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POLITICAL OFFENDER OR EXTRADITABLE CRIMINAL: THE POLITICAL
OFFENCE, INTERNATIONAL ORDER AND PROTECTION OF THE INDIVIDUAL

JAMES TROTTIER
049732

LL.M. THESIS (1993)
GRADUATE STUDIES IN LAW
FACULTY OF LAW
UNIVERSITY OF OTTAWA



James Trottier, Ottawa, Canada, 1994



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ABSTRACT OF THESIS

POLITICAL OFFENDER OR EXTRADITABLE CRIMINAL: THE POLITICAL
OFFENCE, INTERNATIONAL ORDER AND PROTECTION OF THE INDIVIDUAL

This thesis studies the evolution and current purpose of the political offence exception for the purpose of determining whether there is a continuing role for the exception. It concludes that there is a continuing need for the exception.

The thesis examines the coexistence in international law and policy between the demand for international public order, as characterized by the system of extradition laws and treaties, and the need to safeguard the rights of the individual, as reflected in the political offence exception to extradition, international refugee protection and the practice of asylum.

Extradition is defined in the thesis as "the formal surrender of a person by a state to another state for prosecution or punishment". Originally political offenders were more likely to be extradited than ordinary criminals. However, states gradually came to consider the question of extradition of political offenders differently than the extradition of ordinary criminals. In practice, this meant an individual, deemed to be a political

offender rather than an ordinary criminal offender, could be protected from extradition through the political offence exception.

There is no commonly accepted definition of a political offence. Four main tests have been developed to identify the political offence. United Kingdom jurisprudence developed the "political incidence" test. To qualify as a political offence, the act must be part of a struggle with the government requesting extradition for control over the state or at least substantive change in the state.

In the version of the "political incidence" test developed by American courts, there must exist a "substantial connection" between the act in question and a political uprising. The test is whether the individual was acting together with a group of individuals committing a violent act for a political objective in the context of a political uprising.

The third test is the "political objective" test developed by French courts. There a key determinant is the motive or purpose of the act. Additional elements are an appropriate means to achieve the objective and proportionality between the act and the objective.

The fourth test is the "predominantly/preponderantly

political" test developed in Swiss jurisprudence. In this test, the key is to determine whether criminal or political elements of a particular act are dominant. Generally there is also a requirement that the acts in question should occur during a struggle for power in the particular state and that the act in question be proportional to the goals pursued.

There are a number of concerns with the political offence exception as currently applied, namely: 1) Designation of inappropriate acts as political offences; 2) Excessive rigidity and formality by some courts; 3) Excessive judicial discretion; 4) Over-emphasis on efficacy of the act in question; 5) Excessive political influence on decision-making.

Alternatives to the use of the political offence exception include executive decision-making, depolitization of offences and use of the "aut dedere aut judicare" provision. Of these the last is the better choice but it is best used in conjunction with the political offence exception.

The thesis proposes an alternative political offence exception test with the following five criteria:

- 1) the individual should be involved in a dispute concerning political control over the state;
- 2) the individual should be part of a group which is involved in

such a struggle and the act in question must be done in furtherance of that struggle;

3) the exception should not apply to heinous crimes such as crimes against humanity;

4) certain acts such as hijacking should be automatically excluded;

5) there should be proportionality between means and ends.

Individuals who are denied the protection of the political offence exception as a result of the above criteria and who face persecution if they are extradited, should be excluded from extradition provided they are prosecuted pursuant to the principle "aut dedere aut judicare".

The phenomenon of terrorism illustrates many of the issues associated with the concept of the political offence. The thesis examines the results when the various tests for the political offence exception are applied to terrorist acts. The proposed test illustrates a way to exclude certain terrorist acts from the category of the political offence and preserve the integrity of the political offence exception.

This thesis also examines the degree of congruence between the determination of political offender status and political refugee status. A key difference is that the political offender faces punishment for an act already committed while the political refugee faces future persecution for an actual or perceived opinion and

need not have committed an offence. An individual may be both a political offender and a political refugee.

The modern concept of (humanitarian) asylum is applicable to both political refugees and political offenders and provides a bridge between the two concepts. The concept of asylum is in a state of flux; it is increasingly viewed as being primarily for the benefit of those who fear persecution rather than for offenders who have disrupted their own societies.

All three concepts - political offence, refugee status and asylum - contain within themselves a balance between protection of individual rights and strengthening of international public order.

The thesis concludes that the political offence exception continues to be important for the protection of individuals facing punishment for their political acts. The new proposed test, combined with the "aut dedere aut judicare" concept, provides a means to protect individual rights and to ensure that serious criminals do not escape prosecution.

JAMES TROTTIER
049732

POLITICAL OFFENDER OR EXTRADITABLE CRIMINAL: THE POLITICAL OFFENCE,
INTERNATIONAL ORDER AND PROTECTION OF THE INDIVIDUAL

TABLE OF CONTENTS

I) INTRODUCTION

II) EXTRADITION AND POLITICAL OFFENDERS

II) A) INTREPRETATIONS OF POLITICAL OFFENCE

II) B) JUDICIAL APPLICATION OF VARIOUS TESTS

II) C) i) UNITED KINGDOM JURISPRUDENCE: POLITICAL INCIDENCE TEST

II) C) ii) SUMMARY OF UNITED KINGDOM JURISPRUDENCE

II) D) i) UNITED STATES JURISPRUDENCE: POLITICAL INCIDENCE TEST

II) D) ii) UNACCEPTABILITY OF CERTAIN ACTS AND PROPORTIONALITY OF
OFFENCES

II) D) iii) SUMMARY OF AMERICAN JURISPRUDENCE

II) E) EUROPEAN APPROACH

II) E) i) FRANCE: THE CONCEPT OF THE "POLITICAL OBJECTIVE"

II) E) i) a) SUMMARY OF FRENCH JURISPRUDENCE

II) E) ii) SWITZERLAND: PREDOMINANTLY/PREPONDERANTLY POLITICAL
APPROACH AND PROPORTIONALITY THEORY

II) E) ii) a) SUMMARY OF SWISS APPROACH TO POLITICAL OFFENCE

II) F) SUMMARY OF VARIOUS TESTS

III) CONCERNS AND ALTERNATIVES

III) A) i) INAPPROPRIATENESS OF DESIGNATION OF CERTAIN ACTIONS AS
POLITICAL OFFENCES

III) A) ii) FAILURE TO MEET ALL FORMAL CRITERIA

III) A) iii) JUDICIAL DISCRETION

III) A) iv) EFFICACY AS CRITERIA

III) A) v) POLITICAL CONSIDERATIONS

III) A) vi) SUMMARY OF PROBLEMS ASSOCIATED WITH VARIOUS TESTS

III) B) ALTERNATIVES IN FACE OF VARIETY OF TESTS AND RESULTS

III) B) i) EXECUTIVE DECISION-MAKING

III) B) ii) DEPOLITICIZATION

III) B) iii) "AUT DEDERE AUT JUDICARE" PROVISION

III) B) iv) SUMMARY OF ALTERNATIVES TO VARIETY OF TESTS

III) C) PROPOSAL FOR A COMMON TEST

III) C) i) CRITERIA OF COMMON TEST

III) D) APPLICATION OF PROPOSED COMMON TEST TO TERRORIST PHENOMENON

III) D) i) INTRODUCTION

III) D) ii) DEFINITION AND CATEGORIZATION OF TERRORISM

III) D) iii) TERRORIST ACTS AND THE POLITICAL OFFENCE

III) D) iii) a) INTRODUCTION

III) D) iii) b) APPLICATION OF USA AND UK TESTS

III) D) iii) c) APPLICATION OF FRENCH POLITICAL OBJECTIVE APPROACH

III) D) iii) d) APPLICATION OF SWISS PROPORTIONALITY APPROACH

III) D) iii) e) APPLICATION OF PROPOSED TEST

IV) POLITICAL OFFENCE EXCEPTION IN CONTEXT OF REFUGEE DETERMINATION

IV) A) POLITICAL REFUGEES

IV) A) i) INTRODUCTION

IV) A) ii) PHENOMENON OF POLITICAL REFUGEES

IV) A) iii) DEFINITION OF POLITICAL REFUGEE

IV) A) iv) KEY ELEMENT OF REFUGEE CLAIM: FEAR OF FUTURE EVENT

IV) A) v) POLITICAL OPINION

IV) B) POLITICAL OFFENDER AND POLITICAL REFUGEE

IV) B) i) CONTRAST BETWEEN POLITICAL OFFENDER AND POLITICAL REFUGEE

IV) B) ii) SIMILARITIES BETWEEN POLITICAL OFFENDER AND POLITICAL REFUGEE

IV) B) iii) POLITICAL OFFENCE AS BASIS OF REFUGEE CLAIM

IV) B) iv) EXAMPLES OF ACTS FROM WHICH POLITICAL OPINION, WHICH MAY PROVIDE A BASIS FOR A REFUGEE CLAIM, MAY BE INFERRED

IV) C) PROTECTION FROM EXPULSION AND REFOULEMENT

IV) C) i) LIMITATIONS ON THE PRINCIPLE OF NON-REFOULEMENT

IV) C) ii) BACKGROUND OF ARTICLE 1(F)

IV) C) iii) BALANCE BETWEEN WORLD ORDER AND INDIVIDUAL PROTECTION

IV) D) NON-REFOULEMENT AND POLITICAL OFFENCE EXCEPTION TO EXTRADITION

IV) D) i) REVIEW OF PRACTICE REGARDING POLITICAL EXCEPTION, EXTRADITION AND EXPULSION

IV) D) ii) PROTECTION FROM EXTRADITION FOR SERIOUS OFFENDERS IN OTHER INTERNATIONAL INSTRUMENTS: "AUT DEDERE AUT JUDICARE"

IV) E) SUMMARY REGARDING POLITICAL OFFENCE EXCEPTION AND REFUGEE DETERMINATION

V) ASYLUM AND ITS RELATIONSHIP TO POLITICAL OFFENCE EXCEPTION

V) A) i) INTRODUCTION

V) A) ii) HISTORY OF ASYLUM AND RELATIONSHIP TO EXTRADITION

V) A) iii) TRADITIONAL VIEW OF RIGHT "TO SEEK ASYLUM" IN UNIVERSAL

DECLARATION OF HUMAN RIGHTS

- V) A) iv) COMPONENTS OF COMPLETE RIGHT TO ASYLUM
- V) A) v) DOMESTIC PRACTICE AND LEGISLATION

V) B) RESTRICTIONS ON ASYLUM

- V) B) i) EMPHASIS ON INTERNATIONAL PUBLIC ORDER MANIFESTED IN PRACTICE OF ASYLUM AND EXTRADITION
- V) B) ii) THOSE INELIGIBLE FOR ASYLUM
- V) B) iii) THOSE FACING PERSECUTION ELIGIBLE FOR HUMANITARIAN ASYLUM

V) C) INTERNATIONAL AND DOMESTIC LEGAL PROCESSES

- V) C) i) INTRODUCTION
- V) C) ii) INTERACTION OF ASYLUM, EXTRADITION, POLITICAL OFFENCE EXCEPTION AND REFUGEE CONVENTION

V) D) CONCLUSIONS REGARDING ASYLUM

VI) CONCLUSIONS

VI) A) SUMMARY

VI) B) INTERACTION OF TENDENCIES

VI) C) WORLD ORDER AND PROTECTION OF INDIVIDUAL RIGHTS

VI) D) CONCLUSION

JAMES TROTTIER (1993)

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POLITICAL OFFENDER OR EXTRADITABLE CRIMINAL: THE POLITICAL OFFENCE,
INTERNATIONAL ORDER AND PROTECTION OF THE INDIVIDUAL

I) INTRODUCTION

In the domains of international relations and law, the demand for international public order co-exists in law and policy with the need to safeguard the human rights of the individual. On the one hand, the thrust towards mutual assistance between states for the purpose of maintaining and enhancing international public order is evident in extradition laws and treaties. On the other, the desire to safeguard individual rights is demonstrated in international human rights law, the international practice of asylum and refugee protection. Although asylum remains a right of states to grant at their discretion (1), it remains significant as a counter-balance to the maintenance of world public order.

The two concepts, international public order and protection of human rights, are not mutually exclusive. Indeed the protection of human rights is increasingly viewed as an essential element of a stable international system. Moreover, the concepts, law and practice of extradition, refugee protection, international human rights law and asylum all contain opposing elements. For example, in extradition the executive and the judiciary set off the goal of

mutual assistance between states against protection extended to the political offender. In turn, the political offence exception itself is subjected to various exceptions based on a weighing by the executive and/or the courts of public order and human rights considerations. Similarly, the individual benefits of asylum, human rights protection, and refugee protection may be offset by overriding concerns of the executive and the judiciary for the security of the society.

This thesis addresses the political offence exception to the law of extradition. It will examine a number of questions. What is the historical practice in regards to political offenders? How did they come to be protected from extradition? What is the principle underlying this protection? How has the political offence been defined by the courts and other authorities? Should the political offence exception be retained?

Section II of the thesis examines the four main tests developed by courts in the United Kingdom, the United States, France and Switzerland to identify political offenders and to determine when they should be protected. Section III analyses concerns and problems regarding the political offence and outlines certain alternatives as well as a proposed test for identifying the political offence. Section III also analyses terrorism as a case study of a practical problem in the realm of the political offence and examines various approaches which have been taken to deal with

this problem. The thesis examines the issue of whether political terrorists should be provided the protection of the political offence exception and proposes the new test as an approach to the phenomenon which has advantages over most of the existing tests.

Section IV analyses similarities and contrasts between the political offender and the political refugee while Section V examines the practice and law of asylum and its relationship to the political offence and protection provided to refugees.

Finally, Section VI provides some conclusions concerning the future of the political offence.

II) EXTRADITION AND POLITICAL OFFENDERS

In this section, the thesis describes the background and historical development of extradition and the development of protection for political offenders. The aim is to demonstrate that there has been an evolution of attitudes from the original view that political offenders were considered by states to be the most dangerous of offenders and thus the most likely to be extradited, to the view, developed in the nineteenth and twentieth centuries, that political offenders in principle should be protected from extradition. At the same time, there was a growing recognition by states of the desirability of cooperating to combat ordinary crime; this led to an increasing number of agreements to extradite

criminal offenders.

Extradition has been defined as "the formal surrender of a person by a state to another state for prosecution or punishment".(2) In the absence of an extradition treaty, no state is under an obligation to extradite an individual pursuant to the demands of a requesting state (3), though many states will, in fact, do so.(4)

Though agreements between states have provided for extradition since antiquity, it is only since the last century that extradition treaties have come to provide political offenders with protection from extradition.(5) In fact, earlier extradition treaties usually served as a vehicle for the extradition of political and religious offenders who were of much more interest to demanding states than common criminal offenders. In contrast to the latter, political and religious offenders posed threats to political order and power structures and extradition treaties were viewed as devices to combat these enemies.(6)

This older tradition regarding extradition continued into the nineteenth century. The Treaty of January 4, 1834 between Austria, Prussia and Russia, for example, provided for the surrender of parties guilty of a number of the classic political offences such as high treason and *lèse-majesté*.(7) This older tradition with its concern about the destabilizing aspect of political acts could

still be seen in the reaction of a British court which sanctioned the extradition of an anarchist in the Meunier case decided in 1894.(8)

Political thinking and developments in France and in other societies from the mid-eighteenth century onwards may be credited with providing the impetus for the inclusion of protection of political offenders in extradition treaties.(9) In the spirit of the Enlightenment, resistance against tyranny came to be seen as a virtue.(10) Writing in 1752, an American thinker, J. Mayhew, stated that "when [the King] turns tyrant, and makes his subjects his prey to devour and destroy, instead of his charge to defend and cherish, we are bound to throw off our allegiance to him, and to resist..."(11)

Consistent with this belief in the inherent virtue of resistance to tyranny was the emerging notion that the worth of political activity and hence the safety of those engaging in such political activity should not be dependent on its success or failure; this was a sphere of activity to be protected for its own sake.(12)

The principle of providing protection to the political offender was recognized in Great Britain in the nineteenth century in the writing of such jurists as Mr. Justice Stephen and thinkers such as John Stuart Mill (13). Mill claimed that if rebellion

against oppression was morally right, then individuals whose attempts at rebellion ended unsuccessfully should be able to obtain asylum in other countries.(14)

Such opinions were not confined to scholars. A British Government Commission declared in 1878:

"And however odious the character of the rebel who disturbs the peace of his own country and gives rise to bloodshed and disorder from interested motives, or reckless disregard for the miseries attendant on civil discord, yet both from history and our own experience we know that there are exceptional instances in which resistance to usurpation or tyranny may be inspired by the noblest motives, and in which, though unsuccessful, it may escape condemnation and even command sympathy."(15)

Nor were such views confined to the United Kingdom. In the United States, Thomas Jefferson expressed the view that "to resist tyranny is not a crime but a virtue."(16) An expert in nineteenth century France, D. Johnson, has provided the following assessment of the nineteenth century view of states such as France and Great Britain concerning the political offence:

"[t]he immorality of the political crime is not as clear or as immutable as that of the common law crime; constantly modified and observed according to the vicissitudes of life, it varies with the times, the events, the laws and the quality of power; it changes from one moment to the next under the force of circumstance, which claims to fashion it according to its needs. In the realm of politics, it is hard to find innocent or

deserving acts which did not receive legal indictment in some part of the world."(17)

States often recognized the distinction between political crimes and ordinary criminal offences in their own domestic legislation and/or practice. Belgium was the first state to introduce the notion of a political offence into its domestic legislation, doing so in its 1833 extradition law.(18) In Czarist Russia, the practice of differentiating between political and criminal offenders was described in the following way by Alexander Solzhenitsyn:

"Criminals were teamed up and driven along the streets ... so as to expose them to public disgrace. And politicals could go ...in carriages. Politicals were not fed from the common pot but were given a food allowance instead and had their meals brought from public eating places."(19)

This practice of differentiating political from criminal offenders extended into the twentieth century. Prisoners deemed to be political offenders in the Weimar Republic were confined separately from other prisoners.(20)

The wide acceptance by states and scholars of the notion of protection of political offenders is witnessed by the following observation of a leading international scholar, H. Lauterpacht, writing in 1944: "[W]e are confronted with the impressive fact that in the legislation of modern states there are few principles so

universally adopted as that of non-extradition of political offenders." (21)

The *raison d'être* and continuing validity of the notion that political offenders should be protected is reflected in the following comment in the Irish Times in 1982: "Extradition raises very deep emotions - and not just in Ireland. How many great names in politics and literature survived because a host country stood firm on the right to provide asylum?" (22)

There was thus in the course of the nineteenth century the development of a sense of political liberalism in Western states. This was marked by a tolerance for domestic political activity and a recognition that political offenders should be differentiated from other criminal offenders in regards to extradition.

At the same time, there was also the growth of a sense of world community which was giving rise to the notion of a common interest in states in combatting criminal activity. (23) Increasingly states began to see a common interest in pooling resources to fight crime.

These two sometimes inconsistent phenomena - political liberalism and a sense of world community - resulted in extradition treaties which provided for the extradition of common criminals while excluding political offenders from the process (24), thus

reversing the traditional pattern (25) where "[C]ommon criminals were not worth the trouble and expense required to extradite them - it was the political offender who was the most dangerous, and whose surrender was to (sic) the common interest." (26)

France and Belgium were the first states to introduce the concept of the protection of the political offender into an extradition treaty. Article 5 of the 1834 extradition treaty between France and Belgium stated:

"Il est expressement stipulé que l'étranger dont l'extradition aura été accordée ne pourra, dans aucun cas, être poursuivi ou puni pour aucun délit politique antérieur à l'extradition ou pour aucun fait connexe à un semblable délit." (27)

The protection of political offenders found in the France-Belgium treaty was followed by similar provisions in other extradition treaties concluded by France. (28) As France was the leading state in the area of formal extradition treaties, its treaties provided a model for other states. (29)

In the United Kingdom and the United States, the practice of excluding political offenders from extradition preceded the formal inclusion of express provisions to this effect in extradition treaties. (30) For example, the 1843 Extradition Treaty between the United Kingdom and France did not include the exemption for political offenders which was found in other such treaties France

was concluding at the time.(31) However, there was a mutual understanding that in fact political offenders were to be exempted and this was formalized in a second treaty in 1852.(32)

II) A) INTREPRETATIONS OF POLITICAL OFFENCE

Although exceptions for political offenders began to appear with frequency in nineteenth century extradition treaties, the latter included no definitions and offered little guidance as to what was meant by a "political" offence though the concept was sometimes contrasted with a "common" offence.(33) In the nineteenth century, eminent jurists and thinkers provided some guidance regarding the meaning of a political offence. In 1883, the British jurist, Mr. Justice Stephen, for example, described a political offence as being an offence which was incidental to and part of political disturbances.(34) The philosopher, J.S. Mill, described a political offence to the House of Commons as "any offence committed in the course of or furthering of civil war, insurrection or political commotion".(35) Such statements assisted to fill the void left by the lack of definition in the various extradition treaties.

Legislators were equally unhelpful in providing a definition. For example, the U.K. Extradition Act of 1870 merely referred to an "offence of a political character" but provided no further elaboration on what was meant by "political character".(36) The

comparable legislation of other jurisdictions was similarly reticent.(36a)

Consequently, courts, governments and commentators have offered their own explanations of the concept. Judges in different jurisdictions have developed various tests to determine whether particular offences are political offences. These tests will be described below. The determination of whether any given action is political or criminal is dependent on the test used in the particular state.

II) B) JUDICIAL APPLICATION OF VARIOUS TESTS

In most states, at least in the West, the lack of definition of "political offence" in treaties and domestic legislation has left it to the courts to apply one of various political offence "tests" to determine if those claiming the benefit of the political offence exemption are entitled to protection.(37) The courts have developed a variety of tests to establish the criteria to use in the determination of whether a particular offence is political and unextraditable.(38) The criteria used varies from state to state.(39)

II) C) i) U.K. JURISPRUDENCE: POLITICAL INCIDENCE TEST

The following section will examine the development of the

"political incidence" test developed by British courts to determine whether a given offence is a political offence. The section will demonstrate the evolution of the test from its original requirement - that the act in question be an act of violence in furtherance of a political disturbance by a group in which the individual has membership - to the modern interpretation that, while the act need not be violent, it must be part of a dispute with the government seeking extradition concerning political control over, or at least political freedom from, the state.

The case of Re Castioni in 1890 was the first in which a British court considered the concept of a political offence (40); in this case the divisional court noted that it was neither necessary nor desirable that it provide an exhaustive definition of the political offence.(41) However, the court did establish the so-called "political incidence" test.

The court agreed that the applicant, a Swiss citizen, who had shot a member of a cantonal government while participating in an armed attack on that government's offices by a group of disgruntled citizens, was a political offender. While there was minority support for the position, borrowed from the published work of Mr. Justice Stephen (42), that political offences need be only "incidental to" and form "part of political disturbances"(43), the more widely held view on the bench was that the offence must go beyond being "in the course of" a political disturbance and must be

in furtherance of (author's emphasis) such a disturbance.(44)

Intent was important.(45)

"It must at least be shewn (sic) that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands..."(46)

In Re Castioni, the court established what was to come to be known, somewhat confusingly in light of the words of the actual decision described above, as the political incidence test. To qualify as a political offence, the court found that the offence in question should be an act of political violence committed by the individual for a political purpose (author's emphasis) during an uprising involving a group in which the individual has membership.(47)

In the case of Re Meunier in 1894, the divisional court narrowed the scope of the political offence exception by requiring that the individual committing the offence must belong to an organized political party struggling for political power with at least one other political group. Judge Cave stated:

"[I]n order to constitute an offence of a political character, there must be two or more parties in the state, each seeking to impose the Government of their own choice on the

other, and [then], if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not."(48)

In Meunier, the Court indicated that to qualify as a political offence, the act in question must take place in the context of a struggle for power.(49) On the other hand, in Meunier the court did not indicate that the required struggle for power need necessarily include violence. Nor did it seem to require that the state necessarily must have been a party to the struggle.(50)

The Court decided in Re Meunier that the bombings of a cafe and an army barracks by an anarchist did not meet the above criteria and therefore did not constitute a political offence. In its view, anarchists were not vying for control of the state; indeed, "the party of anarchy is the enemy of all governments. Their efforts are directed primarily against the general body of citizens."(51)

Re Meunier provides a good example of how political judgment can color judicial decisions about political offences. A narrow reading of the political offence category provided the opportunity to exclude a group thought to be particularly undesirable.(52) Some argue that the Meunier case should be read strictly in the context of the perceived need to deal with the anarchist threat of the time and should not be viewed as supplanting the Castioni decision.(53)

But this rationalization, while perhaps satisfying those who seek consistency in the application of the political offence exception to extradition, provides little comfort for those searching for an objective definition of a political offence. It may be that the Meunier decision indicated the limitations of the Castioni approach. Faced with the unpalatable conclusions that a strict application of the Castioni criteria would lead to, namely protection for anarchists, the court sought a way out and found one with its blanket exclusion of anarchists from the exception. A better approach may have been to consider a refinement of the test to include a proportionality aspect, along the lines of the test developed later by the Swiss courts (54) and touched upon in the United Kingdom case Regina v. Governor of Brixton Prison ex parte Kolczynski. (55)

Despite the caution by the court in Castioni (56) to the effect that it was not purporting to provide an exhaustive definition of the political offence, after the Meunier case in 1894 (57), British courts applied the test in the Meunier case for more than 50 years and did not reexamine the issue until 1954.

In 1954, in Regina v. Governor of Brixton Prison ex parte Kolczynski (58), the divisional court was faced by a demand from Poland for the extradition of seven Polish sailors who had seized a fishing trawler from its captain and the rest of the crew. Poland sought their extradition for a number of extradition offences.

