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The Political Offense Exception And Terrorism

ABRAHAM D. SOFAER*

In the aftermath of the Achille Lauro hijacking the United States sought to utilize its bilateral extradition treaties with Italy and Yugoslavia to obtain the provisional arrest of the hijacker's commander, the Palestinian terrorist Mohammed Abbas. These efforts were to no avail, and the American people were rightly disappointed by this failure of the international extradition process.

Most Americans would be shocked to learn that, in several instances, our own nation has refused to extradite terrorist fugitives to our democratic allies. In the last few years, the United Kingdom has requested the extradition of fugitives accused of crimes ranging from murder to bombing, but federal courts have denied the requests on the ground that these terrorists had committed "political" offenses that were exempt from extradition.

Decisions such as these have led the U.S. Government to initiate negotiations with several of our extradition treaty partners. The first product of those negotiations, a revision of our treaty with the United Kingdom, was recently approved by the Senate Foreign Relations Committee. This Supplementary Treaty is a necessary modification of our extradition practice, and is an important step in the legal battle against terrorism.

The Supplementary Treaty amends the extradition treaty between the United States and the United Kingdom.¹ It explicitly identifies particular crimes — such as airplane hijacking and murder of diplomats — that should no longer be regarded as "political offenses." The Supplementary Treaty recognizes that no criminal who commits these specified acts of violence and destruction should be immune from extradition merely because he was acting to advance a political objective.

The political offense exception is a long standing doctrine with noble intentions. The concept has been incorporated into many United States extradition treaties.² But the overbroad application of any concept — however enlightened— can lead to foolish and anti-social results. The po-

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

2. See, e.g., Treaty for the Mutual Extradition of Fugitives from Justice, Oct. 26, 1901, United States-Belgium, 32 Stat. 1894, T.S. No. 409; Treaty of Extradition, May 6, 1931, United States-Greece, 47 Stat. 2185, T.S. No. 855; Treaty on Extradition, Mar. 3, 1978, United States-Japan, 31 U.S.T. 892, T.I.A.S. No. 9625.

litical offense exception to extradition is unfortunately no exception to this fundamental rule.

I. ORIGIN AND EVOLUTION OF THE POLITICAL OFFENSE EXCEPTION

The political offense exception is, above all, an exception. The basic tradition of international law applicable with respect to fugitives from justice is one of cooperation between nations to enhance their capacity to maintain the lawful order and security upon which all liberty ultimately depends. The oldest known document in diplomatic history — a peace treaty between Ramses II of Egypt and the Hittite prince Hittusili III, concluded in 1290 B. C. — provided for the exchange of criminals of one nation found in the territory of the other.³ This principle of cooperation in extraditing fugitives has survived to modern times.

The great 18th century revolutions were based, in part, upon the notion that individuals have the right to engage in revolutionary political activity in pursuit of liberty. Those were times when today's democracies were ruled by kings and emperors, when universal suffrage did not exist, and when the mere open, verbal criticism of a ruler was frequently regarded as sedition or treason. In the wake of those revolutions, the emerging democracies of Western Europe did not want to surrender to foreign sovereigns' revolutionaries who had committed offenses in the course of exercising their political rights. The Jacobean Constitution of 1793, reflecting this revolutionary spirit, declared that the French people "grant asylum to foreigners banished from their countries *for the cause of freedom*."⁴ The same sentiment gave rise to the seminal provision in the Belgian extradition law of 1833, which provided that a fugitive "shall not be prosecuted or punished for any political offense. . . , nor for any act connected to such crime".⁵

From its inception, the political offense exception has been applied without significant controversy to "pure" political offenses, which are those directly related to the security of the state: sedition, treason and the like. Governments and courts have had little trouble excepting these offenses from extradition. By contrast, application of the exception to "relative" political offenses has always been problematic. Relative political offenses are common, often violent crimes — such as murder and arson — whose perpetrators nevertheless claim immunity from extradition because their criminal acts were allegedly committed in the course of a rebellion or for a political purpose.

Historically, claims of immunity from extradition based on "relative"

3. See Langdon & Gardiner, *The Treaty of Alliance Between Hittusili King of the Hittites and the Pharaoh Ramses II of Egypt*, 6 J. EGYPTIAN ARCHAEOLOGY 179 (1920).

