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In Re Extradition of Atta: Tension between the Political Offense Exception and U.S. Counterterrorism Policy

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NOTE

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Introduction

Since 1980, more than 5,000 terrorist acts[1] have occurred which have resulted in 3,800 deaths and over 10,000 people wounded. Of these casualties, 363 of the dead and 518 of the wounded were American.[2]

The increase in terrorist activities during the Reagan Administration has produced a tougher United States position through the adoption of a hard-line policy[3] regarding terrorism[4] and the means of dealing with it.[5] This position was demonstrated by the United States responses during the Achille Lauro

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[1] There is no universal acceptance of a definition for terrorism or terrorist acts, this is partly due to disagreement as to the desirability and necessity of defining the term. J. MURPHY, PUNISHING INTERNATIONAL TERRORISTS THE LEGAL FRAMEWORK FOR POLICY INITIATIVES 3 (1985); Bell, *Terror: An Overview*, in INTERNATIONAL TERRORISM IN THE CONTEMPORARY WORLD 36-43 (Livingston 1978).

[2] Department of State Bureau of Public Affairs, GIST International Terrorism (May 1988).

[3] Vice President's Task Force, *Public Report of the Vice President's Task Force On Combatting Terrorism* ii (Feb. 1986) [hereinafter *Public Report*]: "The Justice Department should pursue legislation making anyone found guilty of murdering a hostage under any circumstances subject to the death penalty." *Id.* at 25.

[4] Despite the lack of a universally accepted definition of terrorism, the United States has attempted to define its use of the word. "Our government believes that terrorist acts have certain characteristics. They are premeditated and politically motivated. They are conducted against noncombatant targets and usually have as their goal trying to intimidate or influence a government's policy." And also, they "are criminal acts". L. Bremer III, *Terrorism and the Rule of Law* (U.S. State Dept., Pub. Aff. Bureau, Current Policy No. 947 (1987).

[5] W. Farrell, *The U.S. Government Response To Terrorism*, 90 (1982). Miller, *Terrorism and Hostage Taking: Lessons from the Iranian Crisis*, 13 RUTGERS L.J. 513, 515 n.8 (1982), *See also Public Report supra* note 3; L. Bremer III, *Counterterrorism: Strategy and Tactics* (U.S. State Dept., Pub. Aff. Bureau, Current Policy No. 1027, 1987).

affair[6] and the military raid on Libya.[7] Congress also acted through the 1984 Act to Combat International Terrorism[8], which focused on the need to have international cooperation in extraditing terrorists.[9] Further, in 1985, the United States Senate ratified the United States - United Kingdom Supplementary Treaty,[10] which has restricted the political offense exception to extradition.[11]

Currently, the United States government has a three-part policy to counter terrorist activity.[12] First, it is the policy of the government that no concessions shall be made to terrorists. Second, the United States engages political, economic and diplomatic pressure on those States which sponsor terrorism. And third, the government has adopted a program designed to bring terrorists to justice. With international cooperation, the government seeks to identify, track, arrest and punish alleged terrorists. "Bringing terrorists to justice - punishing them - is the final step in the process of fighting terrorists. Merely thwarting them is not enough, for if the guilty can know no fear, then the innocent can know no rest."[13]

This program has recently met with some success. In 1986, terrorism reportedly dropped six percent and another ten per-

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[6] *See generally* N.Y. Times, Oct. 17, 1985, at A12, col 5; *id*, Oct 14, 1985 at A12 col 3, Time, Oct 21, 1985 at 22 col. 1-3.

[7] *See* Church, *Hitting The Source*, Time, Apr. 26, 1986 at 16-27, Doerner, *In the Dead of Night*, Time, Apr. 26, 1986 at 28-31, Church, *Forgetting Gadaffi*, Time, Apr. 21, 1986, at 18-27.

[8] 1984 Act to Combat International Terrorism, Pub. L. No. 98-533, 98 Stat. 2706 [codified in same sections of 18 U.S.C., 22 U.S.C., 41 U.S.C. (1984)].

[9] *Id.* §201 Under "International Cooperation" section.

[10] Supplementary Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, signed in Washington D.C. on June 25, 1985 and formally transmitted to Senate of July 17, 1985, S. Doc. No. 8, 99th Cong. 1st Sess. (1985), *reprinted* in 24 I.L.M. 1104 (1985)[hereinafter U.S.- U.K. Supplementary Treaty]. Later revisions of the Supplementary Treaty were prepared by the Senate Foreign Relations committee and ratified in the Senate by resolution on July 17, 1986, S. Doc. No. 8, 99th Cong. 2nd Sess. (1986).

[11] *Id.* Article I.

[12] L. Bremer III, *Terrorism: Myths and Reality* (U.S. State Dept., Pub. Aff. Bureau, Current Policy No. 1047, 1988). *See also*, L. Bremer III, *Terrorism and The Rule of Law* (U.S. Department of State, Pub. Aff. Bureau, Current Policy No. 947, 1987).

[13] L. Bremer III, *Practical Measures For Dealing With Terrorism* (U.S. State Dept., Pub. Aff. Bureau, Current Policy No. 913, 1987).

cent in 1987.[14] In West Germany, Hamadei, a Lebanese terrorist awaits trial, charged with air hijacking and murder stemming from the 1985 hijacking of TWA Flight 847.[15] In France, Georges Ibrahim Abjallah was sentenced to life imprisonment for his involvement in the murders of a U.S. military attache and an Israeli diplomat.[16] In Washington, D.C., Fawaz Yunis, a Lebanese terrorist awaits trial, charged with hostage taking arising from the 1985 highjacking of Jordanian Airlines Flight 401.[17] The F.B.I. arrested Yunis after luring him into international waters.[18] In New York, Mohmoud Abed Atta, an Fatah Abu Nidal terrorist, has been incarcerated awaiting possible extradition to Israel to face criminal charges arising from an attack on a bus on the West Bank of the Occupied Territories.

The United States government, however, has encountered difficulty in the prosecution of Mohmoud Abed Atta. Unable to assert its own extra-territorial jurisdiction, the United States has not complied with the Israeli request for Atta's extradition because it has not yet obtained judicial certification. Although the State Department favors extradition, the extradition has not been certified by a United States magistrate. Magistrate Caden in *In Re Atta*[19] denied certification, finding Atta non-extraditable due primarily to the political offense exception to the extradition treaty between the U.S. and Israel.

Part I of the note includes background information on the political offense exception and current trends of interpretation by other courts. This part also includes a brief discussion of the U.S.-U.K. Supplementary Treaty, the Eain and Quinn decisions, and the neutrality doctrine. Part II presents the facts and a summary of the Atta decision, including the Court's application of the political offense exception, an analysis of the incidence test, and a discussion of the Court's jurisdiction. Part III con-

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[14] L. Bremer III, *Counterterrorism: U.S. Policy And Proposed Legislation* (U.S. State Dept., Pub. Aff. Bureau, Current Policy No. 1019, 1987).

[15] N.Y. Times, June 15, 1985, at i1, col. 6.

[16] L. Bremer III, *Counterterrorism: Strategy And Tactics* (U.S. State Dept., Pub. Aff. Bureau, Current Policy No. 1073, 1987).

[17] United States v. Yunis, 681 F. Supp. 896 (D.D.C. 1988)(The court ruled that it had jurisdiction over the defendant).

[18] *See id.* at 912.

[19] In Re Extradition of Atta, No. 87-M-0551 (E.D.N.Y. June 17, 1988)(WESTLAW 66866)(Caden, J.).

cludes that despite United States policy objectives, the political offense exception has still be applied by the courts, raising the issue of a resulting supplementation to the U.S.-Israeli extradition treaty.

Part I: The Political Offense Exception - Background

A. *The Exception*

The political offense exception is incorporated in most extradition treaties.[20] Its history lies in the American and French revolutions and their subsequent Constitutions,[21] and it was first seen in the Franco-Belgian Treaty of 1834.[22] The political offense exception is the recognition of a continual right of a people to manifest their disatisfaction with a ruling government and their right to political change.[23] The political offense exception protects the right of persons to rebel against any government they find unsatisfactory[24] or oppressive,[25] even by armed resistance under certain circumstances,[26] by eliminating the threat of extradition. The term political offense has rarely been defined in extradition treaties.[27] Judicial interpretation has been the primary source of its definition,[28] allowing wider flexibility in its

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[20] S.P. SINHA: ASYLUM AND INTERNATIONAL LAW, 173 (1971).

[21] Decleration des droits de l'homme et du Citoyen du 26 Aout 1789, art. 2 (Fr.), incorporated as La preamble de la Constitution de 1791 (Fr.), *reprinted in* LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, 33 (S. Godechat ed. 1970); Declaration of Independence para. 1 (U.S. 1776).

[22] 22 B.F.S.P. 223.

[23] Lafferty, *The Turning Point Approaches: The Political Offense Exception to Extradition*, 24 SAN DIEGO L. REV. 549, 565 (1987). *But see* Note, *Combatting International Terrorism: Limiting the Political Offense Exception Doctrine in Order to Prevent "One Man's Terrorism" from becoming Another Man's Heroism*, 3 VILL. L. REV. 1495, 1537 (1986).

[24] Lafferty, *supra* note 23, at 565.

[25] The Declaration of Independence provides:

> Whenever any Form of Government becomes destructive of [the people's inaliable rights], it is the Right of the People to alter or abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such forum, as to them seen most likely to effect their Safety and Happiness.

The Declaration of Independence para.1 (U.S. 1776).

[26] Bassiouni, *The "Political Offense Exception" Revisited: Extradition Between the United States and The United Kingdom. A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy*, 15 DEN. J. INT'L L. & POL'Y 255 (1987).

[27] S.P. SINHA, *supra*, note 20 at 173.

