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IN THE MATTER OF THE EXTRADITION OF ATTA: LIMITING THE SCOPE OF THE POLITICAL OFFENSE EXCEPTION*

I. INTRODUCTION

With Israel being their primary target,¹ Palestinian terrorist groups² are responsible for some of the most violent attacks worldwide.³ These groups place a high premium on accomplishing their political goals and to achieve that end they use indiscriminate forms of violence, very often against civilians.⁴ These seemingly random victims include Israeli athletes, school children, and civilians on passenger buses.⁵ Perhaps what is most disturbing is that these terrorists refer to themselves as "fedayeen," or self-sacrificers willing to die for their causes.⁶ Therefore, they are unresponsive to the counterterrorist policies of target states.⁷

The United States Department of State views terrorist groups as a major threat to world peace.⁸ Israel, however, has been somewhat successful in lessening the threat of terrorist activities by using sophisticated airport security systems and by developing an efficient organization that deals with bombs found

* This Comment disagrees with the views set forth in Note, *In Re Extradition of Atta: Tension Between the Political Offense Exception and U.S. Counterterrorism Policy*, 1 PACE Y.B. INT'L L. 163 (1989). That Note takes the view that the political offense exception is necessary to preserve due process rights and primarily discusses Magistrate Caden's *In Re Extradition of Atta*, No. 87-M-0551 (E.D.N.Y. June 17, 1988) (1988 Westlaw 66866) opinion which was reversed by the district court opinion discussed in this Comment. *In re Extradition of Atta*, 706 F. Supp. 1032 (E.D.N.Y. 1989).

1. Bremer, *Countering Terrorism in the 1980's and 1990's*, 89 DEP'T ST. BULL. 61, 62 (1989) [hereinafter Bremer, *Countering Terrorism*]. Israel, while being their main target, is not their only target. *Id.*

2. Palestinian terrorist groups include the Abu Nidal Organization, Al-Fatah, 15 May Organization, Force 17, Lebanese Armed Revolutionary Faction, Palestine Liberation Front, Palestine Liberation Organization (PLO), Popular Front for the Liberation of Palestine, Popular Front for the Liberation of Palestine-General Command, Popular Front for the Liberation of Palestine-Special Command, and Popular Struggle Front. United States Department of State, *Patterns of Global Terrorism: 1987*, Pub. No. 9661 (Aug. 1988) [hereinafter Department of State, *Patterns of Global Terrorism*].

3. Bremer, *Countering Terrorism*, *supra* note 1 at 61.

4. Beres, *The Ever Violent Middle East*, in *THE STRUGGLE AGAINST TERRORISM* 79 (W. Lineberry ed. 1977) [hereinafter Beres].

5. Beres, *supra* note 4, at 79.

6. Beres, *supra* note 4, at 79.

7. Beres, *supra* note 4, at 79.

8. Bremer, *Countering Terrorism*, *supra* note 1, at 61.

in populated areas.⁹ Additionally, the United States has contributed to the counterterrorist effort through a three-part policy¹⁰ which includes: (1) refusing to negotiate with terrorist groups;¹¹ (2) pressuring states not to use terrorism as part of their foreign policy;¹² and (3) imposing sanctions on terrorists for their criminal actions.¹³ This policy appears to be an effective method for reducing terrorism.¹⁴ Nevertheless, terrorism is a persistent international problem¹⁵ which must be addressed by all members of the international community so that it will be substantially reduced.¹⁶

Extradition is one process that should help to alleviate the effects felt by terrorist groups. Extradition is helpful because the terrorists that are extradited, if found guilty in the state in which the terrorist act was committed, will be punished for their

9. Department of State, *Patterns of Global Terrorism*, *supra* note 2, at 8.

10. The United States Ambassador at Large for Counterterrorism, L. Paul Bremer, III stated three pillars of American counterterrorist policy in a statement before the House Foreign Affairs Committee:

First, we will not accede to terrorist demands. We will not pay ransom, pardon convicted terrorists, or pressure other countries to give in to terrorist demands. In other words, we will make no deals. But we will talk to anyone authoritative-anywhere, anytime-about the welfare and unconditional release of our hostages.

Second, we have taken the lead in pressuring states which support terrorist groups and use terrorism as part of their foreign policy. We have shown these states that they will be penalized for supporting terrorism. The United States will not tolerate their aiding and abetting terrorist groups by supplying them with weapons, money, passports, training bases and safehouses.

Third, we are imposing the rule of law on terrorists for their criminal actions. Good police work is catching terrorists, and they are being brought to trial. Since 1986, the United States has had a law which enables our law enforcement agencies to better combat terrorism overseas. Popularly called a "long arm" statute, the law makes it a Federal crime to kill, injure, threaten, detain, or seize an American citizen anywhere in the world in order to compel a third person or government to accede to a terrorist's demands.

Bremer, *Terrorism: Its Evolving Nature*, 89 DEP'T ST. BULL. 74-75 (1989) [hereinafter Bremer, *Terrorism*].

11. Bremer, *Countering Terrorism*, *supra* note 1, at 1.

12. Bremer, *Countering Terrorism*, *supra* note 1, at 1.

13. Bremer, *Countering Terrorism*, *supra* note 1, at 1.

14. Bremer, *Countering Terrorism*, *supra* note 1, at 61; Bremer, *Terrorism*, *supra* note 10, at 74-76.

15. In 1988 a record 900 international terrorist incidents occurred. Bremer, *Terrorism*, *supra* note 10, at 74.

16. Bremer, *Countering Terrorism*, *supra* note 1, at 61. Recently, Saudi Arabia beheaded 16 Pro-Iranian Kuwaitis for their participation in terrorist activities. Ibrahim, *The Saudis Behead 16 Pro-Iran Kuwaitis Linked to Terrorism*, N.Y. Times, Sept. 22, 1989, at A1, col. 1. It is this Comment's view that the action taken by Saudi Arabia is perhaps the most extreme method of combating terrorism.

heinous acts. Serious legal issues arise when considering terrorism in light of existing extradition law. A critical question that must be addressed in extradition cases is whether the offense committed by the person for whom extradition is sought is criminal or political in nature.¹⁷ This is an important issue because extradition treaties generally provide that persons who commit acts that are labeled as "political offenses" are not extraditable.¹⁸ Since terrorists by definition undertake certain actions in order to further a political goal, problems arise since terrorist acts may fall within the scope of the political offense exception.¹⁹ Thus, the political offense exception to extradition is a major obstacle to the efforts to combat terrorism.

Recent United States case law dealing with the extradition of terrorists reveals the difficulties the courts have had in determining whether or not terrorist activities fall within the political offense exception to extradition.²⁰ The recent case of *In the Matter of the Extradition of Atta*²¹ discussed the precise scope of the political offense exception and its applicability to a Pales-

17. See *infra* notes 51-57 and accompanying text.

18. The United States "has included the political offense exception in each of its 96 treaties of extradition." Lubet, *Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists*, 15 CORNELL INT'L L.J. 247, 250 (1982) [hereinafter Lubet, *Extradition Reform*].

