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In re Extradition of Khaled Mohammed El Jassem: The Demise of the Political Offense Provision in U.S.-Italian Relations

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Abstract

This Comment argues that the Al-Jawary decision is justified and that the cooperation achieved between the United States and Italy in this case reveals the importance of adhering to legal channels in the extradition of terrorists. Part I examines the history of extradition and reviews the respective approaches to the political offense doctrine adopted by both the United States and Italy. Part II discusses the factual and procedural background of Al-Jawary, the judgment of the Court of Cassation, and the reasoning behind the Court's opinion. Part III argues that Al-Jawary represents a proper interpretation of the political offense doctrine under current Italian jurisprudence and parallels prevailing U.S. law governing application of the political offense provision to terrorist crimes. This Comment concludes that the successful extradition of Al-Jawary via the U.S. and Italian authorities designated to handle extradition is the appropriate way for the United States to bring international terrorists to justice. As Al-Jawary reflects, adhering to proper channels to apprehend criminals permits the United States to strengthen continued mutual cooperation in legal matters with its allies and encourages a uniform approach to the political offense doctrine.

COMMENT

*IN RE EXTRADITION OF KHALED MOHAMMED EL JASSEM: THE DEMISE OF THE POLITICAL OFFENSE PROVISION IN U.S.-ITALIAN RELATIONS**¹

INTRODUCTION

The rise in international terrorism over the past decade has led to increased efforts to combat terrorist activities.² Both

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1. The defendant's full name is Khalid Duhhan Al-Jawary, alias Khaled Mohammed El Jassem [hereinafter Al-Jawary]. The trial of Al-Jawary opened in Brooklyn Federal Court in the Eastern District of New York only days following the World Trade Center bombing on Feb. 26, 1993. *Terror in the Twin Towers; Jury Panel Sequestered in Bomb Trial*, Hous. CHRON., Mar. 5, 1993, at A16. Al-Jawary was sentenced on April 16, 1993 to serve a 30 year jail term. "Palestinian Militant Sentenced to 30 Years in Jail," REUTERS, Apr. 16, 1993, available in LEXIS, Nexis library, OMNI File.

2. Committee on International Terrorism of the American Branch of the International Law Association, *Report on Efforts to Revise United States Legislation on Extradition as It May Impact on Combatting International Terrorism*, in INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE 333 (Ved P. Nanda & M. Cherif Bassiouni eds., 1987) [hereinafter NANDA & BASSIOUNI]; see *Antiterrorism Act of 1986: Hearings on H.R. 4294 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 18 (1986) (setting forth statement of Hon. Ron Wyden, a Representative in Congress from State of Oregon) [hereinafter *Antiterrorism Act of 1986*]. U.S. citizens, in particular, have been signalled out as the targets of many terrorist activities. *Antiterrorism Act of 1986, supra*, at 18. State Department statistics reflect that since 1968, U.S. citizens have been attacked in more than 70 countries. *Id.* In 1985, U.S. citizens and property alone were the targets of about twenty-five percent of all international terrorist attacks. *Id.* Twenty-three Americans out of a total of 139 wounded died. *Id.*; see New York State Bar Association, *The Creation of An International Criminal Court*, REPORT OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION 10 (1991) [hereinafter NY Bar Report]. In an effort to combat terrorism, countries have adopted various approaches including entering into treaties or conventions by which they agree that

- (i) a particular type of conduct is violative of international law . . . ;
- (ii) each party to the convention will pass domestic or national legislation criminalizing the conduct under each of their respective laws; and
- (iii) each party will either prosecute or extradite any offender apprehended within its borders.

the nations targeted for terrorist attacks and those that have become refuges for terrorists seeking to evade prosecution have sought to strengthen international cooperation to facilitate apprehension of such criminals.³ As a result, international

New York Bar Report, *supra*, at 10.

The principle of "prosecuting or extraditing" is referred to in international law as *aut judicare aut dedere*. ANTONIO CASSESE, TERRORISM, POLITICS AND LAW: THE ACHILLE LAURO AFFAIR 10 (1989). Under this principle, "the contracting state on whose territory the author, or alleged author, of a terrorist crime is found, must either try him or hand him over to the other contracting party that requests his extradition according to the treaty provisions." *Id.*

The seven Economic Summit nations (the United States, Germany, Italy, Japan, Canada, France, and Great Britain) have vowed to commit themselves to "support the rule of law in bringing terrorists to justice." Antje C. Petersen, Note, *Extradition and the Political Offense Exception in the Suppression of Terrorism*, 67 IND. L.J. 767, 770 n.8 (1992). The list of multilateral conventions adopted by many of the Economic Summit Seven members to combat terrorism include the Air Piracy Conventions such as the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter Tokyo Convention]; the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570 [hereinafter Montreal Convention]; the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192 [hereinafter Hague Convention]. Subsequent conventions include the 1973 New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; and the 1979 International Convention Against the Taking of Hostages, G.A. Res. 34/146, U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979).

3. RICHARD CLUTTERBUCK, TERRORISM, DRUGS AND CRIME IN EUROPE AFTER 1992 26 (1990). Italy is an example of a nation besieged by terrorist activities and is notorious for its four giant criminal networks: the Sicilian Mafia, operating a worldwide drug-trafficking network; the rival Neapolitan Mafias, Camorra and New Camorra; and the Calabrian 'Ndrangheta. *Id.*; see CLAIRE W. STERLING, OCTOPUS: THE LONG REACH OF THE INTERNATIONAL SICILIAN MAFIA 45 (1990) (describing official estimate that Mafia brings annual revenue approaching quarter of trillion dollars, making Mafia twentieth richest "nation" in world). "Their activities [dominate] national politics, local government, commerce, industry, and terrorism and they themselves apply terrorist tactics in some ways more vicious than most political terrorists." CLUTTERBUCK, *supra*, at 26; see Claudio Rinaldi, *Italia del Disonore: Come Vincere Questa Guerra*, L'ESPRESSO, Aug. 2, 1992, at 12 (noting brutal attack by which Italian Mafia assassinated Italy's top Anti-Mafia Magistrates Giovanni Falcone, Paolo Borsellino and their escorts in two separate car bomb incidents in Summer of 1992). For this reason, "Italy has had to cope with the highest level of political terrorism outside Northern Ireland and Spain." CLUTTERBUCK, *supra*, at 26.

In an effort to combat international narcotics trafficking, organized crime, and terrorism, the United States and Italy have adopted various methods to increase cooperation between law enforcement officials in the two countries. Richard A. Martin, *Problems in International Law Enforcement*, Address Presented at the Fordham University School of Law (February 28, 1991), in 14 FORDHAM INT'L L.J. 519 (1990-1991) [hereinafter Martin Address]. One such example is the United States-Italian Working

cooperation in law enforcement has assumed an increasingly important role.⁴ Through the institution of mutual legal assistance treaties, one country's national law enforcement authorities can exchange information with the law enforcement officials in other countries, thus expediting the apprehension of terrorists.⁵

Locating a terrorist, however, is only the initial phase in bringing one to justice. The requesting state⁶ must overcome numerous obstacles before it is granted custody over an individual found in another country.⁷ Extradition provides the

Group on Organized Crime and Narcotics which has been expanded to include terrorism as well. Martin Address, *supra*, at 521. The most significant form of cooperation, however, has been through the ratification of the Treaty on Mutual Legal Assistance in Criminal Matters with the Italian Republic, Nov. 9, 1982, entered into force Nov. 13, 1985, reprinted in 24 I.L.M. 1539 (1985).

4. Martin Address, *supra* note 3, at 519.

5. JOSEPH J. LAMBERT, *TERRORISM AND HOSTAGES IN INTERNATIONAL LAW* 248 (1990). "[S]ince 1973 the United States has entered into a series of comprehensive bilateral treaties with other States—of both the common law and civil law systems—on the subject of mutual assistance in criminal matters." *Id.* These treaties serve as one of the most important means through which law enforcement officials exchange information, permitting governments "to eliminate time-consuming methods of gathering evidence and serving documents abroad." Robert L. Pisani & Robert Fogelnesto, *The United States Treaties on Mutual Assistance in Criminal Matters*, in NANDA & BASSIOUNI, *supra* note 2, at 233.

Mutual legal assistance treaties [hereinafter MLATS] replace the obscure and time-consuming use of letters rogatory. LAMBERT, *supra*, at 247 n.7. Prior to the institution of MLATS, requests from judicial authorities had to be transmitted through various diplomatic channels. *Id.* These judicial requests, referred to as letters rogatory, posed numerous problems, such as a lack of specified procedures for taking testimony evidence in a another jurisdiction or of mandatory procedures regarding authentication of another jurisdiction's documents. JOHN F. MURPHY, *PUNISHING INTERNATIONAL TERRORISTS* 97 (1985). The U.S.-Italy MLAT has done away with the cumbersome channels that had to be followed for executing requests by designating the U.S. Attorney General and the Italian Minister of Grace and Justice as the central authorities for processing judicial requests. U.S.-Italy MLAT, *supra* note 3, art. 2, reprinted in 24 I.L.M. at 1542. The Senior Counsel for International Law Enforcement in Rome, Italy acts as a liaison office to coordinate judicial requests exchanged between the Italian Ministry of Grace and Justice in Rome and the Office of International Affairs in Washington, D.C. (Summer Internship conducted by Comment Author with Senior Counsel for International Law Enforcement, U.S. Department of Justice, in Rome, Italy, Summer 1992).

6. M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 359-60 (2d ed. 1987). "Requesting state" refers to the nation making the extradition request and "requested state" refers to the nation receiving the request. JOSEPH M. SWEENEY ET AL., *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 146 (3d ed. 1988).

7. NY Bar Report, *supra* note 2, at 4-5. In a simple scenario where a foreign national of Country A commits a criminal act directed in some manner against Coun-

means by which one nation may transfer a terrorist from its own territory to another jurisdiction.⁸ Extradition treaties are bilateral agreements that create a legal framework for the extradition of criminals.⁹ In 1983, the United States and Italy, in an effort to achieve more effective cooperation in the repression of crimes, concluded a new treaty for the reciprocal extradition of criminal offenders.¹⁰ Similar to many other extradition treaties that the United States has ratified, the Extradition Treaty between the Government of the United States of America and the Government of the Republic of Italy (the "U.S.-Italy Extradition Treaty") contains a broad political offense exception that prohibits the extradition of individuals who have committed political offenses.¹¹ Because the ultimate

try B (requesting state) and is then apprehended in Country C (requested state), numerous questions arise once the suspect is apprehended and country B requests that the individual be extradited to country B. *Id.* Issues such as whether extradition should be granted to the requesting state, or whether instead the accused should be prosecuted in the requested state arise. *Id.* at 5. In addition, complications exist as to which country's laws should apply if no extradition treaty exists between the two countries. *Id.* Furthermore, if the act is politically motivated, this motivation may serve as a defense, but it is unclear who sets the criteria for assessing political motivation. *Id.* Above all, even if there is a desire to prosecute, the requested state may not be able to obtain the evidence necessary to convict the individual under its judicial system. *Id.* As Murphy notes, "the problems often become increasingly complex after apprehension." MURPHY, *supra* note 5, at 96. See SWEENEY, *supra* note 6, at 142 (noting that once individual commits offense in one state, but manages to get beyond its borders, person is, in absence of appropriate arrangements, beyond reach of power of state).

8. Christopher J. Morvillo, *Individual Rights and the Doctrine of Specialty: The Deterioration of United States v. Rauscher*, 14 *FORDHAM INT'L L.J.* 987, 988-89 (1990-1991) (noting that extradition represents formal diplomatic process by which one country petitions second country to return fugitive that has been apprehended within legal jurisdiction of latter country). "The right of foreign sovereigns to demand and obtain the extradition of an accused criminal is created by treaty, the absence of which does not obligate a requested state to comply with an extradition request." SWEENEY, *supra* note 6, at 146. See *United States v. Rauscher*, 119 U.S. 407, 411-12 (1886) (noting that prior to treaties there was no well-defined obligation of one country to deliver fugitives to another and though such delivery was often made, it was upon principle of comity).

9. Valerie Epps, *Abolishing the Political Offense Exception*, in *LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS* 203 (M. Cherif Bassiouni ed., 1988) [hereinafter *BASSIOUNI, LEGAL RESPONSES*].

10. Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy, Oct. 13, 1983, U.S.-Italy, T.I.A.S. No. 10837, *reprinted in* 24 *I.L.M.* 1527 (1985) [hereinafter *U.S.-Italy Extradition Treaty*].

11. U.S.-Italy Extradition Treaty, *supra* note 10, art. V, ¶ 1, 24 *I.L.M.* at 1528. Article V of the U.S.-Italy Extradition Treaty prohibits extradition for a political of-

decision to extradite lies with the judiciary of the requested state, domestic law and internal criminal procedure codes dictate whether a crime is extraditable.¹² A conflict arises if the requested state adheres to domestic principles and refuses to extradite an individual in apparent defiance of an international bilateral treaty.¹³

In *In re Extradition of Khaled Mohammed El Jassem* ("In re Al-Jawary" or "Al-Jawary"),¹⁴ the Italian Supreme Court of Cassation¹⁵ (the "Court" or "Court of Cassation") addressed the is-

fense without defining a political offense. *Id.* Article V, ¶ 1 states that "extradition shall not be granted when the offense for which extradition is requested is a political offense." *Id.*

12. GIULIO CATELANI & DANIELE STRIANI, *L'ESTRADIZIONE* 10-11 (1983). The author notes that

Allo stato attuale della legislazione interna italiana e della consuetudine vigente nei rapporti internazionali l'estradizione è concepita come un atto dello Stato di soggiorno della persona perseguita, atto per il quale è sostanzialmente previsto un ampio margine di discrezionalità delle autorità dello Stato cui la richiesta è stata inoltrata, discrezionalità sottratta ad ogni controllo giurisdizionale.

Id. at 8. (discussing how under Italian legal system extradition is recognized as act of requested state subject to wide margin of discretion by authorities of requested state who must nevertheless abide by legal standards) (translation synopsis by Comment Author).

13. See SWEENEY, *supra* note 6, at 293-95 (discussing refusal by French court to grant U.S. request for extradition of William Roger Holder and Mary Katherine Kerkow, both indicted in United States in connection with 1972 airline hijacking). Following the extradition denial, the U.S. Embassy at Paris forwarded the following note to the Acting Legal Adviser in the French Foreign Ministry regarding the French refusal and the applicability of the U.S.-French extradition convention in force:

In the view of the United States Government the decision of the French Government in this case to deny extradition on the sole grounds of an alleged political motivation for the crime is inconsistent with France's obligations under the Treaty of Extradition between the United States of America and the Republic of France.

Id. at 296.

14. Judgment of Feb. 17, 1992 (Khaled Mohammed El Jassem), Corte di Cassazione, Sezione Pen. I/a, Sentence No. 767 [hereinafter *In re Al-Jawary*].

15. G.L. CERTOMA, *THE ITALIAN LEGAL SYSTEM* 224-26 (1985). Criminal jurisdiction in the Italian legal system is exercised by the ordinary courts known as the Pretore, the Tribunale, and the Corte d'assise. *Id.* Decisions may be appealed to the Corte d'appello, and the Corte d'assise d'appello. *Id.* The Court of Cassation serves as the nation's supreme criminal court. *Id.* at 189. The Court of Cassation reviews questions of law and is "charged with the duty of ensuring the exact observance and uniform interpretation of the law . . . thereby . . . maintaining national unity in the substantive law." *Id.* Unlike the U.S. Supreme Court, however, the Court of Cassation is not designed to decide constitutional questions. *Id.* at 156. Under the Italian legal system, "where a constitutional issue arises in the course of proceedings before any ordinary or administrative court, the judge remits the issue to the Constitutional

sue of whether Khaled Mohammed El Jassem ("Al-Jawary"), an Iraqi terrorist accused of placing three bombs in New York City in 1973 and subsequently arrested in Rome in 1991, could be extradited to the United States.¹⁶ The Court of Cassation delivered a judgment that challenges the traditional Italian view of what constitutes a political offense.¹⁷ In *Al-Jawary*, the Court of Cassation held that in accordance with the prevailing tendency in international law to diffuse the political offense doctrine, Al-Jawary's crime did not constitute a political offense.¹⁸ The Court reached this conclusion despite provisions in Italian Penal Law and the Italian Constitution that appear to place Al-Jawary's act under the guise of the political offense exception.¹⁹ Thus, rather than upholding Italian domestic law and the traditional approach to the political offense doctrine, the Court of Cassation applied a new interpretation of political offenses in view of prevailing international legislation.²⁰

This Comment argues that the *Al-Jawary* decision is justified and that the cooperation achieved between the United States and Italy in this case reveals the importance of adhering to legal channels in the extradition of terrorists. Part I exam-

Court and suspends the original proceedings pending the resolution of the issue." *Id.* As a condition for the submission of the issue to the Constitutional Court, however, "the original court must be satisfied that the resolution of the issue is significant to the resolution of the original proceedings and that the issue is not manifestly unfounded." *Id.* The exception explains why the Court of Cassation often engages in deciding constitutional issues because the Court frequently finds "legitimate constitutional issues to be patently groundless, thereby foreclosing their consideration by the Constitutional Court." MARIO CAPPELLETTI ET AL., *THE ITALIAN LEGAL SYSTEM: AN INTRODUCTION* 77-78 (1967).

16. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Penale I/a, Sentence No. 767, at 1.

17. *Id.* at 14-18.

18. *Id.*

19. *Id.*

20. *Id.* at 15-16. The Court of Cassation noted that "[A]i fini estradizionali, occorre muovere . . . dall'evoluzione della normativa internazionale (trattati bilaterali e convenzioni plurilaterali) in materia." *Id.* [With regards to extradition, it is necessary to proceed . . . with [an analysis of] the evolution of international norms [bilateral treaties and multilateral conventions] on the subject (translated by Comment Author). The relevant treaties that the Court is referring to include the Montreal Convention, *supra* note 2, the Air Piracy Conventions, *supra* note 2, and the European Convention on the Suppression of Terrorism, Jan. 27, 1977, E.T.S. 90, *reprinted in* 15 I.L.M. 1272 (1976), and JOSEPH M. SWEENEY ET AL., *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM, DOCUMENTARY SUPPLEMENT* 534 (3d ed. Supp. 1988) [hereinafter Sweeney Supplement].

ines the history of extradition and reviews the respective approaches to the political offense doctrine adopted by both the United States and Italy. Part II discusses the factual and procedural background of *Al-Jawary*, the judgment of the Court of Cassation, and the reasoning behind the Court's opinion. Part III argues that *Al-Jawary* represents a proper interpretation of the political offense doctrine under current Italian jurisprudence and parallels prevailing U.S. law governing application of the political offense provision to terrorist crimes. This Comment concludes that the successful extradition of Al-Jawary via the U.S. and Italian authorities designated to handle extradition is the appropriate way for the United States to bring international terrorists to justice. As *Al-Jawary* reflects, adhering to proper channels to apprehend criminals permits the United States to strengthen continued mutual cooperation in legal matters with its allies and encourages a uniform approach to the political offense doctrine.

I. THE ORIGINS OF EXTRADITION AND THE POLITICAL OFFENSE DOCTRINE

Extradition is an instrument of international cooperation whereby an individual charged with a crime against the law of one state but found in another is returned by the latter state to the former in order to stand trial.²¹ Nations enter into bilateral agreements, such as an extradition treaty, to achieve more effective cooperation in various matters, including facilitating the transfer of terrorists from one country to another.²² Such a transfer, however, is subject to exceptions such as the political offense doctrine and is dictated by the laws of the re-

21. *Terlinden v. Ames*, 184 U.S. 270, 289 (1902) (defining extradition as surrender by one nation [requested state] to another [requesting state] of individual accused or convicted of offense outside of its own territory, and within territorial jurisdiction of other, which, being competent to try and punish him, demands surrender); CATELANI & STRIANI, *supra* note 12, at 19, 28.

22. *Aftermath of the Achille Lauro Incident: Hearing and Markup on H. Con. Res. 228 Before the Comm. on Foreign Affairs and its Subcomm. on International Operations*, 99th Cong., 1st Sess. 16-19 (1985) (statement of Hon. Robert Oakley, Director, Office for Counter-Terrorism and Emergency Planning, Department of State) [hereinafter *Achille Lauro Hearings*]. As Judge Sofaer notes, parties to an extradition treaty are more willing to share information with one another because "it is both easier and more effective to develop . . . relationships on a one-on-one basis as they are not so likely to be complicated by the various foreign policy and other concerns which multilateral fora generate." *Id.* at 18.

quested state.²³ Courts thus apply national conceptions and adhere to domestic laws when dealing with treaty provisions.²⁴ This adherence, however, may create various problems because the laws of one nation are often incompatible with the criminal justice system of another.²⁵ Varying interpretations of an extradition treaty provision, such as the political offense exception, frequently emerge and often prevent the two signatories to a bilateral agreement from achieving a uniform approach to an extradition treaty provision.²⁶ Pursuing legal channels can become tedious and in an effort to avoid the inconveniences, a government may choose to bypass legal channels and engage in illicit means to apprehend terrorists.²⁷

23. MURPHY, *supra* note 5, at 44. See M. CHERIF BASSIOUNI, *INTERNATIONAL TERRORISM AND POLITICAL CRIMES* 399 (1975) [hereinafter BASSIOUNI, *INTERNATIONAL TERRORISM*]. "[T]he courts of the requested state unavoidably apply national conceptions." *Id.*; see also CATELANI & STRIANI, *supra* note 12, at 10-11. "Lo Stato di rifugio pone limiti all'estradizione, non propriamente per proteggere la persona del delinquente, bensì per tutelare la propria sovranità." *Id.* [The requested state sets limitations on extradition not necessarily to protect the criminal, but to safeguard its own sovereignty] (translation by Comment Author).

24. CATELANI & STRIANI, *supra* note 12, at 10-11.

25. MURPHY, *supra* note 5, at 97. The laws of one nation, particularly a common law country, may vary considerably with those following the civil code. *Id.* The difference is particularly evident between the United States and Italy. See *Memorandum Del Dipartimento Di Giustizia Degli Stati Uniti Sulla Documentazione A Corredo Delle Domande Di Estradizione*, in *L'ESTRADIZIONE E L'ASSISTENZA GIUDIZIARIA NEI RAPPORTI ITALIA-STATI UNITI D'AMERICA* 107 (Giuliano Turone ed., 1986) [hereinafter TURONE] (noting that there are substantial differences between two nations' judicial systems). As a consequence, there may be formidable difficulties in both obtaining evidence and exchanging information between the two countries. MURPHY, *supra* note 5, at 97. Civil law countries also may be sensitive to the intrusion of foreign evidence-gathering agencies, thus inhibiting efforts to conduct proper investigations that will lead to the successful prosecution of terrorists. *Id.* But see *U.S. to Probe Mafia Foe's Murder*, CHI. TRIB., May 29, 1992, at C1 (noting statement by U.S. Embassy spokesman Tom Skipper in Rome, Italy that FBI agents were being sent to investigate assassination of Judge Giovanni Falcone); *Rone Tempest, No Respect for Sicily's Godfathers*, L.A. TIMES, July 25, 1992, at A1 (describing how team of FBI explosives experts operating under supervision of Italian magistrate were in Palermo to assist Italian authorities with investigation of Judge Paolo Borsellino's assassination following brutal bomb attack on magistrate and his escorts); see also *Against the Mafia*, WASH. POST, August 6, 1992, at A24 (discussing how in rare form of cooperation between Italian and U.S. law enforcement authorities multi-defendant drug conspiracy trial was recessed in Sicily and moved to Washington, D.C. for two weeks in order to protect U.S. witnesses).

