political offences, because they would be incidents in carrying on a civil war. I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances." (J. Stephen, *A History of the Criminal Law of England* (1883), Vol II, at 70-71).

This reasoning was applied in the case of *In re Castioni* [1891] 1 Q.B. 149, 167 which became the leading influence on the application of the political offenses exception in American courts. The difficulty with the simple formula of the *Castioni* case is that it did not recognize that there are limitations on the conduct of internal armed conflict and that revolutionary violence which transgresses these limitations is not tolerable under the political offenses exception. Moreover, every political disturbance does not provide justification for violent criminal acts.

A 1907 French law comes much closer to the recognition of these limitations. It provided:

[Extradition is not granted] when the crime or offense has a political character or when it is clear [resulte] from the circumstances that the extradition is requested for a political end.

. . .

As to acts committed in the course of an insurrection or a civil war by one or the other of the parties engaged in the conflict and in the furtherance . . . of its purpose, they may not be grounds for extradition unless they constitute acts of odious barbarism and vandalism prohibited by the laws of war, and only when the civil war has ended. (Law of March 10, 1927, Tit. 1, Art. 5, para. 2, as quoted in Hannay, *Inter-*

national Terrorism and the Political Offense Exception to Extradition, 18 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 381, 386 (1979).

Similarly, the 1967 Protocol relating to the Status of Refugees (606 U.N.T.S. 267, 19 U.S.T. 6223) which prohibits the expulsion or return of a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or membership of a particular social group or political opinion, does not apply to persons with respect to whom there are serious reasons for considering that he has committed a war crime or a serious nonpolitical crime (Arts. 2F, 33).

The gap between normative prohibitions and measures of enforcement in the 1949 Geneva Conventions and its Protocols is plugged with respect to hostage taking by the 1979 Convention Against the Taking of Hostages. (Senate consent completed, but treaty not yet in effect).

Common Article 3 and Article 4 of Protocol II prohibit the taking of hostages in a non-international armed conflict. Article 75 of Protocol I, which lays down fundamental human rights for persons who do not qualify as "protected persons," also prohibits this act. But the grave breach of the Fourth Convention applies only to "protected" civilians in the power of an adverse party in an international armed conflict. The effect of Article 12 of the 1979 Hostage Convention, however, is to make the Hostage Convention with its very strong prosecute or extradite provisions applicable to acts of hostage taking in armed conflicts, whenever the Geneva Conventions and its Protocols do not establish the obligation to submit [?] for prosecution or to extradite.

In view of the practice of states in regard to applying the political offenses exception to normal combat activities occurring in a non-international armed conflict occurring in another country, the provision of S. 220 and H.R. 2643 which excludes all acts of violence from the benefits of the exception, should be modified.

9. There remains for consideration, the issue whether a particular situation amounts to an armed conflict.

The 1977 Protocol II Applicable in Non-International Armed Conflict has a very high threshold. Under Art. 1, that Protocol (which includes rules regulating combat activities as well as basic human rights provisions) is applicable to armed conflicts:

. . . which take place in the territory of a high Contracting party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. (Protocol I, Art. 1(1)).

In view of the sophisticated provisions of Protocol II its implementation requires sufficient statelike characteristics on the part of the rebels as to suggest a level of organization and violence to be found in a classical civil war, where one might expect international armed conflict rules to

apply, either under recognized belligerence or a prudent expectation of reciprocity.

Protocol II also establishes a negative limitation which is relevant to Common Article 3 (despite the express disclaimer that Protocol II does not modify its existing application). Art. 1(2) provides: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

The term "armed conflict" is not defined in Common Article 3, mainly because no definition was able to command a consensus in the 1949 Geneva Conference. Presumably, in view of its basic minimum human rights provisions it should be much lower than the threshold for Protocol II. There is nothing in paragraph 1 of Common Article 3 which is not already demanded by the procedure of penal law of "civilized" states in relation to the treatment of common criminals.

Nevertheless, as the application of Common Article 3 acknowledges the existence of an "armed conflict," many states have refused to admit its application to insurgencies occurring in their territories. Thus, France refused to apply Common Article 3 until late in the Algerian war; Pakistan denied its applicability to the Bangladesh secession. The U.K. has never conceded that the troubles in Northern Ireland constitute an armed conflict, despite its declaration, in justifying its derogation of certain provisions of the European Convention on human rights, that an emergency exists threatening the life of the nation.

Insofar as foreign governments do not consider themselves bound to refrain from applying the combatants' privilege as it applies to extradition cases involving violent acts occurring in an internal armed conflict, it would seem that they are similarly not bound to follow the *de jure* government's determination as to whether an armed conflict exists for purposes of the political offenses exception.

The threshold article proposed for initial application (Incl. 4) consists of the minimum requirements that the dissident armed forces:

- a. be linked to a party to the conflict;
- b. be organized;
- c. be under a command responsible to the party for the conduct of subordinates, and;
- d. that, the government's armed forces (rather than the civil police) be committed to suppress the insurrection.

It also uses the negative provisions of Protocol II to make certain that acts of violence against the police of a State in situations falling short of "armed conflict" do not benefit from the political offenses exception. The "extraordinary circumstances" clause, however, remains in the draft proposal in order to allow courts to apply the exception to meritorious cases involving the use of violence in situations falling short of armed conflict. The burden of establishing extraordinary circumstances by a preponderance of the evidence is on the person sought.