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down in *Gulf Oil Corp. v. Gilbert*,[20] and to take into consideration the nationalities of the parties, the law to be applied, the fact that the bills of lading were written in English, and the availability and location of possible witnesses.

The *Elikon* decision is significant because it provides new authority for the *Indussa* approach to the disputed issue of forum selection clauses. Although this approach is an exception to the general rule of upholding the validity of forum selection clauses, it is consistent with the provisions of *Restatement (Second) of the Conflict of Laws*[21] and the *Model Choice of Forum Act*.[22] Both the Restatement and the Model Choice of Forum Act allow the courts to declare forum selection clauses invalid when there is a violation of public policy, or when the transaction is otherwise unfair, unjust, or unreasonable.[23] While *Bremen* recognized this exception, *Indussa* and *Elikon* have gone further by directly applying the exception to bills of lading governed by COGSA and invalidating forum selection clauses which relieve or lessen the liability of ocean carriers.

Wade H. Gateley

Eain v. Wilkes: Establishing the Parameters of the Political Offense Exception in Extradition Treaties

The Court of Appeals for the Seventh Circuit recently upheld the extradition of a member of the Palestine Liberation Organization (PLO) accused by Israel of exploding a bomb that killed and injured over thirty people.[1] After fleeing to this country, the PLO member had sought a writ of habeas corpus to prevent the Secretary of State from extraditing him to Israel. The court, in a strongly worded opinion, rejected the petitioner's argument that the bombing constituted a political offense—a determination which would have blocked his extradition to Israel. *Eain v. Wilkes* is noteworthy for several reasons. First, the court reiterated the traditionally important role the judiciary plays in extradition proceed-

20. 330 U.S. 501 (1947).

21. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971).

22. MODEL CHOICE OF FORUM ACT (National Conference of Commissioners on Uniform State Laws, 1968).

23. *See* Nanda, *Forum Selection and Choice-of-Law Agreements in International Contracts*, THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS § 8 (V. Nanda ed. 1981).

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

ings, particularly with regard to the "political offense" exception found in many extradition treaties. Second, the court indicated that those crimes which fit within the political offense exception must be aimed at the political, and not the social, structure of a country. Third, the court emphasized that the United States would not be a safe haven for terrorists who come to this country to avoid answering for their crimes.

On May 11, 1979, Abu Eain, a member of the PLO, travelled to the restort town of Tiberias, Israel, to find a place to hide a bomb. Three days later, on the celebration of Israel's independence day, he returned to Tiberias and placed a bomb in a refuse bin in the center of town. The subsequent explosion killed two boys and injured thirty other persons. Eain then obtained a visa to enter the United States and arrived in Chicago, where on August 22, 1979, he was arrested by the F.B.I. on the basis of information supplied by Israeli authorities. Shortly thereafter, Israel sought his extradition under the terms of its 1962 Extradition Convention with the United States.[2]

After a hearing, a magistrate found that Eain should be extradited to Israel to stand trial for murder, attempted murder, and causing bodily harm with aggravating intent.[3] Eain sought a writ of habeas corpus from

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2. Convention on Extradition, Dec. 10, 1962, United States-Israel, 14 U.S.T. 1707, T.I.A.S. No. 5476, 484 U.N.T.S. 283 (*entered into force* Dec. 5, 1963) [hereinafter cited as the Extradition Convention].

3. In Re Abu Eain, No. 79 M 175 (N.D. Ill. Dec. 18, 1979). The Extradition Convention specifies that:

> Persons shall be delivered up according to the provisions of the present Convention for prosecution when they have been charged with, or to undergo sentence when they have been convicted of, any of the following offenses:
>
> 1. Murder.
>
> . . .
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> 2. Malicious wounding; inflicting grievous bodily harm.
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> . . .
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> Extradition shall also be granted for attempts to commit or conspiracy to commit any of the offenses mentioned in this Article provided such attempts or such conspiracy are punishable under the laws of both Parties by a term of imprisonment exceeding three years.

