The Political Offence Exception and Terrorism: Its Place in the Current Extradition Scheme and Proposals for Its Future

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I. Introduction

On March 16, 1978, Desmond Mackin, a member of the Provisional Wing of the Irish Republican Army ["I.R.A"] lay in ambush. Stephen Wooten, a young British soldier out on a routine patrol of Belfast, approached. Moments later, shots rang out and Wooten lay wounded, yet another casualty of the troubles in Northern Ireland.

Mackin was subsequently arrested but skipped bail and fled to the United States. In America Mackin was apprehended by the Immigration and Naturalization Service ["I.N.S."] which sought to extradite him to Northern Ireland to stand trial. However, American courts refused to order Mackin's extradition because his attempted murder of Wooten was a political crime.

The Mackin case illustrates a serious and growing problem in international law: the use of the political offence exception by terrorists to avoid extradition. This Article examines the history of the political offence exception. In addition, it discusses the problems endemic to the current system of extradition, with a

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2. id.
3. id.
4. id.
5. id.
6. id.
7. See infra notes 10-38 and accompanying text.
special emphasis on terrorism. Finally, this Article makes several suggestions for improving both the substance and procedure of the political offence exception in order to restore a balance between the protection of true political offenders and the suppression of international crime.

II. History of Extradition

Extradition is the process by which one jurisdiction secures the return of a suspected or convicted criminal from another jurisdiction. The principle of State sovereignty, one of the basic premises of international law, encompasses the right of a State to control all persons within its territory. In keeping with this principle, international law does not impose a duty of extradition on States. Instead, this duty is established solely by treaty. States are willing to cede some of their sovereignty by formulating extradition treaties because they realize that there is more to be gained by giving up some of their power than by allowing criminals to go unpunished.

8. See infra notes 41-127 and accompanying text.
9. See infra notes 128-70 and accompanying text.
11. Id. at 25-26.
13. That is, the state is the absolute sovereign over those within its territory. See id.

While international law is often criticized as being "soft law," in fact it has a well-defined structure. The Statute of the International Court of Justice identifies the generally-accepted sources of international law. These include:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations; and,
d. subject to the provisions of Article 59, judicial decisions and teachings of the most highly qualified publicists of the various nations as a subsidiary means for the determination of rules of law.


Additionally, while decisions of the ICJ have no value with respect to stare decisis, their persuasive weight is great. HARRIS, supra note 12, at 23-24.

15. See SATYA SIVA BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE 31 (1968). In fact, extradition treaties, although limiting on a state's sovereignty, actually exemplify that sovereignty because they must be agreed to and cannot be imposed on a state.
Thus, States adopt extradition treaties not out of altruism but out of self-interest. When States execute an extradition treaty, however, the "fundamental principle of the law of treaties" mandates that it is "binding upon the parties to it and must be performed by them in good faith."

Extradition was originally accomplished via informal surrender or return, and was viewed as an act of courtesy from one sovereign to another. For this reason, extradition was initially sought only to secure the return of persons who had committed crimes against the sovereign. As a result, extradition at its nascence was not contemplated for common criminals because they were "not considered . . . a public danger."

However, the Industrial Revolution led to the large-scale migration of immigrants and naturally resulted in the international movement of criminals. Consequently, an increased need to extradite individuals arose for so-called "common" crimes such as murder, rape, and theft. A desire to memorialize and codify extradition law in treaties accompanied this need.

16. See id. at 15; CHRISTINE VAN DEN WIJNGAERT, THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION 5 (1980). This rationale is even more compelling today, with the increasingly transnational character of criminality. "As time passes, whether acknowledged or not, the real capacity of the state to provide the requisite domestic stability is diminishing . . . ." Richard Falk, Toward Obsolescence: Sovereignty in the Era of Globalization, 17 HARV. INT'L REV. 35 (1995).


18. See Art. 26, Vienna Convention On The Law Of Treaties, May 22, 1969, 8 I.L.M. 679 (entered into force Jan. 27, 1980). Even states which are not a party to this Convention are bound by this principle as it is a binding norm of customary international law. See HARRIS, supra note 12, at 762 (discussing the principle of pacta sunt servanda). Thus, States are bound to interpret and apply treaty provisions in good faith. However, because at least two theories exist to justify refusing to extradite terrorists, this may not appear to be as high a duty. See infra notes 105-27 and accompanying text.


20. VAN DEN WIJNGAERT, supra note 16, at 5.

21. Id.


24. See Abramovsky, supra note 23.
III. The Political Offence Exception

Treaties do not impose an unqualified duty to extradite individuals. Instead, they are subject to the political offence exception which mandates that the State to which the individual flees must not allow extradition for crimes which are of a political character.

The political offence exception was created to protect dissidents from judicial retribution for their political activities. While extradition was originally sought for those who had offended the sovereign by committing political crimes, the advent of liberal democracies brought about a revolution of ideas which resulted in increased sympathy for political offenders.

For instance, the French government was hesitant about extraditing political offenders as early as 1829. But it codified, for the first time, the political offence exception in the Belgian Extradition Act of October 1, 1833. The exception soon found its way into numerous extradition treaties, including the U.S.-Belgian Extradition Treaty of 1843.

The exception has since become universally accepted. As the late British Judge Sir Hersch Lauterpacht observed, “in the legislation of modern states there are few principles so universally adopted as that of non-extradition of political offenders.”

25. This exception is technically a reservation. See VAN DEN WIJNGAERT, supra note 16, at 45. In extradition proceedings in which the political offence exception is invoked, the burden is on the detainee to present evidence sufficient to bring herself within the ambit of its protection. See, e.g., McGlinchey v. Wren [1989] I.L.R. 49, 53.


29. See id. at 11-12.


The political offence exception developed out of an "almost naive" identification of liberal democrats with political offenders. After all, it was not so long ago that they too had revolted against autocratic governments. They saw an idealized version of themselves in these dissidents, never considering that someday they too would face those same guns.

