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The degree to which States parties comply with an extradition treaty influences relations between those countries, particularly when political offenses are involved.[1] As a result of recent domestic developments, both legal and political, in the United States and Israel, each State's application of the 1962 U.S.-Israel Extradition Treaty[2] is creating uncertainty as to the Treaty's scope. In applying the Treaty's political offense exception, the United States Courts of Appeals have failed to reach a consensus on how to distinguish terrorist acts from political offenses. Despite this lack of consistent application, the United States has exhibited a willingness to extradite individuals in accordance with the Treaty. Israel's ability to meet the terms of the Treaty, on the other hand, is impaired by domestic legislation prohibiting the extradition of its nationals.[3] For instance, Federal Bureau of Investigation officials await the result of their request to Israel for the arrest of Robert Manning, a suspect in a string of pipe bomb murders who has dual United States and Israeli citizenship.[4] Israel's refusal to extradite individuals suspected of crimes in the United States, such as Manning, would undermine the purpose of the Treaty as well as the relationship formed between Israel and the United States as a result of the treaty.[5]

Part I of this note will examine the different approaches taken by the Second, Seventh and Ninth Circuits in their application of the

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1. Grooms and Samson, *International Law — The Political Offense Exception to Extradition: A 19th Century British Standard in 20th Century American Courts*, 59 NOTRE DAME L. REV. 1005, 1007 (1984).

2. Convention on Extradition, Dec. 10, 1962, United States-Israel, 14 U.S.T. 1707, T.I.A.S. No. 5476 [hereinafter 1962 U.S.-Israel Extradition Treaty].

3. Offences Committed Abroad (Amendment of Enactments) Law, § 2, 32 LAWS OF THE STATE OF ISRAEL 63, 64 (1978) (amending Extradition Law of Aug. 23, 1954, *infra* note 97).

4. In October 1988, an arrest warrant, the first step in extradition, was issued for Manning. Spano, *Israel Unlikely to Arrest Killing Suspect*, L.A. Times, Oct. 22, 1988, § 2 (Metro), at 10, col. 4. *See also* Tipping, *Charges Dropped in Mail Bombing*, U.P.I. Jan. 27, 1989 (NEXIS, Domestic News).

5. Grooms & Samson, *supra* note 1, at 1007.

Treaty's political offense exception. Part II will discuss the conflict that may arise from Israel's application of a domestic law which contravenes the purpose of the Treaty. Part III will address both the need for the United States and Israel to reconcile problems in applying the political offense exception through renegotiation and the dilemma arising from the failure of the Israeli government and the Knesset to coordinate policy with regard to the extradition of nationals.

I. POLITICAL OFFENSE EXCEPTION: DIVERGENT APPLICATIONS BY U.S. COURTS

Extradition is one State's surrender of persons accused or convicted of crimes to another State so that the requesting State may try or punish those persons under its own laws.[6] Extradition has three main purposes: to bring criminals to justice, to promote good bilateral relations between treaty parties and to prevent a State from becoming a haven for dangerous persons.[7] Absent a treaty, principles of international law neither require a State to extradite nor prevent a State from voluntarily doing so.[8] Treaties create an obligation by specifying the situations under which the parties are required to extradite individuals.

In defining extraditable crimes, multilateral and some bilateral treaties require "double criminality," the principle that the act be illegal in both the State requesting the extradition and the State receiving the request.[9] Most bilateral treaties contain a list of specific crimes for which a person may be extradited.[10] The 1962 U.S.-Israel Extradition Treaty lists extraditable crimes in article II.[11]

Most extradition treaties include a political offense exception.[12] The exception protects the right of people to rebel against an oppressive government.[13] It also may protect the person sought against un-

6. M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 107 (6th ed. 1987); L. HENKIN, R. PUGH, O. SCHACTER & H. SMIT, INTERNATIONAL LAW AND CASE MATERIALS 885 (2d ed. 1987) [hereinafter INTERNATIONAL LAW].

7. Note, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U. L. REV. 654, 658 n.18 (1986) [hereinafter *Political Offense Exception*] (citing *Draft Convention on Extradition*, 29 AM. J. INT'L L. 22, 112-13 (Supp. 1935) (article 5 and commentary thereto)).

8. INTERNATIONAL LAW, *supra*, note 6, at 885-86 (quoting Factor v. Laubenheimer, 290 U.S. 276, 287 (1933)).

9. INTERNATIONAL LAW, *supra* note 6, at 886.

10. *Id.*

11. 1962 U.S.-Israel Extradition Treaty, *supra* note 2, at art. II.

12. Note, In Re Extradition of Atta: *Tension Between the Political Offense Exception and U.S. Counterterrorism Policy*, 1 PACE Y.B. INT'L L. 163, 167 (1989) [hereinafter *Atta Extradition*].

13. *Political Offense Exception*, *supra* note 7, at 661.

fair treatment by the requesting country and prevent the requested country from becoming embroiled in another State's domestic conflict.[14] Article VI(4) of the 1962 U.S.-Israel Extradition Treaty provides exception to extradition when

> [t]he 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 aimed with a view to trying or punishing him for an offense of a political character.[15]

Like most extradition treaties,[16] the 1962 U.S.-Israel Extradition Treaty does not define a political offense. Because there is a lack of international consensus as to what constitutes a political offense and because the United States has never defined the term by legislation or treaty,[17] United States courts have traditionally assumed the role of interpreting the phrase with the hope of setting forth a politically neutral interpretation based on the facts of each case.[18]

Typically, the United States government has insisted that the determination of what constitutes a political offense be left to the Executive Branch. U.S. courts have consistently held, however, that this determination comports with the duty of the courts to interpret a treaty in accordance with its text as well as 18 U.S.C.A. § 3184.[19] Courts have reasoned that application of the political offense exception involves the kind of factual determinations routine to the process of judicial interpretation and does not touch upon any foreign policy ele-

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14. *Id.*

15. 1962 U.S.-Israel Extradition Treaty, *supra* note 2, at art. VI.

16. *Atta Extradition*, *supra* note 12, at 166.

17. *Political Offense Exception*, *supra* note 7, at 655-56.

18. *Atta Extradition*, *supra* note 12, at 166-67.

19. Quinn v. Robinson, 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986); Eain v. Wilkes, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981). 18 U.S.C.A. § 3184 (West 1990) reads:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

ments that are beyond judicial competence.[20]

Leaving the determination of the scope of the political offense exception to the Executive Branch is problematic from a practical standpoint, given its interest in the extradition process. The United States State Department's role in the extradition process is primarily one of prosecutor.[21] It helps the requesting State to formulate its request to win the approval of a United States court[22] and works closely with the Department of Justice which controls the extradition litigation.[23] To prevent those whose extradition is sought from becoming political pawns, courts typically do not defer to the Executive Branch's judgment regarding any specific extradition request.[24] However, the general policy of the Executive Branch does influence courts in extradition matters. Although the Ninth Circuit has set forth a policy of neutrality in applying the political offense exception, other courts have attempted to incorporate the State Department's stance against terrorism in limiting application of the political offense exception.[25]

A. *Relative Political Offenses and the Incidence Test*

Political offenses are classified as either pure political offenses or relative political offenses.[26] Pure political offenses are crimes committed against the the state[27] and include treason, espionage and sedition.[28] They differ from common crimes,[29] such as those listed in article II of the 1962 U.S.-Israel Extradition Treaty, and are not extraditable.[30] Relative political offenses are common crimes which would be extraditable were it not for the fact that they were committed in

20. *Quinn*, 783 F.2d at 787-90; *Eain*, 641 F.2d at 513-17.

21. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1488 (1988).

22. Article IX of the 1962 U.S.-Israel Extradition Treaty provides:

> The determination that extradition based upon the request therefor should or should not be granted shall be made in accordance with the domestic law of the requested Party and the person whose extradition is sought shall have the right to use such remedies and recourses as are provided by such law.

1962 U.S.-Israel Extradition Treaty, *supra* note 2, at art. IX.

23. Kester, *supra* note 21, at 1488.

24. *Id.* at 1484-89.

25. Eain v. Wilkes, 641 F.2d 504, 515 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981); Ahmad v. Wigen, 726 F.Supp. 389 (E.D.N.Y. 1989).

26. Karadzole v. Artukovic, 247 F.2d 198, 202-03 (9th Cir. 1957), *vacated*, 355 U.S. 393 (1958).

27. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962).

28. *Id.* at 1234. *See also* Garcia-Mora, *Treason, Sedition and Espionage as Political Offenses Under the Law of Extradition*, 26 U. PITT. L. REV. 65 (1964).

29. Littenburg, *The Political Offense Exception: An Historical Analysis and Model for the Future*, 64 TUL. L. REV. 1196, 1198 (1990).

30. *Id.* Article II of the Treaty reads as follows:

furtherance of a political objective.[31] Definitional problems arise with this latter classification. Because the limits to the political offense exception have not been defined, it has been difficult for the courts to distinguish a common crime from a political offense and a political

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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.
2. Manslaughter.
3. Malicious wounding; inflicting grievous bodily harm.
4. Rape.
5. Abortion.
6. Unlawful carnal knowledge of a girl under the age specified by the laws of both the requesting and requested Parties.
7. Procuration.
8. Willful non-support or willful abandonment of a minor or other dependent person when the life of that minor or that dependent person is or is likely to be injured or endangered.
9. Kidnapping; abduction; false imprisonment.
10. Robbery.
11. Burglary; housebreaking.
12. Larceny.
13. Embezzlement.
14. Obtaining money, valuable securities or goods by false pretenses or by threats or force.
15. Bribery.
16. Extortion.
17. Receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained.
18. Fraud by a bailee, banker, agent, factor, trustee, executor, administrator or by a director or office of any company.
19. Forgery, including forgery of banknotes, or uttering what is forged.
20. The forgery or false making of official documents or public records of the government or public authority or the uttering or fraudulent use of the same.
21. The making or the utterance, circulation or fraudulent use of counterfeit money or counterfeit seals, stamps, dies and marks of the government or public authority.
22. Knowingly and without lawful authority making or having in possession any instrument, tool, or machine adapted and intended for the counterfeiting of money, whether coin or paper.
23. Perjury; subornation of perjury.
24. Arson.
25. Any malicious act done with intent to endanger the safety of any persons travelling upon a railway.
26. Piracy, by the law of nations; mutiny on board a vessel for the purpose of rebelling against the authority of the Captain or Commander of such vessel; by fraud or violence taking possession of such vessel.
27. Malicious injury to property.
28. Smuggling.
29. False swearing.
30. Offenses against the bankruptcy laws.
31. Offenses against the law relating to dangerous drugs.

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

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

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

31. *Id.*

offense from a terrorist act with any consistency.[32]

Traditionally, the "incidence test," first introduced in *In re Castioni*,[33] has served as a guideline for determining relative political offenses.[34] The incidence test is comprised of two prongs: first, there must be a political uprising or disturbance existing at the time of the alleged crime; second, the act committed must be incidental to or in furtherance of a political objective.[35] United States courts have added requirements to the classic formulation of the incidence test. For example, the court in *Quinn v. Robinson* set out a geographical requirement that the act in question be committed in the territory where the uprising is occurring, not merely in the general area, in order for the exception to be applicable.[36] District Judge Sprizzo added a balancing component in *In re Doherty*, listing for consideration the following factors: "the nature of the act, the context in which it is committed, the status of the party committing the act, the nature of the organization on whose behalf it is committed, and the particularized circumstances in the location where the act takes place."[37]

Decisions from the Second, Seventh and Ninth Circuits illustrate the varied approaches taken in applying the incidence test. The Seventh Circuit approach attempts to eliminate terrorist acts from the political offense exception by articulating a subjective test to determine the legitimacy of the political goal and the means used to achieve it. The Ninth Circuit supports a position of neutrality when it comes to examining the means used to further political objectives. On August 10, 1990, the Second Circuit upheld U.S. District Judge Weinstein's decision to extradite a United States citizen to stand trial in Israel for a 1986 bus bombing on the West Bank.[38] Judge Weinstein of the Eastern District of New York introduced the use of the Law of Armed Conflict to distinguish a political offense from a terrorist act.[39]

1. Eain v. Wilkes — *Seventh Circuit Test*

The Seventh Circuit criticized literal application of the traditional incidence test for being both underinclusive and overinclusive. The

32. *Political Offense Exception*, *supra* note 7, at 656.

33. [1891] 1 Q.B. 149.

34. Quinn v. Robinson, 783 F.2d 776, 795 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

35. *Id.*

36. *Id.* at 808.

37. In re Doherty, 599 F.Supp. 270, 275 (S.D.N.Y. 1984). These considerations are similar to those suggested in Part IIIA. of this note. Unfortunately, Judge Sprizzo gave little justification for focusing on the fourth consideration at the expense of the others.

38. Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990).

39. Ahmad v. Wigen, 726 F.Supp. 389 (E.D.N.Y. 1989).

test is underinclusive because it will not apply to political crimes occurring outside the period of the political disturbance and thus fails to protect some acts which are nevertheless committed to further a political objective. It is overinclusive because it affords protection to a broad range of acts in furtherance of a political objective, including most terrorist acts.[40] The Seventh Circuit limited the incidence test by inquiring whether the political objective and the means used to further it were legitimate. In *Eain*, the State of Israel requested the extradition of Abu Eain, a West Bank resident and Palestine Liberation Organization ("PLO") member, for a 1979 bombing which killed two and injured more than thirty in the Israeli city of Tiberias.[41]

In affirming the order of extradition by the district court, the *Eain* court examined the legitimacy of both the method and motivation behind the act and made three determinations. First, in assessing the legitimacy of the tactics used, the court distinguished between organized military conflict and single, violent acts committed by dispersed PLO forces.[42] Second, while admitting that assessment of the motive will not alone decide whether an act is a political offense, the court nevertheless made an assessment of motive and found that PLO activity in question was intended to uproot Israel's social structure, rather than its political structure.[43] Third, the court ruled that regardless of the political objective, the "indiscriminate bombing of a civilian population" did not qualify as a political offense.[44]

The *Eain* test, aimed at curbing the possibility of the United States becoming a safe haven for terrorists, has been criticized for encouraging courts to make the kind of foreign policy determinations usually made by the State Department.[45] The *Eain* court justified the limitations it imposed by pointing out that terrorist activity "does not conveniently fit the categories of conflict with which the courts and the international community have dealt in the past."[46] The same may also be said of contemporary domestic revolutionary tactics. While the incidence test as applied in *Quinn* may fail to recognize the growing

40. Eain v. Wilkes, 641 F.2d 504, 519 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981) (quoting Lubet & Czackzes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, J. CRIM. L. & CRIMINOLOGY 193, 203-04 (1980)).