[28] M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 371 (1974).

application[29] based upon the circumstances and facts of each case.[30]

There are two categories of political offenses which are recognized; pure political offenses and relative political offenses.[31] Pure political offenses are acts which are directed toward a ruling government affecting public interest and not having any elements of a common crime.[32] Since pure political offenses are targeted at the rights of the government and don't effect the individual rights of private citizens,[33] courts usually conclude them to be non-extraditable offenses.[34] Thus, application of the political offense exception becomes unnecessary. Relative political offenses reach private interests[35] and are considered private wrongs or common crimes committed in furtherance of a political objective.[36] In order for an act to be a relative political offense it is required that there exist a nexus between the crime committed and the political act or motive.[37] It is these types of offenses that are often found extraditable requiring a court to determine whether to apply the exception.

Although several approaches to defining the political offense exception have been developed by courts throughout the world,[38] American courts have adopted the "incidence" test.[39] The incidence test was first introduced in *In re Castioni*,[40] where the court said that "fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and form

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[29] In re Mackin, 80 Cr.Misc. 1 (S.D.N.Y. Aug. 13, 1981), *appeal dismissed*, 668 F.2d 122 (2d Cir., 1981).

[30] M. BASSIOUNI, *supra* note 28 at 26.

[31] Karadzole v. Artukovic, 247 F.2d 198, 203 (9th Cir., 1957), *vacated* 355 U.S. 393 (1958)(mem.).

[32] M. BASSIOUNI, *supra* note 28, at 383.

[33] *Id.* at 383.

[34] Recent Decisions, *The Political Offense Exception to Extradition: A 19th Cent. British Standard in 20th Cent. American Courts*, 59 NOTRE DAME L. REV. 1005, 1009 (1984); Quinn v. Robinson, 783 F.2d 776, 794 (9th Cir., 1986), *cert. denied*, 107 Sup. Ct. 271 (1986).

[35] M. BASSIOUNI, *supra* note 28 at 383.

[36] *Id.*

[37] *Id.*

[38] *Quinn*, 783 F.2d at 794, n.34. The two major approaches used were the French "objective" test and the Swiss "proportionality" or "predominance" test.

[39] *Id.* at 795, n.4.

[40] [1891] 1 Q.B. 149 (1890).

part of a political disturbance."[41] The incidence test was subsequently adopted by the United States Supreme Court in *Ornelas v. Ruiz*,[42] which is the only time the Court has ever reviewed the political offense exception, and has since been applied.[43] The incidence test is a two pronged test. First, the court must find the existence of a political uprising or disturbance. Second, the act committed must be incidental to or in furtherance of a political objective[44], *i.e.*, a nexus must exist between the act and the uprising.[45]

Some courts have required additional elements be satisfied before finding the exception applicable. This seems to be the result of some courts' difficulty in reconciling the exception and terrorism.[46] Some require that the defendant be a national of the State where the uprising has occurred. Others have focused on whether the defendant was a member of a group, and the objectives of that group.[47] The court in *Quinn v. Robinson* apparently added an additional requirement that the act occur in the territory where the political change is sought, rather than mere territorial proximity.[48]

In the latest challenge to the validity and application of the political offense exception, *In re Atta*[49] has brought the exception back to life following a period of criticism and controversy over its existence and application.[50] *In re Atta* reapplies the political offense exception in view of U.S. ideological political val-

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[41] *Id.* at 152.

[42] Ornelas v. Ruiz, 161 U.S. 502 (1896).

[43] Eain v. Wilkes, 641 F.2d 504 (7th Cir., 1981), *cert. denied*, 454 U.S. 894 (1981), Quinn v. Robinson, 783 F.2d 776 (1986), In re Machin, 80 Cr. Misc. 1 (1981), Matter of Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984), Garcia-Guillern v. United States, 450 F.2d 1189 (5th Cir., 1971).

[44] *Quinn*, 783 F.2d at 809.

[45] *Id.* at 809.

[46] *Id.* at 801-03.

[47] *Matter of Doherty*, 599 F. Supp. at 275. In Re McMullen, Magis.No. 3-78-1099 MG (N.D. Cal., filed May 11, 1979).

[48] *Quinn*, 783 F.2d at 808.

[49] In re Extradition of Atta, No. 87-M-0551 (E.D.N.Y. June 17, 1988)(WESTLAW 66866)(Caden, J.).

[50] Baunach, *The U.S.-U.K. Supplementary Treaty: Justice for Terrorists or Terror for Justice?*, 2 CONN. J. INT'L L. 463, 465 (1987); Note, *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450, 452-53 (1985). *But see* Note, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U. L. REV. 654, 657 (1986).

ues[51] and also international relations, where the goal of the judiciary should be neutrality in determining the legitimacy of particular political objectives.[52] The means by which these political objectives are achieved, often through armed struggle, may seem barbaric to some yet are viewed acceptable and valid to others.[53] The doctrine of neutrality saves the court from making this distinction.

In *Atta*, Magistrate Caden applied the incidence test and upheld the use of the political offense exception to deny the Israeli request for extradition.[54] The Magistrate stated that the political offense exception protects "the rights of those, whose philosophy may differ from ours, to fight for a way of life they believe in,"[55] and political change even if accomplished by less than desirable means.[56] The court recognized the importance of neutrality in arriving at its decision.[57] In doing so, the court concluded that its only objectives were to determine whether or not there was a political uprising and whether the acts of the defendant were incidental to the conflict or in furtherance of the political objective.[58] After reviewing both historical and testimonial evidence of the situation on the West Bank, which is where the act had taken place, Magistrate Caden concluded that there was an uprising and that the act committed by the defendant

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[51] U.S. Declaration of Independence, *supra* note 25. The ideas are embodied in the American Revolution, and from George Washington who was the father of modern guerilla tactics, in attacking, ambushing and sabotaging superior British forces. *See* J. BOND, THE RULES OF RIOT; INTERNAL CONFLICT AND THE LAW OF WAR 45-48 (1974); *see generally* M. SMELSER, THE WINNING OF INDEPENDENCE (1972).

[52] *Quinn*, 783 F.2d at 804.

[53] The Court stated:

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

Id. at 804.

[54] *In re Atta*, (WL 66866 at 36)(Caden, J.).

[55] *Id.* at 36.

[56] *Id.* at 39.

[57] *Id.* at 40.

[58] *Id.* at 40.

had been in furtherance of or incident to that uprising.[59]

B. *The Quinn & Eain Cases*

Recent decisions addressing the political offense exception are *Eain v. Wilkes*[60] and *Quinn v. Robinson.*[61] In *Quinn*, Great Britain sought the extradition of the defendant, Quinn, from the United States in order to face charges of conspiracy and murder. These charges stemmed from a Provincial Irish Republican Army letter bombing campaign and the murder of a British police constable.[62] The court in *Quinn* restricted the uprising component of the incidence test. Those persons, it concluded, who were not citizens of the country or territory where the uprising occurred were to be excluded form the protection of the political offense exception. Furthermore, it was determined that the offense must have occurred within the territory where the change in government was sought.

Magistrate Caden in the *Atta* case rejected this part of the incidence test analysis,[63] pointing out that since Ahmad's act occurred on the West Bank, the territorial proximity requirement could be liberally satisfied.[64] As to the citizenship requirement established by *Quinn*, Magistrate Caden did not interpret this to be a strict requirement, rather a flexible one that could be met in view of the defendant's ties to the West Bank.[65] Quinn also held that only a liberal nexus between the act and the uprising needs to be shown.[66] Similarly, all the circumstances surrounding the defendant's acts were deemed necessary for review by Magistrate Caden in order to review the liberal standard.[67]

Eain v. Wilkes[68] involved a request for extradition by Israel of a defendant who was accused of setting a bomb in an Israeli

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[59] *Id.* at 50.

[60] 641 F.2d at 504.

[61] 783 F.2d at 776.

[62] *Id.* at 783-85.

[63] The Quinn court had noted that under certain circumstances territorial proximity could satisfy the test. *Id.* 783 F.2d at 807.

[64] *In re Atta*, (WL 66866 at 16)(Caden, J.).

[65] *Id.* at 19.

[66] *Quinn*, 783 F.2d at 809.

[67] *In re Atta*, (WL 66866 at 34) (Caden, J.).

[68] *Eain v. Wilkes*, 641 F.2d at 504.

city's market area that killed two young boys and injured thirty others.[69] The United States Court of Appeals, Seventh Circuit, excluded this bombing from the definition of a political act and thereby, rendering the political offense exception inapplicable to it. The court identified the political disturbance requirement as involving organized forms of violence aimed at the disruption of a political system.[70] As such, the court held that "[t]he indiscriminate bombing of a civilian population is not recognized as a protected political act."[71] This notion was further reiterated in *Quinn*, which held crimes against humanity to be excluded from coverage of the political offense exception.[72] International terrorism, the court said, did not merit the incidence test.[73] The Magistrate in the *Atta* case accepted this philosophy, yet, he did not see the passengers on the bus as mere civilians or settlers.[74] The Magistrate pointed out that although the settlers on the West Bank might not be deemed military in the traditional sense, they displayed many of the characteristics of military personnel.[75] Many of them are reserve members of the Israeli Army and are frequently called into active duty in the area of their settlements.[76] Living in a violent area where combat with the P.L.O. and the Palestinians is a common occurrence, the Israeli Army provides training and weapons to the inhabitants of the Occupied Territories, as well as cooperation on a regular basis. In view of this, Magistrate Caden concluded that the settlers were not common civilians.[77] "While the settlers may not fit the description of military personnel as it is commonly thought of, it is clear that at a minimum they are willing participants in a civil war or a violent community conflict designed to acquire a long sought after homeland."[78]

The Court in *Eain* declined to recognize how the offenses involved, committed by a member of the P.L.O., could be con-

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[69] *Id.* at 509-10.
[70] *Id.* at 219.
[71] *Id.* at 521.
[72] *Quinn*, 783 F.2d at 801.
[73] *Id.* at 817.
[74] *In re Atta*, (WL 66866 at 36-37)(Caden, J.).
[75] *Id.* at 36.
[76] *Id.*
[77] *Id.*
[78] *Id.*

sidered part of a political conflict. It stated that a political conflict traditionally involves "ongoing organized battles between contending armies, a situation which, given the dispersed nature of the P.L.O., may be distinguished."[79] Conversely, terrorist activity is sporadic and somewhat arbitrary in nature and "seeks to promote social chaos."[80] Overshadowing the Court's argument that P.L.O. or terrorist activity does not fit within the definition of political conflict was their concern with the consequence of giving the political offense exception liberal application. If terrorist activity were deemed to be part of a political conflict nothing would prevent an influx of terrorists seeking a safe haven in the United States via the political offense exception. Although the Court recognized the "validity and usefulness of the political offense exception," it warned that, "it should be applied with great care lest our country become a social jungle and encouragement to terrorists everywhere."[81] Despite the *Eain* Court's concerns, Magistrate Caden in the *Atta* case found the situation on the West Bank of the Occupied Territories to be a political uprising,[82] satisfying the first prong of the incidence test.