26. MURPHY, *supra* note 5, at 10-11.

27. SWEENEY, *supra* note 6, at 142. Once an individual who has committed a criminal act no longer lies within the state's jurisdiction, a state, "powerful as it may be as the sole legitimate depository of power in its territory, is now helpless." *Id.* In order to apprehend the individual, states "highly dedicated to the rule of law [will, at

A. *Extradition, Its Role in Combatting Terrorism and the Political Offense Doctrine: An Historical Analysis*

Extradition itself represents one of the oldest instruments of cooperation between states in criminal matters.²⁸ Historically, extradition was utilized by monarchs to seek the return of individuals accused of committing crimes against the state.²⁹ Since then, extradition has evolved through bilateral and multilateral conventions to incorporate a myriad of crimes.³⁰ Though the use of extradition has increased in scope, it has generally retained its original purpose, the surrender by one nation to another of individuals accused or convicted of committing an offense within the jurisdiction of the requesting state.³¹

Extradition treaties provide a more directed approach toward apprehending terrorists than multilateral agreements.³²

times] . . . — under the latin motto *male captus, bene detentum* — [sponsor] kidnaping and other illegal practices to return the offender for prosecution. *Id.*; see generally Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151 (1991) [hereinafter Abramovsky, *Catch and Snatch Policy*] (describing how U.S. government has pursued official policy of securing jurisdiction through extraterritorial abductions); see also *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (holding that U.S. government may kidnap people outside U.S. borders to stand trial within United States even if United States has extradition treaty in force with that nation).

28. CATELANI & STRIANI, *supra* note 12, at 21. The origins of extradition can be traced as far back as 1280 B.C., prior to the institution of the Roman precept *ius gentium*. *Id.* The first recorded extradition treaty involved a peace treaty between Ramses II, Pharaoh of Egypt, and the Hittite King Hattusili III. Gregory Chadwick Perry, Comment, *The Four Major Western Approaches to the Political Offense Exception to Extradition: From Inception to Modern Terrorism*, 40 MERCER L. REV. 709, 714 (1989). The treaty provided for the mutual return of criminals who had fled and sought refuge in the other leader's territory. *Id.*

29. MURPHY, *supra* note 5, at 46. Such crimes included treason, attempts to assassinate the monarch, and other politically inspired crimes. Perry, *supra* note 28, at 714.

30. Achille Lauro Hearings, *supra* note 22, at 20-21; Theo Vogler, *Perspectives on Extradition and Terrorism*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 391 (M. Cherif Bassiouni ed., 1975); see *supra* note 2 and accompanying text (listing multilateral conventions and crimes that they incorporate).

31. Petersen, *supra* note 2, at 771.

32. See *supra* note 22 and accompanying text (discussing how parties to extradition treaty are more inclined to share information when acting directly). Although the bilateral and multilateral approach to extradition create a legal framework for combatting terrorism, states rarely utilize multilateral conventions to extradite individuals guilty of terrorist crimes. Vogler, *supra* note 30, at 391. One reason is because no specific definition of international terrorism exists. *Id.* As Frank H. Perez, Deputy Director of the State Department's Office of Combatting Terrorism, testified

Bilateral extradition treaties can effectively combat terrorism due to the nature of the agreement accepted by both parties.³³ Parties enter into a bilateral extradition treaty to achieve a mutual interest.³⁴ The negotiation of a binding instrument is in-

in *In re Mackin*, 80 Cr. Misc. 1 (S.D.N.Y. 1981), "[O]ne man's terrorist is another man's freedom fighter." *Id.*; see MURPHY, *supra* note 5, at 42-43 (stating that although there are number of multilateral extradition arrangements, most extradition takes place in accordance with terms of bilateral extradition treaties). The absence of a standard definition of terrorism led nations to revert to listing crimes in extradition treaties. MURPHY, *supra* note 5, at 43. These treaty lists, however, become quickly out-dated as new crimes are discovered and defined. *Id.* In an effort to overcome this problem and thus bypass continued amendments to treaties once new crimes developed, the United States has abandoned the list approach and replaced it with a coverage of crimes of a certain level of severity. *Id.* at 43; see, e.g., *Extradition Treaty with Italy*, S. REP. No. 98-33, 98th Cong., 2d Sess. 2 (1984) [hereinafter Treaty Analysis] (describing how U.S.-Italy Treaty, similar to other recently negotiated treaties by United States, dispenses with traditional list of offenses and adopts prevailing modern international practice of permitting extradition for any crime punishable under laws of both countries).

States also rarely utilize multilateral conventions to extradite individuals because absent an extradition treaty applicable to the country in question, no rule of customary international law obligates the requested country to return an alleged offender to the requesting state. MURPHY, *supra* note 5, at 36. To avoid complications, the United States has signed over 104 extradition treaties to govern extradition for specific offenses. Abramovsky, *Catch and Snatch Policy*, *supra* note 27, at 154. Under U.S. jurisprudence, extradition is only permissible by treaty and is controlled by 18 U.S.C. §§ 3181, 3184, 3186. NANDA & BASSIOUNI, *supra* note 3, at 344.

Because states are not obliged to return fugitives to the requesting state, the effectiveness of multilateral conventions is limited by the willingness of states to enforce them. See Achille Lauro Hearings, *supra* note 22, at 22. Hon. Robert Oakley emphasized that the United States has looked to the Summit Seven industrial states for closer cooperative measures against terrorism, but the results have been mixed. *Id.* at 20. Attaining effective cooperation "even among [such] a small group of like-minded nations" is not easy because each state faces a different terrorist problem, has its own foreign or economic priorities, and acts to satisfy its own interests. *Id.* at 21.

33. See *supra* note 22 and accompanying text (discussing how parties to extradition treaties are more inclined to share information in bilateral arrangement). *Id.*; see CATELANI & STRIANI, *supra* note 12, at 203 (noting that "l'istituto dell'extradizione si basa sull'esigenza di una collaborazione internazionale per combattere le manifestazioni criminose più gravi; tale collaborazione ovviamente presuppone una mutua fiducia nel corretto svolgimento dell'attività giudiziarie.") *Id.* [the institution of extradition is based on the need for international cooperation to combat serious criminal manifestations; this cooperation clearly presupposes that each nation will faithfully execute its judicial activities] (translation by Comment Author).

34. Treaty Analysis, *supra* note 32, at 1 (noting how U.S.-Italy Extradition Treaty is intended to facilitate U.S.-Italian efforts to prosecute narcotics conspiracies by expressly providing that conspiracies and attempts to commit extraditable offenses constitute extraditable offenses); see CATELANI & STRIANI, *supra* note 12, at 10-11 (discussing need for extradition to combat international crime).

dicative of a willingness to cooperate to further that interest.³⁵ Because of varying interpretations of treaty provisions applied by nations, however, obtaining a country's ratification of a bilateral extradition treaty does not guarantee that country's adherence to such a treaty.³⁶

In recent years, the political offense exception has posed a significant obstacle for nations to obtain the successful extradition of terrorists despite extradition agreements negotiated to facilitate the apprehension of terrorists.³⁷ The nineteenth century doctrine permits offenders who have committed a "political offense"³⁸ to invoke an exception to the extradition re-

35. TURONE, *supra* note 25, at 149 (noting how need to conduct effective fight against international trafficking of drugs and desire to strengthen procedural cooperation formed basis of new U.S.-Italy Mutual Legal Assistance Treaty).

36. Achille Lauro Hearings, *supra* note 22, at 22 (setting forth statement of Hon. Robert B. Oakley). One well-known incident that attracted worldwide attention was the Achille Lauro affair in which Palestinian terrorists seized an Italian cruise ship, the *Achille Lauro*, and subsequently killed one U.S. citizen confined to a wheel chair. Martin Address, *supra* note 3, at 531-534. In a flawless military operation conducted days after the incident, U.S. military fighters intercepted an Egyptian airliner on which Abu Abbas and several of the terrorists were found. *Id.* The plane was forced to land at the Sigonella NATO base in Sicily. *Id.* The United States, strictly adhering to the U.S.-Italy Extradition Treaty, immediately requested Abu Abbas' provisional arrest pursuant to provisions set forth in the bilateral treaty. *Id.* The Italian Justice Minister did not feel that the evidence submitted satisfied factual and substantive requirements mandated by Italian law and subsequently denied the request only six hours after its presentation despite what appeared to be sufficient evidence to support it. *Id.* at 533. The terrorists were later released but ultimately prosecuted in Italy *in absentia*. *Id.* As one commentator reflected on the whole affair, "the United States was right in accusing Italy of violating the 1983 treaty." CASSESE, *supra* note 2, at 97.

37. Achille Lauro Hearings, *supra* note 22, at 68; BASSIOUNI, LEGAL RESPONSES, *supra* note 9, at 202; Martin Address, *supra* note 3, at 529.

38. LAMBERT, *supra* note 5, at 193. "[T]he term 'political offense' has not been defined by the international community . . . [and] is probably undefinable." MURPHY, *supra* note 5, at 45. The problem posed by the political offense exception when it is applied to terrorist acts is that these offenses are generally committed in a political context. *Id.* "In the broadest sense, it may be argued that all crimes are political crimes inasmuch as all prohibitions with penal sanctions represent the defense of a given value system . . . in which the prevailing social power believes." STEPHEN SCHAFER, *THE POLITICAL CRIMINAL* 19 (1974). Generally, extradition treaties provide that extradition will not be granted when "the offense for which extradition is requested is a political offense or when it appears that the request for extradition is made with a view to prosecuting, trying or punishing the person sought for a political offense." MURPHY, *supra* note 5, at 44-45. Applying this definition strictly would virtually elevate all terrorist acts to political offenses, exempt terrorists from extradition, and thus grant such offenders immunity from acts that normally would be subject to criminal prosecution (e.g. murder, assault, kidnapping). *Id.*

quirement.³⁹ The doctrine has developed differently in many nations, due in part to divergent notions of the scope of the political offense exception.⁴⁰ The varying interpretations applied by the judicial authorities of both civil and common law countries have prevented the development of a uniform interpretation of this doctrine.⁴¹ The political offense exception thus poses one of the most problematic issues in extraditing terrorists.⁴²

The political offense exception is a standard clause in extradition treaties,⁴³ thus illustrating the significant recognition it has attained in the international community throughout the course of its historical development.⁴⁴ Historically, extradition served as a vehicle for states to apprehend persons who had committed acts directed against the sovereign and subsequently fled the state to avoid prosecution.⁴⁵ The rise of political theories on freedom and democracy,⁴⁶ coupled with the spirited revolutionary movements of the early nineteenth century, reversed the traditional hostile attitude towards political offenders.⁴⁷ Democratic governments romantically glorified political offenders,⁴⁸ no longer considering them criminals, but noble revolutionaries fighting for democracy against repressive regimes.⁴⁹ In the 1830s, France and Belgium devised the first

39. BASSIOUNI, *LEGAL RESPONSES*, *supra* note 37, at 203.

40. MURPHY, *supra* note 5, at 47. "In practice, states have defined the term 'political offense' unilaterally, usually through their judiciaries." *Id.* As a consequence, "the courts of the requested state unavoidably apply national conceptions, standards and policies . . ." BASSIOUNI, *INTERNATIONAL TERRORISM*, *supra* note 23, at 399. The result has been that despite the doctrine's universality, no single definition exists. *Id.*

41. BASSIOUNI, *INTERNATIONAL TERRORISM*, *supra* note 23, at 399.

42. MURPHY, *supra* note 5, at 44.

43. BASSIOUNI, *INTERNATIONAL TERRORISM*, *supra* note 23, at 399.

44. SWEENEY, *supra* note 6, at 148.

45. DR. CHRISTINE VAN DEN WIJNGAERT, *THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION* 5 (1980). "In general, sovereigns were totally indifferent towards persons [who had committed common crimes and] who had fled the country . . . For crimes against the state, however, the situation was completely different since sovereigns had a direct interest in the suppression of such crimes . . ." *Id.*

46. BASSIOUNI, *INTERNATIONAL TERRORISM*, *supra* note 23, at 400.

47. Waldemar A. Solf, 33 *AM. U. L. REV.* 53, 60 (1983); MURPHY, *supra* note 5, at 46-47; see BARTON L. INGRAHAM, *POLITICAL CRIME IN EUROPE* 245 (1979) (discussing lenient and honorable forms of imprisonment invented for political offenders in addition to legal rights they were guaranteed).

48. WIJNGAERT, *supra* note 45, at 14.

49. *Extradition Act of 1981: Hearing on S.1639 Before the Senate Comm. on the Judici-*

political offense exception provision forbidding the extradition of all political offenders.⁵⁰ The drafters, however, failed to recognize the implications of formulating such a broad definition,⁵¹ and subsequent events both in Europe and the United States made it clear that the drafters needed to restrict the definition.⁵²

A series of worldwide exceptions to the political offense doctrine emerged.⁵³ One of these exceptions consisted of the Belgian *attentat* clause, a provision designed to deny protection to political offenders charged with attempting to assassinate the leader of a foreign government or a member of the leader's family.⁵⁴ Despite such exceptions to the political offense provi-

ary, 97th Cong., 1st Sess. 97 (1981) [hereinafter Extradition Hearing] (Statement of Prof. Christopher H. Pyle). Liberal statesmen from Belgium and France sought to protect revolutionaries like Kossuth, Massini, and Garibaldi from the reactionary regimes of Austria-Hungary and Naples. *Id.*

50. Extradition Hearing, *supra* note 49, at 97. In 1829, Naples requested the extradition of Mr. Galotti, a Neapolitan officer who had participated in the Revolution of 1820 and fled to France as soon as the Bourbons returned to power. WIJNGAERT, *supra* note 45, at 11. France granted the extradition on the condition Mr. Galotti would not be prosecuted for a political offense. *Id.* Contrary to the agreement, the Neapolitans sentenced Mr. Galotti to death for his participation in the Revolution. *Id.* The French government sent warships to Naples and was prepared to declare war when the Neapolitans finally decided not to execute Mr. Galotti. *Id.* French public opinion had been so deeply provoked by the incident that soon after the incident the French Government declared that the extradition of political offenders would no longer be requested or granted. *Id.* at 12. The Belgian government was the first country to codify the political offense exception via the Belgian Extradition Act of 1883. MURPHY, *supra* note 5, at 47.

51. Extradition Hearing, *supra* note 49, at 97; see MURPHY, *supra* note 5, at 47 (discussing how those supporting romantic glorification of political offenders failed to "realize that the political offender might eventually attack the new liberal legal order itself").

52. WIJNGAERT, *supra* note 45, at 14. In the second half of the 19th century, anarchists, nihilists, and terrorists began to attack liberal democracies. *Id.* "Between 1854 and 1911 nineteen heads of state died at the hands of assassins, including Presidents Lincoln, Garfield, and McKinley of the United States, . . . Czar Alexander II of Russia, . . . Empress Elizabeth of Austria, King Humbert of Italy, and President Carnot of France." Extradition Hearing, *supra* note 49, at 97-98.

53. BASSIOUNI, INTERNATIONAL TERRORISM, *supra* note 23, at 435. Additional exceptions denied protection to anarchists, as well as persons charged with war crimes, crimes against humanity, and genocide. *Id.* Other exceptions also developed to permit the return of individuals from one country to another that had been charged with crimes against diplomats, or had committed acts of piracy, hijacking, and/or slavery. Extradition Hearing, *supra* note 49, at 98.

54. Extradition Hearing, *supra* note 49, at 98. The *attentat* clause evolved as a result of the *Jacquin* case in which two Frenchman residing in Belgium were unsuccessful in their attempt to assassinate French Emperor Napoleon III by placing a

sion, the political offense doctrine continued to evolve while its fundamental premise, the protection of political dissidents fleeing from despotic regimes, remained unchanged.⁵⁵

In the twentieth century, changing ideologies reinforced the need for the political offense exception as nations were confronted with an influx of people who could not return to their country of origin for fear of religious, social, ethnic, or political persecution.⁵⁶ The lack of a uniform definition to address changing criminal trends, however, has created a significant obstacle for extraditing terrorists who allege that their acts are protected by the political offense exception.⁵⁷ Both domestic laws and bilateral extradition treaties continue to incorporate the doctrine and various interpretations of the ex-

bomb on the railway where the Emperor's train was about to pass. See WIJNGAERT, *supra* note 45, at 14 n.73. The French government requested Jacquin's extradition, but the Belgian Court of Appeals held that the crimes charged were political offenses. *Id.* at 14-15. The Belgian government faced a difficult situation. *Id.* at 15. Denying the request could lead to retaliation by the militarily superior French, while ignoring the court's decision was not politically desirable. *Id.* The French government chose to withdraw the request, ultimately resolving the issue, but urged the Belgian government to pass a law to prevent similar judicial interpretations of the political offense exception in the future. *Id.* Thus evolved the Belgian *attentat* clause. *Id.*

55. WIJNGAERT, *supra* note 45, at 18-19. Additional justifications have been cited for the political offense exception. SWEENEY, *supra* note 6, at 148. The first justification, consistent with the modern consensus that political crimes have greater legitimacy than common crimes, focuses on the right to resort to political activism to foster political change. *Id.* The second justification relates to sovereignty and the notion that governments should not intervene in the internal political struggles of other nations. *Id.*

56. WIJNGAERT, *supra* note 45, at 17-20. Following World War I and II, nations were confronted with an influx of people who "could or would not return to their country of origin for fear of religious, ethnic, racial, social, political or other persecution." *Id.* at 17. As a result, "the twentieth century . . . witnessed a tendency to widen the scope of the political offence exception [to protect these individuals from being returned to their countries to face oppression]." *Id.* The doctrine, however, has been expanded so greatly that "persons who reject democracy can equally enjoy the protection of the political offence exception together with the criminal immunity resulting therefrom." *Id.* at 20; see Miriam E. Sapiro, Note, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U. L. REV. 654, 656 (1986) (discussing how political offense exception "was created to protect individuals from unjust persecution for political beliefs, but can be used by perpetrators of common crimes with political overtones to avoid extradition"). The political offense exception thus becomes detrimental to international public order because "it offers shelter and immunity from criminal liability to persons who may have committed very serious offences." *Id.* at 657.

57. See *supra* note 38 and accompanying text (discussing how lack of uniform definition has permitted terrorists to utilize political offense exception to escape prosecution).

ception exist.⁵⁸ As a consequence, courts have applied the exception to situations inconsistent with the doctrine's purpose.⁵⁹ International efforts to combat terrorism have been hampered by this inconsistent application, particularly in situations where a bilateral extradition treaty contains a political offense exception, but the respective signatories adopt unilateral approaches and apply divergent domestic laws to the political offense question.⁶⁰

B. *History of the Political Offense Exception in U.S. Jurisprudence*

Extradition in the United States is principally based on treaties.⁶¹ The executive, legislative and judicial branches of the federal government, however, all play a role in the extradition process.⁶² The Senate gives its advice and consent to treaties negotiated by the executive,⁶³ while the judiciary is empowered to interpret and apply treaty provisions.⁶⁴ This framework allows U.S. courts to be instrumental in shaping the definition of treaty provisions such as the political offense doctrine.⁶⁵

58. See *supra* note 40 and accompanying text (discussing how states will apply unilateral interpretations of political offense doctrine based on national conceptions, ultimately preventing any uniform definition to develop). For a discussion of the various interpretations that have emerged in determining what elements constitute a political offense see Perry, *supra* note 28, at 718-30 (highlighting Swiss "predominance test," French "objective test," and Anglo-American "incidence test").

59. Martin Address, *supra* note 3, at 529; see NANDA & BASSIOUNI, *supra* note 2, at 335 (discussing how courts have applied 19th century concepts to 20th century reality).

60. *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984) (discussing U.S. refusal to grant extradition request by United Kingdom for member of Irish Republican Army accused of attacking convoy of British soldiers in Northern Ireland); *In re Mackin*, No. 80 Cr. Misc. 1 (S.D.N.Y. 1981) (denying extradition request by U.K. for member of IRA accused of murdering British soldier in Northern Ireland); *In re McMullen*, No. 3-78-1099 MG (N.D. Cal. 1979) (discussing U.S. denial of U.K. extradition request for member of IRA accused of murdering British soldier outside of Northern Ireland); see Epps, *supra* note 9, at 203 (discussing how decisions rendered in these cases strained relations between United States and United Kingdom and resulted in formulation of U.S.-United Kingdom Supplementary Extradition Treaty which virtually eliminates use of political offense exception for acts committed by IRA).

61. M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 39 (1987).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

In the United States, the principle underlying the political offense exception is embodied in the ideal that inspired the American Revolution.⁶⁶ The right to resort to political action to foster political change is a cornerstone of democratic governments.⁶⁷ Such a broad right, however, is not absolute.⁶⁸ A series of exceptions designed to limit the broad scope of political offenses exist in the international community.⁶⁹ In the United States, similar to other fundamental rights in U.S. history that have been limited to protect the public interest,⁷⁰ U.S. courts have attempted to narrow application of the polit-

66. Sapiro, *supra* note 56, at 661 n.44. As the words of the Declaration of Independence provide

We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that *whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government*, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776) (emphasis added).

67. DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776); *see, e.g., Doherty*, 599 F. Supp. at 270, 275 n.4.

68. *See supra* notes 49-52 and accompanying text (explaining that political offense doctrine developed to assist liberal revolutionaries in their struggles against despotic and totalitarian regimes, but broad definition failed to take into account that "anarchists and terrorists" would strike democratic states via assassinations and attacks on innocent civilians).

69. *See supra* note 54 and accompanying text (discussing formulation of Belgian *attentat* clause). The limits to be placed on the political offense doctrine have been the center of controversy in Congressional debates. *See* Antiterrorism Act of 1986, *supra* note 2, at 26 (reporting statements by Victoria Toensing, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, regarding problems presented by political offense provision of Antiterrorism Act). The lack of a uniform definition of the political offense will continue to stir debates over whether an act is political or criminal, but as Ms. Toensing noted, "where there are stable democracies, we cannot permit terrorists to use bullets or bombs in lieu of the ballot box [to foster political change]." *Id.* at 27; *see* BASSIOUNI, *LEGAL RESPONSES*, *supra* note 9, at 184 (discussing statement by Abraham D. Sofaer, Legal Adviser to Department of State, defining a terrorist as anyone who violently attacks "stable democracies in which the political process is available to redress legitimate grievances and in which the judicial system provides fair treatment").

70. *Schenck v. United States*, 249 U.S. 47 (1919). Justice Holmes, in deriving a clear and present danger standard to free speech, echoed the famous words, "the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic." *Id.* at 52.

ical offense exception in order to address increased international terrorist activity.⁷¹

In an effort to facilitate application of restrictions on the political offense doctrine, U.S. courts have distinguished two categories of political offenses.⁷² The first category, the "pure" political offense, refers to acts directed against the gov-

71. *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986), *cert. denied*, 479 U.S. 882 (1986) (disclosing that political offense exception is not applicable to murder, bombings, and attempted bombings carried out in England by member of Irish Republican Army (IRA) when political violence has been exported from zone of conflict in Northern Ireland); *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981), *cert. denied*, 454 U.S. 894, (1981) (holding that "indiscriminate bombing of a civilian populace is not recognized as a protected political act" following assertion by Abu Eain, a member of the PLO, that bomb he set in market place in Tiberias, Israel, killing two boys and injuring numerous others, was political act); *In re Saravia*, Case No. 87-3598-CIV (S.D. Fla. 1988) (concluding that political offense exception is not applicable to murder of priest by Salvadoran right-wing "death squad" for purposes of silencing his opposition to violence and support for peaceful political and social reform), *reprinted in MEMORANDUM OF THE UNITED STATES DEPARTMENT OF JUSTICE CONCERNING THE REQUEST FOR THE EXTRADITION OF KHALID DUHHAN AL-JAWARY* 9-10, November 26, 1991 [hereinafter U.S. Memo]; *In re Suarez Mason*, 694 F. Supp. 676 (N.D. Cal. 1988), (holding that political offense exception is not applicable to murders committed by member of Argentine military as part of "dirty war" to suppress suspected subversives); *In re Artukovic*, 628 F. Supp. 1370 (C.D. Cal. 1986) (noting that political offense exception is not applicable to systematic murder of unarmed civilians and prisoners by official of Yugoslav fascist regime during World war II); *Artukovic v. Boyle*, 140 F. Supp. 245 (D. Cal. 1956), *aff'd* 247 F.2d 198 (9th Cir. 1957), *vacated* 355 U.S. 393 (1958). *But see In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984) (denying extradition request by United Kingdom (U.K.) for member of IRA accused of attacking convoy of British soldiers in Northern Ireland); *In re Mackin*, No. 80 Cr. Misc. 1 (S.D.N.Y. 1981), *appeal dismissed*, 668 F.2d 122 (2d Cir. 1981) (denying extradition request by United Kingdom for member of IRA accused of murdering British soldier in Northern Ireland); *Ramos v. Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959) (denying Cuban request for extradition of member of Castro's armed forces who allegedly shot prisoner escaping from garage in Cuba in which soldiers and associates of deposed Batista government were held). In each of these cases, U.S. courts, in assessing whether common crimes marked by serious violence should be elevated to political offense status, applied the political offense doctrine whenever "the victims were in effect involved in the political conflict at issue and the crimes were committed in the zone of that conflict." U.S. Memo, *supra*, at 10 n.8. *In re McMullen*, No. 3-78-1099 MG (N.D. Cal. 1979), is an exception. *Id.* In *McMullen*, the court denied extradition for the murder of a British soldier committed by a member of the IRA outside of Northern Ireland. *Id.*

The decisions have stirred a great deal of public controversy and reflect the difficulties encountered by the courts when limiting the political offense exception. See Epps, *supra* note 60 and accompanying text (discussing how public controversy resulted in formulation of new treaty with United Kingdom).