The 1890's saw a rise in the activities of anarchists, who sought to overthrow all forms of government. Their activities posed special problems for the political offence exception. The problem was solved by adopting a restrictive definition of "political." This new definition carved out several "exceptions to the exception," with the most notable being the attentat clause which stated that attempts on the life of the head of state was not sufficiently political so as to refuse extradition. The political offence exception was also restricted by the qualified interpretations given by municipal law. These restrictions, however, have failed to stop the exception's application to the modern equivalent of anarchists: terrorists.

IV. Defining Political

In the struggle to ascertain which offences merit protection, there is a strict division between "pure" and "relative" political offences. Furthermore, within the relative political offence category there are three distinct approaches which are used to determine which offences are not subject to extradition.

A. "Pure" Political Offences

Pure political offences are actions which are directed solely at the State and do not affect civilians. In addition, they are not

34. Id. Ironically, the former Russian Soviet Federated Socialist Republic, a State which owed its birth directly to political revolution, reserved its highest penalty for political offenders. HAROLD J. BERMAN & JAMES W. SPINDLER, SOVIET CRIMINAL LAW & PROCEDURE: THE RSFSR CODE 27 (2d ed. 1972). Under the 1926 Criminal Code, serious political crimes merited the death penalty; by contrast, intentional homicide merited only ten years imprisonment. Id.
36. Id.
37. Id. at 15 & n.75.
38. See infra notes 54-104 and accompanying text.
39. See infra notes 41-104 and accompanying text.
40. See infra notes 48-104 and accompanying text.
accompanied by the commission of a common crime.\textsuperscript{41} These include such crimes as treason, sedition, conspiracy to overthrow the government, and espionage.\textsuperscript{42}

There seems to be unanimity in the international community that these pure political crimes clearly qualify for the political offence exception.\textsuperscript{43} States have little trouble accepting the application of the political offence exception to these crimes for several reasons. First, the nature of these crimes is such that they lack the elements of common crimes.\textsuperscript{44} For instance, they do not offend the common sense of justice in the same way as rape or murder.\textsuperscript{45} Second, these pure political crimes often fail to satisfy the requirement of dual criminality in which extradition may be refused for any offence which does not also constitute a crime in the requested state.\textsuperscript{46} Third, on a philosophical plane, since these acts are directed against the state they epitomize the types of acts which the political offence exception was designed to protect.\textsuperscript{47}

B. "Relative" Political Offences

Despite the acceptance of pure political offences, there is an inconsistent application of the political offence exception to delits complexes, or "relative" political offenses.\textsuperscript{48} These are crimes which have a hybrid nature, that is, they involve either a combination of a common crime with a pure political offence,\textsuperscript{49} or more

\begin{itemize}
  \item \textsuperscript{41} See Garcia-Mora, \textit{A Knotty Problem of Extradition Law}, supra note 26, at 1237.
  \item \textsuperscript{42} See Manuel R. Garcia-Mora, \textit{Treason, Sedition and Espionage as Political Offences Under the Law of Extradition}, 26 U. PITT. L. REV. 65 (1964) [hereinafter Garcia-Mora, \textit{Sedition}]. Indeed, there is authority in state practice that espionage is not always an international delict, but may actually be the norm. \textit{See Id.} at 79-80.
  \item \textsuperscript{43} See, e.g., Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), \textit{cert. denied}, 336 U.S. 918 (1949) (allowing a prosecution for treason, but noting that extradition could have been refused); \textit{Ex parte} Kolczynski, 1 Q.B. 540 (1954) (refusing to extradite mutineers from a Polish vessel); Alfred E. Novotne, \textit{Random Bombing of Public Places: Extradition and Punishment of Indiscriminate Violence Against Innocent Parties}, 6 B.U. INT'L L.J. 219, 230 (1988).
  \item \textsuperscript{44} \textit{But see}, e.g., 18 U.S.C. \textsect. 1111 (1982) (murder); Canadian Criminal Code, R.S.C., ch. C-46, \textsect. 222(1) (1985) (Can) (murder).
  \item \textsuperscript{45} \textit{See generally} Novotne, \textit{supra} note 43, at 230.
  \item \textsuperscript{46} BEDI, \textit{supra} note 15, at 69-77. Prosecution based on political speech or dissidence usually fails this requirement, especially if the requested state is a liberal democracy. \textit{See}, e.g., Garcia-Mora, \textit{Sedition}, \textit{supra} note 42, at 86-88.
  \item \textsuperscript{47} \textit{See} supra notes 25-26 and accompanying text.
  \item \textsuperscript{48} \textit{See infra} notes 49-104 and accompanying text.
  \item \textsuperscript{49} For example, espionage coupled with assault. \textit{See Regina v. Governor of Pentonville Prison ex parte} Rebott, LS GAZ. 43 (1978), \textit{cited} in \textit{STANBROOK &}
often, a common crime which is perpetrated pursuant to a political agenda.\textsuperscript{50} These crimes are problematic because they force governments to wrestle with the fundamental question of whether a criminal should be given \textit{de facto} immunity from prosecution simply because of the \textit{reason} for his criminality and thus, are quite problematic. Unfortunately, no clear answer has emerged. Instead, three discrete approaches have arisen: the “political incidence” test,\textsuperscript{51} the “predominant purpose” test,\textsuperscript{52} and the “mixed” Continental approach.\textsuperscript{53}