41. *Eain*, 641 F.2d 504.

42. *Id.* at 519-20.

43. *Id.* at 520.

44. *Id.* at 520-21.

45. *See* Note, *Terrorist Extradition and the Political Offense Exception: An Administrative Solution*, 21 VA. J. INT'L L. 163, 177-78 (1980) [hereinafter *Terrorist Extradition*]; *Political Offense Exception*, *supra* note 7, at 668-70.

46. *Eain*, 641 F.2d at 520.

terrorist threat on the international level, by contrast, the *Eain* test's subjective standard threatens the policy behind the political offense exception by legitimizing some methods of revolt and rejecting others.[47]

2. Quinn v. Robinson — *9th Circuit Neutrality Approach*

In *Quinn v. Robinson*, a divided three-judge panel of the Ninth Circuit Court of Appeals asserted a policy of neutrality in its application of the incidence test, refusing to limit the test with inquiry into the methods used to further a political objective.[48] The court refused the United Kingdom's request for the extradition of a member of the Irish Republican Army ("IRA"), allegedly involved in a 1975 bombing,[49] under the United States-United Kingdom Extradition Treaty.[50] While Judge Reinhardt, writing for the court, recognized the legitimacy of efforts to exclude acts of terrorism from the exception, he refused to make a judgment on the tactics used to further the IRA's political goals, stating that "not all politically-motivated violence undertaken by dispersed forces and directed at civilians is international terrorism and not all such activity should be exempted from the protection afforded by the exception."[51]

The court specifically rejected the *Eain* court's inquiry[52] into the legitimacy of both the political goal asserted and the means used to achieve the goal. The *Quinn* court stated that a proper application of the incidence test would, in fact, exclude international acts of terrorism.[53] However, the *Quinn* approach has been accused of affording protection to most terrorist acts because of its neutral stance with regard to the methods used to pursue a political objective.[54] Judge Duniway, who wrote a concurring opinion in *Quinn*, preferred the *Eain* analysis because the *Quinn* majority test protects attacks on

47. Quinn v. Robinson, 783 F.2d 776 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

48. *Quinn*, 783 F.2d 776.

49. *Quinn*, 783 F.2d 776.

50. Extradition Treaty, Oct. 21, 1976, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468.

51. *Quinn*, 783 F.2d at 805. The court further elaborated:

> [I]t is not our place to impose our notions of civilized strife on people who are seeking to overthrow the regimes in control of their countries in contests and circumstances that we have not experienced, and with which we can identify only with the greatest difficulty. It is the fact that these insurgents are seeking to change their governments that makes the political offense exception applicable, not their reason for wishing to do so or the nature of the acts by which they hope to accomplish that goal.

783 F.2d at 804.

52. Eain v. Wilkes, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).

53. *Quinn*, 783 F.2d at 776.

54. *Political Offense Exception*, *supra* note 7, at 52.

civilians.[55]

3. Ahmad v. Wigen — *Judge Weinstein's Use of the Laws of Armed Conflicts*

U.S. District Court Judge Weinstein rejected the Ninth Circuit policy of neutrality. He asserted in *Ahmad v. Wigen*, a case brought in the Eastern District of New York, that the *Quinn* decision ignored the fact that a victim's status as a civilian has been a significant factor in the political offense equation since the Nineteenth Century.[56] The order in *Ahmad* was to extradite Mahmoud El-Abed Ahmad, a naturalized citizen of the United States also known as "Atta," to stand trial in Israel for a 1986 bus bombing in the West Bank.[57] The April 1986 attack by three men using Molotov cocktails and automatic weapons resulted in the death of the bus driver and injury to a passenger.[58] Atta was a suspected accomplice in the attack.[59]

Dissatisfied with the result reached by applying only the two-pronged incidence test, Weinstein acknowledged a need to limit the political offense exception to exclude acts inconsistent with international standards of conduct,[60] but also emphasized the need to prevent courts from expanding their power of inquiry.[61] Instead of adopting the Seventh Circuit's subjective test set out in *Eain*, Judge Weinstein chose to restrict the incidence test by distinguishing terrorist acts from political offenses. He declined to follow the application by another district court judge[62] of the military rules of engagement, which are the restrictions a government places on its own armed forces at a particular time and place.[63] Judge Weinstein instead distinguished a terrorist act from a political offense by application of the Law of Armed Conflict, "the body of international law governing all armed conflict and all nations,"[64] embodied in Protocol I to the Geneva Conventions.[65] The incidence test, as applied with this added restriction,

55. *Quinn*, 783 F.2d at 819.

56. Ahmad v. Wigen, 726 F.Supp. 389, 404 (E.D.N.Y. 1989).

57. *Id.*

58. Reuter Library Report (Aug. 14, 1990).

59. *Id.*

60. *Ahmad*, 726 F.Supp. at 401-05.

61. *Id.* at 405.

62. Judge Weinstein's ruling was based upon a petition for a writ of habeus corpus. On habeas corpus review, mixed determinations of fact and law, such as the political offense exception, are reviewed de novo. *Id.* at 397 (citing *Quinn*, 783 F.2d at 791).

63. In re Extradition of Atta, 706 F.Supp. 1032, 1042-43 (E.D.N.Y. 1989).

64. *Ahmad*, 726 F.Supp. at 405.

65. Protocol I to the Geneva Conventions, U.N. Doc. A/32/144 (1977), *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

would define crimes committed in violation of the laws of armed conflict as extraditable regardless of any political motivation.