C. *The Neutrality Concept*

Magistrate Caden's discussion of the political offense exception also concentrated on the purpose and policy of protecting the court of the requested State from having to take a seemingly political position in favor of one side of the conflict.[83] The Court in *Atta* enjoyed the protection offered by the exception.[84] Courts will not inquire into the judicial system of the requesting State as to whether the person may receive unfair or unbiased treatment. This non-inquiry rule removes political judgement from the judiciary, allowing the court to focus on the legal issues.[85]

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[79] *Eain v. Wilkes*, 641 F.2d at 519; *see also*, Ramos v. Diaz, 129 F. Supp. 459 (S.D. Fla. 1958)(members of an organized revolutionary army with established chain of command operating within the country).

[80] *Eain v. Wilkes*, 641 F.2d at 519.

[81] *Id.* at 520.

[82] *In re Atta*, (WL 66866 at 33)(Caden, J.).

[83] *Id* at 38; Bassiouni, *supra* note 26, at 266.

[84] *In re Atta*, (WL 66866 at 40)(Caden, J.).

[85] Lafferty, *supra* note 23, at 556; *see also* Laubenheimer v. Factor, 61 F.2d 626 (7th Cir., 1932); Sindona v. Grant, 461 F.Supp. 199 (S.D.N.Y. 1978).

Further, the *Quinn* Court pointed out that a court should merely apply the incidence test to the offense and not determine what action would increase the chances of obtaining the sought after political objective.[86] *Quinn* noted that judgments regarding foreign governments are political questions outside the judicial role.[87] The Court in *Atta* followed this reasoning. "Today's rebels in the West Bank may be tomorrow's rulers there, and it is not this court's objective or purpose to impair future foreign relations by prejudging the legitimacy of the Palestinian objectives."[88] The Court did not pass judgment on the activities of the Israelis or the Palestinians, for that was what the neutrality protection of the political offense exception afforded.[89] The court's function was to apply the law as it existed. Was there an uprising and, if so, was the act incidental to it, or committed in furtherance of its objectives?[90]

D. *The United States-United Kingdom Supplementary Treaty*

Discussion of the political offense exception would not be complete without a brief summary of the United States-United Kingdom Supplementary Treaty.[91] Most recently, the United States government has sought to restrict the political offense exception from its extradition treaty with Great Britain.[92] The Supplementary Extradition Treaty has been seen as an attempt to avoid what the United States government views to be unfavorable judicial decisions.[93] Then Secretary of State, George Shultz, described the treaty as representing ". . . a significant step to improve law enforcement cooperation and counter the threat of international terrorism and other crimes of violence."[94]

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[86] *Quinn*, 783 F.2d at 804.

[87] *Id.* at 804.

[88] *In re Atta*, (WL 66866 at 40)(Caden, J.).

[89] *Id.* at 40.

[90] *Id.* at 40.

[91] U.S.-U.K. Supplementary Treaty, *supra* note 10.

[92] Note, *Expediting Extradition: The United States-United Kingdom Supplemental Treaty of 1986*, LOYOLA L.A. INT'L & COMP. L.J. 135 (1988).

[93] Lafferty, *supra* note 23, at 562.

[94] U.S.-U.K. Supplementary Treaty, supra note 10, *reprinted in* 24 I.L.M. 1104 (1985)(letter from Secretary of State George Shultz accompanying the treaty).

Moreover, the treaty has been viewed as assisting the British government in its conflict with I.R.A. terrorists.[95] Prior to the treaty, several I.R.A. members were denied extradition to Great Britain by U.S. courts[96] through the application of the political offense exception.

In application, the Supplementary Treaty eliminates the political offense exception as a viable exception to extradition.[97] The term political offense has rarely been defined by extradition treaties.[98] Yet, this Treaty lists those acts which are not to be considered political, and thus, does away with the political offense through exclusion. Article 1 of the Treaty lists the crimes that cannot be considered offenses of a political character. These include: aircraft hijacking and sabotage, crimes against internationally protected persons (such as diplomats), hostage taking, murder, manslaughter, kidnapping, unlawful detention, and offenses relating to explosives, firearms, and serious property damage.[99] With Article 1, the first prong of the incidence test cannot be met since these acts are statutorily non-political. The result is confusion as to what is left of the political offense exception under this Treaty.

Article 4 of the Treaty retroacts the provisions with respect to offenses committed before the Treaty had taken effect.[100] This may create constitutional problems as it affects the extradition of individuals whom U.S. courts refused to extradite previously.[101]

By eliminating the political offense exception throughout Article 1 of the Supplementary Treaty, the United States government has taken the determination of what constitutes a po-

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[95] Lafferty, *supra* note 23, at 572.

[96] Note, *supra* note 92, at 142; cases where Great Britain was denied extradition of Irish nationalists include: United States v. Doherty, 786 F.2d 491 (2d Cir., 1986); Quinn v. Robinson, 783 F.2d at 776; In re Mackin, 668 F.2d at 122; In re McMullen, Magistrate No. 3-70-1099 MG (memorandum decision) (N.D. Cal. 1979).

[97] Lafferty, *supra*, note 23 at 564.

[98] S.P. SINHA: ASYLUM AND INTERNATIONAL LAW 173 (1971).

[99] U.S.-U.K. Supplementary Treaty, supra note 10, at 1105-07.

[100] U.S.-U.K. Supplementary Treaty, *supra* note 10, art. 4 at 1107-08 ("This Supplementary Treaty shall apply to any offense committed before or after the Supplementary Treaty enters into force").

[101] Lafferty, *supra* note 23, at 563 & n. 90 (possible violation of the prohibition against ex post facto laws and bills of attainder).

litical act out of the hands of the judiciary.[102] This Treaty represents a break in the historical neutrality[103] of the U.S. in not assisting another State in suppressing its internal political dissent.[104]

Part II: *In the Matter of the Extradition of Mahmoud Abed Atta*

A. *The Facts*

The defendant, Mahmoud Abed Atta, *a/k/a* Mahmoud El-Abed Ahmad[105] (hereinafter Atta) was charged under Israeli law with murder, attempted murder, causing serious bodily injury with aggravating intent, attempted arson, and conspiracy to commit a felony.[106] Israel issued an arrest warrant for Atta on May 3, 1987.[107] These charges arose from an attack on an Egged Bus at the Dir Abu Mishal intersection on the West Bank of Israel's Occupied Territories which occurred on April 12, 1986.[108] On May 9, 1987, the United States issued a warrant to provisionally arrest Atta for his involvement in the attack.[109] Later, Atta was arrested on board a plane bound for the United States after being expelled from Venezuela on immigration charges.[110] On June 26, 1987, Israel submitted to the United States a request for the extradition of Atta pursuant to 18 U.S.C. § 3184 and the 1962 Treaty of Extradition between the United States

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[102] *Id.* at 573.

[103] Bassiouni, *supra* note 26, at 280.

[104] Lafferty, *supra* note 23, at 567.

[105] The court noted that the defendant had several names, *see In re Atta*, (WL 66866 at 51 n.1)(Caden, J.). While the opinion reffered to defendant as Ahmad, he will be hereinafter referred to as Atta.

[106] *Id.* at 2.

[107] *Id.*

[108] *Id.*

[109] The warrant was issued under 18 U.S.C. § 3184 which states in part:

> Whenever there is a treaty or convention for extradition between the U.S. and any foreign government, any justice or judge of the U.S. or any magistrate . . . may, upon complaint . . . charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty . . . issue his warrant for the apprehension of the person so charged. . . .

Id. at 1.

[110] *In re Atta*, (WL 66866 at 42)(Caden, J.).

and Israel.[111]

The sworn statements of the two alleged accomplices,[112] Salah Yousef Ahmad Hariz (hereinafter Ahmad Hariz) and Salah Mohammed Yousef Hariz (hereinafter Mohammed Hariz),[113] and a video reenactment of the incident,[114] formed the basis of the facts which the court reviewed.

In early 1986, according to one of Mohammed Hariz's statements, he and Atta met in Puerto Rico.[115] There, the two men decided to join the Fatah Abu Nidal organization after the Al-Fatah organization of Abu Mussa had divided.[116] In June of 1985, Mohammed Hariz went to Syria for weapons training at the suggestion of Atta. Atta, having previous received such military training in Syria, went to the West Bank in order to recruit Palestinians for the Fatah Abu Nidal organization.[117]

In February 1986, Atta and Mohammed Hariz met again in Israel after Mohammed Hariz returned from Syria having completed his weapons training.[118] Atta informed Mohammed Hariz that they would initiate attacks on Israeli settlers in the area of

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[111] Convention on Extradition Between The Government of the United States of America and the Government of the State of Israel; 14 U.S.T. 1707, 484 U.N.T.S. 283 (1962) [hereinafter *Extradition treaty*].

[112] Though these sworn statements were relied upon by the court as the factual basis of the events, Salah Yousef Ahmad Hariz claimed to have falsely admitted his participation to protect Ahmad. The court also mentioned that his three statements were contradictory, yet the record was unclear. *In re Atta*, (WL 66866 at 3)(Caden, J.).

[113] Both have been tried and convicted in Israel. *Id.* at 3.

[114] Hariz participated in the video reenactment.

[115] *In re Atta*, (WL 66866 at 4)(Caden, J.).