The United States has entered into bilateral extradition treaties with the following countries: Albania; Argentina; Australia; Austria; Bahamas; Barbados; Belgium; Bolivia; Brazil; Burma; Canada; Chile; Colombia; Congo (Brazzaville); Costa Rica; Cuba; Cyprus; Czechoslovakia; Denmark; Dominican Republic; Ecuador; Egypt; El Salvador; Estonia; Fiji; Finland; France; Gambia; Federal Republic of Germany; Ghana; Grenada; Greece; Guatemala; Guyana; Haiti; Honduras; Hungary; Iceland; India; Iraq; Ireland; Israel; Italy; Jamaica; Japan; Kenya; Latvia; Lesotho; Liberia; Liechtenstein; Lithuania; Luxembourg; Malawi; Malaysia; Malta; Mauritius; Mexico; Monaco; Nauru; Netherlands; New Zealand; Nicaragua; Nigeria; Norway; Pakistan; Panama; Papua New Guinea; Paraguay; Peru; Poland; Portugal; Romania; San Marino; Sierra Leone; Singapore; South Africa; Spain; Sri Lanka; Surinam; Swaziland; Sweden; Switzerland; Tanzania; Thailand; Tonga; Trinidad and Tobago; Turkey; United Arab Republic; United Kingdom; Uruguay; Venezuela; Yugoslavia; and Zambia. 18 U.S.C. § 3181 (1990). See also *infra* notes 39-41 and accompanying text.

19. A widely accepted definition of "terrorism" is "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine state agents, usually intended to influence audience." Department of State, *Patterns of Global Terrorism*, *supra* note 2, at v. A wider definition of a terrorist is "anyone who attempt[s] to further his views by a system of coercive intimidation." J. MURRAY, A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES (1919) cited in W. LAQUEUR, *TERRORISM* 6 n.3 (1977). Recently, "the term 'terrorism' . . . has been used in so many different senses as to become almost meaningless, covering almost any, and not necessarily political, act of violence." *Id.* at 6.

20. See *infra* notes 58-70 and accompanying text.

21. 706 F. Supp. 1032 (E.D.N.Y. 1989).

tinian terrorist who bombed a bus that was *en route* to Tel Aviv.²² The court, after reviewing previous case law and analyzing the situation surrounding the acts of the Palestinian terrorist, determined that not all politically motivated acts should fall within the political offense exception.²³ The court concluded that the actions of the terrorist in question were not protected by the political offense exception of the United States-Israel Extradition Treaty²⁴ and thus granted extradition to Israel.²⁵

This Comment will explore the history of the political offense exception and explain why a clear definition of "political offense" is needed.²⁶ It will examine whether the political offense exception covers acts of terrorism and will argue that the exception should not apply to terrorists. The need for reform of the political offense exception is apparent because United States cases that invoke the exception generally cannot be reconciled with the cases that render it inapplicable. This Comment will argue that the necessary reform cannot come from the courts and accordingly recommends that the legislature take action to ensure that counterterrorist efforts will not be hindered by the inconsistently applied political offense exception.

II. BACKGROUND

A. History

Extradition is a process whereby one country makes a for-

22. *Id.* at 1034-52.

23. *Id.* at 1042-50.

24. Convention on Extradition Between the Government of the United States of America and the Government of the State of Israel, Dec. 10, 1962, 14 U.S.T. 1707, T.I.A.S. No. 5476 [hereinafter United States-Israel Extradition Treaty]. Article VI, sec. 4 states: "Extradition shall not be granted in any of the following circumstances: 4 When the offense is regarded by *the requested Party* as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him for an offense of a political character." (emphasis added). *Atta*, 706 F. Supp. at 1042-50, 1052.

25. *Id.*

26. There is no universally accepted definition of "political offense," however, there is a distinction made between "pure political offenses" and "relative political offenses." See Note, *American Courts and Modern Terrorism: The Politics of Extradition*, 13 INT'L L. & POLITICS 621, 623-24 (1981); Lubet, *Extradition Reform*, *supra* note 18, at 253. Pure political offenses are limited to acts directed against the state and are never extraditable while relative political offenses are generally common crimes connected to a political element. With a relative political offense, the requested state must determine if there is a sufficient nexus between the crime and the political goal in order to invoke the exception. *Id.* See *infra* notes 177-94 and accompanying text.

mal request that another country surrender an accused criminal or convicted fugitive to the requesting state's jurisdiction.²⁷ The right to demand extradition of a fugitive, as well as the duty to surrender the fugitive to the requesting state, arises from bilateral and multilateral extradition treaties.²⁸ These treaties either include specific lists of offenses for which extradition may be granted, or state that the acts for which extradition is requested must be regarded as a criminal offense under the municipal law of each party to the treaty.²⁹

Today, extradition is used primarily to effectuate the surrender of a person accused or convicted of a crime.³⁰ Ironically, this was neither the intent nor the purpose of the original practice of extradition. From ancient times until the end of the seventeenth century, extradition treaties were primarily concerned with political and religious offenders, and were least concerned with common criminals.³¹ This was because states that had strong ties with each other had reciprocal interests in surrendering persons who threatened the stability of each state's political order.³² However, the scope of extradition treaties began to evolve.

Due to international efforts aimed at combating piracy be-

27. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW* 885 (2d ed. 1987) [hereinafter L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT]; for a definition of the term "extradition," see M. BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 5-10 (1974) [hereinafter M. BASSIOUNI].

28. International law only recognizes a legal right to demand extradition and the reciprocal duty to surrender the fugitive where treaties are entered. G. VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO INTERNATIONAL LAW* 263 (4th ed. 1981) [hereinafter G. VON GLAHN]. Therefore, it is possible that state A may voluntarily surrender a fugitive to state B where no extradition treaty has been entered, however, state B has no legal right to request that state A extradite the fugitive for a crime committed in state B. *See generally id.* A state may also extradite based on reciprocity or comity. M. BASSIOUNI, *supra* note 27, at 8, 59-61. "Although most [methods of extradition] are based on bilateral agreements, in the absence of a generally accepted convention on the subject there has come into being sufficient similarity in state practices to support the view that by now a series of customary rules has developed or that the rules are in the final stages of development." G. VON GLAHN, at 262.

29. M. BASSIOUNI, *supra* note 27, at 324-30. The treaties which provide for extradition where the offense committed is a crime punishable in both countries that are the parties to the treaties originated in the twentieth century. *Id.* at 324-35.

30. Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 HARV. INT'L L.J. 61, 63 (1979) [hereinafter Epps, *Political Offender Exception*].

31. *Id.* at 62; M. BASSIOUNI, *supra* note 27, at 7.

32. Petty crimes did not threaten the internal political order of a state and, until the 1800s, extradition was directed at maintaining the stability of the political system of the requesting state. M. BASSIOUNI, *supra* note 27, at 4.

tween the sixteenth and eighteenth centuries, the scope of extradition treaties gradually expanded to include ordinary crimes as one of the bases for extradition.³³ As modes of transportation became more sophisticated, criminals were able to quickly flee from the jurisdictions where they had committed their crimes.³⁴ Thus, general extradition treaties were developed in order to deal with criminal offenders.³⁵ Political and religious offenses were no longer the primary concern of extradition treaties and eventually political offenses were no longer a basis for the surrender of fugitives.³⁶

During the end of the eighteenth century, concern for the political offender arose as representative forms of government took shape and sovereigns began to accept political theories based on individualism and the right to rebel against oppressive forms of government.³⁷ In response to this growing concern, the Belgians and French, in their joint extradition treaty of 1834, explicitly excluded political offenders from extradition.³⁸ In 1843, the treaty between the United States and France became the first extradition treaty into which the United States entered that included a political offense exception.³⁹ By the end of the nineteenth century the political offense exception had become a standard clause in all United States extradition treaties.⁴⁰ The underlying basis for including the political offense exception in extradition treaties were the concepts of freedom, individualism, and democracy. Indeed, the exception itself was closely linked to the concept of political asylum.⁴¹

B. Extradition Procedure

There is a standard procedure for extradition which is gen-

33. M. BASSIOUNI, *supra* note 27, at 7.

34. Modern international cooperation began in the 1900s in order to suppress crime. Before the advancement of travel, conditions were perilous and transport was difficult. Further, the stranger was not well received and sanctuary in a new place was not certain. A. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 7 (1971) [hereinafter A. SHEARER].

