Volume 59, Issue 1 Page 181

Stanford Law Review

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INTRODUCTION

The political offense exception—the principle that an individual cannot be extradited to face criminal prosecution for a "political" act—has long been a staple of extradition law. Its existence is a matter of international consensus; almost every modern treaty contains boilerplate language exempting such offenses from its provisions.[1] That consensus abruptly ends, however, at the task of line-drawing. What is or is not "political" conduct has been the subject of controversy since the first exception appeared over 180 years ago.

The changing global landscape of the past several decades has prompted a significant reexamination of the exception's scope. Increasing attention has been drawn to acts of terrorism, internal conflict, and totalitarian oppression—matters previously shelved by the international community during the pendency of the Cold War.[2] The same era has also witnessed diplomatic cooperation and the development of supranational institutions to respond to these atrocities. An increasing number of countries now display a refreshing intolerance for the exploitation of their immigration and asylum procedures by former political leaders, military officials, revolutionaries, and terrorists to avoid domestic prosecution.[3]

The political offense exception stands at the crossroads of this juncture. Because so much conduct is at least *arguably* political, how can courts render coherent and intellectually honest decisions in extradition cases? An overbroad application would grant immunity to abhorrent and intuitively punishment-worthy crimes. Yet, an unduly restrictive interpretation would vitiate the very principles of self-determination and responsible revolution on which the exception was crafted. Given these pressures, this Note aims to understand the modern application of the political offense exception in U.S. courts and supplement the existing framework in response to its current inadequacies.

Part I highlights the values underlying the political offense exception from the perspective of both state actors and human rights advocates. Part II recounts the exception's historical origins and its incorporation into United States law through the "incidence test." Part III reviews the attempts by federal courts and the political branches to revamp the application of the "incidence test," and concludes that such efforts did little to advance the values behind the political offense exception or to improve the legitimacy of the courts in this area. Part IV proposes a "retrofit" of the incidence test using international law—specifically multilateral agreements and customary international law—as an external restraint on the political offense exception's operation in the United States. Despite some uncertainty over the substantive content of these sources

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1. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 595 & n.17 (4th ed. 2002).

2. *Cf.* CHRISTINE VAN DEN WIJNGAERT, THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION, at ix (1980).

3. *Cf.* BASSIOUNI, *supra* note 1, at 194-95.

and the competence of the judges who would apply them, this Note ultimately endorses the validity of such an approach as consistent with the exception's original values.

I. EXTRADITION AND THE POLITICAL OFFENSE EXCEPTION IN INTERNATIONAL AFFAIRS

Extradition agreements, like all treaties, form contractual relationships between two countries.[4] A state's good-faith compliance with its terms will encourage harmony and cooperation in the field of international affairs. The political offense exception is an awkward creature of nearly all such agreements. A state actor, usually through its courts, may frustrate an otherwise valid extradition request if it finds that the fugitive's alleged crimes were "political" in nature. Invocation of the doctrine implicates both complex diplomatic relationships and a concern for human rights.

State actors have a genuine interest in reaching a settled definition of a "political" crime. Under a purely rationalist model, a state's self-interest should constrain overuse of the doctrine. Denials of extradition reduce the likelihood of compliance when a once-resisting state later becomes the requesting state. Furthermore, overuse upsets the established political order and diplomatic stability; the entire extradition framework is weakened and criminal prosecutions are frustrated. The United States's application of the political offense exception during the mid-1980s provides an excellent case study of this dynamic.[5] The State Department then noted the "harmful and unacceptable decisions of other nations" to invoke the doctrine, citing refusals by French courts in 1975 and 1976 to extradite groups of hijackers of American aircraft.[6] In one of those cases, a French court gleaned a political motive from the group's assertion that they "hijacked the plane to escape racial segregation in the United States and that the charges against them constituted political persecution."[7] By the same token, the State Department conceded the unwillingness of American courts to extradite several members of the Irish Republican Army (IRA) to England after they invoked the same defense—a situation characterized as "intolerable."[8]

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4. BASSIOUNI, *supra* note 1, at 641 ("The bilateral treaty approach . . . reflects a definite choice to revert back to the nineteenth century view that extradition is a contract between states, for the benefit of states, in which individuals are objects of the process, rather than its subjects.").

5. "The public, both in the United States and in other civilized nations, is distressed and angry over the inability of governments to bring these [terrorist] criminals to justice." Abraham D. Sofaer, *The Political Offense Exception and Terrorism*, CURRENT POL'Y NO. 762 (U.S. Dep't of State, Washington, D.C.), Nov. 1985, at 1 (reprint of statement before the Senate Foreign Relations Committee on August 1, 1985).

6. *Id.* at 3.

7. *Id.*

8. *Id.* at 3-4. Great Britain has long been criticized for its historic refusal to extradite

Human rights advocates should find a properly crafted definition of a "political offense" equally appealing. International human rights conventions proclaim the right of all persons to self-determination,[9] and implicitly recognize the need for revolution when those in power fail to respond. The political offense exception provides partial protection when those revolutions falter; should an opposition member escape the country, the doctrine proscribes his extradition for fear of an "unfair and retaliatory trial in the requesting state which, being the target of the political crime, would function simultaneously as judge and jury."[10] By the same token, an overly broad definition of a "political crime" could shield undeserving offenders—war criminals,[11] mass murderers,[12] and common criminals[13]—from domestic criminal prosecution, irrespective of whether those same actions might trigger international criminal culpability.

The rapid development of human rights norms during the 1990s has further amplified the importance of the political offense exception. On a broad scale, the international community's attention, focused for a half-century on the Cold War, was drawn to internal civil conflicts and injustices in discrete areas of the world. Tolerance for unspeakable crimes occurring inside a nation's borders—genocide, torture, forced disappearance, and ethnic cleansing—waned with the establishment of ad hoc war-crimes tribunals and the permanent International Criminal Court. Of greatest relevance, countries are frequently using the tool of extradition to secure alleged fugitives who fled their home countries. These individuals—former political leaders,[14] military generals,[15] and terrorists[16]—

terrorism suspects as well. *See* Elaine Sciolino & Don Van Natta Jr., *For a Decade, London Thrived as a Busy Crossroads of Terror*, N.Y. TIMES, July 10, 2005, § 1, at 1; *see also Britain to Charge Cleric*, N.Y. TIMES, Oct. 15, 2004, at A7.

9. International Covenant on Civil and Political Rights art. 1, *opened for signature* Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 1, *opened for signature* Dec. 19, 1966, S. EXEC. DOC. D, 95-2 (1978), 993 U.N.T.S. 3.

10. WIJNGAERT, *supra* note 2, at 3.

11. *See, e.g.*, *In re* Extradition of Demjanjuk, 612 F. Supp. 544, 571 (N.D. Ohio 1985) (denying "political offense" exception to extradition of alleged Nazi concentration camp guard).

12. *See, e.g.*, Artukovic v. Boyle, 140 F. Supp. 245 (S.D. Cal. 1956) (denying extradition based on "political offense" exception to former Croatian official accused of ordering murders of 1293 named individuals and some 30,000 unidentified individuals), *aff'd sub nom.* Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *vacated and remanded*, 355 U.S. 393 (1958), *surrender denied on remand sub nom.* United States *ex rel.* Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959).

13. *See, e.g.*, Ornelas v. Ruiz, 161 U.S. 502, 511-12 (1896) (determining that charges of murder, arson, robbery, and kidnapping could not be "political" since revolutionaries were not engaged in *any* combat with the Mexican government at the time of the crimes).

14. *See, e.g.*, Juan Forero, *Court in Chile Refuses to Free Peru's Ex-Leader*, N.Y. TIMES, Nov. 9, 2005, at A3 (reporting Peru's extradition request to Chile for its former president, Alberto Fujimori, for alleged rights abuses and corruption during his administration).

share one common bond: their extradition requests and alleged crimes are steeped in political considerations. Since each circumstance raises a potential application of the political offense exception and weighty diplomatic anxieties, the operation and scope of the exception should be fully understood.

II. GROWTH OF THE POLITICAL OFFENSE EXCEPTION AND THE "INCIDENCE" TEST

The application of the political offense exception is knotted up with its historical origins. Circumstances surrounding its birth, particularly the liberal democratic movements in Europe at the turn of the eighteenth century, underpin the controversies that plague its modern application. This Part summarizes the historical background and the integration of the political offense exception into U.S. law. It also highlights the central flaw of the doctrine's applicability—the difficulty in defining the term "political."

A. *Historical Development*

The political offense exception is a fairly modern creation. In 1625, Hugo Grotius announced an unconstrained definition of extraditable offenses: those crimes that affect public order, or that are atrociously criminal.[17] The increasing mobility of individuals generally, and criminals specifically, during the eighteenth century created a need for a more formalized framework between the nations of Europe.[18] Extradition treaties flourished; their targets were usually run-of-the-mill offenses—desertion, robbery, murder, arson, and vagrancy.[19] Persons accused of political offenses received no special treatment.[20]

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15. *See, e.g.*, Clifford Krauss, *Britain Arrests Pinochet to Face Charges by Spain*, N.Y. TIMES, Oct. 18, 1998, at A1 (reporting Spain's request to Great Britain to extradite former Chilean dictator Augusto Pinochet for the presumed murders of Spanish citizens); *see also* Allan Lengel, *Man Found Guilty in Va. Sought by Peru in Killings*, WASH. POST, Oct. 1, 2004, at A26 (detailing Peru's request to extradite an ex-paramilitary soldier for alleged forced disappearances of citizens).

16. *See, e.g.*, Tim Weiner, *Case of Cuban Exile Could Test the U.S. Definition of Terrorist*, N.Y. TIMES, May 9, 2005, at A1 (reporting Venezuela's request to the United States to extradite former Cuban exile, and CIA operative, for the bombing of a Cuban airliner in 1976); *see also* Simon Saradzhyan, *Putin Lashes Out at the U.S.*, MOSCOW TIMES, Sept. 8, 2004, at 1 (listing refusals by the United States, Great Britain, and Denmark to extradite Chechen separatists to Russia).

17. WIJNGAERT, *supra* note 2, at 7 (quoting HUGO GROTIUS, DE JURE BELLI AC PACIS, bk. II, ch. XXI, § V (1625)).

18. *Id.* at 8.

19. *Id.* at 8 & nn.41-42.

20. For instance, Russia, Austria, and Prussia agreed to extradite persons accused of high treason, armed revolt, and acts against the safety of the throne or the government. *Id*. at 9-10 & n.48.