72. U.S. Memo, *supra* note 71, at 7; Charles L. Cantrell, Note, *The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 MARQ. L. REV. 777, 780 (1977).

ernment and includes offenses such as treason, sedition, and espionage.⁷³ The second category, the "relative" political offense, includes all other common crimes such as murder, kidnapping, and assault.⁷⁴

In order to assess whether a common crime constitutes a "relative" political offense, U.S. courts must first apply the political incidence test and examine whether the accused committed the act in the course of a severe, violent political conflict.⁷⁵ The political incidence test preserves the original purpose of the political offense doctrine by seeking to protect individuals from forced return to oppressive regimes that they may have spoken and/or acted against.⁷⁶

If the court finds that the political incidence test is satisfied, the accused must demonstrate a rational nexus between the alleged crimes and the prevailing turmoil in the state.⁷⁷

73. *Quinn v. Robinson*, 783 F.2d 776, 793 (9th Cir. 1986); *Eain*, 641 F.2d at 512; U.S. Memo, *supra* note 71, at 7; *Cantrell*, *supra* note 72, at 780.

74. *Quinn*, 783 F.2d at 776; *Eain*, 641 F.2d at 512; U.S. Memo, *supra* note 71, at 7.

75. U.S. Memo, *supra* note 71, at 7. See *Escobedo v. United States*, 623 F.2d 1098, 1104 (5th Cir. 1980), *cert. denied*, 449 U.S. 1036 (1980) (defining political offense as "an offense committed in the course of and incidental to a violent political disturbance, such as war, revolution and rebellion"). The "political incidence" test, as this approach is known, developed in the English case of *In re Castioni*, 1891 1 Q.B. 149, [1886-90] All E.R. 640, and has formed the basis for U.S. case law concerning extradition and the political offense exception. Scott C. Barr, *The Dilemma of the Political Offense Exception: To Which Acts Should it Apply?* 10 HAMLINE J. PUB. L. & POL'Y 141, 144 (1989). In *Castioni*, the Swiss government requested that England extradite a Swiss citizen accused of killing a Swiss government official during the course of a protest sparked by the Swiss government's refusal to revise the Swiss Constitution. *Castioni*, 1891 1 Q.B. at 149. The English Court of Common Pleas denied extradition on the grounds that "fugitive criminals are not to be surrendered for extradition crimes if those crimes were 'incidental to' and formed part of the political disturbances." *Id.* For a discussion of how the political incidence test was incorporated in U.S. law see *In re Ezeta* 62 F. 972 (N.D. Cal. 1894) and *Ornelas v. Ruiz*, 161 U.S. 502 (1896). Recent decisions such as *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984), and *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981), have limited the political incidence test on the basis that "[it] is hardly consistent with . . . the realities of the modern world." *Doherty*, 599 F. Supp. at 274. The *Doherty* court, similar to the *Eain* court, "has concluded that the traditional incidence test is insufficient to determine which offenses are protected by the exception." *Doherty*, 599 F. Supp. at 270. Both courts advanced a totality of the circumstances approach, comparable to the Swiss ends-means or proportionality test, to assess the political nature of common crimes. *Id.*

76. U.S. Memo, *supra* note 71, at 7 n.6; see *supra* note 56 and accompanying text (discussing original purpose of political offense doctrine).

77. See, e.g., *In re Artukovic*, 628 F. Supp. 1370, 1376 (C.D. Cal. 1986). The U.S.

U.S. courts utilize a totality of the circumstances approach when assessing the relationship between the individual's crimes and the outcome the individual sought to achieve.⁷⁸ Courts scrutinize the totality of the circumstances to discern an individual's motivation and to evaluate the nature of the act, the context in which it was committed, and the status of the party committing the act.⁷⁹ Assessing these factors insures that the courts do not make decisions solely based on the political situations in other countries, a role exclusively designed for the Executive or Department of State.⁸⁰ Courts in the United States are not designed to evaluate whether the internal strife in a nation other than the United States constitutes civil war, political turmoil, or merely an act of civilian discontent.⁸¹ The totality of the circumstances test also is intended to prevent crimes aimed at innocent civilians from acquiring protection under the political offense doctrine.⁸² In the absence of either a political conflict or a rational nexus, the courts will refuse to elevate a common crime to relative political offense status.⁸³

government has defined a rational nexus as a "direct, substantial and rational connection between the offense itself and that conflict." U.S. Memo, *supra* note 71, at 7.

78. *Artukovic*, 628 F. Supp. at 1376. The court noted that in searching for a rational nexus, "the focus of inquiry is on the circumstances, and on the status of those harmed, and not on whether the acts merely were committed during the disorder." *Id.* U.S. courts, in determining whether a common crime should be considered a political offense, have utilized a totality of the circumstances approach enunciated in *Artukovic* many times before. See, e.g., *Ornelas v. Ruiz*, 161 U.S. 502, 511 (1896) (re-affirming decision reached by hearing magistrate that political offense exception was not applicable "in view of the character of the foray, the mode of attack, [and] the persons"); *Doherty*, 599 F. Supp. at 275 (noting that "the court must assess the nature of the act, the context in which it is committed; the status of the party committing the act, the nature of the organization on whose behalf it is committed and the particularized circumstances of . . . where the act takes place").

79. *Doherty*, 599 F. Supp. at 275.

80. *Sapiro*, *supra* note 56, at 663-64; see Lloyd W. Grooms and Jane M. Samson, *The Political Offense Exception to Extradition: A 19th Century British Standard in 20th Century American Courts*, 59 NOTRE DAME L. REV. 1005, 1007 (1984) (noting how, on international level, political offense cases affect government's foreign relations, particularly in situations where requesting country may see extradition denial as endorsement by requested state of accused's actions).

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

82. *Id.* In *Eain*, the court held that the "indiscriminate bombing of a civilian populace is not recognized as a protected political act." *Id.* at 521.

83. See, e.g., *Sindona v. Grant*, 450 F. Supp. 672 (S.D.N.Y. 1978), *aff'd*, 619 F.2d 167 (2d Cir. 1980). Italy requested Michele Sindona's extradition from the United

An individual's political motive for committing an act is a common element adopted in political offense provisions of civil law nations such as France and Italy.⁸⁴ This factor alone, however, is not determinative in U.S. jurisprudence.⁸⁵ The objective approach adopted by the United States differs greatly from the subjective analysis that many civil law countries apply when deciding political offense cases.⁸⁶ A discrepancy thus arises when the United States and a civil law nation enter into a bilateral extradition treaty incorporating the political offense provision, but each nation confronts the political offense issue differently.⁸⁷

States for fraudulent bankruptcy. *Id.* Sindona claimed his acts were political because they "resulted from political maneuverings" and were "pursued for political reasons." *Sindona*, 619 F.2d at 173. The court rejected any analysis of the political nature of the crime because there was "no showing that there was a violent political disturbance in Italy as to which it could relate." *Id.*

84. Codice Penale, art. 8, reprinted in THE AMERICAN SERIES OF FOREIGN PENAL CODES: ITALIAN PENAL CODE 23 (Edward M. Wise trans., 1978) [hereinafter FOREIGN PENAL CODES]. Article 8 of the Italian Penal code provides that a common crime, inspired in whole or in part, by political motives shall be deemed a political offense. *Id.*; see Michael R. Littenburg, *The Political Offense Exception: An Historical Analysis and Model for the Future*, 64 TUL. L. REV. 1195, 1201-02 (1990) (observing that under French law "fugitive's motivation is now a factor in determining whether a crime constitutes offense of 'political character'").

85. U.S. Memo, *supra* note 71, at 9 (stating that under U.S. jurisprudence, "it is a clear and consistent principle . . . that political motivation alone cannot transform a common crime into a non-extraditable 'political' offense"); see, e.g., *Eain*, 641 F.2d at 520 (discussing that "for purposes of extradition, motivation is not itself determinative of political character of any given act"); *Escobedo v. United States*, 623 F.2d 1098, 1104 (5th Cir. 1980) (noting that "an offense is not of a political character simply because it was politically motivated"); *In re Doherty*, 599 F. Supp. 270, 274 (S.D.N.Y. 1984) (confirming that "[n]ot every act committed for a political purpose or during a political disturbance may or should properly be regarded as a political offense"). Thus,

even where a political purpose or motivation may be apparent, if consideration of other circumstances such as the gravity of the offense, the status of the victims, and the place in which the offense is committed indicates that the asserted connection between that political purpose and the offense is attenuated or disproportionate to the gravity of the crime, the political offense doctrine will not apply.

U.S. Memo, *supra* note 71, at 9; see *supra* note 71 and accompanying text (discussing various cases when political offense exception was refuted despite assertion by individuals that acts were politically motivated).

86. Martin Address, *supra* note 3, at 528 (discussing how France has been notorious for denying many extradition requests made by Italian government for return of Red Brigade members accused of committing terrorist attacks in Italy).

87. U.S.-Italy Extradition Treaty, *supra* note 10, art. V, 24 I.L.M. at 1528. Article V of the Treaty prohibits the extradition of individuals who commit a political offense

C. The History of the Political Offense Doctrine in Italian Jurisprudence

The Italian legal system has developed over a period of twenty-four centuries and has been influenced by numerous events, movements, and institutions.⁸⁸ Italian extradition law, in particular, has undergone various modifications. The repressive elements of the fascist era, combined with the more democratic ideals of the post-World War II period, have shaped contemporary Italian extradition practice.⁸⁹

1. The Italian Penal Code and the Italian Constitution: Two Divergent Approaches to the Political Offense Provision

Italy, unlike many other countries, does not have a special law on extradition.⁹⁰ In Italian jurisprudence, three distinct provisions govern application of the political offense doctrine. Two provisions are found in the Constitution, while another is found in the Penal Code.⁹¹ Under Article 13 of the Italian Penal Code, extradition shall be governed by Italian penal law, conventions, and international usage.⁹² The Italian Penal Code and the Code of Criminal Procedure therefore dictate

without, however, defining a political offense. *Id.* As a result, domestic codes and internal criminal procedure law dictate whether a crime is extraditable. *See supra* notes 84-85 and accompanying text (discussing how approaches utilized by U.S. and Italian courts regarding motivation vary considerably).

88. MARIO CAPPELLETTI ET AL., *THE ITALIAN LEGAL SYSTEM* 51 (1967) [hereinafter CAPPELLETTI].

89. *Id.*

90. MARIO PISANI, *TUTELA PENALE E PROCESSO* 199 (1978). The closest Italy came to adopting a specific law on extradition was the Commission of 1881 led by the Minister of Foreign Affairs P.S. Mancini. *Id.* For a discussion of the project see *ATTI DELLA COMMISSIONE MINISTERIALE PER LO STUDIO E LA COMPILAZIONE DI UN PROGETTO DI LEGGE SULLA ESTRADIZIONE*, P.S. MANCINI (1885) (on file with the Italian Ministry of Foreign Affairs, Rome, Italy).

91. *CONSTITUTION OF THE REPUBLIC OF ITALY*, Gazz. Uff., n. 298, Dec. 27, 1947, entered into force January 1, 1948, *reprinted in* Cappelletti, *supra* note 88, at 281 [hereinafter *Italian Constitution*]; Codice Penale, art. 13, *reprinted in* FOREIGN PENAL CODES, *supra* note 84, at 5.

92. Codice Penale, art. 13, *reprinted in* FOREIGN PENAL CODES, *supra* note 84, at 5. Article 13 of the Italian Penal Code provides "L'estradizione è regolata dalla legge penale italiana, dalle convenzioni e dagli usi internazionali." *Id.* [Extradition shall be governed by Italian Penal Law, by conventions and by international usage] (translation from FOREIGN PENAL CODES). In addition, "[e]xtradition shall not be accorded if the act giving rise to the request for extradition is not designated as an offense by Italian law and by the foreign law." *Id.*

when and how extradition will take place.⁹³ The current Penal Code, also known as the Rocco Code (the "Italian Penal Code" or "Penal Code"), originated during Italy's fascist era.⁹⁴ Despite the collapse of Benito Mussolini's regime, the Penal Code has remained largely intact.⁹⁵ Following the fall of fascism, Italy adopted a new constitution, but did not renounce the Rocco Code.⁹⁶ The inherent conflict between the democratic principles set forth in the Italian Constitution (the "Constitution") and the fascist ideas underlying the Penal Code has materialized in relation to the political offense doctrine.

Articles 10 and 26 of the Italian Constitution prohibit the extradition of political offenders without defining a political offense.⁹⁷ Article 8 of the Italian Penal Code, however, provides a very broad definition of a political offense by stating that a

93. PISANI, *supra* note 90, at 199. Articles 661 through 671 of the Codice di Procedura Penale (Code of Criminal Procedure) control extradition proceedings in Italy. G.L. CERTOMA, *THE ITALIAN LEGAL SYSTEM* 247 (1985). Under these provisions,

[a] person whose extradition is sought may be arrested pursuant to a warrant for detention issued by the *pubblico ministero* upon request of the Minister of Grace and Justice. The arrest cannot extend beyond 60 days if the State requesting the extradition is in Europe, or 90 days in any other case. The ultimate decision rests with the government which can never order an extradition without a favorable opinion of the instruction section of the Court of Appeal of the district in which the person is held or was arrested. The decision of the Court is merely a declaratory judgment subject to review by Cassation, in this case, on the merits as well.

Id.

94. FOREIGN PENAL CODES, *supra* note 84, at xxi. The first Italian Penal Code, the so-called Zanardelli Code of 1889, named in honor of the Italian Minister of Justice instrumental in its promulgation, Giuseppe Zanardelli, took a moderately liberal approach towards criminals, incorporating many of the teachings of the neoclassical school of thought. *Id.* at xxv. Overall, the code sought the general reduction in the severity of punishment towards criminals. *Id.* Despite its international reputation (the Code was particularly influential in Latin America), the Zanardelli Code came under attack following World War I. *Id.* at xxvi. Defending society against crime, rather than seeking to proportion punishment to the crime, took center stage. *Id.* at xxvii. The Zanardelli Code was replaced by the Rocco Code, named in honor of the Italian Minister of Justice Alfredo Rocco, on July 1, 1931. *Id.* at xxix. The new code, founded on the fascist principles of establishing the supremacy of the state, greatly increased the level of punishment for crimes. *Id.* at xxxv. As one commentator notes, the Rocco Code was "harsh, vindictive, [and] atavistically brutal." *Id.*

95. *Id.* at xxi.

96. CONSTITUTION OF THE REPUBLIC OF ITALY, Gazz. Uff., n. 298, Dec. 27, 1947, entered into force January 1, 1948, reprinted in CAPPELLETTI, *supra* note 88, at 281.

97. Italian Constitution, art. 10, reprinted in CAPPELLETTI, *supra* note 88, at 282. Article 10, paragraph 4 of the Italian Constitution provides "[n]on è ammessa

political crime is any crime that either injures a political interest of the State or is inspired, in whole or in part, by political motives.⁹⁸ The first part of the definition encompasses objective criteria, while the latter focuses on the subjective elements that may compel an individual to commit a crime.⁹⁹

A problem emerges when an international convention or treaty ratified by Italy defines a political offense narrowly, but the Italian Penal Code defines it broadly.¹⁰⁰ The conflict is

l'extradizione dello straniero per reati politici." [There shall be no extradition of foreigners for political offenses] *Id.*

Article 26, paragraph 1 of the Italian Constitution provides "[l]'extradizione del cittadino può essere consentita soltanto ove sia espressamente prevista dalle convenzioni internazionali." [Extradition of citizens shall be allowed only in cases expressly prescribed by international agreements] *Id.* at 286. Paragraph 2 continues, "Non può in alcun caso essere ammessa per reati politici." [It shall in no case be allowed for political offenses]. *Id.* (translations from CAPPELLETTI, *supra* note 88, at 282).

98. MARIO ABATE, *I NUOVI CODICI PENALE E DI PROCEDURA PENALE E LE LEGGI COMPLEMENTARI* 82 (1991). Article 8, paragraph 3 provides: "Agli effetti della legge penale, è delitto politico ogni delitto, che offende un interesse politico dello Stato, ovvero un diritto politico del cittadino. È altresì considerato delitto politico il delitto comune determinato, in tutto o in parte, da motivi politici." [For purposes of penal law, a political crime shall be any crime which injures a political interest of the State, or a political right of a citizen. A common crime inspired, in whole or in part, by political motives shall also be deemed a political crime] Codice Penale, art. 8, *reprinted in FOREIGN PENAL CODES*, *supra* note 84, at 3.

99. *FOREIGN PENAL CODES*, *supra* note 84, at 3.

100. Antonio La Pergola & Patrick Del Duca, *Community Law, International Law and the Italian Constitution*, 79 *AM. J. INT'L L.* 598, 603 (1985): Under Italian jurisprudence, whenever an ordinary law conflicts with customary international law incorporated into the national legal system, "customary international law takes precedence over ordinary statutory law because Article 10 . . . gives the incorporated international law constitutional rank." *Id.* The Italian solution "is designed to guarantee respect for international law and . . . to diminish the possibility of another war by integrating the state into the international community." *Id.* This framework has two consequences. First, "the requirement of its application can be altered only by constitutional amendment; and second, it may be applied only through . . . centralized constitutional review." *Id.* Because the dualist view prevails in Italy, "customary international law is considered as external law continuously being incorporated into national law" via Article 10. *Id.* at 605. Thus, "constitutional values can take precedence over constitutional acceptance of international law . . . [because] for Italian jurists, constitutional values . . . ought to prevail over other values, even . . . international law." *Id.* Thus, hypothetically, if genocide were to become accepted by international law and thus became part of Italian law, it would have to be rejected for it would be incompatible with the constitutional provisions.

The constitutional framework plays a significant role with regard to treaties. *Id.* Under Article 80 of the Constitution, ratification of a treaty requires the passage of an ordinary law by Parliament. *Id.* at 606. A treaty thus bears the rank of an ordinary law, and as such, is subject to later modification both by the legislature and ordinary judges. *Id.* at 607. An understanding of this framework explains how the

caused by the provisions set forth in Article 10 of the Italian Constitution, which provide that the Italian legal system must conform with generally recognized principles of international law.¹⁰¹ The Italian courts have thus been confronted with the rather arduous task of determining whether Article 8 of the Italian Penal Code should be given deference when defining a political offense pursuant to Articles 10 and 26 of the Italian Constitution.¹⁰²

Court of Cassation had the authority to impose a new standard regarding the political offense provision and why Article 8 of the Penal Code was ultimately held to be subordinate to Articles 10 and 26 of the Constitution in light of the current trend in international law to diffuse the political offense doctrine. Judgment of Feb. 17, 1992 (Khaled Mohammed El Jassem), Corte di Cassazione, Sezione Pen. I/a, Sentence No. 767.

101. Italian Constitution, art. 10, *reprinted in* CAPPELLETTI, *supra* note 88, at 282. Article 10, paragraph 1 provides, "L'ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute." [The Italian legal order shall conform to the generally recognized rules of international law] (translation from CAPPELLETTI, *supra* note 88, at 282). *See* La Pergola & Del Duca, *supra* note 100, at 599 (discussing importance of international law in Italian legal system).

Following World War II, Italy sought to guarantee that it would never again become a totalitarian state. La Pergola, *supra* note 100, at 599. As a result, the Italian Constitution adopted international law as part of the national legal system. *Id.* To understand the Italian legal system, it is important to know that by adopting international law, Italy does not accept the monist view of sovereignty and thereby subordinate its national legal system to a superior legal order. *Id.* at 601. Unlike most countries who adopt international law as part of the national legal system, a dualist view prevails in Italy so that international law and national law are considered separate systems. *Id.* "Therefore, Article 10 of the Italian Constitution . . . is seen as permanently transforming customary international law into domestic law. By using the word 'conforms,' Article 10 implies that as customary international law evolves, the Italian legal order will adopt it continuously and automatically [without the need for implementing legislation]." *Id.*

The task of discovering changes in international law is reserved exclusively to the Constitutional Court. *Id.* Thus, if domestic law conflicts with customary international law applicable to a particular case, the Constitutional Court is the sole power entrusted "to establish the superiority of international law." *Id.* at 602.

102. CATELANI & STRIANI, *supra* note 12, at 197. The implications of choosing either the Penal Code or the constitutional provisions are so complex that Italian jurists, legislators, and legal scholars have debated the issue for over forty years without reaching a consensus. Giuliano Vassalli, *Il Delitto Politico*, in *QUADERNI DELLA GIUSTIZIA* 1, 4-5 (1982) [hereinafter Vassalli].

The prevailing view in Italian jurisprudence, prior to the cases immediately preceding *In re Al-Jawary*, was that Article 8 of the Penal Code was to be given precedence over the Constitutional provisions when assessing the political nature of an act. *Id.* "La prevalente dottrina ed anche la giurisprudenza hanno sempre affermato che la nozione andava ricercata nel codice penale vigente (art. 8, 3 comma)." *Id.* Recently, numerous writers have suggested various reasons as to why the traditional Italian approach of reverting to Article 8 of the Penal Code is incorrect. *See, e.g.,*

Article 8 of the Penal Code represents a distinct attempt by the fascist regime to depart from the penal code in effect prior to 1930, the Zanardelli Code,¹⁰³ and to eliminate the political offense exception from Italian law.¹⁰⁴ In this way, the fascist regime could punish political offenders more harshly.¹⁰⁵ Unlike the previous Zanardelli Code, the Rocco Code contains no provision for barring the extradition of political offenders.¹⁰⁶ The interpretation of the Rocco Code coincides with

CATELANI & STRIANI, *supra* note 12, at 199, citing various jurists such as Quadri (noting that prevailing doctrine is erroneous because it would formally create framework whereby constitutional notion of political offense would depend entirely on definition prescribed by ordinary law, thereby inverting logical order of legal principles: constitutional provisions must serve as measure for ordinary laws, and not vice versa); Nuvolone (emphasizing that Articles 10 and 26 of Constitution have not assimilated definition of political offense prescribed in Article 8 because neither constitutional article discusses deferring definition of political offense to other norms). In fact, as Article 10, paragraph 1 reveals, any time the legislature intended to defer definition of one law by reference to another, the article expressly provided for it. *Id.* at 199-201; Mantovani (discussing that constitutional provisions do not coincide with Article 8 of Penal Code because while in former political offense is much broader and designed to protect human principles (e.g. right to political asylum), in latter it serves repressive function). *Id.* at 209-210. Striani notes that of the three proposals, Mantovani's approach is correct because under his interpretation, the constitutional principles would embrace all types of crimes, common and political, which the requesting state may punish for political purposes. *Id.* Whether the crime is political is a decision which must rest with the requested state. *Id.* Thus, when a state analyzes an offense, those crimes manifestly contrary to the Constitution of the requested state, such as terrorism, genocide, and crimes against humanity, would not be considered political offenses. *Id.* *But see* Aloisi-Fini and Sabatini, CATELANI & STRIANI, *supra* note 12, at 202 (emphasizing that constitutional articles contain no definition of political offense, thereby leading to conclusion that notion of political offense must be assessed by reverting to only law still in effect which does provide a definition, Article 8).

