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## Terrorist or Revolutionary: The Development of the Political Offender Exception and Its Effects on Defining Terrorism in International Law

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# TERRORIST OR REVOLUTIONARY: THE DEVELOPMENT OF THE POLITICAL OFFENDER EXCEPTION AND ITS EFFECTS ON DEFINING TERRORISM IN INTERNATIONAL LAW

VINCENT DEFABO

## I. INTRODUCTION

Coming to a consensus on the definition of terrorism has escaped not only multi-national organizations, like the United Nations,<sup>1</sup> but even individual nations, such as the United States.<sup>2</sup> This has led one scholar to exclaim that “[n]o paper on the crime of terrorism would be complete without the introductory observation that its definition is not generally agreed upon.”<sup>3</sup> The lack of consensus in a definition of terrorism could be said to be unproblematic because terrorist acts can be punished as ordinary criminal offences within individual nations.<sup>4</sup> Also, the international community has worked without a coherent definition of terrorism for decades.<sup>5</sup> However, it is important to have a definition of terrorism from a legal standpoint;<sup>6</sup> without a definition of terrorism the international community is unable to definitively condemn certain actions and work coherently to eradicate terrorism.<sup>7</sup> Moreover, without a definition, counter-terrorism measures and oppressive regimes sometimes go

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1 The United Nations has not passed anything beyond condemnation measures. *See generally* G.A. Res. 3034 (XXVII), U.N. Doc. A/8967(Dec. 18, 1972)(on measures to prevent international terrorism); G.A. Res. 40/61, U.N. GAOR, 40th Sess., (Dec. 09, 1985) (stating that the United Nations has not passed anything beyond condemnation measures.); *see also* 18 U.S.C. §2331(1) 2006 (showing that there is a definition of “terrorism” in the U.S. Code, but this is arguably only used for purposes of designating certain groups as terrorism for purposes of limit financing and immigration issues only).

2 There is a definition of “terrorism” in the U.S. Code, but this is arguably only used for purposes of designating certain groups as terrorists for purposes of limit financing and immigration issues only. 18 U.S.C. §2331(1) 2006. The Department of Defense and the Federal Bureau of Investigation have their own definitions. Nicholas J. Perry, *The Numerous Federal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 250 (2004) (explaining that there are nineteen distinct definitions of terrorism in the U.S. Code).

3 Erin Creegan, *A Permanent Hybrid Court for Terrorism*, 26 AM. U. INT’L L. REV. 237, 240 (2011).

4 *See id.* at 240-243 (showing the various different definitions for terrorism and the problems that arise because of this).

5 *See* John F. Murphy, *Defining International Terrorism: A Way out of the Quagmire*, in 19 ISR. Y.B. H.R., 23-25 (Yoram Dinstein and Mala Tabory eds., 1990) (showing that there is no common definition for terrorism).

6 *See generally* BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 10-15 (2006).

7 *See generally id.* at 10-11.

too far, potentially encompassing even nonviolent political protests.<sup>8</sup> Finally, the lack of coherence on a definition strains international relations and muddies the waters of asylum law.<sup>9</sup>

To properly define terrorism, it is necessary to go back to the original reason for reaching an international definition of terrorism: the political offender exception.<sup>10</sup> Problems arose during the nineteenth century with how to treat political offenders that sought refuge in foreign nations.<sup>11</sup> The idea that the “enemy of my enemy is my friend” often left states in the curious position of holding an individual who committed a political crime in an enemy state and giving him or her immunity from extradition.<sup>12</sup> To avoid the possibility of conflict, states created the political offender exception to extradition.<sup>13</sup> Also, many nations had been newly formed on ideals of democratic rebellion and did not want to extradite their brethren in revolutionary movements.<sup>14</sup> Under the political offender exception, if an individual committed a political offence he or she would not be extradited, even if there was a common criminal element to the political offender’s actions.<sup>15</sup>

The political offender exception created a new problem of those who committed certain politically-motivated acts (usually violent), offended international standards of justified political action, and harmed persons who deserved protecting, such as heads of state.<sup>16</sup> To discourage extreme political offences, an exception was created within the exception: those who committed “terrorist actions” would not be safe from extradition.<sup>17</sup> Thus, one cannot begin to define terrorism or know of the complications in seeking a universal definition without understanding how the exception to the political offender came into existence.<sup>18</sup>

It is through studying the history of the political offence exception, and seeing its effects on

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8 See *id.* (stating that a common theme in both common law and civil law is that generally one cannot be convicted for *ex post facto* laws, but without a definition of terrorism this is exactly what nations are doing).