[116] The Fatah Abu Nidal Organization's goal is the destruction of Israel. It carries out terrorist acts against Israel, western democracies which support that State, and against rival Arab and Palestinian organizations which support negotiation or accommodation with Israel. L. Bremer III, *Terrorism: Myths And Reality* (U.S. State Dept., Pub. Aff. Bureau, Current Policy No. 1047, 1988). The Abu Nidal Organization is believed responsible for attacks on Jordon in 1983, the Achille Lauro highjacking, the Rome and Vienna airport massacres of December 27, 1985, and the 1986 murder of 22 worshippers at an Istanbul synagogue. In 1983, Abu Nidal was expelled from Iraq. In June of 1987, Syria expelled most of the Abu Nidal Organization. L. Bremer III, *Counterterrorism: U.S. Policy And Proposed Legislation* (U.S. State Dept., Pub. Aff. Bureau, Current Policy No. 1019, 1987). In November of 1988, Abu Nidal appeared at the Palestinian National Congress in Algiers, at the time of this writing he is still at large. *See*, Department of State Statement on the Declaration by the Secretary of State on the visa application of Mr. Arafatt, (U.S. State of Dept., Pub. Aff. Bureau, Nov. 28, 1988).

[117] *In re Atta*, (WL 66866 at 5)(Caden, J.).

[118] *Id.*

Dir Abu Mishal at Ein Zarga.[119] After five failed attempts to attack Israeli settlers and a failed assassination attempt, Atta next planned an attack on a bus at the Dir Abu Mishal junction.[120] Having inspected the location several times, the two men set up at the junction of Dir Abu Mishal on April 12, 1986, armed with an Uzi submachine gun and Molotov cocktails.[121] That night, an Egged Bus traveling between settlements passed the junction at approximately 7:30 p.m., en route from Neve Tsuf and heading towards the village of Aabud.[122] As the bus crossed the junction, Mohammed Hariz threw a Molotov cocktail which hit the front of the bus. Meanwhile, Atta shot at the bus with the Uzi submachine gun as it continued on its route.[123] The bus managed to arrive at Aabud. As a result of the attack, however, one passenger was slightly injured and the driver suffered serious injuries that later resulted in his death.[124] After the attack, Atta fled Israel. Atta's subsequent known journeys led him through many countries within a two year period, including: Columbia, Cyprus, Puerto Rico, Mexico, Spain and Venezuela.[125]

Atta was then arrested in Venezuela on immigration charges and was ordered deported to the United States.[126] He had been a naturalized citizen of the United States since 1982. Although the record was not clear as to what role Israeli and United States officials had in Atta's arrest and interrogation,[127] the immigration charges were apparently pretextual.[128] After being in-

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[119] *Id.* Hariz also stated that he and Atta had previously harassed and threatened road crews working on the road between the village of Aabud and Dir Abu Mishal.

[120] *Id.* The Dir Abu Mishal junction is located outside the traditional borders of Israel on the West Bank of Samaria.

[121] *Id.* at 6.

[122] *Id.*

[123] *Id.*

[124] *Id.* at 7.

[125] *Id.* at 59-62 & n.16.

[126] *Id.* at 43. The court noted that the lack of an extradition treaty between Israel and Venezuela was probably a factor in Venezuela's decision to deport Atta to the U.S.

[127] *Id.* at 42.

[128] Atta claimed that he had been under surveillance by U.S. agents prior to his arrest and that he had been interrogated by U.S., Israeli and Venezuelan authorities. Documents submitted by the government of Venezuela indicated that Atta was suspected of being a member of the Fatah Abu Nidal terrorist organization and was *processed* by counterintelligence. Atta claimed that he had not questioned about the immigration charges but rather about his activities in Israel, the United States, Mexico, Puerto Rico and Venezuela. *Id.*

terrogated, denied access to an attorney and friends, and having never been given Miranda warnings, Atta was boarded onto a plane destined for the United States.[129] Atta was not extradited to Israel because of the lack of an extradition treaty between Israel and Venezuela. The record was unclear as to whether he was arrested while the plane was in international airspace or upon landing in New York.[130] Nevertheless, following Atta's arrest, Israel submitted to the United States a request for his extradition.[131]

B. *The Decision*

The issues before the United States District Court in the *Atta* case were: whether Atta was found within the territorial jurisdiction of the United States according to the Article III limitation of the Extradition Treaty[132] between the United States and Israel; whether there was sufficient evidence to justify committing Atta to trial in Israel according to Article V of the Extradition Treaty;[133] and whether the Court had to deny the extradition request because the acts in question were of a political character according to Article VI (4) of the Treaty.[134] The

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[129] *Id.* at 45.

[130] The court could not ascertain whether the arrest occurred while in the plane over international airspace or after landing in New York. *Id.*

[131] ". . .the fact that the Israeli arrest warrant for Ahmad dated May 3, 1987, states that Ahmad was presently in the United States seems to indicate that Israel was aware of Ahmad's arrest and that Ahmad would be brought to the United States soon thereafter," suggesting Israeli participation. *Id.* at 44.

[132] Convention on Extradition Between The Government of the United States of America and the Government of the State of Israel; 14 U.S.T. 1707, 484 U.N.T.S. 283 (1962) [hereinafter Extradition treaty], "When the offense has been committed outside the territorial jurisdiction of the requesting party, extradition need not be granted unless the laws of the requested party provide for the punishment of such an offense committed in similar circumstances." *Id.* at art. 3.

[133] Article V states:

> Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, either to justify his committal for trial, if the offense of which he is accused had been committed in that place or to prove that he is the identical person convicted by the courts of the requesting party.

Id. at art. 5.

[134] Article VI, para. 4, states: "Extradition shall not be granted . . . [w]hen the offense is regarded by the requested party as one, of a political character." *Id.* at art. 6,

charges of murder, attempted murder, causing serious bodily injury with aggravating intent, attempted arson, and conspiracy to commit a felony, brought against Atta by Israel, were all extraditable offenses under Article II, paragraphs 1, 3, and 24 of the Extradition Treaty.[135]

The Court first determined Israel's Penal Law to be overbroad in that it granted Israel jurisdiction over offenses committed outside its territory.[136] According to United States law, this exercise of extraterritorial jurisdiction would not be permitted.[137] However, an Article III determination is not a bar to extradition. While the treaty states that where the offense has been committed outside the territory of the requesting State, extradition need not be granted, the Court found that the Treaty did not prevent the United States from extraditing Atta if it so desired.[138]

The Court next determined that there was probable cause to believe that Atta was guilty of the crimes charged and that the evidence was sufficient to justify Atta's committal to trial.[139]

It then turned its attention to the political offense exception and Atta's burden of showing that the acts in question were of a political character and, therefore, outside the scope of the Extradition Treaty.[140] Noting the recent difficulty of other courts in reconciling the exception with acts of terrorism,[141] the Court specifically adopted the incidence test defined by the Ninth Cir-

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para. 4.

[135] Article II of the treaty reads:

> Persons shall be delivered up according to the provisions of the present Convention for prosecution when they have been charges with . . . any of the following offenses: 1. Murder 2. Manslaughter 3. Malicious wrongdoing; inflicting bodily harm . . . 24. Arson . . . Extradition shall also be granted for participation in any of the offenses mentioned in this article.

Id. at art. 2.

[136] *In re Atta*, (WL 66866 at 8)(Caden, J.).

[137] Under Article IX, the court need only consider United States law. *Extradition treaty, supra*, note 132 at art. 9.

[138] *In re Atta*, (WL 66866 at 9)(Caden, J.).

[139] *Id.* at 10. The court based its decision of guilt of Ahmad based upon affidavits by one Israeli police inspector, two Israeli police officers, two passengers on the bus and two doctors who treated the driver as well as affidavits of Ahmad's accomplices and a video reenactment of the crime.

[140] *Id.* at 15.

[141] *Id.* at 16.

cuit Court of Appeals in *Quinn v. Robinson.*[142] Under *Quinn*, the act has to be done incident to or in furtherance of a political uprising in order for the political offense exception to apply.[143] However, the Court rejected the *Quinn* requirement that the act occur within the territory where the change in government was sought.[144] Even if it was a requirement, the Court reasoned, it would have been met since Atta's acts occurred on the West Bank and thus territorial proximity to Israel existed.[145] Unlike the Court in *Quinn*, the Magistrate did not resolve the issue of whether the political offense exception applies only to nationals of the land where the disturbances are occurring. "This court need not decide whether citizenship or close ties need always exist for the political offense exception to apply."[146] The *Quinn* Court said:

> While determining the proper geographic boundaries of an 'uprising' involves a legal isue that ordinarily will be some circumstances under which it will be more difficult to do so. We need not formulate a general rule that will be applicable to all situations.[147]

Atta was not a national of Israel but a naturalized citizen of the United States. However, Atta had been born in the region, had lived most of his life in the area, and had left his wife and children there. In light of these factors, the Magistrate held that Atta's ties to Israel were sufficient to invoke the political offense exception.

Pursuant to the incidence test, the Court stated that there were two requirements for the application of the exception. First, it had to examine whether there was a political uprising, and then, whether Atta's acts were done incident to or in furtherance of a political objective.[148]

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[142] *Quinn*, 783 F.2d at 776.

[143] *Id.* at 807.

[144] *In re Atta*, (WL 66866 at 16)(Caden, J.).

[145] *Id.* at 16-17.

[146] *Id.* at 19.

[147] *Quinn*, 783 F.2d at 807.

[148] *Id.* at 18.

C. *"The Uprising"*

The threshold question addressed by the Court was whether there existed a political uprising or disturbance.[149] In *Eain*, the activity in the Occupied Territories did not pass this scrutiny.[150] Such a determination requires a factual analysis of whether an uprising existed "at the time of" and "at the location of" the individual's acts.[151] Magistrate Caden made a thorough inquiry into the historical roots and social realities of the conflict on the West Bank. The Court chronologically examined the history of the region[152] starting with the first Jewish settlements in the late nineteenth century of Palestine. The Court reviewed the historical immigration of the area, the emergence of the State of Israel, the hostilities between Palestinians and Israelis, the nationalistic concerns of each side, the Arab-Palestinian organizations including the P.L.O., the involvement by the United Nations, the hostility between Arab States and Israel, and the subsequent wars, border disputes, occupations, and terrorism. The Court reviewed the history of the Israeli occupation of the West Bank, obtained from Jordan following the Six Day War of 1967, and also the Palestinian-Israeli hostilities that have heightened since the occupation. Magistrate Caden also analyzed the settlement of the Occupied Territories, the establishment of military governments and army patrols, the Israeli custom of seizing and condemning land for public use (such as roads linking Israeli settlements together), land seizures for military use, and restrictions imposed on the Palestinian use of their own land.[153]

The Court concluded that the evidence showed that an uprising was occurring on the West Bank when Atta's act took place.[154]

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[149] *Id.* at 20. The incidence test being a two part analysis, if the first requirement of political uprising cannot be shown there is no logical reason to determine the validity of the second requirement of whether the act was incident to or in furtherance of the uprising.