1. \textbf{The Anglo-American “Political Incidence” Approach}.—Great Britain and the United States require that a crime, in order to be classified as political, must have been “incidental to and form[ed] part of political disturbances.”\textsuperscript{54} The seminal case which established this standard was \textit{In re Castioni}, in which Switzerland sought the extradition of Angelo Castioni from England for the crime of murder.\textsuperscript{55} Castioni was a citizen of the Canton of Ticino in Switzerland.\textsuperscript{56} After much unrest resulting from civilian dissatisfaction with the local authorities, Castioni, along with a mob of fellow citizens, stormed the municipal palace.\textsuperscript{57} As they broke in, Castioni shot and killed Luigi Rossi,

\begin{footnotesize}
\textsuperscript{50} See supra notes 48-49 and accompanying text and infra notes 51-104 and accompanying text.
\textsuperscript{51} See infra notes 54-77 and accompanying text.
\textsuperscript{52} See infra notes 78-95 and accompanying text.
\textsuperscript{53} Under relevant rules of treaty interpretation, one must first look to the “plain meaning” of the words of a treaty in order to effectuate the parties’ intent. Art. 31, Vienna Convention On The Law Of Treaties, supra note 18. Since the wording of the political offence exception is fairly ambiguous, “recourse may be had to supplementary means of interpretation,” including judicial decisions and the writings of publicists, to aid in the arena of the political offence exception. Municipal law has attained primacy in interpreting questions of international law.
\textsuperscript{54} \textit{In re Castioni}, 1 O.B. 149, 166 (1891). This test has gained acceptance in numerous other nations. See, e.g., \textit{In re Pavelic and Kwaternik}, 7 ANN. DIG. 372 (Corte d’appello, Turin 1933-34) (refusing extradition for two accused of complicity in the murder of King Alexander of Yugoslavia); \textit{In re Peyre}, 22 I.L.R. 525 (Camara Nacional Especial 1955) (granting extradition of Peyre, who was accused of giving bribes to support Ho Chi Minh’s Indo-China policy, stating that Peyre was “not ... motivated by any consideration other than his own profit.”); \textit{In re De Bernonville}, 22 I.L.R. 527-28 (R.S.T., Brazil 1955) (refusing extradition of a man accused of treason by France); \textit{In re Campora}, 24 I.L.R. 518 (Supreme Court Chile, 1957) (refusing extradition of former officials in the government of Argentine President Juan Peron).
\textsuperscript{55} \textit{In re Castioni}, supra note 54, at 150.
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.} at 150-51.
\end{footnotesize}
a State Councillor. In the aftermath, Castioni fled to England and subsequently, Switzerland sought his extradition.

Although the local magistrate felt that extradition was justified, the Queen's Bench reversed his decision stating that it was "clear that the offence with which the prisoner is charged is an offence of a political character . . . ." Thus, the offence did not justify extradition under the political offence exception of the applicable extradition treaty. In struggling to propagate a workable standard, the Court stated that "fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances." While admitting that this formulation was somewhat vague, Justice Hawkins wrote that it was "the most perfect to be found or capable of being given . . . ."

This standard was further refined in the case of In re Meunier. In Meunier, the French government demanded the extradition of an anarchist accused of detonating a bomb which killed two people. The Queen's Bench demanded extradition but imposed a further "party affiliation" requirement on the Castioni test. It stated that "there must be two or more parties in the state, each seeking to impose the Government of their own choice on the other." Since anarchists did not have such a party and advocated the absence of government, the court ruled that extradition was proper.

While embracing the Castioni test, United States courts have tended to apply the factors in a "mechanical" fashion which has led to blatant inequities. For instance, in Artukovic v. Boyle,
extradition of a former pro-Nazi Croatian government official was denied despite evidence of his complicity in the execution of 200,000 Serb prisoners. In applying the Castioni factors, the court found that the offences were sufficiently political. While this situation was subsequently rectified by amending United States immigration laws to allow Artukovic's deportation, the reasoning of the court remains valid.

In the case of terrorism, American courts have often refused to extradite terrorists, most notably members of the IRA. In In re Doherty, for example, the United Kingdom sought extradition of Joseph Doherty, a member of the IRA who had been convicted in absentia for the 1981 murder of a British Army Captain. As in Mackin, this murder occurred as the result of an ambush of a routine patrol.

Despite Doherty's admitted involvement in the IRA and his adjudicated involvement in the murder, the District Court for the Southern District of New York refused to order extradition because "the realities of the modern world" and the circumstances surrounding the IRA's struggle were sufficient to characterize the actions of IRA members as political crimes. Thus, American courts effectively provided a safe haven for some terrorists.


71. 247 F.2d at 198.

72. See In re Artukovic, Case No. CV 84-8743-R (B), CV 85-3611-R (C.D. Cal. Feb. 6, 1986), cited in Taulbee, supra note 69, at 64. See also Sarah L. Nagy, Comment, Political Offence Exceptions to United States Extradition Policy: Aut Dedere Aut Judicare (Either Extradite or Prosecute), 1 IND. INT'L & COMP. L. REV. 109, 136 (1991). It is important to note that Artukovic's eventual return was through the "back door," as he was deported, not extradited. See Kleindienst v. Mandel, 408 U.S. 753, 765 (1972) stating that the power to exclude aliens is "inherent in sovereignty" (quoting, Fong Yue Ting v. United States, 149 U.S. 698, 737-38 (1893)(Justice Brewer, dissenting)).

73. See In re Mackin, 668 F.2d 122, 124 (S.D.N.Y. 1981); McMullen v. I.N.S., 788 F.2d 591 (9th Cir. 1986) (refusing extradition for an accused bomber of a British Army installation).


75. 599 F. Supp. at 272.

76. Id. at 274-76.

77. This problem was addressed subsequently by establishing a Supplemental Treaty which excludes terrorism from the political offence exception. See Supplementary Treaty Concerning The Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, 1985, U.S.-U.K.-N. Ir., 24 I.L.M.
2. *The Swiss “Predominant Motive” Approach.*—Swiss courts have rejected the English political incidence test, preferring a more rigorous examination of the offender’s motivation and circumstances. They have adopted what is by far the most restrictive approach: the “predominant motive” or “proportionality” test. Under this test, the predominant motive of the offender determines if the offence is of an apolitical character. Nevertheless, Swiss courts have adopted a rather crabbed view of “predominant motive” by erecting stringent requirements for the political offence exception’s application. Thus, despite the test’s name, political motivation alone is not sufficient.