9 See *infra* Section IV.

10 See *infra* Section III.

11 See Gregory Chadwick Perry, Comment, *The Four Major Western Approaches to the Political Offence Exception to Extradition: From Inception to Modern Terrorism*, 40 MERCER L. REV. 709, 713 (1989) (stating that it is up to each state to determine who they shall let in to their country).

12 See Gray Culbreath, *Joint Defense Agreements*, 19 S.C. LAW 36, 39 (2008) (stating that the “enemy of my enemy is my friend” is an old Arab proverb); see also Perry, *supra* note 11, at 716 (showing that sovereigns did not want to extradite political offenders).

13 See, e.g., Perry, *supra* note 11, at 713 (“The repression of crime and the punishment of offenders has become of vital interest to states.”).

14 See Bradley Larschan, Comment, *Extradition, The Political Offence Exception and Terrorism: an Overview of the Three Principal Theories of Law*, 4 B.U. INT’L L.J. 231, 243-46 (1989) (saying that this change in attitude is reflected in the exclusion of political criminals from extradition to the state in which the offence was committed).

15 See Perry, *supra* note 11, at 715-16 (showing that political offence is the exception to the general rule of honoring an extradition request, even by a friendly nation).

16 See also R. Stuart Phillips, Comment, *The Political Offence Exception and Terrorism: Its Place in the Current Extradition Scheme and Proposals for its Future*, 15 DICK. J. INT’L L. 337, 341 (1997) (stating that the problem was solved by adopting a restrictive definition of political).

17 See *id.* (showing that attempts on the life of the head of state was not sufficiently political so as to refuse extradition).

18 See *id.* (explaining that the “political offence exception developed out of identification of liberal democrats with political offenders”).

modern national and international law, that the definition of terrorism will be more clearly defined. In other words, by answering the question of why terrorism was originally found to be an international crime, it is easier to determine the definition of terrorism. Besides defining terrorism through studying the political offender exception, this paper seeks to address the following issues: how the old political offender exception applies to today's international legal system; what complications have arisen in the political offender exception; why the international community should define terrorism, and; what treaties and concepts should be used to define terrorism. While defining terrorism may be a challenge, the task can be simplified by examining the political offender exception and its effects on modern international law.<sup>19</sup>

## II. HISTORY OF THE POLITICAL OFFENDER EXCEPTION

The practice of extradition has existed for centuries, beginning in Egyptian, Chinese, Chaldean, and Assyro-Babylonian civilizations.<sup>20</sup> Nations sought extradition for treason, attempts to assassinate the monarch, and anything else that could affect the political influence and policies of the monarch.<sup>21</sup> Hugo Grotius warned about the possibility of war without proper extradition procedures, writing, “among the evils that arise from differences between states” is “the fact that [i]t is possible for those who have done wrong to one state to flee to another for refuge.”<sup>22</sup> In the early eighteenth century, common criminals escaping to other nations was not seen as an international problem, part of the general public danger that warranted international treaties, or even a major concern.<sup>23</sup> Thus, extradition was originally developed to return those who threatened the monarch and disrupted the political order.<sup>24</sup>

Extradition treaties for common crimes did not begin until the late eighteenth and nineteenth centuries.<sup>25</sup> Current extradition law allows for the possibility of international administrative of justice and has a more domestic character.<sup>26</sup> International extradition, as it stands currently in international law, can be defined as the “process by which one nation surrenders for purposes of trial and

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19 See *id.* at 348-352 (showing the problems that arise when states fail to define terrorism and political offence).

20 See Perry, *supra* note 11, at 713 (citing M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 371 (1974)).

21 *Id.* at 714.