35. *Id.* at 6-8.

36. M. BASSIOUNI, *supra* note 27, at 4; see also A. SHEARER, *supra* note 34, at 6 n.4.

37. Epps, *Political Offender Exception*, *supra* note 30, at 63; see Lubet, *Extradition Reform*, *supra* note 18, at 248-49.

38. Epps, *Political Offender*, *supra* note 30, at 63 (citing Extradition Treaty between Belgium and France, Nov. 22, 1834, art. 5, 84 Parry's T.S. 457, 462).

39. Epps, *supra* note 30, at 63 (citing Treaty of Extradition between the United States and France, Nov. 9, 1843, art. 4, 8 Stat. 580, T.S. No. 89).

40. Epps, *Political Offender Exception*, *supra* note 30, at 63.

41. Lubet, *Extradition Reform*, *supra* note 18, at 250-51.

erally followed by states that have extradition treaties.⁴² First, a formal request for extradition must be made by a diplomatic agent of the state that seeks the surrender of a fugitive.⁴³ The country that has been requested to extradite the fugitive commences an investigation through its judicial branch to determine whether there is sufficient evidence under its own laws to warrant their arrest.⁴⁴ If there is sufficient evidence which meets the local law requirements, the fugitive is turned over to the agents of the state that requested extradition and is then returned to the country seeking custody.⁴⁵ When the fugitive is returned to the jurisdiction of the requesting state he or she may only be tried for the offense that served as the basis for extradition.⁴⁶

In the United States, a state requesting extradition can not appeal an unfavorable decision regarding extradition to a higher court.⁴⁷ However, a state may refile its extradition request before another trial court.⁴⁸ Similarly, the defendant may not appeal an adverse decision, but may file a writ of habeas corpus which is

42. G. VON GLAHN, *supra* note 28, at 264. "Although extradition treaties vary considerably as regards the offenses listed in them as the basis of surrender, the actual procedure utilized in extradition has been standardized fairly well all over the world." *Id.*; see generally L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 27, at 885-90.

43. G. VON GLAHN, *supra* note 28, at 264.

44. G. VON GLAHN, *supra* note 28, at 264.

45. G. VON GLAHN, *supra* note 28, at 264. Because of the possibility of a fugitive leaving a current place of refuge upon learning of the threat of extradition proceedings, most treaties provide for the provisional arrest of fugitives after an informal request for extradition. *Id.* at 265. See also 18 U.S.C. § 3187 (1988) which states:

The provisional arrest and detention of a fugitive . . . in advance of the presentation of formal proofs, may be obtained by telegraph upon the request of authority competent to request the surrender of such fugitive addressed to the authority competent to grant such surrender. Such request shall be accompanied by an express statement that a warrant for the fugitive's arrest has been issued within the jurisdiction of the authority making such request charging the fugitive with the commission of the crime for which his extradition is sought to be obtained.

This provision restricts the amount of time the fugitive can be held in custody upon telegraphic request to ninety days. 18 U.S.C. § 3187 (1988).

46. G. VON GLAHN, *supra* note 28, at 265. This has been referred to as the principle of specialty.

According to the principle of specialty the requisitioning state may not, without the permission of the asylum state, try or punish the fugitive for any crimes committed before the extradition except the crimes for which he was extradited. The permission of the asylum state is also required to re-extradite the fugitive to a third state.

L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 27, at 889.

47. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 27 at 890.

48. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 27, at 890. See M. BASSIOUNI, *supra* note 27, at 608.

appealable to higher federal courts.⁴⁹ This relatively simple process is complicated when a fugitive terrorist claims to be a political offender exempt from extradition under the political offense exception. The uncertain legislative history of the political offense exception and inconsistent case law reflect the indecisiveness in the area of the political offense exception.

C. Political Offenses

Traditionally, political offenses fall into two categories: (1) pure political offenses;⁵⁰ and (2) relative political offenses.⁵¹ There has been little litigation concerning pure political offenses committed against a government.⁵² Pure political offenses consist of direct acts committed against a state and include such acts as treason, sedition, and espionage.⁵³ Such offenses are meant to be vehicles for carrying out the expression of political ideas, they generally do not incite violence, and thus lack the elements of common crimes.⁵⁴ As demonstrated by the Belgian and French extradition treaties, and later in United States treaties, pure political offenders are the primary targets that the political offense exception seeks to protect.⁵⁵

The majority of cases regarding the applicability of the political offense exception concern relative political offenses which are actions motivated by political reasons and carried out through common crimes.⁵⁶ Acts of terrorists are generally indiscriminate forms of violence that do not immediately affect governmental structure. Thus, terrorism falls under the definition of relative political offenses rather than that of pure political offenses. Because relative political offenses involve both the elements of common crimes and the elements of a political offense,

49. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 27, at 890.

50. See *infra* notes 54-55 and accompanying text.

51. See *infra* notes 56-57 and accompanying text.

52. J. MURPHY, PUNISHING INTERNATIONAL TERRORISTS: THE LEGAL FRAMEWORK FOR POLICY INITIATIVES 47 (1985) [hereinafter J. MURPHY].

53. Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exception in Extradition — A Proposed Judicial Standard for an Unruly Problem*, 19 DE PAUL L. REV. 217, 245-48 (1969) [hereinafter Bassiouni, *Political Offenses*; J. MURPHY, *supra* note 52, at 47.

54. Bassiouni, *Political Offenses*, *supra* note 53, at 245-58; J. MURPHY, *supra* note 52, at 46.

55. Epps, *Political Offender Exception*, *supra* note 30, at 63.

56. Bassiouni, *Political Offenses*, *supra* note 53, at 248; J. MURPHY, *supra* note 52, at 47.

the courts have developed specific tests to determine whether a particular act should be afforded protection under the political offense exception, or whether the act should be deemed a common crime and therefore extraditable.⁵⁷

D. *The Political Offense Exception Tests*

There are two tests that United States courts use in order to determine the applicability of the political offense exception to a fugitive during extradition proceedings.⁵⁸ These tests, the incidence test and the proportionality or predominance test, both attempt to draw a line between the offenses that deserve the protection of the political offense exception and the offenses which do not deserve the protection of the political offense exception.⁵⁹

In determining the applicability of the political offense exception in extradition cases, courts have generally relied on two nineteenth century English cases⁶⁰ which focused on whether there was an uprising or violent political disturbance at the time the act was committed, and whether the offense committed was incidental to the uprising.⁶¹ This analysis has been labeled the "incidence test" and generally provides that an accused is not

57. Bassiouni, *Political Offenses*, *supra* note 53, at 248-54; J. MURPHY, *supra* note 52, at 47-48.

58. Goldie, *The "Political Offense" Exception and Extradition Between Democratic States*, 13 OHIO N.U.L. REV. 53, 67-75 [hereinafter Goldie, *Extradition*]; In *Re Doherty*, 599 F. Supp. 270, 276 (S.D.N.Y. 1984) *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981).