As noted above, in the case of Meunier, it had been decided that for the application of the political offence exception, it was necessary for the individuals concerned to be involved in an organization struggling for power. However, none of the sailors were members of any political organization attempting to overthrow the Government of Poland nor was there any organized internal opposition to that government in Poland.(59) Their own counsel admitted that reliance on earlier cases such as Castioni and Meunier would result in their extradition but he argued that those cases should be viewed in their nineteenth century historical context.(60)

The Court refused the extradition request. Justice Cassell accepted the argument that in considering whether the political offence exception should be applied, due consideration must be paid to "circumstances of the time"(61):

"The present time is very different from 1890 when Castioni's case was decided. It was not then treason for a citizen to leave his country and to start a fresh life in another. Countries were not regarded as enemy countries when no war was in progress."(62)

The court found that a political offence had been committed in the case at hand. The court characterized the seizure of the ship and the seeking of asylum as "a rebellion against the political head [the master] of...[a] political unit [the whole crew]" (63); the sailors therefore had participated in a revolt of a political

character. Judge Cassell stated that in a totalitarian state, escape may be the only viable form of political protest.(64)

The court also introduced a novel element into the jurisprudence in this area. In the court's opinion, if the sailors were returned to Poland, they would have been tried, in fact, for treason even though the formal charge may have been the extradition offence of revolt on the high seas. "[T]here could be no doubt that, while they would be tried for the particular offence mentioned they would be punished as for a political crime."(65)

In considering the consequences of a return to Poland, the court introduced an element that is one of the underlying rationales for the political offence exception and is reflected in the so-called discrimination clause in domestic legislation, such as that contained in s. 3(2) of the U.K. Extradition Act.(66) The U.K. act provides for protection from extradition when the extradition request, while ostensibly for a non-political offence, was really motivated by a desire to punish the individual for a political act.(67)

The Court took the view that there was only a minimal criminal component involved in the sailors' political act. This introduced the notion of proportionality (author's emphasis); not only was the crime carried out to achieve a political object, but the criminal element was essential and proportional to the political end.(68) As

will be noted below, the issue of proportionality may be a useful concept when considering the issue of how to protect political offenders on the one hand, while, on the other, ensuring that individuals are not free to commit any act, however brutal, for political ends and be shielded from prosecution.(69)

The Court itself acknowledged that the decision in this case gave a broad reading to the political offence exception but argued that it was necessary

"if only for reasons of humanity, to give a wider and more generous meaning to the words we are now construing, which we can do without in any way encouraging the idea that ordinary crimes which have no political significance will be thereby excused".(70)

Although in Meunier the court had used a narrow reading to exclude from the political exception an undesirable group, in the Polish Seamen's (Ex parte Kololzynski) case the court fit particular acts into the political offence category by giving a broader reading to the concept, variously construing the mutiny either as a political act, in and of itself (71), or as an act necessary to avoid punishment for a political offence.(72)

Another case narrowed the concept of the political offence by restricting its application to offences committed against requesting states. In the case of Regina v. Governor of Pentonville Prison ex parte Tzu-Tsai Cheng in 1972 (73), the United States successfully

sought extradition of an individual who had been convicted in the United States of attempting to murder in New York the son and political heir of Taiwanese leader General Chiang Kai-shek. Extradition was granted despite the fact that the individual in question belonged to a political organization sworn to overthrow the general's regime. The Court took the view that the Extradition Act of 1870 (74) had no application to this case; the Court ruled that the scope of the protection provided to political offenders in that act was restricted to offences which had been directed against the requesting state which was, in the Cheng case, the United States. (75)

In providing this interpretation of the political offence exception in the Cheng case, the court leaned towards a finding supportive of the struggle against international terrorism. As in Meunier, the court demonstrated a willingness to narrow the scope of the political offence test to meet a political objective. In Cheng, the court relied on an obiter dictum to this effect in Regina v. Governor of Brixton, ex parte Schtraks in 1964 (76). This latter case, in further refining the meaning of the political offence, also demonstrated that to qualify as a political offence, it is insufficient that an act be potentially political; the act must have a political purpose and must be part of a struggle between the offender and the requesting state for political control over or, at least, escape from the state.

In Schtraks, a demand for extradition stemmed from a dispute regarding child custody; the demand was portrayed by those opposing extradition to Israel as part of a struggle for political power between secular and religious factions of Israeli society.(78)

In this case, the House of Lords upheld a decision of the divisional court which had declined to recognize the claimant as being covered by the political offence exemption. The court found that the actions of the accused were privately motivated and were not a demonstration of opposition to the government. The court ruled unanimously that to be political, offences must be committed for a political purpose, not merely have the potential to be political. Lord Reid noted that "the motive and purpose of the accused in committing the offence must be relevant and may be decisive" and that "not every person who commits an offence in the course of a political struggle is entitled to protection."(79)

In obiter, in Schtraks, the Lords offered some guidance on a modern interpretation of the concept of the political offence: the crux of the concept is the existence of opposition between offender and requesting state for political control over the state.

In doing so, the Lords acknowledged that past definitions were not entirely adequate. For example, the requirement in earlier cases that a political offence could only occur in the course of a political disturbance should not be seen as an end in itself.

Rather it should be viewed as rooted in the valid concept that individuals whose extradition is demanded must have been involved in something other than ordinary criminal activity; they should be involved in a dispute with the government seeking extradition concerning political control over the state (author's emphasis). (80)

In an opinion much cited in later cases, Viscount Radcliffe in Schtraks emphasized the importance of a situation of conflict between the individual and the state:

"In my opinion the idea that lies behind the phrase "offence of a political character" is that the fugitive is at odds with the State that applies for his extradition on some issue connected with the political control or government of the society..." (81)

"It is this idea that the judges were seeking to express in the two earlier cases of Re Castioni and Re Meunier when they connected the political offence with an uprising, a disturbance, an insurrection, a civil war or struggle for power; and in my opinion it is still necessary to maintain the idea of that connexion. It is not departed from by taking a liberal view as to what is meant by disturbance or these other words, provided that the idea of political opposition as between fugitive and requesting State is not lost sight of." (82)

It was this latter opposition between the offender and the requesting state which was the key ingredient. In Lord Reid's view, this opposition need not actually be manifested in an open insurrection. He pointed out the inappropriateness of applying

rigid categorizations in this area:

"An underground resistance movement may be attempting to overthrow a government and it could hardly be that an offence committed the day before open disturbances broke out would be treated as non-political while a precisely similar offence committed two days later would be of a political character." (83)

Nor, in Lord Reid's view, must the opposition necessarily aim at toppling the regime of the demanding state. "It would be enough if they were trying to make the government concede some measure of freedom but not attempting to supplant it"(84) or, in the view of Lord Diplock in Cheng, "to enable...escape from the jurisdiction of a government of whose political policies the offender disapproved but despaired of altering..."(85)

In the Schtraks case, Lord Radcliffe expressed concern lest the concept of opposition between offender and requesting state be lost by the characterization of an offence as political merely because it had a political end or political motive. He expressed the view that the criteria in the Polish Sailors Case was too broad.(86)

"There may, for instance, be all sorts of contending political organizations or forces in a country, and members of them may commit all sorts of infractions of the criminal law in the belief that by so doing they will further their political ends: but if the central government stands apart and is

concerned only to enforce the criminal law that has been violated by these contestants, I see no reason why fugitives should be protected by this country from its jurisdiction on the ground that they are political offenders." (87)

II) C) ii) SUMMARY OF UNITED KINGDOM JURISPRUDENCE

To sum up developments concerning the United Kingdom approach to the political offence exception, the inclusion of the political exception in extradition treaties represented a shift from an exclusive focus on the interest of the state to one which also took into consideration the interests of the individual. At the heart of the political offence exception in extradition proceedings is the concept that individuals who are sought by governments for other than ordinary criminal law enforcement should be protected.

However it is clear in British jurisprudence that a mere political end or political motive is insufficient. There must be a substantial struggle for control of the state between the requesting government and the political movement of which the individual is a part or at least a serious attempt "to make the government concede some measure of freedom" (88), and there must be a close connection between the act in question and the goal of the political movement.

The criteria do not take into account either the seriousness of the particular offence or its international character.

A fairly wide area of discretion and interpretation regarding criteria has been left to individual courts. Moreover, as noted above, from time to time, courts have established additional criteria in certain cases or provided novel interpretations. There has been more than a suggestion in various judgments that courts have shaped some judicial decisions to conform with political views. (89)

II) D) i) UNITED STATES JURISPRUDENCE: POLITICAL INCIDENCE TEST

In the United States judicial proceedings regarding extradition are for the purpose of determining whether there is sufficient evidence for the executive to extradite an individual.(90) Should a magistrate decide that the offence of the individual in question comes within a political offence exception within the particular extradition treaty, "he has no authority to certify such a case to the executive department for any action whatever"(91) and the executive cannot extradite the individual.(92) If the magistrate does certify an individual as extraditable, the executive then has discretion to choose whether to extradite.(93)

American courts have developed a "political incidence" test to determine what is a political offence. This test requires a substantial connection between the act in question and a political uprising (94); the particular act must be "incidental to and [form]

a part of political disturbances".(95) Furthermore such disturbances must be active, organized and violent.(96)

The political incidence test is rooted in the concept reflected in the English Castioni case which was cited approvingly in the American case In re Ezeta in 1894.(97)

In In re Ezeta, the court refused an extradition request from El Salvador for a former commander of that state's armed forces because the capital offences, allegedly committed during the revolution that resulted in his overthrow, for which his extradition was sought, were found to have been connected "with a political offense or with an offense subversive of the internal or external safety of the state".(98) The offences were found to have been committed during the struggle against the ultimately successful insurgents; they were "closely identified with the acts of a political uprising, in an unsuccessful effort to suppress it".(99) In the opinion of the presiding magistrate, crimes "associated as they are with the actual conflict of armed forces, are of a political character"(100). This complied with the requirement that there must exist a "substantial connection" between the act and a political uprising.(101)

In the single case in which the Supreme Court has examined the issue of the political offence in Ornelas v. Ruiz, it ruled that such an offence could only take place during a political

uprising.(102)

Ezata marked the introduction of the political incidence test into American case law.(103) This test has required a substantial connection between the offence and a political uprising (104) and that the offence be "incidental to and [form] a part of political disturbances".(105)

An attempt in a lower court in the 1979 Abu Eain case to substitute another test was overturned on appeal and the political incidence test was reaffirmed. In Abu Eain case, the magistrate applied a different three part test. Firstly, he decided that the applicability of the political offence exception required participation in a political movement and political motivation for the particular act. Secondly, the magistrate required a link between the act and the political objective. Thirdly, the lower court insisted on a relationship or proportionality between the offence, its methodology and the political objective.(106) Applying this test to the facts of the case, the magistrate found that while the subject may have met the first part of the test, he did not satisfy the second part. Therefore the magistrate had no need to inquire whether the third condition was fulfilled and he ruled that the case did not fall within the political offence exception.(107)

On appeal, the Court of Appeal of the Seventh Circuit applied

the traditional political incidence test, with the same result.(108) To fit within the political offence exception a "violent political disturbance" must be concurrent with the act for which the exception was being invoked and the act must be "incidental" to the disturbance.(109)

The decision of the Court of Appeal in Abu Eain reflects the general acceptance in American jurisprudence of the political incidence test as set out in In re Ezata.

As noted above, the political incidence test in Ezata required that the act in question be "incidental and [form] a part of political disturbances".(110) American courts have given a liberal interpretation to the phrase "incidental to" with the result that a variety of criminal acts have been considered political offences.(111) A series of cases dealing largely with Irish nationals whose extraditions were requested by the United Kingdom provide examples of the broad meaning given to the phrase by American courts.

In the Lynchehoun case in 1947, the presiding commissioner found that an assault with intent to murder an English landlady constituted a political offence (112) because it was sufficiently "incidental to a popular movement to overthrow landlordism in Ireland" and win independence from Britain.

In the case of re Peter McMullen in 1979, the presiding magistrate found that the bombing by a member of the Provisional Irish Republican Army (PIRA) of a British army barracks in England which resulted in the death of a charwoman "was a crime incidental to and formed as part of a political disturbance, uprising or insurrection and in furtherance thereof." (113) The magistrate had taken judicial notice of the civil strife in Northern Ireland and characterized it as meeting the criteria set out in the Castioni case. (114)

The case of Quinn v. Robinson in 1986 demonstrated both the importance of the existence of an uprising and a limitation to the broad interpretation given to the phrase "incidental to". The Ninth Circuit Court of Appeals found that the existence of an uprising was a necessary element of the political offence exception and that the uprising must take place in the country requesting extradition. An uprising in a third country was insufficient. (115) Since no uprising was found to exist in England where the offence took place, as opposed to Northern Ireland, the Court decided that the political offence exception did not apply.

While the Quinn case required the existence of an uprising in the state requesting extradition, it also demonstrated how broadly the criteria were to be construed if such an uprising is found to exist. In Quinn, the court stated that to satisfy the incidence test, the accused need not prove his political motivation directly,

or establish that leaders of the group responsible for the uprising had ordered the act or even that the particular act was an effective means of achieving the objectives of the group.(116) In the specific case of Quinn, the court found that if an uprising did exist, then the killing of a police officer and the concealment of a bomb factory were incidental to it.(117)

The broad fashion in which the "incidental to" criteria has been construed has been subject to some criticism. In the 1957 case of Karadzole v. Artukovic (118), the court had described the killing of thousands of people in Yugoslavia during World War II as a relative political offence covered by the political offence exception due to "the marked degree of connection between the alleged murders and a political element".(119) One commentator noted the following in regard to this decision:

"The connection existing between Artukovic's common offense and his alleged political act is so feeble that the political character of the crime has accordingly disappeared. It requires little effort to realize that the thousands of killings attributed to him have absolutely nothing to do with an offense against the state and, what is perhaps more important, are most forcibly condemned by the ethical judgment of all civilized men. It is precisely in recognition of this consideration that war crimes and crimes against humanity are almost universally recognized as criminal..."(120)

Despite the legitimate criticism of the Artukovic decision and the broad interpretation of the criteria which lead to it, American

jurisprudence since that case demonstrates the continued general acceptance of a broad reading of the "incidental to" criteria.

The other requirement in American jurisprudence is that the political offence must occur in the course of, or in furtherance of a political disturbance.(121) Generally, American courts have taken a strict view of "political disturbances", interpreting them as uprisings which are active, organized and violent,(122) amounting to "civil war, insurrection or political commotion"(123).

The tone was set in the 1908 case re Krishian Rudewitz where the court made the following decision:

"a person acting as one of a number of persons engaged in acts of a political character, with a political object, and as part of the political movement and rising in which he is taking part, is a political offender and so entitled to an asylum in this country".(124)

The need for a violent political disturbance was maintained in the 1971 Fifth Circuit decision in Garcia-Gallern v. United States in 1971, which stated: "A political offense under the extradition treaties, must involve an "uprising" or some other violent political disturbance."(125)

In Escobedo v. United States (126) in 1980, the U.S. Court of Appeals for the Fifth Circuit ordered the extradition of

individuals accused of kidnapping, despite the fact that the kidnapping was politically motivated, because the offence had not taken place in the context of a violent uprising.(127)

The importance of the existence of a violent political disturbance and the nature of such a disturbance was highlighted by the Court of Appeals for the Seventh Circuit in Eain v. Wilkes in 1981. This case involved a bombing of a marketplace in Israel. The court noted that the nature of the conflict in question in this case was different than the disturbances in other extradition cases where the political offence exception had been successfully invoked. In those cases, a political disturbance was said to consist of "a war, revolution or rebellion".(128) In the court's opinion, the Palestinian Liberation Organization (PLO) was not involved in such a disturbance which the court described as entailing contending armies engaged in continuing, organized battles (129) though the court did state that there was a "conflict" in Israel (130) and conceded that that it could be argued that the conflict was "a violent political disturbance".(131)

In any case, the court concluded that the bombing was not incidental to either a political disturbance or to a "cognizable" political aim (132); furthermore, in its view, an offence which preceded the political disturbance cannot constitute a political offence.(133)

The narrow interpretation given to the "disturbance" criteria has not gone totally unchallenged. For example, in a 1984 case, In re Doherty, in the Southern District of New York, the court rejected the contention that the type of disturbance giving rise to political offences should be defined as narrowly as in Eain. (134)

However, the preponderance of American jurisprudence demonstrates clearly that not only must the offence in question be incidental to a political disturbance but that the disturbance must be active, organized and violent. (135)

If the criteria for extradition are met, American jurisprudence indicates that American courts have generally found themselves, pursuant to the doctrine of non-inquiry, "bound by the existence of an extradition treaty to assume that the trial will be fair." (136) This is so even when the individuals whose extradition are being requested are former leaders of the states demanding extradition and the states demanding extradition are in the hands of their political opponents. The mere fact that those demanding extradition and those whose extradition is requested are political opponents is not in itself sufficient to bring a particular act within the political offence exception. (137)

For example, in the case of Jimenez v. Aristeguieta (138) in 1962, the court approved the extradition request of Venezuela for that state's former president who had been overthrown in a coup by

those who now formed the government seeking his extradition. The former president was accused of a number of criminal offences resulting from the acceptance of kickbacks from government contracts. The Court found that as there was "no evidence that the financial crimes charged were committed in the course of and incidentally to a revolutionary uprising or other violent political disturbance" (139), they did not constitute political offences.(140).

The decision in Jimenez v. Aristeguita (141) was in conformity with Ezata.(142) Clearly, in the Court's view, to apply the political offence exception, it was not sufficient that those seeking the extradition had been at odds with the accused "on an issue related to the political control of the country".(177/143)

Similarly in Garcia-Guillern v. United States (144) in 1971, an individual was extradited upon the request of the Government of Peru despite indications that he would be punished by his political opponents within that government.

This position of not examining the motives of the demanding states has not gone unchallenged. Some courts have examined the motivation of those seeking the particular extradition. For example, in the 1971 case of Mylonos (145), a district court in Alabama found that the fact that the embezzlement of which the individual was accused had taken place during a civil war and those

who were asking for his extradition were suspected of doing so for political reasons connected to the political struggle in which they had all been engaged, satisfied the requirement that the offence be incidental to political disturbances.(146) This decision was made with no apparent examination of whether the actual offence itself had been done for political reasons; there was, in fact, no evidence that this had been the case.(147)

Similarly, in Gallina v. Fraser the court stated, in regards to the principle of non-inquiry, that it could "imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require re-examination of the principle".(148)

However the approach taken in Mylonos and Gallina is the exception and has not been followed in higher courts. There the approach has been the line laid down in the Fifth Circuit in the 1980 case of Escobedo v. United States where, upon appeal from a district court ruling, the court stated:

"[I]t is not a part of the court proceedings....to exercise discretion as to whether a criminal charge is a cloak for political action, nor whether the request is made in good faith. Such matters should be left to the Department of State."(149)

Similarly in Eain v. Wilkes, in response to the claim by the subject of the extradition request that the real reason that Israel

sought his extradition was to punish him for his political views, the Federal Court of Appeal ruled that the question of the motives of the requesting state was not a judicial concern but one for the Secretary of State.(150)

American courts have shown themselves to be reluctant to go behind the ostensible grounds for extradition requests and examine the motivation of those making the requests. This can have serious consequences as the State Department, in turn, has proved loath to accept claims that foreign judicial processes are unfair (151), despite the existence of arrangements with certain countries that there will be no extradition if it can be proved that "the extradition request has been made for the purpose of trying or punishing him for an offense of a political character".(152)

Despite judicial and State Department disinclination to consider the motivation of extradition requests and the consequences of return to the countries making the requests, in certain respects such consideration would reflect an older tradition. Prior to 1838, the United States refused to become a party to any extradition agreements because of its concern about becoming an accomplice of states with unfair legal systems. Thomas Jefferson refused an early French extradition request with the following remarks:

"The evil of protecting malefactors of every dye is sensibly felt here as in other nations,

but until a reformation of the criminal codes of most nations, to deliver fugitives from them would be to become their accomplice...".(154)

It is also doubtful that an extradition request for, and subsequent trial of a former head of state can ever be free of a political element, no matter how ostensibly non-political the charges appear to be.

Indeed the inclusion of the political offence exception in extradition treaties was meant to address this concern about the unfairness of foreign legal processes.(155) Nevertheless American jurisprudence makes clear that, providing there are ostensibly legitimate grounds for the extradition request, the motivation of those making the request is unlikely to be examined.

II) D) ii) UNACCEPTABILITY OF CERTAIN ACTS AND PROPORTIONALITY OF OFFENCES

American courts have also considered how to deal with crimes against humanity and others serious crimes. In cases such as Lynchehoun (156), Peter McMullen (157), Karadzole v. Artukovic (158) and Eain v. Wilkes (159), the courts have examined whether certain crimes are so disproportionate to political objectives that they should be excluded from consideration as political offences for the purpose of extradition, whatever their political motives. In particular, the Lynchehoun, McMullen and Eain cases raise the

issue of the applicability of the political offence exception to cases of terrorism.

The issue of how to deal with crimes against humanity was considered in the 1947 Artukovic case. The court considered the effect of U.N. resolutions which endorsed the extradition of war criminals charged with crimes against peace and humanity. General Assembly resolution 3 of 1946 stated that states should

"take all necessary measures to cause the arrest of those war criminals who have been responsible for or have taken a consenting part in the above crimes, and to cause them to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries..."(160)

The state requesting extradition in Artukovic argued that this resolution should result in extradition given the circumstances of this case where the subject of the extradition request was accused of being responsible for deaths in concentration camps; the indictment stated that he had "issued orders based on criminal motives, hatred and the desire for power, to members of bands of which he was one of the leaders, to carry out mass slaughters of the peaceful civilian population of Croatia, Bosnia and Herzegovina."(161)

The court found that it was bound to deny extradition, the accused having met the traditional political offence test; the U.N.

resolution had insufficient weight to alter this decision. (162) However in a 1986 case, Quinn v. Robinson (163), the same court acknowledged that it had erred in Artukovic and that the normal rules did not apply to "crimes against humanity" whose "nature and scope... exceeded human imagination".(164) This meant, in practice, that the dispatch of people to concentration camps should not be considered a political offence.(165)

Similarly, in the case of In re Doherty in 1984, in the Seventh Circuit, the district court accepted that "persons who commit the most heinous atrocities for political ends" should not receive the benefit of the political offence exception.(166) Each court had a responsibility to distinguish between indiscriminate violence and legitimate political action.(167) While the court refused extradition of an individual accused of attacking a British military patrol in Ireland based on its interpretation of the facts (168), it did provide, in obiter dicta, an explicit description of unacceptable acts, namely those not meeting "international standards of civilized conduct", public bombings causing indiscriminate personal and property loss, injuring of hostages and breaches of the Geneva Conventions.(169)

The three part test put forward at the initial hearing in the Eain case in 1983 by the presiding magistrate may be better able to address the issue of terrorism through the proportionality leg of the test than the standard political incidence test (170).

However a federal appeal court rejected the 3 part test proposed by the magistrate in Eain v. Wilkes, while reaching the same conclusion as the magistrate regarding the extradition itself; the court agreed to the extradition. But it did not endorse the proportionality rationale of the magistrate. Rather the federal court based its decision on a technical interpretation of what constituted an uprising or disturbance (171), on the non-existence of a direct link between the act, the individual and his political movement's specific goals and on its decision that the political offence exception did not apply to acts which disrupted "the social structure that established the government" but only to acts which "disrupt the political structure of a state".(172)

The underlying rationale that led to the federal court's conclusion can be gleaned from the following passage of the judgment in Eain v. Wilkes; the court stated that with a political offense exception which was too broad

"nothing would prevent an influx of terrorists seeking a safe haven in America... Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States and live in our neighborhoods and walk our streets forever free from any accountability for their acts. We do not need them in our society... [T]he political offense exception... should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere."(173)

In this respect, the court echoed some of the sentiments

previously expressed regarding anarchists in In re Meunier (174), to the effect that terrorists should be held accountable for their actions and should not be given protection by third states.

"We do not need them in our society. We have enough of our own domestic criminal violence...without harbouring with open arms the worst that other countries have to export." (175)

Furthermore, the court noted that in the Abu Eain case the bombing in question was random in nature and aimed at private citizens; in the view of the court, the actual target of the bombing was Israeli society rather than the overthrow of the Israeli government. (176) Moreover the court was not prepared to accept that the political offence exception was meant to cover this sort of activity.

"The exception does not make a random bombing intended to result in the cold-blooded murder of civilians incidental to a purpose of toppling a government..." (177)

This latter statement was qualified somewhat by a comment that seem to imply that such a bombing while not in itself sufficient to qualify as a political offence might be so considered if there were other elements:

"[a]bsent a direct tie between the PLO and the specific violence alleged, the act involved here, without more, was not the sort which may

be reasonably "incidental to" a political disturbance."(178)

The comments in Eain concerning the nature of the bombing appear to be more political than legal in nature and to be aimed at the exclusion of certain categories of individuals and certain types of attacks, namely attacks on civilian targets (179), from consideration as political offence exceptions. The comments in Eain represent a significant narrowing of the political offence exception.

In Quinn v. Robinson in 1986, the Court of Appeal of the Ninth Circuit refused to make the distinction between legitimate and illegitimate targets suggested by the Seventh Circuit Court of Appeal in Eain v. Wilkes.(180) In Quinn, the court stated:

"[T]here is no justification for distinguishing ... between attacks on military and civilian targets. The "incidental to" component, like the incidence test as a whole, must be applied in an objective, non-judgmental manner; it is for revolutionaries, not the courts, to determine what tactics may help further their chances of changing the government."(181)

This latter statement cuts to the heart of the matter and sets down a marker for the guidance of courts. It seeks to limit the discretion of the courts to judge the legitimacy of methods of political movements and the goals sought.

The court in Quinn further declared that there "is no reason... to construe the incidence test in a subjective and judgmental manner that excludes all violent political conduct of which we disapprove." (182) At the same time, as noted above (183), the court specifically excluded "crimes against humanity" from the political offence exception category. (184)

In American decisions about the acceptability of certain offences, two types of acts have been distinguished. There is first of all the type of offence which can be characterized as an atrocity constituting a crime against humanity or its equivalent. American jurisprudence has evolved since the Artukovic decision. It is clear that certain crimes are so heinous so as to remove them from consideration as political offences.

What is less clear is the reaction to other offences which, while serious, are not necessarily crimes against humanity. There, American jurisprudence reflects two schools of thought. There is first of all the view reflected in the Fain decision of the Court of Appeal of the Seventh Circuit that the courts have a role to play in deciding whether means and ends of political disturbances are legitimate. (185)

On the other hand, the Quinn decision of the Court of Appeal of the Ninth Circuit indicates that decisions as to the need or acceptability of certain actions should be left to the actors

rather than the courts to decide; apart from crimes against humanity (186), the means chosen by the movement in question are "simply irrelevant to the question of whether the political offense exception is applicable." (187) The court doubted that the judiciary is equipped to assess the appropriateness of means chosen to attack a particular government. (188)

II) D) iii) SUMMARY OF AMERICAN JURISPRUDENCE

To sum up developments in American jurisprudence, American courts also have developed a "political incidence" test, derived from the U.K. test, to determine what is a political offence. The American political offence test requires a substantial connection between the offence and a political uprising (189); the particular act must be "incidental to and [form] a part of political disturbances". (190) Furthermore such disturbances must be active, organized and violent. (191)

The liberal interpretation given to the phrase "incidental to" has resulted in a variety of criminal acts being considered as political offences. (192) The accused does not have to prove political motivation or demonstrate that leaders of the group responsible for the uprising had ordered that the offence be committed or even that the offence was an efficient way to achieve the goals of the group.

American cases distinguish between crimes against humanity and other types of serious crimes. The jurisprudence has evolved so that courts now agree that those accused of crimes against humanity should not receive the benefit of the political offence exception. This is not necessarily so for those who have committed other serious offences. The jurisprudence regarding other crimes which are serious but not crimes against humanity reflects a divergence of views. Some courts have ruled that the courts have a role to play in deciding on the legitimacy of certain acts. Other courts have said that this is a decision for revolutionaries not courts.

II) E) EUROPEAN APPROACH

II) E) i) FRANCE: THE CONCEPT OF THE "POLITICAL OBJECTIVE"

In France, the courts have generally taken a "political objective" approach to the issue of determining what is a political offence. A key factor in determining whether a particular act is a political offence is the motive or purpose of the act.(193) But political motive or purpose is not enough. French jurisprudence also requires the choice of an appropriate means to achieve the objective and a proportionality between the act and the objective.