The Second Circuit Court of Appeals upheld Judge Weinstein's extradition order on August 10, 1990.[66] The court rejected Atta's claim that the bombing was a political act covered by the "political offense" exception to the 1962 U.S.-Israel Extradition Treaty, deciding that an attack on a commercial bus carrying civilian passengers was not a political offense. It stated plainly: "Political motivation does not convert every crime into a political offense."[67] The court was silent as to whether it would specifically follow Judge Weinstein's limitation of the incidence test, saying only that the analyses of both Judge Weinstein and Judge Korman were persuasive and in line with the stance of the State Department.[68]

What is surprising about Judge Weinstein's selection of the Law of Armed Conflict to limit the incidence test is the extent to which such an application gives rise to the same kind of problems encountered with application of the rules of military engagement. Judge Korman's analysis was criticized for incorporating the rules into the political offense exception context because of their design for military conflict between nations, not civil strife between a government and its own people.[69] Any use of organized military procedure seems unusual in the context of a political offense exception, a primary goal of which is to recognize the right of people to rebel against a government.[70]

Judge Weinstein's use of the Laws of Armed Conflict embodied in Protocol I is also ironic in that neither the United States nor Israel has ratified the Protocol. Weinstein conceded that the United States had not ratified Protocol I because it did not agree with the Protocol's definition of "wars of determination."[71] He maintained, however, that Protocol I represented a "developing consensus on substantive and procedural due process" of which American courts were entitled to take account of in interpreting a treaty.[72] Although the Protocol applies to "armed conflicts in which peoples are fighting against colonial domination and alien occupation,"[73] the kind of organized military

66. Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990).

67. *Id.* at 1066.

68. *See id.* at 1063.

69. *Atta Extradition*, *supra* note 12, at 196-97.

70. *Political Offense Exception*, *supra* note 7, at 662.

71. Ahmad v. Wigen, 726 F.Supp. 389, 406 (E.D.N.Y. 1989).

72. *Id.*

73. Protocol I, *supra* note 65, at 1397 (art. 1(4)).

warfare to which the laws refer ignores the prevalence of certain civil rebellion tactics which have emerged in this century.

For example, the Protocol adopts a broad definition of "civilian."[74] Under the Protocol, a civilian is one who is not recognizable as belonging to the organized armed forces of a party to the conflict.[75] The definition of "civilian" includes members of militias and volunteer corps apart from the armed forces only if they have a "fixed distinctive sign recognizable at a distance," bear arms openly and "conduct operations according to the laws and customs of war."[76] Under the Laws of Armed Conflict, then, the only acceptable targets of revolutionary activity would be the organized forces of the target government. Such a standard is problematic in that it may be impossible in a number of situations for a people to successfully stage a rebellion if their only legitimate targets are the better equipped, better trained and better organized government forces.

A second difficulty is that the flexibility inherent in the Laws of Armed Conflict, as with the rules of engagement, prevents their use as a predictable standard for courts. The nature of the rules of engagement makes it impossible for the government to impose the same

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74. In Protocol I, article 50, "civilian" is defined as

> any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention [defined in Article 2 at page 1397 as Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949] and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

Protocol I, *supra* note 65, at 1413 (article 50(1)). Article 4(A) of the Third Convention reads as follows:

> A. Prisoners of war, in the sense of the present convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or authority not recognized by the Detaining power.
>
> * * *
>
> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 135, 138.

75. *Id.* at art. 4(A)(1).

76. *Id.* at art. 4(A)(2).

preplanned set of rules upon troops in every military conflict.[77] Although some general principles may apply in every situation, the details concerning acceptable modes of conduct will vary with the circumstances.[78] The Laws of Armed Conflict are similarly designed. The language of Protocol I, article 48, to which Judge Weinstein refers, sets out a straightforward rule against attacks on civilians:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objects and accordingly shall direct their operations only against military objectives.[79]

However, the flexibility of article 57(2), which lists the means of complying with article 48 through precautionary measures, suggests that article 48 is a general articulation of an interest in protecting civilians that will prevail only insofar as the chaotic nature of warfare permits. Article 57 describes an indiscriminate attack as one which causes *excessive* civilian fatalities in light of the political objective,[80] and it requires doing what is *feasible* under the circumstances to make sure that a target is not civilian.[81] The flexibility of article 57(2) recognizes that in some situations attacks which cause the death of civilians will be necessary to accomplish military objectives. Article 48 is thus substantially qualified by article 57. This suggests that there may be consensus as to the goal of protecting civilians, but not necessarily as to the extent to which such a goal is to be enforced. If article 48 is diluted with consideration of other factors in its original context, then one can hardly say that there exists a consensus to apply it as a predictable standard in the context of extradition.

B. *Assessment of Tests*

With respect to the *Eain* court's assessment of the political objective, it is important to note that the West Bank conflict has evolved into more than dispersed rock-throwing activity aimed against the social structure. The Intifadah, the uprising on the West Bank that began in December of 1987, has created a core of leadership within the Occupied Territories which has been organizing protest to Israeli occupation.[82] The protest has taken the form of strikes, with participa-

77. THE ARMY LAWYER, July 1988, at 20.

78. *Id.*

79. Protocol I, *supra* note 65, at 1412.

80. *Id.* at 1416 (article 57(2)(1)(a)(i-ii)).

81. *Id.* at 1416 (article 57(2)(a)(iii)).

82. *See* Abu 'Amr, *Notes on Palestinian Leadership*, MIDDLE EAST REP., Sept.-Oct. 1988, at 23.

tion numbering in the tens of thousands, boycotts of Israeli goods and demonstrations in major cities.[83] These leaders whom the Intifadah has pushed to the forefront are imprisoned, deported or are placed under house arrest or administrative detention.[84]

The *Quinn* test and the use of the Laws of Armed Conflicts have their own deficiences. Use of the Laws of Armed Conflict to limit the exception fails to acknowledge the political character of non-military crimes. The *Quinn* court supported inclusion of non-military offenses: "It is clear that various 'non-military' offenses, including acts as disparate as stealing food to sustain the combatants, killing to avoid disclosure of strategies, or killing simply to avoid capture, may be [political]."[85] Giving protection only to attacks on the military may, in ignoring the "realities of contemporary domestic revolutionary struggles," be thwarting the primary purpose of the political offense exception by placing serious impediments on the ability of peoples to rebel against oppressive regimes.[86] In acknowledging the existence of a wide range of legitimate non-military tactics of revolt, the *Quinn* test also protects terrorist acts.

The predicament of the circuit courts stems from competing interests. The courts must interpret treaty terms which are mired in political policy while respecting the Executive Branch's dominion over political questions. The courts are given little guidance in interpreting the 1962 U.S.-Israel Extradition Treaty's political offense exception. Efforts by Congress to amend the extradition process and clarify the meaning of political offense faded in the early 1980's.[87]

The Supreme Court could decide to settle any discrepancies in the differing approaches offered by the circuit courts, but such a decision seems unlikely before a renegotiation of the treaty takes place given that the last time the Supreme Court addressed the political offense exception issue was in 1896.[88] Moreover, a true solution would re-

83. Paul, *Israel and the Intifadah. Points of Stress*, MIDDLE EAST REP., Sept.-Oct. 1988, at 13.

84. Abu 'Amr, *supra* note 82, at 23.

85. Quinn v. Robinson, 783 F.2d 776, 810 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

86. *Id.*

87. S. 1940, 99th Cong., 1st Sess., 131 CONG. REC. S17, 607 (1985). *Reform of the Extradition Laws of the United States: Hearings on H.R. 2643 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 34 (1983). *Extradition Act of 1981: Hearings on H.R. 5227 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982); *Hearings on S. 1639 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981).