59. Goldie, *Extradition*, *supra* note 58, at 62.

60. *In re Castioni*, [1891] 1 Q.B. 149. G. VON GLAHN, *supra* note 28, at 270-71 (citing *In re Meunier*, [1894] 2 Q.B. 415). "The decision in *In re Meunier* began a trend by the British courts towards narrowing the sweep of the political offender exception." Epps, *Political Offender Exception*, *supra* note 30, at 65. In *Meunier*, the French Government requested the extradition of Meunier, a French citizen, from Great Britain. Meunier had been accused by the French of two bombings in France linked to an anarchist movement. Meunier sought reliance on *Castioni* to prevent his extradition on the basis that his acts constituted a political offense. However, the English court permitted his extradition on the grounds that Meunier's acts lacked a sufficient connection to a political incidence or uprising. Specifically, the court noted the absence of a struggle among two or more parties in the French state seeking to establish a government of its choice and added that the goal of the anarchist movement of which Meunier was a part of was to abolish all governments rather than to create one. Moreover, the court ruled that anarchist offenses directed at private citizens fell outside of the meaning of the political offense exception notwithstanding the secondary or incidental effects upon a government. Epps, *Political Offender Exception*, *supra* note 30, at 65; *Quinn v. Robinson*, 783 F.2d 776, 796 (9th Cir. 1986).

61. Lubet, *Extradition Reform*, *supra* note 18, at 262.

subject to extradition if the act was committed in connection with a political uprising or disturbance.⁶²

Most recently, the incidence test has been applied in cases involving terrorists who are members of the Irish Republican Army (IRA).⁶³ Some courts have been hesitant in finding certain members of the IRA who engage in terrorist activities extraditable to the United Kingdom, and because of mechanical and inflexible application of the incidence test, these courts afford them protection under the political offense exception.⁶⁴

Somewhat related to the incidence test is the proportionality test which finds its roots in Swiss case law.⁶⁵ In addition to a direct connection between the offence and advancement of a political goal, the political elements of the act must outweigh the common crime elements, or be proportional to the political ends sought.⁶⁶ Recent extradition cases in United States courts have adopted the proportionality test in determining the applicability of the political offense exception to an IRA member⁶⁷ and Palestinian terrorists.⁶⁸

In the past, United States courts have generally relied on the incidence test, but more recently, courts have utilized the proportionality or predominance test to determine the applicability of the political offense exception to terrorists.⁶⁹ The problem is that there has been little uniformity in how United States courts have applied the offense exception to terrorists. The following analysis of recent United States case law demonstrates this fundamental lack of uniformity.

62. Lubet, *Extradition Reform*, *supra* note 13, at 262; Goldie, *Extradition*, *supra* note 58, at 66.

63. See Epps, *Political Offender Exception*, *supra* note 30, at 64.

64. See *infra* notes 71-111 and accompanying text.

65. See *infra* notes 112-35 and accompanying text; Goldie, *Extradition*, *supra* note 58, at 63-64.

66. Goldie, *Extradition*, *supra* note 58, at 63-64.

67. *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984). See *infra* notes 113-24 and accompanying text.

68. *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981); see *infra* notes 125-34 and accompanying text.

69. See *infra* notes 112-76 and accompanying text. There is a third test, called the "objective test," that was developed and is used by the French judiciary. The political motivation of the offender is not considered, and the court looks solely at whether the state or its political organizations have been injured. Thus, the objective test recognizes only pure political offenses. Goldie, *Extradition*, *supra* note 58, at 62-63.

III. CASE LAW

Recent cases in United States courts have inconsistently applied the political offense exception to terrorists. While the courts have adopted specific tests to determine whether or not a particular defendant is extraditable, the standards have been adapted to meet the desired ends of particular cases. What has resulted from the uncertainty surrounding the political offense exception are lengthy opinions which have generated much criticism regarding the application of the political offense exception to terrorists.⁷⁰

A. *The Incidence Test*

United States courts first followed the British courts in applying the "incidence test" to determine whether the political offense exception applied to a defendant in extradition proceedings.⁷¹ This test looks at whether there is an uprising or political disturbance, and then determines whether the act was incidental to the uprising.⁷² Both of these aspects of the test must be satisfied in order for the exception to apply. The "incidence test" has been mechanically and inflexibly applied where the United Kingdom has requested that the United States extradite terrorists belonging to the IRA. Generally, the courts have held that members of the IRA are nonextraditable.⁷³ Three recent IRA cases which have employed the "incidence test" are *In re McMullen*,⁷⁴ *In re Mackin*,⁷⁵ and *Quinn v. Robinson*.⁷⁶

In *In re McMullen*, a member of the Provisional Wing of the Irish Republican Army (PIRA) was involved in the bombing of British military barracks in Great Britain which killed off duty soldiers.⁷⁷ McMullen, who had fled to the United States, was accused of murder by the British Government.⁷⁸ The United Kingdom filed a request for extradition with the United States

70. See generally Lubet, *Extradition Reform*, *supra* note 18.

71. See Lubet, *Extradition Reform*, *supra* note 18, at 262.

72. Lubet, *Extradition Reform*, *supra* note 18, at 262.

73. See *infra* notes 77-110 and accompanying text.

74. No. 3-78-1099 M.G. (N.D. Cal. May 11, 1979) (Mem.) (unreported).

75. No. 80 Cr. Misc. 1 (S.D.N.Y. Aug. 13, 1981) (unreported), *aff'd*, *United States v. Mackin*, 668 F.2d 122 (2d Cir. 1981).

76. C-82-6688 R.P.A. (N.D. Cal. Oct. 1983) (unreported), *vacated and remanded*, *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986).

77. *McMullen*, No. 3-78-1099 M.G. slip op. at 1-2.

78. *Id.*

pursuant to the United States-United Kingdom Extradition Treaty.⁷⁹

At the extradition hearing, the magistrate applied the "incidence test" to the specific facts of the case. The court found that there was sufficient evidence to establish that a political uprising existed in Northern Ireland.⁸⁰ Furthermore, the court found that the uprising had spread to Great Britain and therefore, even though it was an isolated act on that particular day, the bombing was incidental to an ongoing political uprising.⁸¹ Additionally, the court found that McMullen was a member of the PIRA at the time the offense was committed and that his orders came from the organization's authorities, thus establishing that McMullen's acts were politically motivated.⁸² Therefore, because the two prongs of the "incidence test" were satisfied, the court concluded that, regardless of the heinous nature of the offense, McMullen's acts fell within the political offense exception and that he could not be extradited.⁸³

In re Mackin added another prong to the "incidence test." In addition to the two traditional prongs of the incidence test, the court asked whether the defendant was a member of the group responsible for the political disturbance.⁸⁴ In this case, Mackin was indicted in Northern Ireland on various charges including the attempted murder and wounding of a British soldier with intent to do grievous bodily harm.⁸⁵ These charges stemmed from a battle in Belfast, Northern Ireland between British troops and members of the PIRA.⁸⁶ Mackin was arrested and released on bail at which time he fled to, and illegally entered, the United States.⁸⁷ Subsequently, he was apprehended by the Immigration and Naturalization Service.⁸⁸ The United Kingdom requested that the United States extradite Mackin pursuant to the United States-United Kingdom Extradition

79. United States-United Kingdom Extradition Treaty, June 8, 1972, 28 U.S.T. 227, T.I.A.S. No. 8468.

80. *McMullen*, No. 3-78-1099 M.G. slip op. at 3.

