Prosecuting International Terrorists in United States Courts: Gaining the Jurisdictional Threshold

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Introduction

On June 14, 1985 two gunmen commandeered Trans World Airlines Flight 847 between Athens and Rome and forced it to fly to Beirut, Lebanon.1 There, they killed off-duty U.S. Navy diver Robert Dean Stethem2 and held thirty-nine U.S. citizens hostage for seventeen days.3 Later that year, a federal grand jury in Washington, D.C. indicted four men on hijacking and murder charges arising out of the Flight 847 events.4 In early 1987 West German authorities arrested one of the indicted, Mohammed Ali Hamadei, as he attempted to bring three bottles of liquid explosives into West Germany.5

The United States immediately expressed an intention to have Hamadei extradited for trial under the 1985 indictment and began negotiations with West Germany.6 In response to West German insistence,7 the United States agreed, as part of a proposed extradition agreement, not to execute Hamadei should he be convicted.8 When two of its nationals were kidnapped in Beirut, however, West Germany hesitated to accede to the American request.9 The case remains unsettled, although West German officials are considering prosecuting Hamadei in Germany for the hijacking.10

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2. N.Y. Times, June 18, 1985, at A9, col. 6.
5. N.Y. Times, supra note 3.
6. Id.
7. N.Y. Times, supra note 4.
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The Hamadei case illustrates the uncertainties surrounding U.S. jurisdiction over international terrorists whose crimes affect U.S. interests. Similar jurisdictional conflicts will undoubtedly surface in the future, given the increasing number of international terrorist offenses. After all, recent statistics point to an alarming rise in international terrorist activity. In 1985, the last year for which complete statistics are currently available, the U.S. Department of State counted 782 separate incidents of international terrorism. This represents an increase of thirty percent over the number of such instances in 1984, and is fifty percent higher than the average number of incidents over the previous five years. In the 1985 incidents, in which citizens of at least eighty-four countries were victimized, more than eight hundred persons were killed and some twelve hundred wounded.

This article will review the various means by which a U.S. court can gain jurisdiction over international terrorists, and will examine proposed changes designed to make U.S. prosecution easier. It is the author's belief that international terrorism against U.S. interests can best be curbed by creating a thorough, thoughtful criminal code, and by providing U.S. law enforcement personnel and prosecutors the tools to bring offenders against that code to justice. By concentrating on jurisdiction, this article avoids the problems inherent in defining terrorism; it takes as a given


For purposes of these statistics, the State Department defines "terrorism" as "premeditated, politically motivated violence, perpetrated against noncombatant targets by subnational groups or clandestine state agents, usually intended to influence an audience." International terrorism involves "citizens or territory of more than one country." DEP'T OF STATE, TERRORISM: 1985, supra, at inside front cover. "In practice it is of course extremely difficult to find examples of purely domestic terrorism. In almost every case some cross-border movement of terrorists, or terrorist weapons . . . is involved." Wilkinson, Fighting the Hydra: Terrorism and the Rule of Law, 7 HARV. INT'L REV. 11, 12 (1985). Therefore, the adjective "international" will be used in this paper only to refer to terrorist acts that take place outside the territory of the state of which the perpetrator is a national, or are directed knowingly against the citizens or interests of a state of which the perpetrator is not a national.

13. "'Terrorism' is a term of uncertain legal content. . . . At the international level, in particular, there is no agreed-upon definition of 'terrorism' and hence no international crime of terrorism." J. MURPHY, PUNISHING INTERNATIONAL TERRORISTS 3-4 (1985). At one time, at least, the United States considered it "counter productive, even if it were technically feasi-
that international terrorism is criminal activity that happens to span international boundaries. As such, this discussion will not consider long-term solutions to the complex social and political problems “underlying” terrorist actions.

Part One of this article will concentrate on the possibility of U.S. courts acquiring subject matter jurisdiction over international terrorist acts. Recent legislative changes expanding U.S. extraterritorial criminal jurisdiction over terrorist acts have been largely the result of numerous multilateral anti-terrorist conventions concluded during the past fifteen years. Part Two will examine methods by which U.S. courts can obtain personal jurisdiction over terrorist offenders. Examining subject matter and personal jurisdiction over international terrorists is, admittedly, a piecemeal approach to a complex problem. Prosecuting international terrorists under U.S. criminal laws will not “solve” the long-term terrorist threat. Nevertheless, terrorists must be subject to judicial process. Criminal prosecution is America’s best hope for labelling terrorists hostis generi humani in the international community and thus for forcing an eventual curtailment of terrorist activity. The value of global moral outrage in inducing a remission of terrorist activity cannot be overstated.14

I. Jurisdiction over the Subject Matter of Terrorist Offenses Abroad

Since the 1960’s, one aspect of the U.S. response to transnational terrorism has been participation in international agreements designed to bring to justice the perpetrators of such political violence.15 These agree-
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ments typically take the form of mutual pledges either to extradite the offender or to submit his case to domestic prosecution, a formulation referred to as aut dedere aut judicare.\textsuperscript{16} As a practical matter, many offenders whose cases fall within the terms of such agreements are found in a state to which they have fled after committing their offenses. If the apprehending state is to have any real alternative to extradition under the rule of aut dedere aut judicare, its domestic law must embody some theory of jurisdiction\textsuperscript{17} that reaches offenses perpetrated beyond its borders. Moreover, states other than the victimized or “refuge” nation may have legitimate interests in punishing the terrorists.\textsuperscript{18}

A. Theories of National Jurisdiction over Criminal Offenses

International law recognizes five broad principles as providing the basis for subject matter jurisdiction over crimes committed abroad: (1) territoriality; (2) nationality of the accused; (3) nationality of the victim; (4) protection of state interests; and (5) universality of certain offenses.\textsuperscript{19}

The principle of territoriality, the power of a state to regulate conduct within its borders and to enforce such prescriptions, is universally recognized\textsuperscript{20} and is inseparable from the sovereignty of the state.\textsuperscript{21} A state’s territory includes its land area, internal waters, and territorial sea,\textsuperscript{22} as


\textsuperscript{17} Jurisdiction has been defined as “the capacity of a state under international law to prescribe or to enforce a rule of law.” RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES [hereinafter RESTATEMENT (2D)] § 6 (1962). More recently, the concept has been divided into three categories: jurisdiction to prescribe, to adjudicate, and to enforce. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Proposed Final Draft 1986) [hereinafter RESTATEMENT (REVISED)] § 401. Although this article is principally concerned with the exercise of jurisdiction to adjudicate, it will nonetheless also consider the effects of U.S. attempts to prescribe and to enforce its law extraterritorially. This article will use the phrase “subject matter jurisdiction” to mean the competence of a court to deal with the criminal allegation brought before it, as opposed to its capacity to compel the attendance of the defendant.

\textsuperscript{18} For an overview of the enactments of many English-speaking nations and of the constituent states of the United States in this regard, see generally LEGISLATIVE RESPONSES TO TERRORISM (Y. Alexander & A. Nanes eds. 1986).

\textsuperscript{19} M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 205 (1974). The Restatement lists only four such principles, omitting that of nationality of the victim. See RESTATEMENT (2D), supra note 17, § 10.

\textsuperscript{20} M. BASSIOUNI, supra note 19, at 204.

\textsuperscript{21} Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812).

\textsuperscript{22} RESTATEMENT (2D), supra note 17, §§ 11-17.
well as the vessels, aircraft, and spacecraft of the state, and of its military forces deployed abroad. Each state has jurisdiction to adjudicate crimes committed wholly or partly within such territory. This principle also extends to the acts of aliens beyond state borders under two conditions: if such conduct has an effect within the state's territory and constitutes a crime or tort "under the law of states that have reasonably developed legal systems," or if the effect within the territory is substantial and foreseeable and its regulation is not inconsistent with generally recognized principles of justice.

The principle of nationality of the accused, also referred to as the active personality theory, is equally well-settled and universally accepted. U.S. courts have upheld this principle on numerous occasions; U.S. legislation, however, has adopted this principle only sparingly, and solely in the national security context.

The passive personality principle, based upon the nationality of the victim, is the subject of considerable controversy. The 1935 Harvard

23. M. Bassiouni, supra note 19, at 224. Such jurisdiction is not exclusive, however, when applied in the territorial seas and airspace of another state. id. at 225-27.


26. RESTATEMENT (2D), supra note 17, § 18. Bassiouni refers to this as the "subjective-objective territorial theory." M. Bassiouni, supra note 19, at 218. In a regulatory context, U.S. antitrust and other commercial legislation has been extensively interpreted to extend to international business operations that have effects within this country, arousing substantial international controversy. See, e.g., Dam, Economic and Political Aspects of Extraterritoriality, 19 INT'L LAW. 887 (1985); Sennett & Gavil, Antitrust Jurisdiction, Extraterritorial Conduct and Interest Balancing, 19 INT'L LAW. 1185 (1985); Pengilley, Extraterritorial Effects of United States Commercial and Antitrust Legislation: A View from "Down Under", 16 VAND. J. TRANSNAT'L L. 833 (1983).

27. See Harvard Research, supra note 25, at 440.

28. M. Bassiouni, supra note 19, at 251.

29. In United States v. Bowman, 260 U.S. 94 (1922), for example, the U.S. Supreme Court held that a citizen was punishable domestically for overseas conspiracy to defraud a U.S. government corporation abroad. See also Blackmer v. United States, 284 U.S. 421 (1932) (U.S. citizen properly convicted of contempt upon return to the United States on the basis of earlier disregard, while in France, of properly served subpoena requiring him to return to testify as witness in criminal case); United States v. Layton, 509 F. Supp. 212 (N.D. Cal.), appeal dismissed, 645 F.2d 681 (9th Cir.), cert. denied, 452 U.S. 972 (1981) (U.S. court had jurisdiction to try citizen for murder of congressman in Guyana on variety of theories, including defendant's nationality).


31. RESTATEMENT (REVISED), supra note 17, § 402 (Reporters' Notes at 192); M. Bassiouni, supra note 19, at 255-56.
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Research in International Law Project omitted it as a basis for criminal jurisdiction, and it was expressly disavowed in the Second Restatement. However, as the reporters for the 1986 Draft Restatement have noted, it has been increasingly invoked and accepted when applied to terrorist or other organized attacks upon a state’s nationals as well as to assassinations of a state’s ambassadors or other officials.

The protective principle is, in effect, a broad theory allowing the state to reach the subject matter of criminal activity abroad that affects its interests. Not all interests, however, have been held to justify invocation of this principle. The conduct the state seeks to regulate, and the misconduct it consequently seeks to punish, must “threaten its security as a state or the operation of its governmental functions” and be generally recognized as a crime.

Of all the classical theories of criminal jurisdiction, the principle of universal jurisdiction has the most interesting recent history. The 1935 Harvard Research Project mandated universal jurisdiction over the crime of piracy as well as over other offenses when committed in certain narrowly defined circumstances. A state, for example, was said to have jurisdiction over a crime other than piracy if the offense was committed in a stateless territory and injured the complaining state or one of its nationals. The 1962 Restatement, however, limited universal jurisdiction to piracy alone. Despite these early limitations, the number of crimes subject to universal jurisdiction has increased substantially in recent years. The 1986 Draft Restatement, remarking on an “expanding class of universal offenses,” posited state competence to define and punish offenses “recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps terrorism,” without regard to the existence of other links between the state and the crime.

B. Multilateral Counterterrorist Conventions

The United Nations and its agencies have sponsored a number of multilateral conventions in response to international terrorism. The Organ-
zation of American States has also produced one, specifically targeted at violence against diplomats. Rather than attempting to deal comprehensively with the problem of transnational political violence, these conventions adopt a piecemeal approach. Each concerns a particular class of offenses that has inspired multinational resolve either because the acts comprising it are committed frequently or because the acts have potentially grievous consequences.

1. The Tokyo Convention

The Convention on Offenses and Certain Other Acts Committed on Board Aircraft, commonly referred to as the 1963 Tokyo Convention, was an early attempt to deal with the offense of aircraft hijacking. The Convention covers penal offenses and other acts, "whether or not they are offenses," that may jeopardize the safety of aircraft in flight or of persons or property thereon. Such acts, to be cognizable, must occur aboard an aircraft registered in a signatory state while that aircraft is in flight, on the surface of the high seas, or in any other stateless territory.

The thrust of the Tokyo Convention is to require its member states to extend their national jurisdiction over the crimes within its purview. Thus, each member state is obligated to establish jurisdiction over extraterritorial acts aboard aircraft registered under its laws. The Convention is an attempt to ensure that at least one state has criminal jurisdiction over the subject matter of every unlawful interference with an aircraft in flight.