The Swiss standard was set forth in 1908 in the *Wassilieff Case*, in which Russia sought the extradition of Victor Wassilieff for murdering a local police chief. Wassilieff claimed that the killing was politically motivated because it had been carried out at the behest of the Russian Revolutionary Socialist Party, which was attempting to overthrow the Tsar. In granting extradition, the Swiss Federal Tribunal held that three criteria must be present to withhold extradition: first, the act must have been committed

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79. Perhaps not coincidentally, it was Switzerland’s extradition request that was spurned in *In re Casioni*. See *supra* notes 54-63 and accompanying text.
80. Art. 10, Swiss Extradition Act, cited in VAN DEN WINGAERT, *supra* note 16, at 126. See also Article 67 of the Swiss Federal Constitution, which provides that extradition from one Canton to another “may not be made compulsory for political . . . offences.” FEDERAL CONSTITUTION OF SWITZERLAND (Christopher Hughes, trans., 1970).
81. This standard has also been adopted by Austria, see EDITH PALMER, THE AUSTRIAN LAW OF EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS (1983); Italy, see also Public Prosecutor v. Zind, 40 I.L.R. 214 (Cass. 1961) (refusing extradition of a man convicted in Germany of espousing pro-Nazi sentiments); see *In re Bressano*, 40 I.L.R. 219 (Cámara Federal de la Capital Argentina 1965) (granting extradition for a bank robber as the “common crime element dominated over the political character of the offence charged”); see *In re De Bernonville*, 22 I.L.R. 527 (R.S.T., Brazil 1955); see *In re García Zepeda*, 22 I.L.R. 528 (Supreme Court Chile 1955) (refusing extradition for the accused murderer of a Guatemalan Army Captain during an uprising); see *In re Fabijan 7 ANN. DIG. 360* (F.R.G. 1933) (allowing extradition because there was no “concrete” political act).
83. See *id.*
appurtenant to a purely political offence; second, the act must constitute a truly efficient means to reach the purpose; and third, the elements of common criminality must be proportional to the political goal. This proportionality requirement was subsequently further refined requiring that the political character of the crime must “outweigh its characteristics as a common crime.”

Thus, under the Swiss approach, one must show more than a mere connection to a political party or that the crime was related to a political agenda. In practice, the added requirement of proportionality has come to mean that the crime must have been “necessary.”

Swiss courts have almost universally refused to sanction the taking of human lives unless it is the ultimo ratio, or last resort, for achieving a political agenda. Additionally, they have adopted an almost per se rule as to terrorism, holding that terrorist acts cannot be proportional to the dissidents’ goal because such acts are “repugnant to any civilized conscience.” Despite this declared aversion to terrorism, Swiss courts have, on occasion, refused extradition for members of terrorist groups. In the Watin case, the Tribune Federale applied the ultimo ratio concept to justify its refusal to extradite a member of the Algerian separatist group Organization Armée Secrète ["OAS"]. Watin had attempted to assassinate Prime Minister De Gaulle in order to gain Algeria’s independence from France. While agreeing that action through the ballot box was preferable, the Swiss court stated that, when viewed from Watin’s standpoint, “the assassination . . . seem[ed] to

84. Id. For an examination of pure political offences, see supra, notes 41-47 and accompanying text.
85. See VAN DEN WUNGAERT, supra note 16, at 129 n.684.
86. See id. at 126.
88. See Novotne, supra note 43, at 237.
89. VAN DEN WUNGAERT, supra note 16, at 129. There is conflicting authority in Swiss case law as to whether a subjective or objective test is to be used. Compare Ktir v. Ministère public fédéral, BGE 87 I 134, 142 (1961) (granting extradition for an Algerian nationalist accused of murdering a compatriot, stating that, objectively viewed, the killing was not a political crime, but merely “un acte de vengeance et de terreur” [an act of vengeance and of terror]) with Watin v. Ministère public fédéral, BGE 90 I 298 (1964) (refusing extradition using a subjective standard).
91. 90 A.T.F. I 300-01.
92. Id. at 298.
be the last [viable] option.\footnote{Id. at 301 ("[I]‘assassinat ... apparaître comme la dernière resource ... pratiquement.").} Therefore, extradition was refused.\footnote{Id. See also Ktir, B.G.E. 87 I 134, 137 (1961).}

3. The “Mixed” Continental Approach.—Current French practice exemplifies the mixed approach. While French courts long applied a motivation test\footnote{At one time, French courts applied an objective test, but abandoned it in favor of a subjective one. Compare In re Gatti and Da Palma Inacio, cited in \textsc{Van Den WijnGaert}, supra note 16, at 121-23.} under which extradition was denied as long as the act had a political motive,\footnote{See, e.g., Da Palma Inacio, (refusing extradition for politically-motivated bank robbery), cited in \textsc{Van Den WijnGaert}, supra note 16, at 122-23 n.659. The apex of this approach is found in the \textit{Hennin} case, in which extradition was refused for a separatist who had set off a series of bombs near Bern, Switzerland. \textit{See Van Den WijnGaert, supra} note 16, at 123. The Court of Appeal of Paris refused extradition for this terrorist because he had acted out of political motives. \textit{Id.} This has been criticized as "subjectivisme exagéré" (exaggerated subjectivism). \textit{Id.}} in the past two decades France has moved to a mixed approach in which the perpetrator’s motive is weighed against the seriousness of the crime committed.\footnote{See generally \textsc{Van Den WijnGaert}, supra note 16, at 123-26.} More serious crimes militate toward ordering extradition.\footnote{Id.}

In the \textit{Croissant} case, the Court of Appeals of Paris applied this approach in ordering the extradition of an accomplice of the Baader-Meinhoff group despite the admitted political motivation of the group.\footnote{Cited in \textsc{Van Den WijnGaert}, supra note 16, at 124 n.664. See also \textit{The Concept of the Urban Guerilla}, in \textsc{The Terrorism Reader: A Historical Anthology} 176-79 (Walter Laqueur & Yonah Alexander, eds., 1987) (detailing the group’s motivation).} Noting that their actions were “characterized by . . . contempt towards the life of [innocent] victims . . . and towards the property of other persons,” the Court held that the group’s motivation “could not . . . constitute an obstacle to the extradition.”\footnote{\textit{Croissant}, cited in \textsc{Van Den WijnGaert}, supra note 16, at 124 n.664.}

Despite this holding, French practice has not been uniform on the subject of terrorism. For example, until 1984, France routinely refused to extradite members of Euskadi Ta Askatasuna [“ETA”].