In its earliest form, the political objective approach was described as meaning that "[i]f the violation of the law is

committed in the course of political happenings, as an insurrection or a civil war," then all those acts which would be legitimate in war would be considered to be political offences. The ordinary penal laws would apply only when the crimes committed during an insurrection would violate international law, such as the the laws of war.(194)

The political objective approach is reflected in the 1927 French Extradition Act which stated:

"As to acts committed in the course of an insurrection or a civil war by one or the other of the parties engaged in the conflict and in the furtherance...of its purpose, they may not be grounds for extradition unless they constitute acts of odious barbarism and vandalism prohibited by the laws of war and only when the civil war has ended."(195)

Commenting on the 1927 legislation, a member of the French Parliament described political offenders as follows:

"[Ils] sont des criminels ou des délinquants politiques ceux que l'ardeur de la passion politique a seule poussés jusqu'à la violation de la loi."(196)

The political objective approach has been the predominant but not the only approach in France. In a 1947 case, In re Giovanni Gatti, a French court concluded that

"[t]he offense does not derive its political character from the motive of the offender but from the nature of the rights it injures. The reasons on which non-extradition is based do not permit the taking into account of mere motives for the purpose of attributing to a common crime the character of a political offence." (197)

In Gatti, the court viewed as crucial the existence of a threat to the interests of the requesting state:

"In brief, what distinguishes the political crime from the common crime is the fact that the former only affects the political organization of the state, the proper rights of the state, while the latter exclusively affects rights other than those of the state. The fact that the reasons of sentiment which prompted the offender to commit the offence belong to the realm of politics does not itself create a political offence." (198)

Despite the decision in In re Giovanni Gatti, in later French extradition cases, motives resulting, for example, from political fanaticism were viewed as crucial (199), even in the absence of membership of a political group or participation in any political activities. (200)

However, there may be limits to the extent that even the most political of motives can transform particular crimes into political offences. One limit is that an act cannot be characterized as political simply because a political motive can be identified. Such a characterization has been described by a French commentator as

"subjectivisme exagéré".(201)

The Piperno case (202) suggests that the political objective approach should be reformulated so as to require a political objective, the choice of an appropriate means to achieve that objective and a certain proportionality between the ends sought and the actions undertaken.(203) This imposes varying limits on the type of actions deemed to be acceptable. In general, this approach would suggest that the more serious the act, the less likely it is to be found to be a political offence.

Such an approach was taken in 1977 in the Croissant case where West Germany sought the extradition of Klaus Croissant from France. Croissant had acted as an attorney for members of the Baader-Meinhof terrorist group and the charges against him were related to his activities on behalf of this group. He contended that members of this group had been convicted of political crimes and therefore that he was covered by the political offence exception.(204) However the Court of Appeal had the following to say regarding the group's motivation and activities:

"[Considérant] que ces actes ne sont pas politiques par leur nature; qu'il s'agit en fait d'opérations criminelles qui, dans la mesure où elles ne s'expliquent pas par de basses considérations matérielles, ne présentent aucun caractère commun qui permette de les intégrer dans un système organisé de lutte contre quelque chose ou en faveur de quelque chose d'autre mais se ressemblent par contre par le mépris de la vie de victimes

innocentes parce qu'étrangères aux faits politiques, et du bien d'autrui;...considérant enfin qu'il est sans intérêt de chercher à tirer une conclusion formelle de ce qui précède car les faits évoqués et les conclusions qui s'en dégagent permettent d'admettre sans équivoque cette fois que même dans l'hypothèse que les crimes reprochés à la "Bande à Baader"- et il s'agit essentiellement de crimes de sang- révéleraient une certaine motivation politique, cette circonstance ne pourrait à elle seule constituer un obstacle à l'extradition de Croissant..."(205)

II) E) i) a) SUMMARY OF FRENCH JURISPRUDENCE

French jurisprudence reflects a political objective approach. The modern interpretation of the political objective approach is that a determination that an act is a political offence requires the existence of a political objective, an appropriate means to obtain that objective and a certain proportionality between the actions undertaken and the goals sought.

II) E) ii) SWITZERLAND: PREDOMINANTLY/PREPONDERANTLY POLITICAL APPROACH AND PROPORTIONALITY THEORY

The Swiss approach to determining whether a criminal act can be characterized as a political offence is to determine whether the political or criminal element is predominant or preponderant. In making this determination the circumstances of the act, and, in particular, the motivation and the purpose of the act are key considerations.

The act generally must take place in the context of a struggle for power although this requirement may be waived in certain circumstances, such as when a totalitarian state offers no political space for any opposition. There must also be a balance between means and ends and the individual must have a reasonable belief that there is no alternative way to achieve the end.

The Swiss approach is reflected in various extradition acts and treaties. For example, article 10 of the 1892 Swiss Extradition Act encapsulated this approach. It states that extradition may occur

"alors même que le coupable alléguerait un motif ou un but politique, si le fait pour lequel elle est demandée constitue principalement un délit commun"
 ("even if the guilty person alleges a political motive or end, if the act for which it has been requested constitutes primarily a common offence").(206)

In determining whether a crime can be said to have a predominantly political character (207), key determinants are the circumstances in which a crime has been committed and, in particular, the motive and purpose of the individual committing the crime.

However, as noted in the Kroeger case decided in the Swiss Federal Tribunal in 1966 (208) and the Castori case decided in 1975, in order to be considered as political offences, the acts

generally must occur "in the framework of a struggle for the power in the state"(209). In practice this is a stricter criteria than the political incidence criteria, in that the Swiss test requires an obvious and direct linkage between the act and the pursuit of political power.(210)

This linkage was not found to exist in the Kroeger case. In that case, the killing of thousands of civilians during World War II was not considered to be predominantly political as the perpetrators, the Nazis, were already in power, rather than pursuing it.(211)

Swiss courts have not required an obvious and direct linkage between the criminal act and the pursuit of political power in certain situations such as those which arise in a totalitarian state where political opposition and a challenge for power are impossible.(212) In Kavic, Bjelanovic and Arsenijevic (213) in 1952, extradition to Yugoslavia was refused on the grounds that the act in question, the hijacking of an aircraft, was a political act even though there was no concurrent political struggle taking place in Yugoslavia. The decision is similar to, and may have influenced, the British decision in 1954 in Regina v. Governor of Brixton Prison ex parte Kolczynski.(214)

Swiss jurisprudence provides for an assessment of means against ends, a measurement of proportionality. If the means are

out of proportion to the ends, the individual will not obtain the protection of the political offence exception. This was expressed in Kavic, Bjelanovic and Arsenijevic (215) where the court took the view that it was acting consistently with past decisions in refusing extradition. In doing so, the court stated:

"[T]he 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 to justify, the injury to private property, and to make the offender appear worthy of asylum. Freedom from the constraint of a totalitarian State must be regarded as an ideal in this sense. In the present case, the required relationship undoubtedly exists".(216)

In a 1930 case, In re Kaphengst, the court ordered the extradition of a German citizen accused of bombings in Germany on the basis that the means used were out of proportion to the ends pursued:

"Bomb outrages of the kind perpetrated in the present case in the struggle for amending the fiscal legislation cannot, according to Swiss conceptions, be regarded as a means justified...by the object of the crime."(217)

If that required proportionality does not exist, then, as reflected above in In re Kaphengst, the individual will not be protected from extradition.

When applied to terrorist offences, this need for

proportionality leads to findings such as that in the Della Savia case in 1969 where the court found that the required proportionality did not exist where actions

"result in gratuitous manifestations of violence which - because of their seriousness and their dangerousness - are repugnant to any civilized conscience, and are on the borders of acts of indiscriminate and gratuitous terrorism".(218)

Not only must the means be proportional to the ends, but the act in question must be a "truly efficient means" to achieve the political purpose.(219) Where the act involves the taking of a life, Swiss jurisprudence has usually required that there be no other way to obtain the political end sought.(220)

However more recent Swiss decisions have loosened this requirement deeming it to have been met where the court decides that the individual reasonably believed the act was his/her only alternative whether in fact objectively it was.(221) Previously, the courts required that the act be, in fact, the only alternative.(222)

The Swiss approach in this regard was set out most eloquently in the 1964 case of Watin where the court stated the following:

"Ce qui importe, c'est l'attitude du coupable...Il faut que l'auteur du crime qui tue par conviction politique, ait pu espérer

raisonnablement que son acte aurait pour conséquence, au-delà du résultat immédiat, une modification politique ou sociale de l'Etat. Il s'ensuit que l'extradition peut être refusée même si l'homicide n'était pas, en réalité, le seul moyen d'atteindre le but visé. Il faut qu'il se soit imposé en fait au coupable comme la mesure la mieux adaptée aux circonstances, encore que l'intérêt en jeu, en principe, eut pu être sauvegardé autrement, notamment par une victoire électorale. L'assassinat peut ainsi apparaître comme la dernière ressource lorsque la personne visée incarne pratiquement le système politique de l'Etat, en sorte qu'on puisse penser que sa disparition entraînera une modification de ce système." (223)

II) E) ii) a) SUMMARY OF SWISS APPROACH TO POLITICAL OFFENCE

The Swiss approach has been described as a "test of political motivation tempered by the theory of predominance." (224) It is commonly used in Europe and South America. (225) It means that offences which contain both political and criminal elements are examined to determine if one or the other of these elements predominate. In making this determination the circumstances of the act, and, in particular, the motivation and the purpose of the act are crucial.

The act generally must occur in the context of a struggle for power; there must be an obvious and direct link between the act and the pursuit of political power. This requirement may be waived in certain circumstances, such as when the offence occurs in a totalitarian state where there is no possibility of opposing the

power in place.

Swiss jurisprudence also requires a proportion between means and ends and there is a further requirement that the individual reasonably believe that there are no alternative means to achieve the desired goal.

II) F) SUMMARY OF VARIOUS TESTS

The preceding sections have examined the four main tests in use to determine whether a given offence is a political offence. United Kingdom jurisprudence has developed the "political incidence" test which has evolved over time so that what is now required is that the offence be part of a struggle with the government seeking extradition concerning political control over, or at least political freedom from, the state. A mere political end or political motive alone is insufficient.

American courts also have developed a "political incidence" test to determine what is a political offence. This test is based on the U.K. test but has evolved from it. The American political offence test requires a substantial connection between the offence and a political uprising (226); the particular act must be "incidental to and [form] a part of political disturbances".(227) Furthermore such disturbances must be active, organized and violent.(228) The term "incidental to" is interpreted in a liberal

way.(229) No proof of political motivation is required; no demonstration of orders from the group responsible for the uprising is necessary. While those responsible for crimes against humanity will not receive protection from American courts, the latter differ among themselves on whether the courts have a role to play in determining whether other types of serious crimes are legitimate in the pursuit of certain objectives.

In France, the courts have developed a "political objective" test to determine whether a particular act is a political offence. A key factor in this determination is the motive or purpose of the act.(230) But political motive is not enough. The means must be appropriate and proportionate to the objective.

The Swiss have developed the "predominantly/preponderantly political" test. In determining whether a particular offence is political, Swiss courts decide whether the political or criminal element is predominant or preponderant. In making this determination, the court examines the circumstances of the offence. In particular, Swiss jurisprudence requires a political motive and objective. In addition, generally the offence must occur during a struggle for power with an obvious and direct link between the act and the pursuit of political power. There must be a balance between means and ends and the individual must reasonably believe that there is no other way to achieve the objective.(231)

III) CONCERNS AND ALTERNATIVES

As the preceding section has shown, there are a variety of tests which may be used to determine whether a particular crime should be considered as a political offence. Added to the confusion caused by the number of tests is the seemingly arbitrary way in which some of the tests are applied. The following section examines the problems caused by the various tests in use, explores some other possible approaches and proposes an alternative test. In addition, a particular problem in the realm of the political offence - terrorism - is examined and the proposed test is applied to it.

III) A) i) INAPPROPRIATENESS OF DESIGNATION OF CERTAIN ACTIONS AS POLITICAL OFFENCES

One concern is that particular tests, such as that used in American courts, may result in protection for some undeserving individuals because their circumstances, upon the surface, may formally fit the criteria. This seems to have been the case in Artukovic (232), for example, where an individual implicated in crimes against humanity was protected from extradition.(233) Similarly in McMullen, the magistrate was willing to protect the individual from extradition, despite a crime described as "deplorable and heinous", because the individual met the formal criteria.(234)

Though the attempt by the magistrate at the initial hearing in In re Eain to go beyond the formal criteria and weigh the harm caused by the offence against the political objective was rejected by the Seventh Circuit Court of Appeal (235), the latter court nevertheless did draw a distinction between legitimate and illegitimate activity. (236) This approach was rejected by the Ninth Circuit Court of Appeal in Quinn v. Robinson. (237)

U.K. decisions sometime share with American decisions a tendency to disregard the seriousness or international character of offences. However U.K. jurisprudence does display more flexibility in its judgements. This is reflected in Schtraks, particularly in the obiter dicta, and in Cheng. (238)

Other tests such as the Swiss predominance/proportionality approach are able to deal with this issue better than the political incidence test. In Switzerland, courts have required that there be a certain proportionality between acts deemed to be terrorist, and the political purposes of the acts, and have found the lack of such proportionality cause for finding that such offences were common criminal, rather than political, in nature. (239) This gives the court a certain flexibility lacking in American jurisprudence. Of course, the fact that this particular criterion seems to have been applied to acts deemed to be terrorist in nature raises, as in Re Meunier, the issue of political considerations colouring judicial decision-making. (240)

Like the Swiss, French courts have also identified certain acts as being unacceptable for the purposes of the political offence exemption. In granting extradition of an Italian citizen, Francesco Piperno, allegedly involved in the kidnapping and killing of Aldo Moro, a former Italian Prime Minister, a French court differentiated between what the court described as acts coming "into the realm of political ideals" on the one hand and assassination and kidnapping on the other.(241) It described the latter acts as common crimes (242) and noted that "whatever objective may have been sought, or whatever the nature of the context in which such facts could be integrated, they, in light of their seriousness, cannot be considered to have a political character."(243)

This approach is reminiscent of the language used in French legislation which referred to the exclusion of "acts of odious barbarism" (244) from the political offence exception.

However, the French judicial position regarding this issue remains ambivalent, given that in cases such as In re Holder and Kerkow, extradition was refused on charges of extortion and kidnapping despite minimal evidence of political motivation.(245)

The preceding demonstrates that too rigid an adherence to formal criteria may lead to protection for individuals undeserving

of protection. A rigid approach may provide a haven for individuals undeserving of refuge, such as those guilty of crimes against humanity who may meet the formal criteria.

Automatically to provide protection for all those who claim political motivation for their deeds - no matter how offensive their claim or how odious their methods - would be to debase the principle underlying protection and could lead ultimately to its extinction.

Automatic protection may also encourage such alternatives to formal extradition processes as disguised extradition, deportations or even abductions (246); this circumvents the normal judicial process and the safeguards for individuals contained therein and leaves matters increasingly in the hands of governments more likely to lean towards maintenance of world order.(247)

A better approach is that reflected in Swiss jurisprudence, namely an assessment of the nature of the objective sought and the degree to which such acts are necessary to achieve that objective.(248)

III) A) ii) FAILURE TO MEET ALL FORMAL CRITERIA

The preceding section illustrates one consequence of too rigid an adherence to formal criteria, namely a failure to take into

account the gravity and nature of particular offences. Such an approach can result in protection being accorded undeserving individuals because they meet certain criteria.

However, an overly rigid approach can also have the opposite effect. Individuals, who appear to have been politically motivated, may be excluded from the protection of the political offence exception, because they do not meet all the formal requirements.(249)

American courts have been criticized for taking an overly rigid and formal approach by requiring, for example, the existence of a political uprising before the political offence exception becomes operational.(250) An overly formal approach may deny the protection of the political offence exception because particular circumstances did not meet what many view as anachronistic requirements of a civil war situation.(251)

The American executive branch's discretion to refuse the extradition request even if a court has ruled that the subject is extraditable provides a certain safeguard against miscarriages of justice.(252) However past practice, including the return of a Jewish fugitive to Nazi Germany in 1934, indicates the danger of relying on this safeguard.(253)

Too rigid a reliance on formal criteria can lead to exclusion

of individuals deserving of protection.

III) A) iii) JUDICIAL DISCRETION

The preceding section illustrates the shortcomings of too strict a reliance on formal criteria. At the same time, judicial discretion can lead to charges of arbitrariness. There is the risk that more flexible criteria, with consequently more discretion left to the decision-maker, will result in more arbitrary and less predictable and consistent results. This could result in extradition in some cases and protection in others.

Indeed the main objection to the Swiss proportionality theory is that it is perceived to be inherently arbitrary (254), given the subjective evaluations which are carried out in arriving at a decision. The subjectiveness of the process is evident in the approach taken by the Swiss court in the 1964 Watin case where the court decided that the determining factor in providing the protection of the political offence exception was whether or not the individual reasonably believed that the offence was his only alternative, whether or not in fact it was.(255) This element of subjectiveness is also present in the evaluation of other criteria used in Swiss jurisprudence such as efficacy.

But a certain arbitrariness and subjectiveness is not peculiar to the proportionality approach. Nor do courts in other

jurisdictions refrain from exercising discretion whether acknowledged or not. This is illustrated in the American case of Quinn in 1986 where the court used its discretion to differentiate between acts carried out in England and an uprising in Northern Ireland; this distinction between England and Northern Ireland allowed the court to conclude that the acts were not incidental to an uprising in the same "geographical entity" and therefore that the political offence exception did not apply. (256)

As the court set out no criteria for the determination of what constitutes a "geographical entity", this opens the possibility that courts may use their discretion to designate a particular area as a "geographical entity" for the purposes of reaching a conclusion they think best.

By contrast, judicial discretion in Switzerland is inherent and clear. Unlike the situation in Quinn when the court rejected the notion that it should judge the acceptability of the methods or ends of the political movement in question but then went ahead and exercised its discretion in another area (257), Swiss courts make a frank assessment of the gravity and acceptability of particular offences.

The proportionality between means and ends used in Swiss jurisprudence provides judges with a certain flexibility, providing an opportunity to escape the formal and rigid application of

particular tests evident in judicial decisions in other jurisdictions.(258)

Judicial discretion is useful for equitable decisions. But it can also be abused, particularly when it is used in a secretive and unacknowledged manner. Therefore, judges should be accorded a certain amount of discretion but the circumstances in which it should be exercised, such as the weighing of means and ends, should be identified.

III) A) iv) EFFICACY AS CRITERIA

A fourth concern about the tests used in various jurisdictions is that some of them place an undue reliance on the efficacy or likelihood of success of the act in question.

The concept of the political offence developed in western societies as part of a humane liberal reaction to tyranny. If there is an intrinsic value to opposition to such rule, then protection of those involved in political struggle should not be dependent on their eventual success or failure.(259) Such individuals should be protected from politically motivated punishment in the requesting state. This is the rationale underlying the development of protection for political offenders.(260)

However some of the tests developed to determine whether a

particular offence is political and whether an individual is worthy of protection - with their emphasis on the utility or efficacy of the particular act vis á vis the political objective - threaten to resurrect the earlier concept of success, or, at least, potential for success, as a criteria of whether the particular act should be covered by the exception.

The three part test of the magistrate in Eain (261) does suggest that in assessing the applicability of the political offence exception, a premium is put on the effectiveness of the action against the state. It is questionable whether this is a desirable criterion; even if it is desirable, it would be preferable to leave such political judgements to the executive rather than to a court with no foreign policy expertise.(262) It is doubtful that judges have the resources and the capacity to make the investigation necessary in order to determine whether a particular action meets the standards to qualify as a political offence, namely whether there is a sufficient connection between act and motivation and whether such an act is appropriate under the circumstances. It is doubtful that making such a determination is a proper role for the courts.

Finally it is doubtful that efficacy is an appropriate criterion if the desire is to uphold the right to pursue political activity.

Less objectionable is the approach taken in Swiss cases (263) where the question is whether the individual reasonably believes this to be his only alternative.

III) A) v) POLITICAL CONSIDERATIONS

A fifth concern is the way in which political considerations may affect judicial decisions.

To the extent possible, courts should avoid political factors influencing their decisions regarding extradition. The political neutrality of courts is, after all, what is said to distinguish such decisions from those made by the executive which is expected to be more sensitive to diplomatic and political considerations.(264) Moreover, an independent judiciary is the key element in the rule of law.

At the same time, we recognize that some judicial decisions regarding the political offence exception have been influenced by political factors, for example, by the desire to combat terrorism.(265) In the words of one commentator:

"Comparison [of various political exception extradition cases] where the courts reached contradictory conclusions on very similar fact patterns, illustrates the lack of a consistent and principled jurisprudence. The results suggest an approach more concerned with political needs and realities than with a principled application of the incidence

test."(266)

The American cases of Karadzole v. Artukovic (267), In re Mylonos (268), Jimenez v. Aristequieta (269) and Ramos v. Diaz (270) are notable examples of the influence of political factors.

In the Ramos v. Diaz case in 1959, the refusal to return two individuals to Castro's Cuba seems to have had less to do with the strict conformity of their actions to the political offence criteria than with the ideological complexion of the regime which had made the request.

In the 1960 Mylonos case, the individual sought was an anti-communist political figure and the individuals who had unsuccessfully sought his extradition were his former political opponents who were ideologically at odds with the American Government.(271) In contrast, in Jimenez v. Aristequieta in 1962 extradition was granted at the request of a new regime regarded with favor by the United States.(272)

Some courts have been frank in expressing their views in this regard; for example, in In re Gonzalez, the judge noted, in obiter dicta, that the definition of the political offence should be widened so as to take into account the nature of totalitarian states.(273) The rationale was that totalitarian states, by their very nature, could act to prevent any uprising from occurring thus

precluding an individual from being covered by the political offence exception if the normal criteria were applied.(274)

The facility with which political factors can come into play is enhanced when, as in the 1961 Eain case, the court provides no clear criteria to determine when actions would be considered "incidental" or what would be considered a "political disturbance".(275)

This impression of politically motivated decision-making is further reinforced when, as in Abu Eain, the court introduces a new element into the equation. The court stated that even if a link could be found between the bombing and the political actions of the PLO, the aims of the PLO were "almost indistinguishable" from the goals of anarchists (276) who had been removed from the protection of the political offence exception in the British case of In re Meunier in 1894.(277) The court described the struggle of the PLO as one directed at the people rather than the government of Israel and distinguished between acts that "disrupt the political structure of a state" which are political offences and those that disrupt "the social structure that established the government." which are not.(278) As in Meunier, the court's decision seemed an attempt to rationalize a decision made essentially on political grounds.

In Quinn v. Robinson in 1986, an American court attempted to

allay concerns regarding the political influences at play by specifically disqualifying itself from judging the legitimacy of the means and ends pursued by political movements.(279) Nevertheless the court then proceeded to base its decision on a finding that distinguished between England and Northern Ireland for the purpose of determining that an offence taking place in England could not be incidental to an uprising in Northern Ireland (280) for the purpose of the political offence exception. In making this finding regarding separate "geographical entities", the court differed from the conclusion of the initial magistrate who found the United Kingdom to be a single political entity.(281) This finding of separate "geographical entities" by the court appears to be rather an artificial distinction, drawn for the purposes of arriving at a politically palatable conclusion.

Quinn aside, political factors may be gleaned from comparing the treatment of other Irish extradition requests, referred to above, with that in Eain.(282)

Colouring of judicial decisions by political consideration is also evident in some post-World War II French cases where the earlier narrow reading by French courts of the political offence exception, limiting the political offence exception to "pure" political crimes put forward in the 1947 case of In re Giovanni Gatti (283), was adjusted to accommodate post-World War II

political reality. In the 1953 case of re Rodriguez (284), arson and murder were characterized as "at least relative political offenses" (285) and extradition of two Spanish nationals to Franco's Spain was denied (286), a result apparently motivated more by antipathy towards the Franco regime than from a strict reading of the political offence category.

Similarly, extradition of a Swiss national was denied in the 1967 case In re Hennin (287) despite the fact that the individual's extradition was sought for arson committed mainly against private property; the court cited as reasons for its decision the fact that the individual was a political fanatic who operated in a very political environment. (288)

Striking examples of political factors influencing judicial decision-making in France were the mid-1970's cases of In re Holder and Kerkow (289) and Abu Daoud (290). In the former case, the hijacking of an aircraft was characterized as a political offence even though there was little evidence of political motive and neither hijacker "belonged to any political group or had engaged in any political activities". (291) In such a case where the minimal requirements of the political offence seem to be absent, political factors seem to have been the deciding factor in the decision.

In the Abu Daoud case, a court released the alleged mastermind of the 1972 Olympic massacre on technical grounds in the face of

West German and Israeli intentions to request extradition.(292) Once again, the decision seems to have been motivated by a desire to avoid the political complications of acceding to an extradition request.

In another case in 1979, a French court characterized members of the Baader-Meinhof group as criminals rather than political offenders and determined that the group's lawyer was extraditable. This decision was made despite the fact that the group and the lawyer were described by authorities in terms which in other circumstances might lead to a conclusion that the parties were political offenders. The arrest warrant issued by German authorities described the group as attempting "to topple the established order in the Federal Republic of Germany" (293) and stated that their lawyer was charged with "organizing and operating an information system between imprisoned terrorists and others in liberty".

The overt judicial use of political factors reflected in the exclusion, in the Abu Eain case (293a), of an individual characterized as a terrorist stem from judicial views that there are certain actions which, by their nature or the circumstances in which they occur, should be excluded automatically from consideration under the political offence exception category.

There are also other political factors which may be brought to

bear on decisions. These include fear of armed or economic retaliation (294) and domestic support in the requested state for the group or cause in question.(295)

Unfortunately, the use of political factors in extradition decision-making undermines the concept of the political offence.(296)

III) A) vi) SUMMARY OF PROBLEMS ASSOCIATED WITH VARIOUS TESTS

There are a variety of problems associated with the various tests. In certain cases the designation of certain acts as political offences is inappropriate despite the fact that the offence in question may fit the formal criteria; such an approach may fail to take into account the gravity and nature of particular offences. The Swiss predominance/proportionality test seems best able to deal with this situation, requiring a certain proportionaility between means and ends.

In other cases, individuals, who appear to have been politically motivated and who deserve protection, may not be able to obtain the protection of the political offence exception, because they do not meet all the formal requirements.(297)

One way of dealing with too rigid adherence to criteria is judicial discretion which is exercised, to a certain degree, by all

courts though not all courts are as candid as Swiss courts in acknowledging this. Judicial discretion may lead to equitable decisions. However to avoid situations where it may lead to arbitrariness and to a decrease in predictability and consistency, there should be clear indication of the circumstances in which judicial discretion can be exercised.

Undue reliance can also be placed on the efficacy or likelihood of success of the act in question. This threatens to resurrect the earlier concept of success as a criteria of whether the particular act should be covered by the exception with the measurement being the utility or efficacy of the particular act vis a vis the political objective. Efficacy is not an appropriate criterion in this area. Moreover, judges do not have the expertise to make an accurate assessment of efficacy in this area.

Political considerations may also affect judicial decisions and have done so, to a greater or lesser extent, in all jurisdictions examined. This undermines the concept of the political offence.

III) B) ALTERNATIVES IN FACE OF VARIETY OF TESTS AND RESULTS

In response to the varied approaches of the courts in deciding on the application of the political offence exception, the complications arising from the varied results of such activity and

the political factors which enter into the decision-making process, various alternatives to the present system have been put forward. These include executive decision-making, depoliticization and the exemption of war crimes and crimes against humanity from the political offence exception and the use of the concept "aut dedere aut judicare". These options are considered below.

III) B) i) EXECUTIVE DECISION-MAKING

An alternative to judicial decision-making is to remove decision-making on this matter from the courts and hand over the entire responsibility to the executive. However, apart from making overt some factors in decision-making which are now covert and eliminating what in some cases is clearly misplaced faith in judicial objectivity, the advantages of doing so are not obvious. Whatever the extent of political influence in current judicial decision-making, that can only increase if decisions are left to governments.