81. *Id.*

82. *Id.* at 6.

83. *Id.*

84. *In re Mackin*, 688 F.2d 122, 125 (2nd Cir. 1981).

85. *Id.* at 124.

86. *Id.* at 125.

87. *Id.* at 124.

88. *Id.*

Treaty.⁸⁹ The case was assigned to an extradition magistrate to ascertain whether there was sufficient evidence to arrest and extradite Mackin.⁹⁰

The court went through an incidence test analysis similar to the *McMullen* court and determined that there was an uprising in Northern Ireland at the time the offense was committed, and that this particular conflict was connected to the overall political disturbance in Northern Ireland.⁹¹ Unlike *McMullen*, however, Mackin's offense took place in Northern Ireland and therefore the court did not have to determine whether the disturbance extended to Great Britain. Additionally, the court found that Mackin's involvement in the PIRA satisfied the additional element the court added to the incidence test because his actions were consistent with those of other members, and because the PIRA was directly involved in the furtherance of the uprising.⁹² Thus, the court concluded that Mackin was a member of the group responsible for the political disturbance. Finally, the court determined that Mackin's alleged offense furthered the goals of the PIRA and was incidental to the political disturbance in Northern Ireland.⁹³ Therefore, the court found that Mackin was not extraditable because the "incidence test" was satisfied.⁹⁴

*Quinn v. Robinson*⁹⁵ demonstrates how the courts have modified and manipulated the incidence test to achieve specific desired results. In *Quinn* the United Kingdom sought the extradition of Quinn, a United States citizen and a member of the PIRA, for the murder of a British Police Constable and his involvement in a conspiracy to commit bombing attacks against civilians.⁹⁶ Initially, a United States magistrate, using the *Mackin* interpretation of the incidence test, found Quinn to be extraditable.⁹⁷ The magistrate determined that there was an uprising in Northern Ireland which extended to Great Britain.⁹⁸ However, the magistrate found that Quinn failed to meet the

89. *Id.* at 123-24.

90. *Id.* at 123.

91. *Id.* at 125.

92. *Id.*

93. *Id.*

94. *Id.*

95. 783 F.2d 776 (9th Cir. 1986).

96. C-82-6688 R.P.A. (N.D. Cal. Oct. 1983) (unreported), *vacated and remanded*, *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986).

97. *Quinn*, 783 F.2d at 810-11.

98. *Id.* at 810.

second prong of the "incidence test" because he failed to establish that the PIRA ordered the bombings in furtherance of its political goals, and thus the murder of the Police Constable was not incidental to the uprising.⁹⁹

Quinn was successful in petitioning the district court for a writ of habeas corpus and the court reversed his extradition, holding that the political offense exception applied.¹⁰⁰ In addition, the district court found that the magistrate had applied erroneous legal standards in coming to the conclusion that Quinn was extraditable.¹⁰¹

The United States Government, on behalf of the United Kingdom, appealed that decision to the Court of Appeals for the Ninth Circuit which affirmed the district court's decision.¹⁰² First, the court determined that the incidence test did not require the accused to prove his political motivations.¹⁰³ Nor did it require that he establish that the acts were done in furtherance of the goals of the organization or that the acts were ordered by its leaders.¹⁰⁴ Additionally, the court said that the incidence test did not require that the accused prove his membership in an organization connected to the uprising.¹⁰⁵ Therefore, the court concluded that in order to determine whether a particular act is a political offense, the magistrate need only look at the traditional two prong incidence test.¹⁰⁶

Focusing on the specific facts of this case, the court of appeals limited the aspect of the test which looks at whether there was a political uprising or disturbance.¹⁰⁷ It determined that although an uprising did exist in Northern Ireland at the time of the incidents, the uprising did not extend to Great Britain.¹⁰⁸ Thus, the offenses did not take place within the geographical location where the existing political structure was to be affected.¹⁰⁹ Therefore, the court concluded that in order for an offense to be properly protected under the political offense exception, it must

99. *Id.* at 811.

100. *Id.* at 781.

101. *Id.* at 811.

102. *Id.* at 781.

103. *Id.* at 811.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 811-12.

108. *Id.* at 813.

109. *Id.* at 807, 813.

take place in the area where nationals are seeking to change the form of government.¹¹⁰

While the decision of the court of appeals reinstates the "original" two prong incidence test, it also states that international terrorists do not meet the test.¹¹¹ The Ninth Circuit's inconsistencies with the district court and the magistrate's application of the incidence test illustrate the confusion surrounding the political offense exception as well as the incidence test. A straightforward application of the incidence test is not flexible enough to afford protection to those who commit political acts not readily attributable to a general uprising. Further, such straightforward application fails to exclude from its protection those who commit atrocities against civilians or those who employ the indiscriminate use of violence during political rebellion. Thus, the potential abuse in the application of the political offense exception can be, and has been, increased through the use of the incidence test.

B. *The Proportionality Test*

United States courts have also used the proportionality test to determine whether or not an accused should be afforded the protection of the political offense exception. The proportionality test, in addition to determining whether an uprising exists and if an act was done in furtherance of the uprising, looks at whether the political elements of the act predominate over the criminal elements.¹¹² Two recent cases which have used the proportionality test are *In re Doherty*¹¹³ and *Eain v. Wilkes*.¹¹⁴

Doherty concerned a member of the PIRA who, at the direction of the IRA, attacked a convoy of British soldiers in Belfast, Northern Ireland.¹¹⁵ The attack resulted in a battle in which a British army captain was killed. Doherty was arrested

110. *Id.* at 807. The court expressly reserved any decision as to whether Quinn's status as a citizen of an uninvolved nation would preclude him from the protections afforded by the political offense exception as well. *Id.* at 807. The court also concluded that acts of international terrorism are not covered by the political offense exception because these offenses do not meet the prerequisites of the incidence test. *Id.* at 807, 813-14.

111. *Id.* at 813-14.

112. Goldie, *Extradition*, *supra* note 58, at 63-64.

113. 599 F. Supp. 270 (S.D.N.Y. 1984).

114. 641 F.2d 504 (7th Cir. 1981).

115. *Doherty*, 599 F. Supp. at 272.

and charged with murder.¹¹⁶ After his trial but before a verdict was reached he escaped from prison.¹¹⁷ He was convicted *in absentia* of murder and other offenses.¹¹⁸ Doherty fled to the United States and was arrested by the Immigration and Naturalization Service.¹¹⁹ The United Kingdom requested his extradition from the United States, and the case was assigned to an extradition magistrate.¹²⁰

The court first determined that satisfying the two prong incidence test is merely the beginning of the analysis because these two prongs alone are overinclusive.¹²¹ The court then announced that in order for an act to not be regarded as political in nature it must be "violative of international law and inconsistent with international standards of civilized conduct."¹²² In coming to the conclusion that Doherty's acts were political and that he was not extraditable, the court considered the structure of the PIRA.¹²³ It determined that the PIRA had the discipline and command structure of a legitimate organization and found it unnecessary to assess the likelihood of the political movement's success.¹²⁴ In sum, the court found that the political elements of the offense were predominant over the criminal elements.