88. *See* Ornelas v. Ruiz, 161 U.S. 502 (1986). In *Ornelas* the Supreme Court held habeas corpus improper when there is sufficient evidence to establish criminality for extradition and the crime is not political. Kester, *supra* note 21, at 1476 n.197 (citing *Ornelas*, 161 U.S. at 509, 512.)

quire more than choosing one of the criticized tests offered by the circuit courts. The Court's task of forming a new test would be facilitated by new developments emerging from a renegotiation of the treaty, assuming such renegotiation takes into account the discrepancies arising from application of the exception.

II. Legal and Political Barriers to Extradition of Israeli Nationals

Despite the confusion among United States courts over application of the political offense exception, the United States has been making extradition decisions in accordance with the 1962 U.S.-Israel Extradition Treaty. Israel, however, has not been able to reciprocate. Domestic developments in Israel on legal and political fronts do not reflect Israel's original intent to abide by the Treaty when it comes to the extradition of its nationals. While the Second Circuit has ordered the extradition of Atta, United States prosecutors await the results of their request for the arrest of Robert Manning, a West Bank inhabitant with dual United States and Israeli citizenship who is sought for the 1980 bomb killing of Patricia Wilkerson.[89] An arrest warrant, the first stage of extradition, was issued in Israel for Robert Manning in 1988,[90] but the Israeli government failed to act on a request by United States prosecutors to arrest Manning.[91] Manning is also a suspect in a string of pipe bomb murders[92] thought to have been carried out by the Jewish Defense League in 1985.[93] One victim was Alex M. Odeh, the Western Regional Director of the American-Arab Anti-Discrimination Committee, in Santa Ana, California.[94]

The fear of becoming a haven for those who commit crimes abroad has influenced the United States in its negotiation of new extradition treaties.[95] The Israeli government shared this concern at the time of the 1962 U.S.-Israel Extradition Treaty negotiations. In spite of the fact that many extradition treaties and the domestic law of many

89. Suspected along with Manning are his wife Rochelle, and William Ross, a real estate broker. Charges were dropped against Ross and Rochelle Manning, who was arrested in Los Angeles in 1988 while disembarking from a plane arriving from Israel, after a deadlocked jury caused a federal judge to declare a mistrial. Robert Manning was subsequently indicted. Tipping, *supra* note 4.

90. Spano, *supra* note 4.

91. Tipping, *supra* note 4.

92. Spano, *supra* note 4; Tipping, *supra* note 4.

93. Friedman, *The California Murder that Israel is Sweeping Under the Rug*, L.A. Times, May 13, 1990, sec. M (Opinion), at 5, col. 1.

94. *Id.*

95. Kester, *supra* note 21, at 1475 n.192.

states except citizens from extradition agreements, no such provision was included in the Treaty, nor did one exist under Israeli law at the time the Treaty was negotiated.[96] The resulting language of article IV, states plainly, "[A] requested Party shall not decline to extradite a person sought because such person is a national of the requested Party."[97]

In 1962, there was further assurance Israel would extradite its own nationals since its domestic law provided for extradition of alleged criminals, national or not, so long as there was a reciprocal agreement with the requesting State.[98] Moreover, the law's drafters made it possible for the government to conclude new agreements without any further act of the Knesset, despite insistence by Knesset members in having a say in the approval of international agreements.[99]

In 1978, however, the Knesset enacted an amendment to the 1954 Extradition Law to forbid the extradition of Israeli nationals. The Knesset created the following exception:

> 2. In the Extradition Law, 5714-1954-
>
> (1) the following section shall be inserted after section 1:
>
> 1A. An Israeli national shall not be extradited save for an offence committed before he became an Israeli national.[100]

The 1978 amendment defies article IV of the Treaty and ignores the 1954 Extradition Law's direction to leave the creation of such exceptions to the treaty-making process.[101] The question of which law takes precedence arises from this stark conflict, and the question must be answered in the absence of an Israeli constitution.

As a rule, the Israeli government's control over the treaty-making process is virtually exclusive.[102] It may negotiate, sign and ratify a treaty without consulting the Knesset, whose participation is at the government's discretion.[103] Although the Government has occasionally submitted treaties affecting relations between Israel and its neigh-

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96. INTERNATIONAL LAW, *supra* note 6, at 889.

97. 1962 U.S.-Israel Extradition Treaty, *supra* note 2, at 1710.

98. *See* Extradition Law of Aug. 23, 1954, § 21, 8 LAWS OF THE STATE OF ISRAEL 144, 147 (1954). The law states the following:

> 21. Where, in an agreement concerning extradition, it has been stipulated between Israel and a foreign state —
>
> (1) that only a part of the offences set out in the Schedule shall be extradition offences in respect of that state; . . . the stipulation shall be followed, notwithstanding the provisions of this Law or of any other Law.

Id. at 147.

99. S. SAGER, THE PARLIAMENTARY SYSTEM OF ISRAEL 200-01 (1985).

100. Offences Committed Abroad (Amendment of Enactments) Law, *supra* note 3, § 2.

101. Extradition Law of Aug. 23, 1954, *supra* note 98, § 21, at 147.

102. S. SAGER, *supra* note 99, at 200.

103. *Id.*

bors for parliamentary ratification,[104] generally the government does not share this treaty-making power with the Knesset.[105] However, in order to become part of the domestic law, treaties require confirmation by the Knesset, the supreme governmental authority by virtue of its power to enact the basic laws in lieu of a constitution.[106] In accordance with traditional British constitutional usage, the provisions of international treaties do not become effective as domestic law by the mere fact of enactment in the international realm.[107] If a treaty is intended to change domestic law, or requires changes in domestic law in order to become effective, the changes must be made through the ordinary channels by which domestic law is enacted.[108] The 1954 Extradition Law, by allowing for extradition in the event that a reciprocal agreement exists between Israel and the requesting State, appears to serve the same purpose as a subsequent adoption by the Knesset of the treaty.[109]

Israeli courts apply the rule of *lex posterior derogat priori*, or last-in-time rule, in situations where the Knesset intends to repeal a prior law, either expressly or impliedly, by enacting a law in contradiction to the first.[110] Therefore, the 1978 amendment to the Extradition Law barring extradition of Israeli nationals would take precedence over the 1954 Extradition Law's original provision extending extradition to nationals in the event that a reciprocal agreement exists between Israel and another country.[111] The 1978 amendment, coupled with mount-

104. *Id.* at 201. They include "the disengagement of forces with Syria in 1974, the 1975 Sinai agreement with Egypt, the Camp David accords in 1978, the peace treaty with Egypt in 1979, and the agreement with Lebanon in 1983." *Id.*

105. *Id.*

106. E. RACKMAN, ISRAEL'S EMERGING CONSTITUTION 1948-51 98 (1955); S. SAGER, *supra* note 99, at 200.

107. U.N. LEGAL DEP'T OF THE SECRETARIAT, LAW AND PRACTICES CONCERNING THE CONCLUSION OF TREATIES, at 67, 71, U.N. DOC. ST/LEG/SER.B/3, U.N. Sales No. 1952.v.4 (1952).