22 MATTHEW E. PRICE, RETHINKING ASYLUM: HISTORY, PURPOSE, AND LIMITS 35 (2009) (citing HUGO GROTIUS, RIGHTS OF WAR AND PEACE (A.C. Campbell, trans. II. 21.5.1 ed. 1979)).

23 CHRISTINE VAN DEN WIJNGAERT, THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION: THE DELICATE PROBLEM OF BALANCING THE RIGHTS OF THE INDIVIDUAL AND THE INTERNATIONAL PUBLIC ORDER 5 (1980) (explaining that sovereigns were totally indifferent towards persons who had fled the country and normally took no measures to continue prosecution extraterritorially).

24 *Id.*

25 See Perry, *supra* note 11, at 715.

26 See WIJNGAERT, *supra* note 23, at 38 (showing that the judicial control on decisions with respect to extradition has a domestic characteristic).

punishment, individuals accused of crimes committed outside its borders, to the nation in which the alleged crimes are committed.”<sup>27</sup>

The political offence exception to extradition is a relatively recent development in international law.<sup>28</sup> Before the French Revolution, the term “political offence” was not even a component of the Law of Nations.<sup>29</sup> However, with the rise of constitutionalism and democratic governments, political thought was transformed, and with it arose the concept of political offence.<sup>30</sup> Article 120 of The Jacobean Constitution of 1793 declared that the French, “grants asylum to foreigners banished from their countries for the cause of freedom . . . it will be denied to tyrants!”<sup>31</sup> However, it was not until the nineteenth century that the political offence exception was generally recognized and what was once the purpose of extradition became the exception to it.<sup>32</sup>

As Enlightenment and democratic movements swept across European states in the nineteenth century, political offenders who committed crimes in their homeland were viewed more sympathetically.<sup>33</sup> Additionally, nations wanted to at least nominally support individuals who supported rebellion in enemy nations without going to war themselves.<sup>34</sup> After all, the “enemy of my enemy is my friend.”<sup>35</sup> Political offenders were viewed as the heroic fighters against tyranny, and the political offender exception to extradition was seen as the way to support these heroes.<sup>36</sup> It became common practice that extradition would not apply to those who were unsuccessful in overthrowing oppressive governments.<sup>37</sup> Political offenders were treated well, even if they were imprisoned.<sup>38</sup> For example,

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27 See Barbara Ann Banoff & Christopher H. Pyle, *To Surrender Political Offenders: The Political Offense Exception to Extradition in the United States Law*, 16 N.Y.U. J. INT'L. & POL. 169, 173 (1984) (citing *Terlinden v. Ames*, 184 U.S. 270, 289 (1902)) (defining extradition as the “surrender by one nation of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which being competent to try and punish him, demands surrender”).

28 See SATYA DEVA BEDI, *EXTRADITION IN INTERNATIONAL LAW AND PRACTICE* 180 (1966) (highlighting that the development is recent).

29 *Id.*

30 See *id.* at 180-181 (stating that the right of the individual to revolt against despotism and absolutism accompanied the rise of constitutionalism and democratic governments).

31 WIJNGAERT, *supra* note 23, at 9.

32 See generally BEDI, *supra* note 28, at 178-181.

33 See Larschan, *supra* note 14, at 243-244 (showing that John Stuart Mill argued that if individuals had right to rebel against oppressive government, then those who failed should be permitted refuge in a foreign nation); see *id.* at 244-45 (citing BEDI, *supra* note 28, at 180-81 (1966)).

34 See Wijngaert, *supra* note 23, at 14 (political offenders exception was drafted with romanticism of liberal revolutionaries).

35 See Culbreath, *supra* note 12, at 36 (explaining the source of “enemy of my enemy is my friend”).

36 See Banoff, *supra* note 27, at 180-81 (political offenders were seen as heroically fighting against tyrannical government at best and committing government at worst); see also BEDI, *supra* note 28, at 180 (political offenders were seen as heroes).

37 See Perry, *supra* note 11, at 715-716 (showing that states began the practice of granting asylum to those whose coup attempts failed).