The exception soon grew out of the era's revolutionary ideology,[21] with its ideals of freedom, democracy, and rebellion against oppression. When governments failed to respond to the needs of their citizens or to protect certain inalienable rights, liberal intellectual thinkers argued that citizens maintained a right to engage in a popular revolution.[22] Such a principle provided the philosophical justification for the American and French revolutions.[23] Illustratively, the Declaration of Independence boldly proclaims: "[W]henever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it . . . ."[24]

In this period of rapid political transformation, nations faced requests to turn over the instigators of failed revolutions. Yet, "those who used violence to challenge despotic regimes often occupied the high moral ground, and were welcomed in foreign countries as true patriots and democrats."[25] There was great concern for the welfare of these individuals,[26] and the possibility that the requesting state was using established treaty obligations to achieve political ends—mainly retribution.[27] Decisions to extradite political refugees triggered political protests,[28] calls for non-compliance,[29] and scholarly discussions regarding an official exception.[30]

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21. 1 OPPENHEIM'S INTERNATIONAL LAW 962 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) [hereinafter OPPENHEIM] ("Before the French Revolution the term 'political crime' was unknown in both the theory and the practice of international law, and the principle of non-extradition of political criminals was likewise non-existent.").

22. *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 324-26 (2d ed. 2000) (quoting Burns Weston, *Human Rights*, *in* 20 NEW ENCYCLOPEDIA BRITANNICA (15th ed. 1992)).

23. *Id.*

24. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

25. T. v. Immigration Officer, [1996] A.C. 742, 753 (H.L.) (appeal taken from Eng.) (U.K.); *see also In re* Doherty, 599 F. Supp. 270, 275 n.4 (S.D.N.Y. 1984) ("The concept was first enunciated during an era when there was much concern for and sympathy in England for the cause of liberation for subjugated peoples."); WIJNGAERT, *supra* note 2, at 11.

26. Manual R. García-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1226 & n.3 (1962).

27. *See In re* Gonzales, 217 F. Supp. 717, 722 (S.D.N.Y. 1963) (noting that a key goal of the political offense doctrine is to prevent U.S. legal processes from being used by a foreign government as an "instrument[] of reprisal against its domestic political opponents"); *see also* BASSIOUNI, *supra* note 1, at 603.

28. WIJNGAERT, *supra* note 2, at 11-12 (summarizing instances in Spain, England, and France).

29. Wijngaert notes the sporadic unwillingness of courts to extradite political offenders—a Potsdam court refused to extradite Voltaire to France, and the Southern Netherlands blocked the return of Sir Henry van der Noot, the leader of the Brussels Rebellion, to Austria. *Id.* at 9 & nn.45-46.

30. *Id.* at 12 nn.57-59; *see also* OPPENHEIM, *supra* note 21, at 962 n.3 (noting that "the principle of non-extradition of political criminals was for the first time defended with juristic arguments, and on a juristic basis" in H. Provo Kliut's 1829 dissertation *De Deditioine Profugorum*).

Belgium became the first country to codify a protection for political offenders in 1833: "It shall be expressly stipulated in these agreements that no foreigner may be prosecuted or punished for any political crime antecedent to the extradition, or for any act connected with such a crime . . . ."[31] Political offense exceptions were soon engrafted into most every European extradition treaty.[32] The United States first experimented with the political offense exception in its 1843 extradition treaty with France: "The provisions of the present convention shall not be applied in any manner . . . to any crime or offence of a purely political character."[33] Similar language has since been inserted in most every U.S. extradition treaty,[34] and various international covenants.[35]

B. *Integration into Domestic Law*

Extradition procedures are governed by title 18, section 3184 of the U.S. Code. Once a request is made, a federal magistrate or judge must make five determinations: (1) whether the judge is authorized to conduct the proceeding; (2) whether the court has jurisdiction over the individual; (3) whether the applicable treaty is in full force and effect; (4) whether the alleged crimes fall within the scope of the treaty; and (5) whether probable cause exists to believe that the individual committed the alleged crimes.[36] Even if the magistrate certifies the individual for extradition, the Secretary of State retains discretion to block final removal.[37]

Although the United States has never enshrined the political offense exception into its domestic statutes,[38] the federal courts have enforced its

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31. Harvard Research in Int'l Law, *Extradition*, 29 AM. J. INT'L L. 15, 362-63 (Supp. 1935) (quoting Official Bulletin (Belg.), No. 77 (1833) (unofficial translation)).

32. BASSIOUNI, *supra* note 1, at 595.

33. Convention for the Surrender of Criminals, U.S.-Fr., art. V, Nov. 9, 1843, 8 Stat. 580.

34. *See, e.g.*, Extradition Treaty, U.S.-Peru, art. 4, July 26, 2001, S. TREATY DOC. NO. 107-6, 2001 U.S.T. LEXIS 94; Extradition Treaty, U.S.-Malay., art. 4, Aug. 3, 1995, T.I.A.S. No. 12,612; Treaty on Extradition, U.S.-Japan, art. 4, Mar. 3, 1978, 31 U.S.T. 892; Treaty on Extradition, U.S.-Austl., art. 7, May 14, 1974, 27 U.S.T. 957; Convention on Extradition, U.S.-Isr., art. 6, Dec. 10, 1962, 14 U.S.T. 1707; Convention for Extradition of Fugitives from Justice, U.S.-Hond., art. 3, Jan. 15, 1909, 37 Stat. 1616; Treaty for the Extradition of Criminals, U.S.-Chile, art. 6, Apr. 17, 1900, 32 Stat. 1850.

35. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A(III), art. 14(2), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948).

36. *See generally In re* Extradition of Atuar, 300 F. Supp. 2d 418, 425-26 (S.D.W. Va. 2003).

37. 18 U.S.C. § 3186 (2006); *cf. In re* Sindona, 450 F. Supp. 672, 694 (S.D.N.Y. 1978) ("The Department of State has the discretion to deny extradition on humanitarian grounds, if it should appear that it would be unsafe to surrender [the fugitive] to the [requesting state].").

38. This passive method of incorporation is rather common in U.S. extradition law—a "remarkable hybrid" and a "delicately orchestrated system" of state, federal, and foreign law employed by executive and judicial branches. Marcella Daly Malik, Comment, *Unraveling*

protections using a framework set forth in the 1894 British case *In re Castioni*.[39] The court in *Castioni* blocked extradition of a man accused of assassinating a member of the State Council of a Swiss canton, finding that "fugitive criminals are not to be surrendered for extradition crimes, if those crimes *were incidental to and formed a part of political disturbances*."[40] This reasoning was adopted three years later by a district court in *In re Ezeta*,[41] followed shortly thereafter by the Supreme Court in *Ornelas v. Ruiz*.[42]

Since *Ornelas*, U.S. courts have traditionally enforced the exception using the "incidence test"—a direct descendent of *Castioni*.[43] Two factors must be present to find that the act in question was "political" and therefore non-extraditable. First, the conduct in question must have occurred during a political revolt, disturbance, or uprising[44]—a condition that has never been precisely defined. In analyzing this prong, most courts will look for some requisite level of violence related to the particular political objective occurring within the territory of the act.[45] The political offense exception cannot be invoked for acts or movements "that involve less fundamental efforts to

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the Gordian Knot: The United States Law of International Extradition and the Political Offender Exception, 3 FORDHAM INT'L L.J. 141, 142-43 (1979). *See generally* OPPENHEIM, *supra* note 21, at 967 n.10 (detailing other countries' incorporation of the exception into domestic law).

39. (1891) 1 Q.B. 149 (Eng.).

40. *Id.* at 166 (opinion of Hawkins, J.) (quoting 2 J. F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 71 (1863)) (emphasis added).

41. 62 F. 972, 997 (N.D. Cal. 1894). In *Ezeta*, the court denied an extradition request from the Government of El Salvador for a military general and four subordinates who, during an unsuccessful effort to quell a revolution against the existing government, allegedly committed murder and robbery. *Id.* The court found that "the crimes charged . . . , associated as they are with the actual conflict of armed forces, are of a political character." *Id.* at 999.

42. 161 U.S. 502, 510-12 (1896). In *Ornelas*, the Mexican government sought extradition of three men for murder, arson, robbery, and kidnapping allegedly committed during an attack on a local village. *Id.* at 510. The Court rejected assertions that these crimes were "political," noting the absence of Mexican government forces near the village at the time of the attack and the fact that the men had absconded with stolen goods. *Id.* at 511.

43. *See* Sindona v. Grant, 619 F.2d 167, 173 (2d Cir. 1980) ("Following the principle announced in *In re Castioni*, American courts have uniformly construed 'political offense' to mean those that are incidental to severe political disturbances such as war, revolution and rebellion.") (internal citation omitted); *see also* BASSIOUNI, *supra* note 1, at 617 (noting that the *Ornelas* court formulated the relative political offense within the context of the political incidence test).

44. *See* Quinn v. Robinson, 783 F.2d 776, 797 (9th Cir. 1986); Eain v. Wilkes, 641 F.2d 504, 518 (7th Cir. 1981); Garcia-Guillern v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971); BASSIOUNI, *supra* note 1, at 611 (dividing the inquiry into three prongs).

45. *See, e.g.*, *Quinn*, 783 F.2d at 807 ("[E]xception [is] applicable only when a certain level of violence exists and when those engaged in that violence are seeking to accomplish a particular objective."); Jimenez v. Aristeguieta, 311 F.2d 547, 560 (5th Cir. 1962) (requiring "a revolutionary uprising or other violent political disturbance"); Ahmad v. Wigen, 726 F. Supp. 389, 409 (E.D.N.Y. 1989) (requiring "endemic and widespread violence").

accomplish change or that do not attract sufficient adherents to create the requisite amount of turmoil."[46]

Second, the act in question must be incidental to the uprising or have formed part of it. Courts have required some unquantifiable showing of a contemporaneous relationship between the two.[47] This prong is designed to isolate "only offenses aimed either at accomplishing political change by violent means or at repressing violent political opposition."[48] Ordinary criminal acts committed for personal motives cannot be political offenses.[49] While sometimes relevant, neither the wisdom of the act in furthering the asserted political objective,[50] the motive of the accused,[51] nor the organization or hierarchy of the uprising group[52] is dispositive to the analysis. Finally, certain crimes are categorically disqualified from the exception because their consequences are too far attenuated from the achievement of any political objective.[53]

C. *A Definitional Dilemma*

The determination of whether a certain act is "political" is, at bottom, an interpretive nightmare,[54] and the incidence test provides little additional clarity.

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46. *Quinn*, 783 F.2d at 807; *see also* Van Duc Vo v. Benov, 447 F.3d 1235, 1238, 1241-43 (9th Cir. 2006) (finding that an anti-communist plot to bomb the Vietnamese embassy in 2001 was not protected by the political offense exception because there was no uprising in Vietnam at the time).