[150] *Eain v. Wilkes*, 641 F.2d at 519.

[151] *In re Atta*, (WL 66866 at 20)(Caden, J.).

[152] *Id.* at 19-40.

[153] The court noted that the restrictions were accomplished by military commanders who could classify the area as a combat zone and close it, restrict the land cultivation and prohibit building or construction. *Id.* at 30-31.

[154] Among other evidence the court looked at statistics from the Israeli government which listed 10,871 disturbances of the peace like barricades, Palestinian flag hoisting or

> Where this Court is neither able nor willing to determine which group, the Israelis or the Palestinians, ought to have the right to govern the West Bank, it is evident that legitimate arguments exist for both positions. Both the Palestinians and the settlers are capable of fitting the definition of either civilian or soldier, and the West Bank can appropriately be described as territory upon which a civil war or a violent communal conflict is occurring. Although there have been, and continue to be, periods of relative calm, the battle for the right to occupy and govern continues and was in full force during the period in question.[155]

D. *"Incidental To"*

After finding the existence of an uprising, the Court addressed the question of whether the acts were done incident to or in furtherance of a political objective. The Court identified the objectives of both the Israelis and the Palestinians as their right to the land as a homeland and to govern, occupy, and own the land in the Occupied Territories of the West Bank.[156] Any action taken against one side's interests and abilities to govern and occupy, while increasing its own interests and abilities, would be incidental to the uprising.[157] Magistrate Caden found that the bus routes formed a supply line for the settlements, and that attacking the busses was a way of impairing the settlers' use of the roads and cutting off the settlements, thereby strengthening Palestinian control of the land.[158] Ambassador Fields, who was an expert witness, testified that the buses, which ordinarily carry armed settlers traveling between settlements at night, could be legitimate military targets for an insurgency group trying to displace an occupying force.[159]

Magistrate Caden found that Atta's acts were incident to the uprising and in furtherance of the Palestinian objective to

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rock throwing between 1977 and 1984 and more than 7,100 cases occurring between mid-1985 and May 1987. *Id.* at 33.

[155] *Id.* at 33-34.

[156] *Id.* at 34.

[157] *Id.*

[158] The palestinians believed this road was designed to facilitate and encourage settlement by the Israelis. *Id.* at 69 n.36.

[159] *Id.* at 35-36.

gain control over the land.[160]

E. *The Court's Jurisdiction*

The Court found that regardless of the political offense exception, extradition was barred as it had no jurisdiction over Ahmad.[161] Article I of the Treaty of Extradition between the United States and Israel states that both parties agree to "reciprocally . . . deliver up persons found . . . in its territory who have been charged with . . . any offenses mentioned in Article II . . . or committed within the territorial jurisdiction of the other or outside thereof . . . ."[162] Atta argued that he had not been found in the United States but had been illegally abducted to the U.S. from Venezuela.[163] Magistrate Caden, upon the government's unwillingness to provide any discovery concerning the kidnapping issue, shifted the burden to the government to prove that Atta was not kidnapped.[164] Atta did not offer any evidence as to his alleged kidnapping. The Court reviewed the testimony of F.B.I. agents involved in the arrest,[165] and the Israeli participation[166], and concluded that Atta had been unlawfully brought to the U.S. for extradition purposes.[167]

Under the *Ker-Frisbee* doctrine,[168] even though Atta was unlawfully arrested by United State's officials, he could still be extradited if it could be assured that he would receive due process of law in the requesting State. In making their political offense exception determination, courts will not inquire into the judicial system of the requesting State consistent with the neu-

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[160] *Id.* at 37.

[161] *Id.* at 34.

[162] Extradition Treaty, supra, note 132 at art. I.

[163] *In re Atta*, (WL 66866 at 41)(Caden, J.).

[164] *Id.* at 41.

[165] *Id.* at 44. ("It is clear from the testimony of F.B.I. agent . . . Lyons, that Ahmad was securely in the custody of U.S. officials while still at the Caracas airport, and long before his eventual 'arrest' [on supposed immigration charges]").

[166] *Id.* at 44 (". . . the fact that the Israeli arrest warrant for Ahmad dated May 3, 1987 states that Ahmad was 'presently in the United States' seems to indicate that Israel was aware of Ahmad's arrest and that Ahmad would be brought to the United States soon thereafter" suggesting Israeli participation).

[167] The court found that there was no basis for his arrest according to the government's evidence. *Id.*

[168] Ker v. Illinois, 119 U.S. 436 (1886); Frisbee v. Collins, 342 U.S. 519 (1952).

trality concept discussed earlier.[169] However, such is not the case when in determining jurisdiction and the applicability of the *Ker-Frisbee* doctrine, it became apparent that Atta was abducted to the United States not to be tried in the United States. The Court stated that it could not guarantee that Atta would not be deprived of his U.S. Constitutional rights if tried in Israel.[170] Thus, Atta could not be extradited.

Under these circumstances, the Court could not certify the extradition of a citizen of the United States over whom it had no jurisdiction .[171] Moreover, the Magistrate pointed out that an American citizen's constitutional rights cannot be denied in order to take advantage of foreign policy objectives or treaties.[172] If the Court allowed this behavior, the Magistrate argued, it would be breaking its neutrality and taking sides in favor of the requesting State, as well as encouraging unconstitutional conduct by U.S. officials.[173]

Part III - Conclusion.

The United States, viewing the political offense exception as an impediment to combatting international terrorism, has recently tried to eliminate it as part of the Reagan-Bush administrations' goal of "streamlining" its international legal procedures. "The State Department has worked successfully to change extradition treaties with Britain, the Federal Republic of Germany, Belgium, Canada, and Spain. Terrorists should not be able to escape justice by availing themselves of legal protection intended for refugees seeking political asylum."[174] The Court in

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[169] Bassiouni, *supra* note 26, at 266.

[170] *In re Atta*, (WL 66866 at 48)(Caden, J.).

[171] *Id.* at 50-51.

[172] *Id.* at 50 [citing United States v. Toscanino, 500 F.2d 267 (2d Cir., 1974)]. In Toscanino, the defendant was kidnapped from South America, transported to the U.S., and tortured for seventeen days. The court held this was a violation of due process requiring the court to divest itself of jurisdiction. The court viewed the action of bringing Ahmad into the U.S. merely for extraditing him as a political move outside the bounds of the U.S. law. *See also*, Plaster v. United States, 720 F.2d 340 (4th Cir., 1983), which held that the U.S. must conform its conduct to the Constitution when carrying out its treaty obligations; In re Geisser 627 F.2d 745 (5th Cir., 1980, *cert. denied*, 450 U.S. 1031 (1981).

[173] *In re Atta*, (WL 66866 at 50)(Caden, J.).

[174] Secretary Schultz *The Struggle Against Terrorism* (U.S. State Dept., Pub. Aff. Bureau, Current Policy Digest No. 22, Dec. 1986).

Atta, however, upholds the political offense exception and reminds us that the fundamental liberties for which the revolutionaries of the U.S. fought are valid and should apply when reviewing offenses committed for political reasons, even if those political reasons are contrary to U.S. foreign policy objectives. *Atta* stands for each individual's fundamental right to seek political change, which as a last resort includes revolution. The *Atta* opinion, while recognizing that there is a limit to the applications and extensions of the political offense doctrine, also reassures the importance of the judiciary in making that application through a flexible approach of the incidence test. Courts in the United States, a nation born from revolutionary uprising and political dissent, have historically maintained neutrality in dealing with other States' attempts to punish dissent. The *Atta* case highlights the importance of this neutrality.

While the courts have promoted this idea of neutrality, the Reagan-Bush Administration has acted to counter these efforts. The Supplementary Treaty between the United States and the United Kingdom is an indication of the U.S. Government's reluctance to uphold the neutrality concept in view of the exception. The Treaty essentially eradicated the political offense exception through extreme limitation of its application.

By applying the judicial definition, the *Atta* case reaffirmed the notion that a political dissenter is entitled to commit acts in pursuance of his political beliefs while avoiding the risk of extradition and perhaps persecution. Although the administration has tried to destroy this neutrality through its three part policy of dealing with international terrorism (of which the Supplementary Treaty is a corollary), *Atta* warns that the government's engagement in operations to abduct suspected terrorists as a way of carrying out its foreign policy commitments will not be tolerated. It is the policy of the United States to "act unilaterally when [the U.S.] cannot secure cooperation or when circumstances make it infeasible to coordinate our actions."[175] While, in this case, the U.S. had the cooperation of Venezuela in abducting Atta, it is apparent that the U.S. is willing to go to great lengths in "streamlining" international legal procedures.

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[175] L. Bremer III, *Counterterrorism: U.S. Policy And Proposed Legislation* (U.S. State Dept., Pub. Aff. Bureau, Current Policy No. 1019, 1987).

The *Atta* case is also important in that it recognizes the activity on the West Bank to be a political uprising. While every extradition hearing is determined by the specific facts of each case, and this opinion has limited precedential value on any other extradition determination, *Atta* marks an important departure from the holding in *Eain*. This recognition may be the beginning of a trend in decisions.