38 See Larschan, *supra* note 14, at 242.

Adolf Hitler was labeled as a political offender and while imprisoned was able to write *Mein Kampf*.<sup>39</sup> Political offenders were thus given a certain amount of respect for their struggles, even if their political motivations were antagonist to the political party in power.<sup>40</sup>

The movement to give refuge to political offenders through the political offence exception was written into law in many nations, beginning in Europe.<sup>41</sup> Belgium was the first nation to codify the political offence exception by statute in the Belgian Extradition Act of October 1, 1833.<sup>42</sup> Before this time, extradition was handled purely at the executive level, so the first codification of extradition involved the political offender exception.<sup>43</sup> Other nations followed suit. For example, the British Extradition Act of 1870 required in Article 3(1) that a “fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of political character, or . . . the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.”<sup>44</sup> The statutory codification of the political offender exception became common throughout nations, starting primarily in European and Western countries.<sup>45</sup>

Besides individual statutes and constitutional declarations, the political offender exception became part of bilateral agreements in the early nineteenth century.<sup>46</sup> France and Belgium executed the first extradition treaty that contained a political offender exception on November 2, 1833.<sup>47</sup> France then went on to conduct similar treaties with the United States in 1843 and England in 1852.<sup>48</sup> Treaties became the primary method of spreading the political offender exception in Anglo-Saxon countries, with Belgium at the lead of the movement.<sup>49</sup>

Even autocracies created a political offence exception in their laws and treaties because “without it, the liberal states were unwilling to extradite ordinary criminals to them.”<sup>50</sup> Perhaps part of the appeal of the political offence exception was that political ideology was technically not applicable.<sup>51</sup> On its face, it did not matter whether a political offender was for democracy, autocracy, or liberalism, because if someone committed a political offence they could not be extradited.<sup>52</sup> Political crimes are

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39 *E.g.*, E. DAVIDSON, *THE MAKING OF ADOLPH HITLER* 240 (1977) (mentioning that Hitler’s confinement was deluxe and he had the leisure of dictating *Mein Kampf* to Rudolf Hess).

40 *See* Larschan, *supra* note 14, at 242-243.

41 *See id.* (explaining how French and British law affected the treatment of political offenders).

42 WIJNGAERT, *supra* note 23, at 12.

43 *Id.*

44 Larschan, *supra* note 14, at 246 (citing The Extradition Act, 33 & 34 Vict., C. 52. (1870) (UK)).

45 *See* WIJNGAERT, *supra* note 23, at 12-14 (showing the various laws enacted by European and Western countries).

46 *Id.* at 13-14.

47 *Id.* at 13.

48 *Id.* Belgium has been called a leading nation (“Leitnation”) with respect to extradition law. By 1890, the country has executed twenty-five extradition treaties. *See id.* at 13 n.66 (stating that Belgium has been called a leading nation (“Leitnation”) with respect to extradition law. By 1890, the country has executed twenty-five extradition treaties).

49 *Id.*

50 PRICE, *supra* note 22, at 48.

51 *See id.* at 49 (stating that the political offence exception gave asylum to any political offender, regardless of offender’s ideological goals).

52 *See id.* (“[o]n its face, the political offence exception appears impartial—it gives asylum to political offenders, regardless of whether they are for autocracy or democracy, deposition, or liberalism”).

deemed intrinsically not criminal because the individual's motives are to benefit society and not him or herself personally.<sup>53</sup> However, the political offence exception was primarily a creation by liberal nations to support those in the fight against tyranny, and in practice, its application only applied to these like-minded revolutionaries.<sup>54</sup>

The political offender exception spread to other Western countries and throughout much of the world.<sup>55</sup> Throughout this development four main principles developed for the political offender exception: (1) the recognition of the legitimacy of political dissent; (2) the desire to protect political offenders from summary execution or a biased judicial proceeding; (3) the belief that extraditing states should not weigh in on the internal affairs of the requesting state; and (4) the practical reasoning that it is better not to bear the wrath of insurgent groups that could spread to one's own government.<sup>56</sup>