103. *See supra* note 94 and accompanying text (describing Zanardelli era).

104. Nicola Mazzacova, *Reato Politico e Divieto di Estradizione Del Cittadino Nella Costituzione*, in *L'INDICE PENALE* 229 (May-Aug. 1980). "[É] fin troppo . . . sottolineare . . . che l'ampia definizione di delitto politico ivi accolta fu dettata da evidenti finalità d'ordine repressivo." *Id.* at 240. "La *ratio* della norma veniva chiaramente messa in luce nella relazione ministeriale: 'per uno Stato che sia consapevole della propria forza e della propria autorità e che per il conseguimento dei propri fini voglia difendere l'una e l'altra contro qualsiasi attentato, dovunque e da chiunque commesso . . .'" *Id.* at 240 n.6. "[L]a vecchia concezione del delitto politico, quasi pervasa di una specie di sentimentalismo storico, perdeva di vista la realtà delle cose e con essa, poiché i due termini non sono antitetici, anche quelle che debbono essere le sole idealità di uno Stato forte." *Id.* at 241 n.6.

105. *Id.*

106. TIZIANA T. LUPACCHINI, *L'ESTRADIZIONE DALL'ESTERO PER L'ITALIA* 128 (1989). Article 9 of the Zanardelli Code provided "L'estradizione dello straniero non è ammessa per i reati politici, né per i reati che a questi siano connessi." *Id.*

the spirit of the fascist regime which sought to repress individual freedom in order to establish state dominance.¹⁰⁷ The drafters of Article 8, therefore, did not have extradition in mind when they adopted the provision.¹⁰⁸ They solely intended to expand application of the Italian penal law to political crimes committed both in and outside of Italy.¹⁰⁹ The

107. *Id.* at 128-129. See Vassalli, *supra* note 102, at 1 (citing legislative history of 1930 Code). "Data la direzione della volontà dell'agente . . . [i] delitti che offendono gli] interessi politici dello Stato . . . per il bene della collettività, dallo Stato rappresentata, [dovevano] essere repress[i]." *Id.* at 2. "In perfetta antitesi con la concezione dello Stato liberale o demo-liberale, lo Stato fascista non può consentire che energie individuali spieghino in alcuna guisa, e per qualsiasi motivo, una attività contrastante con i suoi interessi politici." *Id.* at 1. (In perfect contrast to a democratic State, the fascist State cannot permit individuals to conduct in any manner, and for whatever motive, an activity opposing the State's political interests.) (translation by Comment Author). According to the fascist ideology, the relation between the State and the individual was to remain constantly unaltered. *Id.* The State therefore would not tolerate any individual activity which would threaten the collective interest. *Id.*

The fascist regime perceived political offenders as the greatest threat to the State's stability. LUPACCHINI, *supra* note 106, at 129. The traditional glorification of political offenders was therefore abandoned. Vassalli, *supra* note 102, at 2. "[I] Fascismo [sorge] per instaurare l'autorità dello Stato . . . [ed] [i]n tema di delitti politici, addirittura capovolge le vecchie concezioni, seguendo per la prima volta . . . un indirizzo ad esse decisamente contrario." *Id.*

108. Antonio Pagliaro, *La Nozione di Reato Politico Agli Effetti Dell'Estradizione*, in *RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE* 807 (1983). "Questa dizione [del articolo 8 c.p.], nel contesto normativo in cui era stata formulata, non aveva nulla a che fare con il problema dell'estradizione (nel codice del 1930 non esisteva affatto un divieto di estradizione per delitti politici)." *Id.* (A reading of Article 8, within the normative context in which it was formulated, reveals that it had nothing to do with the problem of extradition (the 1930 Code did not contain any political offense exceptions to extradition) (translation by Comment Author). "Essa era stata concepita per dilatare quanto più è possibile l'applicabilità della legge penale italiana ai delitti politici commessi all'estero." *Id.* at 807-08. (Article 8 was drafted to expand as broadly as possible the application of Italian Penal Law to political crimes committed outside of Italy) (translation by Comment Author). *But see* LUPACCHINI, *supra* note 106, at 131 (noting how drafters claimed that by passing such act, Italy could now provide unlimited cooperation to other states to combat what legislators felt was one of major concerns of foreign governments, punishing [political] crimes).

109. Pagliaro, *supra* note 108, at 807. See PISANI, *supra* note 90, at 207 (noting "[i]l legislatore del 1930 aveva coniato la nozione di delitto politico per derivarne—nella prospettiva di una maggior perseguibilità dei delitti politici commessi all'estero—una tutela rafforzata per gli interessi politici dello Stato *italiano* e dei diritti politici del cittadino *italiano*"). "L'articolo 8, ult. co. . . ., era stato voluto . . . proprio per consentire una più agevole procedibilità per i delitti politici commessi all'estero dal cittadino e dallo straniero." *Id.* at 217. (Article 8 was precisely adopted to facilitate proceeding against Italians and non-nationals who committed political crimes outside of Italy) (translation by Comment Author). The legislators purposely provided such a broad definition to Article 8 so as to expand the repressive power of

broad language of Article 8 converted virtually any crime to a political offense,¹¹⁰ thus granting the Italian state authority to prosecute any individual, citizen or non-Italian, who committed an act that the state did not approve.¹¹¹

Ironically, in the period between 1930 and 1948, the majority of bilateral treaties that Italy negotiated contained provisions for exempting political offenders from extradition.¹¹² Thus, a problem arose whenever a state requested the extradition of an individual from Italy and relied on the treaty in force between the two nations, but the treaty handled the political offense issue differently than the Italian Penal Code.¹¹³ To settle the matter, most of the treaties provided that the ultimate decision regarding the political nature of the crime vested with the requested state.¹¹⁴

the State. *La Convenzione Europea Per La Repressione Del Terrorismo: Analisi Critica*, in UNIVERSITÀ DEGLI STUDI DI TRIESTE: ISTITUZIONI EUROPEE E LOTTA AL TERRORISMO 14, 31 (1986).

110. Pietro Nuvolone, *Delitto Politico e Diritto D'Asilo*, in L'INDICE PENALE 171-74 (Jan.-Apr. 1970). Nuvolone discusses the objective and subjective elements incorporated in Article 8 of the Italian Penal Code. *Id.* The objective element holds that "a political crime shall be any crime which injures a political interest of the State, or a political right of a citizen." *Id.* The subjective element states that "a common crime inspired, in whole or in part, by political motives shall also be deemed a political crime." *Id.* at 171. Nuvolone concludes there is only one essential difference between the provisions. *Id.* The objective element affirms State supremacy and thereby seeks to punish persons who offend any State interest. *Id.* The subjective element is directed to punish the motives that lead one to commit a political crime. *Id.* at 174. The distinction, straightforward as it may appear, reflects how the very broad nature of Article 8 converts virtually any crime to a political offense. *Id.*

111. Vassalli, *supra* note 102, at 2. "[L]a eccessiva estensione del delitto soggettivamente politico . . . arrivava ad abbracciare, nel suo odio, anche fatti comuni commessi per moventi comuni, purchè in essi fosse rinvenibile, anche in minima parte, una finalità politica." *Id.*; see Nuvolone, *supra* note 110, at 178 (discussing that via Art. 7 ¶ 1 and Art. 8 ¶ 1 of Italian Penal Code, the Italian State, in addition to the territoriality and personality principles of jurisdiction, reserved for itself jurisdiction to prosecute both citizens and foreigners solely on basis of defending State interests).

112. VALERIA DEL TUFO, *ESTRADIZIONE E REATO POLITICO* 68 (1985). Italian treaties contained political offense provisions because of the traditional noble view the Italian legal system had adopted towards political offenders. *Id.* at 125. The treaties containing the political offense provisions included the 1896 Treaty with Tunisia, the 1899 Treaty with Mexico, the additional protocol of 1886 with Argentina (entered into force in 1904), the 1907 Treaty with Paraguay, and the 1922 Treaty with Austria. PISANI, *supra* note 90, at 207-08.

113. PISANI, *supra* note 90, at 209.

114. DEL TUFO, *supra* note 112, at 68. The practice of reverting to Article 8 to determine if a common crime constituted a political offense developed in *In re Pavelic*, Judgment of Nov. 23, 1934, Sezione Istrutt. della Corte d'appello di Torino,

The introduction of the political offense exception in the Italian Constitution of 1948 permitted the Italian legal system to protect political offenders from extradition and thus return to the tradition of the Zanardelli era.¹¹⁵ The drafters, however, overlooked the fact that Article 8 of the Rocco Code was still in effect.¹¹⁶ Furthermore, the legislative history of Articles 10 and 26 failed to direct the courts as to whether the Constitution or the Penal Code should control.¹¹⁷

Articles 10 and 26 created an absolute ban on extraditing political offenders, but neither article defined a political offense.¹¹⁸ Only Article 8 of the Italian Penal Code offered a solution, but its broad definition permitted all common crimes to attain political offense status simply by considering the offender's subjective motivation.¹¹⁹ The legislature's failure to

in *Riv. Pen.* 1383 (1934). *Id.* at 71 n.10. The French judicial authorities sought the extradition of two Yugoslav citizens, Pavelic and Kwaternich, who were accused of murdering King Alexander of Yugoslavia and the French Minister of Foreign Affairs following an attack conducted in Marseille, France. *Id.* The Appellate Court of Turin denied the request on the grounds that the crime constituted a political act under Article 8, paragraph 2 of the Italian Penal Code, and not on the basis that the convention signed by Italy and France exempted political offenders from extradition. *Id.* at 72.

115. Vassalli, *supra* note 102, at 3; LUPACCHINI, *supra* note 106, at 132-33. Article 10 of the Constitution, ¶ 4 exempted Italian citizens accused of political crimes from extradition, and art. 26, ¶ 2 applied to foreigners. Italian Constitution, Art. 10 and 26, *reprinted in* CAPPELLETTI, *supra* note 88, at 282.

116. Vassalli, *supra* note 102, at 3.

117. Vassalli, *supra* note 102, at 3; PISANI, *supra* note 90, at 206.

118. Mazzacuva, *supra* note 104, at 239.

119. *See* Vassalli, *supra* note 102, at 3. "Era infatti veramente aberrante che l'estradizione potesse venir rifiutata per un reato comune, magari gravissimo, sol per il fatto della presenza nell'animo dell'agente di un anche minimo movente politico pur in concorso con altri motivi." *Id.*; *see also* Mazzacuva, *supra* note 104, at 244 (noting "[a]lla stregua dell'art. 8 c.p. era, infatti, sufficiente che un delitto comune fosse dettato anche parzialmente da motivi politici per rendere perseguibile il reato"); Domenico Manzione, *Vecchie e Nuove Prospettive Nei Rapporti Tra Reato Politico ed Estradizione*, Cassazione Penale 219 (1985) (asserting that Article 8 "opera al riguardo, un'indiscriminata apertura alla rilevanza dei motivi dell'agente"). For an indepth look at the legislative history of Article 8 *see V Lavori Preparatori del Codice Penale e del Codice di Procedura Penale* 40 (1929).

The legislative history of Article 8 reveals that the Rocco Code considered terrorist and anarchist crimes political offenses. DEL TUFO, *supra* note 112, at 69. Minister Rocco himself noted, "[N]on ho riprodotto . . . il caso relativo ai delitti dolosi commessi con materie esplodenti, accecanti o asfissianti a danno di cittadino italiano, in quanto la relativa ipotesi può ritenersi compresa nella più larga previsione contenuta nell'articolo 8, a norma del quale è punito secondo la legge italiana il cittadino o lo straniero, che commetta all'estero qualsiasi delitto, che possa considerarsi polit-

provide any guidance as to which article should control when assessing a political crime left the question within the courts' discretion. No evidence existed that the legislature sought to depart from the customary approach of reverting to Article 8 of the Penal Code when evaluating the political nature of a crime.¹²⁰ Unable to discern legislative intent, the courts chose to adopt the traditional view in effect prior to the institution of Articles 10 and 26 of the Constitution.¹²¹

ico, a danno dello Stato o di un cittadino." *Id.*; see also Mazzacuva, *supra* note 104, at 245 (noting "l'anarchismo, come ogni altra simile attività antisociale, è considerato dal codice delitto contro la personalità dello Stato, così che non può dubitarsi che i delitti comuni determinati da motivi anarchici o altrimenti antisociali siano delitti soggettivamente ed oggettivamente politici"). The same attitude prevailed regarding terrorist crimes. *Id.* at n.18. See generally, DEL TUFO, *supra* note 112, at 73 (noting statements by Manzini and Longhi regarding political nature of terrorist crimes: "[P]er il vigente codice penale, i delitti anarchici o terroristici in genere, sono indubbiamente politici," and "([T]ra i reati politici) sono quindi compresi i reati terroristici"). (In the current penal code, anarchist and terrorist crimes, in general, are undoubtedly political. Thus, political crimes include terrorist offenses) (translation by Comment Author).

120. PISANI, *supra* note 90, at 216; DEL TUFO, *supra* note 112, at 68, 74-75 (discussing "il legislatore Costituente italiano aveva dietro di sé una tradizione giuridica sufficientemente consolidata in tema di estradizione per reati politici. Secondo questa tradizione il concetto di delitto politico ai fini estradizionali viene fornito dall'art. 8 c.p.. La nozione comprende anche . . . reati anarchici e terroristici") (The Italian legislature was confronted with a strong tradition regarding extradition and political crimes. According to this tradition, Article 8 of the Penal Code furnished the definition of political crimes. The notion of political offenses encompassed both anarchist and terrorist crimes as well.) (translation by Comment Author). According to some writers, if the drafters of the Constitution, well aware of the traditional mode of referring to Article 8 of the Penal Code to assess a political crime, had wanted to introduce a new approach via Articles 10 and 26 of the Constitution, the drafters would have done so explicitly. *Id.* These writers thus concluded that Articles 10 and 26 adopted the definition for political offenses within the parameters set forth in Article 8 of the Penal Code. *Id.*

121. DEL TUFO, *supra* note 112, at 5-9 (discussing *In re Wagner*, *In re Cartonnet*, *In re Minvielle*, *In re Court*). Early decisions reveal how the courts adhered to this approach without recognizing the ramifications. *Id.*

See *supra* note 119 and accompanying text (discussing how Minister Rocco intended terrorist crimes to be considered political crimes). *But see* CATELANI & STRIANI, *supra* note 12, at 216 (discussing how Italian courts, in adopting traditional notion of political offense by reverting to Article 8, may have attributed broader meaning to political offense provision under Article 8 than originally contemplated by Rocco Code). For example, in the extradition case of *In re Koronakis*, Judgment of Sept. 6, 1957, Corte di Cassazione, in *Giustizia Penale* II (1958), Greek authorities requested the extradition of a Greek citizen accused of placing a time bomb before the Greek Ministry of Justice building. *Id.* Mr. Koronakis alleged his act was politically motivated, but the court upheld extradition on the grounds that even though the accused alleged he was subjectively motivated, he had failed to prove it. *Id.* The

2. Decisions Rendered by Italian Courts Adhering to the Traditional Approach

A series of decisions in the 1960s made it apparent that the traditional approach to the political offense issue required reformulation.¹²² In *In re Zind*,¹²³ a German national was sentenced by the Federal Republic of Germany for expressing support for Adolf Hitler's extermination of the Jews in World War II and thereby desecrating the name of holocaust victims.¹²⁴ The Italian Court of Cassation,¹²⁵ subsequent to an extradition request by Germany, refused to extradite Mr. Zind on the grounds that his act constituted a political offense under Article 8 of the Italian Penal Code.¹²⁶ Pursuant to Article 10 of the Constitution, the Court of Cassation concluded that Mr.

court noted that "the accused's affirmations are irrelevant, for the political motive must emerge from the positive elements that accompany the act." *Id.* (translation of Italian text by Comment Author). The court added that a political offense can be considered subjectively motivated when it is directed, in the accused's mind, to influence the constitution and functioning of the State, or otherwise to further political, social or religious ideas for the principal purpose of realizing a political idea. *Id.* This interpretation was adopted by the courts to define subjective political offenses under Article 8. *Id.*

Striani notes that in the legislative history of Article 8, a subjectively motivated crime was to be considered a political offense because in the accused's mind, the act was committed to offend a political interest of the State. CATELANI & STRIANI, *supra* note 12, at 217. In the legislator's mind, the act should be considered political in order that it could be repressed to safeguard the community's interest, for the benefit of the State. *Id.* Striani adds that for the courts to interpret the subjective notion of a political offense to embrace acts directed to further political, social or religious interests of the accused is a broad expansion of the principles established in the original article by the drafters. *Id.* at 216.

122. Giovannangelo De Francesco, *Reato Politico*, in 38 *ENCICLOPEDIA DEL DIRITTO* 902 (1987).

123. Judgment of Apr. 5, 1961, Corte di Cassazione, in *Foro It. II* at 68, reprinted in *DEL TUFO*, *supra* note 112, at 11 n.30.

124. *Id.*

125. See *supra* note 15 and accompanying text (discussing framework of Italian legal system).

126. Judgment of April 5, 1962 (*In re Zind*), Corte di Cassazione, in *Foro It. II* at 68. The Court held "il motivo del reato deve definirsi politico, quando esso consenta di delineare lo scopo dell'agente, che deve trascendere la persona del suo autore ed investire in tutto o in parte interessi che attengano all'attuazione di contrastanti idealità e concezioni politiche e che nella valutazione di tale scopo dell'azione deve prescindere da ogni giudizio in ordine alla moralità, socialità e nobiltà delle idee e delle finalità perseguite, che possono anche presentarsi con carattere vessatorio nei confronti di coloro." *Id.*, reprinted in *DEL TUFO*, *supra* note 112, at 214-15.

Zind was automatically exempt from extradition.¹²⁷

The decision mirrored the holding rendered by the Italian Court of Appeals of Bologna¹²⁸ in *In re Kröger*.¹²⁹ Once again, Germany requested from Italy the extradition of an individual sentenced in the Federal Republic.¹³⁰ The Court of Appeals stressed that under Article 8 of the Italian Penal Code, the subjective and objective elements of an act must be weighed when assessing the political nature of a crime.¹³¹ The Court of Appeals denied the extradition request holding that the act was subjectively politically motivated.¹³² Despite the criticism that emerged following the decision,¹³³ the courts refused to limit the broad application of Article 8.

127. Judgment of Apr. 5, 1962 (*In re Zind*), Corte di Cassazione, in *Foro It. II* at 68, reprinted in DEL TUFO, *supra* note 112, at 214-15.

128. See *supra* note 15 and accompanying text (discussing framework of Italian court system).

129. Judgment of Jan. 11, 1963, Corte d'appello di Bologna, in *Foro It. II* at 74, reprinted in DEL TUFO, *supra* note 112, at 12 n.33.

130. *Id.* Unlike Mr. Zind, however, Mr. Kröger had murdered over 3000 Jews and mental patients during World War II. *Id.*

131. *Id.*

132. DEL TUFO, *supra* note 112, at 12. The court rendered the decision despite noting the gravity of the crime. "[N]onostante la loro eccezionale gravità, non possono non essere ritenuti soggettivamente politici." *Id.* The court held the acts were surely committed in adherence to the ideological and political principles of nazism and to further German State interests. CATELANI & STRIANI, *supra* note 12 at 215.

133. ENCICLOPEDIA DEL DIRITTO, *supra* note 122, at 903. See CATELANI & STRIANI, *supra* note 12, at 215-16 n.49 (discussing how Italy was part of Genocide Convention that expressly stated that genocide is not political offense and how Court of Appeals chose to uphold principles set forth in Article 8 of Penal Code rather than modify internal code with provisions of Genocide Convention). The court's reasoning may be understood in terms of the way the Italian legal system functions. See *supra* note 100 and accompanying text (discussing importance afforded to ordinary conventions in Italian legal system). Under Article 10, ¶ 1, of the Italian Constitution, Italy's legal system conforms with the generally recognized principles of international law. *Id.* It would appear that the Genocide Convention automatically became part of Italy's law, but this was not true because conventions are given the same weight as ordinary law and therefore if inconsistent with the Italian penal system, the latter prevails, and the political nature of single acts, here genocide, was not, at the time, considered a generally recognized principle of international law. See *supra* note 100 and accompanying text (discussing importance afforded to ordinary conventions in Italian legal system).

The court ultimately erred in its final analysis because even if the above holds true, genocide is incompatible to the Constitutional protections afforded by the Italian legal system and on these grounds the court should have granted Mr. Kröger's extradition. See *supra* note 100 and accompanying text (discussing incompatibility of international law with Italian Constitution). To avoid future decisions like *Kröger*, a constitutional amendment was passed on June 21, 1967 stating explicitly that geno-

3. The European Convention on the Suppression of Terrorism and the Subsequent Departure by Italian Courts from the Traditional Approach

The rise of international terrorism in the 1970s made it apparent that Italian courts needed to modify the traditional approach to avoid decisions such as *In re Kröger* and bring terrorists to justice.¹³⁴ The traditional approach of referring to Article 8 of the Penal Code, however, was so deeply rooted in Italian jurisprudence that changes could only occur gradually.¹³⁵ Nations adopted numerous conventions condemning terrorism during the 1970s in an effort to increase international cooperation to combat terrorist crimes.¹³⁶ Among these treaties, the European Convention on the Suppression of Terrorism¹³⁷ (the "Convention") dealt directly with the political offense exception to international extradition.¹³⁸ Italy ratified the Convention, but invoked Article 13 of the Convention to retain the right to refuse to extradite an individual for an act deemed to be a political offense under the Italian Constitution.¹³⁹ Despite this reservation, Italy's ratification of the Con-

cide does not constitute a political offense under either Article 10 or 26 of the Constitution. CATELANI & STRIANI, *supra* note 12, at 216 n.49.

134. MURPHY, *supra* note 5, at 45 (discussing how terrorism, like term political offense, has not been defined by international community). Numerous efforts have been adopted to fight terrorism including multilateral conventions, *see supra* note 2, bilateral agreements, and United Nations Resolutions, *see United Nations Resolution on Terrorism*, G.A. Res. 40/61, U.N. GAOR, 40th Sess., Supp. No. 53, at 301, U.N. Doc. A/40/53 (1985), but no single definition has emerged. *Sapiro*, *supra* note 56, at 655. In Italy, the Ministry of the Interior declared, "Il terrorista è un crimine e deve essere trattato come tale, quali che siano le sue motivazioni: questa è la posizione molto ferma dei ministri dell'interno dei nove paesi della Comunità recentemente riunitisi a Londra." *Lottare Contro Il Terrorismo*, in 23 EUROFORUM 4 (June 7, 1977).

135. Vassalli, *supra* note 102, at 3-5.

136. European Convention on the Suppression of Terrorism of January 27, 1977, E.T.S. 90, *reprinted in* 15 I.L.M. 1272 (1976); [hereinafter Convention or Strasbourg Convention].

137. *Id.*

138. Strasbourg Convention, *supra* note 136; MURPHY, *supra* note 5, at 13. The Convention attempts to limit those crimes that may be regarded as political offenses inspired by political motives by listing a series of crimes that parties to the Convention are to exclude from the political offense exception to extradition. *Id.* at 13-14. For a list of these crimes, *see* MURPHY, *supra* note 5, at 13.