\footnote{Belgian courts have taken this “seriousness” element a step further in the terrorism milieu, stating categorically that actions which endanger innocent persons who are not involved in the political conflict do not qualify as political crimes. \textit{Abarca}, (involving a failed attempt to bomb an airplane in protest of Spain’s Franco regime), cited in \textsc{Van Den WijnGaert}, supra note 16, at 125 n.666.}
the notorious Basque separatist group responsible for numerous murders and car bombings in Spain. Additionally, in 1977, France arrested Abu Daoud, who was suspected of involvement in the 1972 "Black September's" massacre of Israeli athletes by the Group Black September at the Munich Olympics. Despite extradition demands from both West Germany and Israel, French courts ordered Daoud's release.

V. Justifications in International Law

A. Terrorism and Self-Determination

As previously asserted, terrorists have often benefitted incidentally from the application of the political offence exception. A more insidious problem, however, would arise if a State were to specifically adopt or apply a particular approach in order to justify a refusal to extradite any individual. Would this be valid under international law?

While the United Nations has condemned all acts of terrorism "wherever and whenever committed," it has, arguably, sanctioned terrorism when it is done for the pursuit of self-determination. The principle of self-determination mandates that "[a]ll peoples have the right to . . . freely determine their political status. . . ." This principle is enumerated as one of the purposes of the United Nations and has been reiterated in numerous international agreements, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

The right to self-determination, which has principally been applied in the arena of decolonization, has been deemed a

101. See Taulbee, supra note 69, at 56.
102. See Id. at 57.
103. Id.
106. U.N. Charter, art. 1(3).
“fundamental human right.” As such, States have a duty under the United Nations Charter to actively promote the exercise of this right. This duty also exists under both of the previously cited Covenants. Some commentators believe that there is a right, if not a political duty, for States to render assistance in such struggles.

This duty to promote self-determination must be viewed in conjunction with the international community's recognition that coercive force, which is generally prohibited, is justified when used to promote the right to self-determination. For example, the Resolution on the Definition of Aggression, which outlines the levels of coercion which the General Assembly deems violative of Articles 2(3) and 2(4) of the Charter, specifically exempts force when used to further self-determination. Additionally, the 1979 Taking of Hostages Convention exempts self-determination-inspired

111. U.N. Charter, arts. 55 & 56.
112. U.N. Charter, art. 1(3).
113. W. Michael Reisman, Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 26, 35-41 (Lori Fisler Damrosch & David J. Scheffer, eds). This is probably a recognition that minorities which possess this right can be prevented from exercising it by virtue of the disparity of power between themselves and their government. The ability to seek and receive assistance levels the playing field somewhat. This recalls the words of the Algerian novelist Camus, who wrote that in a struggle between man and an oppressive regime, "[c]rushed between human evil and destiny, between terror and the arbitrary, all that remains to him is his power to rebel . . . ." Albert Camus, Beyond Nihilism, in THE REBEL: AN ESSAY ON MAN IN REVOLT 304 (A. Bower Trans. 1956).
114. For example, the General Assembly has declared: Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commissions of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

115. See Reisman, supra note 113. For an opposing view, see OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 119-120 (1995) (stating that "no such exception . . . has been accepted by the community of States").
116. In the arena of self-determination, people have the right to “struggle to that end and to seek and receive support . . . .” Resolution on the Definition of Aggression, Apr. 12, 1974, 13 I.L.M. 710, 714.
terrorism from its scope.\textsuperscript{117} This is especially important because most terrorist organizations have a philosophical grounding in self-determination.\textsuperscript{118}

Despite an apparent "license," few States have chosen to actively support terrorism; those that have, such as the Libyan Jamahiriya and Sudan, have met with international censure.\textsuperscript{119} Nevertheless, these repeated textual references provide a strong argument that a State may seek refuge in this respect and "promote language of the Charter to justify an otherwise delictual refusal to extradite a terrorist."\textsuperscript{120}

\textbf{B. Intertemporal Law}

As noted above, the political offence exception has at times been interpreted and applied in such a way that terrorists would gain protection.\textsuperscript{121} While these former interpretations have now been eschewed, they still pose potential problems.

In interpreting treaties, the International Court of Justice ["I.C.J."] long adhered to the principle of \textit{tempus regit factum}.\textsuperscript{122} In the \textit{Aegean Sea Continental Shelf Case}, for example, the Court stated that "[t]he evolution of law . . . cannot change the meaning