4. French Const. of 1793, art. 120, reprinted in 6 L. DUGUIT, H. MONNIER & R. BONNARD, *LES CONSTITUTIONS ET LES PRINCIPALES LOIS POLITIQUES DE LA FRANCE DEPUIS 1789* (6th ed. 1952)(emphasis added).

5. CODES BELGES, 1927 at 1113, 8 BULL. OFF. 1195. See generally Deere, *Political Offenses in the Law and Practice of Extradition*, 27 AM. J. INT'L L. 247, 250-53 (1933).

political offenses have posed difficulties for civilized nations. For example, in 1855, a Belgian court invoked the political offense exception to deny a French request for extradition for a fugitive who had placed a bomb under the railway line over which Emperor Napoleon III was traveling.⁶ This decision led the Belgian legislature — the country in which the exception was first codified — to amend the 1833 extradition law to refuse to recognize as political offenses certain common crimes used by terrorists for political ends. The statute provided:

An attempt (attentat) against the person of the head of a foreign government or against the members of his family, when this attempt constitutes that act of murder, assassination or poisoning, shall not be considered as a political offense or an act in connection with a political offense.⁷

This provision, known as an “attentat clause”, gained widespread acceptance as a limitation on the political offense exception.

Courts have continued to grapple with the political offense exception through the years. For example, in 1891, Britain’s Queen’s Bench divisional court considered a Swiss extradition request for one Castioni, a fugitive who had shot and killed a State Council member in the course of an armed attack upon a municipal building. In a landmark decision, the justices held that a criminal act was not protected under the political offense exception if committed merely “in the course of” a political conflict or uprising; it must also be done “in furtherance of” a political cause. The court found that Castioni had acted as a participant in an insurrection, that the shooting had, in fact, not been an act of personal malice against the victim. The justices therefore ruled that the offense was political and denied extradition.⁸ American courts that have recently refused extradition have relied heavily on the ruling in *Castioni*.⁹

Three years after *Castioni*, however, the British courts refined the doctrine. The French Government requested extradition of one Meunier, who had bombed a crowded cafe and an army barracks. Meunier fought extradition by invoking the political offense exception. Justice Cave held that, for an offense to be judged political, “there must be two or more parties in the State, each seeking to impose the Government of their choice on the other.” Meunier, the court found, was an anarchist who was the enemy of all organized society. Accordingly, he was not subject to the exception and was ordered extradited.¹⁰

While *Castioni*, narrowly construed, may have made sense when it

6. Judgment of Feb. 17, 1855, Cour d’appel, Brussels, 1 Pasirisie Belge 115.

7. Deere, *supra* note 5, at 252.

8. *In re Castioni*, [1891] 1 Q.B. 149.

9. See, e.g., *In re McMullen*, Mag. No. 3-78-1099 M.G. (N.D. Cal. May 11, 1979); see also Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 COLUM. J. TRANSNAT’L L. 381, 401 (1979) (criticizing the Magistrate in McMullen because he “mechanically applied” *Castioni*).

10. *In re Meunier*, [1894] 2 Q.B. 415.

was decided, it makes no sense today to deny extradition to a nation such as Switzerland — with a democratic political system and a fair system of justice — in such a case involving a man who attempts to impose his will on the people through murder. If civilized society is to defend itself against terrorist violence, some offenses committed in or against stable democracies must fall outside the scope of the exception, even though they are politically motivated. The *Meunier* decision represents an early recognition that legal principles such as the political offense exception are based on the determination of sovereign nations to refuse, for humane or ideological reasons, to cooperate with other nations in the enforcement of criminal statutes. These principles do not create “rights” in the individuals who assert them. Each nation must decide how far to extend the doctrine based on its own values, and many have refused to shield from justice individuals who would destroy the freedoms and lives of others to gain political advantage.¹¹