108. *Id.* at 71.

109. The 1954 Extradition Law passed by the Knesset reads:

> 2. A person as aforesaid may be extradited if -
>
> 1) an agreement providing for reciprocity as to the extradition of offenders exists between Israel and the state requesting his extradition (hereinafter: "the requesting state"); and
>
> 2) he is accused or has been convicted in the requesting state of an offence of a non-political character and which, had it been committed in Israel, would be one of the offences set out in the Schedule to this Law. . . .

Extradition Law of Aug. 23, 1954, *supra* note 98, at 144.

110. E. LIKHOVSKI, ISRAEL'S PARLIAMENT 87 (1971).

111. *See* Extradition Law of Aug. 23, 1954, *supra* note 98, § 2, at 144.

Federal prosecutors argued for a denial of bail for Rochelle Manning in the 1988 Wilkerson trial for the reason that she could rejoin her husband in Israel, fearing Israel would refuse extradition on grounds of the domestic law. Spano, *U.S. Judge Signs Release Order for Israeli Accused in Bombing*, L.A. Times, Nov. 24, 1988, § 1, at 40, col. 1. After U.S. District Judge Dickran

ing political pressures, may force the courts to deny extradition in spite of the intentions that the Israeli government had when it entered into the 1962 Treaty with the United States.[112]

Israeli courts are not likely to challenge the Knesset's enactment of the 1978 amendment in contradiction to both the Treaty and the 1954 Extradition Law. A notion of legislative supremacy exists between the Knesset and the courts;[113] a relationship exists that is similar to that between the British Parliament and courts. Thus the Israeli courts are generally deemed to exercise no judicial restraint on the Knesset's law-making power.[114] If the doctrine of judicial review of legislation exists in Israel, it is in exceptional cases.[115]

As an alternative to addressing the domestic law, there is the question of whether the Israeli government may use the West Bank issue to create a jurisdictional bar to extradition, thus avoiding the real issue of a potential breach of the 1962 U.S.-Israel Extradition Treaty.[116] If Israel could successfully base its refusal of extradition requests on its lack of jurisdiction in the West Bank instead of its domestic law, it may not be necessary to address the conflict between the 1962 Treaty and the domestic law in the Manning case. Because the State Department will not recognize Israel's jurisdiction over the West Bank, the extradition request for Manning asks that the Israeli government arrest Manning within the pre-1967 borders.[117] Israel contends it lacks the resources to monitor Manning's movement up until he reaches the border.[118] According to the Israeli sources of federal prosecutors, the Israeli government will not arrest Manning so long as he remains in the West Bank.[119] However, an Israeli government spokes-

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Tevrizian refused to set bail for Rochelle Manning because of the risk that she might flee, the Ninth Circuit Court of Appeals ordered release with the condition that Manning wear an electronic tracking device. *Id.*

112. There is a question whether or not political pressures will force the Israeli government to refuse the extradition of Manning in breach of the 1962 Treaty. Robert I. Friedman, who has written a book on Jewish Defense League (JDL) founder Rabbi Meir Kahane, believes that although the Justice Department has spent five years amassing evidence to convict Robert Manning for the murder of Alex Odeh, an extradition request would meet with "a firestorm of protest from right-wing legislators" in Israel. Friedman suggests that the Israeli government's incomplete responses, or lack of response, to FBI requests for information about suspects may arise "not out of love for the JDL trio, but because many Israelis view those who slay Arab-American supporters of the Palestine Liberation Organization or alleged Nazis as heroes. That makes Israel's compliance with an extradition request very difficult." Friedman, *supra* note 93.

113. E. LIKHOVSKI, *supra* note 110, at 78-79.

114. *Id.* at 78.

115. *Id.* at 91.

116. Spano, *supra* note 4.

117. Friedman, *supra* note 93.

118. *Id.*

119. Spano, *supra* note 4.

man denied that Manning's residence in the West Bank would be a relevant issue. Provided that Manning's extradition is approved, Manning will be arrested anywhere in Israel, including the West Bank, the spokesman said.[120] Ilan Mor, consul for press and information at the Israeli Consulate in Los Angeles, agreed that if and when Israel approved the extradition, Manning could be arrested on the West Bank; "the West Bank has an importance as a topic in a political dispute but not in a legal process."[121]

Regardless of whether the jurisdiction issue or the domestic prohibition of extradition of nationals will serve as the basis for Israel's refusal to extradite Manning, the current state of affairs reflects little of the original concern of the 1962 U.S.-Israel Extradition Treaty over safe harbors for criminals in either country; rather it increases the probability of the West Bank becoming such a haven for those who engage in terrorist tactics.

III. Revitalizing the 1962 Extradition Treaty

A. *Clarification of the Political Offense Exception*

Renegotiation of the 1962 Treaty appears at this point inevitable. Without the parties actually enjoying the heart of the bargain, for which they expended the effort of negotiation, the written word means little. Renegotiation, if conducted before relations between the parties sour, may salvage the bargain by redefining the goal and rerouting the means by which it is to be reached.

Abolition of the political offense exception is not necessary, nor is it desirable. It has been suggested that abandonment of the political offense exception will allow the requested State to remain neutral during a civil uprising because systematic extradition of all offenders without regard for political motivation will prevent having to choose sides.[122] This argument addresses only the policy of neutrality behind the political offense exception and ignores the policy of noninterference with legitimate political action against a government.

Severe restrictions on the definition of the political offense exception may have the same result as abolishing the exception. The negotiations for a supplement to the 1972 United States-United Kingdom Extradition Treaty[123] produced a new, narrow definition of the polit-

120. *Id.*

121. *Id.*

122. *Political Offense Exception*, *supra* note 7, at 664.

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

ical offense exception in the 1986 United States-United Kingdom Supplementary Extradition Treaty[124] which some claim is an "important step in the battle against terrorism"[125] and which others believe is, in effect, an "evisceration" of the exception.[126]

The United States and the United Kingdom negotiated the Supplementary Treaty in the wake of three United States cases in which suspected Provisional Irish Republican Army ("PIRA") terrorists who had committed violent acts in the United Kingdom and Ireland avoided extradition by seeking protection under the political offense exception.[127] The Supplementary Treaty prevents United States courts from basing a refusal of extradition on the political offense exception when certain violent crimes are involved.[128] Article 1 of the Supplementary Treaty lists certain crimes to be automatically excluded from the political offense exception.[129] Subparts (a) through

124. Supplementary Extradition Treaty, June 25, 1985, United Sates-United Kingdom, S. EXEC. REP. No. 17, 99th Cong., 2d Sess. 15 (1985), *reprinted in* 24 I.L.M. 1105-09 (1985) [hereinafter Supplementary Treaty].

125. Sofaer, *The Political Offense Exception and Terrorism*, 15 DEN. J. INT'L L. & POL'Y 125 (1986).

126. Blakesly, *The Evisceration of the Political Offense Exception to Extradition*, 15 DEN. J. INT'L L. & POL'Y 109 (1986).