Conversely, in *Eain v. Wilkes*,¹²⁵ the court found that the criminal elements of the offense committed predominated the political elements.¹²⁶ Eain, a member of the Al Fatah branch of the Palestine Liberation Organization (PLO), was accused of placing a bomb in a crowded market area in Israel which exploded and caused the death of two young boys and injured thirty other people.¹²⁷ Shortly after the bombing, Eain, a resident of the West Bank area of the Jordan River, traveled to the United States.¹²⁸ Israel requested that the United States extradite Eain to Israel pursuant to an extradition treaty between the

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 274.

122. *Id.*

123. *Id.* at 276.

124. *Id.*

125. 641 F.2d 504 (7th Cir. 1981).

126. *Id.*

127. *Id.* at 507.

128. *Id.*

two countries.¹²⁹ A United States magistrate determined that Eain could be extradited to Israel to stand trial for murder and causing bodily harm with aggravating intent.¹³⁰ Eain sought a writ of habeas corpus which was denied by the district court.¹³¹ The court of appeals affirmed.¹³²

In addition to addressing the two prongs of the incidence test, the court of appeals was concerned with the military or civilian status of the victims of the offense.¹³³ The court determined that a bombing directed at civilians rather than at the government was not incidental to a political disturbance and did not warrant the protection of the political offense exception.¹³⁴ Additionally, the court directly addressed the problem of modern day terrorism and the ills of allowing terrorists to seek safe haven in the United States.¹³⁵

While the predominance test is more flexible than the incidence test, it is open for abuse because it gives the judiciary the task of determining if a given political objective is legitimate. It hardly seems appropriate for a court to pass judgment on either the political structure of a foreign government, or the legitimacy of a political movement to change an existing form of government. It seems evident from the existing case law that courts have either limited or broadened the prongs of the incidence test in order to effectuate a specific result. *In re Extradition of Atta*¹³⁶ follows this development of modifying the tests used to determine the applicability of the political offense exception in order to produce a result which is both desirable and consistent with recent efforts to combat terrorism.

IV. *In Re Atta*: FACTS AND PROCEDURE

On April 12, 1986, three members of the Abu Nidal Organization,¹³⁷ a Palestinian terrorist group, attacked a passenger bus

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 522.

133. *Id.*

134. *Id.* at 520-21.

135. *Id.* at 520.

136. 706 F. Supp. 1032 (E.D.N.Y. 1989).

137. The Abu Nidal Organization (also known as Fatah Revolutionary Council, Arab Revolutionary Council, Arab Revolutionary Brigades, Black September, Revolutionary Organization of Socialist Muslims) is currently based in Libya and Lebanon, and is fortified with several hundred members. It split from the PLO in 1974, and since then has

on its way to Tel Aviv.¹³⁸ The attack occurred near the Dir Abu Mishal Intersection in the West Bank of the Occupied Territories of Israel.¹³⁹ Molotov cocktails were launched at the bus which was also attacked with the open fire of Uzi sub-machine guns.¹⁴⁰ Of the three passengers on the bus, one was struck by shrapnel while the other two passengers were not injured.¹⁴¹ The driver of the bus was fatally injured.¹⁴²

Subsequently, two Palestinians were apprehended by Israeli authorities and tried and convicted for their participation in the attack.¹⁴³ In the statements they made while in custody, these two men implicated the defendant as the third member of the Abu Nidal Organization who participated in the attack.¹⁴⁴ The defendant, Mahmoud El-Abed Ahmad (also known as Atta),¹⁴⁵ left the West Bank after the April 12th attack and a year later Israeli authorities discovered that he was living in Venezuela.¹⁴⁶ Atta was detained in Venezuela on charges connected with his involvement with the Abu Nidal Organization, and on May 6, 1987, was deported to the United States, his place of citizenship.¹⁴⁷ A United States magistrate issued a warrant for the provisional arrest of Ahmad and Federal Bureau of Investigations agents executed the warrant during Ahmad's flight from Caracas to the United States.¹⁴⁸

Israel formally requested that the United States extradite Atta on June 26, 1987.¹⁴⁹ He was charged with murder, at-

carried out at least 90 terrorist attacks in 20 countries. They are responsible for the injuries and deaths of nearly 900 people. "Major attacks include: Rome and Vienna airports in December 1985 . . . and the Pan Am Flight 73 hijacking in Karachi in September 1986." Department of State, *Patterns of Global Terrorism*, *supra* note 2, at 41.

138. *Atta*, 706 F. Supp. at 1034.

139. *Id.*

140. The "Molotov cocktails" were prepared from petrol, diesel and tar. *In the Matter of the Extradition of Atta*, No. 87-M-0551 (E.D.N.Y. June 17, 1988) (WESTLAW 66866 at 3).

141. *Atta*, 706 F. Supp. at 1034.

142. *Id.*

143. *Id.* at 1035.

144. *Id.*

145. *In the Matter of Extradition of Atta*, No. 87-M-0551 (E.D.N.Y. 1988) (WESTLAW 66866 at 22 n.1).

146. *In re Atta*, 706 F. Supp. 1032, 1035 (E.D.N.Y. 1989).

147. *Atta*, No. 87-M-0551 at 18.

148. *Atta*, 706 F. Supp. at 1035. Atta could not be extradited from Venezuela to Israel because Venezuela does not have an extradition treaty with Israel. Therefore, Venezuela agreed to deport Atta to the United States, Atta's place of citizenship so that the United States could have an extradition hearing for him. *Id.* at 1037.

149. *Id.* at 1035.

tempted murder, causing harm with aggravated intent, arson, and conspiracy to commit a felony which are all violations of the Israeli Penal Law.¹⁵⁰ These crimes also fall within Article II of the United States-Israel convention on extradition.¹⁵¹ The convention is a reciprocal agreement between the United States and Israel to extradite persons found within their territory who have been charged with or convicted of an offense described in Article II.¹⁵²

The United States filed an extradition complaint in the United States District Court for the Eastern District of New York. On June 17, 1988 the extradition request was denied by the magistrate.¹⁵³ The magistrate, applying the incidence test, labeled the attack as political thereby excluding Atta from extradition.¹⁵⁴ Additionally, the magistrate stated that Atta could

150. *Id.*

151. United States-Israel Extradition Treaty, *supra* note 24. The offenses listed in Article II include in relevant part: "1. Murder; 2. Manslaughter; 3. Malicious Wounding; inflicting grievous bodily harm; 24. Arson; 25. Any malicious act done with intent to endanger the safety of any person travelling upon a railway; 27. Malicious injury to property."

Article II further provides that:

Extradition shall be granted for any of the offenses numbered 27 through 31 only if the offense is punishable under the laws of both Parties by a term of imprisonment exceeding three years.

Extradition shall also be granted for attempts to commit or conspiracy to commit any of the offenses mentioned in this article provided such attempts or such conspiracy are punishable under the laws of both Parties by a term of imprisonment exceeding three years.

Extradition shall also be granted for the participation in any of the offenses mentioned in this Article.

Id.