139. Strasbourg Convention, *supra* note 136, art. 13, 15 I.L.M. at 1275 (noting any State could reserve right to refuse extradition with respect to any offense mentioned in Article 1 which it considered to be political offense, offense connected with political offense or offense inspired by political motives). The reservation provision has raised serious doubts about the Convention's efficacy, for it allows states who

vention signified a departure from its traditional approach to the political offense question. In an effort to apply the Convention to Italian jurisprudence, Italian jurists proposed to give the political offense exception of Articles 10 and 26 of the Constitution a new meaning by departing from the traditional approach of referring to the definition set forth in Article 8 of the Penal Code.¹⁴⁰

agree to be bound to adopt a reservation to preserve their right to assess the political offense question under domestic principles, thus limiting the very purpose for which the Convention was adopted — reaching uniform consensus on the political offense question to increase cooperation in combatting terrorism. *See also* CATELANI & STRIANI, *supra* note 12, at 235 n.70 (citing GHISLAINE FRAYSSE-DRUESNE, *La Répression du Terrorisme*, in *REV. GEN. DE DROIT INTERNATIONAL PUBLIC* 969 (1978)). The most significant provision of Article 13 focuses on the factors reserving states must take into account when evaluating the character of an offense. Art. 13, Strasbourg Convention, *supra* note 136, at 538. As Article 13 makes clear, a reservation may be made

provided that [the reserving state] undertakes to take into due consideration, when evaluating the character of the offence, any particularly serious aspects of the offence, including:

- a. that it created a collective danger to the life, physical integrity or liberty of persons; or
- b. that it affected persons foreign to the motives behind it; or
- c. that cruel or vicious means have been used in the commission of the offence.

Id.

Under Italian law, conventions are given the same authority as ordinary law. *See supra* note 100 and accompanying text (discussing role of conventions in Italian legal system). As a result, conventions must abide by the principles set forth in the Italian Constitution, otherwise they will be deemed unconstitutional by the Constitutional Court. *Id.* This principle contrasts sharply with U.S. law where treaties are accorded the same authority as the Constitution. U.S. CONST. art. VI, § 2. Pursuant to Article 13 of the Strasbourg Convention, Italy reserved the right to deny extraditing an individual when the offense committed constituted a political offense under the Italian Constitution. Strasbourg Convention, *supra* note 136, art. 13, 15 I.L.M. at 1275, *reprinted in* Maria-Riccarda Marchetti, *Istituzioni Europee e Lotta al Terrorismo* 161 (1986). The reservation was an effort by the Italian government to assure that the Italian approach to the political offense provision, and not Article 1 of the Strasbourg Convention, remained the primary source for evaluating political offenses. Marchetti, *supra* at 161. Absent the reservation, the Convention would have been deemed unconstitutional for an ordinary law cannot violate the principles of the Italian Constitution. *Id.* The Strasbourg Convention was ratified by Italy on November 26, 1985 with the following reservation:

Lo Stato italiano, facendo uso della facoltà prevista dall'articolo 13 della convenzione e tenendo conto anche dei criteri per la valutazione della politicità del reato in tale articolo indicati, rifiuterà l'estradizione riguardo a qualsiasi reato elencato nell'articolo 1 della convenzione stessa che sia da considerare politico, nel rispetto della Costituzione italiana.

Id.

140. *I Limiti All'Estradizione*, in *XIII ENCICLOPEDIA GIURIDICA*, Sez. III, Diritto In-

Several decisions rendered by Italian courts in the period following the Convention reflect a gradual departure from Italy's traditional approach to the political offense question. In *In re Locatelli*,¹⁴¹ Switzerland requested the extradition of Luigi Locatelli, a Swiss national located in Italy and accused of defrauding the Swiss National Bank of Lugano.¹⁴² Mr. Locatelli claimed that his act was politically motivated and that his extradition would violate Article 10 of the Italian Constitution.¹⁴³ The Italian Court of Cassation¹⁴⁴ refuted his allegations, stressing that the political motive must be deduced from the nature of the act and that the accused's mere assertion that he acted for a political purpose is irrelevant.¹⁴⁵ The Court noted that even though Article 8 of the Penal Code defines the political character of an offense, fraudulent crimes committed against the state did not constitute political offenses.¹⁴⁶ This decision marked the first attempt by the Italian courts to limit the broad reach of the political offense provision in Article

ternazionale 5-6 (1989). "La dottrina italiana ha proposto di dare al concetto di reato politico previsto dalla Costituzione in relazione all'extradizione significati diversi, sganciati, di preferenza, dalla definizione del codice penale." *Id.* Parliamentary debates on the Strasbourg Convention indicate that the traditional approach of referring to Article 8 of the Italian Penal Code to interpret Articles 10 and 26 of the Constitution was no longer recognized as the only solution for assessing the political nature of a crime in an extradition request. DEL TUFO, *supra* note 112, at 37-40; see *supra* note 100 and accompanying text (discussing various solutions developed by Italian jurists as to which Article should control in assessing political nature of crime).

141. Judgment of Jan. 18, 1978, Corte di Cassazione, *in* Giust. Pen. III at 148, reprinted in DEL TUFO, *supra* note 112, at 13.

142. *Id.*

143. *Id.*

144. See note 15 and accompanying text (discussing framework of Italian Legal system).

145. Judgment of Jan. 18, 1978 (*In re Locatelli*), Corte di Cassazione, Giust. Pen. III at 154, reprinted in DEL TUFO, *supra* note 112, at 13.

146. *Id.* The Court echoed the Court of Appeals decision rendered in *Kröger*, Corte d'appello di Bologna, *in* Foro It. II at 74, by stating "cio che caratterizza il delitto soggettivamente politico è il motivo che permette il delinarsi dello scopo dell'agente, che deve trascendere la persona dell'autore ed investire, in tutto o in parte, interessi che attengano all'attuazione di contrastanti idealità e concezioni politiche. . ." [a subjective political offense is characterized by the actor's motive which permits delineation of the actor's purpose. The motive, however, must transcend personal wishes and invest interests directed towards furthering conflicting political ideals and conceptions] (translation by Comment Author). *Locatelli*, Corte di Cassazione, *in* Giust. Pen. III at 154, reprinted in DEL TUFO, *supra* note 112, at 13 n.39.

8.¹⁴⁷

In 1982, the Italian Court of Cassation provided the first real departure from the traditional approach to the political offense exception. In *In re Musbach*,¹⁴⁸ the Federal Republic of Germany requested Italy's extradition of Mr. Musbach, a Libyan national accused of murdering a compatriot pursuant to orders received from a revolutionary Libyan movement.¹⁴⁹ The accused claimed that his act constituted a political offense under Italian law, thereby exempting him from extradition.¹⁵⁰ The Court of Cassation held that under Italian law, the political nature of a crime must be assessed first by reference to Article 8 of the Penal Code,¹⁵¹ and then to Article 10 of the

147. Judgment of Jan. 18, 1978 (*In re Locatelli*), Corte di Cassazione, Giust. Pen. III at 148, reprinted in DEL TUFO, *supra* note 112, at 13. Throughout Europe a trend developed to limit the political offense exception regarding terrorists and became evident in the French cases *In re Piperno*, judgment of Oct. 17, 1979, Cour d'appel, Paris, T.A.C.P., and *In re Pace*, judgment of Nov. 7, 1979, Cour d'appel, Paris, T.A.C.P. 367, reprinted in LITTENBURG, *supra* note 84, at 1204-05; CATELANI & STRIANI, *supra* note 12, at 246. Italy requested the extradition of Red Brigade members accused of kidnapping and murdering the Italian Prime Minister Aldo Moro and his escorts. *Id.* In French jurisprudence, the extradition of political offenders is controlled by French law of 1927 which provides that extradition will be denied for political crimes or requests that are made for political reasons ["Lorsque le crime ou delit a un caractère politique ou lorsqu'il résulte des circonstances que l'extradition est demandée dans un but politique"]. Guido Salvini, *Spazio Giudiziario Europeo e Delitto Politico*, in RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 992, 999-1000 (1980). In addition, Article 698 of the French Procedural Code contains a provision for subjective political crimes analogous to Article 8 of the Italian Penal Code. *Id.* at 1000.

The French court focused on the gravity of the crimes and the death of innocent victims (the escorts), holding "the political context wanes in the face of the hideous character of the aggression." *Id.* The court granted the extradition requests and noted that via the 1927 law, "the legislature intended to permit extradition for every offense the rude, wild, or inexcusable character of which would shock the universal consciousness." LITTENBURG, *supra* note 84, at 1204. The decision is significant because France had yet to ratify the Strasbourg Convention of 1977, but chose to grant the extradition request based on the gravity of the crime, evidence that the French court did not wish to extend the political offense exception to terrorist crimes. Salvini, *supra*, at 1002-04. This approach was affirmed in subsequent decisions rendered by the French court in which it granted the extradition of German and Spanish terrorists, each time stressing that the heinous nature of the crimes precluded an examination of the offenders' political motivation. LITTENBURG, *supra* note 84, at 1204.

148. Judgment of January 14, 1982, Corte di Cassazione, in Foro It. II at 125, reprinted in DEL TUFO, *supra* note 112, at 13 n.40.

149. *Id.*

150. *Id.*

151. Angelo Ferraro, *In Tema di Divieto di Estradizione Per Reati Politici*, in Cassazione Penale 1113 (1983). For a common crime to be considered subjectively polit-

Constitution.¹⁵² In discussing Article 10 of the Constitution, the Court held that only those offenders who commit an act outside of Italy in an effort to oppose an illegitimate regime, or seek to assert a fundamental freedom expressly forbidden in their own country, or prove that the request for surrender by the requesting state has been made for political reasons will be exempted from extradition.¹⁵³ In the present case, the Court reasoned that Mr. Musbach's political motives were extraneous to the political system in Germany.¹⁵⁴ More importantly, the Court found that Germany, a democratic state withdrawn from the ideological conflict of Libyan nationals, would have no reason to be influenced by political motives in requesting Mr. Musbach's surrender other than to bring the accused to justice.¹⁵⁵ The Court therefore granted Germany's request for Mr. Musbach's return.¹⁵⁶

4. Modern Integration of International Norms with Italian Law

In the past decade, Italian courts began to conform Italian law with prevailing international norms condemning terrorism in an effort to further restrict the broad application of Article 8 to political crimes.¹⁵⁷ The movement culminated with the

ical, the Court held that it must be qualified by a strictly and exclusively political motive. *Id.* "Il reo deve essere stato spinto a delinquere dal fine di potere, a mezzo della sua azione, incidere sulla esistenza, costituzione, o funzionamento dello Stato, oppure favorire o contrastare idee, tendenze politiche, sociali o religiose al precipuo scopo di realizzare una idea politica." *Id.* The court added that the offender must be moved to commit his act, even through the commission of a common crime, to offend a political interest of the state or a political right of a citizen. *Id.* The decision re-confirms the Court's holding in both *Locatelli*, Corte di Cassazione, in *Giust. Pen.* III at 148, and *Zind*, Corte di Cassazione, in *Foro It.* at 68.

152. Judgment of Jan. 14, 1982 (*In re Musbach*), Corte di Cassazione, in *Foro It.* II. at 125.

153. *Id.* at 128. "Nel nostro ordinamento devono ritenersi tutelati con il divieto di estradizione gli autori dei reati commessi all'estero sia quando il movente dei reati stessi sia stato quello di opporsi a regime illiberale o di affermare un diritto di libertà il cui esercizio è negato nel loro paese, sia quando si abbia fondato motivo di ritenere che il giudizio nello Stato richiedente possa essere influenzato da fattori ideologici o politici." (Italian translation of English text) *Id.*

154. *Id.*

155. *Id.* at 128.

156. *Id.*

157. See *supra* note 101 and accompanying text (discussing problem posed by treaties when they conflict with constitutional principles).

Court of Cassation's decision in *In re Gomez Ces*.¹⁵⁸ Mr. Gomez Ces, a member of the Spanish Basque terrorist group ETA, shot two Spanish policemen, murdering one and injuring the other and an innocent passerby in the process.¹⁵⁹ Upon discovering that Mr. Gomez Ces was in Italy, the Spanish government formally requested his arrest and extradition.¹⁶⁰ The accused claimed that his act was political and that pursuant to Article 8 of the Italian Penal Code and Articles 10 and 26 of the Constitution, he was exempt from extradition.¹⁶¹

The Court of Cassation rejected his claim, holding that Mr. Gomez Ces' acts did not constitute a political offense.¹⁶² In rendering its decision, the Court viewed such acts in light of prevailing international notions incorporated in the various treaties that Italy had ratified condemning acts aimed at innocent civilians.¹⁶³ The Court stressed that with the evolution of international conventions on terrorism, the traditional limits on the political offense exception had multiplied.¹⁶⁴ The Court cited the international movement to limit political offenses as evidence that the subjective notion of political crimes could not be resolved exclusively by referring to Article 8 of the Italian Penal Code.¹⁶⁵ The Court concluded that the grav-

158. Judgment of Mar. 30, 1989, Corte di Cassazione II, Sez. I Penale (c.c. 2/27/89, Sentence No. 499), in *Gius. Pen.* at 394 (1990).

159. *Id.* The crimes for which he is sought include homicide, attempted murder, kidnapping and illegal weapons possession. *Id.*

160. *Id.* at 395.

161. *Id.*

162. *Id.*

163. *Id.* The various pertinent treaties the Court refers to include the European Extradition Treaty of 1957, the Extradition Treaty with Spain, and the Strasbourg Convention of 1977. *Id.* at 337. The court established a new approach for assessing the political nature of a crime, stating that in an extradition request, the subjective notion of Article 8 must be integrated with the principles set forth in paragraph one of Article 10 of the Constitution through which Italian law must conform to generally accepted international principles; the overall disposition of the Constitution to protect human values; the specific discipline of international treaties and conventions ratified by Italy which seek to limit the broad aspects of the political offense provision; and Article 13 of the European Convention on the Suppression of Terrorism which mitigates the subjective criteria of political offenses by focusing on the gravity of objective factors such as the harm posed to the life, physical integrity, and individual freedom of persons. *Id.*

164. *Id.* at 400. "L'evoluzione . . . di quest'ultima normativa [il diritto internazionale] dimostra che si sono moltiplicate le clausole tradizionalmente derogative di estradizione per reati politici." (Italian translation of English text) *Id.*

165. *Id.* The various clauses that have sought to de-politicize the political of-

ity of Mr. Gomez Ces' acts fell within the parameters of Article 13 of the European Convention on the Suppression of Terrorism.¹⁶⁶

In *In re Van Anraat*,¹⁶⁷ the Supreme Court of Cassation modified the guidelines established in *Gomez Ces* to further weaken the application of the political offense provision of Article 8 of the Italian Penal Code.¹⁶⁸ Frans Van Anraat, a Dutch national, was indicted in the United States for unlawfully exporting thiodiglycol¹⁶⁹ from the United States to Jordan.¹⁷⁰ The United States filed a request for his extradition, but the Court of Appeals of Milan denied it on the grounds that the United States was inspired by political motives for requesting Mr. Van Anraat's surrender.¹⁷¹ On appeal before the Court of

fense exception, such as the Belgian *attentat* clause and the Swiss proportionality test, are, the Court noted, "unequivocal evidence" that a subjective political offense cannot be assessed solely by referring to Article 8. *Id.*

166. *Id.* at 400-01.

167. Judgment of January 23, 1990, Corte di Cassazione, Sez. I Penale (c.c. December 15, 1989, Sentence No. 3329).

168. *Id.*

169. See Judgment of July 19, 1989, Corte di appello di Milano, Sez. Istruttoria at 1. Thiodiglycol, a product usually used in the textile industries, can also be used as a chemical precursor for the production of Yprite (mustard gas). *Id.*

170. Judgment of July 19, 1989 (*In re Van Anraat*), Corte di appello, Sez. Istruttoria at 1. The exportation of thiodiglycol requires a special license by the U.S. government for any countries not allied with the United States. *Id.* Thiodiglycol cannot be exported to Iran, Iraq, and Libya. *Id.* The United States issued these regulations in response to evidence that Iran and Iraq were using mustard gas in their war. Supplemental Affidavit for U.S. Government at 4, *United States of America v. Frans Van Anraat*, Corte di Cassazione, Sez. I Penale No. 3329 (1989) [hereinafter U.S. Supplemental Affidavit.]. The violation is punishable by U.S. laws under 50 U.S.C. App. 2410(B), 15 C.F.R. 372.1, 374.1, 387.2, 387.6, 399.1 and 18 U.S.C. 2. Judgment of July 19, 1989 (*In re Van Anraat*), Corte di appello, Sez. Istruttoria at 1. Van Anraat was also charged for making false statements to U.S. Government Agencies. U.S. Supplemental Affidavit, *supra*, at 7. Under the regulations created to control the export of thiodiglycol, a fundamental requirement is that exporters will furnish the government with information to monitor the chemical's destination. *Id.* at 7. Exporters must apply for a license and specify the ultimate destination of the product. *Id.* The regulations prohibit the reexport of the product to any destination contrary to the one specified in the agreement made with the United States. To do otherwise would undermine the very purpose of the law. *Id.* In the present case, Mr. Van Anraat informed government officials the product's destination was in Western Europe. *Id.* He, however, re-exported the product to Jordan. *Id.* For making false statements, he is also charged with deceiving U.S. officials. *Id.* at 5-6.

171. Judgment of July 19, 1989 (*In re Van Anraat*), Corte di appello di Milano, Sez. Istruttoria at 2. The court held that foreign politics inspired the U.S. government to prevent the exportation of thiodiglycol to Iran or Iraq and added that be-

Cassation, the Italian Court reversed, holding that the U.S. purpose for requesting Mr. Van Anraat's extradition was not politically motivated.¹⁷² The Court noted that politics did not motivate the United States to prohibit the exportation of the chemical component to potential recipients such as Iran or Iraq, nations with which the United States did not enjoy harmonious relations.¹⁷³ Instead, the Court reasoned that the United States request expressly intended to prohibit the transfer of deadly instruments to warring nations.¹⁷⁴

The Court added that when judging criminal activities, the political nature of a crime cannot be assessed according to the provisions set forth in Article 8 of the Penal Code due to the inherent conflicting goals of the Penal Code and the constitutional provisions.¹⁷⁵ The Court concluded that extradition will

cause "this violation is strictly a political violation [whose] aim is to fulfill ideological differences and different political conceptions," extradition must be denied. *Id.*

172. Judgment of Jan. 23, 1990 (*In re Van Anraat*), Corte di Cassazione, Sez. I Penale (c.c. Dec. 15, 1989) Sentence No. 3329 at 8-9.

173. *Id.*

174. Judgment of Jan. 23, 1990 (*In re Van Anraat*), Corte di Cassazione, Sez. I Penale (c.c. Dec. 15, 1989) Sentence No. 3329, at 9. The decision is consistent with the broad consensus in the international community that chemical weapons are barbaric and should be eradicated. U.S. Supplemental Affidavit, *supra* note 170, at 3. See Treaty on Gas Warfare, June 17, 1925, T.I.A.S. No. 8061. The decision also reinforces the purpose for which Article 10, paragraph 1, of the Italian Constitution was adopted. See *supra* note 100 and accompanying text (discussing how purpose of Article 10 of Constitution was to conform Italian law to international principles in order to integrate state into international community and thus avoid possibility of another war).

175. Judgment of Jan. 23, 1990 (*In re Van Anraat*), Corte di Cassazione, Sez. I Penale (c.c. Dec. 15, 1989) Sentence No. 3329, at 6. The court discusses the various approaches proposed by legal scholars for dealing with the political offense provision in Italian law. *Id.*; see *supra* note 102 and accompanying text (discussing various approaches posed by legal writers). The court stresses that the political offense doctrine is designed to serve two different goals in Article 8 of the Penal Code and Articles 10 and 26 of the Constitution. Judgment of Jan. 23, 1990 (*In re Van Anraat*), Corte di Cassazione, Sez. I Penale, Sentence No. 3329, at 6. In the Penal Code, the political offense doctrine serves a repressive function. *Id.* The framers intended to expand the definition so that such crimes could be repressed more easily. *Id.* This interpretation coincides with the Fascist ideology that the state is all powerful. See *supra* notes 107-08 and accompanying text (discussing goal sought to be achieved by fascists in expanding scope of political offenses). In the Constitution, however, the provision serves to guarantee certain rights within the limits set forth in the Constitution. *Van Anraat*, Corte di Cassazione, Sez. I Penale No. 3329, at 6. The rights referred to include the right to protect persons from being extradited without recognition of the inherent protections provided for in the Constitution (e.g. right of asylum). *Id.* The two definitions cannot be reconciled, as the former seeks to repress

be barred under the constitutional provisions of the political offense doctrine only when the accused opposes an illiberal regime, affirms a fundamental right guaranteed in the Italian Constitution, or proves that political purposes motivate a nation's extradition request.¹⁷⁶ The decision was premised on the fundamental principles established in *Musbach* and reflects the Court's willingness to adhere to preceding cases that have gradually diminished the political offense doctrine in Italian jurisprudence.

D. *United States-Italy Extradition Treaty*

In 1983, the United States and Italy entered into a bilateral extradition treaty to replace the former agreement that had been in effect since 1975.¹⁷⁷ Through Article V of the new extradition treaty, the signatories sought to adopt a single approach to the political offense doctrine.¹⁷⁸ Article V of the U.S.-Italy Extradition Treaty prohibits extradition for political offenses, but fails to define a political offense.¹⁷⁹ As a result, domestic codes and internal criminal procedure dictate which crimes can be characterized as political offenses.¹⁸⁰ The respective approaches utilized by each country for assessing a

the political offense doctrine in an effort to expand state power, while the latter does exactly the opposite, seeking to limit the punitive power of foreign states. *Id.* In effect, the constitutional provisions serve one essential purpose: to prevent the Italian State from collaborating and thus making it possible for a foreign state to request one's extradition solely for political purposes. *Id.* at 7.

176. Judgment of Jan. 23, 1990 (*In re Van Anraat*), Corte di Cassazione, Sez. I Penale (c.c. December 15, 1989) Sentence No. 3329, at 8.

177. GIULIO CATELANI & DANIELE STRIANI, *L'ESTRADIZIONE, APPENDICE DI AGGIORNAMENTO 3* (1987).

178. Article V, ¶ 2 of the U.S.-Italy Extradition Treaty, *supra* note 10, 24 I.L.M. at 1528, provides:

For the purpose of the application of paragraph 1 of this Article, an offense with respect to which both Contracting Parties have the obligation to submit for prosecution . . . or any attempt to commit such an offense, will be presumed to have the predominate character of a common crime when its consequences were or could have been grave. In determining the gravity of the offense and its consequences, the fact that the offense endangered public safety, harmed persons unrelated to the political purpose of the offender, or was committed with ruthlessness shall, in particular, be taken into account.

Id.

179. See Art. V, ¶ 1 of U.S.-Italy Extradition Treaty, *supra* note 10, 24 I.L.M. at 1528.

180. See CATELANI & STRIANI, *supra* note 12 and accompanying text (discussing how extradition decision ultimately rests with judiciary of requested state).

political offense, however, conflict, thus inhibiting both nations from achieving a uniform definition of political crimes.¹⁸¹ In an effort to secure that Italy would not categorize terrorist crimes as political offenses, the United States sought reassurances from Italy that terrorist crimes would be precluded from political offense consideration if they were directed against innocent civilians.¹⁸² Italy assured the United States that terrorist crimes would not be considered political offenses if they were directed against a party withdrawn from the political conflict.¹⁸³

Despite the assurances, the fact that both nations utilize divergent approaches for assessing a political crime jeopardizes the principle of reciprocity set forth in Article II of the extradition treaty.¹⁸⁴ Article II, paragraph 1 provides that an offense shall be extraditable if it is punishable under the laws of both countries.¹⁸⁵ Thus, under the principle of reciprocity, if either the United States or Italy requests an individual's extradition from the other contracting party and the crime for which the accused is sought is punishable by the laws of both nations, there is a duty to extradite.¹⁸⁶ A problem arises, however, if the individual sought commits a crime that is punishable under the laws of both countries, but the accused alleges it is a political offense and subject to the protection afforded by the political offense exception. The rules adopted by both the United States and Italy governing the political offense status of a crime differ.¹⁸⁷ Therefore, although an offense may be punishable under the laws of both countries and subject to extradition, one party to the treaty may apply domestic interpretations of the political offense doctrine to declare that an offense is not extraditable.¹⁸⁸ In such a scenario, one country could refuse to extradite an individual solely because it characterizes

181. See *supra* notes 84-85 and accompanying text (discussing how approaches utilized by U.S. and Italian courts regarding political offense vary).