While there is no statutory provision allowing the U.S. government to directly appeal from an adverse ruling, the government is not without recourse. If a magistrate concludes that an individual is not extraditable, it is up to the Secretary of State to decide, under 18 U.S.C.A. § 3184, whether to pursue the issue before another magistrate. In fact, the Secretary of State has exercised this option in the *Atta* case. In October of 1988, Justice Korman of the United States District Court for the Eastern District of New York became the second trier in the matter to hear oral argument. At the time of this writing no opinion has yet been issued. If Justice Korman determines Atta to be nonextraditable, the Secretary of State may again seek a ruling from another magistrate or judge because there is no res judicata effect in extradition cases.

A question remains whether subsequent adverse rulings, or even the possibility of such, will have the effect of a renegotiation of the Extradition Treaty with Israel, and to eradicate the political offense exception, as was done with the United States-United Kingdom Treaty. This is a real possibility in light of current U.S. foreign policy. Ambassador Bremer, Ambassador at Large for Counter-Terrorism, has stated that: "[m]any of these . . . treaties contain a so-called political exception clause which could protect terrorists and other criminals from extradition . . . We have been working hard to limit this clause by revising our extradition treaties."[176] The *Atta* case exemplifies the dynamic tension between the political offense exception and U.S. foreign policy objectives.

Meanwhile, Mahmoud Abed Atta has now been incarcerated for twenty-one months. A decision on his bail application is still pending.

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[176] L. Bremer III, *Terrorism and the Rule of Law*, *supra* note 12.

Editor's Note - Shortly before this issue was to be published, Judge Korman delivered an opinion in the second extradition hearing. Judge Korman granted the certification for Atta's extradition. These two diametrically opposed opinions illustrate the split in authority, the inconsistent application, and the continuing controversy surrounding the political offense exception.

1. *Introduction*

In the second decision of *In re Extradition of Atta*, Judge Korman, acting as an Article II magistrate, certified the extradition of the defendant.[177] The doctrines of double jeopardy[178] and res judicata[179] are inapplicable here. Under 18 U.S.C. § 3184, the U.S. sought the de novo ruling of another magistrate. The extradition determination of the first magistrate should be given "only such weight as [a judge] would give to an opinion of a respected judge in an unrelated case."[180] Thus, even though Judge Korman concluded that Magistrate Caden "applied erroneous legal standards and . . . his findings of fact are plainly erroneous,"[181] and the new magistrate's decision to certify the extradition of the defendant governs, the previous opinion still warrants consideration. Both opinions demonstrate the conflicting views as to the application of the political offense exception when dealing with *terrorists*. Judge Korman's opinion is now discussed.

2. *Facts*

Judge Korman briefly recounted the facts and in doing so, elicited a different set of findings. On April 12, 1986, a Saturday, an Egged bus was attacked while traveling through "Israeli suburban communities"[182] The bus was attacked by three individu-

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[177] In re Extradition of Atta, No. 88-CV-2008 (ERK) (E.D.N.Y. Feb. 14, 1989) (WESTLAW 12227) (Korman, J.).

[178] Collins v. Loisei, 262 U.S. 426, 429-30 (1923).

[179] United States v. Doherty, 786 F.2d 491, 501 (2d Cir., 1986); Matter of Mackin, 668 F.2d 122, 137 n.20 (2d Cir., 1981).

[180] *In re Atta*, (WL 12227 at 48 n.2)(Korman, J.), *quoting Doherty*, 786 F.2d at 501.

[181] *In re Atta*, (WL 12227 at 7)(Korman, J.).

[182] *Id.* at 1. These communities are commonly referred to as "settlements."

als using one or more Moltov cocktails and an Uzi submachine gun. The bus was carrying Israeli settlers "who were going to work to visit friends and family, to the movies, or perhaps even to synagogue."[183] The driver of the bus was fatally wounded and one passenger was injured. Two of the Palestinians were arrested, confessed and were tried and convicted, but not before implicating the defendant.[184]

Judge Korman then focused on the Abu Nidal Organization, the objectives of that group and whether Atta was a member of the Organization.[185] While some courts have focused on whether the defendant was a member of a group, and the group's objectives in determining the application of the exception while reconciling it with terrorism,[186] Judge Korman found that the objective of the group is the establishment of an independent Palestinian State through the use of violence.[187] He observed that the Organization opposes any peaceful efforts or diplomatic settlement to the Arab-Israeli "dispute." In the past, the Organization has carried out 90 or more terrorist attacks killing approximately 300 people and wounding around 575. It has not only targeted Israel and its supporters, but also the United States, any country incarcerating its members, moderate Arab governments and even the P.L.O. Currently, Judge Korman continued, the group is involved in intra-Palestinian politics, but at the same time raising a militia from the Lebanese refugee camps and its aim is still the violent establishment of a Palestinian homeland.[188]

As for the defendant's involvement in the Organization, Judge Korman pointed out that Magistrate Caden had found probable cause to believe that Atta was an Abu Nidal terrorist.[189]

In late April, Venezuela detained Atta due to his suspected terrorist activity. Venezuela then boarded Atta on a flight to the

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[183] *Id.*

[184] *Id.* at 5.

[185] *Id.* at 2-5.

[186] *See infra* notes 46-47 and text accompanying.

[187] *In re Atta*, (WL 12227 at 4)(Korman, J.).

[188] *Id.* at 4.

[189] *Id.* at 5, *citing In re Atta*, (WL 66866 at 10)(Caden, J.)("there is probable cause to believe the accused is guilty of the crimes charged.").

U.S. after Magistrate Caden had issued a warrant for his provisional arrest. On June 26, 1987, Israel "formally" requested the U.S. to extradite the defendant for crimes covered by Article II of the U.S.-Israeli Extradition Treaty.[190] The first extradition hearing was held before Magistrate Caden who refused to certify extradition based upon application of the "incidence test" of the political offense exception, and upon jurisdictional grounds.[191]

The U.S. Attorney General filed a second extradition complaint pursuant to 18 U.S.C. § 3184 and was allowed to relitigate the issues of law and fact at a second extradition hearing.

The law is quite clear on this procedure. Since Magistrate Caden found the defendant nonextraditable, the United States government was permitted to pursue the matter before another magistrate. When a magistrate declines to certify the extradition of an individual, the "sole recourse" of the U.S. is to file another complaint before another magistrate "that must be considered de novo by the new extradition magistrate."[192]

3. *Jurisdiction*

Judge Korman first addressed the jurisdictional issue and determined that the divesture of jurisdiction by Magistrate Caden was erroneous as a matter of fact. Magistrate Caden determined that because Atta was brought into the U.S. in a "constitutionally impermissible manner" and not "found" in the U.S., jurisdiction could not be exercised.[193] Judge Korman pointed out that Caden's conclusion that the U.S. had requested Venezuala to arrest Atta "for the sole purpose of returning him for extradition to Israel" was based solely on a presumption stemming from the U.S. governments unwillingness to litigate the issue.[194] At the second extradition hearing, however, the gov-

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[190] *See infra* note 106 and accompanying text. Judge Korman did not address whether an "informal" request had been made any time earlier.

[191] For a discussion of the Caden opinion see infra text accompanying notes 105-73.

[192] *In re Atta*, (WL 12227 at 47-48 & n.2)(Korman, J.) *quoting Doherty*, 786 F.2d at 491, 501. *See also* Collins v. Loisei, 262 U.S. 426, 429-30 (1923)("traditional double jeopardy standards are inapplicable to multiple extradition applications"); *but compare* Hooker v. Klein, 573 F.2d 1360, 1366 (9th Cir., 1978).

[193] *In re Atta*, (WL 66866 at 44)(Caden, J.).

[194] *In re Atta*, (WL 12227 at 8)(Korman, J.), *quoting In re Atta*, (WL 66866 at 44)(Caden, J.).

ernment presented "credible and compelling evidence" that it had not made any such request to Venezuala, and in fact, it had tried "everything possible" to influence Venezuala to deport the defendant to Israel.[195] Nor was it responsible for the defendant's confinement. "This newly presented evidence" Judge Korman said, "is sufficient to resolve the jurisdictional issue."[196]

Judge Korman determined then that the divesture of jurisdiction was erroneous as a matter of law. Under the *Ker-Frisbee* doctrine,[197] "the power of a court to try a person is not impaired by . . . reason of a forcible abduction. . . . Due process of law is satisfied when one present in court is convicted . . . after having been fairly appraised of the charges against him and after a fair trial in accordance with constitutional procedural safegards."[198] Magistrate Caden distinguished this case since Atta was not forcibly abducted to stand trial in the U.S., but abducted to be extradited.[199] "In an extradition proceeding designed to send the defendant out of the United States, the court cannot assure the accused will receive due process."[200] Thus, as the defendant was brought to the U.S. in a "constitutionally impermissible manner" Magistrate Caden found jurisdiction to be lacking. Judge Korman, though, noted that the Magistrate never explained how the U.S. government's actions were "constitutionally impermissible."[201] Judge Korman could find no basis for determining that the U.S. request to Venezuala violated due process. The request did not involve conduct "that shocks the conscience, . . . offends 'a sense of justice,' or runs counter to the 'decencies of civilized

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[195] *In re Atta*, (WL 12227 at 8)(Korman, J.).

[196] *Id.*

[197] Under the doctrine of *mali captus bene detentus*, a State which obtains an individual through abduction does not lose jurisdiction over that individual. This doctrine was recognized in *Ker v. Illinois*, 119 U.S. 436 (1886) and Frisbee v. Collins, 312 U.S. 519 (1952). *But See* United States v. Toscanino, 500 F.2d 267, 275 (2d Cir.), *reh'g denied*, 504 F.2d (380 (2d Cir. 1974)("a court [must] divest itself of jurisdiction over the person of a defendant where it has been acquired as a result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."). *See infra* note 172.

[198] *In re Atta*, (WL 12227 at 9)(Korman, J.), *quoting Frisbee v. Collins*, 342 U.S. at 522.

[199] *In re Atta*, (WL 12227 at 9)(Korman, J.), *citing In re Atta*, (WL 66866 at 48)(Caden, J.).

[200] *In re Atta*, (WL 66866 at 48)(Caden, J.).