\begin{footnotes}
\item[117] International Taking of Hostages Convention, Dec. 4, 1979, 18 I.L.M. 1456.
\item[118] For example, the IRA's aim is the liberation of Northern Ireland from British rule. \textit{See generally Freedom Struggle by the Provisional IRA}, \textit{in THE TERRORISM READER} 132 (Walter Laqueur & Yonah Alexander, eds. 1987). The PLO was founded to end the Israeli occupation of the Palestinian homeland which arose from the (arguably) illegal use of force to acquire territory subsequent to the end of the British mandate and the Arab-Israeli War. \textit{See id.} at 145.
\item[120] Another weakness is that even if extradition is improperly refused, international practice is not dispositive of a proper remedy. While the state that requests extradition would obviously prefer the return of the offender, courts have not given primacy to this form of quasi-\textit{restitutio in integrum}. In the \textit{Casablanca} case, for example, French Army deserters sought asylum in the German embassy in Casablanca. The French violated the diplomatic protection of the embassy and seized the deserters. \textit{See Art. 22, Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95} (stating that "[t]he premises of the mission shall be inviolable"). In Germany's subsequent suit against France, the Court declined to order the return of the soldiers to Germany, the asylum State, preferring instead to merely exact a formal apology from the French Republic.
\item[121] \textit{See, e.g., supra} notes 54-77 (noting American refusal to extradite IRA members) and notes 96-104 (addressing French practice pre-1976).
\item[122] The time rules the facts. This is also known as the doctrine of contemporaneity; that is, a contemporaneous interpretation is preferred.
\end{footnotes}
of a declaration; it cannot make the declarant say what he did not wish to say or even what he could not have wished to say.\textsuperscript{123} Under this theory, known as intertemporal law, the terms of a treaty must be interpreted in light of their meaning at the time the treaty was established.\textsuperscript{124} Thus, if a State established an extradition treaty at a time when one of the aforementioned interpretations was extant, there is international authority that the State would be justified in continuing to apply that approach.

While it is true that the problem of terrorism has grown enormously in the past twenty years, there is support in State practice \textit{vis-a-vis} terrorism for the primacy of this doctrine. When the United States and the United Kingdom were thwarted by the successful invocation of the political offence exception by members of the IRA, they concluded a Supplemental Treaty that specifically excluded acts of terrorism from the exception's ambit.\textsuperscript{125} This treaty was a tacit recognition that the previous interpretation of the political offence exception was in conformity with the requirements of international law at the time the former treaty was entered into. In order to change the result, the treaty had to be changed.

Both this doctrine and the legitimacy given to self-determination struggles provide the basis for States which have refused the extradition of terrorists to validly claim that they have fulfilled their "good faith" duties in their performance of the extradition treaty.

VI. Proposals For Change

The application of the political offence exception has suffered from the vagaries of the shifting political winds of the moment. Although revered in theory as a bulwark of liberalism, it has too often been subordinated to the perceived need to seek political advantage by acceding to an extradition request.\textsuperscript{126}

As at least one commentator has argued, this recasting of what is a fundamentally legal question in political terms is tantamount to

\begin{flushright}
\textsuperscript{123} 1978 I.C.J. 3, Aegean Sea Continental Shelf Case (Dec. 19) (Greece v. Turk.) (interpreting a Greek declaration as to jurisdiction).
\textsuperscript{124} See Western Sahara Case 1975 I.C.J. 12 (Oct. 16) (Advisory opinion) (concerning Morocco's claim to certain territory in Western Sahara).
\textsuperscript{125} See \textit{supra} note 77.
\textsuperscript{126} This is hardly surprising since extradition was originally agreed to as a means of currying favor with another sovereign. See \textsc{Van Den Wijngaert}, \textit{supra} note 16, at 5. If the country has adopted an approach that would merit the exception's application, then the Foreign Ministry may simply seek deportation. This would not merit the same protections afforded in an extradition hearing. 
\end{flushright}
a violation of human rights.\textsuperscript{127} Additionally, in its current incarnations, the political offence exception is too often open to abuse by terrorists. Given these endemic problems, change is clearly in order.

A. \textit{Clearly-Accepted Definition of "Political"}

While abolition of the political offence exception would be the easiest way to assure uniform treatment, this seems to be a rather fantastic suggestion. While states differ on the approach to take, and while “no contemporary municipal legal system recognizes political motivation as a bar to prosecution,”\textsuperscript{128} no civilized nation has seriously questioned the continuing validity of the exception itself.\textsuperscript{129}

Among the three approaches, the English system is somewhat artificial, especially the “party” requirement imposed by \textit{Meunier.}\textsuperscript{130} Instead, the French system’s balancing approach would best effectuate the original aim of the political offence exception while ensuring that true criminals are punished.\textsuperscript{131}

1. \textit{Adoption of Multilateral Vice Bilateral Treaties.}—Another source of disunity is the plethora of bilateral extradition treaties.\textsuperscript{132} While there have been several attempts to regulate certain crimes,\textsuperscript{133} these attempts address the symptom and not the

\textsuperscript{127} See \textit{VAN DEN WIJNGAERT}, supra note 16, at 64-66.
\textsuperscript{128} Taulbee, \textit{supra} note 69, at 49.
\textsuperscript{129} While fantastic, it is not wholly without merit. Since a crime is an offence against both the state and one’s fellow citizens, should it be excused merely because of the perpetrator’s motivation? In the words of Viscount Radcliffe to the House of Lords:

\begin{quote}
There may, for instance, be all sorts of contending political organizations or forces in a country and members of them may commit all sorts of infractions of the criminal law in the belief that by so doing they will further their political ends: but if the central government stands apart and is concerned only to enforce the criminal law that has been violated by these contestants, I see no reason why fugitives should be protected by this country from its jurisdiction on the ground that they are political offenders.
\end{quote}

\textsuperscript{130} See \textit{supra}, notes 64-67 and accompanying text.
\textsuperscript{131} See \textit{supra}, notes 96-104 and accompanying text.
disease. Effecting multilateral extradition treaties, perhaps under the auspices of the United Nations, would be a more effective and lasting approach. Indeed, the creation of a single treaty subscribed to by all nations would be the optimal solution.\textsuperscript{134} It would truly transnationalize extradition.

There seem to be few obstacles to such a program. For example, a consensus exists on crimes generally covered by extradition treaties. Therefore, it is likely that nations could agree on the crimes to be covered in a multilateral treaty. This agreement would not require states to cede any more of their sovereignty than in the current scheme.