127. In re Mackin, 668 F.2d 122 (2d Cir. 1981); In re Doherty, 599 F.Supp. 270 (S.D.N.Y. 1984); In re McMullen, Mag. No. 3-78-1099 MG (N.D. Cal. May 11, 1979).

128. Groarke, *Revolutionaries Beware: The Erosion of the Political Offense Exception Under the 1986 United States-United Kingdom Supplementary Extradition Treaty*, 136 U. PA. L. REV. 1515, 1516 (1988).

129. Article 1 of the Supplementary Treaty reads:

For the purposes of the Extradition Treaty, none of the following offenses shall be regarded as an offense of a political character:

(a) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at The Hague on 16 December 1970;
(b) an offense within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature at Montreal on 23 September 1971;
(c) an offense within the scope of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature at New York on 14 December 1973;
(d) an offense within the scope of the International Convention against the Taking of Hostages, opened for signature at New York on 18 December 1979;
(e) murder;
(f) manslaughter;
(g) maliciously wounding or inflicting grievous bodily harm;
(h) kidnapping, abduction, false imprisonment or unlawful detention, including the taking of a hostage;
(i) the following offenses relating to explosives:
  (1) the causing of an explosion likely to endanger life or cause serious damage to property; or
  (2) conspiracy to cause such an explosion; or
  (3) the making or possession of an explosive substance by a person who intends either himself or through another person to endanger life or cause serious damage to property;
(j) the following offenses relating to firearms or ammunition:
  (1) the possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life; or

(d) exclude of the crimes listed in some multilateral conventions from the exception. Subparts (b) through (k) automatically exclude the types of common crimes that previously may have been covered under the exception provided there was political objective. Subpart (l) excludes attempts to commit the crimes listed in (a) through (k).[130]

Concern over the increase in terrorism provided a strong rationale for the Supplementary Treaty. One factor, in particular, was the failure of the United States to procure the provisional arrest by way of its bilateral treaties with Italy and Yugoslavia of Mohammed Abbas, the suspected Palestinian leader of the Achille Lauro hijacking.[131] A bilateral extradition treaty's effectiveness is questionable when its political offense exception provides protection to blatant terrorist acts. The Supplementary Treaty contained a new definition of the exception which was designed to discourage terrorists from committing violent acts with the belief that they would receive protection from the exception and to prevent the United States from serving as a haven for criminals fleeing the law of their own countries.[132]

One criticism of the Supplementary Treaty has been that it undermines the traditional role of the courts in determining questions of law and fact concerning individual freedom.[133] One critic of the Supplementary Treaty believes that the courts are competent to fulfill this task alone, contending that "the distinction between the killing of an off-duty, civilian clothed military person during the hijacking of a civilian aircraft, and a firefight during a civil war seem significant enough for the courts to distinguish."[134] This criticism is answered by the argument that the role of the courts is to interpret existing law and that a change in the definition of the political offense exception does not usurp judicial power, but is lawmaking that is aimed at facilitating the task of interpretation.[135]

The more valid criticism of the Supplementary Treaty is that although the attempt to clarify the application of the political offense

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(2) the use of a firearm by a person with intent to resist or prevent the arrest or detention of himself or another person;

(k) damaging property with intent to endanger life or with reckless disregard as to whether the life or another would thereby be endangered;

(l) an attempt to commit any of the foregoing offenses.

Supplementary Treaty, *supra* note 124, at art. 1.

130. *Id.*

131. Sofaer, *supra* note 125, at 125.

132. *Id.* at 125, 132-33.

133. Blakesley, *supra* note 126, at 118.

134. *Id.* at 123.

135. Lubet, *Extradition Unbound: A Reply to Professors Blakesley and Bassiouni*, 24 TEX. INT'L L.J. 47, 58-59 (1989).

exception is commendable, the use of *per se* rules to do so is short-sighted.[136] The use of the political offense exception is altogether prohibited with regard to the *per se* exceptions in the Supplementary Treaty.[137] The fact that such *per se* rules prohibit any inquiry into the circumstances surrounding the crime may not be as desirable as it may sound, even with respect to the most atrocious of crimes.[138] Attempted murder of an oppressive dictator who is guilty of mass abuse of human rights is a violent crime against the person, but may be politically justified.

In considering whether such *per se* rules would have a place in a supplement to the 1962 U.S.-Israel Extradition Treaty, one may draw a distinction between stable democratic States and those less stable. Without denying the possibility of civil uprisings occurring in stable democratic States, it is easier to justify *per se* rules in these States because the political offense exception will more likely than not be used as a terrorist loophole. In less stable areas where uprisings are more frequent, automatic extradition without consideration of political objectives, such as the Intifadah, would often work results in contradiction with the policies behind the political offense exception.[139]

Another drawback of supplementing the 1962 U.S.-Israel Extradition Treaty with automatic extraditable offenses is that the timing of such a legal decision may crucially impact United States foreign relations with countries in the Middle East other than Israel. With respect to the Supplementary Treaty with the United Kingdom, it was contended that the real purpose of the limits in the political offense exception was to aid the United Kingdom in suppressing IRA activities.[140] If the United States were to agree with Israel to implement a similar limit on the political offense exception at a point when the Arab-Israeli conflict on the West Bank is in full flame, it would threaten foreign relations with other countries in the Middle East. Such a decision might strengthen relations with Israel, but other nearby States would view the surrender of virtually all suspects by the United States to Israel, regardless of political motive, as taking sides in the West Bank conflict.

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136. Van den Wyngaert, *The Political Offense Exception to Extradition: How to Plug the "Terrorists' Loophole" without Departing from Fundamental Human Rights*, 19 ISRAEL Y.B. ON HUM. RTS. 297, 304 (1989).

137. *Id.* at 306.

138. *Id.* at 304.

139. *Id.* at 307.

140. Bassiouni, *The "Political Offense Exception" Revisited: Extradition Between the U.S. and the U.K. — A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy*, 15 DEN. J. INT'L L. & POL'Y 255, 264 (1987).

It has been suggested that normative rules, rather than automatic exemptions, be used to limit the political offense exception.[141] For example, the European Convention on the Prevention of Terrorism provides for normative considerations as well as *per se* rules.[142] Although the Convention lists crimes which fall outside the political offense exception, it allows parties to make a reservation which allows courts to review normative considerations before extraditing those who have committed a listed crime. Such considerations include "whether it created a collective danger for the life, physical integrity or liberty of the person, whether it reached persons foreign to the motives behind it or whether particularly perfidious or cruel means were used for its accomplishment."[143]

Assuming normative standards are preferable to *per se* rules for the purpose of curtailing the use of the political offense exception by terrorists, another problem arises with respect to uniformity in foreign relations. If the United States and Israel were to adopt normative rules as guides for the courts, such a policy decision would vastly differ from the approach taken with the Supplementary Treaty with the United Kingdom. Different policies applied by the United States to different States may hamper foreign relations.[144] If, for example, the United States were to refuse to abide by *per se* exceptions with respect to Israel, Israel may feel that the United States is unwilling to afford the Israeli government the same degree of confidence that it affords the United Kingdom. There is nevertheless a strong argument that lack of uniformity in foreign policy with those States which are stable democracies and those which are not may be desirable.[145] In stable, democratic States the propensity to use the political offense exception as a means to avoid extradition for terrorist crimes is greater.[146] In less stable States, a broader interpretation of the exception will prevent extraditions of those involved in legitimate political uprisings.