As noted above, there is reason to believe that states, on occasion, use the political offence exception to disconcert a regime of a differing political ideology, rather than out of an interest in protection of the individual per se.(299) Conversely there is a tendency to wish to avoid providing shelter to those accused of offences in states of similar political and ideological outlooks. This latter tendency is reflected in the demand of

British members of the European Parliament that European Community states refuse to grant political asylum and agree to extradite all individuals charged with "terrorist" offences.(300)

That such demands are made is not surprising, given that one of the circumstances which allowed the concept of the political offence to develop in the first place was the development of regimes of differing political ideologies and the interest of states in maintaining the existence of opposition groups to the regimes of rival states (301) or at least their indifference regarding political opponents of foreign governments.

In 1950, using reasoning similar to that used four years later by a U.K. court in the Polish Seamen's case (302), the United States Government refused to return the hijackers of three Czechoslovak Airlines planes which had been hijacked to the American zone in West Germany. The American position was "that these individuals fled Czechoslovakia for political reasons by whatever means they could find to escape".(303)

It is true that governments may be able to bring some foreign policy expertise to such decisions. However, what may be gained in regards to an understanding of the foreign country concerned and the political context may be lost in regards to the story of the individual involved; a judicial process with the opportunity for cross-examination provides a better means to assess the

individual's circumstances than a secretive administrative process. The latter invites abuse. Ultimately, such decisions, involving questions of both law and fact, seem more the province of the judiciary than the executive. (303a)

The scope for political factors influencing decisions would be significantly enhanced if the executive takes from the judiciary the responsibility of determining the applicability of the political offence exception.

III) B) ii) DEPOLITIZATION

An alternative to leaving decisions concerning the political offence entirely in judicial hands is to depolitize certain offences; such offences would not be considered to be political, whatever the justifications offered for them. This has been done in certain jurisdictions.

The earliest example of the exemption of certain behaviour from the protection of the political offence exception is the so-called "attentat" clause, commonly contained in many extradition treaties (304); this excludes from the protection of the political offence exemption attacks against heads of states/governments and sometimes their families (305) and is considered to be part of both customary and conventional international law. (306) Nevertheless, a number of states have refused to agree to automatically extradite

individuals charged with offences covered by the "attentat" clause.(307)

As noted above, the effect of the judgment in In re Meunier was essentially to depolitize anarchist acts.(308)

This concept has been expanded in some extradition agreements to exempt other sorts of offences such as genocide (309) and attacks on internationally protected persons.(310) The Genocide Convention prohibits parties from characterizing genocide and related offences as political offences for extradition purposes.(311) The Genocide Convention originated in the post-World War II period, from a conviction that war criminals should not escape justice. In a unanimous 1946 resolution, the United Nations General Assembly urged states to arrest war criminals and to "cause them to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries".(312)

The 1985 United States - United Kingdom Supplementary Treaty (313) amended the USA - UK Extradition Treaty (314) and was one of several efforts by the United States to negotiate similar treaties during the Reagan administration.(315) It depolitizes certain offences such as murder, kidnapping, hijacking, maliciously wounding.

The European Convention on the Suppression of Terrorism also designates certain offences as non-political.(316)

The range of such offences could be expanded to include a wide number of offences such as aircraft hijacking, attacks on diplomatic personnel, offences covered by multilateral treaties obliging either extradition or prosecution, narcotic offenses, rape, and conspiracy to commit aircraft hijacking and rape.

The depolitization approach has the advantage over the various judicial tests that have been developed in that it removes some of the uncertainty and judicial discretion regarding the application of the political offence exception.

To a degree, depolitization also offers a formula to avoid conflict between states caused by disputes about whether particular acts should be considered political offences.

Nevertheless, a question arises about the appropriateness of depolitizing certain offences, sight unseen, regardless of the circumstances, when by any or all of the current judicial tests they could be found to be political offences. Critics contend that depolitization undermines the whole basis of the notion of the political offence exception and that its implementation would result in the extradition of many deserving political offenders.(317)

The automatic exclusion of certain offences from eligibility for consideration as political offences may result in miscarriages of justice. It may be that violence is required to escape torture or death at the hands of a brutal dictator. Similarly, for example, it would be unacceptable if the German officers who attempted to assassinate Adolf Hitler in July 1944 were to have been denied the benefit of the political offence exception because of a position that attacks against national leaders should be excluded from the category of the political offence. (318)

In any case, many states will not agree to the automatic exclusion of certain offences from the political offence category. This is true even of the "attentat" clause which is the oldest and most widely accepted provision of this sort; 5 of the first 19 states to ratify the European Convention on Extradition entered reservations to the clause, reserving to themselves the determination of whether the type of offence referred to in the clause is a political offence. (319) This is noteworthy given that the underlying *raison d'être* and justification of states for the "attentat clause" is the threat assassination poses to all governments.

There is a temptation to abrogate the principle of the political offence exception in order to deny shelter to individuals guilty of particularly odious acts. As the Irish Times put it in one editorial:

"In the case of Ireland today, we are not dealing with great political thinkers or philosophers of a better way of organising society. Or so it seems. We are dealing with people, some of whom have committed...political offences of a particularly heinous and sordid character... Extradition may not be the right way to deal with this situation. An Irish Government today might think it correct to extradite a person or persons to Belfast for an act of murder. Would we then be committing ourselves in principle to extradite, in the future, suspects to El Salvador or Argentina or Russia or South Africa?" (320)

An alternative to wholesale depolitization is to retain a list of depolitized offences but narrow its scope. For example, international law indicates that perpetrators of crimes against humanity and war crimes should not benefit from the protection accorded by the political offence category, whatever the political motivation of the particular act.(321)

National legislation may contain similar provisions, to be enforced by national courts. The French Extradition Act of 1927 stated that "acts of odious barbarism and vandalism prohibited by the laws of war" committed during a civil war would not allow their perpetrators to obtain the protection of the political offence exemption.(322)

Similarly the Supreme Court of Argentina has denied protection from extradition for "cruel or immoral acts" which "clearly shock the conscience of civilized peoples."(323)

Treating crimes against humanity as ordinary penal offences. would be consistent with the origins of the political offence as a means to protect individuals from having their rights violated. From this perspective, sheltering of those charged with crimes against humanity seems an anomaly.

Depolitization, in particular cases, could be made to depend on the degree to which a fair trial is available to the subject of the extradition request in the requesting state. The problem with this approach is that either the court or the executive will be faced with having to make judgments on the fairness of foreign judicial processes. Apart from the possibility of being open to political pressure, this introduces once again into the process an assessment of the judicial and/or political systems in foreign states, with all this entails. Nevertheless, as noted above, such a responsibility has been accepted in various jurisdictions including the U.K. (324)

III) B) iii) "AUT DEDERE AUT JUDICARE" PROVISION

An alternative to complete or partial depolitization is the approach taken in various multilateral instruments such as those dealing with aircraft hijacking (325), attacks on diplomatic personnel (326) and the taking of hostages. (327) In these treaties, particular acts are not depolitized; instead states receiving requests for extradition have a choice of extraditing or

prosecuting; this is the so-called "aut dedere aut judicare" provision.(328)

The "aut dedere aut judicare" provision allows states to sidestep the politically charged situation of being obligated to return individuals to requesting states which are likely to persecute the individual or, at least, which are unlikely to provide a fair trial (329) or which may be ideological opponents of the requested states. Hence, for example, the vigorous opposition to Soviet proposals to require automatic extradition for hijacking of, and attacks against aircraft.(330)

Irish legislation, for example, provides for prosecution in Ireland for certain crimes, such as bombings, committed by Irish citizens outside of Ireland.(331) Such prosecution has, in fact, occurred for offences deemed "political" by some.(332) In Ireland, the legislation is widely viewed as having successfully reconciled a need to punish those guilty of heinous acts and a need to uphold the principle of protection from extradition for the political offender.(333)

The "aut dedere aut judicare" provision also provides a way of overcoming the concern of some that the extradition of political offenders violates a so-called right to asylum, despite the fact that there is, in fact, no recognized right to asylum in international law.(334)

An advantage of the "aut dedere aut judicare" is that it provides both protection and prosecution.

The European Convention on the Suppression of Terrorism (335) blends elements of both the depolitization and the "aut dedere aut judicare" approaches, while providing protection from being returned to a state of persecution. Article 1 depolitizes a series of listed offenses including seizure of aircraft, attacks on diplomatic personnel and kidnapping. Article 1 states:

"For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives."(336)

However the European Convention does not provide for automatic extradition even for those offences listed in Article 1. Rather extradition is viewed as a primary option rather than an obligatory act.(337) Article 5 allows states to refuse to extradite if the requested state

"has substantial grounds for believing that the request ... has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that the person's position may be prejudiced for any of these reasons."(338)

Furthermore, article 3(2) of the European Convention on Extradition provides that there should be no extradition

"if the requested State has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, or political opinion, or that that person's position may be prejudiced for any of these reasons".(339)

Article 13 of the European Convention on the Suppression of Terrorism provides further that states may make a reservation to the Terrorism Convention "in respect of any offence mentioned in article 1 which it considers to be a political offence, an offence connected with a political offence or an offence inspired by political motives".(340)

If a state decides not to extradite pursuant to the Terrorism Convention, it is obligated to prosecute.(341)

The "aut dedere aut judicare" provision is not without problems, both of a legal and practical nature. A state may lack domestic jurisdiction for the particular offence in question. Even when the state has the will and the legal means to prosecute, it may lack the evidence necessary for a trial of an offence which took place in a foreign country.

In regards to the question of jurisdiction, the "aut dedere

aut judicare" principle has been established on an offence by offence basis as a result of the coming into force of specific conventions dealing with particular international crimes such as aircraft hijacking and attacks on diplomatic personnel.(341a) Such conventions contain provisions whereby the signatories agree to criminalize the offences in question and establish jurisdiction for them.(341b) An increased use of the "aut dedere aut judicare" approach will require more international agreements to cover offences not yet covered or, alternatively, a comprehensive treaty covering a wide number of serious offences, including those such as hijacking covered in existing treaties with the "aut dedere aut judicare" provision included, and those such as torture which are not covered by the "aut dedere aut judicare" provision. Either approach will require states to take steps to ensure that they have the necessary legislation in place to fulfill their international obligations.

Extra effort and resources will have to be deployed to obtain the evidence to prosecute offences which occur in another country. However prosecutions which have taken place in various states of alleged war criminals several decades after the events in question indicate the feasibility of doing so. In most cases, the offences covered by the "aut dedere aut judicare" provision would have been committed in the much more recent past.

III) B) iv) SUMMARY OF ALTERNATIVES TO VARIETY OF TESTS

Various alternatives to the variety of present tests have been proposed. These include executive decision-making, depolitization including exemption of war crimes and crimes against humanity from the political offence exception and the use of the concept "aut dedere aut judicare". Reliance on executive decision-making seems to have more disadvantages than advantages; in particular, it would make it more likely than ever that decisions on extradition would be influenced by political factors. The depolitization of certain offences has certain advantages; it would remove some of the judicial discretion and consequent uncertainty regarding the application of the political offence exception. Nevertheless, depolitization without some additional safeguard could lead to the extradition of genuine political offenders and miscarriages of justice.

One safeguard would be to restrict depolitization to particularly odious crimes such as crimes against humanity and war crimes. Another is to restrict it to situations where a fair trial is available; one disadvantage of the latter approach is that it requires an assessment of a foreign judicial process, an assessment which a court may be unwilling or unable to make.

A better safeguard is to provide states receiving extradition requests with the options of either extraditing or prosecuting; this is the so-called "aut dedere aut judicare" provision. This provision allows states to take into account such factors as the

absence of fair trials in the state requesting extradition while still ensuring that individuals are held accountable for their crimes; it provides both protection and prosecution.

III) C) PROPOSAL FOR A COMMON TEST

The variety of tests and alternative options described above illustrate the desirability of a test which will preserve that which the political offence exemption was originally meant to protect, while at the same time meeting the legitimate interests of states in international order, in protecting civilians from violence, and in ensuring that undeserving criminals do not find shelter behind the protection designed for political offenders. The new test proposed below would require relatively minor changes to the tests applied in American, U.K. and Swiss courts.

A fundamental point that underlies the original development of the political offence exemption, namely that certain political offenders should be considered differently than ordinary criminal offenders and, as such, deserve protection, remains valid today. This reflects the principle that modern liberal democracies - founded on the principle of opposition to tyranny and advocacy of democracy - should not exhibit less concern for the right to rebel against tyranny than their nineteenth century predecessors.

III) C) i) CRITERIA OF COMMON TEST

Set out below is a proposal for a new test made up of five criteria, drawn from existing tests, to determine whether the offence in question qualifies for the political offence exception. The first two criteria are threshold criteria based on U.K. and American jurisprudence, the third and fourth are exclusionary and the fifth is a restatement of the Swiss proportionality test.

The key threshold component to be drawn from U.K. and American jurisprudence is that outlined in obiter in the Schtraks case by Lord Radcliffe, namely that the individuals in question should be involved in a dispute with the government seeking extradition concerning political control over the state.(342) To be avoided is both the rigidity which has required a certain type of uprising and the situation exemplified in the circumstances described as "subjectivisme exageree" (343) whereby this requirement of a struggle for power with the government is neglected and a mere assertion of political motivation suffices.

Secondly, following from the above, the individuals in question must be part of a group which is involved in such a struggle and their act must be done in furtherance of that struggle. This goes beyond the Swiss requirement that the individual's acts be related to a general movement.

The first two criteria would preclude the protection provided by the political offence exception for a lone individual or fringe movement which does not pose a real challenge to a government. This is consistent with the position that political motivation in and of itself is insufficient; there must be a real challenge to the regime. A partial exception should be made for individuals who have committed offences in making their escape from totalitarian states where opposition is impossible. This covers the situation described in the Kolczynski case in the U.K. (344)

Thirdly, there are acts such as crimes against humanity and other acts "inconsistent with international standards of civilized conduct" (345) that are so heinous that their authors cannot be allowed to go unpunished. The political offence exception should not apply to these crimes. It is preferable that such a result ensue from objective criteria rather than from a subjective interpretation of the political offence exception or of the circumstances of the act or from the creation of new exceptions to the exception.

Fourthly, certain acts should be automatically excluded from the political offence exemption category, namely attacks on diplomats, aircraft hijacking etc. (346) However, the exclusion of all crimes of violence, as is done in Extradition Treaty Between the Government of United States of America and the United Kingdom of Great Britain and Northern Ireland (347) is too broad an

approach and would virtually eliminate protection for those who resort to any sort of violence.

Fifthly, other offences which are crimes but yet are not "crimes against humanity" or their equivalent or covered by the fourth criteria listed above should be assessed on the basis of their acceptability as a means to a specific end, on their appropriateness under the circumstances. Individuals cannot be provided carte blanche to pursue their political objectives any way they see fit. Rather, as in Swiss jurisprudence (348) and, at least implicitly, in some American jurisprudence (349), there should be proportionality between means and ends. This approach avoids the rigidity inherent in American jurisprudence where certain conduct is automatically excluded or included.(350)

Finally, where individuals who are otherwise extraditable would face genuine persecution or an unfair trial if extradited, they should be excluded from extradition, provided the requested state is willing to prosecute them for alleged crimes. The experience with multilateral conventions concerning certain types of offences indicates that "aut dedere aut judicare" rather than automatic extradition may be a better way of dealing with some offenders charged with offences excluded from the political offence exception for the reasons stated above. This would ensure that individuals who would face genuine persecution if extradited would be protected from persecution, while ensuring that they would be

tried for their alleged offences.(351)

Similarly, where extradition is refused because of the political offence exception, serious criminal offenders should not be allowed to escape unpunished for their crimes. It would be appropriate for the requested state to prosecute individuals for the criminal component of acts common to both requested and requesting states pursuant to the "aut dedere aut judicare" formula.

III) D) APPLICATION OF PROPOSED COMMON TEST TO TERRORIST PHENOMENON

III) D) i) INTRODUCTION

A major issue in the area of the political offence is that posed by the concept of terrorism, both in terms of the definition of terrorism and the appropriateness of the categorization of terrorism as a political offence. The following section will examine the concept of terrorism and international efforts to deal with the problem, including the way in which it has been dealt with in the context of the political offence exemption, the appropriateness of treating terrorist acts as political offences and a comparison of the tests which have been developed and proposed to identify those offences covered by the exemption. In this regard, the way in which terrorism has been dealt with by some

of the major tests for the political offence exemption will be reviewed. Finally, the way in which the phenomenon of terrorism could be dealt with, pursuant to the proposed common test outlined above, will be examined.

III) D) ii) DEFINITION AND CATEGORIZATION OF TERRORISM

The Oxford English Dictionary provides a number of definitions of terrorism including the following:

"A policy intended to strike with terror those against whom it is adopted; the employment of methods of intimidation; the fact of terrorizing or condition of being terrorized".(352)

Another definition of terrorism is "a strategy whereby violence is used to produce certain effects in a group of people so as to attain some political end or ends".(353) It is said that an end may be termed political when its target is the state and its aim is to alter or damage the state (354) and the activity is collective. The requirement for group action is based on the notion that an individual acting alone will be unable to challenge the state structure.(355) The Northern Ireland (Emergency Provisions) Act, 1978 describes terrorism as "the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear".(356)

One definition which is widely used by the American Government describes political terrorism in the following way:

"[T]he threat or use of violence for political purposes when such action is intended to influence the attitude and behavior of a target group wider than its immediate victims and its ramifications transcend national boundaries".(357)

The definitions used by different parties often reflect political orientations. Thus the USA has defined a terrorist as follows:

"[a]ny person who unlawfully kills, causes serious bodily harm or kidnaps another person, attempts to commit such an act, or participates as an accomplice of a person who commits or attempts to commit any such act."(358)

But elsewhere terrorism is described as "a rational strategy of achieving political goals through violence".(359) In the eyes of some, it is likened to a military action. In a 1988 case in Canada, involving an individual charged with having attacked an Israeli airliner, his lawyer stated the following:

"The actions of the (Popular Front for the Liberation of Palestine) are not terrorist, they are military actions in the course of a war".(360)

A political scientist described this conflict in the same

fashion. In his opinion, "Palestinian attacks on Israeli targets abroad...should be seen as part of a war."(361)

Most media and public attention is focussed on "terrorist" acts of individuals or groups.(362) However, it should be noted that one of the definitions contained in the Oxford Dictionary refers to the fact that government action may also be termed terrorist:

"Government by intimidation as directed and carried out by the party in power in France during the Revolution of 1789-1794; the system of the 'Terror'."(363)

Moreover, the Northern Ireland legislation cited above is worded so broadly that it could include actions of security forces. Certainly, this century has had no shortage of regimes that could be described as "terrorist" by the Oxford Dictionary definition. Felix Dzerzhinsky, the founder of the Soviet secret police, described his organization's role as follows: "We represent in ourselves organized terror."(364)

Acts of both states and individuals can be characterized as terrorist. The common elements of terrorist acts are that they are acts of violence intended to intimidate in order to achieve a certain political end. Some of the definitions reflect positive or negative attitudes towards the phenomenon; others assume a more neutral tone. The definitions reflect no agreement on whether

terrorism is a legitimate means to achieve an end; the question of legitimacy has a direct bearing on whether a terrorist act can be considered a political offence.

In light of disagreement reflected in the definitions about the legitimacy of acts considered to be terrorist, the various tests which have been developed to identify political offences and the new test proposed above can be used to examine whether terrorist acts meet the criteria for the political offence exception.

III) D) iii) TERRORIST ACTS AND THE POLITICAL OFFENCE

III) D) iii) a) INTRODUCTION

Terrorism is a relative as opposed to a pure political offence in that it combines criminal and political elements. Like other relative political offences, terrorism has been difficult to identify in a precise fashion.(365) Acts of terrorism usually resemble common criminal acts. It is the motivation and the purpose of the terrorist which make the acts different.

III) D) iii) b) APPLICATION OF USA AND UK TESTS

Terrorist acts usually comply with the technical requirements as set out in the American case of Ezeta.(366) According to the

Ezeta test, matters such as the extent that actions of the accused are essential or even directly related to the ultimate political goal or the degree of the harm caused are irrelevant to the issue of the action being a political offence. Ezeta's "political incidence" test requires the particular act to be "incidental to and [form] a part of political disturbances". (367) It is sufficient that the accused belonged to a political group involved in conflict with the requesting state (368) and that there exist "a substantial connection" between the act and a political uprising (369), namely that the act be "committed in the course of or furthering of civil war, insurrection or political commotion".(370)

As noted above, in the United States the exclusion of a specific act from the protection of the political offence exception is dependent on judicial interpretation of the criteria and judicial decision-making as to whether there are certain acts which ought to be excluded and, if so, whether the act in question is one of these. This approach increases the subjective nature of the ultimate decision.(371)

Similarly, in the U.K., the absence of a proportionality approach may result in ad hoc, subjective decision-making in order to exclude acts of terrorism, as was done earlier to exclude anarchist acts.(372)

III) D) iii) c) APPLICATION OF FRENCH POLITICAL OBJECTIVE APPROACH

In France, a key factor in determining whether a particular act meets the standard of the "political objective" test and can be deemed to be a political offence is the motive or purpose of the act.(373) However political motive is not enough. Unlike American and U.K. cases, French jurisprudence requires that the means be appropriate and proportionate to the end. This provides the courts with the means to exclude terrorist acts if they choose, as being disproportionate to the objectives. The more heinous the act, the more likely it is to be excluded.

III) D) iii) d) APPLICATION OF SWISS PROPORTIONALITY APPROACH

The Swiss proportionality approach also provides a means by which to exempt from the protection of the political offence category, actions which "result in gratuitous manifestations of violence which - because of their seriousness and their dangerousness - are repugnant to any civilized conscience, and are on the borders of acts of indiscriminate and gratuitous terrorism".(374)

III) D) iii) e) APPLICATION OF PROPOSED TEST

The test proposed above (375) takes the same approach as Swiss jurisprudence and would allow a court to exclude terrorist

actions from the political exception pursuant to certain criteria, namely if they were acts "inconsistent with international standards of civilized conduct"(376), if they are covered by various international conventions such as those covering attacks on diplomats (377), or if they were disproportionate to achieve a certain end and inappropriate under the circumstances. Some of those excluded from the political offence exception could be protected from extradition pursuant to the "aut dedere aut judicare" formula.(378)

The proposed test therefore offers a formula which preserves the integrity of the political offence, deals with the phenomenon of terrorism and protects individuals from genuine persecution.(379)

IV) POLITICAL OFFENCE EXCEPTION IN CONTEXT OF REFUGEE DETERMINATION

IV) A) POLITICAL REFUGEES

IV) A) i) INTRODUCTION

The above has described the various criteria used in the process of determining whether or not an individual qualifies as a political offender for purposes of extradition. There is another process - the determination of refugee status - which may be

relevant to the identification of political offenders and, in particular, to the determination of the fairness of the process political offenders are likely to face if they are extradited and to the determination of whether there is a genuine risk of persecution in the requesting state.

Problems may arise if there are significant discrepancies between the processes for determining whether an individual is covered by the political offence exception and for determining whether an individual is eligible for refugee status.(380) This provides a reason for harmonizing the processes. "Since both the asylee and the political offender seek refuge in the asylum State, the legal basis for a grant or denial of protection in both cases should be synchronized".(381)

The following describes the history, legal regime and criteria of refugee determination and compares these criteria with those for political offender determination with the aim of determining the degree of congruence between the two procedures and the implications of differences which may exist.

IV) A) ii) PHENOMENON OF POLITICAL REFUGEES

As noted above (382), the political offence exception to extradition was developed in the nineteenth century to deal with a

particular historical phenomenon, namely the presence of political offenders in countries of asylum. The exception offered protection from extradition to a certain category of individuals. At the same time ordinary criminal offenders could be extradited.

The twentieth century has seen the emergence of a new phenomenon, namely the mass displacement of millions of people fleeing persecution for political and other reasons. It has been estimated that at no point since World War II has the number of refugees in the world been less than five million.(383) In 1993, the number of refugees has been estimated to be nineteen million.(384) In many cases, those seeking protection and asylum have committed no offence, political or otherwise.

IV) A) iii) DEFINITION OF POLITICAL REFUGEE

Having had separate origins, political offenders and political refugees have been treated differently both in regards to legal status and regimes of protection. A legal distinction was drawn between political offenders and political refugees.

Customary international law contains no definition of the term "refugee", political or otherwise.(385) However the term is defined in several international instruments dealing with refugees.

The essential elements of refugee status may be found in the following two definitions. The first was adopted in 1936 in Brussels by the Institut de Droit International. The relevant

resolution states:

"Dans les présentes Résolutions le terme "réfugié" désigne tout individu qui, en raison d'événements politiques survenus sur le territoire de l'état dont il était ressortissant, a quitté volontairement ou non ce territoire ou en demeure éloigné, qui n'a acquis aucune nationalité nouvelle et ne jouit de la protection diplomatique d'aucun autre Etat."(386)

The second definition contained in an authoritative text by Professor A. Grahl-Madsen, a leading expert on international refugee protection, repeats that the flight of the refugee is caused by political events in the country of origin but adds that those events have "rendered his continued residence [in his country of origin] impossible or intolerable". This definition adds that in the case of individuals who are already abroad, they may be found to be refugees if they are "unwilling or unable to return, without danger to life or liberty, as a direct consequence of the political conditions existing there."(387)

The most authoritative definition is that contained in the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees.(388) Article 1 (A)2 of the Convention Relating to the Status of Refugees, which is incorporated into the 1967 Protocol (389), defines a refugee as follows:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, [the person] is outside the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country..."(390)

This is the definition most commonly referred to in other international instruments.(391)

Common to all of the above definitions is the concept that political refugees are the victims of political events in their countries of origin. They need not be actors in those political events; they need not have committed any offence. All that is necessary is that they have a well-founded fear of persecution because of those events.

IV) A) iv) KEY ELEMENT OF REFUGEE CLAIM: FEAR OF FUTURE EVENT

A political refugee is motivated by fear of a future event, namely the persecution the refugee may face upon return to the country of origin because of that individual's real or perceived political convictions.(392)

In the view of the Ad Hoc Committee responsible for drafting the Refugee Convention, the definition in the Refugee Convention requires only that the claimant demonstrate "good reason" why he or she fears persecution.(393) According to the authoritative UNHCR

Handbook on Procedures and Criteria for Determining Refugee Status, which is commonly used in Western states by the authorities responsible for determining refugee status (394), "if an applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt." (395)

The Guidelines used by the Canadian Government's now disbanded Canadian Refugee Advisory Committee (RSAC) stated:

"Looking, as it does, to the future, the refugee definition is concerned with possibilities and probabilities rather than with certainties. A well-founded fear may be based on what has happened to others in similar circumstances...A person need not be singled out for persecution in order to be a refugee." (396)

Further on, the Canadian Guidelines stated: "A person may be credible even though he has never been persecuted." (397)

The key is fear of persecution in the future. Persecution in the past may be evidence of the likelihood of this occurring. But it is not necessary to wait in the country of origin until such persecution actually begins.