Two aspects of the Tokyo Convention are interesting in light of later developments. First, the Convention defines neither the phrase "offenses

43. Id. art. 1.1(b).
44. Id. art. 1.2. "In flight," for international law purposes, is defined as that period between the closing of the external doors following embarkation and their opening for disembarkation, except that following a "forced landing" the Convention continues to apply until competent authorities have taken over responsibility for the aircraft and for the persons and property aboard. Id. art. 5.2.
45. Id. art. 1.2.
46. Id. art. 3.3.
47. Id. art. 3.2.
48. Id. art. 3.1.
49. But see R. Lillich, TRANSNATIONAL TERRORISM: CONVENTIONS AND COMMENTARY 1 (1982) ("Even though a Contracting State is required to adopt the laws necessary to give its courts jurisdiction, it is not obligated to ensure that all offenders will be prosecuted . . . . The Convention provides for a Contracting State to take delivery from the aircraft commander of a suspected offender . . . , but it places no obligation on the receiving State to grant extradition of a suspected offender to a state that has jurisdiction to try him.") See also supra note 17.
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against penal law" nor the other acts "whether or not they are offenses" with which it is concerned. The latter omission is not critical; it appears to place the definition and handling of non-criminal acts that threaten the aircraft's safety within the discretion of the aircraft commander for such immediate action as he may deem necessary.\textsuperscript{50} But the former omission is more serious in that it leaves the definition of an international criminal offense open to the inconsistencies of national law. Equally problematic, signatory states need take no further action against hijackers other than to return the aircraft and cargo to its rightful owner and allow the passengers and crew to continue their journey.\textsuperscript{51} That is, there is no Tokyo Convention obligation to extradite offenders\textsuperscript{52} or to subject them to any type of prosecution.

2. The Hague Convention

The Tokyo Convention did little to deter aircraft hijackings, which increased dramatically during the late 1960's and early 1970's.\textsuperscript{53} Out of this mounting crisis was born the Hague Convention of 1970.\textsuperscript{54} Article 1 of the Hague Convention corrects a major deficiency of the Tokyo Convention by establishing and defining the international crime of hijacking a civil aircraft.\textsuperscript{55} It defines hijacking as the unlawful seizure or exercise of control, or an attempt to seize or exercise control, over an aircraft in

\textsuperscript{50} Tokyo Convention, \textit{supra} note 42, arts. 5-10.
\textsuperscript{51} \textit{Id.} art. 11.2.
\textsuperscript{52} \textit{Id.} art. 16.2.
\textsuperscript{55} The Hague Convention does not apply to “aircraft used in military, customs, or police services.” Hague Convention, \textit{supra} note 54, art. 3.2.
flight by force, threat of force, or intimidation. Anyone who acts as an
accomplice of a hijacker also commits the offense of hijacking.\textsuperscript{56}

More importantly, article 7, the heart of the Hague Convention, adopts the \textit{aut dedere aut judicare} principle. This principle gives a state
the choice of extraditing the offender, or, should it be unwilling or unable
to do so because of internal legal constraints, of referring the case for
prosecution.\textsuperscript{57} However, the Hague Convention, like most such agree-
ments, stipulates as the alternative to extradition not prosecution per se,
but submission of the case to national prosecuting authorities for consid-
eration of prosecution. While this arrangement has been criticized be-
cause of its susceptibility to political influence,\textsuperscript{58} it is difficult to conceive
of an acceptable alternative to the requirement of mere submission of the
charges; in many liberal democracies in particular, such a restriction on
prosecutorial discretion would arouse objections of political interference
in national judicial processes.

Article 4 requires a contracting state to extend its extraterritorial crim-
inal jurisdiction over the offense of hijacking if it is: (1) the state where
the aircraft is registered; (2) the state where the aircraft lands with the
hijacker still aboard; (3) the state in which the aircraft lessee's principal
place of business is located or, if the lessee has no such place of business,
the place in which it maintains its permanent residence; or (4) the state in
which an alleged offender is present, but from which he is not extra-
dited.\textsuperscript{59} If it was an aim of the Tokyo Convention to ensure that at least
one state would have jurisdiction over any hijacking,\textsuperscript{60} a purpose of the
Hague Convention is to establish a form of near-universal jurisdiction
over hijacking, or at least a system of overlapping jurisdictions over each
hijacking incident. To give effect to such jurisdiction, contracting states
are obliged to take into custody or otherwise assure the presence of any
alleged offender found within their territories,\textsuperscript{61} and immediately thereaf-
fer to notify all potentially interested states of the apprehension.\textsuperscript{62} Fi-
nally, the offense is to be made punishable “by severe penalties” under
the national law of each of the convention's signatories.\textsuperscript{63}

\textsuperscript{56} Id. art. 1. “In flight” is defined in art. 3 in a similar fashion as it is in the Tokyo
Convention. See supra note 44.

\textsuperscript{57} Costello, supra note 16, at 486-88; Wilkinson, supra note 12, at 13.

\textsuperscript{58} J. MURPHY, supra note 13, at 13:

Once the case is in the hands of government attorneys, they retain complete discre-
tion as to whether to bring the case to trial. While their decisions may be based on
such traditional grounds as insufficiency of evidence, or unavailability of witnesses,
they may also turn on considerations of political expediency clothed in legal terms.

\textsuperscript{59} Hague Convention, supra note 54, art. 4.

\textsuperscript{60} See supra text accompanying note 49.

\textsuperscript{61} Hague Convention, supra note 54, art. 6.1.

\textsuperscript{62} Id. art. 6.4.

\textsuperscript{63} Id. art. 2.
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3. The Montreal Convention

The Montreal Convention of 1971\textsuperscript{64} requires its contracting states to subject to "severe penalties" by their national legislation a much broader range of activities interfering with civil aviation than did either the Tokyo or Hague Convention.\textsuperscript{65} It defines as international crimes acts endangering the safety of an aircraft in flight or rendering an aircraft incapable of flight. These include: acts of violence against persons on board an aircraft in flight; destruction of, or damage to, an aircraft in service; sabotage of an aircraft in service; destruction of, or damage to, air navigation facilities, or interference with their operation; and communication of false information that, by its communication, endangers an aircraft in flight.\textsuperscript{66} Moreover, any attempt to commit these offenses, or to aid or abet one who commits or attempts any of them, constitutes an offense.\textsuperscript{67}

Contracting states must "endeavor to take all practicable measures" for the prevention of the offenses enumerated in the Montreal Convention.\textsuperscript{68} They must make such crimes extraditable;\textsuperscript{69} should a custodial state decline to extradite an alleged offender, it is required, "without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution."\textsuperscript{70} Unlike the Hague Convention, the Montreal Convention also places upon those authorities an obligation to make their decision to prosecute "in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."\textsuperscript{71} This formulation goes as far as is practically possible to overcome the objection that it is meaningless to impose a requirement of \textit{aut dedere aut judicare} upon criminal systems subject to political influence.\textsuperscript{72} The requirements for exercising subject matter jurisdiction are identical to those set out in the Hague Convention,\textsuperscript{73} except that an additional right exists to establish territorial criminal jurisdiction in the state where the offense was committed.\textsuperscript{74}


\textsuperscript{65.} Montreal Convention, \textit{supra} note 64, art. 3.

\textsuperscript{66.} \textit{Id.} art. 1.1. This formulation of the article is adapted from R. Lillich, \textit{supra} note 49, at 38.

\textsuperscript{67.} Montreal Convention, \textit{supra} note 64, art. 1.2.

\textsuperscript{68.} \textit{Id.} art. 10.1.

\textsuperscript{69.} \textit{Id.} art. 8.

\textsuperscript{70.} \textit{Id.} art. 7.

\textsuperscript{71.} \textit{Id.}

\textsuperscript{72.} See \textit{supra} text accompanying note 58.

\textsuperscript{73.} See \textit{supra} text accompanying note 59.

\textsuperscript{74.} Montreal Convention, \textit{supra} note 64, art. 5.
4. The New York Convention

Unlike the previous conventions developed specifically in response to threats to civil aviation, the 1973 New York Convention, another United Nations convention, is intended to deter violence against "internationally protected persons." These persons are defined as heads of state, heads of government, foreign ministers and their families when in foreign countries, and officials of states or of international organizations and their families when other international law grants them special protection. Under the Convention, contracting states must protect such persons against murder, kidnapping, or other attacks upon their person or liberty; violent attacks upon their means of transport, private accommodations, or official premises likely to endanger their persons or liberty; and threats and attempts. The enumerated acts, however, are not specifically made international offenses, as was the case in the Hague and Montreal Conventions. Instead, they are to be made the subject of national prohibitions by the various contracting states.

Like the agreements already discussed, the New York Convention is founded on the principle of aut dedere aut judicare; contracting states are required, first, to "take the appropriate measures" to ensure the continued presence of an alleged violator found within its territory, and second, to notify without delay other states associated with the alleged offender, the victim, or the situs of the offense. Thereafter, the custodial state must extradite the offender upon request or, "if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution." A contracting state is obliged to establish jurisdiction over the specified crimes: when they are committed in the territory of the state or aboard a ship or aircraft registered in the state; when the alleged offender is a national of the state; when the victim is an internationally protected person by virtue


76. Id. art. 1.

77. Id. art. 1.1(b). For an overview of privileges and immunities of state and international organization officials in international law, see Vienna Convention on Diplomatic Relations, Apr. 18, 1961, arts. 29-30, 3 U.S.T. 3227, T.I.A.S. No. 7502, 50 U.N.T.S. 95; Ling, A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents, 33 WASH. & LEE L. REV. 91 (1976).

78. See New York Convention, supra note 75, art. 2.1.

79. Id. art. 2.2.

80. Id. art. 6.1.

81. Id. art. 7.
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of functions he performs for the state; or when the perpetrator of an article 2 offense is found within the state and is not extradited.82

5. The OAS Convention

Whereas the New York Convention seeks to enhance the security of "internationally protected persons" through mandatory changes in the domestic law of its contracting parties,83 the 1971 OAS Convention84 establishes a class of crimes known as "common crimes of international significance" for kidnapping, murder, or other assaults against the life or personal integrity of, or extortion related to such crimes against, "those persons to whom the state has the duty to give special protection according to international law."85 While it is accurate to say that the OAS Convention was largely superseded in 1977 when the New York Convention entered into force,86 the more precise scope of the OAS Convention as to offenses covered, the outright internationalization of the crimes it does specify, and its potentially more flexible inclusion of protected persons give it continued relevance.

The OAS Convention requires states "[t]o comply most expeditiously with the requests for extradition concerning the criminal acts contemplated in this convention";87 alternatively, it provides for submission of a case to the national prosecuting authorities of the requested state if extradition is denied because the fugitive is a national of the requested state "or because of some other legal or constitutional impediment."88 The OAS Convention makes no specific provision for enlarging the criminal jurisdiction of contracting states. On the other hand, since this convention obligates a state to submit to domestic prosecution those cases in which it declines to extradite a fugitive—"as if the act had been committed in its territory"89—it must require an implicit juridical basis upon which states can proceed in their own courts. This minimal extraterrito-

82. Id. art. 3.
83. See supra text accompanying notes 75-79.
85. OAS Convention, supra note 84, art. 2. It is not clear exactly who these protected persons are. "Precisely how far the convention’s scope of protection does extend is a matter of conjecture." J. Murphy, supra note 13, at 12.
In addition to creating this class of crimes, the convention requires contracting states "[t]o endeavor to have the criminal acts contemplated in this convention included in their penal laws, if not already so included." OAS Convention, supra note 84, art. 8(d).
86. J. Murphy, supra note 13, at 11-12.
87. OAS Convention, supra note 84, art. 8(e).
88. Id. art. 5.
89. Id.
trial jurisdiction should be sufficient to establish jurisdiction over kidnap-
ning, murder, or assaults against the life or personal integrity of an
internationally protected person or extortion in connection with those
crimes, regardless of where such offenses occurred, if the alleged offender
is found within the territory of a contracting state.90

6. The Hostages Convention

The international community's recognition of the need for anti-terror-
ist legislation is evidenced by the United Nations' rapid passage of the
International Convention Against the Taking of Hostages.91 The Con-
vention was proposed by the Federal Republic of Germany in 1976, and
approved by the General Assembly just three years later, in December
1979.92 The United States signed the Convention four days later, with
the Senate unanimously agreeing to ratification in July 1981.93

Under the Hostages Convention, the international offense of hostage-
taking is committed by "[a]ny person who seizes or detains and threatens
to kill, to injure or to continue to detain another person (... the 'hos-
tage') in order to compel a third party (... to do or abstain from doing
any act as an explicit or implicit condition for the release of the hostage
..." Attempts to commit or to abet the offense are also crimes.94 Pro-
visions dealing with the custody of alleged offenders,95 the notification of
affected states and international organizations,96 and the choice of either
extradition97 or submission for prosecution98 are comparable to those of
the Hague, Montreal, and New York Conventions. However, a state
party to the Hostages Convention is bound to refuse extradition if it has
substantial grounds to believe that a resulting prosecution in the request-
ing state would be tainted by prejudice against the accused based on his
race, religion, nationality, ethnic origin, or political opinion.99 The Sen-
ate Foreign Relations Committee report to the Senate concluded that this
provision will have no effect on U.S. extradition practice, which, it

90. Id. art. 2.
[hereinafter Hostages Convention]. The treaty entered into force on January 6, 1985; 29 states
have ratified it. TREATIES IN FORCE, supra note 54, at 308.
93. Id. An account of the negotiation of the Convention in the United Nations Sixth
Committee may be found in Aston, The United Nations Convention Against the Taking of
Hostages: Realistic or Rhetoric?, in BRITISH PERSPECTIVES ON TERRORISM 139 (P. Wilkinson
94. Hostages Convention, supra note 91, art. 1.
95. Id. art. 6.1.
96. Id. art. 6.2.
97. Id. art. 10.
98. Id. art. 8.
99. Id. art. 9.1.
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pointed out, is governed entirely by bilateral treaties. This view is questionable, in that the Convention specifically provides that, with respect to hostage-taking and related offenses, "all extradition treaties and arrangements applicable between States Parties are modified . . . to the extent that they are incompatible with this Convention." Thus, the provision could give reluctant states a facade of law behind which to disguise the political motives prompting a denial of extradition.