152. United States-Israel Extradition Treaty, *supra* note 24. The offense must have been committed within the territorial jurisdiction of the requesting Party; if the offense was committed outside of the territorial jurisdiction then it must fall within Article III of the Convention in order to be extraditable. *Id.*

Article III states in part: "When the offense has been committed outside the territorial jurisdiction of the requesting Party, extradition need not be granted unless the laws of the requested Party provide for the Punishment of such an offense committed in similar circumstances." *Id.* at art. III. In the first extradition hearing Ahmad argued that his acts were committed outside the territorial jurisdiction of Israel, however, Israel claimed jurisdiction over Ahmad through the Penal Law of Israel, 5737-1977 section 7(a), which gives Israel authority to try a person under Israeli law if the offense, had it been committed in Israel, "was intended to injure the life, person, health, freedom or property of an Israeli national or resident." Atta, No. 87-M-0551 (E.D.N.Y. June 17, 1988) (WESTLAW 66866 at 3). This jurisdictional issue was not brought up again in the second extradition hearing. In the Matter of Extradition of Atta, 706 F. Supp. 1032 (E.D.N.Y. 1989).

153. *Id.* at 1035.

154. *Id.*

not be certified for extradition because he was not legally brought into the United States and therefore the court did not have jurisdiction over him.¹⁵⁵

In accordance with United States federal law, a second extradition complaint was then filed by the United States Attorney.¹⁵⁶ A new extradition magistrate was appointed for a de novo hearing and each party was permitted to bring in additional witnesses to supplement the record.¹⁵⁷

Initially, the Court of Appeals for the Second Circuit rejected the jurisdictional holding of the magistrate finding Atta had not been illegally deported to the United States from Venezuela.¹⁵⁸ According to United States law and Article I of the United States-Israel Extradition Treaty, jurisdiction may be exercised over anyone "found" in the United States regardless of how the person enters the country.¹⁵⁹

The heart of the court's opinion focused on the applicability

155. *Id.*

156. *Id.* at 1036.

157. *Id.* Judge Korman, sitting as an extradition magistrate in the second hearing, said that even if there were no additional witnesses and the case had to be decided upon the record from the first extradition hearing, the denial of extradition would have to be reversed because erroneous legal standards were applied by the magistrate, and the findings of fact were erroneous. *Id.* at 1036, 1052.

Atta filed a writ of habeas corpus claiming that the alleged crime was barred by the principle of double jeopardy, that insufficient probable cause was shown and that he would not receive due process from the courts of Israel. In the Matter of the Petition of Mahmoud El-Abed Ahmad, No. 89-CV-715, (E.D.N.Y. September 26, 1989) (Lexis 11454 at 4-5).

The due process issue was not raised by Judge Korman's hearing and the petition was referred to Judge Weinstein, who, on May 16, 1989 ruled that he would consider the due process claim. On June 20, 1989, the United States Court of Appeals for the Second Circuit denied the government's request for a writ of mandamus to bar the court from holding a hearing on Israeli judicial procedures. On September 26, 1989, Judge Weinstein, in upholding the extradition findings of Judge Korman and in determining that Atta would receive a fair trial in Israel, dismissed the petition for the writ of habeas corpus. *Id.* at 5, 6, 90.

158. In the Matter of Extradition Atta, No. 87-M-0551 (E.D.N.Y. June 17, 1988) (WESTLAW 66866); *Atta*, 706 F. Supp. at 1038. The last part of the opinion deals with the sufficiency of evidence, the defendant's last argument. Judge Korman found that the accomplice's testimony created probable cause. *Id.* at 1050. Additionally, Judge Korman noted that a jury does not have to disregard a confession which was coerced, but the jury could determine what weight they want to give such a confession. *Id.* at 1051-52; *see also* United States v. Daley, 865 F.2d 485, 492 (2d Cir. 1989).

159. *Atta*, 706 F. Supp. at 1036-37. The court explained that the United States "did everything possible to encourage Venezuela to deport him to Israel rather than the United States." *Id.*; 18 U.S.C. § 3184 (1988); United States-Israel Extradition Treaty, *supra* note 24.

of the political offense exception to Atta.¹⁶⁰ The analysis reviewed the inconsistent case law in this area and additionally looked to the State Department's recommendations.¹⁶¹ The State Department took the view that the indiscriminate use of violence is not to be considered a political offense.¹⁶² This position is responsive to the current threat of terrorism on world peace.¹⁶³

The court discussed the ramifications of viewing the political offense exception in its broadest sense.¹⁶⁴ The "broad view" of the political offense exception claims that "any atrocity, if politically motivated, is a political act."¹⁶⁵ This view of the political offense exception, while preserving neutrality, does not take into account the nature of the act.¹⁶⁶ The court pointed out that it is the requested party who must determine whether the act is of a political nature, and this determination is "inherently qualitative" and there is no reason why it should be made "without reference to 'our notions of civilized strife.'"¹⁶⁷ Thus, the court concluded that not all politically motivated acts, particularly those which are violent in nature, should be afforded the protection of the political offense exception.

The court then addressed the consequences of rejecting the broad view of the exception. Relying on *Matter of Doherty* as being representative of the cases which do not follow the broad view the court stated, ". . . [s]urely an act which would be properly punishable even in the context of a declared war or in the heat of open military conflict cannot and should not receive recognition under the political exception to the treaty."¹⁶⁸ The court stated that these rules of engagement provide a neutral standard which aids in the determination of what acts are justifiable in armed conflict.¹⁶⁹ Using the *Doherty* analysis the court concluded that Atta's actions did not constitute a political offense.¹⁷⁰

160. *Atta*, 706 F. Supp. at 1038-50.

161. *Id.*

162. *Id.* at 1039 n.5.

163. See Bremer, *Countering Terrorism*, *supra* note 1, at 62.

164. *Atta*, 706 F. Supp. at 1040-41.

165. *Id.* at 1042.

166. *Id.* at 1041.

167. *Id.*

168. *Id.* at 1042.

169. *Id.* at 1044-45.

170. *Id.* at 1047.

In connection with the rules of engagement, the court addressed the distinction between military personnel and objects and civilians and civilian objects.¹⁷¹ The court determined that the passenger bus was not a legitimate military target.¹⁷² It also found that not all settlers on the West Bank were part of the Israeli military.¹⁷³

Even if the attack on the bus was considered a political act, the court stated that there must also be a conflict of sufficient magnitude so that the settlers living on the West Bank could be characterized as military.¹⁷⁴ Based upon the overwhelming evidence, the court concluded that the violent attacks at that time were not so frequent that an uprising of sufficient magnitude was created. As a result, the court stated that Magistrate Caden's finding that there was an uprising at the time was erroneous.¹⁷⁵ Lastly, the court declared that if murder is to be regarded as a political offense because the accused claims a political motivation, or believes that the victims lack political legitimacy, it must be a policy determination made by the executive branch.¹⁷⁶

V. ANALYSIS

It is unlikely that the development of the political offense exception anticipated modern day terrorism, or its inclusion therein. The varied decisions in extradition cases regarding terrorists suggest the need for reform.¹⁷⁷ *In re Atta* moves toward narrowing the definition of "political offense" by using the proportionality test and focusing on the rules of engagement to determine what acts are justifiable in armed conflict. However, because the application of the exception in the past has led to the nonextraditability of terrorists, it does not seem reasonable to assume that the courts will immediately conform to the views expressed in *Atta*.

Since courts do not all apply the same test in cases where

171. *Id.* at 1042-47.

172. *Id.* at 1043.

173. *Id.* 1044-45.

174. *Id.* at 1047-50.

175. *Id.* at 1049. At the time of the attack there was not an uprising on the West Bank. In fact, the attack occurred on April 12, 1986, and the Palestinian uprising (the Intifada), that today would most likely constitute an uprising of a sufficient magnitude, did not begin until December 9, 1987. N.Y. Times, Oct. 29, 1989, §6 (Magazine), at 36.