47. *Quinn*, 783 F.2d at 809 (requiring some "nexus between the act and the uprising"); *Eain*, 641 F.2d at 518 (noting that for the exception to apply the action must be "in the course of and incidental to" the uprising); *Garcia-Guillern*, 450 F.2d at 1192 (same).

48. Koskotas v. Roche, 931 F.2d 169, 172 (1st Cir. 1991).

49. *In re* Doherty, 599 F. Supp. 270, 277 n.7 (S.D.N.Y. 1984); *see also* Ornelas v. Ruiz, 161 U.S. 502, 511-12 (1896) (noting that "acts which contained all the characteristics of crimes under the ordinary law" could not be political offenses).

50. *In re* Castioni, (1891) 1 Q.B. 149, 158-59 (Eng.).

51. *Eain*, 641 F.2d at 519; *see also* Andreas F. Lowenfeld, Ahmad*: Profile of an Extradition Case*, 23 N.Y.U. J. INT'L L. & POL. 723, 745 (1991) ("It is the act, not the motive, that should count in defining the crime, and therefore the extraditabilty of the person accused of the crime.").

52. *Quinn*, 783 F.2d at 809-10. The accused's membership in a certain organization may, however, be probative of a relationship between an individual's action and any ongoing uprising. *See, e.g.*, *In re* Mackin, 668 F.2d 122, 125 (2d Cir. 1981); Ramos v. Diaz, 179 F. Supp. 459, 463 (S.D. Fla. 1959).

53. *See, e.g.*, *Koskotas*, 931 F.2d at 172 ("Criminal conduct in the nature of financial fraud, even involving political corruption, traditionally has been considered outside the 'political offense' exception.").

54. Some members of the executive and judicial branches have suggested that the term "political offense" lacks sufficient substantive content for courts to interpret, thus rendering the exception non-justiciable. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 826 (D.C. Cir. 1984) (Robb, J., concurring) ("[T]here is simply 'no justiciable standard to the political offense.'") (quoting *Extradition Reform Act of 1981: Hearings on H.R. 5227 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 97th Cong. 24-25 (1983)

The inquiry admittedly depends on an infinite variety of factors,[55] triggering a fear that resolution will turn on the prejudices and biases of the decision-maker.[56] When the decision-maker does not share the political ideologies of the fugitive, he is far less likely to perceive some redeeming value in the fugitive's conduct, deem it "political," and halt the extradition.[57] This is further confounded by the inquiry's binary nature; it fails to recognize that most political offenses are ordinary crimes committed with ideological motives.[58] The more unpopular the motive, the less likely it will be viewed as "political" by a third party.

This definitional unease should not be all that surprising. The political offense exception was crafted to delicately balance the receiving State's concern for the fugitive's welfare with its general aversion to involvement in the political affairs of the requesting State.[59] The grafting of these interests onto a legal framework, with resolution vested in the judicial branch, may be designed to provide a "legal cloak" for what is essentially a political judgment.[60] That cloak conveniently excuses the country's political branches from the knotty dilemma of having to deny extradition, thereby sparking a diplomatic confrontation. Yet, the vesting of the decision in the judicial branch creates an equally knotty balancing act—the application of a superficially legal framework to a question fraught with political considerations. As the next Part demonstrates, civil strife and modern political struggles have tested the federal

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[hereinafter *Hearings*] (statement of Roger Olson, Deputy Assistant Att'y Gen.)). The federal courts have roundly rejected such assertions. *See, e.g.*, *Quinn*, 783 F.2d at 787-90; *In re* Mackin, 668 F.2d at 131-37; *Eain*, 641 F.2d at 513-18; *see also Tel-Oren*, 726 F.2d at 796-98 (Edwards, J., concurring). Most countries have vested the decision in the judiciary. Only Spain and Ecuador use a purely executive review process. *See* WIJNGAERT, *supra* note 2, at 38.

55. In *Castioni* itself, Lord Denman noted that it was not "necessary or desirable . . . to put into language in the shape of an exhaustive definition exactly the whole state of things or every state of things which might bring a particular case within the description of an offence of a political character." *Castioni*, (1891) 1 Q.B. at 155.

56. As Professor Gilbert eloquently states, "The very term 'political offence' should have forewarned the nineteenth century drafters of the impending conflicts and disputes, because for every *ten* people there will always be at least *ten* different interpretations of 'politics'." GEOFF GILBERT, TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW: EXTRADITION AND OTHER MECHANISMS 207 (1998) (emphasis in original); *see also* BASSIOUNI, *supra* note 1, at 597.

57. Concerns of subjectivity are buttressed by observations that, during the 1980s, IRA members were far more successful in invoking the political offense doctrine than PLO members. *See* Antje C. Petersen, Note, *Extradition and the Political Offense Exception in the Suppression of Terrorism*, 67 IND. L.J. 767, 777-78 (1992).

58. Bassiouni labels these crimes as "relative political offenses," where some private interest is harmed in furtherance of a political purpose. *See* BASSIOUNI, *supra* note 1, at 607-10. Pure political offenses are those crimes directly aimed at the state, such as treason, espionage, and sedition. *Id.* at 604-05.

59. *See* GILBERT, *supra* note 56, at 204 (quoting TORSTEN STEIN, DIE AUSLIEFERUNGSAUSNAHME BEI POLITISCHEN DELIKTEN 377-81 (English translation) (1983)).

60. GILBERT, *supra* note 56, at 204-05.

judiciary's competence to employ the political offense exception in a conscionable, yet still apolitical fashion.[61]

III. RETHINKING THE INCIDENCE TEST

The growth in extradition requests and invocations of the political offense exception throughout the 1970s and 1980s[62] forced judges to reassess the traditional application of the incidence test. Designed in a bygone era when wars were fought by uniformed soldiers on defined battlefields, the test was now being applied to individuals using more unorthodox methods of warfare. U.S. courts have responded in three different ways, none of which is entirely satisfying. One commentator cynically summarized that "courts . . . either limited or broadened the prongs of the incidence test in order to effectuate a specific result."[63]

A. *Hewing to Neutrality*

The traditional application of the political offense exception envisions a limited role for the courts. Judge Hawkins, in *Castioni*, first recognized the dangers in post hoc assessment of a civil disturbance:

> [O]ne cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, *even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over.*[64]

Fully accepting this apprehension, the district court in *Ezeta* avoided any inquiry into the wisdom of the fugitive's actions, asking only whether the acts in question were undertaken in the course of and incidental to a political uprising: "I have no authority, in this examination, to determine what acts are with the rules of civilized warfare, and what are not. War, at best, is barbarous . . . ."[65] Until the mid-1980s, the federal courts consistently hewed to *Castioni*'s approach with little discussion or rancor.[66]

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61. *See, e.g.*, Quinn v. Robinson, 783 F.2d 776, 801 (9th Cir. 1986) ("[A] number of courts have begun to question whether, in light of changing political practices and realities, we should continue to use [the incidence test].").

62. *Hearings*, *supra* note 54, at 25, 28 (1983) (statement of Roger Olsen, Deputy Assistant Att'y Gen.).

63. Nancy M. Green, In the Matter of the Extradition of Atta: *Limiting the Scope of the Political Offense Exception*, 17 BROOK. J. INT'L L. 447, 463 (1991).

64. *In re* Castioni, (1891) 1 Q.B. 149, 167 (Eng.) (emphasis added).

65. *In re* Ezeta, 62 F. 972, 997 (N.D. Cal. 1894).

66. *See, e.g.*, Sindona v. Grant, 619 F.2d 167, 173 (2d. Cir. 1980); Garcia-Guillern v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971); *In re* Mackin, No. 80 Cr. Misc. 1, 1981

Facing an extradition request by Great Britain for an IRA member accused of murdering a London police constable and conspiring to murder civilians, the Ninth Circuit in *Quinn v. Robinson* provided a modern exposition of this traditional approach. Rendering judgments about the legitimacy of an internal revolutionary movement, the court worried, was "the type of subjective judgment[]" that would "plunge our judiciary into a political morass."[67] The court further reasoned that any searching judicial examination into the fugitive's conduct would reek of cultural imperialism[68] and was, in the end, irrelevant to a faithful application of the incidence test.[69] The Ninth Circuit, sitting en banc, reaffirmed *Quinn*'s stance of neutrality *in toto* last year.[70]

Quinn focuses the judge's attention away from the fugitive's individual actions and objectives, and towards contemporaneous political events in that country. An examination of that nexus, rather than the legitimacy of the individual's conduct, is more likely to result in a dispassionate analysis. From the perspective of institutional legitimacy, *Quinn*'s methodology further immunizes the judiciary from claims that the political offense exception is a nonjusticiable political question.[71]

Yet, by refusing to evaluate the strength of the fugitive's political motives and the legitimacy of his tactics, judges lost the ability to render nuanced decisions. The first prong of the incidence test—the presence of an uprising—effectively became the dispositive factor.[72] For example, until 1986, every IRA member facing extradition in the United States successfully sought protection.[73] This approach ultimately, and predictably, rendered the traditional neutrality of the political offense exception unpalatable. Diplomatic relations frayed as other countries too began refusing to extradite individuals to the United States.[74] A perception of overinclusivity festered and calls for reform were lodged.[75]

U.S. Dist. LEXIS 17,746, at *31-40 (S.D.N.Y. Aug. 13, 1981); *In re* Gonzalez, 217 F. Supp. 717, 720-21 (S.D.N.Y. 1963); Ramos v. Diaz, 179 F. Supp. 459, 462-63 (S.D. Fla. 1959).

67. Quinn v. Robinson, 783 F.2d 776, 801 (9th Cir. 1986).

68. *Id.* at 804 ("[I]t is not our place to impose our notions of civilized strife on people who are seeking to overthrow the regimes in control of their countries in contexts and circumstances that we have not experienced, and with which we can identify only with the greatest difficulty.").

69. *See id.* at 805-06.

70. *See* Barapind v. Enomoto, 400 F.3d 744, 750-51 (9th Cir. 2005) (en banc) (per curiam).

71. *See supra* note 54. *See generally* Baker v. Carr, 369 U.S. 186, 217 (1962) (suggesting the presence of a political question if, inter alia, there is an "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion" or the "potentiality of embarrassment from multifarious pronouncements by various departments on one question").

72. *See* GILBERT, *supra* note 56, at 230; WIJNGAERT, *supra* note 2, at 119.