Almost from its inception, the political offender exception was limited by confining the definition of political crime.<sup>57</sup> The uncomfortable situation of giving refuge to individuals who assassinated heads of state or attempted to do so was too difficult for many nations to accept.<sup>58</sup> Belgium, the nation that first put into law the political offender exception, was also the first nation to enact legislation that restricted what was considered a political crime after having to refuse extradition of two would be assassins of French Emperor Napoleon III.<sup>59</sup> This exception to the political offence exception was initially named the *Belgium clause*, but is more commonly referred to as the *attentat*

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53 See Nadia Yakoob, *Political Offender or Serious Criminal? Challenge the Interpretation of "Serious, Nonpolitical Crimes" in INS v. Aguirre-Aguirre*, 14 GEO. IMMIGR. L.J. 545, 549 (2000) (explaining that political offender's actions are not criminal because the perpetrator, in theory, is motivated by benefiting society making his or her actions less reprehensible and possibly excusable).

54 See BEDI, *supra* note 28, at 180-81 (noting that the "rise of constitutionalism and democratic governments" contributed to a notion of the right to revolt); see also Perry, *supra* note 11, at 716 ("traditional states sought to continue to punish political offenders, while the newer state promoted self-determination of peoples and democratic thought and process, even if rebellion ensued.").

55 See WIJNGAERT, *supra* note 23, at 18-21 (stating that extradition has been linked to the concept of international criminal justice).

56 See Michael R. Littenberg, *The Political Offence Exception: An Historical Analysis and Model for the Future*, 64 TUL. L. REV. 1195, 1198 (1990) (citing Harvard Research in International Law, *Extradition*, 29 AM. J. INT'L L. SUPP. 1, 362-63 (1935); M. BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 4-5 (1974). The fourth practical reason for allowing for extradition was obviously not explicitly stated, but has been accepted by scholars as a motivating factor in the creation of the political offence exception. *Id.*; see also WIJNGAERT, *supra* note 23, at 22 (discussing the early practical difficulties of international extradition law).

57 See WIJNGAERT, *supra* note 23, at 14 (noting that in 1831 Belgian legislators wanted to enact a definition of 'political crime' but were struggling to do so because the many revolutions occurring at the time).

58 See Perry, *supra* note 11, at 717-18 (stating that many states have recognized the limitation of the political offence exception for assassination attempts on heads of states) (citing L. OPPENHEIM, *INTERNATIONAL LAW* 709 (H. Lautherpacht ed. 7th ed., 1948)).

59 See WIJNGAERT, *supra* note 23, at 14-15. Napoleon was making a short trip by train to Tournai, Belgium. *Id.* Two Frenchmen living in Belgium placed a bomb on the railway that exploded, but did not kill Napoleon. *Id.* Subsequently, the Court of Appeals of Brussels rendered a negative advisory opinion for the two Frenchmen's extradition holding that the political offence exception applied. *Id.* at 14-15 n.73-74.

*clause*.<sup>60</sup> “The importance of this clause lies not only in the fact that it has been widely accepted, but also in its technical approach to the formalization of exception to the political offence exception: the *depoliticizing formula*.”<sup>61</sup>

International law and nations developed an “exception to the exception” in the form of the *attendant clause*.<sup>62</sup> Like Belgium, nations did not want to be in the position of protecting individuals who assassinated or attempted to assassinate heads of state.<sup>63</sup> The nineteenth and twentieth centuries saw the expansion of the *attendant clause* to include acts of genocide, wars crimes, apartheid, and acts of *terrorism*.<sup>64</sup> The development of the exception to the political offender exception, as well as its application to acts of terrorism, will together be the focus of the rest of this article.

### III. DEVELOPMENT OF THE POLITICAL OFFENDER EXCEPTION

In the nineteenth and twentieth centuries, the exception to the political offender exception was developed by refining what was labeled as political.<sup>65</sup> Offences were divided into pure political and relative political offences.<sup>66</sup> Additionally, nations’ judiciaries developed individual tests for defining the elements of what is a political offence.<sup>67</sup> Finally, the exception to the political offender exception has led to the development of new condemnable actions not considered political in nature by international legal discourse and treaties, which is now commonly referred to as terrorism.<sup>68</sup> The stakes are obviously high because a state that chooses not to label an individual as political offender may extradite the individual to a nation where he or she is bound to face prosecution.<sup>69</sup>

There has never been a precise definition of what constitutes a political offence between states, which has generally led to different interpretations of the term.<sup>70</sup> Political offences can easily be limited to acts of treason and sedation, but this limits political offences to situations where there is a

60 *See id.*

61 *Id.* at 16 (emphasis added); *see also* Perry, *supra* note 11, at 71 (“The first attempt to clarify this complex issue of ‘relative political offence’ was the *attendant clause*”) (emphasis added).