The European Convention on the Suppression of Terrorism provides ample precedent for such an agreement.\textsuperscript{135} The Convention requires that a State, when examining an extradition request, weigh the following factors against the perpetrator: (1) that the action created a "collective danger" to life, liberty, or physical integrity; (2) that the act affected persons foreign to the motives; or (3) that cruel or vicious means were used.\textsuperscript{136}

This Convention likewise sets forth numerous acts of terrorism which are excluded from the application of the political offence exception, including hijacking, kidnapping, or offences involving the use of explosives.\textsuperscript{137} This agreement has proven very successful and should set the standard for similar agreements on a larger scale.

2. \textit{The Creation of an International Criminal Court.}—Several commentators have suggested creating an international court with jurisdiction over criminal matters.\textsuperscript{138} This idea has been precipita-
ted by several problems, including the rise in terrorism and the
abuse of extradition treaties by accused criminals with "conne-
tions."\textsuperscript{139}

The idea for such a court is not altogether new. In 1926, the
International Association of Penal Law proposed that criminal
jurisdiction should be given to the Permanent Court of Internation-
al Justice of the League of Nations.\textsuperscript{140} Consequently, in 1937 the
Convention for the Prevention and Punishment of Terrorism and
for the Creation of an International Criminal Court was promulga-
ted.\textsuperscript{141}

Despite the lack of momentum to establish such a court, in the
post-World War II era the United Nations has addressed the
subject on several occasions. In 1951, the Special Committee of the
General Assembly promulgated the Draft Statute for an Interna-
tional Criminal Court\textsuperscript{142} which was largely based on the 1926
International Association of Penal Law recommendations.\textsuperscript{143}
States believed that this 1951 Statute infringed too greatly on their
sovereignty.\textsuperscript{144} Thus, a Revised Draft Statute was created in 1953
which called for a court "to try natural persons accused of crimes
generally recognized under international law,"\textsuperscript{145} but only when
the States had conferred jurisdiction over the crimes involved.\textsuperscript{146}
These Drafts, however, have never been passed.\textsuperscript{147}

\textit{Criminal Court in the New International World Order}, 25 VAND. J. TRANSNAT’L

139. In addition to bribes, terrorist tactics are now being used by "narco-
terrorists" to ensure that local governments will refuse to extradite them. See
Court}, 22 N.Y.U. J. INT’L L. & POL. 709, 713 (1990); Bruce Zagaris, \textit{Protecting the
Rule of Law from Assault in the War Against Drugs and Narco-Terrorism}, 15

140. See Robert A. Friedlander, \textit{The Foundations of International Law: A

141. Id. at 19. No state signed the \textit{Convention on the International Criminal
Court}. Id.


143. See Gianaris, \textit{supra} note 138, at 93 n.20.

144. See id. at 93-94 n.21.


146. Id. at art. 29.

147. See Gianaris, \textit{supra} note 138, at 95. Despite the United States’ failure to
sign either Convention, the House of Representatives has, paradoxically, called for
"the establishment of an International Criminal Court to... deal[ ]... with... acts of terrorism, drug trafficking, genocide and torture..." H.R.J. Res. 66, 101st
There are numerous benefits to establishing an International Court. First, such a body would be able to apply a single, uniform body of law, thus alleviating choice of law problems.\textsuperscript{148} Second, states would have no cause to doubt the legitimacy of the Court's decisions, doubts that have in the past led to illegal acts to capture criminals and bring them before the accusing state's courts.\textsuperscript{149} Third, an International Court would solve choice of forum problems.\textsuperscript{150} Last, it could be used by States that do not have an extradition treaty extant between them.\textsuperscript{151}

The leading proposal for a Court is that of Professor Bassiouni who envisions a court with the power to investigate, issue arrest warrants and subpoenas and try criminals for numerous crimes.\textsuperscript{152} Unfortunately, given that nations have been unwilling to cede such power to a supranational body in the past, it is unlikely that they will do so in the near future.\textsuperscript{153}

3. \textit{International Court to Determine Political Status}.—The loss of state sovereignty that would result from the creation of an International Criminal Court probably dooms it to a life only in law review articles. An International Court or Commission, created for the sole purpose of ruling on extradition demands in which the

\textsuperscript{148} See Gianaris, \textit{supra} note 138, at 105-08.
\textsuperscript{150} See Gianaris, \textit{supra} note 138, at 110; Patel, \textit{supra} note 139, at 733.
\textsuperscript{151} See Gianaris, \textit{supra} note 138, at 110.
\textsuperscript{152} BASSIOUNI, \textit{supra} note 138, at 226-42. Professor Bassiouni’s proposal is very similar to one which is currently being proposed by the International Law Commission. \textit{Compare} M. Cherif Bassiouni, A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal (1987) \textit{with} Draft Articles on the Draft Code of Crimes Against the Peace and Security of Mankind, Sept. 11, 1991, 30 I.L.M. 1584 [hereinafter Draft Code]. However, even ILC reports admit that support from the international community is far from unanimous. While the idea of an ICC has garnered support, a “substantial” number of states have reserved opinion until the drafts are complete and a few have repudiated the idea \textit{in toto}. See Rose Marie Karadsheh, \textit{Creating an International Criminal Court: Confronting the Conflicting Criminal Procedures of Iran and the United States}, 14 DICK. J. INT’L L. 243, 252-63 (1996).
\textsuperscript{153} As one author noted, “\textit{R}e\textit{q}uir\textit{e}ing the consent of the nation harboring the accused would present some of the problems that weaken extradition.” Gianaris, \textit{supra} note 139, at 116. Without this consent, some form of coercion (force or economic sanctions) would have to be used. See \textit{id.} at 117. This would clearly violate the Charter of the United Nations, which forbids “the use or threat of force” in international relations. U.N. Charter art. 2(4). It seems counterproductive to break the law in order to enforce it.
political offence exception has been raised, would be a more measured approach for the following reasons.154

In the course of normal extradition proceedings municipal legal systems have competently adjudicated issues such as dual criminality and specialty. However, the political offence exception is a thorny issue. Given the disparate results in the application of the three approaches, the advantage of a neutral arbiter applying a single, uniform standard, can hardly be overemphasized. Aside from obviating the problems caused by the application of divergent views of the political offence, removing the decisions to a neutral forum would also lessen the impact of regional passions, prejudices, and political expediency weighing against the extraditee.