73. GILBERT, *supra* note 56, at 229 & n.123.

74. *See* Barbara Ann Banoff & Christopher H. Pyle, *"To Surrender Political Offenders": The Political Offense Exception to Extradition in United States Law*, 16 N.Y.U.

The neutrality approach also triggered concerns that the political offense exception was protecting patently undeserving conduct. Some criticisms were unfounded,[76] as even a classic application of the exception would not protect acts of genocide and mass murder.[77] Nevertheless, courts were asked to apply the exception to political struggles involving unorthodox fighting methods: guerrilla warfare, the targeting of civilians, and indiscriminate violence.[78] The historical disconnect was evident to some commentators: "While nineteenth-century cases usually involved victims who were adversaries vying for control of governmental entities, today the victims—whether private citizens, government representatives, or members of the armed forces—often bear only a tangential relationship to the underlying conflict."[79]

Finally, some scholars noted the irony between the origins of the doctrine and its modern application. As Professor Gilbert argued, "The exemption was aimed to protect people fighting for liberal democracy, yet the same language is still applied today to persons intent on destroying liberal democracy."[80] Under

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J. INT'L L. & POL. 169, 185 (1984) ("[T]he invocation of the uprising test was offensive to a most friendly nation and threatened to undermine Britain's willingness to surrender fugitives sought by the United States."); Sofaer, *supra* note 5, at 3.

75. Sofaer, *supra* note 5, at 4.

76. *See, e.g.*, James L. Taulbee, *Political Crimes, Human Rights and Contemporary International Practice*, 4 EMORY INT'L L. REV 43, 64 (1990) (worrying that the political incidence test has been "transformed . . . into a license for gratuitous murder on a wholesale scale, a potential justification for genocide") (citation omitted).

77. The exception requires the existence of some political struggle. In most cases of mass murder and genocide, the victimized group has already been fully subjugated. As aptly explained in *In re Extradition of Demjanjuk*:

> The murder of Jews, gypsies and others at Treblinka was not part of a political disturbance or struggle for political power within the Third Reich. The murders were committed against an innocent civilian population in Poland after the invasion of Poland was completed. No allegations have been advanced, or could be sustained, claiming that those Jews and non-Jews killed were part of an active attempt to change the political structure or overthrow the occupying government.

612 F. Supp. 544, 570 (N.D. Ohio 1985). *But see* Artukovic v. Boyle, 140 F. Supp. 245, 247 (S.D. Cal. 1956) (granting political offense exception to former Croatian official accused of ordering murders of 1293 named individuals and some 30,000 unidentified individuals). The disposition in *Artukovic* has been overruled and fully discredited. *See* Quinn v. Robinson, 783 F.2d 776, 799 (9th Cir. 1986) ("The offenses with which Artukovic was charged [were] 'crimes against humanity' . . . . [C]rimes of that magnitude are not protected by the exception."); WIJNGAERT, *supra* note 2, at 119.

78. *See, e.g.*, *Quinn*, 783 F.2d at 783-84 (planned explosions in a metropolitan city); Eain v. Wilkes, 641 F.2d 504, 507, 523-24 (7th Cir. 1981) (the killing of two children from a bomb placed in a marketplace); *In re* Doherty, 599 F. Supp. 270, 277 (S.D.N.Y. 1984) (the killing of army captain during ambush); *In re* Mackin, No. 80 Cr. Misc. 1, 1981 U.S. Dist. LEXIS 17746, at *8-25 (S.D.N.Y. Aug. 13, 1981) (the killing of a plainclothes policeman on street corner).

79. Miriam E. Sapiro, Note, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U. L. REV. 654, 676 (1986); *see also Quinn*, 783 F.2d at 804; *Eain*, 641 F.2d at 519-20.

80. GILBERT, *supra* note 56, at 209; *see also* T. v. Immigration Officer, [1996] A.C. 742, 753 (H.L.) (appeal taken from Eng.) (U.K.) ("These laws were conceived at a time

this perspective, a neutral application of the exception is not a necessary corollary to its founding purposes.

The political branches responded to these pressures during the early 1980s with legislative efforts to strip the courts' jurisdiction to adjudicate political offense exception claims,[81] purge certain offenses from the exception's scope,[82] and delineate strict criteria for the courts' inquiries.[83] With one exception, a revised extradition treaty with Great Britain,[84] such measures fizzled. Nonetheless, the above pressures soon prompted some federal courts to take up the mantle of reform.

B. *Balancing the Means and the Ends for Acts Harming Civilians*

The Seventh Circuit, facing a similar circumstance in *Eain v. Wilkes*, rejected a traditional application of the political offense exception and crafted a much heralded reinterpretation of its "incidental to" prong. *Eain* addressed an Israeli extradition request of a Palestine Liberation Organization (PLO) member who planted and detonated a bomb in a marketplace, killing two young boys and maiming thirty others.[85] Even if a political uprising was present, the court held that only those actions that "disrupt the political structure of a State, and not the social structure that established the government" will be recognized as "incidental" to the goal of toppling a government.[86] Acts disrupting the social structure of a State would not be deemed "incidental" "*absent a direct link* between the perpetrator, a political organization's political goals, and the specific act."[87] Extradition was certified on this basis.

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when political struggles could be painted in clear primary colours largely inappropriate today; and the so-called 'political exception' which forms part of these laws . . . was a product of Western European and North American liberal democratic ideals which no longer give a full account of political struggles in the modern world."). Further details on the exception's historical origins can be found at *supra* notes 21-24 and accompanying text. *See also* John Patrick Groarke, Comment, *Revolutionaries Beware: The Erosion of the Political Offense Exception Under the 1986 United States-United Kingdom Supplementary Extradition Treaty*, 136 U. PA. L. REV. 1515, 1529 (1988) ("Because the original purpose of the political offense exception was to protect democratic revolutionaries, it would seem contradictory to allow the exception to be used by those trying to destroy what those democrats created.").

81. *See* Catherine Nicols Currin, Note, *Extradition Reform and the Statutory Definition of Political Offenses*, 24 VA. J. INT'L L. 419, 441-42 (1984).

82. *See id.* at 446-48.

83. *See id.* at 454-55.

84. Supplementary Extradition Treaty, U.S.-U.K., June 25, 1985, T.I.A.S. No. 12,050. Article One exempts offenses defined under certain international agreements and certain crimes—murder, manslaughter, malicious wounding, abduction, causing of an explosion—from the political offense exception. *See id.*

85. 641 F.2d 504, 507 (7th Cir. 1981).

86. *Id.* at 520-21.

87. *Id.* at 521 (emphasis added). Another approach, endorsed by a minority of Ninth Circuit judges in *Barapind*, would use a multi-factor balancing test to determine whether an

In reaching this conclusion, the Seventh Circuit imported the post-*Castioni* British case of *In re Meunier*, which exempted anarchists from the exception because they targeted the social fabric of a State: "the anarchist movement did not represent a party . . . 'seeking to impose the Government of their own choice on the other [party],' a prerequisite for invoking the exception."[88] The bombing of a marketplace was viewed as so divorced from any substantial political purpose that it was analogous to anarchist activity, and therefore disqualified from the exception's shield.[89]

A number of problems pervade this reasoning. First, the court's harmonization of British precedent is dubious. The court in *Meunier* carved out anarchists from the exception's protections as part of a far more liberalized political offense framework. Unlike U.S. courts, British courts no longer require the existence of a political uprising but look exclusively to the political motivations and objectives of the actor.[90] By contrast, the U.S. courts have consistently shied away from such inquiries,[91] leaving the Seventh Circuit to examine only the characteristics of the act in question—the bombing of a civilian populace.

Second, the court cited no support for its central premise that tactics disrupting the social structure of a state generally *are not recognized* as "political." Modern anecdotal evidence demonstrates the factual inaccuracy of this premise: attacks against civilian targets are routinely planned and executed as part of a greater political objective[92]—the seizure of a Beslan school by Chechen separatists,[93] the bombing of Madrid rail cars several days before a

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act was "political," looking to whether "the foray is directly in aid of the uprising, how it was conducted, whether civilians or military were targeted, and what happened to the victims and their property." Barapind v. Enomoto, 400 F.3d 744, 757 (9th Cir. 2005) (en banc) (Rymer, J., dissenting). The dissenters argued that their approach was faithful to the Supreme Court's opinion in *Ornelas*, which employed similar language. *Id*. (citing Ornelas v. Ruiz, 161 U.S. 502, 511-12 (1986)). The *Barapind* dissenters crafted their test by isolating key phrases from *Ornelas*. Yet, since 1896, neither the case law nor scholarly commentary has followed this approach, instead reading *Ornelas* as a straight forward application of *Castioni*'s incidence test. *See supra* notes 43, 66.

More importantly, the inquiry asks a judge to engage in a post hoc assessment of a political movement's methods and consequences. As with *Eain*, the answer can be tainted by the fact-finder's subjective assessment of the movement's overall legitimacy. *See infra* text accompanying notes 104-06.

88. *Eain*, 641 F.2d at 521 (quoting *In re* Meunier, (1894) 2 Q.B. 415, 419 (Eng.)).

89. *Id.* at 521-22.

90. BASSIOUNI, *supra* note 1, at 612.

91. *Eain*, 641 F.2d at 520; *see also supra* notes 50-52 and accompanying text.

92. *Cf.* Quinn v. Robinson, 783 F.2d 776, 805 (9th Cir. 1986) ("Politically motivated violence, carried out by dispersed forces and directed at private sector institutions, structures, or civilians, is often undertaken—like the more organized, better disciplined violence of preceding revolutions—as part of an effort to gain the right to self-government.").

93. *See* Peter Baker & Susan B. Glasser, *Russia School Siege Ends in Carnage—Hundreds Die as Troops Battle Hostage Takers*, WASH. POST, Sept. 4, 2004, at A1 (noting the connection between hostage-takers' demands and Russian occupation of Chechnya).

Spanish national election,[94] insurgent beheadings of civilians in Iraq in order to prompt countries to withdraw their armed forces from the country,[95] and the kidnapping of tourists by Muslim extremists in the Philippines.[96]

Perhaps the court was offering a normative judgment that tactics directed at civilian targets, even if incidental to a larger political objective, *should not be recognized* by the political offense exception.[97] Drawing support from *Meunier* for this proposition is troublesome. Anarchists, by definition, reject all organized structures and have no political goals.[98] The PLO, by contrast, retained an organizational structure[99] and a defined political objective—to topple the government of Israel through armed struggle and replace it with an Arab state.[100] Its members' bombing missions against civilians were presumably incidental to this purpose. Thus, while *Meunier* excluded the anarchist from the political offense exception because his actions were divorced from any political objective,[101] *Eain* reached the absurd conclusion that the PLO member should also be excluded because his actions, though having a clear political purpose, were "so closely analogous to anarchist doctrine."[102] No other precedent or justification was cited for such a normative conclusion.[103]

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94. *See Spain Ousts Strong U.S. War Ally in Upset Win for Socialists at Polls*, WASH. POST, Mar. 21, 2004, at A3 ("Spaniards voted to remove the party of Prime Minister Jose Maria Aznar from power, apparently blaming his staunch support of the U.S.-led war in Iraq for the bombing attacks on March 11 that killed 201 people in Madrid.").