The question arises whether the use of normative standards will create the same kinds of problems encountered with the court endeavoring to create their own standards. One commentator stated that use of the normative rules would "plant us squarely in the territory of

141. *See* Van den Wyngaert, *supra* note 136, at 306.

142. European Convention on the Suppression of Terrorism, Jan. 27, 1977, Europ. T.S. No. 90, *reprinted in* 15 I.L.M. 1272 (1976) [hereinafter Terrorism Convention].

143. Van den Wyngaert, *supra* note 136, at 306 (citing article 13 of the Terrorism Convention, *supra* note 142).

144. *Id.* at 281.

145. Sofaer, *supra* note 125, at 132.

146. *Id.*

policymaking. . . ."[147] On the other hand, application by courts of a single standard which fits the expectation of both State parties is preferable to a haphazard evolution of a variety of judicially created tests. Moreover, the margin of divergence would be narrowed when courts apply the same list of normative considerations. The same set of normative standards may increase a tendency by the courts to follow similar tracks of reasoning, encouraging more uniformity in decisions.

B. *Improbable Change in Israel's Domestic Law*

Assuming termination or suspension, in full or in part, of the 1962 U.S.-Israel Extradition Treaty were an option for the United States under customary law,[148] such a decision would harm relations with Israel and weaken efforts to curb terrorism in both States. Moreover, deletion by renegotiation or reciprocity of article IV, which requires the extradition of one's own nationals,[149] would harm United States interests. The United States policy of extraditing nationals is not merely a concession to encourage other Party States to do the same, but also a measure to protect United States citizens from those who seek haven in the United States after committing crimes abroad.

A simple solution to Israel's domestic law prohibiting the extradition of nationals seems to be a bargain reached between the United States and Israel for a rescission of that law, but such a bargain seems unlikely. In light of the conflict over the Occupied Territories, current sentiment may call for Israeli courts to grant more leniency to nationals who have killed slain PLO supporters than courts would afford in the United States.[150] In addition, the Israeli government may argue

147. Lubet, *supra* note 135, at 59.

148. Article 60 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969), 63 AM. J. INT'L L. 875 (1969), *reprinted in* L. HENKIN, R. PUGH, O. SCHACHTER, AND H. SMIT, BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW CASE AND MATERIALS, 281 (1980), addresses termination and suspension of a treaty by the nonbreaching party. The European Court of Justice has interpreted article 60 as a reflection of customary law. F. Kirgis, *Some Lingering Questions about Article 60 of the Vienna Convention on the Law of Treaties*, 22 CORNELL INT'L L.J. 549, 550 (1989) (citing Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 47 (June 21, 1971); *In Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.)*, 1972 I.C.J. 46, 47 (Aug. 18, 1972). While it is agreed that under customary international law a nonbreaching party may, in some circumstances, exercise a right of termination or suspension, it is unclear when breach of one article of a treaty gives rise to this right. *See* Secretary-General's report to the Security Council on Armistice Agreements between Israel and various Arab states in 1949, 11 SCOR, Supp. Apr.-June 1956 at 34-35, U.N. Doc. S.3596, at 6-7 (1956), *reprinted in* INTERNATIONAL LAW, *supra* note 6, at 484. *See also* Charlton v. Kelly, 229 U.S. 447 (1913) (Supreme Court held that executive branch had waived its right to suspend its own performance with regard to extraditing nationals according to an extradition treaty with Italy because it had ignored Italy's prior violation of the treaty).

149. 1962 U.S.-Israel Extradition Treaty, *supra* note 2, at 1710.

150. *See* Friedman's discussion, *supra* note 112.

against rescission on the basis that Israel's domestic extradition law fulfills the spirit of the 1962 U.S.-Israel Extradition Treaty because the law has two faces. True, nationals may not be extradited, but the 1978 amendment to the 1954 Extradition Law also provides the courts in Israel the power to try under Israeli law nationals who have committed offenses abroad.[151] From the perspective of the United States, this second face to Israel's extradition law fails to salvage the part of the 1962 U.S.-Israel Extradition Treaty which the first face destroys, namely the assurance that those who commit crimes in the United States will be dealt justice in United States courts according to United States law.

Even if there were an incentive to reach a compromise with the United States with regard to extradition of nationals, the Israeli government may not be able work such a change within its own system. Executive powers lie with the Prime Minister and Cabinet, and the Israeli inner cabinet does have the final say on foreign affairs decisions.[152] The executive is, however, controlled by political parties who rule in the Knesset.[153] The Prime Minister does not hold office by way of direct election, but by being the leader of a political party who has gained the support of the majority in the Knesset.[154] Prime Minister Shamir's administration is supported by the right-wing Likud party, which holds a bare majority in the Knesset.[155] The political parties, themselves, have bent to the will of smaller, extremist religious parties.[156] Israel's two largest political parties, centrist Labor and Likud, are of "paralyzingly equal strength" and have solicited support from the smaller religious parties to gain a political edge.[157]

Voters have been calling for reform of the political situation in Israel because "the system doesn't work. The Prime Minister cannot make decisions."[158] The Knesset has the power to reform the system,

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151. Offences Committed Abroad (Amendment to Enactments) Law, § 1, *supra* note 3, at 63.

(1) the following section shall be inserted after section 4:

4A. (a) The Courts in Israel are competent to try under Israeli law an Israeli national or resident of Israel who committed abroad an act which had it been committed in Israel, would be one of the offences included in the Schedule to the Extradition Law), 5714-1954.

152. ABC-Clio, Inc. (Sept. 25, 1990).

153. T. Phelps, *Israeli Government Still at Standstill*, N.Y. Newsday, June 5, 1990 (Nassau and Suffolk edition).

154. ABC-Clio, Inc., *supra* note 152.

155. The Christian Science Monitor, July 27, 1990, at 18 (Opinion).

156. Phelps, *supra* note 153.

157. *Id.*

158. *Id.* (quoting Ehud Sprinzak, professor of political science at the Hebrew University in Jerusalem and reform leader.)

exercising supreme governmental authority through its power to enact the basic laws until a constitution is set in force.[159] It is unlikely, however, that the Knesset will do so. To maintain support from the religious groups who are strengthened by the current system, the two Likud and Labor parties have had to agree to avoid from electoral change.[160]

Until internal political reform takes place in Israel, whether by implementation of direct elections or by other means, any agreement the United States reaches with the Israeli government for rescission of domestic law will not be reliable. The Israeli government cannot fulfill international obligations without the Knesset's cooperative restraint from counteracting foreign policy with domestic law.

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159. *Id.*

160. *Id.*