A party to the Hostages Convention is obliged to amend its national law so as to establish criminal jurisdiction over hostage-takings within its territory or aboard ships and aircraft registered in its territory, by any person subsequently found within its territory or by its own nationals, or carried out to compel that state to do or refrain from doing any act. Furthermore, the Convention provides for discretionary national jurisdiction over foreign hostage-takings by stateless persons who habitually reside in the state, and over those incidents in which nationals of the state are taken hostage.

7. The Convention on the Physical Protection of Nuclear Material

In September 1985 there were eighty-five nuclear reactor power plants in the United States licensed for full power and another five licensed for low power. Construction permits had been granted for an additional thirty-seven plants. There have as yet been no terrorist attacks and only one terrorist threat against any nuclear facility in the United States: a 1984 announcement by the "Radical Nuclear Group" that it would use "terrorist violence" against nuclear weapons facilities. With the exception of one rocket attack upon a controversial French breeder reactor under construction, there have been no incidents outside the United States either. Still, it cannot be denied that nuclear terrorism is a very real possibility.

In 1979, responding to the possibility of nuclear terrorism, fifty-eight states and the European Atomic Energy Commission, under the sponsor-
ship of the International Atomic Energy Agency,\textsuperscript{106} negotiated a Convention\textsuperscript{107} requiring each state party to criminalize numerous offenses relating to nuclear material. These include the theft, embezzlement, or fraudulent obtainment of nuclear material; the unlawful receipt, possession, use, transfer, alteration, disposal, or dispersal of nuclear material that causes or is likely to cause death or serious injury to any person or substantial damage to property; any demand for nuclear material by threat, force, or intimidation; any threat to use nuclear material to cause death, serious injury, or substantial property damage; any extortion by threat to steal nuclear material; and any attempt to commit or complicity in such acts.\textsuperscript{108} Various provisions dealing with the detention of alleged offenders,\textsuperscript{109} notification of states concerned,\textsuperscript{110} extradition,\textsuperscript{111} and submission for prosecution if extradition is refused\textsuperscript{112} are comparable to those found in the Hague Convention.

Each state party is obliged to ensure its jurisdiction over the enumerated offenses when such crimes are committed in its territory—including aboard ships and aircraft registered in the state—or when the alleged offender is a national of the state, regardless of the situs of the crime or whether the alleged offender is present in the state but cannot be extradited. In addition, a state may obtain subject-matter jurisdiction over an offense involving nuclear material when it is "involved" in international transport of the material that is the subject of the offense, either as its exporter or importer.\textsuperscript{113}

The Senate unanimously consented to ratification of the Convention in 1981.\textsuperscript{114} The United States formally ratified it in December 1982, but too few states have ratified it for it to come into force internationally.\textsuperscript{115}


\textsuperscript{108} Nuclear Material Convention, supra note 107, art. 7.

\textsuperscript{109} Id. art. 9.

\textsuperscript{110} Id.

\textsuperscript{111} Id. art. 11.

\textsuperscript{112} Id. art. 10.

\textsuperscript{113} Id. art. 8.

\textsuperscript{114} Hearing on S. 1446, supra note 106, at 8-9 (statement of Richard T. Kennedy, Under Secretary of State for Management and U.S. Representative to the International Atomic Energy Agency).

\textsuperscript{115} As of May 1986, only 15 states had ratified the Convention. Treaty Office, U.S. Department of State, in response to author's inquiry (May 29, 1986).
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While it has been argued that the Convention is already in force for the states that have ratified it, such a claim may not be warranted; the test will be whether those states will amend their national legislation to conform with the Convention’s specific requirements for extraterritorial jurisdiction.

8. The Multilateral Counterterrorist Conventions in Practice

Of the seven conventions just analyzed, only the convention relating to nuclear material is not currently in force. The Tokyo and OAS Conventions, however, are essentially of historical interest. The effectiveness in practical terms of the remaining four is difficult to gauge. While commercial hijackings have declined in number since the Hague Convention, it is not clear that the Convention, rather than enhanced international airport security, is to be credited with that decline. Moreover, extradition requests concerning offenses enumerated in the conventions are likely to be made under bilateral extradition treaties, which often adopt the language of the conventions.

Taken together, the Hague and Montreal Conventions have established a theoretical framework for the assertion of national jurisdiction over nearly every possible dangerous interference with commercial air navigation. The New York Convention has created a context for similar treatment of violence against internationally protected persons, and the Hostages Convention has provided a jurisdictional framework to cover political kidnapping.

Still, this network of international agreements has two very practical shortcomings. The first is the failure of the international criminal law system to deal with the most disturbing terrorist offense of all: the seemingly random murder of internationally unprotected persons, targeted merely because of their nationality or ethnic affiliation. Individual states may assert national jurisdiction over such extraterritorial offenses, but there is no international agreement, in form or in fact, that such an asser-

116. See REPORT ON NUCLEAR MATERIAL CONVENTION, supra note 106, at 5.
117. Article 8 of the Italian Penal Code, for example, posits jurisdiction over “political crime[s]” by citizens and aliens, regardless of the situs of the crime. A common crime may be deemed a political crime for this purpose if it was inspired, in whole or in part, by political motives. THE ITALIAN PENAL CODE 3 (E. Wise trans. 1978). Israeli law also provides for competence of domestic courts to try any person who has committed abroad an act which would have been an offense if committed in Israel, if that act was intended to harm Israel, its security, its property, its economy, or its transportation or communication links with other countries. J. MURPHY, supra note 13, at 31. This legislation provided the jurisdictional basis for Israel’s 1973 prosecution of Faik Bulut, a Turkish citizen convicted of the offense of membership in the PLO in Lebanon and Syria. See Note, Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law, 72 MICH. L. REV. 1087 (1974); Note, Bringing the Terrorist to Justice: A Domestic Law Approach, 11 CORNELL L. REV. 71, 76-77 (1978).
tion may be the basis for the surrender of a fugitive. The second short-
coming is the dependence of the entire international counterterrorist 
legal struture upon the aut dedere aut judicare principle. Where states 
shirk their responsibility to extradite or to try, the system collapses. 
And, as the following sections make clear, the decision of whether or not 
to extradite political offenders may be fraught with complications.

C. United States Legislation in Response to International Terrorism 
and the Counterterrorist Conventions

Besides encouraging the establishment of universal jurisdiction over 
terrorist offenses, the global anti-terrorist conventions have been instrumental in promoting U.S. responses to the jurisdiction problem; they 
have given U.S. lawmakers a theoretical framework for the liberation of 
national criminal jurisdiction from the territorial principle, at least as to 
the particular offenses which they cover.\(^\text{118}\) In response to the conven-
tions, the U.S. Congress has enacted substantially all the jurisdictional 
measures which the agreements require; at present the subject-matter ju-
risdiction of U.S. federal courts over extraterritorial terrorist crimes can 
be summarized by listing the offenses embraced by the conventions. Ju-
risdiction exists in nearly all cases of aircraft hijacking and other danger-
ous interference with civil aviation, as well as in most cases of violence 
against internationally protected persons and officials of the United 
States government. It extends to the taking of hostages and the wrongful 
appropriation of or interference with nuclear material.

\(^{118}\) Although U.S. courts have traditionally espoused a strict territorial theory of jurisdic-
tion, many have been willing in practice to extend territorial jurisdiction to comprehend extra-
territorial criminal acts that have effects within the country. M. BASSIOUNI, supra note 19, at 
217. See, e.g., Ford v. United States, 278 U.S. 593 (1927) (British subjects on British vessel on 
the high seas were properly convicted of conspiracy to violate United States liquor laws); 
United States v. Baker, 609 F.2d 134 (5th Cir. 1980) (U.S. court had jurisdiction over offense 
of possessing 26 tons of marijuana aboard a U.S. vessel on the high seas); United States v. 
Winter, 509 F.2d 975 (5th Cir.), cert. denied, 423 U.S. 825 (1975) (court had jurisdiction over 
entire conspiracy, including extraterritorial acts of Jamaican co-conspirators who never en-
tered United States, when the object of the conspiracy was importation of marijuana into the 
United States and a conspirator had committed an overt act in United States territory; Sachs v. 
Gov't of Canal Zone, 176 F.2d 292 (5th Cir. 1949) (U.S. citizen was properly convicted of 
criminal libel when he composed document in a foreign country but intended it for distribution 
in United States territory). Furthermore, several U.S. cases have explicitly held that Congress 
may extend the reach of national law to acts of U.S. citizens abroad under the protective or 
nationality theories. United States v. Bowman, 260 U.S. 94 (1922); Blackmer v. United States, 
284 U.S. 421 (1932); United States v. Kaercher, 720 F.2d 5 (1st Cir. 1983); Brulay v. United 
States, 383 F.2d 345 (9th Cir. 1967). Although Reid v. Covert, 354 U.S. 1 (1957), and McEl-
roy v. United States ex rel. Gagliardo, 361 U.S. 281 (1960), held unconstitutional, at least in 
time of peace, 10 U.S.C. § 802(11) (1956), which subjects civilians serving with, employed by, 
or accompanying the armed forces overseas to the Uniform Code of Military Justice, the con-
stitutionally infirm aspect of § 802(11) was not the reach of U.S. jurisdiction but the extension 
of military judicial procedures to civilians.
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To be sure, some of the U.S. legislation pertaining to extraterritorial jurisdiction was enacted without regard to U.S. participation in the multilateral agreements outlined above. For example, in 1952 the special maritime and territorial jurisdiction law of the United States was amended to cover aircraft belonging to the United States, its citizens, and its corporations, while such aircraft are in flight over the high seas or over waters of the United States.\textsuperscript{119} The amendment was intended to preclude the recurrence of an event like the 1950 dismissal for lack of subject-matter jurisdiction of assault charges based upon conduct that occurred aboard an airliner flying between San Juan and New York.\textsuperscript{120} In 1965, extraterritorial jurisdiction was extended to the killing or kidnapping of, or assault upon, the President and other elected officials of the executive branch, as well as over conspiracies and attempts to carry out such crimes.\textsuperscript{121} Congress extended the same protection to itself in 1971,\textsuperscript{122} and to the Cabinet and Supreme Court in 1982.\textsuperscript{123}

Nonetheless, most of the legislation aimed at gaining U.S. jurisdiction over terrorists has been introduced in direct response to the conventions examined above. The Anti-Hijacking Act of 1974,\textsuperscript{124} for example, amended the Federal Aviation Act of 1948 to redefine “aircraft piracy” along the lines of the Hague and Montreal Conventions, adding “intimidation” to the means by which aircraft piracy could be committed within the statute.\textsuperscript{125} This Act, and its 1977 amendment, also modified the “special aircraft jurisdiction of the United States” to conform generally to the scope of jurisdiction required of contracting states by the Hague and Montreal Conventions.\textsuperscript{126} Moreover, this legislation established U.S. jurisdiction over hijacking “outside the special aircraft jurisdiction of the United States,” incorporating by specific reference hijackings that lack a U.S. nexus other than the offender’s eventual presence.\textsuperscript{127} This Act also added a provision placing attempted hijacking under federal jurisdiction should the failure of the attempt result in the plane’s remaining on the

\textsuperscript{120} United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950).
\textsuperscript{121} 18 U.S.C. § 1751 (1982). In 1982 the statute was amended to include appointed members of the presidential and vice-presidential staffs.
\textsuperscript{123} \textit{Id}.
\textsuperscript{125} 49 U.S.C. app. § 1472(i)(2) (1982). All other means of hijacking covered by the Hague Convention were already prohibited by U.S. law.
\textsuperscript{126} 49 U.S.C. app. § 1301(38) (1982). The formula enacted is needlessly complicated, in that it attempts to graft the Hague and Montreal Convention requirements onto preexisting statutory language, instead of adopting them verbatim.
\textsuperscript{127} 49 U.S.C. app. § 1472(n) (1982).
Together with a new prohibition against placing bombs or incendiary devices aboard civil aircraft, this provision materially satisfies the Montreal Convention requirement for jurisdiction over offenses that occur before takeoff.

In 1972, in response to the killing of Israeli Olympic athletes in Munich, Congress amended the United States Code to federalize the kidnapping and murder of foreign officials and "official guests," a provision that lent some precision to the vagueness of the OAS Convention. Following the New York Convention, in 1976, Congress amended the relevant U.S. statutes to include "internationally protected persons" as a third category of potential victims given special protection. Universal jurisdiction over crimes against such people, required implicitly by the OAS Convention and explicitly by the New York Convention, was adopted by the United States in 1976. U.S. jurisdiction thus exists over offenses against "internationally protected persons" no matter where the offenses occur, if the offender is later present within the United States.