II. ABUSE OF THE POLITICAL OFFENSE EXCEPTION

A few examples should illustrate how some courts have extended the doctrine too far, and how harmful and unacceptable the results can be. In 1972, two American citizens, Holder and Kerkow, hijacked a domestic U.S. flight, extorted \$500,000 from the airline that owned the plane, and forced the pilot to fly to Algeria. They were indicted in the United States for aircraft piracy, kidnapping, and extortion. The United States requested their extradition to stand trial. Although the crimes were extraditable offenses under the U.S.-France Extradition Treaty,¹² a French court denied extradition in 1975. The court noted that, at one point in the skyjacking, Holder had demanded that the plane be flown to Hanoi. (He later dropped that demand.) The court held that Holder's invocation of Hanoi as his destination demonstrated that he had acted out of political motive, thus bringing the crimes within the scope of the political offense exception.¹³

Another egregious example of overbroad application of the exception resulted from the 1973 hijacking by five U.S. citizens of a domestic flight. They demanded and received \$1 million in ransom for the passengers' release and then forced the plane to fly to Algeria. Two of the fugitives had escaped from prison, where they had been serving sentences for murder and armed robbery. The five fugitives later made their way to France

11. For example, over twenty European nations, including the Republic of Ireland, are parties to a convention that, inter alia, modifies the political offense exception. See European Convention on the Suppression of Terrorism, signed Jan. 27, 1977, entered into force Aug. 4, 1978, Europ. T.S. No. 90, reprinted in 15 I.L.M. 1272 (1976).

12. See Extradition Convention, Jan. 6, 1909, United States-France, 37 Stat. 1526, T.S. No. 561; Supplementary Extradition Convention, Feb. 12, 1970, United States-France, 22 U.S.T. 407, T.I.A.S. No. 7075.

13. See E. McDowell, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 168 (1975).

and the United States sought their extradition. A French court, however, refused to extradite. The court accepted the fugitives' claims that they had hijacked the plane to escape racial segregation in the United States and that the charges against them constituted political persecution. The court therefore implicitly held that the skyjacking and extortion were political offenses.¹⁴

Several court decisions in the United States have applied the political offense exception as expansively and unreasonably as it has been applied against the U.S. by other nations. For example, in *Karadzole v. Artukovic*,¹⁵ the Ninth Circuit considered Yugoslavia's extradition request for one Andrija Artukovic. Artukovic was charged with sending thousands of civilians to Nazi death camps while he was Minister of the Interior of the wartime puppet government of Croatia. The Ninth Circuit affirmed the district court's finding that Artukovic should not be extradited. Both courts held that his crimes were "political". Several recent decisions are similarly shocking. They all concern Provisional Irish Republican Army (PIRA) fugitives,¹⁶ but the U.S. Government's objections to them are based on principle, not on an opposition to any particular movement.

One example concerns William Quinn. He was accused of a variety of crimes, including the placing of bombs in public places (such as a railway station, a pub, and a restaurant) and the mailing of letter bombs to a Roman Catholic Bishop, a judge, and a London newspaper. These bombs caused significant damage. One letter bomb exploded in a judge's face and a guard who opened another letter bomb lost his left hand. Quinn was eventually stopped by a policeman in London for questioning about a burglary. He fled, and another policeman tried to arrest him. Quinn shot the policeman three times, killing him.

Quinn escaped to the United States, where he was arrested in San Francisco and his extradition was sought by the United Kingdom. The evidence of his guilt was overwhelming — his fingerprints were on the bombs, and the gun that killed the policeman was in his apartment. Nevertheless, in 1983 a federal district court barred Quinn's extradition, ruling that a "political uprising" existed in the United Kingdom and that Quinn's acts of murder and bombing were "incidental" to that uprising.¹⁷ The Ninth Circuit recently vacated this decision and held Quinn extraditable.¹⁸ But the grounds for the Circuit Court decision are remarkable.

14. See E. McDowell, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 124-25 (1976).

15. 247 F.2d 198 (9th Cir. 1957), *vacated and remanded on other grounds*, 355 U.S. 393 (1958). Artukovic was later deported to Yugoslavia to stand trial.

16. In re Doherty, 599 F. Supp. 270, 276 (S.D.N.Y. 1984); In re Mackin, Mag. No. 86 Cr. Misl. (S.D.N.Y. Aug. 13, 1981), *appeal denied*, 668 F.2d 122 (2d Cir. 1981); In re McMullen, Mag. No. 3-78-1099 M.G. (N.D. Cal. May 11, 1979); Quinn v. Robinson, No. CV-82-6688 RPA (N.D. Cal. Oct. 3, 1983), *vacated and remanded*, 783 F.2d 776 (9th Cir. 1986).