95. *See* Edward Wong, *Captives, Japanese and British, Plead for End of Occupation*, N.Y. TIMES, Oct. 28, 2004, at A16 (detailing the broadcast pleas of Japanese and British hostage to their respective countries).

96. *See* Mark Landler, *A Nation Challenged: The Philippines; The Temperature's a Lot Warmer but the Mission's the Same: Hunting Down Terrorists*, N.Y. TIMES, Nov. 4, 2001, at 1B (noting the spate of kidnappings of Western tourists by Abu Sayyah guerrillas and their avowed goal of carving out a Muslim state in the Philippines).

97. *But see Quinn*, 783 F.2d at 804-05 ("It is the fact that the insurgents are seeking to change their governments that makes the political offense exception applicable, not their reasons for wishing to do so or the *nature of the acts* by which they hope to accomplish that goal.") (emphasis added).

98. BLACK'S LAW DICTIONARY 94 (8th ed. 2004) (defining anarchy as a theory of governance where "individuals govern themselves voluntarily, free from any collective power structure enforcing compliance with social order").

99. MARK TESSLER, A HISTORY OF THE ISRAELI-PALESTINIAN CONFLICT 430 (1994) ("[In the early 1970s,] [t]he PLO sought to achieve a high level of institutionalization and structural development, as well as comprehensiveness with respect to membership . . . .").

100. THE PALESTINIAN NATIONAL CHARTER (PLO COVENANT) art. IX (1968), *reprinted in* A SURVEY OF ARAB-ISRAELI RELATIONS 334 (Cathy Hartley ed., 2d ed. 2004).

101. *In re* Meunier, (1894) 2 Q.B. 415, 419 (Eng.) ("[T]he party of anarchy[] is the enemy of all Governments. . . . They may, secondarily and incidentally, commit offences against some particular Government; but anarchist offences are mainly directed against private citizens.").

102. Eain v. Wilkes, 641 F.2d 504, 522 (7th Cir. 1981).

103. Beyond invocations of *Meunier*, the *Eain* court cited a piece of scholarly commentary and a United Nations Secretariat study. *See id.* at 521.

Third, *Eain*'s framework smacks of a subjective element long avoided by the U.S. courts. A fugitive can be extradited, even if he otherwise satisfies the incidence test, so long as the judge perceives an insufficient relationship between the consequences of his act and his ultimate political objective. The court provided no guidance on quantifying these factors or ascertaining their proportional relationships. A concurring opinion in *Quinn* chastised this approach for forcing the judge to personally "evaluat[e] the legitimacy of given political objectives and the conduct of internal political struggles."[104] The more disagreeable either factor is to the judge, the more likely the judge will perceive the act to be disrupting only the social structure of the state.[105] Moreover, the asserted link between the act and the ultimate political objective may not be apparent or easily understood by a foreigner unfamiliar with the background and subtleties of the conflict.[106]

At bottom, *Eain* probably reached the conscionable result. It is viscerally difficult to label the killing of two young boys as "political," and therefore excusable. Yet, the Seventh Circuit reached this outcome by deferring to those same sensibilities rather than adhering to precedent or other established sources of law. In the process, the court replaced a neutral, albeit imperfect, framework with a nebulous and subjective framework. In doing so, it failed to provide a principled improvement over the traditional neutrality of the political offense exception.

C. *Categorical Constraints—Objective but Rigid*

Recognizing the pitfalls of traditional neutrality but fearful of a standardless balancing approach, two courts imposed categorical limitations on *Castioni*'s incidence test in hopes of carving out undeserving fugitives from the exception in an objective fashion. Neither venture proved sufficiently workable given its rigidity.

1. Quinn*'s geographical limitation*

Despite protestations to the contrary, the Ninth Circuit in *Quinn* did effect one important alteration to the incidence test—a narrow interpretation of the first "uprising" prong. The court explicitly defined "uprising" as "a revolt by indigenous people against their *own government or an occupying power*."[107] Consequently, the political offense exception protects only those political offenses that occur inside "the borders of the country or territory in which a

104. Quinn v. Robinson, 783 F.2d 776, 819 (9th Cir. 1986) (Fletcher, J., concurring in part and dissenting in part).

105. For discussion, see *supra* Part II.C.

106. *See supra* note 68 and accompanying text.

107. *Quinn*, 783 F.2d at 807 (emphasis added).

group of citizens or residents is seeking to change their particular government or governmental structure"; it would not protect "the exportation of violence and strife to other locations—even to the homeland of an oppressor nation."[108] The court then rejected Quinn's invocation of the political offense exception, finding the IRA violence in England at the time of his alleged acts to be "insufficient."[109]

At first glance, *Quinn*'s geographical limitation appeared to be a promising answer. It excluded international terrorists and other criminals without sacrificing the exception's original purpose to protect domestic revolutionaries. Two immediate difficulties emerged however. First, the court's analysis was woefully inadequate. Quinn's alleged conspiracy occurred between January 1974 and April 1975,[110] at the height of an IRA bombing campaign in mainland Britain designed to destabilize the existing government:

> In 1973 eighty-six explosions occurred, killing one and injuring more than 380 people. The first ten months of 1974 witnessed another ninety-nine incidents, resulting in seventeen deaths and 145 injuries. The campaign reached a climax on 21 November 1974. Explosions at two pubs in Birmingham left twenty-one people dead and 160 injured. Public revulsion immediately following the incident spurred Westminster to introduce emergency legislation.[111]

The Ninth Circuit's response, that "the violent attacks and the responses to them were far less pronounced outside of Northern Ireland,"[112] does not explain why those attacks and responses were insufficient to constitute an "uprising" under the incidence test. Without such an analysis, or enunciation of standards, *Quinn*'s geographical limitation risks regression into the subjective and judgmental inquiry that it so deplored.

Second, the geographical limitation imposes a rigid and often artificial constraint on internal political struggles. By the time of Quinn's alleged conspiracy, the British government in London had dissolved the Northern Ireland parliament and imposed direct rule.[113] The IRA campaign on Northern Ireland and on the mainland targeted *the same political institution*. The fact that the uprising at issue occurred over two geographically distinct land masses seems trivial, and justifying differential treatment on such grounds appears suspect.[114] On a broader scale, *Quinn*'s geographical constraint fails to

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108. *Id.*

109. *Id.* at 813. In dicta, the court noted that the disposition in *Eain* could have been reached under its version of the incidence test because there was no "uprising" in Israel at the time of the alleged crimes. *Id.* at 807.

110. *Id.* at 783.

111. LAURA K. DONOHUE, COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM 1922-2000, at 207 (2001) (internal citation omitted).

112. *Quinn*, 783 F.2d at 813.

113. *See* DONOHUE, *supra* note 111, at 122.

114. *See, e.g.*, Groarke, *supra* note 80, at 1526 ("The *Quinn* court appears to be guilty of the same subjective interpretation of the political incidence test as the *Eain* court, because it manipulated the test so as to exclude a particular group that it disfavored.").

recognize that a government's existence may be inextricably tied to the financial or military support of a second geographically distinct state. Much like Heracles's quest to kill the nine-headed Hydra, an internal revolutionary movement often cannot succeed without striking at the heart of the oppressor government.[115]

2. Suarez-Mason*'s exclusion of former government officials*

In the 1988 case of *In re Suarez-Mason*, a district court in California confronted the issue of whether the political offense exception should protect former government officials.[116] The government of Argentina requested the extradition of a former general for directing the kidnapping and murder of numerous individuals during that country's "dirty war."[117] The court held that the exception was originally developed for one categorical purpose—to "protect[] acts of rebellion against oppressive rule."[118] It did not shield "actions taken in the course of quashing the political activism."[119]

Like *Quinn*'s geographical limitation, *Suarez-Mason*'s exclusion of former government officials from the political offense exception was overly rigid. First, political change does not always occur in favor of liberal democracies.[120] Like oppressive totalitarian regimes, a democratically elected government is vulnerable to internal revolution and may be forced to take measures in its defense. If that government ultimately fails and its elected leaders flee, *Suarez-Mason* would deny U.S. courts the ability to refuse their extradition back to

115. The political situation in Lebanon between 1975 and 2005 provides an apt case study. Had an internal armed revolution erupted during that time, it most surely would have required some action against Syria in order to succeed. The Syrian government had installed, supported, and directed the government in Beirut during those thirty years. *See generally* Interview by Jim Lehrer with Condoleezza Rice, Sec'y of State, THE NEWSHOUR (PBS television broadcast Mar. 4, 2005), *available at* http://www.state.gov/secretary/rm/2005/42999.htm (recounting Syrian influence in Lebanese political affairs).

116. 694 F. Supp. 676 (N.D. Cal. 1988).

117. *Id.* at 685.

118. *Id.* at 704.

119. *Id.*; *see also* Aimee J. Buckland, Comment, *Offending Officials: Former Government Actors and the Political Offense Exception to Extradition*, 94 CAL. L. REV. 423, 451 (2006) (arguing that the exception had "been built around the situation of rebels who commit violent acts in protest against their governments"). This position is particularly surprising given that prior courts reviewing extradition requests for former government officials had simply assumed the exception applied equally to those pursuing change and those fighting against it. *See, e.g.*, *In re* Ezeta, 62 F. 972, 977 (N.D. Cal. 1894) (former general); *see also* Karadzole v. Artukovic, 247 F.2d 198, 200 (9th Cir. 1957) (former Minister of the Interior); Ramos v. Diaz, 179 F. Supp. 459, 462 (S.D. Fla. 1959) (former army captain and corporal).

120. *See, e.g.*, Celia W. Dugger, *No Timetable to Restore Pakistani Democracy*, N.Y. TIMES, Nov. 2, 1999, at A10 (reporting General Pervez Musharraf's unwillingness to discuss the scheduling of elections or reinstituting Pakistan's democratically elected parliament after his military coup).

face trial for ostensibly political acts taken while in power[121]—a result running counter to the very purpose of doctrine.[122] Second, as a political uprising drags forward, the ex ante positions of each side increasingly blur. Each perceives the uprising as a struggle for its preferred political structure. Granting the exception to only the side that had previously been out of power may be quite arbitrary in many circumstances, particularly when control of a territory oscillates back and forth between the sides.