In addition, the subject matter jurisdiction of this proposed Court would be purposefully limited. States are notoriously wary of giving up sovereignty, even for altruistic reasons.155 But by restricting this Court to the adjudication of political offence extraditions, States would merely be agreeing to an extremely narrow loss of their sovereignty.

4. A Unified Approach to Terrorism.—Terrorism has been defined as “the threat or use of violence in order to create extreme fear and anxiety in a target group so as to coerce them to meet political (or quasi-political) objectives of the perpetrators.”156 Simply put, when violence is directed against a government or its institutions it is revolution, when it is directed against civilians and civilian property it is terrorism.157 The bombing of areas frequented by the public is paradigmatic of terrorism.158 Increasingly, this is carried out by “well-financed and superbly organized criminals with the resources and the tenacity to go to almost any extreme.”159

154. See Richard Allan, Terrorism, Extradition & International Sanctions, 3 ALB. L.J. SCI. & TECH. 327, 332 (1993). Another problem raised by the creation of an ICC is reconciling the often conflicting principles and procedures enshrined in domestic legal systems. See generally Karadsheh, supra note 152, passim (comparing and contrasting the legal systems of the United States and Iran).

155. This is the reason why any proposal for an International Criminal Court seems absurd. It would simply require states to cede too much sovereign power to an international body.

156. SCHACHTER, supra note 115, at 162-63. Terrorism is, almost by definition, politically motivated; however, “[t]errorism is defined by actions, not by the cause it is intended to serve.” Id. at 163.


158. See Novotne, supra note 43, passim.

159. Gianaris, supra note 138, at 105.
While "terrorism" is often considered too nebulous a term to use as a de jure basis for denying the application of the political offence exception,\(^\text{160}\) it has a de facto application because state practice shows that actions which endanger the lives of innocent bystanders are often deemed not sufficiently "political."\(^\text{161}\) For example, States which are parties to the European Convention have shown their willingness to abide by its terms, and routinely grant extradition for terrorists.\(^\text{162}\) Until there is worldwide unanimity, however, the political offence exception will be open to abuse.

5. Aut Dedere aut judicare.—The doctrine aut dedere aut judicare mandates that a state must "either extradite or prosecute."\(^\text{163}\) This principle, which dates back to the 17th-century philosopher Hugo Grotius,\(^\text{164}\) is set forth in numerous treaties drafted under the auspices of the United Nations and the Council of Europe\(^\text{165}\) and is based upon the precept that it is in the common interest of all states to suppress international crimes.\(^\text{166}\)

It is important to remember that States incorporate the political offence exception into treaties in order to avoid becoming complicitous in the vindictive prosecution of true political offenders.\(^\text{167}\) The aut dedere principle strikes a balance between this desire and the need to punish criminals.

\(^{160}\) See generally J. Dugard, Towards a Definition of International Terrorism, 67 AM. SOC'Y INT'L L. PROC. 94-100 (1973).

\(^{161}\) See generally VAN DEN WIJNGAERT, supra note 16, at 155-59.

\(^{162}\) See, e.g., In re, Cour de Cassation, Chambre Criminelle, May 30, 1995 (applying heightened standard to an "enterprise terrorist" or an "infraction[]... sur les explosifs"); Germany extradites suspected Islamic terrorist to France, DEUTSCHE PRESSE-AGENTUR, July 25, 1995. Court rejects IRA suspect Donna Maguire's appeal against extradition to Germany, REUTER TEXTLINE, Sept. 11, 1991.


\(^{165}\) See M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW, PROCEEDURE 415 (1986) (stating that "the contemporary trend in the world community is to follow the maxim aut dedere aut judicare, namely to prosecute or punish.").

\(^{166}\) See BEDI, supra note 15, at 171-75. Indeed, failing to aid in suppressing such criminality is tantamount to ratification of the criminal act, complicity in the act, or even aiding and abetting the criminals. See Richard B. Lillich & John M. Paxman, State Responsibility For Injuries To Aliens Occasioned By Terrorist Activities, 26 AMER. U. L. REV. 217, 304 (1977).

Currently, the invocation of the political offence exception results in the accused criminal receiving *de facto* immunity from prosecution and has the effect of sanctioning the crimes committed based on the criminal's motivation. The application of the *aut dedere* principle would alleviate this problem while still respecting the doctrinal basis for the political offence exception itself. Even if the State from whom extradition is demanded had reason to suspect that an unfair trial would result from extradition, it should have no such doubts about its own courts. By subjecting these accused criminals to local prosecution a State can prevent the abuse of legitimate political dissidents while simultaneously ensuring that criminals do not go unpunished.

VII. Conclusion

Theoretically, the political offence exception serves to protect political dissidents from unjust prosecution; arguably, that is the purest of motives. Unfortunately, in practice it is subject to abuse by both governments and extraditees. In addition, the application of numerous standards lead to inconsistent decisions, especially when terrorists seek refuge under international law. Although terrorism is universally condemned by civilized nations, the political offence exception is still applied to terrorists.\(^{169}\)

The foregoing suggestions are aimed at alleviating many of these problems, if not solving them entirely. While some of the suggestions may require slight infringements on state sovereignty, the compromise would serve to benefit *all* States by suppressing criminality and simultaneously protecting legitimate political dissidence. At its most basic level, the *raison d’être* of extradition and the political offence exception is to balance the right to dissent with the need to control crime.\(^{170}\) Perhaps by adopting some of these proposals the international community can restore the balance.

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168. Obviously, motivation has little bearing on prosecution under municipal law. "Even in the context of organized political protest, persistent, organized, premeditated lawlessness menaces in a unique way the capacity of a State to maintain order and preserve the rights of its citizens." Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 768 (1993) (Kennedy, J., concurring) (addressing restrictions on anti-abortion protests).