In 1984, responding to the obligation imposed by the Hostages Convention, Congress extended criminal jurisdiction over international hostage-taking with the Comprehensive Crime Control Act of 1984. This legislation defines hostage-taking according to the provisions of the Hostages Convention. Under the Act, the crime, "whether committed inside or outside the United States," is justiciable in U.S. courts if either the offender or a hostage is a national, if the government extorted is the United States, or otherwise if the offender is found in the United States.

Purely domestic hostage-takings—those in which there is no interna-

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130. J. MURPHY, supra note 13, at 23.
133. See supra text accompanying note 85.
134. See supra text accompanying notes 85-90.
135. See supra text accompanying notes 75-79.
136. 18 U.S.C. § 1116(c) (1982). The precise meaning of this universal jurisdiction was examined judicially in 1981 in the trial of a U.S. citizen for the murder of Congressman Leo J. Ryan in Guyana. The defendant contended that, because he had been indicted while still in Guyana, he had not been "present" in the United States and his indictment must be quashed. The court agreed with this argument, but found that the grand jury properly exercised jurisdiction over the offense based upon alternative theories, including effects within the territory, protection of state interests, passive personality, and nationality. United States v. Layton, 509 F. Supp. 212 (N.D. Cal.), appeal dismissed, 645 F.2d 681 (9th Cir.), cert. denied, 452 U.S. 972 (1981).
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tional element and the entity compelled is not the U.S. government—are covered by state law under this statute.\(^{139}\)

Although the Convention on the Physical Protection of Nuclear Material is not yet in force, the United States has already extended its jurisdictional authority to deal with the international crimes created by the agreement.\(^{140}\) In addition to establishing jurisdiction over offenses within U.S. territory,\(^{141}\) committed by U.S. nationals,\(^{142}\) or committed by offenders later found in the United States—mandatory under the Convention—Congress has extended jurisdiction over other offenses where the United States is the exporter or importer of nuclear material in transit, regardless of the national registration of the carrier or situs of the offense.\(^{144}\)

Moreover, in implementing its anti-nuclear terrorism law, the United States went further than the Convention in proscribing certain other offenses in order to "render the protection of nuclear material complete."\(^{145}\) For example, although the Convention is limited in scope to the protection of nuclear material used for peaceful purposes,\(^{146}\) U.S. jurisdiction now comprehends unlawful interference with military nuclear material if undertaken within U.S. territory or by a U.S. national.\(^{148}\)

In late 1986, the United States went beyond the requirements of any of the Conventions to bring within U.S. criminal jurisdiction all homicides, attempts to commit homicide, or conspiracies to commit homicide of a U.S. national outside the United States.\(^{149}\) In so doing, it embraced for the first time the passive personality theory of jurisdiction. However, such legislation was really the only possible way for national law to reach the seemingly random murder of ordinary persons who appear to have no link with the terrorists' political goals except their U.S. nationality.

No prosecution under this statute may be undertaken without certification by the Attorney General or his highest ranking subordinate that the offense was intended to coerce, intimidate, or retaliate against a govern-

\(^{139}\) 18 U.S.C. § 1203(b)(2) (Supp. III 1985). For the responses of some states to this offense when it lacks an international character, see LEGISLATIVE RESPONSES TO TERRORISM, supra note 18.
\(^{141}\) Id. § 831(c)(1). "Territory" includes the special maritime and territorial jurisdiction and special aircraft jurisdiction of the United States. Id.
\(^{142}\) Id. § 831(c)(2).
\(^{143}\) Id. § 831(c)(3).
\(^{144}\) Id. § 831(c)(4).
\(^{146}\) Nuclear Material Convention, supra note 107, art. 2.
\(^{147}\) See supra note 141.
\(^{148}\) See supra note 142.
ment or a civilian group. The death penalty is not an authorized punishment under the statute.

The question naturally arises whether there are other fields of terrorist endeavor toward which multilateral conventions and domestic statutory reforms should be directed. Currently, U.S. jurisdiction does not appear to reach several types of terrorist activities. For example, U.S. laws may not reach such crimes as the hijacking of commercial vessels on the high seas, armed attack upon passengers waiting in crowded airports, and the use by terrorists of threats of deadly chemical or biological poisoning to compel government action. Such shortcomings in U.S. jurisdiction must be corrected if the United States hopes to combat terrorism effectively.

It appears, however, that the movement favoring the creation of new international terrorist crimes may have run its course, at least for the time being. The inability of the 1979 Convention on the Physical Protection of Nuclear Material to win quick ratification illustrates that, even where the threat is logical and apparent, but not yet a common international occurrence, the world community will be slow to consider itself endangered and to act accordingly. In the absence of continued multilateral progress, the best chance for necessary adjustments in international jurisdiction lies in regional and bilateral agreements between states that share certain characteristics making them susceptible to particular forms of terrorist action. These common characteristics may include a relatively high proportion of affluent international travelers, economic dependence upon significant levels of international tourism, and an inability to establish acceptable security near vulnerable targets because of high societal expectations of individual privacy. Of course, if no regional or bilateral progress is made, the United States will need to extend its jurisdiction unilaterally.

II. Jurisdiction over the Person of the Offender

The establishment by an offended state of competence to adjudicate an offense solves only half the jurisdictional problem associated with international terrorism. The offended state must also obtain jurisdiction over the person of the alleged offender, someone who is likely to be beyond the reach of state law. Extradition is the ordinary mechanism for exercising personal criminal jurisdiction over an offender not found within the prosecuting state.
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A. Extradition and the Terrorist

1. General Principles of Extradition

Extradition has been defined as "the process by which persons charged with or convicted of a crime against the law of a State and found in a foreign State are returned by the latter to the former for trial or punishment." The states involved are referred to as the "requesting" and "requested" state, respectively. The formal request, a "requisition," names the person claimed by the requesting state.

Formal procedures for the transfer of fugitives between sovereigns date from the time of the Egyptian, Assyro-Babylonian, and early Chinese civilizations. However, modern scientific developments in mass transportation and communications have made it easier for criminals to seek refuge in foreign countries, a fact which is reflected in the increasing numbers of aircraft hijackings since the early 1970's. As a result, extradition has become a growth industry in recent years. While the United States generally received fewer than ten international extradition requisitions per year prior to 1970, this number grew during the last decade, reaching 150 in 1979, and 218 in 1980.

No rule of customary international law requires a state to comply with an extradition request; the obligation to extradite, if any, arises purely out of prior bilateral agreement, usually in the form of an extradition treaty. Some states, however, will extradite in the absence of a treaty while others will not. Along these lines, the U.S. Supreme Court has held not only that there is no duty to extradite absent a treaty, but also that no authority exists to extradite under U.S. law except by legislation or treaty.

150. 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 727 (1942); see also Harvard Research, supra note 25, at 21.
151. Id.
152. M. BASSIOUNI, supra note 19, at 1.
153. Id. at 37.
154. See supra note 53.
156. J. MURPHY, supra note 13, at 36. For a summary of the disputes among international law publicists on this point, see Blakesley, Extradition Between France and the United States: An Exercise in Comparative and International Law, 13 VAND. J. TRANSNAT'L L. 653, 656 n.6 (1980).
157. France exemplifies this "continental theory and practice." Blakesley, id. at 656.
The United States is party to the most extensive network of bilateral extradition treaties, some of them now outdated, in the world. It considers itself confined as a matter of policy as well as law to extraditing only to those states with which it has concluded such a treaty. Thus, although the multilateral anti-terrorist conventions previously discussed contain as a central element mechanisms for extraditing offenders, the United States declines to recognize them as proper bases for extradition.

Despite its dependence upon the specific terms of individual treaties, U.S. extradition practice is characterized by a number of standard provisions. Restrictions upon double jeopardy, for example, appear in nearly all U.S. extradition treaties, even those concluded with countries in which foreign conviction is not a bar to prosecution on the same facts. The principle of double criminality, requiring that the offense on which the requisition is based be a crime in both states party to the request, provides another limitation, as does the principle of speciality, which prohibits the prosecution by the requesting state of the person claimed for any offense other than that for which he is extradited. The most significant limitation of all, however, is provided by the political offense exception.

2. The Theory Behind the Political Offense Exception to Extradition

Commentators have pointed out that, although the existence of an exception from extradition for political offenders is a matter of international consensus, there is still a great deal of debate as to its practical application and theoretical underpinnings. Some commentators have described the political offense exception as a “concept . . . vitally related to the protection of human rights.” Yet the relationship between the
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political offense exception and human rights is open to question. After all, a state may surrender an accused political criminal without offending any rule of international human rights law.\textsuperscript{171} Even where a treaty does not require the extradition of political offenders, these offenders may be extradited by a state for foreign policy reasons.\textsuperscript{172} Thus the human rights rationale does not provide a convincing explanation for the political offense exception. The exception is designed primarily to promote the rights of states, not individuals.\textsuperscript{173}

Alternatively, some observers have argued that the exception is a means by which states can remain neutral in the internal power struggles of their neighbors.\textsuperscript{174} Thus, the decision of whether or not to exercise the exception is, in large part, a matter of foreign policy. But this rationale does not accord sufficient weight to the fact that the exception is enforced by the judiciary, along with or in place of the executive, in many states.\textsuperscript{175} Finally, there are those who believe that the citizens of a state are entitled to participate in political activity to change their government, in spite of prohibitions against such activity under most repressive regimes.\textsuperscript{176} In other words, they contend that political offenses are not inherently criminal because they arise out of legitimate social rather than personal motives.\textsuperscript{177} The political offense exception, however, makes no theoretical distinction between rebels against oppressive states and political offenders in liberal democracies, where alternative means of governmental change are available. Moreover, reliance upon the motivation of the offender tends to overlook the harmful effects of political violence on individuals, as well as the threat such violence poses to international order.

There is further disagreement as to precisely what constitutes a political offense falling within the exception. There is no question\textsuperscript{178} about offenses that are directed against the state and possess none of the ele-

\textsuperscript{171} Harvard Research, \textit{supra} note 25, at 66, 110.
\textsuperscript{172} Chandler v. United States, 171 F.2d 921, 935 (1st Cir. 1948), \textit{cert. denied}, 336 U.S. 918 (1949).
\textsuperscript{173} \textit{See} Garcia-Mora, \textit{supra} note 170, at 1227-28.
\textsuperscript{174} \textit{See} C. \textsc{Van den Wijngaert}, \textit{supra} note 169, at 3.
\textsuperscript{175} "Purely executive decisions with respect to extradition are rather exceptional today." \textit{Id.} at 38.
\textsuperscript{177} C. \textsc{Van den Wijngaert}, \textit{supra} note 169, at 3; Argentina v. Camporas, LIV Revista de Derecho, Jurisprudencia y Ciencias Sociales y Gaceta de los Tribunales 197 (Supreme Court of Chile 1957), summarized in \textit{Report of the Law Librarian}, \textit{supra} note 158, at 446-47.
\textsuperscript{178} \textit{See} Bassiouni, \textit{supra} note 168, at 405-08.
ments of an ordinary crime,\textsuperscript{179} including treason,\textsuperscript{180} sedition, and espionage.\textsuperscript{181} To deal with ambiguous crimes that contain both political and common elements, however, commentators have created a confusing array of relative, mixed, complex, and connected offenses.\textsuperscript{182} The "complex" and "connected" classification system has lost its significance; most modern writers speak only of purely political offenses and related, or relative, political offenses. Related or relative offenses consist of all those common crimes which are committed for a political purpose and have political consequences or occur in a political context.\textsuperscript{183}

Most extradition treaties reject the extradition of fugitives charged with or convicted of relative political offenses.\textsuperscript{184} Given the open-ended definition of these offenses, and the freedom of each state to establish their scope, it is not surprising that "[t]he difficulty of obtaining a common definition of 'political offense' in extradition matters is notorious . . . ."\textsuperscript{185} In addition, the debate continues over who should be responsible for settling this confusion, the legislature or the judiciary.