The imposition of categorical boundaries in response to the inadequacies of the traditional incidence test fell prey to a trap opposite that of *Eain*. Instead of creating a boundless inquiry, these two attempts artificially constrained the exception to where it would no longer apply to acts and internal uprisings that were undoubtedly political. They avoided subjectivity in favor of underinclusiveness.

IV. THE INTERNATIONAL LAW "RETROFIT"

The political offense exception, as presently applied, is untenable. Under the main iterations of the incidence test, a judge must choose strict neutrality and risk protecting the unsavory terrorist, or divine some value judgment about the "proper" course of a revolution that is incapable of principled and consistent application.

Of course, U.S. extradition law is not inextricably bound to the incidence test. Many countries have adopted far different frameworks when crafting their definition of "political"—focusing on the "effects" of the fugitive's alleged offenses or attempting to inquire into his primary motives.[123] Identifying the most desirable approach is, however, an academic feat that extends beyond the objectives of this Note. As of this moment, the incidence test is sufficiently entrenched in American jurisprudence so as to make its removal unlikely. Absent its abandonment by the Supreme Court or a comprehensive rewriting of U.S. extradition treaties by the political branches, we must operate within its boundaries.

This Note proposes a middle path. Attempting to work a solution without a wholesale jurisprudential revolution, this Part recommends a "retrofit" to the incidence test using international law. It proceeds under the following premise:

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121. *See, e.g.*, Celia W. Dugger, *Treason Charge for Pakistan's Ousted Premier*, N.Y. TIMES, Nov. 11, 1999, at A1 (reporting the filing of criminal charges against Pakistan's democratically elected prime minister one month after a military coup).

122. Furthermore, there would be the additional concern that these officials would face trumped-up charges or an unfair trial. *See supra* note 27 and accompanying text.

123. France, for instance, looks to whether the alleged crime had effects on the political organization of the state. *See* García-Mora, *supra* note 26, at 1249-51. By contrast, Swiss courts require the fugitive to possess a political motive, demonstrate a connection between the motive and the alleged crime, and establish the political motive as predominating over any other element. *Id.* at 1251-55.

once certain conduct triggers universal condemnation under accepted bodies of international law, it can never be legitimately employed in furtherance of political objectives.[124] The political offense exception would therefore be constrained by a set of standards external to the factfinder, thus avoiding the crux of the Seventh Circuit's *Eain* opinion.

Two bodies of international law can provide these external constraints: multilateral agreements and customary international law. As detailed below, these bodies, *if imported carefully and in tandem with each other*, could provide principled and workable constraints. While not a complete solution, the proposal offers a much improved application of the political offense exception.

A. *Looking to Multilateral Agreements*

Multilateral agreements provide an accepted and non-controversial route to restrict the political offense exception. They would retrofit the incidence test by inserting a predicate inquiry for the courts—is the fugitive's alleged conduct condemned as a crime under an applicable international agreement to which both the United States and the requesting state are parties?

A multilateral agreement is best analogized to a contract. It provides background rules and procedures that govern the relationship between two or more states. Of most interest to the present topic, the international community is awash with agreements identifying certain conduct that all state parties agree to criminalize.[125] Of course, the mere fact that a class of conduct is stamped "criminal" does not withdraw the political offense exception's protective umbrella. The exception historically protected ordinary criminal conduct undertaken for political purposes.[126]

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124. WIJNGAERT, *supra* note 2, at 140 (reciting Hugo Grotius's rule that "international crimes (*delicti juris gentium*) should not remain unpunished and that the perpetrators of such crimes should be prosecuted and punished as 'enemies of mankind' (*hostes humani generis*)"); *see also* BASSIOUNI, *supra* note 1, at 658-59 ("Offenses against the laws of nations of *Delicti Jus Gentium* by their very nature affect the world community as a whole. As such, they cannot fall within the political offense exception because, even though they may be politically connected, they are in derogation of the 'laws of mankind' . . . .").

125. Professor Bassiouni provides a concise list: aggression, genocide, crimes against humanity, war crimes, crimes against United Nations and associated personnel, unlawful possession or use or emplacement of weapons, theft of nuclear materials, mercenarism, apartheid, slavery, torture, human experimentation, piracy, aircraft hijacking, acts against maritime navigation of platforms on the high seas, threat and use of force against internationally protected persons, taking of civilian hostages, unlawful use of the mail, unlawful traffic in drugs and related drug offenses, destruction or theft of national treasures, unlawful acts against certain internationally protected elements of the environment, international traffic in obscene materials, falsification and counterfeiting, unlawful interference with international submarine cables, and bribery of foreign public officials. *See* BASSIOUNI, *supra* note 1, at 663-65 & nn.214-37.

126. *See supra* note 58 and accompanying text.

Rather, a subset of these agreements contain text that evidences a shared intent among member states to withdraw certain crimes from the realm of the "political." The Genocide Convention, for instance, explicitly proclaims that genocide and its related offenses "shall not be considered as political crimes for the purpose of extradition."[127] Other multilateral agreements, such as the Convention Against Torture, impose a duty on contracting states to extradite persons accused of such crimes or alternatively prosecute them in their domestic courts.[128] In essence, state parties will have *contracted around the normal operation of the political offense exception.* When discerning whether the fugitive's alleged conduct falls under one of these treaties in any one case, courts would conduct an inquiry long within their purview and competence—classic treaty construction.[129]

Employing multilateral agreements to constrain the political offense exception is obstructed by three strong forces of inertia. First, the very drafting of multilateral agreements requires broad international consensus—a process that can take years to complete. Second, an agreement does not become binding upon a member state until ratification.[130] For instance, the U.S. Senate has not ratified either of the Additional Protocols to the Geneva Conventions.[131] Thus, their provisions, which obligate fighting forces to distinguish between civilian and military targets,[132] cannot directly attain the status of federal law subject to

127. Convention on the Prevention and Punishment of the Crime of Genocide art. 7, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277. Even in the absence of the Convention, the crime of genocide could probably never be a "political offense" under the classic incidence test. *See supra* note 77 and accompanying text.

128. *See, e.g.*, International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, G.A. Res. 44/34, art. 10, U.N. Doc. A/RES/44/34 (Dec. 4, 1989); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 8, U.N. Doc. A/RES/39/46 (Dec. 10, 1984) [hereinafter Convention Against Torture]; Convention on the Physical Protection of Nuclear Material art. 9, Mar. 3, 1980, T.I.A.S. No. 11,080, 1456 U.N.T.S. 124; Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 88, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Convention for the Suppression of Unlawful Seizure of Aircraft art. 8, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. For a full discussion, see M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW (1995).

129. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . .").

130. *See generally* U.S. CONST. art. II, § 2, cl. 2; Vienna Convention on the Law of Treaties art. 14, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. By signing a treaty, a state undertakes an obligation not to defeat the object and purpose of the treaty until it becomes clear that ratification will not occur. Vienna Convention, *supra*, art. 18.

131. STAFF OF S. COMM. ON FOREIGN RELATIONS, 109TH CONG., PENDING TREATIES 3 (Comm. Print 2006), *available at* http://foreign.senate.gov/treaties.pdf.

132. *See* Protocol I, *supra* note 128, art. 48.

judicial enforcement. Third, even after ratification, an additional step is needed before a multilateral agreement can constrain the political offense exception: domestic legislation must "implement" the multilateral agreement, or language must be added to each extradition treaty referring to the agreement as a constraint.

Domestic implementing legislation: U.S. courts have established an interpretive framework whereby multilateral agreements are either (i) "self-executing"—their guarantees are automatically enforceable on par with a federal statute,[133] or (ii) "non-self-executing"[134]—they have no direct effect on domestic law until further legislation is enacted.[135]

While the doctrine's proper application is the subject of much academic debate,[136] the aforementioned multilateral agreements are non-self-executing because they bespeak of member states' *future* obligations.[137] Unsuccessful attempts by Congress in the 1980s to pass domestic implementing legislation further confirm that these agreements cannot alone constrain the exception.[138]

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133. Edye v. Robertson (Head Money Cases), 112 U.S. 580, 598-99 (1884) ("A treaty . . . is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."); *see also* Medellin v. Dretke, 544 U.S. 660, 685 (2005) (O'Connor, J., dissenting).

134. *See, e.g.*, Hamdan v. Rumsfeld, 415 F.3d 33, 38 (D.C. Cir. 2005), *rev'd on other grounds*, 126 S. Ct. 2749 (2006); Tel Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring).

135. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) ("[A treaty is] to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."); *see also* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 702-03 (1995).

136. To answer the question of whether a treaty should be self-executing, courts attempt to divine the intention of the United States in entering the treaty. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 102 cmt. h (1987) [hereinafter RESTATEMENT]. The precise method of that inquiry has prompted a wealth of academic commentary. *Compare* Vázquez, *supra* note 135, *with* John Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) (debating the merits of the self-executing treaty doctrine).

137. *See, e.g.*, Convention Against Torture, *supra* note 128, art. 8 ("States Parties undertake to include such offenses as extraditable offenses in every extradition treaty to be concluded between them."); Protocol I, *supra* note 128, art. 88 ("[T]he High Contracting Parties shall co-operate in the matter of extradition."); Convention for the Suppression of Unlawful Seizure of Aircraft, *supra* note 128, art. 8 ("Contracting States undertake to include the offence as an extraditable offence in every extradition treaty to be concluded between them.").

138. *See* M. Cherif Bassiouni, *Extradition Reform Legislation in the United States: 1981-1983*, 17 AKRON L. REV. 495, 548 (1984) (detailing House and Senate bills that would have exempted offenses under the Convention for the Suppression of Unlawful Seizure of Aircraft and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation from the political offense exception); *see also* S. 220, 98th Cong. § 3194(1)(D) (1983), *quoted in* Currin, *supra* note 81, at 447 (noting one unsuccessful proposal that would have disqualified any offense "with respect to which a multilateral treaty

Furthermore, the sweep of this approach may lack political salience. U.S. political branches would probably hesitate to incorporate wholesale constraints on the political offense exception for fear of its over-dilution.[139]

Revising extradition treaties one-by-one: Alternatively, two states can limit the scope of the political offense exception by direct textual reference to multilateral agreements in their bilateral extradition treaties. In the past two decades, the United States has begun to adopt this approach, renegotiating a number of its extradition treaties to narrow the exception by (i) listing specific multilateral agreements as constraints[140] or (ii) including a provision that broadly incorporates all relevant multilateral agreements (i.e., all agreements that impose a duty to extradite).[141]

This method of incorporation can be rather clumsy and time intensive. Whenever a new multilateral agreement comes into force, the individual redrafting of every extradition treaty is required. Additionally, U.S. courts interpret treaties much like contracts or statutes,[142] applying the basic canon of construction of *expressio unius est exclusio alterius*.[143] As a result, if an

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obligates the United States to either extradite or prosecute a person accused of the offense" from the exception); H.R. 3347, 98th Cong. § 3194(e)(2)(B) (1983), *quoted in* Currin, *supra* note 81, at 453 (same).