The UNHCR stated the following in a brief submitted to the U.S. Supreme Court in the case of INS v. Stevic:

"Fear, rather than a certainty or 'clear probability' of persecution is what makes a refugee unwilling to return to his country of origin, and 'good reason' for that fear, rather than proof of a particular degree of probability of being persecuted, may be all that a refugee can show in support of his claim." (398)

The requirement that an applicant need only have a reasonable fear of persecution to establish a refugee claim is reflected in the guidelines and opinions of the UNHCR (399) and in the practice of several states. (400)

In the case of a political refugee, the motive of the fear is a political dispute in the country of origin. The government of that country may be a protagonist in the dispute or merely unwilling or unable to assist the individual. (401)

In turn, such a fear may or may not have its basis in activity, such as an offence, that the refugee has committed in the past. The refugee may be a passive victim or he or she may have committed a political offence for which the government wishes to punish the claimant or the latter may have refused to bow to the state's commands. (402) If the fear is found to be genuine, the refugee is protected from return, subject to some exceptions, by the principle of non-refoulement regardless of whether the refugee has committed any offence, political or otherwise, in the past. (403)

In contrast, by definition, the political offence exception cannot be activated unless an actual offence has been committed.

Persecution, as it relates to the determination of refugee status, may take different forms. For example, depending on the jurisdiction, it may be physical (404) or economic.(405)

Authorities differ on what constitutes persecution. Virtually all would agree that threats to life amount to persecution and most would agree that threats to physical liberty, at least threats to arbitrarily deprive an individual of liberty for a substantial period of time for political reasons would amount to persecution.(406)

There is also substantial agreement that serious threats to economic livelihood may constitute persecution. A leading proponent of a restricted view of persecution conceded that persecution included "enforced, protracted unemployment in the absence of other means of livelihood".(407) Also included is the denial of all "suitable" work.(408)

While some would argue that even torture and other inhuman acts need not necessarily constitute persecution "unless such attacks (torture, &c.) may lead to the victim's death or implies loss of physical freedom"(409), the majority and better view is that "torture and other forms of cruel, inhuman or degrading treatment or punishment" would constitute persecution.(410)

American jurisprudence has defined physical persecution as "confinement, torture or death inflicted on account of race, religion or political viewpoint." (411)

While some would argue that persecution does not include sanctions of an economic nature that "may tend to lead to social ostracism, or deny one an opportunity to obtain and enjoy some of the social niceties and physical comforts"(412), others contend that in addition to threats to life and liberty "other measures in disregard of human dignity may also constitute persecution".(413) In this view, requiring certain persons to wear specific articles of clothing or barring them from universities or professions or certain residential areas could amount to persecution.(414) Persecution could also include the deprivation of legal capacity.(415)

Other types of action such as restrictions on freedom of movement, thought, conscience, religion and assembly are more problematic.(416)

The key to determining whether a particular action amounts to persecution is whether the measures are severe and whether the act is meant to intimidate and oppress the individual or part of the population of a state. The Refugee Convention is meant to protect individuals who fear genuine oppression.(417) In determining whether a particular act is persecution, the purpose behind the

act, its particular political context and the way the action was carried out are relevant factors.(418)

It is generally thought that the term "persecution" may include prosecution except for those "genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations".(419)

It is clear that the aim of the Convention is the protection of those who have a well-founded fear of persecution.

IV) A) v) POLITICAL OPINION

Political refugees face persecution on account of their actual political opinion or that attributed to them by the government in question. This opinion may be expressed or unexpressed, public or private (420); the crucial factors are that the opinion, representing a fundamental opposition to the prevailing political system in the particular state not just to certain policies (421), is attributed to the refugees by their governments or by another party against whom the particular government is unable or unwilling to offer protection, and that it arouses a well-founded fear of persecution.(422) The expression of such an opinion may not necessarily be an offence, in and of itself.(423)

Persecution for political opinion may also arise in the case

of refusal to do certain things such as join a particular political party (424) or to keep silent.(425)

In general, political opinion is construed broadly to include the exercise of a number of rights contained in the Universal Declaration of Human Rights (426), which is specifically referred to in the preamble of the Refugee Convention.(427) Persecution on account of the exercise of these rights or an attempt to exercise these rights may constitute persecution on account of political opinion.(428) These rights would include: article 18, freedom of thought; article 19, freedom of opinion and expression, including the right "to seek, receive and impart information and ideas through any media and regardless of frontiers"; article 20, freedom of assembly and association; article 21, the right to free elections; and article 23, "the right to form and to join trade unions".

In reality, the very fact that an individual faces persecution because of an opinion suggests that the authorities regard that opinion as political, as casting aspersions on the legitimacy of the regime.(429) The existence of this actual, implied or inferred questioning of the political system is a key element in the determination of a refugee claim.(430)

The underlying premise of the protection from persecution on the basis of political opinion is set out in a West German

judgment:

"The Convention seeks to protect persons who would be subject to political persecution through no fault of their own. In this connexion the struggle for a certain political conviction is not to be regarded as a fault but as a right founded in the Law of Nature." (431)

IV) B) POLITICAL OFFENDER AND POLITICAL REFUGEE

IV) B) i) CONTRAST BETWEEN POLITICAL OFFENDER AND POLITICAL REFUGEE

Persecution laying the basis for a political refugee claim may consist of prosecution for a political offence. (432) However, committing a political offence does not provide the automatic protection of the Refugee Convention to political offenders. Such protection is only available when the offence in question reflects or is deemed to reflect the offender's political opinion (433) and the offender has a well-founded fear of persecution on the basis of that opinion.

Like the political refugee, a political offender is also driven by fear of the consequences of return to the country requesting extradition. However, by definition, that fear is rooted in an offence deemed to have been committed in the past though consequences upon return may be relevant in determining whether the

individual obtains protection from extradition.(434)

In contrast, a refugee need not have committed an offence. For example, the individual may qualify for refugee status because of changes occurring in the claimant's homeland (435) or because acts committed abroad by the claimant are deemed to be politically motivated.(436)

Another contrast between refugees and political offenders is that the Refugee Convention is focussed on protection while the political offence exception is an exception to extradition law which emphasizes public order.

IV) B) ii) SIMILARITIES BETWEEN POLITICAL OFFENDER AND POLITICAL REFUGEE

Despite the distinction between political offenders and refugees, there is a relationship between the two categories. Firstly, individuals may be both political offenders, facing prosecution and punishment for having committed political offences, and political refugees, having a well-founded fear of persecution on account of their political opinions. For example, the expression, actual or inferred, of a particular political opinion may be an offence. In such a case, prosecution may amount to persecution.(437)

Secondly, in cases where individuals are pursued in an extra-judicial fashion or are, in fact, facing punishment for political reasons though formally facing criminal charges, it may be inappropriate and artificial to maintain a distinction between prosecution and persecution.(438) Moreover, in the political offence category, offenders may be saved from extradition as a result of fears that they will face persecution upon return.(439)

Thirdly, the Refugee Convention is not concerned wholly with the individual refugee claimant. That concern may be over-ridden in particular circumstances. Refugee status may be denied in a case where "a person who is in no danger of being persecuted commits a crime which is not pertinent to his objective or necessary for his defence...This is particularly true if the crime is a heinous one."(440) In such circumstances, the concern is for public order.

IV) B) iii) POLITICAL OFFENCE AS BASIS OF REFUGEE CLAIM

A political offence, and the expression of political opinion that a state may infer from it, may be the basis for a well-founded fear of persecution but is not a necessary foundation of such a fear.

As noted above, various tests have been developed to determine whether particular offences with mixed political and non-political elements qualify as political offences so as to protect those who

have committed such offences from extradition. Similarly, in the context of international refugee protection, courts in various jurisdictions have developed criteria to determine whether particular mixed offences give rise to a well-founded fear of persecution. Although there are similarities in the criteria developed in the two contexts, there are also differences with the result that an act deemed to be political in one area need not necessarily be found to be so in another.

One school of thought has suggested that one should distinguish a case where the punishment to be suffered is due largely to the political component of the offence from one where punishment results from the non-political element.(441) A second, related to the first and favoured in some German jurisprudence, states that the real issue is whether the expression of the political opinion is the preponderant factor in the kind and level of punishment experienced.(442) A third suggests that the significant issue is whether the motivation for committing the offence is political.(443) A fourth position, expressed by a West Germany court regarding the case of an unauthorized departure, is to the effect that the actual opinion of the individual under these circumstances is of less importance than the underlying motivation of the pursuing state.(444)

The preponderance of French and German jurisprudence and leading academic authorities on international refugee protection

leans to the view that the most important element in deciding whether the protection of the Refugee Convention should apply in the case of prosecution for mixed and relative political offences is the inferred or actual political motivation of the individual in the undertaking of the offence.(445) Such political motivation should relate to fundamental opposition to the government in power not merely to some of its policies.(446)

This position is better suited to accord with the key purpose of the Refugee Convention, namely the protection of refugees. It is simpler to determine the motivation of the individual than it is to determine whether state action is motivated primarily by political or other considerations.

Although the emphasis on the inferred or actual political motivation of the individual who claims a well-founded fear of persecution resembles an important aspect of various of the political offence tests such as the French "political objective" test, other criteria developed in the context of the political incidence tests in U.K. and American jurisprudence are absent, notably the requirement in the U.K. case of Re Castioni that to qualify for the political offence exception, the individual must have committed an act of political violence for a political purpose during an uprising involving a group in which the individual has membership.(447)

A refugee claimant faces no such requirement.

IV) B) iv) EXAMPLES OF ACTS FROM WHICH POLITICAL OPINION, WHICH MAY PROVIDE A BASIS FOR A REFUGEE CLAIM, MAY BE INFERRED

Unauthorized departures from states and conscientious objection to, and evasion of, military service are offences which may lay, in particular circumstances, the foundation for successful refugee claims.

Unauthorized departures are offences in a number of states; such was the case until recently in various East Bloc states such as Czechoslovakia and Romania (448) which regarded unauthorized departures as political acts and restricted exits for the precise purpose of maintaining political control of the population. This was the view of a West German court which stated the following:

"[Punishment for the crime of flight from the Republic] serves the goal of securing the political sovereign authority of communism. It is not comparable with the penalties with which, even in 'constitutional states', unauthorized border crossing is punished." (449)

Under these circumstances, the state of origin is liable to infer political opinion, whether or not the individual in question actually holds any such opinion. (450)

Just as particular sanctions applied to individuals because of their opposition to a particular government may be persecution, punishment applied to individuals who leave the country without authorization or to those who overstay abroad may also be deemed to be persecution.(451)

In the case of conscientious objection to military service, the question arises of whether an individual legitimately may seek and obtain political asylum if the sole activity is evasion of military service per se. Such action may be motivated by a number of causes other than expressed or inferred political opinions, including, for example, religious reasons. In this regard, motivation is the key. This approach has been adopted in French and West German jurisprudence.(452)

Military conscription laws are generally laws of general application which are not directed at a single individual.(453) However, such laws may create political refugees when they are directed, for example, at particular minorities which are opposed to the country in which they find themselves:

" [A] man must be considered a refugee if he leaves his country of origin - of which he has become a national by virtue of a peace treaty - at the moment when he should enter the army, because he belongs to a minority and will not serve a country which he regards as his oppressor. Strictly speaking, he is a rebel, an ordinary delinquent; in fact, he is a political refugee."(454)

In a larger sense, mandatory military service may be viewed as an essential ingredient of the political authority of a state and compulsory service may be seen as particularly repugnant to one who detests the regime in power; refusal to perform such service then may be viewed as posing a fundamental challenge to the state's authority:

"[A] young man of military age can have a passionate hatred for the authoritarian regime and... his refusal to serve in its army can be an act of political opposition".(455)

In this sense, such refusal is a political act, either explicit or implicit, reflective of a certain political view regarding the authority of the state. Where no alternative is offered to military service (456), prosecution for failure to comply with service requirements may amount to persecution for political reasons, depending on a number of factors including the nature of the punishment the individual faces and whether the refusal to do the military service represents a fundamental opposition to the political system in place.(457)

IV) C) PROTECTION FROM EXPULSION AND REFOULEMENT

The Refugee Convention protects refugees from expulsion or refoulement to a state of persecution. The principle of non-refoulement is embodied in article 33 (1) of the Refugee Convention:

"No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".(458)

The principle of non-refoulement is binding on all states which have ratified the Refugee Convention and is not subject to reservations.(459) The principle of non-refoulement is widely accepted even by many states which have chosen not to ratify the Refugee Convention. However the question of whether the principle is binding upon such states remains unresolved (460), though there is a persuasive view, expressed by the Executive Committee of the UNHCR in 1982 that "as a result of constant reaffirmation by States over a number of years", the principle of non-refoulement "has increasingly come to be regarded as a peremptory norm of international law from which no derogation is permitted."(461)

IV) C) i) LIMITATIONS ON THE PRINCIPLE OF NON-REFOULEMENT

Article 33(2) of the Refugee Convention states that the principle of non-refoulement may not be applicable to a refugee in certain circumstances:

"The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious

crime, constitutes a danger to the community of that country." (462)

In addition, Article 1 (F) of the Refugee Convention states that the Convention

"shall not apply to any person with respect to whom there are serious reasons for considering that: (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) He has committed a serious non-political crime outside of the country of refuge prior to his admission to that country as a refugee; (c) He has been guilty of acts contrary to the purposes and principles of the United Nations". (463)

These provisions mean that the well-being of the individual claimant may be subordinate to the need to maintain public order on the one hand and to ensure that those guilty of gross violations of human rights do not obtain refuge on the other hand. This illustrates similar coexisting tendencies to those found in the political offender determination process.

IV) C) ii) BACKGROUND OF ARTICLE 1 (F)

Article 1 (F) reflects the view set out in a 1946 General Assembly resolution which noted "the necessity of clearly distinguishing between genuine refugees and displaced persons on the one hand, and the war criminals, quislings and traitors... on

the other". This resolution specified

"no action taken... shall be of such a character as to interfere in any way with the surrender and punishment of war criminals, quislings and traitors, in conformity with present or future international arrangements and agreements".(464)

The Statute of the Office of the UNHCR specifically exempts from the responsibility of the High Commissioner an individual under the following circumstances:

"[I]n respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights."(465)

Crimes mentioned in the London Charter of the International Military Tribunal are crimes against peace, including the planning and waging of wars of aggression and unjust wars, and war crimes which are defined as "violations of the laws and customs of war".(466)

London Charter crimes also include crimes against humanity which are defined as follows:

"murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian populations, before or

during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."(467)

Complementing and supplementing the offences defined in the London Charter are the war crimes, referred to as "grave breaches", contained in the four Geneva Conventions of 1949.(467a) These crimes include "wilful killing, torture or inhuman great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person".(468)

Also covered by article 1 F (a) is the crime of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948.(469)

The provision in Article 1 F (a) regarding the non-applicability of the protection of the Refugee Convention basically replicates the circumstances under which persons may be excluded from the right "to seek and to enjoy asylum" contained in the Universal Declaration.(470)

Involvement in the activities described in Article 1 F (a) may prove less than an absolute bar to protection in certain cases. For example, an individual implicated in such activities may still receive protection if he fears persecution for reasons unconnected to his war crimes.(471)

Article 1 F (b) of the Refugee Convention states that the Convention shall not apply to the following type of individual:

"any person with respect to whom there are serious reasons for considering that ... (b) he has committed a serious non-political crime outside of the country of refuge prior to his admission to that country as a refugee".(472)

The phrase "serious non-political crimes" is meant to cover serious criminal offences as opposed to lesser offences or misdemeanours.(473) A leading academic expert, Professor A. Grahl-Madsen as described "serious" offences in the following way

"The "seriousness" of the offence may relate to the nature of the crime or the sentence. A useful rule of thumb is that the act in question should be a serious offence that may result in a substantial punishment".(474)

While the former remarks provide some guidance, the assessment of whether a particular offence qualifies as a "serious non-political crime" depends on an assessment of the particular circumstances.(475) Relevant to the assessment of whether article 1 F (b) removes a particular individual from the protection of the Convention is an assessment and a comparison between the offence committed and the likely punishment on the one hand and the persecution feared on the other.(476)

The *raison d'etre* of article 1 F (b) is to ensure that

criminal fugitives do not take advantage of an international convention meant for genuine refugees.(477) This corresponds to the concern in the political offence context to protect political offenders as opposed to ordinary criminal offenders.

The acts referred to in article 1 F (c) of the Refugee Convention are generally considered to have a narrow meaning, mainly applicable not to "the man-in-the-street," but to "persons occupying government posts, such as heads of States, ministers and high official".(478)

IV) C) iii) BALANCE BETWEEN WORLD ORDER AND INDIVIDUAL PROTECTION

The primary aim of the Refugee Convention is to ensure protection of refugees. At the same time, through articles 1 (F) and 33 (2), the Refugee Convention itself provides that in certain circumstances this protection is inapplicable. Under certain circumstances, other considerations of a public/national security and/or humanitarian nature will prevail over protection of the individual refugee claimant.

The provisions excluding protection for certain categories of individuals illustrate once again the coexisting and sometimes competing tendencies to protect individual human rights, to maintain world public order and to ensure that abusers of human

rights do not obtain undeserved protection.

They also indicate that in the realm of refugee protection the exclusion of particular categories of individuals is much clearer and more explicit than is provided for in the determination of whether particular individuals deserve protection pursuant to the political offence exemption to extradition.

IV) D) NON-REFOULEMENT AND POLITICAL OFFENCE EXCEPTION TO EXTRADITION

According to the terms of article 33(1) of the Refugee Convention, the benefits of non-refoulement and protection from expulsion are technically reserved for refugees as opposed to other types of asylum seekers, including political offenders.

Article 33(1) states that "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever". Originally, draft article 33 included a specific reference to extradition and to non-admission at the border.(479) It is argued by many that despite the omission of specific references to extradition and to non-admission, these situations should be covered by the present formulation in order to truly protect refugees.(480) Informed opinion seems to increasingly reflect the view that extradition should be included within the principle of non-refoulement.(481) Otherwise political refugees could be

extradited to states where they face persecution.

It has been argued that the use of the term "in any manner whatsoever" suggests that extradition should be covered by the provision.(482) Though this is attractive for the purpose of avoiding the problem of "disguised expulsion", it is not consistent with the travaux préparatoires of the conference which adopted the Refugee Convention where the specific inclusion of extradition and non-admission at the frontier was considered and rejected.(483)

At that conference various states specifically stated that extradition was not affected by the provision regarding non-refoulement; these statements were unopposed.(484) The travaux préparatoires indicate that the language in article 33, "to return", was meant to reflect as closely as possible the meaning of the French term "refouler" and did not have a wider meaning.(485)

This is also consistent with usage in the Convention relating to the International Status of Refugees of 1933 and the Convention concerning the Status of Refugees coming from Germany of 1938, neither of which applied to extradition.(486)

IV) D) i) REVIEW OF PRACTICE REGARDING POLITICAL EXCEPTION, EXTRADITION, AND EXPULSION

While technically the political exception to extradition does not protect political offenders from expulsion to the requesting state or "disguised extradition" (487) as it has been described, it has long been contended that an individual who would be protected from extradition on political exception grounds should not be delivered to the pursuing state by means of expulsion. (488) As long ago as 1892, the Institut de Droit International stated:

"L'expulsé réfugié sur un territoire pour se soustraire à des poursuites au pénal, ne peut être livré, par voie détournée, à l'Etat poursuivant, sans que les conditions posées en matière d'extradition aient été dument observées." (489)

The principle underlying the avoidance of "disguised extradition" of political offenders is equally applicable to non-refoulement of refugees and that just as the principle of non-refoulement protects refugees from expulsion to the state of persecution, the principle should also protect them from extradition or "disguised expulsion".

In some domestic jurisdictions, those found to be refugees are provided with the benefits of the political offence exception to extradition. (490) However, national courts generally are reluctant to apply the Refugee Convention and, in particular, the principle of non-refoulement in extradition cases. (491)

Administrative agencies of government have proved ready to do

so, using the principle of non-refoulement to prevent the extradition of political refugees, sometimes disregarding contrary opinions of the courts (492) or acting before such decisions were even rendered.(493)

However such administrative practices as suspending a decision regarding extradition until courts have made a determination regarding refugee status offer no guarantee when they remain discretionary, as various cases have illustrated.(494) Moreover, the fact that refugees may be protected in particular states from extradition does not imply an international obligation on states to provide such protection and in some notable cases that protection has not been provided. (495)

Non-extradition of a refugee may be considered to be only a principle of good faith dependent on the absence of an extradition treaty. Where there is an extradition treaty containing an obligation to extradite those who might face political persecution, then that treaty may take precedence.(496)

Since the Refugee Convention, various international conventions, by providing for the non-extradition of those facing persecution, have effectively extended non-refoulement to cover extradition, at least under particular circumstances.(497)

In the O.A.U. 1969 Convention on Refugee Problems in Africa,

article II (3) states:

"No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2".(498)

The 1957 European Convention on Extradition provides protection from extradition for political offences. Furthermore that protection will be extended under the following circumstances:

"the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, or political opinion, or that that person's position may be prejudiced for any of these reasons".(499)

The protection from extradition, even in a limited and ad hoc fashion, provided to refugees is consistent with an orientation towards protection of the individual and provides yet another illustration of how the primary concern for public order reflected in extradition arrangements may be overcome in practice.

IV) D) ii) PROTECTION FROM EXTRADITION FOR SERIOUS OFFENDERS IN OTHER INTERNATIONAL INSTRUMENTS: AUT DEDERE AUT JUDICARE

The alternative courses of returning individual, because they, for example, have committed serious but non-political offences, to a country where they face persecution or allowing such individuals to stay unpunished in the country of asylum are equally unpalatable. The "aut dedere aut judicare" approach may be attractive under such circumstances.

Several international conventions concluded since the Refugee Convention was adopted have provided protection from extradition for serious offenders such as hostage-takers and aircraft-hijackers who may nevertheless face persecution if returned to their countries of origin.(500) The principle of "aut dedere aut judicare" ensures that where extradition is not granted, the criminal will still face prosecution.(501)

It would be ironic and inappropriate if those who have committed the serious offences covered in international conventions such as those concerning hostage-taking and aircraft-hijacking are protected from extradition/refoulement to countries where they face persecution while those who have committed less serious criminal offences are not provided with such protection. This would be contrary to the principle reflected in the above international agreements.

IV) E) SUMMARY REGARDING POLITICAL OFFENCE EXCEPTION AND REFUGEE DETERMINATION

Refugees have a different legal status than political offenders. They also have their own regime of protection. While there is no definition of refugee in customary international law, there are definitions contained in several international instruments. The most important of these instruments are the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees.

Political refugees are victims of political developments in their countries of origins. They need not be participants in those events. Political refugees have a well-founded fear of future persecution because of their real or perceived political opinion. The principle of non-refoulement protects genuine refugees from return to the country of origin.

There are differences between political refugees and political offenders. Refugees need not have committed any offences in the past. In contrast, the political offence exception depends on a political offence having been committed. Furthermore political offenders are not entitled to political refugee status unless they have a well-founded fear of persecution. Ultimately, refugees are covered by the Refugee Convention, an international instrument with an emphasis on protection while the political offence exception is an exception to extradition law, domestic legislation which emphasizes public order.

There are also similarities between the two categories. Individuals may be both political refugees and offenders. In some cases, prosecution may amount to persecution. In addition, just as there are exceptions to the political offence exception, there are situations where refugee status will be denied on public/national security or other grounds. As with the political offence exception, there is an interest in ensuring that ordinary criminals do not take advantage of provisions meant for political refugees.

In the different provisions concerning refugees, there coexist tendencies to protect individual human rights, to maintain world public order and to ensure that abusers of human rights do not receive undeserved protection. Similar concerns are reflected in the application of the political offence exception, although the categories to be excluded are not as clearly expressed.

Technically, the principle of non-refoulement does not cover extradition but refugees often, in fact, are protected from extradition. In most cases, such decisions remain at the discretion of the authorities concerned although some are taken pursuant to provisions of various international instruments. The protection from extradition which may be provided to refugees is an example of how the public order emphasis of extradition may be overcome in practice. The principle of "aut dedere aut judicare" provides a means to ensure that individuals are either extradited or prosecuted in the country of refuge.

V) ASYLUM AND ITS RELATIONSHIP TO POLITICAL OFFENCE EXCEPTIONV) A) i) INTRODUCTION

Both political offenders and political refugees seek asylum. The concept of (humanitarian) asylum, being applicable to both political offenders and political refugees, provides a bridge between the two situations.

Asylum has been defined by the Institut de Droit International in the following way:

"la protection qu'un Etat accorde sur son territoire ou dans un autre endroit relevant de certains de ses organes à un individu qui est venu la rechercher".(502)

In the following, unless otherwise indicated, asylum refers to the practice of allowing a permanent, rather than just a temporary, stay.

The principle of non-refoulement protects asylum seekers from being returned to states of persecution. However it does not necessarily give rise to permanent asylum. Many states and, in particular, those facing large influxes of asylum-seekers are prepared to allow entry and shelter only on condition that the stay is a temporary one.(503) Similarly, a refusal to extradite does not necessarily lead to permanent asylum.

V) A) ii) HISTORY OF ASYLUM AND RELATIONSHIP TO EXTRADITION

Asylum is a practice with long historical roots. It pre-dated any extradition arrangements. Asylum has always been provided at a state's discretion; originally asylum was more commonly extended to common criminals than to political offenders.(504)

It was the French Revolution with its introduction of ideology into state relations, its challenge to traditional monarchical authority and its influence on the development of states with different systems of governments which represented a watershed in the practice of asylum. Asylum was politicized by the French Revolution; French frontier signposts proclaimed that the "land of freedom begins here."(505)

Increasingly states were prepared to provide asylum for a wide variety of political opponents of regimes in power (506) while ordinary criminal offenders were subjected to an increasing number of extradition arrangements between states, thus illustrating both an intent to protect the exercise of political rights and a search for international public order.(507)

The focus of attention in the practice of asylum may have shifted from individuals involved in criminal acts to those involved in political activities. However the granting of asylum continued to be viewed as an exercise of a state's

sovereignty.(508) This view is in accord with classical scholarly opinion. Vattel asserted that the granting of asylum is valid because a state is "free to act as it pleases, so far as its acts do not affect the perfect rights of another Nation".(509) He went on to state:

"By reason of its natural liberty it is for each Nation to decide whether it is or is not in a position to receive an alien. Hence an exile has no absolute right to choose a country at will and settle himself there as he pleases; he must ask permission of the sovereign of the country, and if it be refused, he is bound to submit."(510)

Vattel did caution however that a state should not refuse asylum without a "good reason" such as a public security ground.(511)

As to the right of a state to refuse an extradition request, the obligations of the state were described in the nineteenth century in the following manner:

"the authorities of a state are not obliged to grant the extradition of a criminal, unless there exist between the two States formal treaties applicable to the subject."(512)

The relationship of extradition and asylum has been characterized in the following way: Asylum based on a general principle and derived from ancient roots continues to be the rule,

granted at a state's discretion, while extradition is the exception, usually undertaken by a state pursuant to a treaty. (513)

V) A) iii) TRADITIONAL VIEW OF RIGHT "TO SEEK ASYLUM" IN UNIVERSAL DECLARATION OF HUMAN RIGHTS

Customary international law does not provide for a right to obtain asylum. (514) The traditional view of the right of asylum is reflected in the Universal Declaration of Human Rights which provides individuals with "the right to seek and to enjoy in other countries asylum from persecution" (515), as opposed to the right to obtain asylum. In fact, the words "to enjoy" were specifically substituted for the phrase "be granted" in an earlier draft of the Universal Declaration which referred to "the right to seek and be granted, in other countries, asylum from persecution". (516) The travaux preparatoires made clear that the granting of asylum was considered to be a right of a state rather than an obligation. (517) Efforts by some delegates to include a specific reference to a right to receive asylum were unsuccessful. (518)

Authoritative opinion has held that states did not even accept nor intend "to assume a moral obligation to grant asylum." (519)

Traditionally, states are under no obligation to grant asylum

though they have a right to do so.(520) Scholar J.H. Simpson put it in the following way in 1939: "Asylum is a privilege conferred by the State. It is not a condition inherent in the individual."(521)

In 1950 the Institut de Droit International stated:

"Tout Etat qui, dans l'accomplissement de ses devoirs d'humanité, accorde asile sur son territoire n'encourt de ce fait aucune responsabilité internationale."(522)

This remains the generally accepted view. The granting of asylum is a right of a state pursuant to international law; asylum implies "the normal exercise of territorial sovereignty".(523)

An underlying aspect of the view of many states regarding asylum may be gleaned from the comment of an American government adviser to the effect that asylum should be restricted to "people who come from fallen allied democratic regimes or who served as support troops in conflicts to preserve Western values."(524)

As noted above, efforts to include a right of asylum in the Universal Declaration were unsuccessful. At the same time, states often do grant asylum in practice.(525)

The international norm contained in the Universal Declaration, namely a right to be granted asylum as opposed to a right to obtain asylum, is reflected in subsequent documents such as the 1967 U.N.