182. U.S. Memo, *supra* note 71, at 3-4.

183. *Id.*

184. U.S.-Italy Extradition Treaty, *supra* note 10, art. II, ¶ 1, 24 I.L.M. at 1527.

185. *Id.*

186. *Id.*

187. See *supra* notes 84-85 and accompanying text (discussing divergent approaches to political offense exception utilized by both United States and Italy).

188. See SWEENEY, *supra* note 13 and accompanying text (discussing French refusal of U.S. extradition request).

the offense as political.¹⁸⁹ Refusing to extradite an individual on these grounds would amount to a derogation of that nation's duty under the principle of reciprocity.

II. THE EXTRADITION OF KHALED MOHAMMED EL JASSEM

In *In re Al-Jawary*, the petitioner, Mohammed El Jassem, alias Al-Jawary, an Iraqi national arrested in Rome, Italy in January 1991, challenged a decision by the Rome Court of Appeals granting his extradition to the United States for the attempted bombing of various Israeli targets in New York City in 1973.¹⁹⁰ Al-Jawary's attorneys alleged that the act was political in nature, and thus pursuant to Article 8 of the Italian Penal Code and Article V of the U.S.-Italy Extradition Treaty,¹⁹¹ exempted their client from extradition.¹⁹² The Italian Court of Cassation rendered a decision premised on the prevailing notions of international law that seek to weaken application of the political offense exception to terrorist crimes.¹⁹³

A. *Factual and Procedural Background*

Early in January 1991, Italian border police detained Al-Jawary at Rome's Fiumicino airport upon suspicion that he was travelling with a false passport.¹⁹⁴ Subsequent investigations linked the Iraqi national to an individual being sought by U.S. authorities for a bombing campaign in New York in 1973.¹⁹⁵ In March 1973, New York City Police Department officials discovered two bombs inside two separate rental cars that had

189. *Id.*

190. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, Sentence No. 767, at 1.

191. *Id.* at 11-12. See Article V, ¶ 1 of the U.S.-Italy Extradition Treaty, *supra* note 11, 24 I.L.M. at 1528.

192. *Id.*

193. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, Sentence No. 767, at 1.

194. "US Confident of Extraditing Wanted Iraqi from Italy," *REUTERS*, Jan. 24, 1991, available in LEXIS, Nexis Library, OMNI File [hereinafter *REUTERS*]. Italian security sources said U.S. officials in Athens had spotted Al-Jawary boarding a plane. Al-Jawary was on his way to Tunis the day before the Gulf War erupted when he was apprehended. *Id.* Upon his detention, Italian officials charged Al-Jawary with traveling with false identification. *Id.*

195. *REUTERS*, *supra* note 194. Al-Jawary had been on the Federal Bureau of Investigation's [hereinafter FBI] most wanted list for 18 years. *Id.*

been towed away from New York City streets.¹⁹⁶ Parking tickets revealed both cars had been parked directly in the vicinity of two Israeli banks.¹⁹⁷ FBI Special Agents were notified and a third rental vehicle containing yet another explosive device was discovered in front of the El-Al Israeli Air Cargo Terminal at John F. Kennedy Airport.¹⁹⁸ None of the devices exploded, apparently due to faulty fuses.¹⁹⁹ Evidence obtained from each of the cars revealed that all three devices were similar in construction, and a subsequent investigation linked the three vehicles to Al-Jawary, an Iraqi citizen allegedly associated with the Black September terrorist group.²⁰⁰

Upon discovering that the Italian police had captured Al-Jawary, the U.S. government, pursuant to Article X of the U.S.-Italy Extradition Treaty,²⁰¹ requested that Al-Jawary be detained on the strength of two arrest warrants issued by the judicial authorities of the Eastern and Southern Districts of New York.²⁰² Italian police detained the petitioner for questioning²⁰³ while U.S. officials forwarded fingerprints to Italy to

196. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, sentence No. 767, at 3-5.

197. *Id.* at 3-4.

198. *Id.* at 5.

199. *Id.* at 4.

200. "Iraqi Denies Planting Bombs," JERUSALEM POST, Apr. 22, 1992; see Brief for Appellant at 5, Gian Antonio Minghelli (1991), Judgment of Feb. 17, 1992, Sez. Penale I/a, Sentence No. 767 [hereinafter Minghelli Brief].

201. U.S.-Italy Extradition Treaty, *supra* note 10, art. X, 24 I.L.M. at 1528. Article X, ¶ 3 provides that requests for extradition relating to persons not yet convicted shall be made through diplomatic channels and shall be accompanied by a certified copy of the arrest warrant. *Id.*

202. Judgment of May 21, 1991 (*In re Al-Jawary*), Corte di appello di Roma, Sez. 4/a Pen., Sentence No. 1/91, at 2. The arrest warrants were issued subsequent to indictments filed in both the Eastern and Southern Districts of New York. *Id.* The indictment in the Eastern District charged Khalid Duhhan Al-Jawary with attempting to damage or destroy the El Al Israeli Airlines cargo facility at John F. Kennedy Airport via an explosive device in violation of Title 18, U.S.C. 844(i). U.S. Government Affidavit at 2, United States of America v. John Doe, a/k/a Khalid Duhhan Al-Jawary, Criminal Docket No. 73-0500, E.D.N.Y., February 4, 1991. The indictment in the Southern District of New York charged Khalid Duhhan Al-Jawary with attempting to damage or destroy two Israeli banks located in Manhattan via an explosive device. See U.S. Government Affidavit at 2, United States of America v. John Doe, a/k/a Khalid Duhhan Al-Jawary, Criminal Docket No. 73-CR-481, S.D.N.Y., February 1991.

203. Minghelli Brief, *supra* note 200, at 6-7. A dispute exists as to whether Al-Jawary was arrested immediately upon his arrival, or upon completion of his questioning. *Id.* Notwithstanding the dispute, the Presiding Judge of the Court of Ap-

identify the detainee.²⁰⁴ By February, the United States had provided all the documentation requested by the Italian authorities.²⁰⁵ One month later, Italian officials submitted an analysis of the fingerprints to the Italian Prosecutor General.²⁰⁶ The analysts concluded that three of the seven partial fingerprints transmitted by the United States were identical to the fingerprints of Al-Jawary.²⁰⁷ In April, the Italian Ministry of Justice requested the Prosecutor General to submit both the indictment and other documentation forwarded by the United States to the Italian Court of Appeals.²⁰⁸ The Prosecutor General,²⁰⁹ on the basis of information submitted by the United States, concluded that the extradition request should be granted.²¹⁰

The Court of Appeals examined the merit of the extradition request to ascertain whether the pertinent evidence and the conclusions reached by the Prosecutor General furnished a reasonable basis for extraditing Al-Jawary to the United States.²¹¹ The court focused on assessing the political nature of Al-Jawary's act and cited recent developments in Italian jurisprudence mandating that the definition of a political crime

peals validated the petitioner's arrest by an order for investigative detention and informed the Italian Ministry of Grace and Justice of its decision. Judgment of May 21, 1991 (*In re Al-Jawary*), Corte di appello di Roma, Sez. 4/a Pen., Sentence No. 1/91, at 2.

204. Judgment of May 21, 1991 (*In re Al-Jawary*), Corte di appello di Roma, Sez. Pen. IV, Sentence No. 1/91, at 2. Fingerprints taken from various items of the alleged perpetrator of the bombings in 1973 (rental cars, newspapers, and hotel room where devices were constructed) were compared to those of the detainee in Rome in order to identify him and assure that the individual arrested in Rome was the same person being sought for the bombings in New York. *Id.*

205. *Id.* at 3. These documents included photographs and fingerprints of the person sought; affidavits indicating facts of the crimes; texts of the laws which describe the essential elements and definition of the crimes; texts of the laws which regulate the prosecution of such crimes. *Id.* The documentation forwarded complied with Article X, ¶¶ 2-3 of the U.S.-Italy Extradition Treaty. U.S.-Italy Extradition Treaty, *supra* note 10, art. X, 24 I.L.M. at 1528.

206. Judgment of May 21, 1991 (*In re Al-Jawary*), Corte di appello di Roma, Sez. Pen IV, Sentence No. 1/91, at 5.

207. *Id.* at 6.

208. *Id.* at 3-4.

209. See G.L. CERTOMA, *supra* note 15 and accompanying text (discussing framework of Italian legal system).

210. Judgment of May 21, 1991 (*In re Al-Jawary*), Corte d' appello di Roma, Sez. Pen. IV, Sentence No. 1/91, at 3-4.

211. *Id.* at 9.

cannot be applied solely by consideration of Article 8 of the Penal Code.²¹² The court then proceeded with an analysis of Article V of the U.S.-Italy Extradition Treaty.²¹³ The court found that the subjectivist criterion contained in Article 8 of the Penal Code needed to be balanced against the treaty provisions of Article V to assess the political nature of a crime.²¹⁴

Applying this standard, the court concluded that placing three cars filled with explosives in crowded locations provided sufficient reason to hold that the crimes committed constituted a danger to the life and safety of innocent people.²¹⁵ As the court reasoned, the bombs, had they detonated, would have harmed persons unrelated to the perpetrator's political purpose.²¹⁶ The court declared that these facts constituted sufficient grounds for granting Al-Jawary's extradition to the

212. *Id.* at 16. The court noted that traditionally, to define a subjective political offense, the courts were obliged to refer to Article 8 of the Penal Code. *Id.* at 15. Extensive doctrinal and jurisprudential debates modified this approach, holding that if a common crime was to be regarded as subjectively political, the crime had to be qualified by a strictly and exclusively political motive. *Id.*; see *supra* note 146 and accompanying text (noting that common crime will be considered subjectively political if perpetrator was moved to commit offense in order to be able to influence through his action existence, constitution, and functioning of State, or to promote or state ideas, and political, social, or religious trends for principal purpose of realizing political idea). The Court of Appeals cited *Gomez* and emphasized that in recent years this approach has been limited. Judgment of May 21, 1991 (*In re Al-Jawary*), Corte di appello di Roma, Sez. Pen. IV, Sentence No. 1/91, at 16.

213. See *supra* notes 178 and accompanying text (outlining text of Article V, ¶ 2).

214. Judgment of May 21, 1991 (*In re Al-Jawary*), Corte di appello di Roma, Sez. Pen. IV, Sentence No. 1/91, at 17.

215. *Id.* at 17-18.

216. *Id.* The court observed that even though the political motives of the offender were only claimed by defense counsel, and not by Al-Jawary who had always declared that he had nothing to do with the crime he had been charged with, the characteristics of gravity established in Article V had been satisfied. *Id.* at 17. Al-Jawary did, however, declare that he was a member of the PLO. *Id.* at 18. In *Al-Jawary*, defense counsel claimed a political motive existed, despite defendant's declarations that he had nothing to do with the crimes he was charged with. *Id.* at 17. The court stressed, however, that even if a political motive was ascribed, which would be hypothetically connected with the well-known conflict between Arabs and Israelis, the gravity of the offense would prevent the act from being elevated to a political offense. *Id.* U.S. investigators, simulating the effects of the bombs had they detonated, estimated that all persons who happened to be within 100 yards of the explosion would have been killed. *Id.* at 17-18; see *supra* note 147 and accompanying text (discussing holding by French Cour d'Appel in *Piperno* where court noted that despite political aspect of crime, gravity of harm precluded act from constituting political offense).

United States.²¹⁷ Al-Jawary appealed the decision to the Italian Supreme Court of Cassation.²¹⁸

*B. The Judgment of the Court of Cassation and the Opinion of
Presidente Corrado Carnevale*

The Court of Cassation (the "Court") considered whether Al-Jawary's act constituted a political offense under Italian jurisprudence and would thus bar his extradition by virtue of the political offense provision of the U.S.-Italy Extradition Treaty.²¹⁹ The Court adopted a new totality of the circumstances test, balancing safeguards incorporated in the Italian Constitution to prevent the extradition of political offenders.²²⁰ The Court, however, ultimately weighed these aspects in relation to international principles on the subject of terrorist crimes and the gravity of the offense.²²¹ The Court affirmed Al-Jawary's extradition and held that under Article 10 of the Italian Constitution²²² and prevailing jurisprudence governing application of the political offense doctrine to terrorist crimes, Al-Jawary's attempted bombing did not constitute a political offense.²²³

The Court of Cassation confronted two central issues in rendering its decision.²²⁴ The first issue involved the applicability of Article V, paragraph two of the U.S.-Italy Extradition Treaty.²²⁵ The second issue focused on an analysis of Italy's interpretation of the political offense doctrine.²²⁶ Concerning the applicability of Article V, the U.S. Department of Justice ("Justice Department") argued that Al-Jawary's act violated a

217. Judgment of May 21, 1991 (*In re Al-Jawary*), Corte di appello di Roma, Sez. Pen. IV, Sentence No. 1/91, at 19.

218. *Id.*

219. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, No. 767, at 12.

220. *Id.* at 1.

221. *Id.* at 17.

222. See *supra* note 101 and accompanying text (discussing how Italian law must conform to generally recognized principles of international law).

223. Judgment of Feb. 17, 1991 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, Sentence No. 767, at 17.

224. *Id.* at 12.

225. See *supra* note 178 and accompanying text (defining Art. V, ¶ 2 of Treaty).

226. Judgment of Feb. 17, 1991 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, Sentence No. 767, at 14-17.

multilateral international agreement binding both nations.²²⁷ The Justice Department submitted evidence indicating that if the explosive planted before the El-Al air terminal had detonated, the potential impact would have damaged incoming aircraft and injured innocent civilians.²²⁸ The U.S. government thus sought to place Al-Jawary's attempted bombing within the scope of the 1971 Montreal Convention Against the Sabotage of Aircraft (the "Montreal Convention").²²⁹ Assessing the evidence, the Court acknowledged that the bomb's location would have put numerous passengers using the terminal at serious risk of death or injury.²³⁰ The Court, however, dismissed the U.S. government's contention that the Montreal Convention was applicable due to the inconsistencies inherent in the evidence.²³¹

227. *Id.* at 13.

228. *Id.* at 13-14. The Federal Bureau of Investigation (FBI) conducted a series of tests in an effort to simulate the situation at JFK Airport. *Id.* FBI experts placed a bomb identical to the one discovered at the scene in an automobile similar to the one parked adjacent to the El-Al air terminal. *Id.* The bomb was detonated, producing "fragmentation of the automobile and its contents, sound and thermal waves, as well as a fireball that rose approximately 100 to 150 feet" into the air. *Id.* at 13-14. The experts concluded that such an explosion would have endangered incoming aircraft using approach "13L" and others that were traveling at an altitude of 300 to 500 feet. *Id.* at 14.

229. Montreal Convention, *supra* note 2, 24 U.S.T. 564, T.I.A.S. No. 7570. The Convention has been ratified by both the United States and Italy. *Id.* Article 1 of the Convention provides that "Any person commits an offense if he unlawfully and intentionally: (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger its safety in flight . . ." *Id.* Article 7 provides that [t]he contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution." *Id.*

230. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, No. 767, at 13. "Secondo l'affidavit, al momento del mancato attentato una parte dell'aerostazione era a disposizione dei passeggeri della El-Al e quindi la posizione della bomba mise in pericolo di morte o di ferimento numerosi passeggeri." *Id.* The conclusions reached by FBI experts following the tests that they conducted provided conclusive evidence of the gravity of the crime. *Id.* at 16.

231. *Id.* at 14. The evidence revealed that the explosion would have created a fireball rising to 150 feet in the air. *Id.* Additional evidence purported to show that airlines travelling at an altitude of 300 to 500 feet would have been placed in jeopardy, more than twice the height of the fireball. *Id.* The court felt the discrepancy was cause for questioning the validity of the evidence. *Id.* In addition, even if the evidence were accepted, the Montreal Convention could only be applied for the crime committed at JFK Airport, and not the other two attempted bombings in Manhattan. *Id.*

The Court then turned to an analysis of Italy's political offense exception.²³² Reiterating its holding in *Gomez Ces*, the Court of Cassation held that the political offense exception in Italian jurisprudence must be defined in terms of the provisions of the Constitution that protect the values of the human being, Article 10 of the Constitution, and the discipline of the conventions and treaties that Italy has signed and ratified.²³³ Judge Corrado Carnevale recalled the legislative history of the political offense exception and stressed that Article 8 of the Penal Code and Articles 10 and 26 of the Constitution were inspired by different legislative goals.²³⁴ Judge Carnevale further noted that Italian jurists adopted various approaches in preceding years to reconcile Article 8 of the Penal Code and the relevant Constitutional provisions.²³⁵ Recent international developments, however, established that the definition of a political crime could no longer be derived solely by referring

232. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, No. 767, at 15-17.

233. *Id.* at 15. "[A]i fini estradizionali, occorre muovere, come già osservato nella citata sentenza in ricorso Gomez, dalla considerazione dei valori umani primari e irrinunciabili consacrati nella costituzione; dalla disposizione dell' Art. 10 comma 1 della stessa . . . e dall' evoluzione della normativa internazionale . . . in materia." *Id.* (Italian translation of English text). One significant obstacle confronting the court was the fact that no single treaty limiting the political offense exception ratified by both Italy and the United States was applicable in the present scenario. *Id.* In *Gomez*, the court relied on the European Convention for the Suppression of Terrorism which both Italy and Spain had ratified to extradite a Spanish terrorist. Judgment of March 30, 1989 (*In re Gomez Ces*), Corte di Cassazione, Gius. Pen. II, at 335. In *Van Anraat*, Judgment of Jan. 23, 1990, Corte di Cassazione, Sez. I Penale, Sentence No. 3329, the Geneva Convention Against the Use of Chemical Weapons, as well as general recognized principles of international law, were binding upon the United States and Italy. *Id.* at 1. In *Al-Jawary*, however, the Court of Cassation dismissed the Montreal Convention, thereby precluding the Court from adopting an analysis premised on an international convention which confined Italy to extradite Al-Jawary. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, No. 767, at 13-14.

234. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, No. 767, at 14-15. "Vi è intanto un' evidente visuale diversa del problema che ispira i due testi legislativi, la quale nasce dalla diversa concezione politica che ad essi è sottesa, essendo ben noto l'intento repressivo al più ampio raggio che muoveva il regime nel quale l'art. 8 del cp. fu approvato." *Id.*

235. *Id.* at 15. See CATELANI & STRIANI *supra* note 12, at 199 (noting that some legal writers mistakenly concluded that Article 8 of Penal Code should have been constitutionalized). As Judge Carnevale makes clear, objections were raised against constitutionalizing Article 8. See *supra* note 102 and accompanying text (observing that constitutional provisions should serve as guide for ordinary law, and not vice versa).

to Article 8 of the Penal Code.²³⁶ Judge Carnevale confirmed juridical interpretations that constitutional provisions should serve as a guide for ordinary laws, and not vice versa.²³⁷ The decision thereby eliminated the traditional practice of referring to Article 8 of the Penal Code to define a political offense.²³⁸ Departing from the traditional approach of defining political crimes, the Court of Cassation adopted a new test to assess whether Al-Jawary's attempted bombing constituted a political offense.²³⁹ The Court emphasized the difficulty of devising a single definition of a political offense.²⁴⁰ The tendency in international law to diffuse the political offense exception,²⁴¹ however, reflected the necessity to protect human values against grave transgressions resulting from politically inspired crimes.²⁴² A political offense, therefore, must be defined by

236. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, No. 767, at 14. "Non è possibile ricostruire la nozione di reato politico alla stregua dell'art. 8 del vigente cod. pen., usando questo come esclusivo strumento di lettura del senso di reato politico del quale pure parlano le disposizioni degli art. 10 ultimo comma e 26 ultimo comma della costituzione." *Id.* (Italian translation of English text).

237. *Id.* at 15.

238. *Id.* "[S]uccessivamente è emersa e si è fatta strada l'obiezione - che qui appare condivisibile e decisiva - che una tale opinione finiva per obliterare il principio che sono i concetti della costituzione che devono servire da misura per la lettura delle norme ordinarie e non viceversa." *Id.* (Subsequently, an objection has emerged, which here appears conclusive, that constitutional provisions should serve as a guide for ordinary laws, and not vice versa) (translation by Comment Author).

239. *Id.* at 16-17.

240. *Id.* at 15. "Ancora è arduo per la verità cogliere una definizione del delitto politico. . ." (Italian translation of English text) *Id.* See SCHAFER, *supra* note 38 (discussing how all crimes may be considered political).

241. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, No. 767, at 15-16. This tendency is reflected in the Belgian *attentat* clause of Article 3, ¶ 3 of the European Convention on Extradition; the European Convention on the Suppression of Terrorism, *supra* note 136; the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, *supra* note 2; and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *supra* note 2. Though the court dismissed the U.S. Government's contention that the Montreal Convention was applicable in the present case, the court agreed that the Convention was evidence of an international consensus to limit the political offense exception. *Id.* at 16.

242. *Id.* at 16. "In tale evoluzione della normativa internazionale non può non apparire evidente come, non tanto la nozione in sè del reato politico, quanto la sua rilevanza ai fini estradizionali sia stata contemporata con la necessità di tutelare primari valori umani universali, gravemente offesi da delitti di ispirazione politica." *Id.* (Italian translation of English text). The gravity of these offenses, the court noted, would be assessed within the parameters set by Article 13 of the Strasbourg Convention. *Id.* These principles coincide with the elements Italy maintained it

balancing various ideals embodied in the Italian Constitution in order to protect the principles set forth therein from serious aggressive acts committed by individuals.²⁴³

Applying this new totality of the circumstances approach to the present case, the Court rejected Al-Jawary's defense that he did not intend to injure anyone because neither of the three car bombs exploded.²⁴⁴ The Court reasoned that the explosive devices, had they detonated, would have killed numerous persons unrelated to Al-Jawary's political objective of overthrowing the State of Israel.²⁴⁵ Al-Jawary's failed attempt therefore violated fundamental human values and assumed the decisive characteristics necessary to exclude the act from political offense consideration.²⁴⁶

Assessing the nature of a political crime by balancing the various elements enumerated in the decision, Judge Carnevale concluded that Al-Jawary should be extradited to the United

would honor in its reservation to the Convention when assessing the political nature of a crime. *Id.* "Questi aspetti della gravità dei reati sono quelli stessi che lo Stato italiano . . . si è impegnato a considerare prima di pervenire al rifiuto dell'estradizione motivata dal carattere politico del reato." *Id.* (The grave aspects of a crime are the same characteristics that Italy . . . reserved the right to assess [in the Strasbourg Convention] before refusing to extradite political offenders) (translation by Comment Author).

243. *Id.* at 16-17. The court noted

Con ciò si ritiene di poter concludere nel senso che la nozione di delitto politico, ai fini estradizionali, trova la sua definizione nel bilanciamento tra il valore insito nel principio costituzionale del rifiuto di consentire alla persecuzione del cittadino e dello straniero per motivi politici, e quello di tutela dei valori primari umani - pur consacrati nella carta costituzionale - quando l'aggressione ad essi abbia quei caratteri di gravità individuabili alla stregua dei parametri su ricordati.

Id. (Italian translation of English text).

The principles inherent in the Italian Constitution which the Court refers to include the refusal to extradite foreigners or citizens for political motives (Art. 10 and 26); and the protection of human values (life, physical integrity). *Id.*

244. *Id.* at 17.

245. *Id.* As a member of the Black September Organization, Al-Jawary's political objective was never expressed, but may be linked to the organization's declared objective of overthrowing the State of Israel. U.S. Memo, *supra* note 71, at 11-12.

246. U.S. Memo, *supra* note 71, at 11-12. See *In re Doherty*, 599 F. Supp. 270, 275 n.4 (S.D.N.Y. 1984) (discussing that political offense exception "does not afford a haven for persons who commit the most heinous atrocities for political ends"). The court in *Doherty* explicitly stated that acts that "transcend the limits of international law" and are "inconsistent with international standards of civilized conduct" will not be protected under the guise of the political offense exception. *Id.* at 274-75.