139. This hesitation will wax and wane depending on the other State's relationship with the United States. States more aligned to U.S. interests will have greater success in limiting the exception through the bilateral approach. *Cf.* BASSIOUNI, *supra* note 1, at 641.

140. *See, e.g.*, Extradition Treaty, U.S.-Peru, *supra* note 34, art. 4 (excluding, inter alia, offenses falling under the Genocide Convention and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances); Extradition Treaty, U.S.-Sri Lanka, art. 4, Sept. 30, 1999, S. TREATY DOC. NO. 106-34, 1999 U.S.T. LEXIS 171 (excluding, inter alia, offenses falling under the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons).

141. *See, e.g.*, Extradition Treaty, U.S.-Belize, art. 4, Mar. 30, 2000, S. TREATY DOC. NO. 106-38, 2000 U.S.T. LEXIS 59 (excluding, inter alia, offenses "for which both Contracting States have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution"); Extradition Treaty, U.S.-S. Afr., art. 4, Sept. 16, 1999, S. TREATY DOC. NO. 106-24, 1999 U.S.T. LEXIS 158 (same); Extradition Treaty, U.S.-Para., art. 4, Nov. 9, 1998, S. TREATY DOC. NO. 106-4, 1998 U.S.T. LEXIS 205 (same); Extradition Treaty, U.S.-S. Korea, art. 4, June 9, 1998, S. TREATY DOC. NO. 106-2, 1998 U.S.T. LEXIS 168 (same).

142. *See* Sullivan v. Kidd, 254 U.S. 433, 439 (1921) ("[T]reaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals . . . ."); *see also* O'Connor v. United States, 479 U.S. 27, 33 (1986) ("The course of conduct of parties to an international agreement, like the course of conduct of parties to any contract, is evidence of its meaning."); Santovicenzo v. Egan, 284 U.S. 30, 40 (1931) ("[T]reaties are contracts between independent nations . . . ."); 74 AM. JUR. 2D *Treaties* § 19 (2004) ("[A] treaty is to be construed on principles similar to those applied to other written contracts *and statutes* . . . .") (emphasis added).

143. *See* Chan v. Korean Air Lines, 490 U.S. 122, 135 (1989) ("'[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions.'") (quoting

extradition treaty references specific agreements as constraints on the exception, courts will presume that list to be exhaustive. If the treaty instead incorporates all multilateral agreements that contain a duty to extradite, courts will only import those agreements that contain an explicit reference to such a duty.[144]

In sum, multilateral agreements provide a relatively simple and non-controversial mechanism for the political branches and the courts, acting in tandem, to restrict the political offense exception. The solution, however, is partial at best. Even when all the above forces are overcome, multilateral agreements operate narrowly. They cherry-pick certain defined offenses from the political offense exception's scope, and they cannot predict all future crimes and situations to which the political offense exception will be invoked. Modernization requires a continuous and unwieldy cycle of redrafting at the international level and implementation at the domestic level. Thus, some other tool is needed.

B. *Using Customary International Law*

Customary international law (CIL), sometimes referred to as the "law of nations," presents a complementary approach to retrofit the political offense exception. CIL norms emerge from "a general and consistent practice of states followed by them from a sense of legal obligation."[145] It is up to the courts, examining the laws and practices of *all* nations, to determine when a particular norm achieves such universal acceptance. Under this approach, a fugitive charged with a crime that contravenes CIL cannot invoke the political offense exception. Even in absence of an explicit international agreement, some actions may never be legitimately employed for "political" ends.[146]

CIL is also a less rigid framework, thus avoiding the inertia and structural flaws of the multilateral agreement regime. By the same token, the approach is untested and slightly more controversial. The following discussion briefly

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The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 71 (1821)); *see also* 2A SUTHERLAND STATUTES & STATUTORY CONSTRUCTION § 4514 (6th ed. 2000) (noting that "one of the intrinsic rules" of statutory construction is the presumption that "when people say one thing they generally do not mean something else").

144. For instance, a district court refused to engraft the substantive provisions of Common Article 3 of the Geneva Conventions onto an extradition treaty between the United States and Peru. *See* Ordinola v. Clark, 402 F. Supp. 2d 667, 677-78 (E.D. Va. 2005). The extradition treaty excluded all offenses set forth in multilateral agreements with a "duty to extradite," but the court found that Common Article 3's language did not impose such a duty. *Id*. at 678.

145. RESTATEMENT, *supra* note 136, § 102.

146. Bassiouni and Wise suggest that CIL also imposes an independent obligation on the state to either extradite the offender or prosecute him in its domestic courts. *See* BASSIOUNI & WISE, *supra* note 128, at 20-25. Whether or not CIL encompasses the principle of *aut dedere aut judicare* is beyond the scope of this Note. I simply argue that CIL imposes definitional constraints on the term "political offense" in U.S. extradition treaties.

explains the legitimacy of CIL as an interpretive device, attempts to assuage the concerns of detractors, and provides a roadmap for federal courts wishing to draw on this body of law in future extradition cases.

1. *Legitimacy of CIL*

CIL is binding on U.S. courts. Only a few terms ago, the Supreme Court reaffirmed that "the domestic law of the United States recognizes the law of nations"[147]—a pronouncement in accord with a long lineage of precedents.[148]

Furthermore, those jurists and scholars who generally oppose CIL's interpretive influence would probably not object to its use here.[149] They assert the original and sole purpose of CIL to be the governing of relations *between two states* as opposed to the governing of relations *between a state and its own citizens*.[150] In the present context, CIL would operate within the interstices of an extradition treaty, providing a set of background rules for the contractual obligation between two states to extradite fugitives. It would not be regulating a state's treatment of its own citizens; the fugitive is just the "object[] of the process."[151]

Inviting federal courts to retrofit the political offense doctrine with CIL will likely trigger two main criticisms. Each is exaggerated.

An unrestrained standardless inquiry: Critics will argue that importing CIL is just another form of arbitrary and standardless line-drawing that, at its base, turns on the personal biases of the judge.[152] The one difference with this approach, however, is the incantation of international law to justify the exercise.

147. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

148. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances."); The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.").

149. For the main arguments against CIL, see *Sosa*, 542 U.S. at 744-50 (Scalia, J., concurring in part and concurring in judgment); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 831-37 (1997).

150. *See Sosa*, 542 U.S. at 749 (Scalia, J., concurring in part and concurring in judgment); Bradley & Goldsmith, *supra* note 149, at 842.

151. BASSIOUNI, *supra* note 1, at 641.

152. *See* Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1154 (7th Cir. 2001) (referring to the "chameleon qualities" of customary international law); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 385 (2002) ("[I]t is very difficult to actually determine whether a given norm satisfies the traditional requirements for customary international law."); *see also Sosa*, 542 U.S. at 750-51 (Scalia, J., concurring in part and concurring in judgment).

History proves that CIL, at least with respect to criminal conduct, defines a far more concrete and exclusive set of norms than its detractors care to admit. As proof that the general practice and *opinio juris* elements are sufficiently demanding prerequisites, only a few offenses have been historically outlawed under CIL[153]—genocide, slavery, murder, torture, and prolonged arbitrary detention.[154] The United States has also deemed many provisions of international humanitarian law, memorialized in Protocols I and II of the Geneva Conventions, to have attained the status of CIL.[155]

Alien Tort Claims Act (ATCA) litigation in U.S. courts over the past two decades provides further confirmation that federal courts can employ CIL with a degree of consistency, competence, and restraint. The Act, which grants aliens the right to sue in tort for a violation of CIL,[156] permits recovery only for violations of those CIL norms "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [that the Supreme Court has] recognized."[157] A survey of lower court opinions applying ATCA demonstrates vigorous gatekeeping of the CIL threshold. The offenses of genocide,[158] summary execution,[159] torture,[160] and other war crimes[161] have passed muster. Illegal detention,[162] conversion,[163] and fraud[164] have not.

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153. *Cf.* Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1187 (1990) (arguing that these elements are "sufficiently demanding to erase the prospect of complete judicial creativity in principle"); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393, 455 (1997) (finding the process of classifying norms as CIL to be "slow and cumbersome" which, by its nature, results in "an extremely short list").

154. RESTATEMENT, *supra* note 136, § 702.

155. *See* Brief for Practitioners and Specialists in the International Law of War as Amici Curiae Supporting Respondents at 8, Rumsfeld v. Padilla, 542 U.S. 426 (2003) (No. 03-1027) (citing DEP'T OF ARMY, LAW OF WAR WORKSHOP DESKBOOK 32 (Brian J. Bill ed., 2000); DEP'T OF ARMY, OPERATIONAL LAW HANDBOOK 11 (T. Johnson ed., 2003)); *see also* Stephens, *supra* note 153, at 456-57.

156. 28 U.S.C. § 1350 (2006).

157. *Sosa*, 542 U.S. at 725.

158. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1354 (N.D. Ga. 2003).

159. *See, e.g.*, Estate of Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250, 1261 (N.D. Ala. 2003); Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987).

160. *See, e.g.*, *In re* Estate of Marcos (Human Rights Litig.), 978 F.2d 493, 499 (9th Cir. 1992); Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980); *Xuncax*, 886 F. Supp. at 184; *Forti*, 672 F. Supp. at 1541; *see also* Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (affirming damage award under ATCA for torture).

161. *See, e.g.*, *Kadic*, 70 F.3d at 240; *Mehinovic*, 198 F. Supp. 2d at 1350.

162. *See, e.g.*, *Sosa*, 542 U.S. at 738. *But see Forti*, 672 F. Supp. at 1541-43 (finding that prolonged arbitrary detention would violate CIL); *Xuncax*, 886 F. Supp. at 184 (same).

163. *See, e.g.*, Cohen v. Hartman, 634 F.2d 318, 320 (5th Cir. Unit B Jan. 1981).

164. *See, e.g.*, Hamid v. Price Waterhouse, 51 F.3d 1411, 1418 (9th Cir. 1995).