17. Quinn v. Robinson, No. CV-82-6688 RPA (N.D. Cal. Oct. 3, 1983), *vacated and remanded*, 783 F.2d 776 (9th Cir. 1986).

18. 783 F.2d at 817.

The court merely held that the District Court had incorrectly assessed the scope of the "political uprising", and that it existed only in Northern Ireland.¹⁹ Quinn's crimes took place in London, hence they could not be deemed political offenses.²⁰ Thus, Quinn merely chose the wrong location for his acts. Under the *Quinn* decision, he, and other PIRA terrorists, would be free to murder and bomb without losing the potential benefits of the political offense exception, as long as they did so in Northern Ireland.

Another example involved Joseph Patrick Doherty, who blasted his way out of a prison in Belfast and fled to the United States while awaiting a court's decision on charges of murder, attempted murder, and possession of firearms with intent to endanger life. Doherty was convicted two days after his escape and the United Kingdom sought his extradition based upon his conviction and on new charges relating to his escape. Based on his review of Irish history and politics, a U.S. district judge concluded that a political conflict existed in Northern Ireland and that Doherty's offenses had been committed "in the furtherance of that struggle." The judge recognized that: "it would be most unwise as a matter of policy to extend the benefit of the political offense exception to every fanatic group or individual with loosely defined political objectives who commit acts of violence in the name of those so-called political objectives."²¹ The judge, nevertheless, drew an exception for the PIRA. After an analysis of its nature, structure, and the mode of its internal discipline, the court concluded that PIRA has "both an organization, discipline, and command structure that distinguishes it from more amorphous groups such as the Black Liberation Army or the Red Brigade."²² The judge declared that Doherty's offenses were political and denied extradition.²³

What the PIRA and other less structured terrorist groups have in common is far more significant in applying the political offense exception than the ways in which they may differ. All of these groups exhibit a willingness to engage in violence to achieve political ends. Furthermore, many radical groups in the U.S. and Europe, as well as their attorneys, would challenge the conclusion that they lack the necessary structure or would otherwise fail to constitute a rebellious force. Some have thousands of "fighters", such as the PLO, or supporters, such as the radical religious groups on the West Bank who have killed and maimed several Arabs. Others may be smaller, but they are nevertheless organized and have concrete political objectives which they seek to achieve by force.

This has led to an intolerable situation. We must not allow our country to become a haven for criminals who belong to groups that use vio-

19. *Id.* at 81.

20. *Id.* at 81-82.

21. *In re Doherty*, 599 F. Supp. 270, 276 (S.D.N.Y. 1984).

22. *Id.*

23. *Id.* at 277.

lence for political ends against the citizens of other countries — just as we expect that foreign governments should not harbor terrorists who commit violence against U.S. citizens.

III. REFORMING THE POLITICAL EXCEPTION

Some commentators assert that reform of the doctrine is not necessary, and maintain that courts already possess adequate doctrinal tools to prevent terrorists from using the political offense exception as a shield from justice. They claim, even in the face of decisions like *Doherty* that the United States does not extend the political offense doctrine to fugitives who commit “wanton crimes”. This so-called wanton crimes exception originated in *Eain v. Wilkes*.²⁴ In *Eain*, the Court held that political offenses were acts that disrupt the political structure of a State, and not the social structure that established the government.” [Thus] the indiscriminate bombing of a civilian populace is not recognized 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.²⁵

While the *Eain* decision is certainly a welcome recognition of the inappropriateness of violence as a political tool in a democracy, any claim that, after *Eain*, the United States does not extend the political offense exception to fugitives who commit “wanton crimes” is misleading and exaggerated for several reasons. First, unfortunately, this decision has not been followed by other jurisdictions.²⁶ Second, *Eain* did not hold that attacks on civilians could never fall within the scope of the political offense exception and did not rule on whether attacks on individual military or other government personnel, such as policemen, constituted acts that “disrupt the political structure of a state” and thus were political, or if they were acts that “disrupt the social structure”, and thus not political. Instead, the *Eain* court held that under the facts of the case, there were no direct links between the perpetrator, a political organization’s goals, and the specific act.