Declaration on Territorial Asylum (526) and the aborted 1977 Draft Convention on Territorial Asylum (527). In the case of the latter, non-governmental organizations had attempted to obtain a provision in the draft convention obliging states to provide asylum.(528) In the end, the text that went forward to the U.N. Conference only stated that a state "shall endeavour in a humanitarian spirit to grant asylum in its territory to any person eligible for the benefits of this Convention."(529) Even this was qualified by the draft's characterization of asylum as an exercise of state sovereignty.(530)

Regional instruments generally take the same approach or like the European Convention for the Protection of Human Rights and Fundamental Freedoms do not deal with asylum.(531) Article II (1) of the O.A.U. Convention on Refugee Problems in Africa states that member countries "shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality".(532)

Furthermore, Article II (2) states: "The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State."(533)

The exception to the characterization of asylum as a

discretionary right of states is reflected in the position set out in the American Convention on Human Rights which does provide the individual with "the right to seek and be granted asylum...in the event he is being pursued for political offences or related common crimes".(534)

There has been heated criticism of the manner in which the right of asylum was dealt with in the Universal Declaration.(535) Many legal commentators have argued that the right of asylum reflected in the American Convention should be recognized in international law.(536) They have been unsuccessful to date.(537) Such a right is not recognized in customary international law (538) nor is it accepted by states as an international obligation.(539)

The principle of non-refoulement does not require that asylum be granted, only that the individual not be returned to the country of persecution. In practical terms, this may require that de facto and, at least, temporary asylum be granted.

V) A) iv) COMPONENTS OF COMPLETE RIGHT TO ASYLUM

In order for there to be a totally effective right of asylum, eligible individuals would have to be protected from expulsion, refusal at the border, deportation and extradition (540), in a similar way to that described in the U.N. Commission on Human

Rights 1960 Draft International Declaration on Asylum in which Article 3 stated:

"[n]o one seeking or enjoying asylum in accordance with the Universal Declaration of Human Rights should, except for overriding reasons of national security or safeguarding at the frontier, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory."(541)

In fact, as noted above (542), while the Refugee Convention does have "the practical effect of protecting individuals under certain circumstances from being refouled or expelled from a country and few, if any, states would nowadays go to the length of claiming that it is entitled to return a refugee to a country of persecution" (543), there is no obligation to grant permanent asylum (544), though the principle of non-refoulement represents a limitation on the absolute right of states to refuse at least temporary asylum under certain circumstances.(545)

The result may be that the individual is left in a permanent legal limbo, caught between the protection accorded those found to be refugees and the paramountcy of state sovereignty, which leaves to states the discretion of whether or not to grant asylum.

V) A) v) DOMESTIC PRACTICE AND LEGISLATION

In certain jurisdictions such as France, the anomaly created by the practice of non-refoulement when not combined with a grant of permanent asylum is avoided by providing the right of asylum to all those within its territory who face persecution.(546) Similarly, the Federal Republic of Germany grants asylum to those found to be political refugees.(547)

In other states such as the United Kingdom, there is a clear distinction drawn between a determination of refugee status and the granting of asylum. In the U.K., a finding of refugee status confers all the rights of the Refugee Convention and Protocol (548) while a grant of asylum merely bars return to the country of alleged persecution.(549) In practice, in the U.K., asylum is generally also accorded along with refugee status when a well-founded fear of persecution is established; in other cases, where "residual doubts about safety still remain", asylum still may be granted even in the absence of refugee status.(550)

The above examples illustrate the fact that, despite the absence of an international legal obligation to grant asylum, national legislation may impose such an obligation.

However, as noted above (551), there is, at best, only discretionary and irregular protection regarding refusal at the border and, arguably, against deportation, even for political refugees. Efforts to include provisions regarding the admission of

refugees in the 1951 Geneva Convention on Refugees were unsuccessful.(552)

V) B) RESTRICTIONS ON ASYLUM

The practice of asylum, while still a prerogative of the state concerned, has been influenced by the conflicting tendencies towards concern for international public order on the one hand, and protection of the individual on the other. As noted above (553), in the last two centuries states have increasingly and voluntarily relinquished their absolute rights regarding the granting of asylum through the conclusion of extradition treaties, reflecting concern regarding public order and adoption of the Refugee Convention (554) and the principle of non-refoulement (555), reflecting concern about the individual.

The right to grant asylum is not unfettered. Where an extradition treaty exists between states, asylum may be granted only to those individuals not included in the provisions of the treaty or to those individuals who are covered by specific exceptions to the treaty.(556)

Asylum has come to be regarded as a protection to be accorded to political refugees and political offenders as opposed to ordinary criminals.(557) Criminal non-political offenders are not generally protected from extradition.

"L'asile n'existe plus que dans sa forme politique. Ainsi, c'est la répression des crimes ordinaires qui s'est universalisée définitivement, seul le crime politique reste détaché de la solidarité à l'échelle du globe." (558)

In 1935 a Harvard study concluded as follows:

"with regard to extradition, as with regard to immigration, the doctrine of asylum has finally lost its wider meaning of earlier days, and is no longer applied to those accused or convicted of common crimes, but generally only to those who have committed political or military offenses". (559)

V) B) i) EMPHASIS ON INTERNATIONAL PUBLIC ORDER MANIFESTED IN PRACTICE OF ASYLUM AND EXTRADITION

States have long recognized for themselves the right to grant asylum. At first this discretionary power was extended more frequently for the benefit of criminal rather than political offenders. The power to grant asylum was circumscribed by extradition treaties which reflected concerns regarding the need for international public order.

Parallel to this development was growing interest among states in shifting the practice of asylum from criminal to political offenders. This interest was manifested in the political exception to extradition. The narrowing of the concept of asylum, to exclude ordinary criminal offenders, reflects the increasing prominence

given to the need for international cooperation for the purpose of obtaining world order.

Though this represents an historical shift in the concept of asylum, the movement is unfinished as even the protection offered to political offenders through the medium of the political offence exception to extradition is itself subject to a growing number of exceptions which, as noted above, make the political offender extraditable.(560) This reflects continued concern regarding international public order.

Furthermore there is another shift underway to make those who fear persecution, as opposed to those who have committed political offences, the primary beneficiaries of asylum practice. It is true that unlike the political exception to extradition which applies only to political offenders and the principle of non-refoulement which applies only to refugees, asylum may be provided to both political offenders and refugees. However, in addition to the shift towards protection of political as opposed to criminal offenders, there has been a further shift over the course of several decades from the concept of asylum as a principle primarily applicable to those who have committed offences (political asylum), to one for the benefit of those who fear persecution in their countries of origin (humanitarian asylum), though, in fact, political asylum may be categorized as one form of humanitarian asylum.(561) This movement is reflected in the Universal Declaration where reference

is made to "asylum from persecution" in Art. 14(1).(562) The concept of humanitarian asylum is reflected in the principle of non-refoulement.

This shift is consistent with a view that asylum should be primarily directed at victims of persecution rather than towards those who have taken an active role in the disruption of societies.(563) This shift is also consistent with the search for international public order on the one hand and the defence of human rights on the other. Many of those facing persecution are passive victims and pose no threat to world order.

Given both the increasing restrictions being applied to the concept of the political exception to extradition and the desire of many to enhance the individual's ability to obtain protection from persecution, it is likely that this latter shift will continue.

V) B) ii) THOSE INELIGIBLE FOR ASYLUM

Article 14(1) of the Universal Declaration of Human Rights states: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

Article 14(2) states:

"This right may not be invoked in the case of prosecutions arising from non-political crimes

or from acts contrary to the purposes and principles of the United Nations."(564)

Article 14(2) has three notable aspects. First, the provision regarding non-political offences is consistent with the shift identified above where asylum has come to apply specifically to political rather than criminal offenders. At the same time, Article 14(2) does not automatically exclude criminal offenders providing they are facing genuine persecution rather than prosecution arising from non-political crimes or persecution separate and in addition to any prosecutions arising from non-political crimes. Nor does Article 14 automatically include political offenders unless they are also facing persecution. On the whole, this provision encompasses both the search for international public order and a desire to protect individuals facing genuine political persecution, thus illustrating both the coexisting tendencies identified previously and the movement noted above.

Second, one reading of the above provision is that individuals who are prosecuted and who are not specifically mentioned in Article 14(2) may be regarded as victims of persecution. In practice, this would mean that those prosecuted for other than non-political offences and acts contrary to the purposes and principles of the United Nations could be regarded as victims of persecution, making them eligible for protection; this issue remains unresolved.(565)

Third, Art. 14(2) does provide that the right to asylum "may not be invoked" by those who had committed certain types of acts, namely those which were "contrary to the purposes and principles of the United Nations". Art. 1(2) of the 1967 U.N. Declaration on Territorial Asylum suggests that this would include "a crime against peace, a war crime or a crime against humanity".(566) This replicates the elements contained in article 1 (F) of the Refugee Convention and highlights the fact that the protection of asylum may not be used to shield perpetrators of such acts from justice. In this instance, concern about the protection of the particular individual must yield to the upholding of certain international standards.

Taken together, the above provisions reflect concerns regarding both world public order and the protection of human rights. They also illustrate that both asylum and refugee law clearly exclude certain types of action from protection while extradition law and practice in this regard is more ambiguous and varies from jurisdiction to jurisdiction.

V) B) iii) THOSE FACING PERSECUTION ELIGIBLE FOR HUMANITARIAN ASYLUM

In contrast to the situation where only political offenders, as opposed to criminal offenders, were eligible for political asylum, anyone, with some exceptions, facing persecution is

eligible for humanitarian asylum even if the person may also be a criminal offender. In some cases, asylum is granted to a considerably wider category than those meeting the refugee definition contained in the Refugee Convention. For example, the French Constitution states: "Tout homme persécuté en raison de son action en faveur de la liberté a le droit d'asile sur les territoires de la République".(567) The Italian Constitution provides for asylum to those deprived of democratic freedoms in their homelands.(568)

The status of political offender is not in itself sufficient to make individuals eligible for humanitarian asylum, unless those prosecuted for political offences also have a well-founded fear of persecution (569); in some cases, such as for "acts contrary to the purposes and principles of the United Nations", asylum may be denied to offenders even if they do have such a well-founded fear.(570)

The right to seek asylum only applies when there is a well-founded fear of a violation of an established right:

"[O]nly the denial of the other human rights entails and requires a claim of asylum. If all human rights would be respected everywhere and by everyone, then also the right to asylum would lose its significance; to that extent, it undoubtedly occupies an exceptional place".(571)

The provisions of the Universal Declaration could arguably make those taking part in such activities as aircraft hijacking, hostage-taking and kidnapping of diplomats, eligible for asylum in that these acts could, in particular circumstances, be considered to be political offences despite having been criminalized in various international conventions which did not deal with the political character of such offences. In contrast, offences contained in the 1948 Genocide Convention, the 1973 Apartheid Convention and the 1977 European Convention on the Suppression of Terrorism were depoliticized.(572)

At the same time, those engaging in such criminalized activity as aircraft hijacking and hostage-taking may be subject to extradition.(573) There is no agreement among states regarding which offences should be exempted from the political offence exception to extradition.(574)

The result may be a clash between the principles contained in the Universal Declaration and the Refugee Convention on the one hand and the principles embodied in extradition agreements and practice on the other. This exemplifies a conflict between the relative priority to be assigned to protection and punishment.

V) C) INTERNATIONAL AND DOMESTIC LEGAL PROCESSES

V) C) i) INTRODUCTION

A significant difference between the protection accorded to the political offender and that provided Convention refugees is that the former is dependent on a domestic process - via the political exception to extradition - while the latter is protected by international law - the Refugee Convention (575) and the principle of non-refoulement.

The Refugee Convention and the principle of non-refoulement does provide some protection to those facing persecution. The issue of whether the principle of non-refoulement is a rule of international law binding upon those states which have not yet ratified the Refugee Convention may not have been settled to everyone's satisfaction.(576) However, it is increasingly viewed as such a rule of international law.(577) In addition international human rights standards apply to refugees. Many states also have incorporated international standards into their domestic legislation.

International law does not yet accord an individual a right to obtain asylum though the right to seek asylum is a principle of international law. The absence of a recognized right of asylum in international law means that the ultimate fate of the political offender is dependent on the domestic legal processes of the state concerned. While a certain protection is provided to

individual political offenders by the political offence exception, there are a growing number of exceptions to the exception.(578)

V) C) ii) INTERACTION OF ASYLUM, EXTRADITION, POLITICAL OFFENCE EXCEPTION AND REFUGEE CONVENTION

The principle of asylum may be incorporated into domestic law. However the grounds for determining that someone should be granted asylum may be different than those necessary to activate the political offence exception to extradition. The effect a determination in one process may have on the other is dependent on domestic law and practice.

There may be inconsistent obligations regarding the responsibilities of states under the Refugee Convention and under a particular extradition treaty. For example, an individual whose extradition has been requested for an extraditable offence may not meet the criteria in the particular state to qualify for the political offence exception. At the same time, the individual may have a well-founded fear of persecution pursuant to the Refugee Convention. One way to resolve such a situation may be to give priority to the agreement that was concluded first.(579) However this approach which is inherently arbitrary, based as it is on accidents of timing, leads to inconsistent results between states.

Another option is to acknowledge that parties to the Refugee Convention are under "no obligation to abrogate any provision of an extradition treaty compelling them in given circumstances to extradite potential political persecutees... The contention that the States Parties to the Refugee Convention are duty bound to refuse the extradition of persons who are likely to be subjected to political persecution by the requesting State seems, in conclusion, to be valid only in so far as extradition is not mandatory and therefore would be inconsistent with the principle of good faith." (580)

However such an approach gives undue weight to a state's obligations under an extradition treaty and too little to its responsibilities pursuant to the Refugee Convention to protect those facing persecution.

A third and better approach is that developed in the Council of Europe where efforts have been made to reconcile the principle of non-refoulement with agreements regarding extradition. Article 3(2) of the 1957 European Convention on Extradition states that extradition shall not be granted under the following circumstances:

"if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or

that that person's position may be prejudiced for any of those reasons." (581)

This extends non-extradition from the political offenders covered in article 3(1) which speaks of protection for political offenders (582) to criminal offenders who may be facing political or other types of persecution. (583)

As a result of rulings since then by the appropriate authorities of the Council of Europe, the above provision of the European Convention on Extradition now contains the essential ingredients of the Convention refugee definition, as the latter pertains to political refugees. (584)

Provisions similar to those in the European Convention on Extradition have been reflected in discussions in other multilateral fora and have influenced bilateral treaties and state laws. In 1977 the Federal Republic of Germany proposed that the draft Convention on Territorial Asylum include protection from extradition to a state where those whose extradition was sought could be persecuted; the USSR and the German Democratic Republic took the view that extradition obligations were paramount. The matter was left unresolved as the relevant conference failed to arrive at an agreed upon text. (585)

Provisions similar to that in article 3 of the European Convention are also contained in bilateral treaties such as the

1958 Belgian-German Extradition Treaty. (586)

In individual states, persons facing persecution may be protected from extradition either through legislation, judicial decisions or administrative action. The Austrian Extradition Law indicates that non-extradition is appropriate if such extradition would result in persecution similar to that outlined in Article 1 of the Refugee Convention. (587)

The United Kingdom's 1967 Fugitive Offenders Act provides for non-return if the individual involved "may be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions". (588)

Courts generally are reluctant to apply the Refugee Convention and, in particular, the principle of non-refoulement to extradition, though some administrative agencies have been willing to do so, on a discretionary basis. (589) One exception to this tendency is Germany. There the Federal Court has ruled that all those found to be political refugees may be beneficiaries of the political offence exception to extradition, thus avoiding the need to define precisely what is meant by a political offence. (590) Once an individual is granted asylum, there is no need to examine whether the political offence exception is applicable as those granted asylum cannot be extradited. (591)

In Germany, the right of asylum may be lost when it is abused and used against "free democratic basic order" (592) thus illustrating the recurring desire to maintain public order.

V) D) CONCLUSIONS REGARDING ASYLUM

Humanitarian asylum, being applicable to both political offenders and political refugees, helps to overcome the differences between the different principles involved in the two processes. Neither a refusal to extradite nor the principle of non-refoulement necessarily give rise to permanent asylum.

Asylum predated any extradition arrangements. Originally extended more often to criminal offenders than to those involved in political activities, asylum now has come to be applied almost exclusively to political refugees rather than criminal offenders; the latter have been subjected to an increasing number of extradition treaties which, in turn, restrict the right of states to grant asylum.

The evolution continues as the political exception to extradition is itself subject to a growing number of exceptions. This is part of a larger shift to make victims of persecution, rather than political offenders, the primary beneficiaries of asylum practice. This is a shift consistent with the wording

contained in Article 14 of the Universal Declaration of Human Rights.

The above developments illustrate concurrent desires to protect individual rights and to increase international cooperation in the interest of international public order. In this light, victims of persecution are seen as deserving of protection and they are seen as less likely than political offenders to pose a threat to world order.

Asylum and refugee law are clearer than extradition law in indicating the types of actions to be excluded from protection. Extradition law and practice in this regard varies from jurisdiction to jurisdiction.

The granting of asylum continues to be a right rather than an obligation of states. That right is often restricted by extradition treaties reflecting concerns regarding the need for international public order.

In customary international law, the individual does not have a right to obtain asylum, merely the right to seek and to enjoy asylum. This remains the case in international and regional instruments with the exception of the American Convention on Human Rights.

At the same time, states often do grant asylum in practice.(593) De facto asylum may result from the application of the principle of non-refoulement though the latter does not contain an obligation to grant permanent asylum. States often take action to grant permanent asylum to those who are already within the state and who face persecution if returned to their homelands.

With some exceptions, anyone facing persecution is eligible for humanitarian asylum even if the person may also be a criminal offender. On the other hand, political offenders are not eligible for humanitarian asylum unless they have a well-founded fear of persecution.

Political offenders are dependent on a domestic political process while refugee claimants can depend on international law. There may be inconsistent obligations of states under the Refugee Convention and a particular extradition treaty. The best way of resolving such conflicts is to include in extradition agreements provisions ensuring that extradition shall not be granted if there are substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of persecuting the individual on account of political opinion or any of the other grounds contained in the Refugee Convention or that the individual's position may be prejudiced for any of those reasons.(594) Similar provisions should be included in multilateral conventions and domestic legislation.

VI) CONCLUSIONSVI) A) SUMMARY

The foregoing has described the coexistence within the political offence exemption to extradition of the desire to maintain international public order and that of protecting the rights of individuals, particularly those who face punishment for political reasons.

This thesis has examined the origins of the political offence exception and the way in which the exception and the concept of extradition have evolved in various societies. Originally used to return rather than protect political and religious opponents of the requesting state, extradition treaties gradually came to distinguish between political and criminal offenders and to extend protection only to the former.

Despite wide use of the term and concept, there is no agreed definition of a political offence. Nor is there agreement on a test to determine whether an act in question is a political offence. It has been left to the courts to develop tests to determine whether a particular offence is political.

The U.K. courts developed the "political incidence" test.(595)
The key ingredient is that the alleged political offender should be

involved in a dispute with the government seeking extradition concerning political control over the state. The "political incidence" test developed in American courts requires that an offence be "incidental to and [form] a part of political disturbances" (596) in order to be considered to be a political offence. The act must be "committed in the course of or furthering of civil war, insurrection or political commotion".(597)

In France, the "political objective" approach means that the key determinant of whether a particular act is a political offence is the motive or purpose of the act.(598) There are also other factors which may be relevant to the determination, namely whether the means are appropriate to the objective and whether there is a proportionality between the ends sought and the actions undertaken.(599)

The Swiss approach, in dealing with acts which appear to have both common criminal and political elements, is to determine which element is predominant or preponderant.(600) Generally, the acts must occur "in the framework of a struggle for the power in the state".(601)

The variety of tests and their inconsistent application by courts has caused some uncertainty and raised a number of concerns: 1) that it is inappropriate to designate certain offences as political offences; 2) that the approach of some courts is too

rigid and formal; 3) that courts exercise too much discretion in determining whether a given act is a political offence; 4) that the use of efficacy as a criteria of determination of the political offence is inappropriate; 5) that political considerations influence the determination.(602)

The thesis described various alternatives to the political offence. These included executive decision-making, complete or partial depoliticization including the exemption of war crimes and crimes against humanity from the political offence exception and the use of the concept "aut dedere aut judicare". The advantages and disadvantages of each were outlined.(603) None of these approaches provides an acceptable and complete substitute for the political offence exception although elements were used in developing a new test to determine whether the political offence exception is applicable.

This political offence exception proposed in this thesis involves five key criteria, namely that 1) the individuals in question should be involved in a dispute with the government seeking extradition concerning political control over the state; 2) they must be part of a group which is involved in such a struggle and their act must be done in furtherance of that struggle; 3) certain acts are too heinous to be considered political offences; 4) certain other acts such as attacks on diplomats, aircraft hijacking etc. should be automatically excluded from the political

offence exemption category; 5) mixed offences containing criminal and political elements should be assessed on the basis of their acceptability as a means to a specific end, on their appropriateness under the circumstances.(604)

In addition, individuals who are ineligible for protection pursuant to the above criteria and who face persecution if extradited, should be protected from extradition, provided the requested state tries them in accordance with the formula "aut dedere aut judicare".

The thesis also examined the way in which the political offence exception has been used in regards to terrorism. This involved an examination of the way in which some of the major tests for the political offence exception have dealt with the phenomenon and the way in which terrorism could be dealt with, pursuant to the proposed common test.(605)

Terrorist acts usually comply with the technical requirements as set out in the American case of Ezeta.(606) American and United Kingdom cases indicate that there is a considerable amount of judicial discretion and subjective judgment involved in the decision of whether a specific terrorist act will meet the political offence criteria.(607)

The Swiss proportionality approach provides a means by which

to exclude acts of terrorism from the protection of the political offence category.(608)

The proposed common test would also allow a court to exclude a variety of terrorist actions from the political offence exception.(609)

The thesis also examined the different origins of the concepts of political refugees and political offenders and the separate legal regimes which have been set up to deal with each phenomenon.(610) Political refugees are victims of political events in their country of origin. They need not be actors in those political events; they need not have committed any offence. All that is necessary is that they have a well-founded fear of persecution in the future.(611) Unlike a political offender, a refugee need not have committed an offence and the fact that a political offence has occurred is not sufficient for the individual to be recognized as a refugee.(612) While there are cases where an individual is both a political offender and a political refugee, that person could be one and not the other.

The concept of humanitarian asylum applies to both political refugees and political offenders.(617)

VI) B) INTERACTION OF TENDENCIES

The developments described above have a common thread, that is the weighing of considerations of international public order against concerns about the protection of individual rights. All the tendencies occur within a context where either concerns regarding public order or human rights may predominate at any given moment. For example, both political offenders and political refugees may have their claims overridden because of concerns regarding public order.(617a)

The different tendencies at play may be viewed in varying ways. They may be regarded as competing phenomena or as independent but inter-related developments which may produce complementary but not necessarily entirely consistent results. The latter appears the better view.

This interaction is illustrated by the following. Those exempted from extradition pursuant to the political offence exception do not include political or other refugees or other asylum seekers unless these political refugees or asylum seekers happen to be political offenders as well.(622) Similarly, political offenders without a well-founded fear of persecution are not eligible for protection as Convention refugees.

The right to apply for asylum may be extended to both political offenders and/or refugee claimants. However, in another illustration of the fine balance between protection of individual

rights and preservation of public order, the concept of asylum is becoming increasingly viewed as being primarily applicable to political refugees who are victims of persecution rather than to political offenders who have disrupted their societies.(622a)

VI) C) WORLD ORDER AND PROTECTION OF INDIVIDUAL RIGHTS

Political offences, particularly those which are terrorist in nature, may pose a threat to world order; this concern is reflected in the American attempt to outlaw all terrorism.(625) Such offences can have destabilizing effects far beyond the country where a particular problem may have been spawned.(626)

Moreover, not only are terrorist attacks not limited to authoritarian and non-democratic regimes, but it is precisely liberal democratic states and their populations which seem the most vulnerable to such assaults.(627) Indeed, a large number of attacks are seemingly motivated by antagonism to liberal democratic values. In addition, some are clearly aimed at changing the foreign policy of third states.(628)

The offences which are depolitized by the U.K.-U.S.A Supplementary Treaty are those most likely to affect international public order; in this respect they resemble the depolitization of the "attentat" offence. For example such offences include murder, manslaughter, attacks on diplomats, aircraft hijacking, hostage-

taking and causing explosions "likely to endanger life or cause serious damage to property" and various offences involving firearms and attempts to carry out the listed offences.(629) Implicit in the inclusion of such offences is the belief that such acts are an illegitimate form of political expression in democratic societies.

The political offence exception was developed to protect the rights of political offenders who face punishment for their political offences. The political offence exception ensures that extradition practice is consistent with the values of liberal democracy, the rule of law and contemporary international concerns regarding protection of human rights. It would be inappropriate and regrettable if the protection for individual rights established over the last two centuries was to be eliminated with no suitable substitute produced to provide alternative protection.

Legitimate concern about terrorist offences should not be allowed to undermine the legitimacy of the political offence exception in general. Nor should the type of depolitization of offences like those contained in the U.K.-U.S.A Supplementary Treaty be included in extradition treaties with undemocratic, authoritarian states.

Political offenders who are extradited are likely to be placed at the mercy of their political opponents.(623) Any trial which occurs is likely to be tainted by political considerations. In

authoritarian states, the political offender will probably be deprived of even the minimal safeguards available to the ordinary criminal offender.

In order to avoid such situations, there is a continued need for the political offence exception to extradition. A major problem with the application of the exception is not due to the principle of the exception per se, but to the inconsistency with which it has been applied. This results from the variety of tests used by different jurisdictions and the inconsistent application of tests within individual states. Another objection is to the de facto impunity from prosecution that a political offender may enjoy in the host country which chooses not to extradite; this is perceived to be particularly unacceptable and unjust when the offender has committed serious crimes.

The test put forward in this thesis provides a means to establish some consistency and equity in the way in which the exception is applied. Moreover combining the proposed test with the "aut dedere aut judicare" formula also provides a way to deal both with political offenders who have committed serious crimes and with those who have been denied political offender status because of the nature of their acts but who would face severe punishment for political reasons if they were returned to their countries. The "aut dedere, aut judicare" formula is a better choice than extradition where the requesting state cannot guarantee a fair

trial and due process, in accordance with relevant international standards (623a), for the individual concerned.