62 *See* Phillips, *supra* note 16, at 341 (“This new definition carved out several ‘exceptions to the exception,’ with the most notable being the *attendant clause* which stated that attempts on the life of the head of state was not sufficiently political so as to refuse extradition”).

63 *Id.*

64 WIJNGAERT, *supra* note 23, at 16.

65 *See* BEDI, *supra* note 28, at 180-81.

66 *See id.* (discussing the branching definition of political offences, in which pure political offences were those directed against governments, while relative political offences were those of “common character” but connected to political acts); *see also*, Phillips, *supra* note 16, at 341 (stating that during the struggle to determine which offences merit protection, there was a division labeling some political offences as pure and others as relative).

67 *See* Perry, *supra* note 11, at 718 (“[V]arious interpretations have emerged in determining what elements constitute a ‘political offence.’”).

68 *See* BEDI, *supra* note 28, at 180, 186-92 (arguing that there are certain types of actions that are “[i]nnocuous to the very concept of civilization”).

69 *See* Perry, *supra* note 11, at 718 (citing Thompson, *The Evolution of the Political Offence Exception in an Age of Political Violence*, 9 YALE J. WORLD PUB. ORD. 315, 317 (1982-1983) (“[O]nce an authority labels an offence as ‘political’, a state may legitimately deny extradition”).

70 *See* BEDI, *supra* note 28, at 181 (noting the lack of agreement between states).

common criminal element that is still of a political nature.<sup>71</sup> Thomas Jefferson, in expressing reservations about extraditing Spanish fugitives wanted for treason, stated that “[t]he unsuccessful strugglers against tyranny have been the chief martyrs of treason laws in all countries . . . [w]e should not wish, then, to give up to the executioner the patriot who fails and flees to us.”<sup>72</sup> Thus, the initial narrowing of political in political offences was simply an implicit requirement that the political offender be committed to the ideals of democracy, although this did not appear in any formal text.<sup>73</sup> Adhering to an implicit and unwritten test was insufficient for limiting what could be considered political, and courts began placing political offences into either pure or relative categories.<sup>74</sup>

Pure political offences are generally “offences directed against the political organization or government of a state, containing no element of a common crime whatsoever.”<sup>75</sup> The “no common crime element” denotes passive dissidence that does not constitute a direct attack against a state or institution.<sup>76</sup> Also, besides not being accomplished by the commission of a common crime, pure political offences cause no injury to private persons, property, or interests.<sup>77</sup> A political offender who commits a pure political offence is merely acting as an agent for a group that wants to alter the political structure of the state.<sup>78</sup> A French court in the *Giovanni Gatti Case* reasoned that pure political offences are “[t]hose which [cause] injury the political organism, which are directed against the constitution of the Government and against sovereignty, [and] which trouble the order established by the fundamental laws of the state and distribution of power.”<sup>79</sup> In most cases, there is no duty to extradite individuals who commit a pure political offence because these actions are deemed to be far removed from the common crime and closely related to the ideals of the political offender exception.<sup>80</sup> Moreover, there is not the issue of conflicts among treaties in pure political offences.<sup>81</sup> There is general agreement among states that the political offender who commits a pure political offence

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71 See PRICE, *supra* note 22, at 50 (“For example, one could murder a political official or rob to obtain funds for a political group.”).

72 *Id.* at 51 (citing *American State Papers, Documents, Legislative and Executive, of the Congress of the United States*, vol. 1, 1789-1815 (Washington, DC: Gales and Seaton, 1832), p. 258).

73 See WIJNGAERT, *supra* note 23, at 18 (“[T]he political offence exception has a clear political function, but also a political limitation, the rule being meant as protection for those who committed themselves to the cause of *democracy*. This limitation, however, was not explicit in the texts.”).