Extradition Convention, *supra* note 2, art. II.

The procedure in this country for extradition is governed by 18 U.S.C. § 3181-95 (1976). The statutes require that a country seeking extradition submit a request through proper diplomatic channels. That request must be supported by sufficient evidence to show that the individual is the person sought for the crimes charged, that the crimes are among those listed as extraditable offenses in the treaty, and that there is sufficient justification for the individual's arrest if the charged crime had been committed in the United States. After evaluation and approval by the Department of State, the necessary papers may be forwarded to the U.S. Attorney in the district where the person sought to be extradited may be found. The U.S. Attorney may then file a complaint and seek an arrest warrant from a magistrate. If a warrant issues, the magistrate then conducts a hearing under 18 U.S.C. § 3184 to determine "[i]f, on such hearing, [the magistrate] deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention. . . ." It is fundamental that the person whose extradition is sought is not entitled to a full hearing. The person charged is not to be tried in this country for crimes he is alleged to have committed

an Illinois federal district court to prevent the Secretary of State from extraditing him in accordance with the magistrate's determination, but the court denied his writ.[4]

On appeal to the Seventh Circuit,[5] Eain argued that the evidence against him failed to establish probable cause to believe that he committed the crimes Israel charged. The court of appeals rejected this argument[6] on the technical basis of its limited scope of review on this issue.[7] The court then proceeded to examine Eain's alternative argument that his extradition should be blocked, since his crime constituted a political offense.[8]

Under article VI of the United States-Israel Extradition Convention, extradition shall not be granted "[w]hen the offense is regarded by the requested Party as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him for an offense of a political character."[9]

Prior to reaching the merits of Eain's arguments, the court reviewed the government's suggestions that the role of the judiciary in applying the political offense exception should be limited one. The government argued that the determination of the political nature of a crime is itself a political question which should be resolved by the legislative and executive—the political—branches of government.[10] Judge Wood, writing for

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in the requesting country. That is the task of the civil courts of the other country.

Under section 3184, should the magistrate either determine that the offense charged is not within a treaty's terms or find an absence of probable cause, the magistrate cannot certify the matter to the Secretary of State for extradition. If the case is certified to the Secretary for completion of the extradition process it is in the Secretary's sole discretion to determine whether or not extradition should proceed further with the issuance of a warrant of surrender. *See* 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW, 49-50 (1942); Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1323 (1962).

4. As mentioned in 641 F.2d at 507.

5. There is no statutory provision for direct appeal of an adverse ruling by a person whose extradition is sought. Instead, that person must seek a writ of habeas corpus. Collins v. Miller, 252 U.S. 364 (1920).

6. 641 F.2d at 509-12.

7. The scope of habeas corpus review in extradition cases is a limited one, according due deference to the magistrate's initial determination. Fernandez v. Phillips, 268 U.S. 311, 312 (1925). "[H]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there is any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Id.* at 312.

8. Eain also argued that Israel's "indictment" of him for the alleged crimes amounted only to a subterfuge in order to have him returned for trial, not for the alleged offenses, but instead for the political offense of membership in the Al Fatah branch of the PLO. The court of appeals held that the determination whether the request for extradition amounted to subterfuge by Israel is a decision clearly within the sole province of the Secretary of State. 641 F.2d at 518. *See also* Laubenheimer v. Factor, 61 F.2d 616 (7th Cir. 1932); In re Lincoln, 288 F. 70 (E.D.N.Y. 1915), *aff'd per curiam*, 241 U.S. 651 (1916); Sindona v. Grant, 461 F. Supp. 199 (S.D.N.Y. 1978).