As a practical matter, from the state's point of view, this solution has the advantage of allowing it to avoid the potential domestic and international outrage which could be aroused by the extradition of a genuine political offender in the absence of a political offence exception. At the same time, the state is spared the embarrassment of having individuals who have committed major crimes remain at large with impunity.

By combining the proposed test with the "aut dedere, aut judicare" formula, the political offence exception is preserved on the one hand, and those who have committed terrorist and other unacceptable acts do not escape trial, on the other hand.

VI) D) CONCLUSION

This thesis has endeavoured to examine the issues and questions surrounding the complex concept of the political offender exception and offer possible solutions to the questions raised.

The various tests described above have one thing in common, and that is to strike the proper balance between protecting dissidents and apprehending criminals. Keeping this major goal in

mind, an examination of the roots and development of the political offence exception and of the jurisprudence in various jurisdictions leads to the conclusion that there remains both a legitimate role for the political offence exception and a valid reason to exclude some specific offences from inclusion in this category.

The test proposed in the thesis is one way in which the various concerns can be met.

SELECTED ABBREVIATIONS

All ER	All England Reports
Am.J.Int.L.	American Journal of International Law
Am. Soc. Int. L. Proc.	A m e r i c a n S o c i e t y o f International Law Proceedings
Am. St. Pap. Foreign Rel.	American State Papers Foreign Relations
Boston U. Intl. L.J.	Boston University of International Law Journal
Brit. & For.State Papers	British and Foreign State Papers
Brit. Y.B. Int'l. L.	British Yearbook of International Law
Brooklyn J. Int'l L.	Brooklyn Journal of International Law
Can. Yrbk. Int'l. L.	Canadian Yearbook of International Law
Case W. Res. J. Int'l L.	Case Western Reserve Journal of International Law
Colum. L. Rev.	Columbia Law Review
Cornell Intl. L. J.	Cornell International Law Journal
Dalhousie L.J.	Dalhousie Law Journal
Den. J. Int'l L. and Pol'y	Denver Journal of International Law and Policy
Dep't State Bull.	Department of State Bulletin
De Paul L. Rev.	De Paul Law Review
D.L.R.	Dominion Law Reports
Duquesne L.R.	Duquesne Law Review
ECOSOC	Economic and Social Council of the United Nations

Hamline J. of Public L. and P.	Hamline Journal of Public Law and Policy
Harvard Int'l Law Journal	Harvard International Law Journal
Hastings Int'l L. & Comp. L. Rev.	Hastings International Law and Comparative Law Review
Indian J.I.L.	Indian Journal of International Law
Ind. J. Int. L.	Indiana Journal of International Law
Int'l. and Comp. L. Q.	International and Comparative Law Quarterly
Int. Bar Conf. Rep.	International Bar Conference Report
Int'l Law and Politics	International Law and Politics
I.L.M.	International Legal Materials
ILO	International Labour Organization
ICJ Rep.	International Court of Justice Reports
Int'l Law	International Law
Int'l Law Assoc.	International Law Association
Int'l L. Rep.	International Law Reports
Israel Y.B.Hum. Rights	Israel Yearbook of Human Rights
J. Crim. L. & Criminology	Journal of Criminal Law and Criminology
J. Du Droit Int'l	Jour du Droit Internationale
Mich.L.Rev.	Michigan Law Review
Mod. L. Rev.	Modern Law Review
N.Y.U. J. Int'l. L. & Pol.	New York University Journal of International Law and Policy
Parry's T.S.	Parry's Treaties Series

Philippines L.J.	Philippines Law Journal
Q.B.	Queen's Bench
Rev. int. D. pen.	Revue internationale du droit penal
San Diego L. Rev.	San Diego Law Review
Texas Int'l. L. J.	Texas International Law Journal
Terrorism: An Int'l. J.	Terrorism: An International Journal
T.S.	Treaty Series
Tulane L.R.	Tulane Law Review
UNHCR	United Nations High Commissioner of Refugees
UNTS	United Nations Treaty Series
U.N.Y.B.	United Nations Year Book
Va. J. Int'l. L.	Virginia Journal of International Law
Va.L.Rev.	Virginia Law Review
Yale J. of World Pub. Ord.	Yale Journal of World Public Order

JAMES TROTTIER

POLITICAL OFFENDER OR EXTRADITABLE CRIMINAL: THE POLITICAL OFFENCE,
INTERNATIONAL ORDER AND PROTECTION OF HUMAN RIGHTS

ENDNOTES

1. L. Oppenheim, International Law, vol.I, 8th ed. by H. Lauterpacht (London: Longman's Green, 1955) at 676-8; F. Morgenstern, "The right of asylum" (1949) 26 Brit. Ybk. Int. L. 327.
2. "Research in International Law under the Auspices of the Faculty of the Harvard Law School" 29 Am. J. Int'l L. 15 at 21 (Supp. No. 1, 1935) (hereinafter cited as "Harvard Research").
3. M. Whiteman, ed., 6 Digest of International Law (Washington, D.C.: U.S. Govt Printing Office, 1970) at 732; S.P. Sinha, Asylum and International Law (1971) at 50.
4. Whiteman, supra note 3 at 727, 733-34. The United States will not extradite in the absence of an extradition treaty. (18 U.S.C. § 3184 (1976)).
5. V. Epps, "The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence" (1979) 20 Harvard Int'l Law Journal 61 at 61.
6. E. Clarke, A Treatise Upon the Law of Extradition (4th ed. 1903) at 20-23; 1 L. Oppenheim, International Law 8th ed. by H. Lauterpacht (London: Longman's, Green, 1955) at 696, 704; Deere, "Political Offenses in the Law and Practice of Extradition" 27 Am. J. Int'l L. 247 at 249 (1937).
7. Treaty of 4 January 1834, 15 Martens Nouveau Recueil des Traites 44.
8. In re Meunier [1894] 2 Q.B. 415.
9. "Harvard Research", supra note 2, at 108-09; Blakesley, "The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History" (1981) 4 B.C. Int'l & Com L Rev 39.
10. "Note from Thomas Jefferson, Secretary of State of the United States of America, to Messrs. Carmichael and Short", March 22, 1792, 1 Am. St. Pap. Foreign Rel. at 258.
11. J. Mayhew, "A Discourse Concerning Unlimited Submission and Non-Resistance to the Higher Powers" in W. Volkomer, ed., The Liberal Tradition in American Thought (New York: G.P. Putnam's Sons, 1969) at 49.

12. P. Papadatos, Le Delit Politique, Contribution a l'Etude des Crimes contre l'Etat (1955) at VII.
13. Sir J. Stephen, History of the Criminal Law of England (1883) at 70-71; J. Mill, On Liberty and Considerations on Representative Government (Oxford: B. Blackwell, 1946) at 2.
14. Mill, *supra*, note 13.
15. Report of the Royal Commission on Extradition 7 (1878) cited in B. Larschan, "Extradition, the Political Offense Exception and Terrorism: An Overview of the Three Principal Theories of Law" (1986) Boston U. Intl. L.J. 231 at 244, note 70.
16. Note from Thomas Jefferson, Secretary of State of the United States of America, to Messrs. Carmichael and Short, March 22, 1792, 1 Am. St. Pap. Foreign Rel. 258.
17. D. Johnson, Guizot: Aspects of French History 1789-1874 (Toronto: University of Toronto Press, 1963).
18. L. Oppenheim, International Law, vol. I, 7th ed. by H. Lauterpacht (London: Longman's Green, 1948) at 706.
19. A. Solzhenitsyn, The Gulag Archipelago (New York: Harper and Row, 1973) at 500.
20. E. Davidson, The Making of Adolph Hitler (1977) at 240.
21. H. Lauterpacht, "The Law of Nations and the Punishment of War Crimes" (1944) 21 Brit. Y.B. Int'l L. 58 at 88.
22. Irish Times (9 July 1982) 9, col.1.
23. Sinha, *supra*, note 3 at 173.
24. Whiteman, *supra*, note 3 at 800.
25. M.C. Bassiouni, International Extradition and World Public Order (Dobb Ferry, New York: Oceana, 1974) at 370-371.
26. Deere, *supra*, note 10.
27. Extradition Treaty between Belgium and France, Nov. 22, 1834, art. 5, 84 Parry's T.S. 457, 462. I.A.
28. See treaties with Sardinia (1838), Baden (1844), the United States (1843), Prussia (1845) and Bavaria (1846) cited in I.A. Shearer, Extradition in International Law (Manchester: The University Press, 1971) at 167.
29. *Ibid.* at 166.

30. Secretary of State Jefferson, 22 March, 1792, American State Papers. For. Rel. 258; Moore, Digest, IV, 332; Oppenheim, International Law, supra, note 1 at 704-7.

31. See treaties cited in note 28 above.

32. Statement by Lord Cairns in the House of Lords, 3 August 1876, Hansard, Parliamentary Debates, 3rd. ser., vol.231, cols. 377-9; 6 British Digest 653-4 (1965).

33. Shearer, supra, note 28 at 168.

34. Stephen, supra, note 13 at 70-71.

35. J.S. Mill as cited in Shearer, supra, note 28 at 170.

36. 33 and 34 Vict. 1870, c. 52, s. 3; the U.K. act also provided for protection from extradition when the extradition request, while ostensibly for a non-political offence, was really motivated by a desire to punish the individual for a political act.

36a. See discussion in "Harvard Research", supra, note 2 at 113.

37. M. Bassiouni, International Extradition and World Public Order, (1974) at 371; Rezek, "Reciprocity as a Basis of Extradition" (1981) 52 Brit. Y.B. Int'l. L. 181.

38. See Carbonneau, "Terrorist Acts - Crimes or Political Infractions? An Appraisal of Recent French Extradition Cases" (1980) 3 Hastings Int'l L. & Comp. L. Rev. 265 at 270 (1980).

39. Scott, " "Political Offences" In Extradition Treaties" (1909) 3 Am. J. Int'l L. 459, 460; Carbonneau, *ibid.*

40. Re Castioni [1890] 1 Q.B. 149 at 155, Denman J.

41. *Ibid.*

42. *Ibid.* at 165-66.

43. *Ibid.* at 160.

44. *Ibid.* at 156, 165-66, Hawkins J.

45. *Ibid.* at 166.

46. *Ibid.* at 156, Denman J.

47. C.V. Schlaefter, "American Courts and Modern Terrorism: The Politics of Extradition" in Int'l Law and Politics 617 at 625.

48. Re Meunier, supra, note 8 at 419.

49. Ibid. at 419.

50. Ibid.

51. Ibid. at 415. In a similar vein, the 1956 Extradition Treaty between Italy and Israel specifically provides that "criminal acts which constitute an open manifestation of anarchy ... shall not be considered as political offenses"; see Treaty Concerning Extradition and Judicial Assistance in Criminal Matters, 24 February, 1956, Israel-Italy, 316 U.N.T.S. 109, art. 4.

52. M. Defensor-Santiago, Political Offences in International Law (1977) at 94.

53. Ibid. Note that in the American case of Eain v. Wilkes, 641 F.2d 504 at 522 (7th Cir. 1981) 61 A.L.R.Fed. 757 (1983), cert. denied, 454 U.S. 894 (1981), an American court denied protection of the political offence exception to an accused bomber and practically equated activities of the PLO with anarchism.

54. See below section II) E) ii).

55. [1955] I Q.B. 540, [1955] I All E.R. 31 (Q.B.); (1954) 21 Int. L. Rep. 240; see discussion below in section II) D) i) c).

56. Re Castioni [1891] 1 Q.B. at 151.

57. Supra, note 8.

58. Supra, note 55.

59. Shearer, supra, note 28 at 172.

60. Supra, note 55 at 544-45.

61. Ibid. at 540, 549.

62. 21 Int. L. Rep., supra, note 55 at 245.

63. [1955] I All E.R. at 36.

64. 1 Q.B. at 549, 21 Int'l L. Rep. at 244.

65. [1955] I Q.B. at 549.

66. S. 3(2) of the U.K. Extradition Act 1870, 33 & 34 Vict., c. 52.

67. C. Parry, ed., British Digest of International Law, vol. 6 (London: Stevens and Sons, 1965) at 661 ff.

68. C. Amerasinghe, Studies in International Law (1969) at 118.

69. See discussion below in sections II) D) iii) b) (3) and III) A) iii).

70. Regina v. Governor of Brixton Prison ex parte Kolczynski, supra, note 55 at 34.

71. Supra, note 64.

72. Supra, note 65.

73. [1973] 1 All E.R. 935 (Q.B.), aff'd, [1973] 2 All E.R. 204 (H.L.).

74. Extradition Act, 1870, 33 & 34 Vict., c. 52.

75. Regina v. Governor of Pentonville Prison ex parte Tzu-Tsai Cheng, supra, note 73 at 939; also see [1973] 2 All E.R. at 209 where Lord Diplock went further and stated that the act in question would have to be committed in the territory of the requesting state.

76. Regina v. Governor of Pentonville Prison ex parte Tzu-Tsai Cheng [1973] A.C. 931 at 961-63 (per Lord Salmon).

77. See obiter dictum by Viscount Radcliffe in L.R.[1964] A.C. 556 at 591; 33 Int'l. L. Rep. 319 at 344 (1967); [1962] 1 Q.B. 55; appeal to House of Lords, L.R.[1964] A.C.556; cases in 33 Int'l. L. Rep. 319 (1967).

78. Ibid.

79. L.R.[1964] A.C. 556 at 583.

80. Supra, note 77.

81. Supra note 77, 33 Int'l. L. Rep. 319 at 344 (1967).

82. Regina v. Governor of Brixton, ex parte Schtraks, supra, note 77, L.R. [1964] A.C. 556 at 591.

83. Ibid. at 583.

84. Ibid.

85. Cheng v. Governor of Pentonville Prison [1973] 2 All ER 204, per Lord Diplock at 209.

86. Regina v. Governor of Brixton, ex parte Schtraks, supra, note 77 at 591.

87. Ibid.

88. Regina v. Governor of Brixton, ex parte Schtraks, supra, note 77 at 583.

89. See for example the decisions in Re Meunier, supra, note 8; Regina v. Governor of Brixton Prison ex parte Kolczynski, supra, note 55; and Cheng v. Governor of Pentonville Prison [1973] A.C. 931.

90. 18 U.S.C. §3184 (1976).

91. In re Ezeta, 62 F. 972 at 997 (N.D.Cal.1894).

92. 4 G. Hackworth, Digest of International Law §316 (1942).

93. 18 U.S.C. §3186 (1976).

94. See Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981) 61 A.L.R.Fed. 757 (1983), cert. denied, 454 U.S. 894 (1981); In re Ezeta, supra, note 91 at 1002.

95. In re Ezeta, supra, note 91.

96. Jimenez v. Aristeguita, 311 F.2d 547 (5th cir.,1962), cert.den. 375 U.S.48 (1963); Shearer, supra, note 28 at 259.

97. Supra, note 91 at 978.

98. Ibid. at 998-999.

99. Ibid. at 1002.

100. Ibid. at 999.

101. See Eain v. Wilkes, supra, note 94; In re Ezeta, supra, note 91 at 1002.

102. 161 U.S. 502 at 511-12 (1896).

103. In re Ezata, supra, note 91.

104. See Eain v. Wilkes, supra, note 94; In re Ezeta, supra, note 91.

105. In re Ezeta, supra, note 91.

106. In re Ziyad Abu Eain, No. 79 M 175 at 18, 20-21 (N.D. Ill. Dec.18, 1979)(mem.), habeus corpus denied sub nom., Abu Eain v. Adams, 529 F. Supp.685 (N.D.Ill. 1980), aff'd sub nom. Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981); 61 A.L.R. Fed. 757 (1983), cert. denied, 454 U.S. 894 (1981).

107. Ibid at 20-21.
108. Eain v. Wilkes, supra, note 94.
109. Ibid. at 504,516.
110. In re Ezeta, supra, note 91.
111. Ornelas v. Ruiz, supra, note 102.
112. Proceedings in the Case of James Lynchehoun, in 1 C.C.Hyde, International Law Chiefly as Interpreted and Applied by the United States, 2d ed. (1947) at 1021.
113. In re McMullen, No. 3-78-1099 MG, at 6 (N.D.Cal.May 11, 1979), (unreported), aff'd 658 F.2d 1312 (9th cir. 1981) discussed in Quinn v. Robinson, 783 F. 2d 776, 801 (9th Cir. 1986), cert. denied 55 U.S.L.W. 3257 (U.S. Oct.14, 1986) and In re Ziyad Abu Eain, supra, note 106 at 17-21.
114. Re Castioni, supra, note 40; In re McMullen, supra, note 113.
115. Ibid. at 813-14.
116. Supra, at 811.
117. Ibid.
118. Karadzole v. Artukovioc, 247 F.2d 198 (9th Cir.1957), vacated and remanded for further proceedings under 18 U.S.C. §3184, 355 U.S.393 (1958).
119. Ibid. at 204.
120. Garcia-Mora, "The Nature of Political Offenses: A Knotty Problem of Extradition Law" (1962) 48 Va. L. Rev. 1226 at 1248.
121. Eain v. Wilkes, supra, note 94 at 514, 519 (7th Cir. 1981); In re Erzata, supra, note 91 at 978; Karadzole v. Artukovic, supra, note 118; Ramos v. Diaz,179 F. Supp.459 at 462 (S.D.Fla 1959); Jimenez v. Aristequita, note 96.
122. Jimenez v. Aristequita, supra, note 96; Shearer, supra, note 28 at 259.
123. Ibid. note 121.
124. Re Krishian Rudewitz (1908), in 4 G. Hackworth, Digest of International Law 49-50 (Washington, D.C: G.P.O., 1942).
125. 450 F.2d 1189 at 1192 (5th Cir. 1971), cert. denied, 405 U.S.

989 (1972).

126. 623 F.2d 1093 (5th Cir. 1980).

127. Ibid at 1104.

128. Supra, note 94 at 519.

129. Ibid.

130. Ibid.

131. Ibid.

132. Ibid. at 520.

133. Ibid. at 560. This decision differs from the view expressed by Lord Reid in obiter in the U.K. case of Regina v. Governor of Brixton, ex parte Schtraks (supra, notes 76, 77, 83 and accompanying text) that "it could hardly be that an offence committed the day before open disturbances broke out would be treated as non-political while a precisely similar offence committed two days later would be of a political character."

134. In re Doherty, 599 F. Supp. 270 at 275 (S.D.N.Y.1984).

135. Jimenez v. Aristeguita, supra, note 96; Shearer, supra, note 28 at 259.

136. Glucksman v. Henkel, 221 U.S. 508 at 512 (1910).

137. Jimenez v. Aristeguita, note 96.

138. Ibid. note 96.

139. Ibid. at 560.

140. Ibid.

141. Ibid.

142. Supra, note 116.

143. Supra, note 96.

144. 450 F.2d 1189 (5th Cir. 1971), cert. denied, 405 U.S. 989 (1972).

145. In re Mylonos, 187 F. Supp. 716 (N.D. Ala. 1960).

146. Ibid. at 719, 721.

147. Ibid. at 719.

148. 278 F.2d at 78-79.

149. In re Lincoln, 228 F. 70 at 74 (E.D.N.Y. 1963); Escobedo v. United States, 623 F. 2d 1098 at 1107 (5th Cir.), cert. denied, 449 U.S. 1036 (1980).

150. Supra, note 94.

151. Note, "Executive Discretion in Extradition" (1962) 62 Colum. L. Rev. 1313 at 1325.

152. C. Currin, "Extradition Reform and the Statutory Definition of Political Offenses" (1984) 24 Va. J. of Int'l. Law 419 at 423, note 20 citing Treaty on Extradition, July 9, 1974, United States-Canada, 27 U.S.T. 983, T.I.A.S. No. 8237 (entered into force March 22, 1976; Treaty on Extradition, June 22, 1972, United States-Denmark, 25 U.S.T. 1293, T.I.A.S. No.7864 (entered into force July 31, 1974).

154. VI Jefferson, Writings 462 (Ford ed.1894) cited in Currin, supra, note 152 at 426, note 38.

155. Currin, supra, note 152.

156. Supra, note 112.

157. Supra, note 113.

158. Supra, note 118.

159. Supra, note 94.

160. G.A. Res. 3, U.N. Doc. A/64, at 9, 10 (1946), as printed in [1946-1947] U.N.Y.B. 66 cited in Karadzole v. Artukovic, supra, note 118 at 205.

161. Ibid. at 204.

162. Ibid. at 205.

163. Supra, note 113 at 808

164. Ibid. at 801.

165. Ibid.

166. Supra, note 134 at 275.

167. Ibid. at 276.

168. Ibid. at 270-71.

169. Ibid. at 274-276.

170. See Carbonneau, "The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created" 1 A.S.I.L.S. Int'l L.J. 1 at 22-31.

171. See notes 128 to 131 and accompanying text.

172. Eain v. Wilkes, supra, note 94 at 520-21.

173. Ibid. at 520.

174. In re Meunier, supra, note 8.

175. Eain v. Wilkes, supra, note 94 at 520.

176. Ibid. at 521.

177. Ibid.

178. Ibid. at 520.

179. Ibid. at 521.

180. Ibid.

181. Quinn v. Robinson, supra, note 113 at 810.

182. Ibid. at 808.

183. See notes 163 to 165 and accompanying text.

184. Quinn v. Robinson, supra, note 113 at 801.

185. Note, "Political Legitimacy in the Law of Political Asylum" (1985) 99 Harv. L. Rev. 450 at 455-56; In re Doherty, supra, note 134.

186. Quinn v. Robinson, supra, note 113 at 801.

187. Ibid. at 813-14.

188. In re Mackin, No. 80. Cr. Misc 1 (S.D.N.Y. Aug.13, 1981), appeal dismissed, 668 F.2d 122 (2d Cir.1981) cited in Quinn v. Robinson, supra, note 113 at 787.

189. In re Ezata, supra, note 91; Eain v. Wilkes, supra, note 94.

190. In re Ezata, *ibid.*

191. Jimenez v. Aristeguita, supra, note 96.

192. Shearer, supra, note 28 at 279.

193. G. Levasseur, "Les Problemes actuels de l'extradition" (1968) 39 Rev. int. D. pen. 571. In contrast, in the United States, in the case of Escobedo v. United States, 623 F.2d 1098 at 1105 (5th Cir.), cert. denied, 449 U.S. 1036 at 1101 (1980), in refusing extradition to Mexico of individuals accused of kidnapping a Cuban diplomat, the court stated "[a]n offense is not of a political character simply because it was politically motivated." It had to be connected to a violent political disturbance.

194. R. Garraud, Precis de Droit Criminel (1912) at 83.

195. Law of March 10, 1927, tit.1, art.5, para.2 in M. Garcia-Mora, "The Nature of Political Offenses: A Knotty Problem of Extradition Law" (1962) 48 Va.L.Rev. 1226 at 1249 and "Harvard Research in International Law" (1935) 29 Am. J. Int'l L. Supp. 380-81 (1935).

196. H. Donnedieu de Vabres, Les Principes Modernes du Droit Penal International (1928) at 267.

197. 14 Ann. Dig. at 145-6 (Fr. Cour d'Appel Grenoble 1947) as noted in M. Littenberg, "The Political Offense Exception: An Historical Analysis and Model for the Future" (1990) 64 Tulane L.R. 1195 at 1205, note 22 (unofficial translation).

198. Ibid.

199. See for example In re Hennin, Cour d'Appel, Paris, [1967] Juris-Classeur periodique, la semaine juridique (J.C.P. II) No. 15274; H. Schultz, "La Convention europeenne d'extradition et le delit politique" in Recueil d'etudes en hommage a Jean Constant (1971) at 321.

200. E. McDowell, ed., Digest of United States Practice in International Law 1975 (Washington, D.C.: U.S. Govt. Printing Office, 1976) at 168-75.

201. H. Schultz, "La Convention europeenne d'extradition et le delit politique" in Recueil d'etudes en hommage a Jean Constant (1971) at 321.

202. In re Piperno (Cour d'appel, Paris) 367 cited in Carbonneau, supra, note 38 at 294.

203. Ibid.

204. Croissant, Court of Appeal of Paris, November 16, 1977, 2nd decision, (1978) 93 J. Trib. at 52 cited in Littenberg, supra, note 197.

205. Ibid. In Belgium, the courts have restricted the designation of common criminal acts as political offences to those committed with the intent to alter political institutions and have removed from this category acts directed against innocent persons with no connection with the particular conflict. (See Abarca, Court of Appeal of Brussels, May 8, 1964, Doss. 26.734.)

206. Federal Extradition Law of 22 January, 1892, art. 10, cited in "Harvard Research", supra, note 2 at 423; see also 1922 Finnish Extradition Act in K. Stahlberg, "World habeas corpus and extradition" (1964) Int. Bar Conf. Rep. 94.

207. Watin v. Ministere Pub. Federal, 72 I.L.R. 614 (Switz. Tribunale federale 1964).

208. Kroeger v. Swiss Fed. Prosecutor's Office, I.L.R. 605 (Swiz. Tribunale federale 1966).

209. Cfr. Castori, March 19, 1975, 101 A.T.F., Ia, 65.

210. Kroeger v. Swiss Fed. Prosecutor's Office, supra, note 208.

211. Ibid.

212. In re Kavic, Bjelanovic and Arsenijevic, April 30, 1952, 78 A.T.F., I, 54 (1952) as translated in (1952) 19 Int. L. Rep. 371 at 374.

213. Ibid.

214. Supra, note 55.

215. Supra, note 212.

216. Ibid.

217. In re Kaphengst, 5 Ann. Dig. 292 at 293 (Federal Court, Swit., 1930).

218. Della Savia v. Ministere Pub. de la Confederation, 72 I.L.R. 618 at 626 (Switz. Tribunale federale 1969). Dutch courts have also relied on the proportionality theory in approving extradition of individuals accused of membership in a criminal organization and participation in "terrorist" activity; see Folkerts, Tribunal of Maastricht, January 25, 1978 and Wackernagel, Schneider, Tribunal of the Hague, January 26, 1978 cited in C. Van den Wijngaert, The Political Offence Exception to Extradition (Boston: Kluwer Deventer, 1980) at 131.

219. Wassilieff, July 13, 1908, 34 A.T.F., I, 553 reported in [1909] Foreign Rel. U.S. 519 (1914) cited in Goldie, "The "Political Offense" Exception and Extradition Between Democratic States"

(1986) 13 Ohio N.U.L.Rev. 53 at 62.

220. Pavan, June 15, 1928, 54 A.T.F., I, 207 referred to in Currin, supra, note 152 at 431.

221. Watin, supra, note 207.

222. Ktir v. Ministere Pub. Federal, 34 I.L.R. 143, 87 A.T.F., I, 137 (Switz. Tribunale federale 1961).

223. Watin, supra, note 207 at 616-17.

224. M. Garcia-Mora, supra, note 120 at 1256.

225. See, for example, Austrian case Hungarian Deserter (Austrian) Case, 28 Int. L. Rep. 343 (Austria 1959) and Chilean case In re Garcia Zepeda, 22 Int'l L. Rep. 528 (Chile 1955).