3. Making the Political Offense Decision: Judicial Interpretation or Executive Discretion

The institutional arrangements by which states make political offense determinations are extraordinarily diverse. Purely executive systems, once the general rule, are rare today.\textsuperscript{186} They still exist, however, in Ecuador, Spain, Canada, and Germany.\textsuperscript{187} Purely judicial systems are found in Brazil,\textsuperscript{188} Chile,\textsuperscript{189} France,\textsuperscript{190} and Israel.\textsuperscript{191} In the United

\textsuperscript{179} Eain v. Wilkes, 641 F.2d 504, 512 (7th Cir. 1981).
\textsuperscript{181} Garcia-Mora, supra note 170, at 1237; Cantrell, supra note 176, at 780; Harvard Research, supra note 25, at 112.
\textsuperscript{182} C. Van Den Wijngaert, supra note 169, at 108.
\textsuperscript{183} Id. at 108; see also Bassiouni, supra note 168, at 408-12. In a relative political offense, the common crime is so connected with a political act that the entire offense is regarded as political. Eain v. Wilkes, 641 F.2d at 512 (quoting Garcia-Mora, supra note 170, at 1230-31). For a more thorough discussion of pure and relative political offenses in a recent case, see the magistrate's extradition opinion in Ex rel. Mackin, reprinted in Hearing on S. 1639, supra note 155, at 140, 162-65.
\textsuperscript{184} Garcia-Mora, supra note 170, at 1239.
\textsuperscript{185} Costello, supra note 16, at 490.
\textsuperscript{186} C. Van Den Wijngaert, supra note 169, at 38.
\textsuperscript{187} Id. Apparently, however, a Spanish executive decision that the exception does not apply may be appealed to a criminal court. Report of the Law Librarian, supra note 158, at 465-66.
\textsuperscript{188} Id. at 441.
\textsuperscript{189} Id. at 444-45.
\textsuperscript{190} Id. at 448-55.
\textsuperscript{191} Id. at 460.
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Kingdom, the Secretary of State makes the political offense determination, with review upon habeas corpus by a court.\textsuperscript{192}

In most countries, the decision is made by the executive, with the assistance of an advisory opinion by a judicial body. In Italy,\textsuperscript{193} Austria,\textsuperscript{194} and Switzerland,\textsuperscript{195} a judicial opinion to the effect that the offense is not extraditable is binding on the executive. In Belgium,\textsuperscript{196} India,\textsuperscript{197} Japan,\textsuperscript{198} Peru,\textsuperscript{199} and Mexico,\textsuperscript{200} by contrast, a judicial opinion that the offense in question is political need only be taken into consideration by the executive. However, as a practical matter, in the latter states the executive rarely overrules a judicial determination of non-extraditability.\textsuperscript{201}

United States extradition practice is largely codified at 18 U.S.C. §§ 3181-3195, which contemplate a requisition made by a foreign sovereign to the Secretary of State. After the State Department approves the request, it forwards papers to the U.S. attorney in the district in which the person claimed may be found.\textsuperscript{202} The U.S. attorney files for an arrest warrant with "any justice or judge of the United States, or any magistrate," or any judge of a state court of record and of general jurisdiction.\textsuperscript{203} If a warrant is issued, a hearing is held to consider the sufficiency of the evidence to make out an offense "under the provisions of the proper treaty or convention."\textsuperscript{204}

Neither party has a right to appeal from an adverse extradition decision, but the person claimed may seek a writ of habeas corpus.\textsuperscript{205} The scope of habeas corpus review is limited, however, with due deference paid to the magistrate's decision.\textsuperscript{206}

If, on the other hand, extradition is

\begin{itemize}
\item \textsuperscript{192} Id. at 485-86.
\item \textsuperscript{193} A judicial decision that the offense is not political, however, does not require the Minister of Justice to accede to the extradition request. \textit{Id.} at 461-62.
\item \textsuperscript{194} The Federal Minister of Justice has the same discretion as his Italian counterpart in cases in which the court does not prohibit extradition. \textit{Id.} at 436.
\item \textsuperscript{195} After the Federal Tribunal finds that the offense for which extradition is requested is not a political one, the Federal Council may still disapprove extradition if it believes that the person claimed will nonetheless be investigated or prosecuted for political reasons. \textit{Id.} at 477.
\item \textsuperscript{196} \textit{Id.} at 439-40; C. \textit{Van Den Wingaert}, \textit{supra} note 169, at 38-39.
\item \textsuperscript{197} Report of the Law Librarian, \textit{supra} note 158, at 480-81.
\item \textsuperscript{198} C. \textit{Van Den Wingaert}, \textit{supra} note 169, at 38-39.
\item \textsuperscript{199} \textit{Id.}
\item \textsuperscript{200} \textit{Id.; see also} Report of the Law Librarian, \textit{supra} note 158, at 463-64.
\item \textsuperscript{201} C. \textit{Van Den Wingaert}, \textit{supra} note 169, at 38-39.
\item \textsuperscript{202} This procedure is summarized in Eain v. Wilkes, 641 F.2d at 508.
\item \textsuperscript{203} 18 U.S.C. § 3184 (1982).
\item \textsuperscript{204} \textit{Id.} The last two words are interesting in light of U.S. policy to proceed with extradition requests only under bilateral treaties, and not under multilateral anti-terrorist conventions. \textit{See supra} text accompanying notes 162-63.
\item \textsuperscript{205} \textit{Hearings on S. 1639}, \textit{supra} note 155, at 3 (statement of Daniel McGovern).
\item \textsuperscript{206} Collins v. Miller, 252 U.S. 364, 369 (1920); Ornelas v. Ruiz, 161 U.S. 502, 508-09 (1896); David v. Attorney General, 699 F.2d 411, 413 (7th Cir. 1983) (it was proper for the same judge to preside at appellant's extradition hearing and at his habeas corpus hearing);
denied, the Secretary of State has been permitted "to shop for a more receptive magistrate." In a recent case, a district court questioned this practice of seeking "unlimited repetitions" of unsuccessful extradition hearings; the court asked whether such behavior "comports with the dignity of the United States Attorney's office."

Like the system in use in most countries, the U.S. system can be characterized as mixed executive-judicial; the United States, however, is unusual in that it refers the political offense issue automatically from the executive to the judiciary for final decision. Although this deference to judicial decision-making has been criticized as having "no particularly apparent reason" behind it, it has been recognized by U.S. law at least since the 1894 case of In re Ezeta.

The U.S. statutory arrangement has been the focus of considerable controversy for much of the present decade. For example, the Senate version of the Extradition Act of 1981, developed with the cooperation of both the State and Justice Departments, sought to place all responsibility for the political offense determination with the Secretary of State with no possibility of judicial review. Although this approach was favored by both the Carter and Reagan Administrations, it met with "a

Escobedo v. United States, 623 F.2d 1098, 1101 (5th Cir. 1980), cert. denied, 449 U.S. 1036 (1980); Eain v. Wilkes, 641 F.2d at 508.


It should be noted that there exists substantial room for executive discretion in current U.S. practice but that it operates only in the direction of denying extradition. That is, should the administration wish, it may declare the claimed person a refugee—one who is unable to return to the country of his nationality because of a well-founded fear of persecution on account of political opinion—and grant the person asylum on that basis. In a recent case, the Supreme Court held that an applicant is entitled to consideration of his request for asylum upon demonstration of such a largely subjective fear. I.N.S. v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987).


62 F. 972 (N.D. Cal. 1894) (holding that, where the persons claimed were high-ranking Salvadoran army officers charged with murder and other crimes in the course of their unsuccessful resistance to a revolution, the magistrate properly determined that their offenses were political in nature). An extradition hearing before a judicial officer is apparently not required as a matter of constitutional due process. See Sayne v. Shiplely, 418 F.2d 679, 686 (5th Cir. 1969) (the statute’s grant of extradition authority exclusively to the Governor of the Canal Zone was not unconstitutional, in that due process requirements were satisfied by the availability of habeas corpus).

In Eain v. Wilkes, the United States argued that the judiciary's historic jurisdiction over political offenses was anomalous and improper, but the court swept the argument aside. 641 F.2d at 516. Federal courts have unanimously rejected the argument that the political offense exception is a nonjusticiable political question. Quinn v. Robinson, 783 F.2d 776, 782-85 (9th Cir. 1986). On legislative proposals for reform, see generally Hannay, supra note 210.

Id. at 53.

Id. at 61 n.27.
barrage of criticism . . . from civil liberties groups who . . . perceived the legislation as a direct assault on due process."215 Because of this opposition, the Act was never passed.

Supporters of executive discretion have argued that "it is impossible—and ultimately improper—for a court to try to define what constitutes a 'political offense' by means of some hard and fast rule or test . . . . [The exception] was created to give the requested state flexibility in responding to extradition requests . . . ."216 A State Department representative described the problem in this way at a recent congressional hearing:

[A] public court proceeding is not an appropriate or desirable forum for a careful analysis of a foreign state's intentions or political system. Rather, a decision on the 'political offense' exception is, as the name suggests, inescapably political in nature and inextricably intertwined with the conduct of foreign relations . . . . The potentially crippling effect of [judicial] decisions on foreign affairs is particularly great where it could compromise U.S. efforts to combat international terrorism.217

Professor Bassiouni, however, has suggested a less far-reaching reform. He advised a congressional committee to set up legislative guidelines for the judiciary or, alternatively, to enact legislative guidelines for the Secretary of State to apply with some mechanism for review.218 Professor Bassiouni's first proposal—to impose a legislative definition upon the existing judicial mechanism—seems more in keeping with the U.S. legal tradition than the State Department's proposal and would require a less disruptive change in extradition procedure. In addition, it would eliminate the greatest single drawback of the present arrangement: a disturbing unpredictability in magistrates' holdings. Elected representatives would be able to fine-tune the system on a continuing basis, without the interference caused by subjective changes in judicial standards.

Professor Bassiouni's second proposal—to entrust extradition decisions to the executive while leaving available habeas corpus review to the person claimed—also has merit. This change would mirror, in effect, the present English system. It would allow the executive to maintain control over day-to-day foreign relations, but would retain judicial supervision of individual cases. Such an arrangement would also satisfy

215. Id. at 61-62.
217. Id. at 4 (statement of Daniel McGovern, Deputy Legal Adviser to the State Department).
218. Id. at 21 (testimony of M. Cherif Bassiouni). Advocates of executive discretion oppose such guidelines because they may also be applied to those whose violence is seen as advancing U.S. foreign policy, or whom we perceive as admirable rebels in legitimate causes. See Hannay, supra note 210, at 64.
constitutional requirements of due process in a way that purely executive discretion would not.\textsuperscript{219} 

The debate over the proper extradition standard will undoubtedly continue. Indeed, the imposition of judicial standards governing the political offense determination is a feature of both the proposed International Terrorism Control Act of 1985\textsuperscript{220} and the recently ratified Supplementary Extradition Treaty with the United Kingdom.\textsuperscript{221} 

4. The Substantive Law of the Political Offense Exception: Civil Law and Common Law Approaches 

The concept of the political offense as a limitation on extradition is relatively recent. The political offense exception was not introduced until 1834, when France began incorporating it in treaties.\textsuperscript{222} Since that time, the exception has become increasingly common in European extradition treaties. 

As the exception developed, a rough distinction in the treatment of the “relative” political offense emerged between civil law and common law countries. The former have paid more attention to the subjective motivations of the offender,\textsuperscript{223} while the latter have focused more on objective features of the offense or its context.\textsuperscript{224} To be sure, civil law approaches vary. German courts use the more objective standard,\textsuperscript{225} while French courts have been considered more subjective.\textsuperscript{226} France, for example, refused a U.S. request for the extradition of two hijackers in 1975 on political offense grounds because, in addition to extorting $500,000 from the owner of the aircraft, the hijackers had made vague references to their 219. For a discussion of these due process requirements, see, e.g., Sayne v. Shipley, 418 F.2d 679 (1969).
220. See supra note 149.
222. Volger, Perspectives on Extradition and Terrorism, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES, supra note 16, at 391-92. For a concise summary of the political offense exception, see C. VAN DER WUINGAERT, supra note 169, at 4-18.
223. Bassiouni, supra note 168, at 421-30, discerns a further distinction between the French “injured rights” theory and the “political motivation” theory which characterizes the approach of much of the rest of Europe. He notes, however, that French courts use injured-rights analysis as part of a broader motivational consideration. Id. at 421-22. Professor Garcia-Mora makes this point as well. Garcia-Mora, supra note 170, at 1249-50.
225. See id. at 120-26.
226. Id. But see Carbonneau, French Judicial Perspectives on the Extradition of Transnational Terrorists and the Political Offense Exception, in INTERNATIONAL ASPECTS OF CRIMINAL LAW 66, 76 (R. Lillich ed. 1981) (arguing that precise characterization of the French approach is difficult, but that it is becoming more ad hoc).
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opposition to the Vietnam war and support for Angela Davis.\(^{227}\) It appears, however, that French courts have recently been using a mixed subjective-objective analysis,\(^{228}\) especially where the offense in question has caused the death of innocents.\(^{229}\)

Switzerland is a civil law country whose political offense jurisprudence has elicited praise from commentators. Its approach is based on the Swiss Extradition Act of 1982, which makes unextraditable crimes that are “primarily political.” The guiding principle, “proportionality,” has been developed and clarified by the courts. First, the offense must have been committed in the course of a struggle for political power.\(^{230}\) Second, the political element of the act must predominate over its common crime aspect.\(^{231}\) This idea was described in one case as “the principle that the relation between the purpose and the means adopted for its achievement must be such that the ideals connected with the purpose are sufficiently strong to excuse, if not justify, the injury to private property, and to make the offender appear worthy of asylum.”\(^{232}\) As a result, extremely serious crimes may automatically be disproportionate to their political ends; homicide in particular must be justified as a last resort.\(^{233}\)

The common law approach is illustrated by the landmark English case of In re Castioni.\(^{234}\) A number of citizens of a Swiss canton revolted against their government, seized an arsenal, and stormed the municipal palace. Castioni, armed with a revolver, was among the first to enter. A member of the State Council resisted their entrance and was killed. There was no evidence that Castioni had any previous knowledge of the victim. The court held that any homicide that Castioni might have committed was “done in furtherance of . . . a political rising, or a dispute

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\(^{227}\) Although the decision of the Cour d’appel in Paris is unpublished, the facts are described in J. Murphy, supra note 13, at 53. The U.S. memorandum of law submitted in the case, as well as a U.S. note delivered to the French government as a result of the decision, are reprinted in E. McDowell, Digest of United States Practice in International Law 168-75 (1975). In fact, the United States did not abandon its 14-year effort to extradite the pair and, in a little-reported conclusion, the French court reversed its decision with respect to one of the hijackers, Willie Roger Holder, in July 1986. See Raleigh News and Observer, July 28, 1986, at 2A, col. 4.