9. Extradition Convention, *supra* note 2, art. VI, para. 4.

10. 641 F. 2d at 513-17.

the court, noted that there was no case precedent for the proposition that only the political branches should decide whether a crime is a political offense.[11] Rather, it is the judicial branch which usually determines whether the political offense exception applies.[12] The court found support for this view in the extradition statutes which require a hearing to determine whether there is sufficient evidence "to sustain the charge *under the provisions* of the proper treaty."[13]

While the court concurred in the government's analysis that, in general, the Constitution places foreign policy and international affairs in the hands of the executive,[14] it rejected the government's conclusion that the political nature of these areas renders them unsuitable for judicial consideration.[15] As the court pointed out, "it is error to suppose that every case or controversy which touches foreign relations relies upon judicial competence."[16] The court went on to recognize the need for "special sensitivity" in the area of foreign affairs,[17] but declared that "[t]his sensitivity does not preclude the Judiciary from having a part of the process of determining whether the political offense exception applies. That determination involves an approach to factfinding that is traditional to the courts."[18]

The court refused to accept the government's argument that the extradition treaty with Israel, by its own terms, left the determination of whether a crime was a political offense to the executive branch.[19] Article VI, paragraph 4 of the Extradition Convention—"extradition shall not be granted . . . when the offense is regarded *by the requested party* as one of a political character"[20]—suggested that such an interpretation was plausible. On the other hand, such an interpretation would destroy the procedural safeguards established to protect defendant's rights in extradition proceedings.[21]

Having established the role of the judiciary in applying the political offense exception, the court of appeals moved to the merits of Eain's arguments. The petitioner pointed out the distinction between "pure" and "relative" political offenses[22] and contended that the Tiberias bombing

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11. *Id.* at 513.

12. *Id.* Sayne v. Shipley, 418 F.2d 679 (5th Cir. 1969), is the only case where the executive was permitted to make the initial determination in extradition matters that the crime charged was committed and that the person sought to be extradited commited it. However, *Sayne* is unique because it involved a treaty that implicated the special relationship between the Canal Zone and the Republic of Panama. *Id.* at 686. The *Sayne* court went on to indicate that executive determination to extradite is still subject to review on habeas corpus.

13. 18 U.S.C. § 3184 (1976) (emphasis added).

14. 641 F.2d at 514.

15. *Id.*

16. Baker v. Carr, 369 U.S. 186, 211 (1962), *quoted in* 641 F.2d at 514.

17. *Id.* at 515.

18. *Id.*

19. *Id.* at 517-18.

20. Extradition Convention, *supra* note 2, art. VI para. 4 (emphasis added).

21. 641 F.2d at 518.

22. *Id.* at 512.

was a "relative" offense. Since the political aspects of his crime were so interwoven with the bombing itself, the entire offense should be regarded as political. In rejecting this argument, the court held that the definition of political offenses in extradition treaties "limits such offenses to acts committed in the course of and incidental to a violent political disturbance such as a war, revolution or rebellion."[23]

In order to interpret this definition, the court focused on those cases which had prevented extradition on the grounds of a political offense and distinguished the "ongoing organized battles between contending armies" in those cases[24] and the "dispersed nature" of the PLO.[25] Therefore, despite Eain's membership in the PLO, his crimes were not political offenses given the nature of the conflict between Israel and the PLO.

More significantly, the court noted that the definition of "political disturbance" was aimed at acts that disrupt the political rather than the social structure of a state.[26] In the Seventh Circuit's view, terrorist activity seeks to promote social chaos by attacking the social structure and does not fit within the political offense exception:

> The exception does not make a random bombing intended to result in the cold-blooded murder of civilians incidental to a purpose of toppling a government, absent a direct link between the perpetrator, a political organization's political goals, and the specific act. Rather, the indiscriminate bombing of a civilian populace is not recognised as a protected political act even when the larger "political" objective of the person who sets off the bomb may be to eliminate the civilian population of a country. Otherwise, isolated acts of social violence undertaken for personal reasons would be protected simply because they occurred during a time of political upheaval, a result we think the political offense exception was not meant to produce.[27]

Several aspects of the case deserve brief mention. First, the court's rejection of the government's argument that the executive should decide whether the political offense exception applies seems warranted for political reasons. With the frequently sensitive nature of foreign affairs, a determination by the executive concerning the application of the political offense exception might be based on facts wholly irrelevant to a proper determination. For example, the executive might be influenced in its decision by the quality of the relationship shared with the country requesting extradition, granting the exception more frequently when the requesting country was not a close ally. In theory, the judiciary would not be subject

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23. *Id.* at 518.