226. Eain v. Wilkes, supra, note 94; In re Ezata, supra, note 91 at 1002.

227. In re Ezata, ibid.

228. Jimenez v. Aristeguita, supra, note 96.

229. Shearer, supra, note 28 at 279.

230. See note 193.

231. Watin, supra, note 207.

232. Supra, note 121.

233. Garcia-Mora, supra, note 120 at 1248.

234. Supra, note 113 at 3.

235. Eain v. Wilkes, supra, note 94 at 520-21; see also notes 128 to 131 and accompanying text.

236. See notes 128 to 131 and accompanying text; Eain v. Wilkes, ibid. at 520-21; In re Meunier, supra, note 8.

237. Supra, note 113 at 817-18.

238. Regina v. Governor of Brixton, ex parte Schtraks, supra, note 77 at 583; Regina v. Governor of Pentonville Prison ex parte Tzu-Tsai Cheng, supra, note 73.

239. Della Savia, supra, note 218.

240. Supra, note 8.

241. Cited in Carbonneau, *supra*, note 38 at 291-95.

242. *Ibid.* at 294.

243. *In re Piperno*, *supra*, note 202 at 205 cited in Carbonneau, *supra*, note 38.

244. Law of March 10, 1927, tit. 1, art.5, para.2, cited in Garcia-Mora, *supra*, note 120 at 1249.

245. Digest of United States Practice in International Law 1975, *supra*, note 200 at 168-75.

246. P. O'Higgins, "Disguised Extradition: The Soblen Case", (1964) 27 Mod. L. Rev. 521; Note, "When Extradition Fails is Abduction the Solution?" (1961) 55 Am. J. Int'l. L. 127.

247. M. Bassiouni, "Ideologically Motivated Offenses and the Political Offenses Exception in Extradition - A Proposed Juridical Standard for an Unruly Problem" (1969) 19 De Paul L. Rev. 17 at 238-40.

248. B. Larschan, "Extradition, the Political Offense Exception and Terrorism: An Overview of the Three Principal Theories of Law" (1986) 4 Boston U. Int'l L J 231 at 271.

249. Cantrell, "The Political Offense Exception in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland" (1980) 60 Marq. L. Rev. 777 at 817-18.

250. Lubet and Czackes, "The Role of the American Judiciary in the Extradition of Political Terrorists" (1980) 71 J. Crim. L. & Criminology 193 at 203-06.

251. D. Lowry, "Terrorism and Human Rights: Counter-Insurgency and Necessity at Common Law" (1977) 53 Notre Dame Law 49 at 66.

252. 18 U.S.C. §3186 (1976).

253. Note, "Executive Discretion in Extradition" (1962) 62 Colum. L. Rev. 1313 at 1325.

254. P. Papadatos, Le Delit Politique. Contribution a l'Etude des Crimes Contre l'Etat (1955) at 81; B.A. Wortley, "Political Crime in English Law and in international law" (1971) 45 Brit. Yrbk. Int. L. 219 at 233 and 239.

255. Watin, *supra*, note 207.

256. *Supra*, note 113 at 812-14.

257. *Ibid.*

258. Kavic, Bjelanovic and Arsenijevic, supra, note 212.
259. Sinha, supra, note 3 at 173.
260. M. Bassiouni, International Extradition and World Public Order (1974) at 425.
261. Supra, note 106.
262. See comment on this in Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 at 111 (1948).
263. See Watin, supra, note 207 at 616-17.
264. B. Banoff & C. Pyle, "To Surrender Political Offenders: The Political Offense Exception to Extradition in United States Law" (1984) 16 N.Y.U. J. Int'l. L. & Pol. 169 at 209.
265. See in particular the case of Abu Eain, supra, note 106.
266. D. Thompson, "The Evolution of the Political Offense Exception in an Age of Modern Political Violence" (1983) 9 Yale J. of World Pub. Ord. 315 at 326.
267. Supra, note 121.
268. In re Mylonos, 187 F. Supp. 716 (N.D. Ala. 1960).
269. Supra, note 121.
270. Ibid.
271. Supra, note 268 at 721.
272. Supra, note 121.
273. In re Gonzalez, 217 F.Supp. 717 (S.D.N.Y.1963)
274. Ibid. at 721.
275. Eain v. Wilkes, supra, note 106.
276. Ibid. at 522.
277. Ibid. at 521; In re Meunier, supra, note 8.
278. Ibid. at 520-21.
279. Supra, note 113 at 804.
280. Ibid. at 813-14.

281. Ibid. at 812-13.

282. Compare for example In re McMullen, supra, note 113 and In re Mackin, No. 80. Cr. Misc 1 (S.D.N.Y. Aug13,1981), appeal dismissed, 668 F.2d 122 (2d Cir.1981) with Eain v. Wilkes, supra, note 106.

283. 14 Ann. Dig. at 145 (Fr. Cour d'Appel Grenoble 1947) as noted in M. Littenberg, "The Political Offense Exception: An Historical Analysis and Model for the Future" (1990) 64 Tulane L.R. 1195 at 1205, note 22 (unofficial translation).

284. Cour d'Appel, Paris, [1953] 2 Gaz. Palais 113, cited in Carbonneau, supra, note 65 at 277.

285. Ibid. at 114.

286. Ibid.

287. Cour d'Appel, Paris, [1967] Juris-Chasseur periodique, semaine juridique (J.C.P. II) No. 15274, cited in Carbonneau, supra, note 38 at 277.

288. Ibid.

289. E. McDowell, ed., Digest of United States Practice in International Law 1975 (1976) at 168-75.

290. J. Du Droit Int'l 843 (Cour d'Appel, Paris 1977).

291. Supra, note 289 at 171.

292. R. Riggle, "L'Affaire Abou Daoud: Some Problems of Extraditing an International Terrorist" (1978) 12 Int'l Law 333.

293. Le Conseil d'Etat, Secretariat du Contentieux, France, 106 J. De Dr. Int'l 91, 94 (1979).

293a. Eain v. Wilkes, supra, note 106.

294. Regarding fear of terrorist reprisals see T. Carbonneau, "The Provisional Arrest and Subsequent Release of Abu Daoud by French Authorities" (1977) 17 Va. J. Int'l. L. 495 at 501-02; regarding danger to economic interest see Riggle, "L'Affaire Abu Daoud: Some Problems of Extraditing an International Terrorist" (1978) 12 Int. Law 333.

295. J. Lodge, Terrorism, A Challenge to the State (Oxford: M. Robertson, 1981) c.6 at 151-52.

296. Bassiouni, supra, note 260 at 426-27.

297. Cantrell, supra, note 292.

299. Bassiouni, *supra*, note 260 at 426.

300. It is not entirely clear from the report whether the request was made in reference to only offences committed in European Community countries though it is clear that the demand was made in reference to countries of similar political/ideological outlook. For report see Irish Times (9 July 1982) 11, col.4.

301. Cantrell, "The Political Offense Exception in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland" (1980) 60 Marq. L. Rev. 777 at 782-83.

302. *Supra*, note 55.

303. M. Whiteman, ed., 6 Digest of International Law, *supra*, note 3 at 810.

303a. S. Barr, "The Dilemma of the Political Offence Exception: To Which Acts Should It Apply?" 10 Hamline J. of Public L. and P. 141 at 149.

304. See, for example, Convention Between the United States and Belgium for the Extradition of Criminals, June 13, 1882, 22 Stat. 972, 975 (art.IV, para.2); Arab League Extradition Agreement, opened for signature November 3, 1952, 159 Brit. & For.State Papers 606 (1952) (art.IV(1),(2)); Central American Extradition Convention, entered into force Jan.25, 1935, 49 Stat.3111, T.S.No.882,165 L.N.T.S.45,51 (art.3).

305. L. Oppenheim, International Law, *supra*, note 1 at 578.

306. S. Sinha, Asylum and International Law, *supra*, note 3 at 178; I.Shearer, Extradition in International Law (Dobb's Ferry, New York: Oceana Publications, Inc., 1971) at 166-93.

307. C. Currin, "Extradition Reform and the Statutory Definition of Political Offenses", *supra*, note 152 at 449, note 182.

308. *Supra*, note 8 at 419.

309. France-Israel Extradition Treaty, Nov. 12, 1958, art. 4, 805 U.N.T.S. 271.

310. United States-Canada Extradition Treaty, December 3, 1971, art. 4(2) (i), T.I.A.S.No. 8237.

311. The Convention on the Prevention of the Crimes of Genocide, December 9, 1948, article VII, 78 U.N.T.S. 277, 282 (entered into force January 12, 1951).

312. United Nations Year Book, 1946-7, at 66; G.A.Res.3 at 9-10, U.N.Doc. A/67 (1946).

313. S. Doc. No.8, 99th Cong., 1st Sess.1 (1985), reprinted in (1985) 24 I.L.M. 1105.
314. Treaty of Extradition, June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468.
315. Statement of A. Sofaer before the Senate Foreign Relations Committee, August 1, 1985, at 22.
316. European Convention on the Suppression of Terrorism, Jan.27, 1977, reprinted in (1976) 15 Int'l Legal Materials 1272.
317. C. Currin, "Extradition Reform and the Statutory Definition of Political Offenders", supra, note 152 at 448, note 182.
318. See a description of the July 20, 1944 attempt on Hitler's life in E. Zeller, The Flame of Freedom (Coral Gables: University of Miami Press, 1967) at 173-396.
319. See 1957 European Convention on Extradition, art. 3(3), E.T.S. No. 24 cited in Currin, "Extradition Reform and the Statutory Definition of Political Offenders", supra, note 152 at 449, note 182.
320. Irish Times (9 July 1982) 9, col.1.
321. G. Brand, "The War Crimes Trials and the Laws of War" (1949) 26 Brit. Y.B. Int'l. L. 414; Lord Wright, "The Killing of Hostages as a War Crime" (1948) 25 Brit. Y.B. Int'l. L. 296; M. Garcia-Mora, "Crimes against humanity and the principle of non-extradition of political offenders" (1964) 62 Mich.L.Rev. 927; L.C. Green, "Political offences, war crimes and extradition" (1962) 11 Int'l. & Comp.L.Q. 329.
322. Act of 10 March 1927, article 5(2).
323. In re Bohne (1968) 62 Am. J. Int'l L. 784-5 (Corte Suprema de Justicia de la Nacion, Argentina 1966).
324. See above section II) B) i).
325. Hague Convention for the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (entered into force October 14, 1971) (hereinafter cited as Hague Convention).
326. New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Adopted December 14, 1973, 28 U.S.T. 1975, T.I.A.S. No.8532, 1035 U.N.T.S. 167 (entered into force February 20, 1977) (hereinafter cited as New York Convention).

327. International Convention Against the Taking of Hostages, opened for signature December 18, 1979, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No.39) at 10, U.N.Doc. A/34/PV.105 (1980) (entered into force June 3, 1983) (hereinafter cited as Hostage Convention).

328. See Hague Convention, supra, note 375, art.7; New York Convention, supra, note 326, art.7; Hostage Convention, ibid. art. 7.

329. Van den Wijngaert, The Political Offence Exception to Extradition (Boston: Kluwer - Deventer, 1980) at 159; Defensor-Santiago, Political Offenses in International Law (1977) at 28.

330. Le Monde (18 October 1977) 5, col.3.

331. Criminal Law (Jurisdiction) Act, 1976 § 4(2) cited in F.W. O'Brien, "Irish Terrorists and Extradition: The Tuite Case" (1983) 18 Texas Int'l. L. J. 249 at 260.

332. See account of prosecution of Gerard Tuite in F.W. O'Brien, ibid. at 249.

333. Ibid. at 272.

334. This was raised in the Irish context because art. 29, section 3 of the Irish Constitution requires that the Irish Government comply with "principles of international law"; see generally F.W. O'Brien, ibid. at 266.

335. European Convention on the Suppression of Terrorism, Jan.27, 1977, reprinted in 15 Int'l Legal Materials 1272 (1976).

336. Ibid. article 1.

337. Ibid.

338. Ibid. article 5.

339. European Convention on Extradition, supra, note 363, article 3(2).

340. Supra, note 335, article 13.

341. Ibid. article 7.

341a. Hague Convention, supra, note 325; New York Convention, supra, note 326.

341b. Hague Convention, ibid. art. 4(2); New York Convention, supra, note art. 3(2).

342. See above section II) C) i).

343. See above section II) E) i).
344. Supra, note 53; see above section II) C).
345. Doherty, supra, note 134.
346. Barr, supra, note 298 at 153.
347. Supra, note 314.
348. See above section II) E) ii).
349. Quinn v. Robinson, supra, note 113; In re Ziyad Abu Eain, supra, note 106.
350. Quinn, ibid.
351. See above section III) B) iii).
352. Oxford English Dictionary (Oxford: Clarendon Press, 1989).
353. E. Evans, Calling a Truce to Terror (Westport, Conn.: Greenwood Press, 1979) at 3.
354. J. Schreiber, The Ultimate Weapon (1978) at 20.
355. Ibid. at 20.
356. C.5, s.31.
357. Statement by Ambassador Quainton, Director of Office for Combatting Terrorism, Department of State (Sept. 26, 1978), quoted in V.P. Ravaschiere, "Terrorist Extradition and the Political Offense Exception: An Administrative Solution" (1980) 21 Va. J of Int L 163 at 163-4.
358. Art.1 of Draft Convention on Terrorism as printed in (1972) 67 Dep't State Bull. 431.
359. Evans, supra, note 353 at 128.
360. Statement by Barbara Jackman cited in The Globe and Mail (1 October, 1988) A3.
361. Statement by Professor Nasir Aruri cited in The Globe and Mail (1 October, 1988) A3.
362. I.C.Green, "International Law and the Control of Terrorism" (1983) 7 Dalhousie L.J. 236 at 237.
363. Supra, note 352.
364. D. Lauter, "KGB's legacy of terror wanes" Toronto Star (23

August 1991) A19.

365. Cantrell, *supra*, note 301 at 801.

366. See, for example, the decision in In re McMullen, *supra*, note 113.

367. *Supra*, note 91 at 166.

368. In re McMullen, *supra*, note 113 at 3, 5-6.

369. Ezata, *supra*, note 91 at 1002.

370. *Ibid.* at 978.

371. See above section II) D) ii).

372. In re Meunier, *supra*, note 8.

373. See note 193.

374. Della Savia, *supra*, note 218.

375. See above section III) C).

376. Doherty, *supra*, note 134; more generally, see discussion of criteria above in section III) C).

377. *Supra*, note 298.

378. See above section III) C).

379. See above section III) C).

380. See potential for discrepancy between U.S. Refugee Act of 1980 (Pub. L. No. 96-212, 94 Stat. 102 (1980)) which establishes a process for asylum claims and draft U.S.A. extradition legislation of 1980 (Extradition Act, S. 1940, 97th Cong., 1st Sess. §3194(a)) which would have left the determination of the acceptability of political offence claims to the executive.

381. Currin, *supra*, note 152 at 444.

382. See above section II.

383. R. Plender, "Admission of Refugees: Draft Convention on Territorial Asylum" (1977) 15 San Diego L. Rev. 45.

384. Information obtained from UNHCR Liaison Office, New York, January 1993.

385. A. Grahl-Madsen, The Status of Refugees in International Law

vol.1 (Leyden: A.W. Sijthoff, 1966) at 73.

386. Article 2(2) of resolutions as cited in Grahl-Madsen, *supra*, note 385 at 74.

387. Cited in Grahl-Madsen, *ibid.* at 74 and 75.

388. Art. 1 (A)2 of Convention Relating to the Status of Refugees, Geneva, July 28, 1951, 189 U.N.T.S., 137 (hereinafter referred to as the Refugee Convention) and Protocol Relating to the Status of Refugees, opened for signature January 31, 1967, 606 U.N.T.S. 267 (hereinafter referred to as the Protocol); but see also the Constitution of the International Refugee Organization 1946, Annex 1, 18 U.N.T.S. 3.

389. Article 1 of Protocol, *ibid.*

390. Refugee Convention, *supra*, note 388, art. 1 (A)2.

391. See, for example, the ILO Convention Concerning Equality of Treatment of Nationals and Non-Nationals in Social Security, 28 June 1962, ILO Convention 118.

392. Art. 1 (A)2 of Refugee Convention, *supra*, note 388.

393. Report of Ad Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/1618, E/AC.32/5, at 3 (1950), reprinted in 1950 U.N.Y.B. 569.

394. See, for example, practice in U.K. and Belgium described in T.N.Cox, "'Well-Founded Fear of Being Persecuted': The Sources and Application of a Criterion of Refugee Status" (1984) X Brooklyn J. Int'l L. 333 at 355-56, 361; see also reference to Handbook in U.S. Federal Court case Stevic v. Sava, 678 F.2d 401, 406 (2d Cir. 1982).

395. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status para. 196 (1979).

396. Refugee Status Advisory Committee, Guidelines on Refugee Definition and Assessment of Credibility, paras.4, 9 (Feb.20, 1982).

397. *Ibid.* para 15.

398. INS v. Stevic, No. 82-973 (argued Dec. 6, 1983) 52 U.S.L.W. 3452, UNHCR Amicus Brief at 9 (U.S. Dec. 13, 1983) cited in T.N.Cox, *supra*, note 394 at 378f.

399. INS v. Stevic, No. 82-973 (argued Dec. 6, 1983) 52 U.S.L.W. 3452, UNHCR Amicus Brief at 9 (U.S. Dec. 13, 1983) cited in Cox, *supra*, note 394 at 378f.

400. Refugee Status Advisory Committee, Guidelines on Refugee Definition and Assessment of Credibility, para 15 (Feb.20, 1982); see for example description of Belgian, Canadian, French and United Kingdom practice contained in Cox, *supra*, note 385 at 355-367.

401. S. Prakash Sinha, Asylum and International Law (The Hague: Martinus Nijhoff, 1971) at 102; Grahl-Madsen, *supra*, note 385 at 189-191.

402. Sinha, *ibid.* at 97.

403. Grahl-Madsen, *supra*, note 385.

404. See United States ex rel. Weinberg v. Schlotfeldt (1938), 26 F. Supp.282.

405. Dunat v. Hurney (1961), 297 F. 2d 744.

406. P. Hyndman, "Refugees under International Law with a Reference to the Concept of Asylum" (1986) 60 Australian Law Journal 148 at 149; Grahl-Madsen, *supra*, note 385 at 193-5, 214.

407. K.F. Zink as cited in Grahl-Madsen, *supra*, note 522 at 193. See also United States ex rel. Weinberg v. Schlotfeldt (1938), 26 F. Supp. 282 at 283; Dunat v. Hurney (1961), 297 F. 2d 744; Hyndman, *ibid.* at 149.

408. Grahl-Madsen, *supra*, note 385 at 208, 214.

409 Zink as cited in Grahl-Madsen, *supra*, note 385 at 193.

410. Grahl-Madsen, *ibid.* at 195; C. Avery, "Refugee Status Decision-Making: The Systems of Ten Countries" (1983) 19 Stanford Journal of International Law 235 at 237f.

411. Sinha, *supra*, note 401 at 98. See also Blazina v. Bouchard (1961), 286 F. 2d 744.

412. Dunat v. Hurney (1961), 297 F. 2d 744.

413. P. Weis, "The Concept of the Refugee in International Law", 87 Clunet 928-1001 (1960) published UN Doc. HCR/INF/49 (Geneva, 1961) at 22.

414. Grahl-Madsen, *supra*, note 385 at 82, 216.

415. Sinha, *supra*, note 401 at 102.

416. Grahl-Madsen, *supra*, note 385 at 195.

417. *Ibid.* at 253.

418. Ibid. at 83.

419. Ibid. at 192.

420. See Federal Republic of Germany case Petke v. Regierungsprasidium Sudwurttemberg-Hohenzollern, 6 BVerwGE 271 (1958) cited in Grahl-Madsen, supra, note 385 at 225.

421. Grahl-Madsen, ibid. at 251.

422. G. Goodwin-Gill, The Refugee in International Law (Oxford: Oxford University Press, 1983) at 31.

423. Sinha, supra, note 401 at 103; Grahl-Madsen, supra, note 385 at 220, 248.

424. See Federal Republic of Germany Case 2070 II/55 (21 September 1955) cited in Grahl-Madsen, supra, note 385 at 224.

425. See Federal Republic of German Bayerisches Verwaltungsgericht Ansbach Case 4093 II/58 (23 September 1959) cited in Grahl-Madsen, supra, note 385 at 226.

426. Universal Declaration of Human Rights, December 10, 1948, U.N. Doc. A/Res. 217 (III).

427. Preambular paragraph 1, Refugee Convention, supra, note 388.

428. Grahl-Madsen, supra, note 385 at 250.

429. Ibid. at 227, 251.

430. Ibid. at 251.

431. Case 4154 II/58 (July 6, 1959) of the Bayerisches Verwaltungsgericht Ansbach cited in Grahl-Madsen, supra, note 385 at 223.

432. Re Castioni, ibid.

433. Goodwin-Gill, supra, note 422 at 31.

434. See, for example, the U.K. Kolczynski case discussed above in section II) C) i).

435. Grahl-Madsen, supra, note 385 at 243.

436. Grahl-Madsen, ibid. at 247.

437. Grahl-Madsen, supra, note 385 at 220.

438. Ibid. at 84.

439. See above section II) C) i).

440. Case 4154 II/58 (July 6, 1959) of the Bayerisches Verwaltungsgericht Ansbach cited in Grahl-Madsen, supra, note 385 at 223.

441. Sinha, supra, note 401 at 103.

442. See Grahl-Madsen, supra, note 385 at 220.

443. International Refugee Organization, Manual for Eligibility at 13, 23f cited in Grahl-Madsen, ibid. at 221.

444. Goodwin-Gill, supra, note 422 at 33.

445. See Puspoki Piros, JCRR 36 (1955) and Majstorovic v. BRD, 1960 MDR 523 cited in Grahl-Madsen, supra, note 385 at 249.

446. Grahl-Madsen, ibid. at 250-51.

447. See above section II) C) i).

448. Plender, supra, note 383.

449. BVerwGE, Bd.39, S.27, 28-29 as cited in Goodwin Gill, supra, note 422 at 32.

450. Ibid. at 33.

451. Grahl-Madsen, supra, note 385 at 242.

452. Ibid. at 231-236.

453. This was, for example, the situation in Greece as described in Atibo v. Immigration Officer, London (Heathrow) Airport [1978] ImmAR 93.

454. Simpson cited in Grahl-Madsen, supra, note 385 at 81.

455. Zellerbach Commission, European Refugee Problems 1959 (New York, 1959) at 64.

456. According to information presented by the Netherlands to the U.N. Commission on Human Rights, such alternative service was provided in 37 of the 90 countries with compulsory military service: See UN doc. E/1980/13, 106-7, 198-9.

457. Grahl-Madsen, supra, note 385 at 250-51.

458. Refugee Convention, supra, note 388.

459. Ibid. article 42.

460. G. Jaeger, Status and International Protection of Refugees, International Institute of Human Rights, 9th Study Session, July 1978, at 38; Grahl-Madsen thought not in Grahl-Madsen, supra, note 385 at 94-98 but had apparently changed his mind by 1982: See Grahl-Madsen, "Refugees and Refugee Law in a World of Transition" in Transnational Legal Problems of Refugees 65, 72 (1982) where he stated that "this rule may be considered embedded in general international law and, therefore, is binding not only on states party to the Refugee Convention and Protocol, but by all law abiding nations as well." See also P. Hyndman, "Asylum and Non-Refoulement - Are These Obligations Owed to Refugees Under International Law?" (1982) Philippine L.J. 43 at 49-52, 59-71.

461. UNHCR Executive Committee, Note on International Protection para.5, U.N. Doc. A/AC.96/609/Rev. 1 (1982).

462. Refugee Convention, supra, note 388.

463. Ibid.

464. UN Doc. A/45, para. d.

465. Statute of the Office of the United Nations High Commissioner for Refugees, Art. 7 (d), in Collection of International Instruments concerning Refugees (Geneva: Office of the United Nations High Commissioner for Refugees, 1979).

466. See article 6a and 6b of Charter of the International Military Tribunal attached as annex to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 279; text also in 39 A.J. (1945), Suppl., 258, 259-60.

467. Article 6c of Charter of the International Military Tribunal, *ibid.* at 279.

467a. No. I For the Amelioration of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31, art. 50; No. II For the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85, art. 51; No. III Relative to the Treatment of Prisoners of War, 6 U.S.T. 3116, T.I.A.S. No. 3364, 75 U.N.T.S. 135, art. 130; No. IV Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3116, T.I.A.S. No. 3365, 75 U.N.T.S. 287, art. 147.

468. Ibid.

469. 78 UNTS 277; see 45 A.J. (1951), Suppl., at 7.

470. Universal Declaration of Human Rights, Article 14(1), (2), December 10, 1948, U.N.Doc.A/Res.217(III).

471. Grahl-Madsen, *supra*, note 385 at 281-2.
472. Refugee Convention, *supra*, note 388.
473. Grahl-Madsen, *supra*, note 385 at 292.
474. *Ibid.* at 295-7.
475. *Ibid.* at 294-5.
476. Weis, UN Doc. HCR/INF/49, 29.
477. Grahl-Madsen, *supra*, note 385 at 292.
478. French delegate cited in Travaux preparatoires of the Refugee Convention UN Doc. E/AC.7/ SR.166, 6. See Grahl-Madsen, *supra*, note 385 at 282-89.
479. S.P. Sinha cited in Van den Wijngaert, *supra*, note 218 at 75, footnotes 413, 414.
480. P. Weiss, "Territorial asylum" (1966) 6 Ind. J. Int. L. at 188-189.
481. See discussion in Van den Wijngaert, *supra*, note 218 at 77-80.
482. *Ibid.*; P. Weiss, "The United Nations Declaration on Territorial Asylum" (1969) 7 Can. Yrbk. Int'l. L. 143.
483. A. Grahl-Madsen, The Status of Refugees in International Law, vol.2 (Leyden: A.W. Sijthoff, 1972) at 98.
484. UN doc. A/CONF.2/SR.24, 10 and SR.35, 21 for views of the United Kingdom and France respectively.
485. UN Doc. A/CONF.2/ S R.35, 21.
486. See article 3 of 1933 Convention in 159 LoNTS 199 and article 5 of 1938 Convention in 192 LoNTS 59.
487. A. Grahl-Madsen, The Status of Refugees in International Law, vol.2, *supra*, note 483 at 4-5.
488. See article 3 of the International Rules on the Admission and Expulsion of Aliens adopted by the Institut de Droit International on September 9, 1950, in IDI, "Resolutions", 51.
489. ECOSOC Res. 319 B (XI), ii. Ch. i Art. 1 C.
490. Van den Wijngaert, *supra*, note 218 at 77-78.

491. Court of Appeal of Paris, November 16, 1977 (2nd decision), 93 J. Trib., 52 (1978); Nicosia v. Wall, U.S. Court of Appeals, 5th Circ., April 6, 1971, 51 Int. L. Rep., 372 (1978).

492. Van den Wijngaert, *supra*, note 218 at 181-3.

493. *Ibid.* at footnotes 966-8 and corresponding text.

494. See reports regarding the Croissant case in Le Monde (18 November 1977) 12 and regarding Piperno case in Le Monde (19 October 1979) 14.

495. Grahl-Madsen, *supra*, note 633 at 88. See in particular the French extradition cases Croissant (1977) and Piperno (1979), *ibid.*

496. Grahl-Madsen, *supra*, note 483 at 88-89.

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POLITICAL OFFENDER OR EXTRADITABLE CRIMINAL: THE POLITICAL OFFENCE,
INTERNATIONAL ORDER AND PROTECTION OF HUMAN RIGHTS

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