\(^{228}\) See Carbonneau, supra note 226, at 76.

\(^{229}\) C. Van den Winggaert, supra note 169, at 121-26 (1980). Still, the courts, relying on subjective analysis of the offender’s motivations, are subject to criticism for their failure to consider the possible political hostility of the requesting state toward the person claimed. Id. at 126.

\(^{230}\) Id. at 127.

\(^{231}\) Garcia-Mora, supra note 170, at 1254-56.

\(^{232}\) In re Kavic (1952), Int’l L. Rep. 371, 374 (No. 80) (Switz.).

\(^{233}\) C. Van den Winggaert, supra note 169, at 129. In the Argentine case of In re Bohme, 62 Am. J. Int’l L. 784 (1968), the court implies a proportionality criterion when it states “extradition will not be denied . . . where we are dealing with cruel or immoral acts which clearly shock the conscience of civilized peoples.”

\(^{234}\) [1891] 1 Q.B. 149 (1890).
between two parties in the State as to which is to have the government in its hands," and was therefore a political offense within the meaning of the Extradition Act of 1870. The *Castioni* "political incidence" theory created a two-part standard. First, it required that a political revolt or disturbance be in progress. Second, the act for which extradition was sought had to have been incidental to that disturbance.

The case of *In re Meunier* further defined the common law standard. In that case, a self-proclaimed anarchist was sought by France for committing a series of bombings. The court found that Meunier's offenses fell outside the protection of the political offense exception in that "the party with whom the accused is identified . . . is the enemy of all Governments. Their efforts are directed primarily against the general body of citizens." After *Meunier*, to fall under the political offense exception a political disturbance had to be directed at replacing an existing government with a new one, and not merely at promoting social chaos.

The political incidence test was loosened considerably by the holding in the more recent *Kolczynski* case, in which an English court confronted the implications of modern totalitarianism. A group of seven Polish seamen mutinied and brought their trawler into port in England, seeking political asylum. A brother of one of them had defected from Poland while the trawler was at sea. His defection resulted in increasingly close observation of the defector's brother and his friends by the vessel's party secretary. The men, believing that they would be punished by the state upon their return to Poland, decided to defect also and thus initiated the mutiny. In resisting their extradition, counsel for the sailors admitted that "at the present time there is no active political opposition to the Communist Party in Poland." Thus, if *Castioni* and *Meunier* were strictly applied, the offenses would be held nonpolitical. The court therefore looked behind the crimes in the formal requisition, finding that "if [the defectors] should be extradited they may well only be tried for

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235. *Id.* at 156 (opinion of Denman, J.).
236. 33 & 34 Vict., ch. 52.
238. [1894] 2 Q.B. 415 (1894).
239. *Id.* at 419.
240. Professor Garcia-Mora criticized the *Castioni-Meunier* standard as "too narrow to afford adequate protection to deserving individuals" because the contemporary political offender may act alone, without benefit of an ongoing state of insurrection. Garcia-Mora, *supra* note 170, at 1242. The point is well taken that one should not be denied protection because of the absence of a state of insurrection, but the argument that *Meunier* denies protection to the person acting alone is unconvincing. Meunier's qualification of *Castioni* was a positive step in its limitation of protection to genuine revolutionaries and refusal to extend exemption to the individual for whom violence itself is the goal.
242. *Id.* at 544.
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the offences for which their extradition is requested, but they will be punished as for an offence of a political character, and that offence is treason in going over to the capitalist enemies.”243 Chief Judge Lord Goddard added, “[t]he evidence about the law prevalent in the Republic of Poland today shows that it is necessary, if only for reasons of humanity, to give a wider and more generous meaning to the words we are now construing . . . .”244

Kolczynski represented a liberalized, ad hoc, common law approach to the political offense exception that took into account all relevant facts, including the nature of the system which proposed to punish the person claimed.245 Its effect was soon blunted, however, beginning with the House of Lords’ 1962 decision in Schtraks v. Government of Israel.246 The case concerned a Jewish fundamentalist who had allegedly kidnapped his nephew from the boy’s parents in Israel and brought him to Britain for the purpose of preventing his secular education. The role of religion in education was a sensitive political issue in Israel at the time, and this particular case aroused debates in the Knesset.247 Although the formal charges were child-stealing and perjury, Schtraks contended that he committed these offenses in a political context. The House of Lords found that the political disturbance in the case fell short of Castioni standards and extradited Schtraks, but they failed to clarify further the meaning of “political offense” under Castioni.

Tsu-Tzai Cheng v. Governor of Pentonville Prison,248 the most recent English case of consequence on the political offense issue, did not adopt the liberalized approach of Kolczynski, but, unlike Schtraks, it did expand the scope of Castioni. Cheng was a Taiwanese dissident who attempted to assassinate the vice-president of that country during the latter’s visit to New York. Cheng then fled to Sweden, from which the United States sought his extradition. Applying a proportionality analysis, the Swedish Supreme Court noted that “the fact that an act has a political motivation is not enough to make it a political crime, . . . especially when we are dealing with the kind of crimes that generally are considered to be the most heinous, such as murder and the like.”249 The court unanimously permitted his extradition. On his way to the United States Cheng was hospitalized in England, where he resisted extradition once again. Adding to Castioni what has become known as the “at odds”

243. Id. at 548 (opinion of Cassels, J.).
244. Id. at 551 (opinion of Goddard, C.J.).
245. See Cantrell, supra note 176, at 786-87; R. Friedlander, supra note 14, at 79.
247. Id. at 534-35.
test, the House of Lords allowed him to be extradited again by ruling that the political offense exception only applied if the government requesting extradition was the one against which the political offense had been directed.

5. The Political Offense Exception Under U.S. Law

United States treatment of the political offense question has been characterized by a rather mechanical application of Castioni. In testimony before the Senate Committee on the Judiciary, Professor Bassiouni described U.S. policy as follows:

Historically the U.S. courts have recognized that for the application of the relative political offense exception the context must be one of war, insurrection, or civil strife; that the individual engages in an act of violence against the State or its political institutions or structure; and that there is a logical nexus between the motives and intentions of the individual and the target that he selects, excluding, of course, international crimes.

Reliance on Castioni's political incidence test by U.S. courts appears to have originated in the 1894 case of In re Ezeta. The Ezeta court discussed Castioni at length before concluding that the Salvadoran officers before it were political offenders, having allegedly committed otherwise common crimes in the course of their unsuccessful resistance against the overthrow of their government in “a political uprising.”

Since Ezeta, however, the courts have failed to produce a workable doctrine. Rigid adherence to the political uprising requirement has produced conflicting results and, for the most part, has reduced the analysis of individual cases to a formalism that has impeded the development of political offense law in the United States. The disparate outcomes of several recent cases illustrate the problem.

The first of these is In re McMullen, which concerned a British army deserter accused of bombing a military barracks in Yorkshire. At his extradition hearing, the defendant argued that the Provisional Irish Republican Army (PIRA), of which he was a member, had directed the bombing. The government contended that the bombing was personally motivated and unrelated to any PIRA activities. The magistrate dismissed the government’s position as without merit in view of the Irish

250. See C. Van Den Wijngaert, supra note 169, at 113-16.
251. Hearing on S. 1639, supra note 155, at 56-60 (statement of William H. Hannay).
252. Id. at 25 (statement of Professor M. Bassiouni).
253. 62 F. 972 (N.D. Cal. 1894).
254. Id. at 998-99.
255. Id. at 1002.
256. No. 3-78-1899 MG (N.D. Cal. 1979), reprinted in Hearing on S. 1639, supra note 155, at 294.
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“political disturbance, with terrorist activity spanning a long period of time,” and found further that McMullen’s offense was “a crime incidental to and formed as a part of a political disturbance, uprising or insurrection and in furtherance thereof.”\(^{257}\) The magistrate refused extradition.

The second major U.S. political offense case of the decade, *Escobedo v. United States*,\(^ {258}\) concerned an attack by U.S. citizens upon the Cuban consul and an associate in Mexico City, resulting in the associate’s death. The alleged assailants fled to the United States after their failed attack. Mexico charged that they had planned to kidnap the consul and release him in exchange for political prisoners held by Cuba. The Fifth Circuit, on appeal of denial of habeas corpus, observed that the prisoners claimed the protection of the political offense exception without contending that they acted in the course of a violent political insurrection, and therefore rejected the claim.\(^ {259}\)

Like *McMullen*, the third case, *In re Mackin*,\(^ {260}\) involved a member of the PIRA. Mackin was charged with attempted murder and wounding with intent to do grievous bodily harm; the offense arose out of an armed assault upon a British soldier in Northern Ireland. The magistrate used a three-part analysis in deciding the applicability of the political offense exception and concluded that: (1) there was “an ongoing political uprising of sufficient severity to satisfy the first prong of the political offense exception”;\(^ {261}\) (2) Mackin was a member of the uprising group, the PIRA, and acted not out of personal ill will toward the victim but in accord with political goals;\(^ {262}\) and (3) Mackin’s act was in furtherance of the uprising.\(^ {263}\) The United States appealed the *Mackin* denial of extradition, but the Court of Appeals found itself without jurisdiction to decide more than that the magistrate had acted within her jurisdiction.\(^ {264}\)

While some federal courts have tried to be innovative and flexible in applying the political offense exception, their success has been hampered by ultimate reliance on the traditional political uprising standard.\(^ {265}\) For

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\(^{257}\) *Id.* at 295.

\(^{258}\) 623 F.2d 1098 (5th Cir. 1980).

\(^{259}\) *Id.* at 1104.


\(^{261}\) *Id.* at 222.

\(^{262}\) *Id.* at 230.

\(^{263}\) *Id.* at 236-37, relying in part upon the requesting state’s intention to try Mackin under extraordinary procedures as a terrorist.

\(^{264}\) Utah of Mackin, 668 F.2d 122 (2d Cir. 1981).

\(^{265}\) *Ornelas v. Ruiz*, 161 U.S. 502 (1896), the Supreme Court’s only pronouncement on the political exception issue, also advocated a more *ad hoc* approach. The case arose from a raid on a Mexican town by an armed band. The Court reversed a finding that the offenses
example, in *Eain v. Wilkes*, a U.S. magistrate found that the crime of the plaintiff, a member of the Palestine Liberation Organization accused of exploding a bomb during a "youth day" rally in the Israeli city of Tiberias, was not unextraditable under the political offense exception. Eain then sought a writ of habeas corpus. On appeal the Seventh Circuit relied upon *In re Meunier* and *Ornelas v. Ruiz* to find that Eain's offense was directed not against the Israeli government but against its citizenry; thus, it could not be incidental to, or in the course of, any political disturbance then in progress in Israel.

In *Matter of Doherty*, the United Kingdom sought extradition of a person convicted of murder, attempted murder, and illegal possession of firearms and ammunition, and charged with further offenses related to his escape from prison while awaiting sentencing. The offenses for which PIRA member Doherty had already been tried arose out of an exchange of gunfire in Belfast, Northern Ireland, between British soldiers and members of the PIRA. In denying extradition, the court considered the history of political violence in Ireland, as well as the organizational structure of the PIRA, and found that the case presented "the assertion of the political offense exception in its most classic form." The judge did add, however, that British use of "Diplock courts," which employ special procedures for the trials of alleged PIRA members and the existence of which was an influential factor in the *Mackin* finding of political incidence, did not establish presumptively that the crimes they tried were by nature political. He also noted, in dicta, that no conduct violative of international law could be protected by the political offense exception.

The most recent of these U.S. cases, *Quinn v. Robinson*, presented the most interesting, though ultimately unsatisfying, analysis. The person claimed was accused of the murder of a London constable and conspiracy to cause explosions by means of bombs mailed to various

were political in nature, deferring to an opinion by the Secretary of State in a companion case that the political character of the raid was contradicted by the raiders' immediate retreat with their booty into Texas, when they had already defeated the only government military forces in the vicinity capable of hindering their further advance into Mexican territory. *Id.* at 511.

266. 641 F.2d 504 (7th Cir. 1981).
267. *Id.* at 507.
268. *See supra* note 265.
270. *Id.* at 276.
271. *Id.* at 276.
272. *See supra* note 263.
273. 599 F. Supp. at 276-77.
274. *Id.* at 274-75.
275. 783 F.2d 776 (9th Cir. 1986).
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prominent civilians in England or left in public places in London. A magistrate found Quinn, a U.S. citizen and avowed member of the PIRA, eligible for extradition. The magistrate held that while there had been an uprising in England at the time of the offenses, Quinn proved neither that he belonged to the group in revolt nor that the acts alleged were incidental to the uprising. A district court reversed on habeas corpus. Applying a more relaxed standard, the court found that the bombings and attempted bombings were intended to modify British policies in Northern Ireland, and that the consequent harm to civilians was merely a by-product of these actions. The murder of the constable, the court found, although committed during Quinn's successful attempt to evade personal arrest in the United Kingdom, was also incidental to the uprising in that it prevented British discovery of the bomb factory.276

On appeal, a Ninth Circuit panel split three ways. The three opinions, each pointing toward a different judicial resolution of the conflict, encapsulate the present confusing state of the law covering the political offense exception.