States.²⁴⁷ The Court deferred the final decision to the Italian Minister of Grace and Justice Claudio Martelli.²⁴⁸ Minister Martelli reviewed the Court of Cassation's analysis and confirmed the Court's finding, thus completing the formal process for extraditing Al-Jawary to the United States.²⁴⁹

**III. THE AL-JAWARY DECISION PROVIDES A NEW
INTERPRETATION OF THE POLITICAL OFFENSE
PROVISION OF THE U.S.-ITALY EXTRADITION TREATY
AND STRENGTHENS U.S.-ITALIAN EFFORTS TO COMBAT
INTERNATIONAL TERRORISM**

The Court of Cassation decision in *Al-Jawary* is significant for two distinct reasons. First, the Italian Court utilized a new approach to the political offense provision, adopting international norms as law rather than relying on the Italian Penal Code.²⁵⁰ Although the decision seems to undermine Italian domestic law in favor of international law, a review of the Italian Constitution and current interpretations of the political offense provision shows that the decision was proper and upholds general principles of international law.²⁵¹ Second, the new approach parallels prevailing U.S. jurisprudence governing application of the political offense provision to terrorist crimes and demonstrates that adherence by the United States to the legal channels instituted to combat terrorism is an effective way to prosecute international terrorists.

A. The Immediate Effect of In re Al-Jawary

Al-Jawary represents the culmination of a series of decisions over the past decade that has permitted Italian courts to depart from the traditional approach of defining a political of-

247. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, Sentence No. 767, at 15.

248. See *La Partecipazione Del Ministro Al Procedimento di Estradizione*, in ENCICLOPEDIA GIURIDICA, Sez. III, Diritto Internazionale, *supra* note 140, at 2-3 (discussing role of Minister of Grace and Justice in extradition proceedings, including authority to negate decision of Court of Cassation).

249. *Id.*

250. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, No. 767, at 15-17.

251. See *supra* note 101 and accompanying text (discussing purpose of Article 10 of Italian Constitution).

fense.²⁵² The decision aids the ultimate development of a narrower interpretation of the political offense exception previously in effect in Italy.²⁵³ The legislatures that devised the Italian Penal Code sought to repress political activism in an effort to secure state interests.²⁵⁴ The subjective elements of the political offense exception were incorporated in the Penal Code to facilitate adjudication of a common crime to political offense status.²⁵⁵ Inclusion of these elements in the code was designed to preserve fascist ideology.²⁵⁶ The fascist era definition of political offenses has proven incompatible with prevailing international jurisprudence that has sought to restrict the meaning of political offenses in light of increased terrorist activities.²⁵⁷

The current international movement to narrow the broad scope of the political offense doctrine is designed to prevent terrorists who engage in ruthless acts directed against innocent civilians²⁵⁸ from escaping prosecution.²⁵⁹ Indeed, the political

252. See *In re Musbach*, Judgment of Jan. 14, 1982, Corte di Cassazione, in Foro It. II at 125, *In re Gomez*, Judgment of Mar. 30, 1989, Corte di Cassazione II, in Gius. Pen. II at 335 (1990), *In re Van Anraat*, Judgment of Jan. 23, 1990, Corte di Cassazione, Sez. I Penale, Sentence No. 3329.

253. See *supra* notes 107-09 and accompanying text (discussing broad expansion of political offenses via Article 8 of Italian Penal Code).

254. See *supra* notes 107-10 and accompanying text (discussing purpose of Article 8 of Penal Code of 1930).

255. CATELANI & STRIANI, *supra* note 12, at 216-17. The legislative history of Article 8 of the Penal Code reveals that subjectively motivated offenses were considered political crimes because the goal of the perpetrator was to offend political interests of the State. *Id.* To protect the collective interest of the State, the drafters of the Penal Code recognized that these acts needed to be repressed. *Id.* Thus, Article 8 really served a narrow purpose. *Id.* The Italian courts in adopting Article 8 to define political offenses appear to have misconstrued the article's purpose, expanding the definition in a way never really contemplated by the drafters. *Id.* at 216; see, e.g., *In re Koronakis*, *supra* note 121 and accompanying text (describing how Italian government granted Greece's extradition request for Greek national who attempted to destroy Greek Ministry of Justice by placing time bomb near building). In *Al-Jawary*, the Court of Cassation notes that this definition has been curtailed by recent jurisprudence. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, No. 767, at 15.

256. CATELANI & STRIANI, *supra* note 12, at 216-17.

257. See *supra* note 241 and accompanying text (describing various conventions limiting political offense exception).

258. See *Time's Labor Lost*, METROPOLITAN, June 2, 1992, at 14 (describing machine gun attack by Palestinian terrorists at Rome's Fiumicino Airport which killed innocent travelers including 10-year old Natasha Simpson); see also Extradition Hearing, *supra* note 49, at 47 n.34 (describing decision by Chambre d'Accusation of French Court of Appeals to uphold extradition of Linaza-Echevarria, reputed Basque

offense doctrine originated in Europe to protect political dissidents from persecution in their homelands where freedom of expression was oppressed.²⁶⁰ In today's democratic societies, a nation cannot tolerate individuals who revert to violence in order to bring attention to their cause.²⁶¹ More importantly, allowing terrorists to seek protection under the guise of the political offense doctrine undermines the very purpose for which the principle first emerged.²⁶²

Unlike the decisions rendered in *Gomez Ces* and *Van Anraat*, which relied on specific provisions of international conventions binding both Italy and the respective requesting states, the Court of Cassation in *Al-Jawary* revealed that the present case was not governed by a convention, but by principles of international law.²⁶³ The Court reasoned that the evolution of inter-

terrorist sought by Spain for murders of alderman and six Spanish Civil Guards). The fugitive alleged that the crimes were politically motivated, but the French court rejected the claim on the grounds the offenses were too serious to be covered by the non-extradition exception. *Id.*

259. CATELANI & STRIANI, *supra* note 12, at 211. As one Italian legal writer has noted, terrorism may not be considered a political act so as to enjoy protection under Article 8 of the Italian Penal Code because terrorism is not an activity protected by the Italian Constitution. *Id.* Terrorism is a crime directed at innocent persons and, as such, requires punishment for it violates the Italian Penal Code. *Id.* By analogy, anything that violates the Penal Code also violates the Constitution, and in a democratic society, political violence cannot be tolerated. *Id.* at 211-12. See Sapiro, *supra* note 56, at 663 (noting that those who promote political change by violent means must remain accountable for their actions that injure rights of others).

260. See *supra* notes 52-56 and accompanying text (discussing how political offense doctrine originated).

261. See *supra* note 69 and accompanying text (noting Toensing statement that terrorism may not be tolerated in today's democratic societies).

262. Sapiro, *supra* note 56, at 663. The doctrine developed to protect the lives of political activists. *Id.* Terrorists, on the other hand, often engage in ruthless acts directed primarily to injure and/or kill. *Id.* To extend protection to such individuals would oppose the spirit of the political offense doctrine. *Id.*; see Extradition Hearing, *supra* note 49, at 51 (stressing that it is "wholly unlikely that a study of 19th century diplomatic sources would corroborate the view that the 'political offense' exception was intended as a recognition of some absolute and unqualified 'right to rebel'").

263. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, No. 767, at 1; Interview with Mary Ellen Warlow, Senior Counsel for International Law Enforcement, U.S. Department of Justice, Office of International Affairs, Criminal Division, in Rome, Italy (July 29, 1992) [hereinafter DOJ Interview]; see *In re Gomez*, Judgment of Mar. 30, 1989, Corte di Cassazione, in Gius. Pen. II at 395 (holding based on European convention binding both Italy and Spain); *In re Van Anraat*, Judgment of Jan. 23, 1990, Corte di Cassazione, Sez. I Penale, Sentence No. 3329 (holding premised on both principles of Geneva Convention and on recognized view of civilized nations that mustard gas is a lethal weapon). *Van Anraat* introduced the

national conventions made it clear that the notion of a political offense must coincide with the need to protect human values.²⁶⁴ Thus, the issue of denying political offense protection to terrorists who had committed grave serious acts emerged as a principle of international law that now binds the Italian courts via Article 10 of the Italian Constitution.²⁶⁵ To comply

central argument advanced by the court in *Al-Jawary* that Italy is bound to adhere to generally recognized principles of international law. DOJ Interview, *supra*.

The reasoning adopted by the court was espoused by Dottore Arico and co-counsel Dottore Merluzzi at oral arguments. DOJ Interview, *supra*. Both attorneys were selected to represent the U.S. Department of Justice throughout the course of the *Al-Jawary* proceedings. *Id.* According to Dott. Arico, under current European jurisprudence, if a terrorist act is committed between nations of the European Community [hereinafter EC], European Conventions (such as Strasbourg Convention on Terrorism of 1977) would control. *Id.* Thus, as made clear in *Gomez*, Spain and Italy were bound to adhere to the principles set forth in the Strasbourg Convention. *Id.* A problem arises, however, where one of the requesting states is not a member of the European Community. *Id.* In such a case, as *Al-Jawary* demonstrates, applying a different standard solely on the basis of a nation's membership in a class creates a disparity. *Id.* Those nations that were part of the European Community would be bound to extradite an individual who had committed acts similar to *Al-Jawary*, but those that were not members would have to seek extradition on separate grounds. *Id.* The absurdity of such a rule is apparent, particularly in light of the fact that the EC is a closed class within which new members, such as the United States, cannot enter. *Id.* As Dott. Merluzzi noted, applying the rule strictly would give those terrorists who committed an act outside the EC "a license to kill." Interview with Dott. Merluzzi, Associate with Studio Legale Arico, in Rome, Italy (July 28, 1992) [hereinafter Merluzzi Interview]. To support their positions, the Italian counsel cited *Piperno*, *supra* note 147, and the detrimental impact releasing Mr. Piperno would have had in the event France refused to extradite the terrorist. Merluzzi Interview, *supra*. The arguments presented by counsel representing the United States are consistent with the civil law mentality among European nations that there should be conformity with the laws. *Id.* In civil law countries, consistency is very important. DOJ Interview, *supra*. In the United States, disparate results are accepted. *Id.* Thus, if the United States has a treaty with Italy, but a different one with Germany, each case brought before a U.S. court will be dealt with differently and in accordance to the relevant treaty. *Id.*

264. See *supra* note 242 and accompanying text (noting that human values must be protected from grave transgressions of political offenders).

265. See *supra* note 100 and accompanying text (discussing purpose of Article 10 of Italian Constitution). Dott. Merluzzi noted that Art. 8 of the Penal Code is an internal code which defines a political offense in a general fashion. Merluzzi Interview, *supra* note 263. The Constitution, as the supreme law of the land, provides that international conventions will dictate what constitutes a political offense. *Id.* When there is a clash between Article 8 of the Penal Code and the Italian Constitution, the latter must govern. Merluzzi Interview, *supra* note 263. See BASSIOUNI, INTERNATIONAL TERRORISM, *supra* note 23, at 434 (discussing how "[o]ffenses against the Law of Nations . . . by their very nature affect the world community . . . [and] [a]s such, cannot fall within the political offense exception because . . . they are in derogation to the 'laws of mankind' in general and international criminal law in particular").

with international norms,²⁶⁶ Italian courts will balance various factors to determine what constitutes a political offense.²⁶⁷ The Court of Cassation therefore did not undermine the Italian Penal Code, but upheld general principles of international law.²⁶⁸ The Court's approach set new precedent, departing from the traditional Italian mode of defining a political offense and, at the same time, recognizing that the complex issue has achieved international law status.

B. *In re Al-Jawary: Conforming Italian Law to United States Practice*

The balance of circumstances approach adopted by the Court of Cassation mirrors current U.S. practice regarding application of the political offense exception. In the United States, courts adopt a proportionality test and examine the totality of the circumstances to determine whether an offense is political.²⁶⁹ In *Al-Jawary*, the Court of Cassation similarly chose to extradite the fugitive after analyzing various circumstances.²⁷⁰ The Court concluded that these factors, when viewed together, precluded the act from attaining political offense status.²⁷¹ The approach utilized by the Italian Court

266. See MURPHY, *supra* note 5, at 56-57. The Committee on International Terrorism of the International Law Association, composed of international law scholars and practitioners, recently declared that certain acts, regardless of political motivation, are so reprehensible that they must be suppressed. *Id.* at 57. The statement "is derived from Principle I of the Principles of International Law Recognized in the Charter and Judgment of the Nuremberg Tribunal, adopted by the United Nations General Assembly in 1950 . . . [and] applies to crimes . . . against humanity . . ." *Id.* "It is suggested that the underlying principle, stated here, is applicable even more broadly" [thus providing additional support for the prevailing international view that grave acts should not be protected by the political offense exception]. *Id.*

267. See *supra* note 243 and accompanying text (discussing various principles in Italian Constitution that Italian court will seek to protect).

268. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, No. 767, at 15.

269. See *supra* notes 75-77 and accompanying text (noting that common crime will be deemed political offense if it were committed during severe, violent political conflict and there was direct, substantial and rational connection between offense and that conflict); see also *Piperno* decision, *supra* note 147 and accompanying text (reflecting how Italian decision conforms to growing trend in Europe to recognize that serious ruthless acts directed against innocent civilians will not be protected by political offense exception).

270. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, No. 767, at 18-19.

271. *Id.*

conforms itself to United States practice on the subject.²⁷² Any other interpretation of the political offense provision would have violated underlying concepts of reciprocity in the U.S.-Italy Extradition Treaty.²⁷³

1. U.S.-Italian Interpretation of the Political Offense Doctrine

The Court of Cassation rejected Al-Jawary's defense that extradition should have been denied,²⁷⁴ although a textual interpretation of Article V of the U.S.-Italy Extradition Treaty would appear to exempt the appellant from extradition.²⁷⁵

272. See U.S. Memo, *supra* note 71, at 11-12. The U.S. Department of Justice noted that

[u]nder U.S. jurisprudence, Al-Jawary would fail to establish that the offenses with which he is charged are political offenses. The asserted political motivation of the offenses would not in itself be sufficient, and the other circumstances that would be considered - the fact that the immediate and overwhelmingly significant consequence of the offenses would have been death, injury and destruction of property and not the achievement of the Black September Organization's declared objective of overthrow of the State of Israel; the fact that the probable victims would be innocent passersby who were completely uninvolved in the political struggle purportedly at issue; the fact that offenses were not committed as part of any violent political struggle against the State of Israel but rather represented the exportation of such violence to a third country - would preclude the conclusion that the relation between the asserted political objective of influencing the resolution of a conflict between Palestinians and the State of Israel and the extraordinarily violent yet indirect method chosen to achieve that objective represented a sufficient, rational connection to merit application of the political offense doctrine.

Id.

273. *Id.* at 6. In a reciprocal situation, if Italy had requested the extradition of an individual for similar offenses, "application of United States jurisprudence would not prohibit extradition on the basis of the political offense doctrine." *Id.*

274. See Brief for Appellant, Prof. Giuseppe Gianzi, at 2-3, Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sez. Pen. I/a, No. 767 [hereinafter Gianzi Brief]. Al-Jawary argued that extradition should have been denied due to the political motive inherent in the act. *Id.* In fact, defense counsel argued that although a political motive was never asserted by the appellant, such a motive "would be hypothetically recognizable and traceable back to the well-known conflict between Arabs and Israelis." *Id.* In the alternative, the "only exception to this rule would be in the case of an offense described in paragraph 2 [of Article V] where the consequences of the offense were or could have been grave." *Id.* at 8-9; U.S. Memo, *supra* note 71, at 2.

275. See Gianzi Brief, *supra* note 274, at 8-9. Al-Jawary's defense counsel argued that a literal interpretation of Article V, ¶ 2 of the Extradition Treaty reveals that "two types of crimes (including attempts to commit such offenses) are presumptively non-political: (1) a grave offense directed against a Head of State or Government or

The Court's reasoning, however, is consistent with the U.S. interpretation of Article V of the U.S.-Italy Extradition Treaty.²⁷⁶ At the time that the U.S.-Italy Extradition Treaty was negotiated, the U.S. delegation²⁷⁷ raised concerns that persons charged with serious terrorist offenses should not be exempt from extradition.²⁷⁸ Italy assured the United States that violent crimes committed by terrorists would be precluded from political offense consideration if they were directed against a

his family, or (2) a grave offense with respect to which both Parties have an obligation under a multilateral international agreement to extradite or prosecute." See U.S. Memo, *supra* note 71, at 3 n.2. As noted earlier, *supra* note 231, the Court dismissed the government's contention that the Montreal Convention was applicable, thereby foreclosing any further discussion of issue number two. *Id.* The present act did not fall into the first category either. As Professor Gianzi argued,

the notion of the gravity of the consequences which the offense has caused or could have caused in no way represents a limit of a general nature to the principle of non-extraditability for political offenses, but represents only an added restriction, inasmuch as it limits more specifically the range of offenses which, because of their nature, are deemed by the Treaty as exceptions to that principle.

Gianzi Brief, *supra* note 274, at 10.

In other words, defense counsel argued that paragraph two establishes two sub-categories for which the gravity of the crime should be assessed, and Al-Jawary's offenses could in no way be included in the sub-categories revealed *supra*. *Id.* Thus, by stressing the gravity of the crime, the Court has conferred to paragraph two a power it does not have. *Id.* That is, the Court's interpretation "downgrades any political offense to the level of common crime on the basis of the gravity, or lack thereof, of the consequences it caused or that could have been caused." *Id.* at 11. *But see* U.S. Memo, *supra* note 71, at 3 (arguing that this interpretation is erroneous because Article V does not preclude an examination of various circumstances which may lead to conclusion that politically motivated offense has predominant character of common crime rather than political one). Specifically, the U.S. argues that

simply because paragraph 2 . . . provides, for two specified categories of offenses, *particular* guidance regarding certain circumstances which should *presumptively* establish that the offense has the predominant characteristic of a common crime, it does not then follow that consideration of those or any other appropriate circumstances must necessarily be excluded with respect to any other offenses.

Id.

276. See U.S. Memo, *supra* note 71, at 3-4. This interpretation is premised on the intentions of the Parties in negotiating the Treaty, as well as representations made to the United States during treaty negotiations concerning the way in which Article V would be applied. *Id.*

277. *Id.* at 4. Representatives Mary Jo Grotenrath, Associate Director of the Office of International Affairs, and Murray Stein, Senior Counsel of the Office of International Affairs, Criminal Division, U.S. Department of Justice, were instrumental in negotiating the treaty. *Id.*

278. *Id.* at 4.

party withdrawn from the political conflict.²⁷⁹ Al-Jawary's act falls within this category of offenses, despite the appellant's contention that the bombs were not intended to detonate, because the bombs were planted in New York and were aimed at innocent civilians not associated with the Arab-Israeli conflict.²⁸⁰

279. U.S. Memo, *supra* note 71, at 4. The U.S. decision to revert to assurances made during treaty negotiations is consistent with Articles 31 and 32 of the Vienna Convention. Vienna Convention on the Law of Treaties, U.N. Conference on the Law of Treaties, U.N. Doc. A/CONF. 39/27, *reprinted in* 8 I.L.M. 679 (1969) [hereinafter Vienna Convention]. Article 31 states

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty . . .

8 I.L.M. at 691-92.

Article 32 provides that

[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstance of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Id. at 692.

See Kearney and Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 518 (1970) (noting that Foreign Offices will take into consideration preparatory work and circumstances of conclusion of treaties when faced with problems of treaty interpretations); M. BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 82 (1985) (describing how negotiations and preparatory work are integral part of surrounding circumstances which courts often rely on to ascertain intentions of parties). *But see* International Law Commission, *Draft Articles on the Law of Treaties*, 61 AM. J. INT'L L. 263, 354 (1967) (discussing how Institute of International Law has adopted textual approach whereby "le texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties") (the text is, with rare exceptions, the only and most recent expression of the parties' common will/intent) (translation by Comment Author). The U.S. Senate has yet to ratify the Vienna Convention on the Law of Treaties, but since 1973 the Department of State has considered the convention as a codification of customary international law and "as authoritative with respect to the executive's treatment of international agreements issues arising after . . . 1969." SWEENEY, *supra* note 6, at 993-94.

280. See Gianzi Brief *supra* note 274, at 5-7. None of the three automobiles did explode, a fact defense counsel argues leads to only one reasonable conclusion: the devices had never been set to explode. *Id.* at 5-6. *But see* U.S. Memo, *supra* note 71, at 11 n.9. (arguing defense presented is contrary to evidence in the case). In fact, the investigation conducted by the FBI revealed a

careful, painstaking plan to construct and place not one but three powerful explosive devices, including: the use of aliases; the rental of three cars; the

More importantly, the Official Technical Analysis (the "Analysis")²⁸¹ prepared by the United States following the U.S.-Italy Extradition Treaty negotiations and submitted to the Senate Committee on Foreign Relations to approve the Treaty, corroborates the approach adopted by the Court of Cassation.²⁸² The Analysis, similar to the Court's decision to refuse to elevate Al-Jawary's act to political offense status due to its inherent ruthlessness, states that acts of terrorism will not be considered political offenses.²⁸³ Any other approach by the Court of Cassation would have amounted to a derogation of Italy's obligations set forth in the Treaty. The decision thus conforms to interpretations adopted by both parties during negotiations of the U.S.-Italy Extradition Treaty.

The decision rendered by the Court of Cassation also satisfies the underlying principle of reciprocity in the U.S.-Italy

purchase of the components for the bomb; the movement by Al-Jawary from one hotel room to another; the construction of the bombs in those hotel rooms; the expert examination of one of the bombs indicating that the timing mechanism was advancing towards the time set for detonation . . . and the immediate flight of Al-Jawary from the United States once all the bombs had been placed.

Id.

The evidence does not suggest an "innocuous attempt to [merely] publicize the cause of the Black September Organization" to which Al-Jawary belonged. *Id.* More so, in the early 1970's, during the same period that the alleged acts occurred, "the modus operandi of the Black September Organization was the commission of actual, and not feigned, acts of terrorism, including assassinations, airplane hijackings, and bombings." *Id.*

281. See *Extradition Treaty with Italy*, S. REP. No. 98-33, 98th Cong., 2d Sess. 2 (1984).

282. See U.S. Memo, *supra* note 71, at 5. The Treaty Analysis provides that [p]aragraph 2 is designed to assure, to the greatest extent possible, that acts of terrorism, particularly those covered by multilateral treaties, such as the aircraft hijacking conventions, and those against the heads of state or government of the Parties and their families, will not be considered as political offenses under the Treaty. It provides that terrorists and others charged or found to have acted without regard to the physical safety of the general public cannot avoid extradition by claiming that their criminal acts were political offenses.

Id.

The United States cites this provision as evidence that the circumstances of the gravity of the offense and the endangerment of public safety need not only be considered within the confines of acts committed against heads of state or those covered under certain multilateral treaties, but that consideration of the gravity of a crime must be incorporated to "limit the applicability of the political offense doctrine to terrorist crimes generally." *Id.*

283. *Id.*

Extradition Treaty.²⁸⁴ Article II, paragraph 1 of the U.S.-Italy Extradition Treaty provides that an offense shall be extraditable if it is punishable under the laws of both countries.²⁸⁵ Thus, in a similar situation, if Al-Jawary had committed the bombing campaign against Italian nationals and had been brought before a U.S. magistrate to assess the political nature of his crime subsequent to an Italian extradition request, U.S. courts applying a totality of the circumstances approach similarly would have concluded that Al-Jawary's act was not political and therefore extraditable.²⁸⁶ In assessing the relative merits of whether a common crime is a political offense, U.S. courts examine the totality of the circumstances of the case²⁸⁷ to determine if the relation between the political purpose and the offense is disproportionate to the gravity of the crime.²⁸⁸ In the present scenario, assuming the acts were committed in Italy and Al-Jawary's purported objective were linked to the Black September Organization's declared objective of overthrowing the State of Israel,²⁸⁹ a U.S. court would examine the nature of the act, the context in which it was committed, and the status of those harmed.²⁹⁰ Assessing these facts, a U.S. court would conclude that because Al-Jawary placed three bombs in an area removed from the Arab-Israeli conflict and directed at innocent civilians uninvolved in the political struggle at issue, the acts were not proportionate to the objective sought.²⁹¹ The analysis would conform to the growing international trend that seeks to remove acts aimed at innocent civilians from acquiring protection under the political offense exception.²⁹²

284. U.S.-Italy Extradition Treaty, *supra* note 10, at art. II, ¶ 1, 24 I.L.M. at 1527.

285. *Id.*

286. See U.S. Memo, *supra* note 71, at 6, 11 (noting that in reciprocal situation U.S. court would similarly conclude Al-Jawary's act was extraditable).