176. *Atta*, 706 F. Supp. at 1050.

177. See *supra* notes 55-176 and accompanying text.

the political offense exception to extradition is invoked, the decisions will remain inconsistent.¹⁷⁸ *Atta*, as well as previous case law, demonstrates that depending on whether the incidence test or the proportionality test is applied to a given set of facts, the outcome of the case can be different. In the first extradition hearing for *Atta*, where the incidence test was employed, the court concluded that *Atta* was not extraditable.¹⁷⁹ However, when the petition for extradition was refiled the court utilized the proportionality test and, essentially with the same set of facts, the court concluded that *Atta* was extraditable.¹⁸⁰ This illustrates that the courts do not feel bound by one test over the other, and that while both of these tests are being applied, it is impossible to adequately define what constitutes a political offense.

Another problem that arises in the relation to extradition cases is that even if the courts adopt the same test, the existing tests are not satisfactory. The incidence test is too inflexible and its straightforward application is both under and over inclusive. As seen in *McMullen*, *Mackin*, and *Quinn*, if a legitimate political act is not readily attributable to a general uprising, then it will not be protected by the political offense exception.¹⁸¹ Thus, the incidence test is under inclusive because it does not afford the protection of asylum to those with legitimate political goals. Furthermore, the incidence test is over inclusive because it affords protection to those who use indiscriminate forms of violence during a political uprising.

The proportionality test relies on the court's discretion in determining the legitimacy of a particular political movement.¹⁸² Thus, the court will be making policy decisions that are better left to the executive and legislative branches of government. Moreover, if the court must make this type of determination, it will be subject to external political pressures and, as a result, will no longer be a neutral decision making body. However, it is important to exclude terrorists from the political offense exception, and, to that end, an understanding of the purposes behind the exception is helpful.

178. See *supra* notes 51-176 and accompanying text.

179. In the Matter of Extradition of *Atta*, No. 87-M-0551 (E.D.N.Y. June 17, 1988) (WESTLAW 66866).

180. In re *Atta*, 706 F. Supp. 1032.

181. See *supra* notes 71-111 and accompanying text (on incidence test).

182. See *supra* notes 112-76 and accompanying text (on proportional test).

The basic philosophy behind the political offense exception can be viewed as protecting three interests within the extradition process: (1) the rights of the accused; (2) the interests of both the state requesting extradition and the state which has custody of the accused; (3) and the concern for international public order.¹⁸³ The political offense exception protects the rights of the accused by requiring the state that has custody of the accused to determine whether the accused will receive a fair trial by the state that requested extradition.¹⁸⁴ Therefore, by reviewing the possible treatment that the state requesting extradition will afford the accused, the accused's interests will remain protected. The second interest to be protected is that of the two states involved in the extradition process.¹⁸⁵ This has been referred to as the principle of neutrality.¹⁸⁶ If the requested state had to review the extraditability of a pure political crime, it would be making a valuation of the internal political structure of the requesting state and could well be viewed as meddling into the affairs of that state.¹⁸⁷ Additionally, because the political offenders of today can become the leaders of tomorrow, the political offense exception allows the United States to remain somewhat neutral, and not intervene in the domestic affairs of foreign states.¹⁸⁸ The issue becomes more complex when terrorists are involved because while they are trying to evoke political change through their actions, it is difficult not to make a judgment on the methods that they use. The exception also protects national sovereignty and the exclusive jurisdiction a state has over those people within its territory.¹⁸⁹

International public order is also protected by the political offense exception. Theoretically, political offenders are trying to force change of an internal governmental structure which is not of concern to international public order. Because political offenses should have no effect beyond the borders of the states in which they seek to evoke governmental change, the state which has been requested to extradite an accused has no immediate

183. J. MURPHY, *supra* note 52, at 45.

184. J. MURPHY, *supra* note 52, at 45.

185. Epps, *Political Offender Exception*, *supra* note 30, at 63; J. MURPHY, *supra* note 52, at 46.

186. J. MURPHY, *supra* note 52, at 45.

187. J. MURPHY, *supra* note 52, at 46.

188. J. MURPHY, *supra* note 52, at 46.

189. J. MURPHY, *supra* note 52, at 46.

interest in seeing the suppression of political crimes.¹⁹⁰ This analysis falls short where terrorists are involved because their acts of violence often have effects on world order, and there is an international interest in preventing violent crimes.

After viewing these three rationale for the political offense exception, it is inappropriate that terrorist activities be afforded the protection that the exception supplies. It has also been shown that the courts have not been able to consistently keep terrorists from successfully invoking the political offense exception. Accordingly, it seems that the only way to effectively narrow the scope of the political offense exception to exclude terrorist activities is limit it through the legislature.

Legislative reform can come in a variety of ways. One method is to change the existing treaties already in force individually. A good example of this is the Supplementary Treaty between the United States and Great Britain.¹⁹¹ This supplement to the existing extradition treaty between the United States and Great Britain excludes political violence from the political offense exception and therefore attempts to limit its application to terrorists.¹⁹² This is a realistic approach to a tough problem. However, given the large number of extradition treaties the United States has entered, it would take a considerable amount of time for the United States to put this exclusion into all treaties in force.

Another way for the legislature to narrow the scope of the exception is to give the courts a working definition of political offense. Perhaps this can be done by supplementing the existing federal statute¹⁹³ with a list of offenses that would not be included under the political offense exception. However, problems might arise if the legislature merely stated that all acts of violence would be excluded from the exception because then the courts would first have to grapple with what constitutes an act of violence. Thus, Congress would have to carefully consider how broad, or narrow, a definition for "violence" would be appropriate. Even though this would be a rather time consuming process, it seems to be the most efficacious solution to the problem be-

190. J. MURPHY, *supra* note 52, at 46.

191. United Kingdom-United States Extradition Treaty Supplement Limiting Scope of Political Offenses to Exclude Acts of Terrorism, July 17, 1985, 24 I.L.M. 1104 (1985).

192. *Id.*

193. 18 U.S.C. §§ 3181 et seq.

cause it would actually supply the courts with a working definition of political offense.

VI. CONCLUSION

Terrorists are a threat to world peace. They are unresponsive to counterterrorist policies and perhaps the only way to deter their heinous activities is through the extradition process. However, because terrorists may fall within the political offense exception it is necessary to revise existing extradition law so that the definition of what constitutes a "political offender" will be narrow enough so that it will not encompass terrorists.

After reviewing the history and case law in this area, it becomes apparent that there is no discernable trend regarding how to determine whether an individual is a political offender. There was a complete reversal from the original extradition treaties, which were primarily adopted for the surrender of political offenders, to treaties which specifically exempted them from extradition.¹⁹⁴ Now, because of the hybrid type political offender, the judiciary has the task of determining the fate of relative political offenders. The courts must decide whether the act is actually a common crime or a political offense.

The task of creating guidelines for the courts is appropriately left to the legislature or executive. Perhaps if the courts had a clear definition of whether a relative political offense is a crime or an exception to extradition, the case law would not be so inconsistent. Because the courts cannot provide an adequate solution to the political offense exceptions applicability to terrorists, it is important that the legislative and executive branches act soon so that extradition law will conform to our public policy regarding terrorist activities. If so, terrorists will know that they will not be able to seek safe haven in the United States.

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194. See *supra* notes 37-49 and accompanying text.