Seen in this light, *Eain* does not support assertions that the United States does not extend the political offense exception to those committing wanton crimes. The limited reach of *Eain* is yet another demonstration of the necessity for reform of the political offense doctrine.

Reform of the exception can occur in either of two ways: across-the-board reform through amendment of our extradition statute, or treaty-

24. 641 F.2d 504 (7th Cir. 1981).

25. *Id.* at 521; see also RESTATEMENT OF THE LAW, FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 477 (Tent. Draft No. 6, 1984), Reporters’ Note 6 (characterizing *Eain* as holding “that random acts of terror are not political offenses”).

26. See RESTATEMENT OF THE LAW, FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 (Tent. Draft No. 6, 1984), Reporters’ Note 6 (noting that, as of 1984, *Eain* had not been uniformly accepted); see also *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986) (criticizing *Eain*).

by-treaty revision, by amending our extradition treaties with certain countries. Unsuccessful attempts have been made to amend our extradition statute. Such efforts cannot be exclusive. A legislative approach would be uniform, applicable to our extradition relations with every country. Uniformity, however, is no advantage in this situation. We currently have extradition treaties in effect with almost one hundred other nations. These nations include stable democracies and countries that have suffered instability or have undemocratic regimes.²⁷

While it is important to maintain extradition relations with as many countries as possible, we need not treat every regime identically. Some of these nations do not permit opponents of the government in power any lawful means of political dissent. With respect to such countries, the political offense exception has a greater role to play than with respect to the stable democracies, where it has unfortunately become a shield behind which terrorists can hide.

This fundamental difficulty with modifying the exception through amendment of our extradition statute has led us to pursue a more narrow, carefully-drawn approach. Instead of across-the-board modification, we have decided to seek treaty-by-treaty revision. This allows us to tailor the political offense exception's reach to account for the nature of the country with which we are dealing. The Supplementary Treaty with the United Kingdom is the first completed step in this process. The United Kingdom meets the criteria we have established: its political system is amenable to redress legitimate grievances and the judicial system provides fair treatment. Obviously other nations offer a similar degree of freedom for peaceful political dissent. We are seeking to negotiate limitations of the political offense exception with such countries. Moreover, the Supplementary Treaty makes the political offense exception unavailable only for certain listed offenses, such as murder, manslaughter, kidnapping, and hijacking, which are not permissible means to express political dissent in a democratic regime that offers nonviolent alternatives.

CONCLUSION

The Supplementary Extradition Treaty with the United Kingdom and other modifications of the political offense exception, are important steps in applying the rule of law to terrorism. Certainly further steps will be necessary, but we cannot continue to permit our courts to endorse the use of violence to accomplish political goals. In stable democracies like the United States and the United Kingdom, there is another way. The

27. See, e.g., Treaty Relating to the Reciprocal Extradition of Criminals, Dec. 18, 1947, United States-South Africa, 2 U.S.T. 884, T.I.A.S. No. 2243; Extradition Treaty and Accompanying Protocol, Nov. 22, 1927, United States-Poland, 46 Stat. 2282, T.S. No.789; Extradition Treaty, July 23, 1924, United States-Romania, 44 Stat. 2020, T.S. No.713; Convention Relating to Extradition, Dec. 10, 1962, United States-Israel, 14 U.S.T. 1707, T.I.A.S. No. 5476; Treaty on Extradition, May 24, 1973, United States-Paraguay, 25 U.S.T. 967, T.I.A.S. No.7838.

Supplementary Extradition Treaty, through its modification of the political offense exception, will eliminate the availability of the United States as a haven for those unwilling to use peaceful means. It is also an essential step to enable us credibly to urge other nations to extradite terrorists to this country. Thus, revision of the political offense exception and ratification of the Supplementary Treaty is a moral imperative. Without it, we contribute to the increase in terrorism by providing shelter to its practitioners, and provide a morally deficient example to the other nations of the world. We must stop letting terrorists get away with murder.