Judge Reinhardt, writing the court's principal opinion, grounded his decision solidly on the "ideologically neutral"277 political incidence test. He argued that the holding in Eain v. Wilkes that particularly heinous acts fall outside the exception's protection constitutes judicial trespass into the field of foreign policy: "the tactics that are used in such internal political struggles are simply irrelevant to the question whether the political offense exception is applicable."278

In a searching examination of the political incidence test, Judge Reinhardt found two inherent limits to the political violence tolerated by the extradition law. First, he found that the "uprising" requirement allowed the exception to become operable only when the revolt in question attracted "sufficient adherents to create the requisite amounts of turmoil," and when the fugitives were involved in acts designed to produce fundamental political change.279 Second, he discerned a geographic limitation on the exception that is also inherent in the "uprising" requirement: "the term 'uprising' refers to a revolt by indigenous people against their own government or an occupying power. . . . [The political offense exception] was not designed to protect . . . the exportation of violence and

276. Neither the magistrate's nor the district court's opinion is published. The facts of the case and its prior history appear in detail in id. at 783-86.
277. Id. at 804.
278. Id. at 805.
279. Id. at 807 (citing Escobedo v. United States, 673 F.2d 1098 (5th Cir. 1980)).
strife to other locations—even to the homeland of an oppressor nation.”

Judge Duniway, concurring, rejected the geographic limitation posited by Judge Reinhardt, fearing that narrowing the scope of the political offense exception in this way would prove too cumbersome for U.S. courts to follow. What if, for example, a Nicaraguan contra sank a vessel operated on the high seas by the Sandinista government and then sought refuge in the United States? The United States would be compelled, as a matter of law, to extradite, but foreign policy considerations would militate strongly against this result. Judge Reinhardt’s failure to anticipate such a possibility led Judge Duniway to favor the Eain v. Wilkes approach, which focuses instead on the tactics and methods used by the person claimed.

Judge Fletcher, concurring and dissenting, joined Judge Reinhardt in rejecting Eain v. Wilkes; she joined Judge Duniway, however, in rejecting the geographic limitation, emphasizing the danger of inconsistent results. She noted, for example, that acts carried out by PIRA members in Northern Ireland would be protected, while the same acts occurring in London would not. The judge would leave to case-by-case decision the extension of the protection of the political offense exception to a non-citizen of the state in which the uprising occurs. In making this determination, she advised the court to consider the strength of the accused’s ties to the state. In Judge Fletcher’s estimation, here the requisite information linking the defendant to Northern Ireland was lacking, leading her to recommend remand for further elaboration of the record.

None of the three opinions is wholly satisfactory. Judge Duniway expressed a preference for examining the tactics and methods employed by terrorists, but failed to make a convincing case for his choice. Judge Fletcher would have left judge-made law largely in its present unsatisfactory state. Judge Reinhardt championed the political incidence test, while straining to impose some limitation on the atrocities it must tolerate. In this effort, the majority standard fails. As Judges Duniway and Fletcher correctly pointed out, the geographic limitation is unworkable. Furthermore, the test of a “sufficiently large” group in revolt coupled with a more direct nexus to political goals is too vague to produce anything but inconclusive results.

280. Id.
281. Id. at 818.
282. Id. at 820.
283. Id. at 821
284. Id.
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The confusion produced by the conflicting U.S. decisions in *McMullen*, *Mackin*, *Doherty*, and *Quinn* led the United States and the United Kingdom to clarify the political offense exception as it exists in the extradition treaty between the two countries. The result was a Supplementary Extradition Treaty signed in June 1985, which specifically removed from the protection of the Extradition Treaty’s political offense exception the following crimes and attempts to commit them: (1) offenses within the scope of the Hague Convention; (2) offenses within the scope of the Montreal Convention; (3) offenses within the scope of the New York Convention; (4) offenses within the scope of the Hostages Convention; (5) murder and manslaughter; (6) malicious wounding or inflicting grievous bodily harm; (7) kidnapping, unlawful detention, and related offenses, including the taking of hostages; (8) offenses involving explosives, if accompanied by an intent to endanger life, or if causing serious damage to property; (9) offenses involving firearms and ammunition, if they are possessed with an intent to endanger life, or are used with an intent to resist or prevent arrest; and (10) damaging property with an intent to endanger life, or with reckless disregard of the likelihood of endangering life. By narrowing the political offense exception, this treaty enhances significantly the ability of the United States and the United Kingdom to extradite individuals charged with terrorist activities in each other’s territories.

6. The Future of the Political Offense Exception

The roots of the current political offense problem lie in continuing uncertainty about the theoretical basis of the exception. If the role of the exception is to insulate the executive, and thereafter the judiciary, from hard foreign policy choices, then assignment of the question to judicial determination and the consequent two- or three-pronged political incidence test have served us well. If, on the other hand, the purpose is to protect the human rights of unsuccessful rebels, the test may be over-restrictive, particularly if the courts accept the qualitative and geographi-
cal limitations that Judge Reinhardt placed upon its "incidental" aspect in Quinn v. Robinson. Finally, if the exception’s rationale is the maintenance of world order through a balanced tolerance of some, but not all, violent rebellion, the goal would be more effectively realized through incorporation of the Swiss concept of proportionality into the doctrine.291

While the Eain v. Wilkes court noted that proportionality may already be an unspoken part of the judicial formulation, it is difficult to find traces of its influence before Eain. Thereafter, it appeared briefly in the dicta in Doherty, which suggested that international crimes should not receive political offense protection. Finally, proportionality was championed implicitly in Judge Duniway’s concurrence in Quinn. Given the entrenched strength of the political incidence test in U.S. case law, however, it is unlikely that proportionality will ever be judicially incorporated into U.S. extradition law.

Proportionality could become part of U.S. extradition law through legislative enactment. Such a development appears equally improbable, however. The failure of various extradition procedure reform acts in the early 1980’s, and the stridency of the debates surrounding ratification of the Supplementary Extradition Treaty with the United Kingdom in 1986, demonstrate the potential for acerbic disagreement on this issue.

Proportionality could also be introduced through executive action; after all, the Supplementary Treaty with the United Kingdom entered U.S. law in this way. That treaty mechanically incorporates the proportionality principle in its detailed provisions denying political offense protection to specific offenses, including those made international crimes by the multilateral anti-terrorist conventions, and to more general offenses committed by means of explosives or firearms. The Supplementary Treaty thus embodies a judgment that certain offenses and certain means are per se disproportionate to political goals.

The scope of depoliticization afforded by the Supplementary Treaty is great; the treaty denies protection to almost any violent opposition to the political status quo that endangers life or limb, and to some opposition that merely endangers property. More importantly, it illustrates how proportionality can be brought into U.S. law by the executive in the form of an international agreement with a state with which the United States has a relationship of trust and goodwill. Through agreements of this sort, proportionality may well play an important role in U.S. extradition law. Moreover, modification of the exception through treaties has the advantage of removing courts from politically sensitive decision-making. Such modifications tail the reach of the exception to the historic character of relations with particular states. Through their specificity, bilat-

291. See supra text accompanying notes 230-33.
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eral agreements can minimize the inconsistency resulting from varying judicial constructions of the present law. Treaty-making involves the executive in determining the scope of the exception without requiring disruptive changes in extradition procedure, and without subjecting individual extradition decisions to the corrosive influence of short-term politics.

B. Alternatives to Extradition

Extradition is unquestionably the most commonly used method by which countries obtain personal jurisdiction over an accused international criminal. Nonetheless, states also rely on other means, including government transfers of fugitives without extradition formalities, "disguised extradition," and abduction.292

1. Informal Surrender of Fugitives

Informal surrender may occur by mistake. In the 1970 Kudirka incident, for example, Coast Guard officers unwittingly returned to Soviet authorities a Lithuanian seaman who had boarded a U.S. ship in U.S. waters to request asylum.293 Extralegal transfers may also, however, be intentional. The defendant in United States v. Sobell294 claimed that Mexican authorities carried him against his will to the U.S. border, where American agents arrested him. Whether purposeful or unplanned, the informal procedures used in these instances apparently suited the interests of the states involved. Nonetheless, they violated international law by abridging the human rights of the surrendered individuals.295

2. Disguised Extradition

A state engages in "disguised extradition" when it employs legal procedures other than extradition to transfer a fugitive from its territory into the hands of another state's authorities. The seizure of the West German Embassy in Stockholm in April 1975 by members of the Baader-Meinhoff group precipitated resort to this variant of extradition. After murdering the economics and military attachés, the terrorists took the rest of the embassy's occupants hostage and then blew up the building.

292. This classification is derived from C. VAN DEN WINGAERT, supra note 169, at 51. A general discussion of alternatives to extradition appears in Evans, Extradition and Rendition: Problems of Choice, in INTERNATIONAL ASPECTS OF CRIMINAL LAW, supra note 226, at 1.
293. C. VAN DEN WINGAERT, supra note 169, at 53.
295. See M. BASSIOUNI, supra note 19 at 143-75. But see Brownlie, The Place of the Individual in International Law, 50 VA. L. REV. 435 (1964) (concluding that the individual is far less than a full subject of international law).
while wiring it for demolition. Sweden could not extradite the surviving attackers because Swedish law did not permit extradition for domestic offenses. Nonetheless, to avoid further violence, the Swedish government decided not to prosecute the Baader-Meinhoff members in Swedish courts. Sweden then formally expelled the remaining terrorists for immigration violations and thus facilitated their arrest by West Germany. As one commentator has observed, "it is improper for one state to request another to deport or to expel an individual as a means of circumventing extradition procedures. In reality, however, these matters are often finessed." 

Disguised extradition is not unknown in U.S. practice. After the United Kingdom's unsuccessful attempt to extradite Peter McMullen in 1979, the United States tried to deport McMullen to the Republic of Ireland. McMullen resisted, arguing that after bombing the British Army barracks in Yorkshire he had denounced and resigned from the Provisional Irish Republican Army, and had cooperated with British and American investigations. As a result, he feared that the PIRA would murder him upon his return to Ireland. Holding that McMullen was likely to be persecuted in his home country, the immigration judge found, pursuant to the Refugee Act of 1980, that he was not deportable. The Board of Immigration Appeals reversed on the grounds that McMullen had not demonstrated a sufficient threat to his life; on McMullen's petition for review, however, the Ninth Circuit reversed the Board.

Subsequently, the Board reconsidered the case, and found that because of his former gun-running and the leadership role he maintained in the PIRA, McMullen was statutorily deportable. Terming his PIRA offenses "acts of an atrocious nature out of proportion to the political goal of achieving a unified Ireland," the Board held him responsible for a "serious nonpolitical crime outside the United States" and refused to with-
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hold his deportation.\textsuperscript{303} This time the Ninth Circuit upheld both the Board’s inquiry into the political character of McMullen’s offenses and its distinction between political offense as defined for the purposes of extradition and political offense as defined for deportation purposes. The court reasoned that “in contrast to extradition, deportation is a matter solely between the United States government and the individual seeking withholding of deportation . . . . Thus, we find ourselves unencumbered by the concerns we expressed in Quinn that we should be careful not to interfere with the political processes in other cultures . . . .”\textsuperscript{304} Moreover, for deportation cases the court specifically endorsed a balancing approach, including consideration of the “offense’s ‘proportionality’ to its objective and its degree of atrocity.”\textsuperscript{305}

Applying this test, the court determined that although the PIRA was “unquestionably a ‘terrorist’ organization,”\textsuperscript{306} its political and nonpolitical terrorist acts were distinguishable. Relying upon both \textit{Eain v. Wilkes}\textsuperscript{307} and \textit{In re Meunier},\textsuperscript{308} the court sharply differentiated “terrorist acts directed at the military or official agencies of the state, and random acts of violence against ordinary citizens that are intended only to promote social chaos.”\textsuperscript{309} Without explicit confirmation of McMullen’s personal participation in the latter type of activities, the court looked to evidence of his willing and material involvement in an organization which carried them out:

McMullen’s claims that he did not actually participate in the civilian violence, even if true, do not help his cause. We are unmoved by the pleas of a terrorist that he should not in any way be held responsible for the acts of his fellows; acts that, by his own admission, he aided by training others and assisting in arms shipments, and otherwise abetted and encouraged.\textsuperscript{310}

The pragmatic conception of a “political crime” which emerges from the \textit{McMullen} litigation is a welcome addition to current legal thinking. As technology offers terrorists an ever wider selection of lethal weapons, the political incidence test of \textit{Quinn v. Robinson} fails to discriminate among practices and practitioners of political violence. At best, \textit{Quinn} conceives U.S. neutrality towards horrific attacks against innocents, as long as they are carried out in the right place by representatives of a group large enough to link the crime to an accepted political goal. \textit{Mc-
Mullen, however, expands the scope of deportation as part of a more determined American response to terrorism.