[201] *In re Atta*, (WL 12227 at 9-10)(Korman, J.).

conduct.' "[202] Judge Korman seemed to indicate that the request was indeed permissible, especially since the U.S. government had probable cause to believe the defendant was a member of a terrorist organization, that he was guilty and that it believed his acts were politically unjustifiable.[203]

Judge Korman also indicated that concern for national interest and foreign relations are not factors to be considered.[204] Magistrate Caden expressed concern that if he had exercised jurisdiction over the defendant in this case, American citizens accused of "heinous" crimes by State, may be denied asylum by other States.[205] Judge Korman stated that these concerns, while read, should not be considered by an extradition magistrate, but by the Executive branch in its initial decision to grant or deny extradition.[206]

Finally, Judge Korman stated that even if defendant's arrest was an unreasonable seizure, the court still could exercise jurisdiction. Relying on the Supreme Court's holding in *Immigration of Naturalization Service v. Lopez-Mandoza*[207] that "the mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding . . .,"[208] Judge Korman determined that "[t]his language [was] equally applicable here."[209]

The Political Offense Exception

Judge Korman noted that under Article VI, paragraph 4, of the Extradition Treaty, extradition shall not be granted "when the offense is regarded by the requested party as one of a political character."[210]

To determine what the requested party (in this case the United States) considers acts of "political character," Judge Korman agreed that the exception lies within the holdings of

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[202] *Id.* at 10, *quoting* Rochin v. United States, 342 U.S. 165, 173-72 (1951).

[203] *In re Atta*, (WL 12227 at 10)(Korman, J.).

[204] *Id.* at 11.

[205] *In re Atta*, (WL 66866 at 50, 52)(Caden, J.).

[206] *In re Atta*, (WL 12227 at 11)(Korman, J.)("These considerations . . . are not matters properly within the concern of an extradition magistrate.").

[207] 168 U.S. 1034 (1984).

[208] *Id.* at 1039-40.

[209] *In re Atta*, (WL 12227 at 13)(Korman, J.).

[210] Extradition Treaty, supra note 132.

Quinn v. Robinson,[211] *Eain v. Wilkes*,[212] *Matter of Mackin*,[213] and *Matter of Doherty*.[214] However, he did not accept the "incidence test" found within these cases as the proper standard, but instead stated: "While these cases reflect continuing debate over the precise scope of the political act exception, the *results reached* in a line of cases . . . support the principle that 'the United States does not regard the indiscriminate use of violence against civilians as a political offense.' "[215] Judge Korman stated: "According to . . . Magistrate [Caden], any act, regardless of how 'heinous' or at whom it is directed, is a political act within the exception . . ., provided that the motive for it is 'purely political' and the act was incidental to a violent political uprising, civil war or rebellion."[216]

Judge Korman then examined the *Quinn* decision. The Judge was troubled to find that under *Quinn* the U.S. would have to grant safe harbor to an individual whose acts were done for purely political reasons of a change in government within an area where the individual resides or has ties to and where a civil war or uprising is occurring.[217]

Judge Korman proclaimed the *Quinn* analysis to be flawed.[218] He dismissed *Quinn's* holding that tactics used are irrelevant to the application of the exception as "sweeping rhetoric."[219] While *Quinn* stated that it is not "our place to impose our notions of civilized strife on people," Judge Korman stated that "it is plainly our place to decide who may obtain safe harbor in, or passage through, the United States."[220] This "safe harbor" argument was addressed in *Eain v. Wilkes*[221] which Judge Korman used to justify dismissal of the *Quinn* decision.

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[211] 783 F.2d 776 (9th Cir.), *cert. denied* 479 U.S. 882 (1986).

[212] 641 F.2d 504 (7th Cir.), *cert. denied* 451 U.S. 884 (1981).

[213] 558 F.2d 122 (2d Cir., 1981).

[214] 599 F.Supp. 270 (S.D.N.Y. 1984).

[215] *In re Atta*, (WL 12227 at 14)(Korman, J.), *quoting* In re Extradition of Demjanjuk, 612 F. Supp. 544, 570 (N.D. Ohio 1985).

[216] *In re Atta*, (WL 12227 at 14)(Korman, J.).

[217] *Id.* at 15-16.

[218] *Id.* at 17.

[219] *Id.*

[220] *Id.* at 17.

[221] 641 F.2d at 520 ("We recognize the validity and usefulness of the political offense exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere.").

Judge Korman also found flaw in the *Quinn* neutrality doctrine. While the political character of an act is determined by the law of the requested party, he said, "it is difficult to understand why that determination should be made in a moral vacuum without reference to 'our own notions of civilized strife.' "[222] The neutrality doctrine's goal is that "today's rebels may be tomorrow's rulers" and that a decision granting extradition may be viewed as favoring one side over the other. Yet, Judge Korman pointed out that the U.S. State Department had already considered this foreign policy matter. A State Department official testified that "extradition is one of the United States' most important law enforcement tools in terrorist matters . . . to ensure that the United States does not become a haven for violent criminals . . . and that the United States becomes viewed as a reliable partner in the fight against terrorist."[223] According to Judge Korman, future impact on foreign relations should be left to the Executive branch.

4. *The Test: Rules of Engagement*

In rejecting the view of *Quinn* that any act, no matter how "heinous," may be a political act if politically motivated, Judge Korman announced that the opinion in *Matter of Doherty*[224] contained the proper analysis.

> Not every act committed for a political purpose or during a political disturbance may or should properly be regarded as a political offense. Surely the atrocities at Dachau, Aushwitz, and other death camps would be arguable political within the meaning of that definition. The same would be true of My Lai, the Bataan death march, Lidice, the Katyn Forest Massacre, and a whole host of violations of international law that the civilized world is, has been, and should be unwilling to accept.
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> . . .
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> Surely an act which would be properly punishable even in the context of a declared war or in the heat of open military conflict cannot and should not receive recognition under the political ex-

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[222] *In re Atta*, (WL 12227 at 19)(Korman, J.), *quoting Quinn*, 783 F.2d at 804-05.
[223] *In re Atta*, (WL 12227 at 20)(Korman, J.).
[224] 599 F. Supp. 270 (S.D.N.Y. 1984).

ception to the Treaty.[225]

Judge Korman announced this to be the analysis to be used; " '[A]n act which would be properly punishable even in the context of a declared war or in the heat of open military conflict' cannot be considered a political offense."[226] This, Judge Korman said "provides a 'neutral' standard derived form rules governing the conduct of military personnel engaged in military conflict."[227] These rules reflect international legal standards promulgated and accepted by the Executive and Legislative branches of the U.S. government. While defendant argued that this rule was too inflexible and did not allow terror to be used as a tactic. Judge Korman answered that such an appeal should be addressed to the Executive branch, who is politically accountable and able to make those non-legal judgments.

Under this new analysis, the issue then became "whether [the defendant's] act was a legitimate act of war or a punishable act" which "depended on whether the act was against military personnel . . . or against civilians . . . ."[228] Judge Korman considered whether the victims on the Egged bus were military personnel or civilians and whether the bus was a military target or a civilian object under the rules of engagement. He noted that "it was [in]appropriate under the rules of engagement to firebomb the Egged bus for the purpose of killing every passenger."[229] Under the rules of engagement, some burden lies with the soldier; that is, an object is presumed civilian until proven otherwise.[230]

As for the Egged bus, Judge Korman found through expert testimony that the bus did not serve a "primarily" military function, that the bus routes and roads were not developed "primarily" for Israeli military operations, and therefore the bus could not be considered anything other than a civilian object that was "occasionally" used in military operations.[231] Since the bus was not being used as a military vehicle at the time of the attack, it

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[225] *Id.* at 274.
[226] *In re Atta*, (WL 12227 at 22)(Korman, J.).
[227] *Id.*
[228] *Id.* at 23.
[229] *Id.* at 33.
[230] *Id.* at 23. This conclusion was drawn from the expert testimony presented.
[231] *Id.* at 24-25.

was not a legitimate military target.

As for the settlers, Judge Korman did not find them to be legitimate military targets, as a matter of fact, when applying the rules of engagement. The facts did not establish that all settlers were a functional part of the military, that all carried weapons and that all were involved in attacking Palestinians.[232]

While Magistrate Caden stated that the settlers "do not fit the description of military personnel as it is commonly thought of. . . . [A]t a minimum they are willing participants in a civil war or violent community conflict designed to acquire a lang sought after homeland."[233] Judge Korman instead argued: "stated in the light most favorable to the defendant, the most that can be said is that the defendant . . . attempted to murder every passenger on a civilian vehicle simply because one or more of the passengers could be described as arguably non-civilian.' "[234] This, he said, violated the rules of engagement. Further the presented statistics supported that "there was no civil war or violent community conflict raging on the West bank in April of 1986 of sufficient magnitude to transform every Palestinian and Israeli . . . into a combatant . . . ."[235]

Finally, Judge Korman stated:

> The question whether the murder of individuals, who are not engaging in combat or who are not members of the military, is a political act because of the perception or the perpetrator, or the validity of the perception, that the victims lack political legitimacy, is one that cannot be answered by extradition magistrates or judges.[236]

5. *Conclusion*

Judge Korman stated that the *Doherty* case provided a "neutral standard" to determine the political character of the act: " 'an act which would be properly punishable even in the context of a declared war or in the heat of open military conflict'

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[232] *Id.* at 33.
[233] *In re Atta*, (WL 66866 at 34)(Caden, J.).
[234] *In re Atta*, (WL 12227 at 34)(Korman, J.).
[235] *Id.* at 34-35.
[236] *Id.* at 41.

cannot be considered a political offense."[237] This, however, was not the *Doherty* test. Judge Sprizzo in that case stated:

> The Court concludes . . . that no act be regarded as political where the nature of the act is such as to be violative of international law, and inconsistent with international standards of civilized conduct.
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> Surely an act which would be properly punishable even in the context of a declared war or in the heat of open military conflict cannot and should not receive recognition under the political exception to the Treaty.[238]

What Judge Korman thought to be the *Doherty* standard was a qualification of the real standard; "violative of international law, and inconsistent with international standards of civilized conduct."[239]

The problem with basing a test upon rules of engagement is that it presumes there to be such rules. Such an approach is inconsistent with the realities of modern warfare. Even the *Doherty* Court recognized that "the political offense exception is not limited to . . . more *traditional* and overt military hostilities. The lessons of recent history demonstrate that political struggles have been commenced and effectively carried out by armed guerrillas . . . ."[240]

Another problem with such a standard is that the historic roots of the exception deal with revolutionary activity and not with war.[241] The terms rebellion, revolution, uprising, civil war, insurrection do not mean war. The *Quinn* Court recognized the distinction:

> ". . . courts do not appear to have applied the incidence test to offenses engaged in during the course of military conflicts between nations. Rather, they have followed the *Castioni* formulation that the offense must be related to 'a political rising,' . . . or the *Ezeta* formulation that it must be related to a 'civil war, insurrection, or political commotion.' "[242]

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[237] *Id.* at 22; *see infra* notes 223-26 and accompanying text.