24. *Id.* at 519. Ramos v. Diaz, 179 F. Supp. 459 (S.D. Fla. 1959) (members of organized revolutionary army with established chain of command operating within the country); United Staes v. Artukovic, 170 F. Supp. 393 (S.D. Cal. 1959) (military government installed by Nazis during World War II; discussed in dicta).

25. 641 F.2d at 519.

26. *Id.* at 520-21.

27. *Id.* at 521.

to such influences and could assure the high degree of objectivity required to guarantee the rights of persons in extradition proceedings. In a similar vein, the court of appeals noted that the United States' present system of extradition provides the executive flexibility by allowing it to defer to the judiciary's decision.[28] This, in turn, "permits the executive branch to remove itself from political and economic sanctions which might result if other nations believe the United States lax in the enforcement of its treaty obligations."[29]

One troublesome aspect of *Eain v. Wilkes* involves the court's definition of political offenses and its distinction between the "ongoing organized battles between contending armies" in cases which upheld political offense exceptions and the "dispersed nature" of the PLO-Israeli conflict in *Wilkes*.[30] In effect, the court suggests that the political offense exception will be applied more readily, if not exclusively, in the more traditional warfare situations. However the court's distinction ignores the reality of modern warfare, where revolutions and rebellions are less often conducted in an organized fashion. If the court's analysis were to be rigidly followed, then few people would ever qualify under the exception, since so few people could ever claim to have fought in organized battles. In any event, it is difficult to understand how a particular type of warfare, by itself, could form the basis for a decision to grant or deny a political offense exception.

The court's analysis is also questionable when it distinguishes offenses aimed at the political structure of a government and offenses aimed at the social structure that established that government.[31] In a footnote, the court acknowledges "that it may not be 'textbook' political science and sociology to distinguish between disagreement with a government and with the society that establishes it."[32] Unfortunately, the court fails to resolve this dilemma, and merely concludes that "we are concerned here only with a violent act focused at the *social* structure."[33]

By using this questionable distinction as the major basis for its decision, *Eains v. Wilkes* gives rise to speculation concerning the real basis for its holding. That basis may very well lie in the often brutal history of the PLO and the court's refusal to legitimize in any way such semingly senseless acts. In a rather emotional passage, the court reveals its feelings on this issue, stating that if a mere presentation of evidence that the PLO seeks the destruction of the Israeli political structure and directs its destructive efforts at a defined civilian populace was

> all that was necessary in order to prevent extradition under the politi-

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28. *Id.* at 513.

29. Lubet & Czaczkes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & CRIMINOLOGY, 193, 200 (1980), *quoted in* 641 F.2d at 513.

30. *Id.* at 519.

31. *Id.* at 520-21.

32. *Id.* at 521 n.20.

33. *Id.*

> cal offense exception nothing would prevent an influx of terrorists seeking a safe haven in America. Those terrorists who flee to this country would avoid having to answer to anyone anywhere for their crimes. The law is not so utterly absurd. . . . We do not need them in our society. We have enough of our own domestic criminal violence with which to contend without importing and harboring with open arms the worst that other countries have to export.[34]

While the court may have correctly upheld Eain's extradition in this case, the strong emotions which pervade the opinion may also have spawned an analysis which would deny the political offense exception to worthy individuals. Rather than the court's analysis, which emphasizes the type of warfare and the aim of the particular offense, a more flexible test is required if political offense exceptions are to have any real meaning. Undoubtedly, future cases will arise where the Seventh Circuit's test will have to be modified or abandoned if justice is to prevail. While the United States should never become a safe haven for foreign terrorists and criminals, neither should it slam the door on those individuals who, for legitimate reasons, seek refuge from political oppression.

Bernie M. Tuggle

34. *Id.* at 520.