Institutional competence: There is also a concern that, under this regime, courts would expand or contract CIL to fit a particular set of facts using an inquiry that is not terribly familiar to them.[165] One can, for instance, cite to a norm prohibiting torture or the indiscriminate targeting of civilian populations with ease. It is far more difficult to apply that norm to a particular set of facts: What constitutes "torture" for the purposes of CIL? How does one discern "indiscriminate" targeting of civilians—by looking to the planning stages, the asserted objective, the target's connection to a political or military institution, or something else?

While perhaps challenging, the CIL approach is workable. The experience of the federal judiciary in the international arena has increased dramatically in recent years, creating a measure of confidence. These courts continue to capably address a wide variety of alleged CIL violations under ATCA and have also delved extensively into complex issues of international humanitarian law and human rights norms in recent years.[166] The Executive Branch has established military tribunals to try detainees in Guantanamo Bay, Cuba for various crimes under CIL and international humanitarian law.[167] These tribunals have the potential to further refine the ambit of prohibited conduct under international law.

Materials from international tribunals will provide equally helpful guideposts. For instance, the International Criminal Tribunal for the Former Yugoslavia announced a comprehensive definition of "torture" under CIL.[168] Should a fugitive charged with such conduct be found in the United States, a federal court could use that opinion to evaluate whether CIL categorically negates the fugitive's invocation of the political offense exception. Decisions by the new International Criminal Court, which has jurisdiction over offenses violating CIL,[169] will further contribute to this reservoir in the coming decades.

If exercised cautiously, CIL would provide an excellent complement to the use of multilateral agreements in restricting the political offense exception. First, it can provide a backstop on the exception's application if the relevant extradition treaty has not yet been renegotiated to incorporate protections from

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165. *See* Flores v. S. Peru Copper Corp., 343 F.3d 140, 154 (2d Cir. 2003) (noting that "the relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges").

166. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004); United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002).

167. Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001). At the time of publication of this Note, the Supreme Court had found that these tribunals were improperly constituted under existing law. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006). The manner in which detainees would be tried was still under review by Congress.

168. *See* Prosecutor v. Kunarac, Case No. IT-96-23 & 23/1-A, Appeal Judgment, 2002 WL 32750375, ¶¶ 134-156 (June 12, 2002).

169. *See* Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90.

multilateral agreements. Second, because CIL operates at a wholesale level, it provides flexibility. As human rights principles gain wider acceptance and new crimes are condemned, countries would have to renegotiate multilateral agreements and their extradition treaties. CIL can evolve, and be applied, more expeditiously.

2. *Deriving norms of CIL: A roadmap for political offense exception cases*

The legitimacy of employing CIL as a constraint will likely rest, at bottom, in its delivery. Deriving such norms from the "customs and usages of civilized nations" demands a comprehensive examination of court opinions and scholarly works, foreign and domestic.[170] If this approach is to avoid the above criticisms, federal courts must undertake the requisite analytical legwork.

To highlight, the Supreme Court in *The Paquete Habana* provided a detailed exegesis on the treatment of coastal fishing vessels over the course of four centuries to ascertain the appropriate CIL rule for prize law: edicts from King Henry IV, Louis XIV, Louis XVI, and the Dutch;[171] treaties between England and France, the United States and Prussia, and the United States and Mexico;[172] decisions by foreign[173] and domestic tribunals;[174] diplomatic correspondence;[175] U.S. practice;[176] French practice;[177] and military and academic treatises.[178]

The International Criminal Tribunal for the Former Yugoslavia in the *Tadic* case adopted an even wider geographic scope.[179] When determining the applicable CIL norms governing internal strife, the appellate chamber looked to state practice during the Spanish Civil War, a 1947 military rulebook from Mao Tse-Tung, Common Article 3 of the Geneva Conventions and Protocol II, statements made by the Congolese Government during its 1964 civil war, the operational code for the Nigerian Armed Forces, 1988 statements by FMLN rebels in the Salvadorian civil war, statements by the International Committee of the Red Cross, U.N. General Assembly Resolutions, European Union declarations, and German military manuals.[180]

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170. The Paquete Habana, 175 U.S. 677, 700 (1900).
171. *Id.* at 687-90.
172. *Id.* at 687-88, 690-91, 698-99.
173. *Id.* at 690, 693, 694-95.
174. *Id.* at 710.
175. *Id.* at 692-93.
176. *Id.* at 696-97, 709-10, 712-13.
177. *Id.* at 699-700.
178. *Id.* at 695-96, 701-08.
179. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeal on Jurisdiction, 1995 WL 17205280 (Oct. 2, 1995).
180. *Id.* ¶¶ 100-118.

Two district court opinions in the 1980s highlight the dangers of incomplete analyses. In *Doherty*, the court held that "no act [should] be regarded as political where the nature of the act is such as to be violative of international law, and inconsistent with international standards of civilized conduct."[181] Similarly, the court in *Ahmad v. Wigen* employed the same analysis to hold that a fugitive charged with the indiscriminate targeting of civilians during an armed conflict could not seek shelter under the exception.[182]

Doherty and *Ahmad*'s justifications for the existence of a CIL norm fell horrendously short of demonstrating the requisite general and consistent practice. *Doherty*'s rule, that indiscriminate attacks on civilian targets would violate norms of CIL, was supported with one lone cite to an Irish Supreme Court opinion.[183] In holding that the targeting of civilian populations violated CIL, *Ahmad* cited to Additional Protocol I of the Geneva Conventions, *Quinn*, an Israeli Supreme Court opinion, Israeli and American scholarly commentary, and the Bible.[184] While an improvement, these citations pale in scope and breadth to the *Paquette Habana* and *Tadic* decisions. Furthermore, the non-binding rules on warfare set forth in Protocol I—the cornerstone of the court's analysis—were crafted only twelve years earlier in 1977. While the CIL framework imposes no age requirement, a relatively new rule can only be deemed a norm of CIL upon a showing of extensive and uniform compliance in the international community[185]—an evidentiary hurdle never cleared in *Ahmad*.

This is not to say that *Doherty* and *Ahmad* reached incorrect conclusions. CIL *may indeed* prohibit indiscriminate attacks against civilian populations.[186] Nevertheless, requiring courts to engage in such an intensive inquiry before employing CIL to restrict the political offense exception is not an exercise in formalism. A rigorous and comprehensive examination of state practice helps to mollify the above criticisms by introducing a large sample size, thereby deterring the judge from honing in on only those state practices that he agrees with. Without this analytical legwork, directing courts to import norms of CIL is no more desirable than the Seventh Circuit's flawed free-form approach in *Eain*.

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181. *In re* Doherty, 599 F. Supp. 270, 274 (S.D.N.Y. 1984).

182. 726 F. Supp. 389, 405-06 (E.D.N.Y. 1989).

183. *Doherty*, 599 F. Supp. at 274-75.

184. *Ahmad*, 726 F. Supp. at 405-07.

185. *See* North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 43 (Feb. 20) ("Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice . . . should have been both extensive and virtually uniform in the sense of the provision invoked . . . .").

186. *See supra* note 155 and accompanying text (discussing the contents of Protocol I and the opinion of military publications that these norms have become accepted as a part of CIL).

If conscientiously applied, this two-pronged "retrofit" should result in a much improved model of the political offense exception—one that remains faithful to the classic incidence test, but recognizes modern international law as a constraint. U.S. courts would draw on international sources and established modes of inquiry to avoid a decision based on the whims of the individual judge, and also to facilitate the stability and order of the entire extradition regime[187]—long promoted in American jurisprudence as an important and self-interested objective.[188]

CONCLUSION

The political offense exception is an invariably knotty device; its application must thread between romantic notions of protecting the idealistic revolutionary, vigorous efforts to scourge terrorism, and the political factors—foreign and domestic—at play in an extradition request. It was designed to promote individual rights, particularly a fair trial for the accused, but is inevitably entwined with the values and policies of a nation. Whatever flaws and internal contradictions it may have, the exception and its application via the "incidence test" are ingrained in U.S. extradition law. Absent some major change in U.S. extradition practices,[189] the ubiquitous presence of oppressive regimes and internal struggles around the world ensures that the political offense exception will retain significant influence in high-profile extradition cases for decades to come.

Extradition treaties were created to establish channels for disputes between nations, and their viability depends on the continued confidence in those channels. The 1980s saw a decline in such confidence when the political offense exception's response to the evils of modern strife—specifically terrorism and attacks on civilian populations—proved unpalatable to political leaders, courts, and the public. Reform was demanded. Yet, attempts to revise the doctrine have been either too loose or too rigid; they failed to provide the

187. *See supra* Part I.

188. *See generally* Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 474-75 (2003) ("Facilitating the orderly interaction between our legal system and the rest of the world is . . . about figuring out how to protect and preserve the things our nation values in our inevitable interactions with the rest of the world."); *id*. at 471-74 (citing examples).

189. For instance, choosing to extradite a fugitive to the International Criminal Court, as opposed to the requesting State, would presumably negate concerns of an unfair, politically motivated trial. There would thus be no need for the political offense exception. *See* Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 228 (2002) (noting that most member states, in authorizing the surrender of suspects to the ICC, did not insert a political offense exception in their implementing legislation); *see also* GILBERT, *supra* note 56, at 316-20. At present, however, the United States does not recognize the court's jurisdiction over its affairs. *See* Peter Slevin, *U.S. Renounces Its Support of New Tribunal for War Crimes*, WASH. POST, May 7, 2002, at A1.

decision-maker with sufficient guidance to render a principled and disinterested decision, or they imposed categorical rules that were artificial and arbitrary. Such approaches, by permitting the extradition of individuals for which the exception was first designed, can also trigger a loss of public confidence.[190]

Engrafting international law onto the traditional incidence test presents a preferable constraint. It preserves a century's worth of precedent but reforms the political offense exception by drawing on established principles of international law. Certain conduct, as defined by multilateral agreements and the general and consistent practice among states, would be categorically disqualified from the exception's protections. One would look primarily to the text of multilateral agreements, taking cues from the political branches on what crimes are and are not "political," and then to CIL where the interstices of the text so demand.

Ideally, this approach navigates between the overinclusivity of *Quinn* and the free-form approach of *Eain*. Courts would have difficulty twisting these sources in any one extradition case to meet the political winds of the moment, but they could, over time, judiciously and conscientiously contract or expand the political offense exception as the international community's understanding of human rights norms evolves.

190. *See supra* notes 25-30 and accompanying text; *see also* GILBERT, *supra* note 56, at 332 ("[O]ne aim of terrorism . . . is to create an oppressive, reactionary State leading to an alienated population who will increasingly rebel.").