3. Abduction

In international law, the abduction of fugitives in lieu of extradition is unquestionably improper. The practice violates international law by disrupting world order, infringing upon the sovereignty and territorial integrity of other states, and violating the human rights of the individuals seized. Most commentators agree that the state responsible for such an abduction is legally obliged to return the abducted person to the state from whose territory he was kidnapped. In fact, however, the divergent treatment of abduction between international and most national law has resulted in the return of only a handful of abductees.

The most famous abduction case is undoubtedly Israel's kidnapping of Adolf Eichmann from Argentina. Following Argentina's complaint regarding infringement of its sovereignty, the United Nations Security Council requested that Israel "make appropriate reparation . . . in accordance with . . . the rules of international law." A joint Israeli-Argentine communique, however, closed the incident by including Israel's acknowledgment that the action taken by its citizens in kidnapping Eichmann "infringed the fundamental rights of the State of Argentina." Meanwhile, Israel tried Eichmann and hanged him.

Despite international law's well-defined opposition to abduction as a substitute for extradition, it remains unclear whether national courts will exercise in personam jurisdiction over abducted terrorists. English courts have confronted this issue for nearly two centuries and have maintained their jurisdiction to try British subjects wanted at home and abducted abroad. In the United States, the most influential treatment of this issue is the Supreme Court's opinion in Ker v. Illinois. Under indictment in Cook County, Illinois for larceny and embezzlement, Ker escaped to Peru. The United States issued extradition papers and dispatched agents to serve them; instead of filing the papers, however, the agents forced Ker aboard a ship and held him incommunicado until his

311. C. VAN DEN WJNGAERT, supra note 169, at 54-55.
312. M. BASSIOUNI, supra note 19, at 124.
313. Id. at 125. While internationalists tend to emphasize the protection of the rights of the state of refuge, national courts are more concerned with adjudication of the original criminal offense once the fugitive is before them.
315. See Evans, supra note 292, at 9 n.35.
316. See, e.g., Ex parte Scott, 109 Eng. Rep. 166 (1829) (court accepts jurisdiction to try Englishwoman conveyed involuntarily to England by British forces); Ex parte Elliott, [1949] All E.R. 373 (jurisdiction exercised over British Army deserter arrested, despite contrary Belgian law, by British forces in Belgium).
317. 119 U.S. 436 (1886).
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arrival in San Francisco. The Supreme Court held that the failure of American authorities to abide by the United States-Peru extradition treaty did not affect Cook County's ultimate jurisdiction over Ker.\textsuperscript{318} Subsequent cases have expressed the rule in terms of the maxim \textit{mala captus bene detentus}, under which a court may assert in personam jurisdiction without inquiring into the means by which the attendance of the accused was secured.\textsuperscript{319}

U.S. courts have produced a rich jurisprudence on the \textit{mala captus bene detentus} doctrine in recent years. In 1973, the Ninth Circuit approved district court jurisdiction over two U.S. citizens who had been brought forcibly from South Vietnam on charges of theft of U.S. government property in Japan.\textsuperscript{320} The Fifth Circuit adopted the rule in 1979\textsuperscript{321} and extended its reach to nonresident aliens in \textit{United States v. Winter}.\textsuperscript{322} The Seventh, Tenth, and Eleventh Circuits have adopted the \textit{Ker} rule without qualification as well.\textsuperscript{323}

Only one circuit has limited the \textit{Ker} rule. In a Second Circuit case, \textit{United States v. Toscanino},\textsuperscript{324} an Italian national appealed his conviction for conspiracy to import narcotics into the United States. He alleged that he had been abducted from Uruguay by Uruguayan police acting for the United States and taken to Brazil, where he was tortured in the presence of a U.S. official. Thereafter, Toscanino claimed, he was drugged and transported to the United States in the custody of U.S. officials. The

\textsuperscript{318} It is an especially interesting feature of the \textit{Ker} case that it was announced the same day as, and reported immediately after, United States v. Rauscher, 119 U.S. 407 (1886), and that Justice Miller wrote both opinions. \textit{Rauscher} held that an accused who was properly surrendered under an extradition treaty could be tried only for the offense for which he was formally extradited (the principle of speciality). It might seem to follow that no fugitive could be tried for any offense if he could have been the subject of a proper extradition, but was not extradited. This logic is urged in Dickinson, \textit{Jurisdiction Following Seizure or Arrest in Violation of International Law}, 28 Am. J. Int'l L. 231 (1934). \textit{Ker}, however, was distinguished from \textit{Rauscher} by noting that the extradition treaty in the former case "was not called into operation, was not relied upon." 119 U.S. at 443. The \textit{Ker} rule was soon applied in \textit{In re Ezeta}, 62 F. 964 (N.D. Cal. 1894) (American court jurisdiction over Salvadoran Army commanders brought unwillingly to the United States). \textit{See supra} text accompanying notes 253-55.

\textsuperscript{319} M. \textit{Bassionni}, \textit{supra} note 19, at 122. The U.S. Supreme Court endorsed this principle in Frisbie v. Collins, 342 U.S. 519 (1952), an interstate rendition case. This case gave rise to the common denomination of \textit{mala captus bene detentus} as the "\textit{Ker}-Frisbie doctrine." Because this article is only concerned with the doctrine's international application, it will be referred to as the \textit{Ker} doctrine.

\textsuperscript{320} United States v. Cotten, 471 F.2d 744 (9th Cir. 1973).

\textsuperscript{321} United States v. Postal, 589 F.2d 862 (5th Cir. 1979) (arrest by the Coast Guard beyond the geographic limits of its authority did not vitiate the district court's jurisdiction over those improperly arrested).

\textsuperscript{322} 509 F.2d at 975 (Bahamian nationals unsuccessfully contested American jurisdiction after their illegal arrest by the Coast Guard in the territorial waters of another sovereign state).

\textsuperscript{323} Hobson v. Crouse, 332 F.2d 561 (10th Cir. 1964); United States v. Marzano, 537 F.2d 257 (7th Cir. 1976); United States v. Darby, 744 F.2d 1508 (11th Cir. 1984).

\textsuperscript{324} 500 F.2d 267 (2d Cir. 1974).
Second Circuit held that, if true, such “deliberate, unnecessary, and unreasonable invasion of the accused’s constitutional rights” by the United States would deprive its courts of jurisdiction. 325

The Second Circuit sharply limited the scope of Toscanino in several later cases, however. In United States ex rel. Lujan v. Gengler 326 the court held that conduct must be “of the most outrageous and reprehensible kind” to trigger application of Toscanino, and that, moreover, the right to complain of any formal violation of international law belonged to the state whose sovereignty had been compromised, and not to the accused. 327 A later case 328 established that the egregious conduct necessary to bring Toscanino into play had to occur at the hands of the U.S. government. More recently, in United States v. Reed, 329 the court defined the limits of the Toscanino rule, holding that the CIA did not “gross[ly] mistreat” the defendant by illegally enticing him onto a private plane on Bimini and then compelling him to lie on the floor of the plane with a cocked revolver to his head during the flight to Florida, “threatening to blow his brains out.” 330 Subsequent cases in other circuits have either expressly rejected Toscanino or limited it to its facts. 331

Judicial willingness to exercise personal jurisdiction over abducted terrorists suggests that forcible abduction of terrorist fugitives from their countries of refuge may become an increasingly important tool of American policy. Such actions, while certainly controversial, would undoubtedly find greater international and domestic support than repeated resort to military counterstrikes in which the real culprits will often remain unharmed while innocent civilians are killed. Moreover, although abduction may at first appear arbitrary and brutal, it may gain legitimacy ex post if it leads to regular trials.

Nonetheless, the Ker rule operates within narrow parameters. Every modern abduction case in U.S. courts has rested upon the acquiescence, if not the outright complicity, of the state from which the fugitive was

325. Id. at 275. On remand, however, Toscanino failed to meet the burden of proving his allegations. 398 F. Supp. 916 (E.D.N.Y. 1975).
327. Id. at 67-68. “Lacking from Lujan’s petition is any allegation of that complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process.” Id. at 66.
328. United States v. Lira, 515 F.2d 68 (2d Cir. 1975) (American defendant claimed to have been tortured by Chilean police before being forced to return to the United States).
329. 639 F.2d 896 (2d Cir. 1981).
330. Id. at 902.
331. United States v. Marzano, 537 F.2d 257 (7th Cir. 1976) (Toscanino requires conduct which shocks court’s conscience); United States v. Darby, 744 F.2d 1508 (11th Cir. 1984) (American officials who allegedly abducted British subject in Honduras and forced him to fly to Miami did not act sufficiently egregiously to trigger Toscanino. Court holds Toscanino questionable in light of Gerstein v. Pugh, 420 U.S. 103, 119 (1975), in which the Supreme Court held that an “illegal arrest does not void a subsequent conviction.”).
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abducted. No modern American court has confronted a case similar to the Eichmann affair, where the state from which the suspect was abducted protested to the United Nations. Moreover, to date no abduction case has involved either a non-extraditable fugitive seized under both American and foreign political offense laws or a fugitive who has received formal or de facto asylum in a foreign country. Under such circumstances, a U.S. court might be more reluctant to exercise jurisdiction over an addictee.

A judicial assertion of personal jurisdiction in abduction cases is more likely if the fugitive's guilt is clear, his offenses atrocious, and the hands of the protesting state unclean. Further, a U.S. court will have greater authority to assume personal jurisdiction if the offender's conduct itself violated international law, especially if such conduct was proscribed by a multilateral anti-terrorist convention. The exercise of jurisdiction over such an abducted offender by U.S. courts would encourage states not to apply the political offense exception to international crimes. Furthermore, the assertion of jurisdiction would suggest United Nations approval of the action, and thereby dissuade a compromised state from protesting the American abduction.

Generally, international legal scholars have opposed all irregular means of rendition, including abduction. Yet, in a world where “most states-members of the U.N. approve, directly or indirectly, of the motives and consequences of terror-violence,” extradition requests will frequently be denied and resort to self-help in bringing terrorists to justice may be inevitable. U.S. Secretary of State George Shultz has defended the practice for precisely such reasons:

It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace, [or] from attacking them on the soil of other nations . . . . International law requires no such result. A

332. After all, the right to complain of international law violations resulting from abductions inheres not in the individual thus brought before the court, but in the state whose territorial integrity was violated. Given this fact, there would appear to be no reason not to apply the Ker rule to cases of informal surrender and disguised extradition. Since the state from which the fugitive was rendered participates in rendition, it will most likely not complain that extradition procedures were circumvented.

333. See, e.g., M. BASSIOUNI, supra note 19, at 124, arguing that “[a]t this stage of development of international law it is no longer possible to rationalize violations of international law on grounds of raison d'etat or to allow such violations to be perpetrated without an adequate deterrent-remedy.”

nation attacked by terrorists is permitted to use force . . . to seize terrorists or to rescue its citizens when no other means is available.\textsuperscript{335}

The Central Intelligence Agency and the U.S. Marshals Service are reportedly preparing a contingency plan for seizing specific fugitive terrorists from other states.\textsuperscript{336} While conceding that such behavior would violate international law, the Legal Adviser to the Department of State has defended extralegal methods of capture in extreme cases.\textsuperscript{337} The United States resorted to abduction in October 1985, when it intercepted the Egyptian aircraft containing the \textit{Achille Lauro} hijackers and forced it to land at a NATO airfield in Italy. This action enabled the Italian government to prosecute the terrorists.

Conclusion

Terrorism is one of the gravest threats facing the international community today. In recent years, the number of worldwide terrorist acts has skyrocketed, with terrorists employing more and more sophisticated means of carrying out their deadly mission. Searching for a way to curtail these acts is a confusing and frustrating enterprise. While it may never be possible to put an end to international terrorism, it is crucial that the world employ whatever means it can to put terrorists on notice that it does not take terrorist activity lightly and that the perpetrators of political violence will be held personally accountable for their actions.

As one of the world’s leaders in the fight against terrorism, the United States has a special responsibility to send a strong signal both to other nations and to terrorists themselves that it will not tolerate international terrorism. To this end, the United States must ensure that its criminal jurisdiction comprehends every conceivable type of terrorist activity against U.S. citizens. While the multilateral counterterrorism effort has apparently come to a standstill, it is crucial that the United States assume a leading role in promoting mutual international resolve by continuing to push forcefully for multilateral action, as well as by pursuing bilateral understandings with other nations. Simultaneously, the United States must unilaterally amend its own laws to comprehend extraterritorial terrorist action; such legislation would serve as a model for the legislative efforts of many other nations which are equally disturbed by the recent upswing in international lawlessness. Additionally, legislative standards are required to add predictability to the present confusion over the extraditability of foreign terrorists from the United States.

\textsuperscript{335} N.Y. Times, Jan. 16, 1986, at A1, col. 5.
\textsuperscript{337} \textit{Id.}
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In its fight against terrorism, the United States must not be afraid to employ creative means to bring terrorists to U.S. courts for prosecution. If, at times, this goal requires the United States to resort to such extraordinary measures as abduction, the United States must not hesitate to take such measures. That increased U.S. vigilance will not, by itself, necessarily lead to a decrease in the volume of terrorist activity does not diminish the importance of U.S. action. Strong U.S. efforts will spur other nations to direct their creative energy toward putting an end to international violence. And, if nothing else, equity requires that violence with an international flavor be treated no more leniently than other heinous crimes.