287. See *supra* notes 75-79 and accompanying text (outlining various factors considered by U.S. courts in assessing political nature of crime).

288. U.S. Memo, *supra* note 71, at 9.

289. See *supra* note 272 and accompanying text (discussing declared objective of Black September Organization).

290. See *supra* note 85 and accompanying text (discussing various factors enumerated by court in *In re Doherty*).

291. See *supra* note 272 and accompanying text (observing that under U.S. jurisprudence, Al-Jawary would fail to prove his act constituted political offense).

292. See *supra* notes 75-78 and accompanying text (noting that common crimes

2. *In re Al-Jawary* Reveals the Importance of Adhering to Legal Channels in the Extradition of Terrorists

The United States encountered several obstacles in its efforts to apprehend Al-Jawary.²⁹³ Despite these obstacles, the United States never resorted to irregular measures to seize Al-Jawary. The United States' success in the present case may be attributed to both the U.S. and Italian officials who recognized a need to uphold the law and strengthen future relations between the two nations.²⁹⁴

will be deemed political offenses only if committed during severe, political conflict and there is direct, substantial and rational connection between offense and that conflict).

293. Author Internship with Senior Counsel for International Enforcement, U.S. Department of Justice, Rome, Italy, Summer 1992. In addition to the apparent procedural and substantive problems that the United States encountered as it sought to deal with a foreign judiciary, language barriers, and a long-established tradition that appeared to exempt Al-Jawary from extradition, the U.S. faced political obstacles as well. *Id.* For one, as became evident in the Achille Lauro affair in 1985, Italy had traditionally maintained good relations with the PLO, a factor which was instrumental in the Italian government's decision to permit Abu Abbas to leave Italy following a flawless military operation conducted by the United States to apprehend the terrorist. Martin Address, *supra* note 3, at 531-34. Similar to the Achille Lauro case, the United States utilized intelligence information and precise investigative techniques to present the Italian government with a solid basis for extraditing Al-Jawary, but there were no assurances the request would be successful. *See supra* note 205 and accompanying text (describing U.S. adherence to art. X of U.S.-Italy Extradition Treaty). Above all, Al-Jawary's successful extradition rested entirely within the hands of Judge Corrado Carnevale, presiding Judge of the Court of Cassation who is notorious for releasing convicted members of the Italian mafia. *See* Giuseppe D'Avanzo and Giovanni Marino, *Carnevale Libera Sei Ergastolani: È L'ennesima Vergogna . . .* LA REPUBBLICA, Oct. 30, 1991, at 1 (describing Judge Carnevale's decision to release six mafiosi who had been sentenced by Corte d'Assise of Naples as utterly disgraceful and an additional affront to the justice system which has seen continued release of mafiosi brought before Judge Carnevale).

294. Author Internship with Senior Counsel for International Law Enforcement, U.S. Department of Justice, Rome, Italy, Summer 1992. The decision to utilize legal channels, however, contrasts sharply with that adopted by United States officials in *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992). In *Alvarez*, government-hired bounty hunters abducted Humberto Alvarez-Machain from his clinic in Mexico so that he could stand trial in the United States for his alleged involvement in the death of DEA Special Agent Enrique Camarena-Salazar. *United States v. Alvarez-Machain*, 112 S. Ct. 2188; *see generally* Abramovsky, Catch and Snatch Policy, *supra* note 27, at 165-70 (describing circumstances of Camarena's kidnapping). Camarena had been assigned to the Drug Enforcement Agency (DEA) in Guadalajara, Mexico and had infiltrated the Guadalajara drug cartel controlled by Rafael Caro-Quintero. Abramovsky, Catch and Snatch Policy, *supra* note 27, at 160. In retaliation for a drug raid conducted at Agent Camarena's urging, the DEA agent was abducted by Mexicans loyal to Caro-Quintero, tortured, and murdered. *Id.* A five year investigation conducted by the DEA linked Dr. Alvarez-Machain as an accomplice to the murder.

The Italian Court of Cassation relied on international law

Id. at 161. Because of Mexico's long-standing hostility to extradition and widespread corruption of Mexican government officials, the DEA and Justice Department concluded that the arrest of the various members involved in the murder could not be accomplished through extradition. *Id.* at 161.

Similar to the United States and Italy, Mexico and the U.S. government are parties to several bilateral agreements to combat narcotics trafficking. Abraham Abramovsky, *Transfer of Penal Sanctions: An Endangered Species?* 24 *VAND. J. TRANSNAT'L L.* 449, 451 (1991). These bilateral agreements include the Extradition Treaty of 1978, a Mutual Legal Assistance Treaty signed in 1987, and an Agreement for Cooperation and Combatting Narcotics Trafficking and Drug Dependency in 1989. *Id.* at 452. Rather than utilizing the appropriate legal channels established by these agreements to apprehend criminals and request Dr. Alvarez-Machain's extradition, the United States chose to bypass extradition procedures entirely. *Alvarez*, 112 S. Ct. at 2188. Mexico has formally demanded Dr. Alvarez-Machain's return and has stated that he would be prosecuted for his offense. *Id.*

Though the U.S. action infringed upon Mexican sovereignty and violated international law, the U.S. Supreme Court condoned the action, holding that a criminal defendant abducted to the United States from a nation with which the United States has an extradition treaty does not acquire a defense to jurisdiction in U.S. courts. *Alvarez*, 112 S. Ct. at 2188. According to the majority opinion, the extradition treaty with Mexico merely "creates an optional method of obtaining jurisdiction over alleged offenders, and that the parties silently reserved the right to resort to self help whenever they deem force more expeditious than legal process." *Id.* at 2199. The decision invites all nations with whom the United States has negotiated an extradition treaty to disregard the legal principles incorporated in the bilateral agreements and to revert to self-help whenever they deem it necessary. *Frontier Justice, Big Time*, *BOSTON GLOBE*, June 17, 1992, at 18 (stating that "[f]or the rule of law, represented by carefully negotiated extradition treaties designed to balance individual rights with national interests, the court has foolishly substituted international vigilantism").

The Supreme Court's ruling reflects an illiberal approach to international law and establishes a precedent that will negatively impact foreign relations. Linda Feldman, *High Court Says U.S. Can Prosecute Mexican Doctor*, *CHRISTIAN SCI. MONITOR*, June 17, 1992 at 1. "The sad aspect of this ruling . . . is that it shows that the Supreme Court views international law as being 'out there,' and that it views the U.S. as not being an integral part of the world - particularly at a time when the U.S. is touting itself as an architect of a 'new world order' under which respect for law is vital." *Id.* See *contra* *The Paquete Habana*, 175 U.S. 677 (1900) (holding by U.S. Supreme Court that international law is part of our law). Justice Stevens summed up the potential impact of the majority's holding by declaring, "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself." *Alvarez*, 112 S. Ct. at 2206, quoting 2 *The Complete Writings of Thomas Paine* 588 (P. Foher ed. 1945).

Mexico's immediate response to the decision included a refusal to accept aid from the United States to carry on its part of the drug war, and undoubtedly will impede future relations. *Mexico is Upset: Refusing U.S. Drug Aid Understandable, Regrettable*, Editorial, *HOUS. CHRON.*, July 28, 1992, at A12. The greatest insult arising from the Supreme Court holding rests with the decision rendered by U.S. District Judge Edward Rafeedie, who on remand, dismissed the case against Dr. Alvarez-Machain for lack of evidence. *No End to the Mexican Kidnap Case*, Editorial, *N.Y. TIMES*, Jan. 2, 1993, at 20. Judge Rafeedie found the evidence against Dr. Alvarez-Machain so

to support its departure from a tradition that has inhibited efforts to combat international terrorism in Italy.²⁹⁵ Al-Jawary's surrender by Italian authorities was vital to the United States because the fugitive had been on the Federal Bureau of Investigation's most wanted list for eighteen years and his arrest in Rome coincided with the outbreak of the Gulf War in Iraq.²⁹⁶ As a result, the U.S. Justice Department worked feverishly to obtain Al-Jawary's extradition to assure that the Italian courts would not deny them the opportunity to prosecute the fugitive for his offenses.²⁹⁷ To accomplish its goal, the Justice Department introduced evidence of the treaty, as well as prior negotiations between U.S. and Italian representatives to refute Al-Jawary's defense that his extradition was barred by a literal interpretation of the treaty text.²⁹⁸ The Italian Court therefore did not resort solely to the treaty language to address the issue in Al-Jawary's extradition.²⁹⁹ If the Court of Cassation had adopted a literal interpretation of the treaty, it would have dismissed the U.S. argument. Instead, the Court permitted the U.S. government to submit evidence of the treaty negotiations

flimsy that it amounted to "the wildest speculation" and dismissed the case without even requiring evidence from defense counsel. *Man is Convicted in Drug Agent's Torture Death*, N.Y. TIMES, Dec. 22, 1992, at A18.

295. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Corte di Cassazione, Sezione Pen. I/a, Sentence No. 767, at 15-17. Unlike the Italian Court of Cassation, the U.S. Supreme Court ignored international law in *Alvarez* in order to circumvent United States obligations under its treaty with Mexico. *Alvarez*, 112 S. Ct. 2188; Charles L. Hobson, *The Treaty was Not Violated*, NAT'L L.J., July 6, 1992, at 15. "[T]he United States-Mexico treaty makes kidnapping itself a crime for which extradition must be granted unless the kidnapper is prosecuted domestically. There is no exception for abductors who work on a federal stipend." *Id.*

296. REUTERS, *supra* note 194, at 5.

297. Author Internship with Senior Counsel for International Law Enforcement, U.S. Department of Justice, Rome, Italy, Summer 1992.

298. See *supra* note 275 and accompanying text (discussing defense presented by Al-Jawary's defense counsel). The United States counter-argued that prevailing jurisprudence governing application of the political offense doctrine to terrorist crimes precluded Al-Jawary's act from being deemed a political offense. U.S. Memo, *supra* note 71, at 1-2.

299. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Sez. Penale I/a, Sentence No. 767, at 1. In *Alvarez*, however, the United States argued that the treaty language was determinative and the Supreme Court confined its decision to an analysis of the treaty text. *Alvarez*, 112 S. Ct. at 2194 n. 11 "[T]he Government's argument is not that the Treaty authorizes the abduction . . . ; but that the Treaty does not *prohibit* the abduction." (emphasis added). The contrasting approaches achieved different goals, but they undermine the credibility of the arguments presented by the United States government in each case.

regarding the exclusion of terrorist acts from the political offense doctrine.³⁰⁰ By doing so, the Court of Cassation was able to highlight the growing trend in international law to diffuse the political offense provision.³⁰¹

Ultimately, *Al-Jawary* signified an important new step towards strengthening cooperation with Italy.³⁰² The development of U.S. legal relations with its allies should be of primary interest if the United States is to achieve continued success in the fight against narcotics traffickers and terrorists.³⁰³ Inevitably, loopholes will exist as two nations try to implement an extradition treaty,³⁰⁴ but these defects can be remedied through

300. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Sez. Penale I/a, Sentence No. 767, at 1; U.S. Memo, *supra* note 71, at 4.

301. Judgment of Feb. 17, 1992 (*In re Al-Jawary*), Sez. Penale I/a, Sentence No. 767, at 15-17.

302. *But see Alvarez*, 112 S. Ct. at 2188. *Alvarez* raises serious questions as to whether the United States seeks to develop its legal relations with its allies or merely preserve its interests without any regard for the consequences of its actions. *See supra* note 294 and accompanying text (discussing various reactions to U.S. Supreme Court decision in *Alvarez*).

303. Martin Address, *supra* note 3, at 539. "Circumvention of our treaties reduces trust on the part of our allies and fosters the belief that the treaties themselves lack significance. I believe that the best interests of the United States lie in developing its relations with its allies and strengthening its use of legal means, including extradition and mutual assistance." *Id.*

304. LAMBERT, *supra* note 5, at 249; *see* Antiterrorism Act of 1986, *supra* note 2, at 34 (discussing inherent problems presented by probable cause, a concept unique to U.S. legal system that is perplexing to most foreign law enforcement and judicial authorities). The inherent problems have been evident in U.S.-Italian relations. *Antiterrorism Act of 1986*, *supra* note 2, at 34. The Italian judicial authorities have had considerable difficulty understanding the justification for such a standard and realizing that an extradition request forwarded to the United States will not be granted unless the U.S. Magistrate is provided with sufficient documentation to demonstrate probable cause that 1) a crime has been committed; and 2) the individual sought has committed the act for which he or she is requested. Turone, *supra* note 25, at 114. Under Italian law, a less stringent standard of reasonable basis ("base ragionevole per credere") is adopted. *Id.* at 115. Italian authorities continue to be frustrated because Article 10, para. 3(b) of the U.S.-Italy Extradition Treaty, in order to facilitate extradition and bring the practice under the Treaty in line with European extradition practice, provides that with respect to persons charged with crimes in Italy, Italy need only submit a summary of the relevant evidence to provide a reasonable basis. Treaty Analysis, *supra* note 32, at 5. The term, however, was adopted only because "probable cause" has no legal meaning in Italian jurisprudence, and the change in terminology was not intended by U.S. authorities to change U.S. extradition practice requiring probable cause. *Id.* In an effort to reconcile the U.S. prerequisite for probable cause and identify and solve other problems presented both by the U.S.-Italy MLAT and Extradition Treaties, the U.S. Department of Justice and the Italian Ministry of Grace and Justice conducted a series of consultations in Rome,

continued cooperation and a greater effort towards understanding each nation's legal system.³⁰⁵ Bypassing legal channels and resorting to illegal methods of apprehension is risky and ultimately undermines the sanctity of extradition treaties.³⁰⁶

C. Al-Jawary and the Future of the Political Offense Doctrine in U.S.-Italian Relations

The Court of Cassation's decision in *Al-Jawary* does not foreclose the political offense controversy, but reflects a partial solution to the conflict between Article 8 of the Penal Code and Articles 10 and 26 of the Italian Constitution.³⁰⁷ *Stare decisis* does not bind Italian courts.³⁰⁸ Future courts may there-

Italy in the summer of 1992. Consultations Between the United States and Italy Concerning Mutual Legal Assistance Treaty in Criminal Matters (attended by Comment Author June 5, 1992 and June 8, 1992). Additional limitations on the obligation to extradite often incorporated in bilateral treaties include a prohibition of extradition of a requested state's nationals, double criminality provisions (alleged offender can be extradited only if the acts alleged constitute a crime in both countries), safeguards against double jeopardy, and statute of limitations exceptions. MURPHY, *supra* note 5, at 44. Though these limitations do not pose problems peculiar for extraditing terrorists, they demonstrate "why extradition often proves a cumbersome and time-consuming process for the rendition of international terrorists." *Id.*

305. Mario Pisani, *Rapporti Giurisdizionali con Autorità Straniere*, in *L'Indice Penale* 398 (1984) (discussing how 1983 U.S.-Italy Extradition Treaty of 1983 replaced 1973 treaty between two nations). By obtaining a greater understanding of foreign legal systems, the United States has been able to incorporate new principles and remedy the defects of past extradition treaties. *See, e.g.*, MURPHY, *supra* note 5, at 43 (describing U.S. abandonment of out-dated list approach in formation of new U.S.-Costa Rica Extradition Treaty); Epps, *supra* note 60 and accompanying text (noting how United States and Great Britain, following successful invocation of political offense doctrine by several IRA members in United States, agreed to new supplementary extradition treaty to virtually eliminate political offense exception).

306. Abramovsky, *Catch and Snatch Policy*, *supra* note 27, at 153. "[T]he United States has a greater interest in preserving and enforcing treaties of extradition and mutual assistance in criminal matters than it has in acquiring jurisdiction over defendants by means of abduction." *Id.*

307. Merluzzi Interview, *supra* note 263.

308. *See* Marco Boschi, *Il Ruolo Della Corte di Cassazione*, in 67 *QUADERNI DELLA GIUSTIZIA* 40 (1987). ["È preferibile il nostro sistema che, escludendo un'applicazione automatica del principio *stare decisis*, consente positive evoluzioni giurisprudenziali volte ad evitare la cristallizzazione di interpretazioni normative superate da nuove realtà socio-economiche" (Our [legal system] is preferable because by excluding an automatic application of the principle of *stare decisis*, it permits the positive evolution of the law, thereby precluding the crystallization of normative interpretations that become replaced by new socio-economic realities) (translation by Comment Author). *Id.*

fore depart from the approach set forth in *Al-Jawary*. The decision, however, sets an important precedent in Italian law.³⁰⁹ The precedent, coupled with the Court's reliance on preceding decisions rendered by the Court of Cassation in *Gomez Ces* and *Van Anraat*, suggests that *Al-Jawary* will play a key role in future decisions.³¹⁰

Al-Jawary will assist U.S.-Italian efforts to combat terrorism. The decision rendered by the Court of Cassation presents an approach quite different than that expressly provided in Article V of the U.S.-Italy Extradition Treaty because the treaty fails to address the issue of terrorist crimes.³¹¹ Amending the treaty to account for the Court of Cassation's decision, however, would be difficult to accomplish.³¹² Furthermore, an amendment would be impractical as it would only serve to confine future courts to follow a proscribed set of guidelines.³¹³ Removing the political offense provision in its entirety does not provide a satisfactory solution either, considering many

309. See Merluzzi Interview, *supra* note 263. As Dott. Merluzzi noted, the Court granted Al-Jawary's extradition even though no one was injured in the attacks. *Id.* Had people been injured, some may have argued that fact was a controlling factor. *Id.* No one, however, was injured, thus reflecting how important the Court felt it was to set down new law. *Id.* Setting new law is very uncommon for Italian courts and the Court makes it clear that the political offense provision cannot be utilized by terrorists to protect themselves from prosecution after having committed, or attempted to commit, terrorist acts against innocent civilians. *Id.*

310. *Id.* at 263.

311. See MURPHY, *supra* note 5, at 98. As Murphy makes clear, "[t]he treaty . . . does not come to grips with the problem most relevant to the prosecution and punishment of international terrorists, namely the political offense exception." *Id.* "In addition, "[n]owhere does the treaty provide for the exclusion of terrorist offenses from the political offense category." *Id.*

312. See La Pergola, *supra* note 100, at 603 (discussing how constitutional amendments are novelty in Italy). See Merluzzi Interview, *supra* note 263 (suggesting treaty should be amended to get future courts to adhere to decision set forth in *Al-Jawary* and, more importantly, to serve as catalyst to European Community to recognize importance of decision). *Id.* According to Dr. Merluzzi, an amendment would allow member states of the European Community to adopt the approach set forth in Italy so that whenever an internal law and the State Constitution conflict, international conventions would control. *Id.*

313. See DOJ Interview, *supra* note 263. First, the political offense issue is not a clear black and white issue, but one that must be assessed on a case by case basis. *Id.* The United States argument presented to the Court of Cassation was directed towards getting Italy's highest court to understand that according to the U.S. interpretation of the treaty, terrorist acts are not protected by the political offense exception. *Id.* Political offenses, as is evident from U.S. jurisprudence, must be assessed by balancing a totality of the circumstances in each case. *Id.*

countries continue to oppress fundamental rights such as free speech.³¹⁴

Despite the lack of potential methods to implement the holding, the *Al-Jawary* decision signifies a continued decline in the application of the political offense exception to terrorist crimes, virtually eliminating any possibility that future terrorists who direct their acts against innocent civilians will escape prosecution. At the same time, the approach adopted by the Court of Cassation permits the United States to confront other members of the European Community with whom the United States may need to negotiate treaties and persuade them to heed the decision of the Italian Court in an effort to develop a more uniform approach to the political offense doctrine in Europe.³¹⁵ Although the Court's decision to grant Al-Jawary's extradition could be attributed to various factors,³¹⁶ the case could not have been successful without the close co-

314. *Id.* In certain countries, for example, defamation of the state is seen as a crime, whereas in the United States such an act would be protected by the First Amendment. *Id.* In these situations, particularly with the civil war currently being waged in former Yugoslavia or the aftermath of the Tiananmen Square incident in China, the United States would not be willing to return an individual to a country where they will be prosecuted for a "political crime." See CATELANI & STRIANI, *supra* note 12, at 221 (discussing how removal of political offense exception would force states to determine whether granting extradition request might subject individual to unfair trial). In such a scenario, denying a request could be interpreted by the requesting state as a negative assessment of its political regime, thereby straining relations between the two nations. *Id.*

315. See DOJ Interview, *supra* note 263, and accompanying text (discussing important role consistency plays in civil law countries).

316. See *ETA Campaign for Basque Independence has Killed Nearly 700*, REUTERS, June 11, 1991, available in LEXIS, Nexis Library, OMNI File (discussing how Spanish Basque guerrilla movement ETA has renewed bomb attacks against Spanish targets in Italy). The surge of ETA attacks made it apparent the terrorists were no longer confining their activities to the Spanish mainland. Merluzzi Interview, *supra* note 263. The threat posed by these attacks may have played a significant role in the Court's decision to make it clear that Italy, unlike France which has permitted numerous Red Brigade members to find refuge, would not become a safe haven for terrorists seeking to avoid extradition. Merluzzi Interview, *supra* note 263. Had the Court denied the U.S. extradition request, Italy would have been inviting foreign terrorists to come to Italy to escape prosecution. *Id.* More so, it would be ironic for Italy to refuse to extradite a terrorist when Italy itself has been the target of some poor decisions by foreign judicial authorities. See Martin Address, *supra* note 3, at 529-30. Finally, any effort by Minister Martelli to override the Court of Cassation's decision would have raised serious concerns that Italy was not abiding to its obligations under the treaty and possibly straining relations between the two nations just as the Achille Lauro Affair in 1985. See *supra* note 13 and accompanying text (discussing U.S. reaction to French court decision to deny U.S. extradition request).

operation manifested between the Italian and U.S. governments.

Although *stare decisis* does not bind Italian courts, *Al-Jawary* has, nonetheless, created important parameters for future courts to abide by when deciding political offense cases. The result in *Al-Jawary* illustrates how the use of established legal channels can be an effective means of apprehending terrorists. The Court's decision marks an important step towards strengthening U.S.-Italian relations and will have a positive effect in combatting international terrorism. Ultimately, adhering to proper channels to handle extradition matters improves cooperation and creates long-term benefits rather than the short-term gains which result when nations choose to engage in acts contrary to a treaty agreement.

CONCLUSION

The increase in ethnic clashes around the globe, coupled with surging nationalism in countries seeking to establish their position in the world, will cause more terrorist groups to emerge and utilize terrorism to spread violence to attract attention.³¹⁷ The political offense exception will play an important role in extraditing members of emerging terrorist groups, but the lack of a uniform application of the doctrine will hinder international efforts to combat terrorism. For this reason, the United States must strengthen the channels of communication currently available for apprehending terrorists and encourage a uniform approach to the political offense doctrine in order to assure that ruthless acts of violence aimed at innocent civilians will no longer be exempt from extradition. Strengthening the channels of communication designed to handle extradition matters will allow foreign jurisdictions to reconcile any differences that they may have with the U.S legal system. More importantly, open communication will allow the United States to

317. See Steve Kerch, *Terrorism Has Buildings on Alert*, CHI. TRI., Mar. 28, 1993, at 2L (discussing bombing of World Trade Center on Feb. 26, 1993); see also Robert D. McFadden, *8 Seized as Suspects in Plot to Bomb New York Targets and Kill Political Figures*, N.Y. TIMES, June 25, 1993, at A1 (discussing arrest by Federal authorities of members of suspected terrorist organization that had plotted bombing and assassination campaign in New York).

cooperate more effectively with other nations and ultimately lead to an increase in the successful prosecution of terrorists.

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