[238] *Doherty*, 599 F.Supp. at 274.

[239] *Id.*

[240] *Id.* at 275.

[241] *See* In re Ezta, 62 F. 972, 998 (N.D. Cal. 1894); In re Castioni, [1891] 1 Q.B. at 156 (1890); *see also infra* notes 22-30 and accompanying text.

[242] *Quinn*, 783 F.2d at 808 n.33, *quoting Casioni*, 1 Q.B. at 165, *Ezeta*, 62 F. at 998.

Judge Korman found the evidence insufficient to call the West Bank situation an "uprising," let alone a war.[243]

Further, is it consistent to hold the Palestinians accountable under the rules of engagement of the Geneva Conventions and Protocols when even Judge Korman found them to be non-combatants? Judge Korman said: "there was no 'civil war or violent community conflict' raging on the West Bank in April of 1986 of sufficient magnitude to transform every Palestinian and Israeli into a combatant 'capable of fitting the definition of . . . soldier".[244] According to Judge Korman's opinion one side to this "dispute" was found to be of "innocent civilian" nature, while, in applying the same analysis, he held the other side to the standard of being a soldier.

In support of the "rules of engagement" analysis, Judge Korman cited *Doherty's* examples of the Nazi atrocities at Dachau, Aushwitz and the other death camps. Other examples of atrocities cited in *Doherty* were extracted and included in the opinion. These are not proper analogies to the defendant's act in this case. Similarly, the *Demjanjuk* case, a case involving alleged "war crimes" and "crimes against humanity," was cited for support, despite its application of the "incidence test" under this same treaty,[245] and its reluctance to adopt the rule in *Doherty*.[246] All of these examples, as well as Judge Korman's characterizations to the defendant's acts as "heinous," illustrate that he did not view the defendant's acts "in a moral vacuum," and his decision may reflect his own moral conclusions of terrorism.

In applying the "rules of engagement" analysis there arises other questions. Under international law, States can consider "war crimes" to be within the political offense exception.[247] Further, under the true *Doherty* analysis, "crimes against humanity," such as genocide, do violate international law.[248] But

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[243] *In re Atta*, (WL 12227 at 22)(Korman, J.).

[244] *Id.* at 34, *quoting In re Atta*, (WL 66866 at 30).

[245] *In re Demjanjuk*, 612 F. Supp. at 570.

[246] *Id.* at 570-71 ("The Court need not address at this time whether the political offense exception in United States extradition treatise are to be interpreted as broadly as the *Doherty* court construes the exception.").

[247] *Quinn*, 783 F.2d at 799.

[248] *See* Convention on the prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, T.I.A.S. No. 1021, 78 U.N.T.S. 277; The Nurnberg (Nuremberg) Trial, 6 F.R.D. 69 (Int'l Military Tribunal 1946); United States v. Artukovic, 355 U.S.

neither the *Eain* or *Quinn* Courts characterized the P.L.O.'s activities as such crimes.[249] While there has been legislative attempts to reject the use of terrorism, its legality under international law is still debatable.[250] And while there was probable cause to believe that Atta had committed the acts specified in the Israeli indictment,[251] there was no evidence presented as to probable cause to believe that a "war crime" or "crime against humanity" had occurred. War crimes are "devastations not justified by military necessity."[252] No evidence was presented for any such conclusion.

Another problem with Judge Korman's opinion deals with the issue and use of the neutrality doctrine and the deference given to the Executive branch. While "today's rebels may be tomorrow's leaders," Korman said, the effect of any such appearance of sponsorship through certification would be made by the Executive branch. In this case, Judge Korman noted that the State Department had weighed the effects of this extradition on foreign policy. The government testified that extradition is one of the U.S.'s "most important law enforcement tools in terrorist matters," and that it should be granted in this case to ensure that the U.S. doesn't become a haven for terrorist and be seen as "a reliable partner in the fight against terrorism."[253]

In *Matter of Doherty* Judge Sprizzo wrote:

> The Court is not persuaded by the fact that the current political administration in the United States had strongly denounced terrorist acts and has stated that to refuse extradition in

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393 (1958).

[249] *Quinn*, 783 F.2d at 802 n.28.

[250] *See* U.N. Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism: United States Working Paper, U.N. Doc. A/C.6/L.850 (Sept. 25, 1972), reprinted in 1 R. Friedlander, Terrorism: Documents of International and Local Control 487 (1979); 1984 Act to Combat International Terrorism §201, Pub.L. 98-533, 96 Stat. 2706, 2707 (to be codified at 18 U.S.C. § 3077); European Convention on the Suppression of Terrorism art. 1, *done* Jan. 27, 1977, *reprinted in* Control of Terrorism: International Documents 87 (Alexander 1979); Protocol I to the Geneva Conventions art. 51, *adopted* June 8, 1977, U.N. Doc. A/32/144 annex I, *reprinted in* 16 I.L.M. 1391, 1431-32 (1977). *But see*, G.A. Res. 3103, 28 U.N. GAOR Supp. (No. 30) at 142, U.N. Doc. A/9030 (1974) (armed struggles for independence and self-determination are in "full accordance with the principles of international law.").

[251] *See infra* note 106 and accompanying text.

[252] The Nurnberg (Nuremberg) Trial, 6 F.R.D. at 130.

[253] *In re Atta*, (WL 12227 at 20)(Korman, J.).

> this case might jeopardize foreign relations . . . The Treaty vest the determination of the limits of the political offense exception in the courts and therefore reflects a congressional judgment that the decision not be made on the basis of what may be the current view of any one political administration.[254]

Certainly, Judge Sprizzo realized that the Executive branch is not capable of being neutral since it is the one seeking extradition. As the government must also determine foreign relations considerations, neutrality is the role of the extradition magistrate.

In supporting the application of the broad rule in *Doherty*, Judge Korman stated that if the rules of engagement proved too inflexible in considering the use of terror as a revolutionary tactic, "the remedy lies in appeal to the Executive Branch, which is politically accountable for its determinations . . . ." Judge Sprizzo in *Doherty* wrote, however, that the opinion of the populace is not dispositive to the issue.

> . . . at the time of the American Revolution, there were a large number of colonists who not only desired a continued union with England, but regarded the thought of armed opposition to the Crown as both treasonous and abhorrent. . . . Given the nature of that history it would indeed be anomalous for an American court to conclude that the absence of a political consensus for armed resistance in itself deprives such resistance of its political character.[255]

Likewise, an American court should not allow political consensus to be the appeal of an inflexible test. This also assumes that the Executive branch would not have already considered any political consequence in its initial decision to extradite a defendant. Nor is it likely, when dealing with terrorism, that any such grass roots movement would swell sufficient enough, if at all, to outweigh the Government's strong foreign policy goals, and trigger a change in the government's decision.

Further, it is not clear from Judge Korman's opinion how "the *results reached* in a line of cases" while supporting the principle that "the United States does not regard the indiscrimi-

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[254] *Doherty*, 599 F. Supp. at 277 n.6. *See also* In re Mackin, 688 F.2d 122, 132-37; *Eain*, 641 F.2d at 513.

[255] *Doherty*, 599 F. Supp at 273 n.2.

nate use of violence against civilians as a political offense,"[256] apply in any analysis. While the results reached depend on the facts of each case, it is not the results which are useful for our purposes, but the principles of law which applied in those cases.

Judge Korman relied on the *Demjanjuk* as a source for the principle. However, that principle was not fully explained. Both *Demjanjuk* and *Eain* exclude violent acts against *innocent* civilians from the political offense exception. But as the *Quinn* Court pointed out: "The distinction between 'innocent' and 'guilty' civilians may not be as simple as it may first appear and it is not always an ideologically neutral distinction."[257] Even Judge Korman's lengthy inquiry into the civilian or combatant status of the Israeli settlers indicates that their innocence is not as clear as the victims of the Nazi death camps.

And while Judge Korman would agree with the result reached in *Demjanjuk*, he cited the case despite that the Court had applied the "incidence test."[258] The *Demjanjuk* Court also declined to adopt the *Doherty* standard: "The Court need not address at this time whether political offense exceptions in United States extradition treatise are to be interpreted as broadly as the *Doherty* court construes the exception."[259]

On a final note, while the result of this case is of no surprise, given the government's ability to relitigate the issue until obtained, the application of law is. From Judge Korman's opinion it is not clear how Magistrate Caden "applied erroneous legal standards," for debate continues as to which legal standards apply in these cases. Whether the "incidence test" or the *Doherty* analysis apply will be decided by Judge Weinstein of the

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[256] *In re Atta*, (WL 12227 at 14)(Korman, J.), *citing Demjanjuk*, 612 F.Supp at 520; *Eain* 641 F.2d at 521 (emphasis added).

[257] *Quinn*, 783 F.2d at 802 n.29.

[258] *In re Demjanjuk*, 612 F. Supp at 570 ("For an act to fall within the political offense exception to the Treaty, the Court must determine that there was a violent political disturbance, such as war, revolution or rebellion, at the time and place of the alleged act and that the acts charged were recognizably incidental to the disturbance.").

[259] *Id.* at 570-71.

Eastern District of New York. Shortly after the Korman decision Atta filed a writ of habeas corpus.

In the meantime, Atta has now been incarcerated for two years.

Lorenzo L. Lorenzotti