74 See BEDI, *supra* note 28, at 181 (discussing the distinction between pure and relative political offences); WIJNGAERT, *supra* note 23, at 106-10 (“[I]n extradition theory and practice the necessity has been felt to introduce certain terminological nuances . . . .”); Larschan, *supra* note 14, at 247-49 (“The phrase “political offence” has traditionally had two different, although closely related, meanings . . . .”).

75 BEDI, *supra* note 28, at 181.

76 WIJNGAERT, *supra* note 23, at 107.

77 *Id.* at 106-07.

78 Larschan, *supra* note 14, at 248-49.

79 *In re Givoanni Gatti*, 14 ANN. DIG. 145 (Cour d’appel, Grenoble 1947).

80 See WIJNGAERT, *supra* note 23, at 107 (“[T]here is usually no duty to extradite with regard to purely political offences, so that the political offence exception in these cases is, as a matter of fact, superfluous.”); see also Banhoff, *supra* note 27, at 178-79.

81 See Banhoff, *supra* note 27, at 178 (“[‘Pure’] political crimes have not created many difficulties in interpretation because such acts are not treaty offences.”).

carries no malice or injury to any individual and only affects the organizational structure of a state.<sup>82</sup> The political offender exception always applies to individual who commit pure political offences.<sup>83</sup>

The closer question for extradition occurs in conduct deemed to be relative political offences because these incidents more closely intertwine political and common crimes elements.<sup>84</sup> A relative political offence “involves the commission of a common crime in connection with a political act or event.”<sup>85</sup> Some suggest that merely infusing a political aim or motive to a common crime makes it a relative political offence.<sup>86</sup> For example, the assassination of a public official in the course of a political disturbance would clearly rise to the level of relative political offence.<sup>87</sup> Relative political offences can even appear to be common crimes from the perspective of an outsider if it is not clear that there is a clear political agenda motivating the criminal action.<sup>88</sup>

Relative political offences are problematic because of the hybrid nature between a common crime and political nature; states do not want to give de facto immunity simply because there is a political element to a crime.<sup>89</sup> Naturally the question arises: to what extent does the political motive in common crimes rise to the level of relative political offence that allows for the political offender exception to apply?<sup>90</sup> The difference in relative and pure political offences is generally not clearly defined in internal laws or in international treaties.<sup>91</sup> Part of the statutory ambiguity is intended to give states the ability to adjust to changes in the world, but this has also led to a difference in judicial interpretation among states.<sup>92</sup> The decision of whether to apply the political offender exception hinges on the application of the relative political offence tests within individual nations.<sup>93</sup>

To deal with the problem of defining the relative political offence, the Swiss courts have cre-

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82 See BEDI, *supra* note 28, at 181 (asserting that the perpetrator of political offence affects “[o]nly the political organization of the state”).

83 See WIJNGAERT, *supra* note 23, at 107 (“Theoretically, pure political crimes are easily dealt with in extradition law.”).

84 See WIJNGAERT, *supra* note 23, at 108-10 (cautioning that the category of political crimes is broad and can apply to all common crime that is “politically motivated or . . . related to apolitical conflict situation); *see also* BEDI, *supra* note 28, at 181-82 (stating that relative political offences are neither wholly political nor wholly criminal).

85 Banhoff, *supra* note 27, at 178.

86 BEDI, *supra* note 28, at 182.

87 *Id.*

88 See Phillips, *supra* note 16, at 342-43 (positing that a relative political offence could involve the combination of a common crime with a political one, or a common crime with a political agenda).

89 *Id.*

90 WIJNGAERT, *supra* note 23, at 108.

91 See Littenberg, *supra* note 56, at 1199-1200 (“[s]tatutory ambiguity is intended to give the state flexibility to adapt the exception to a changing world.”).

92 *See id.* (“[J]udicial bodies have by necessity adopted a variety of tests to determine when a relative political offence satisfies the political offence exception.”); *see also* BEDI, *supra* note 28, at 182 (“[I]t is extremely difficult for the courts to ascertain the degree of connection between the common crime and the political act, there is a noteworthy cleavage concerning this point among the courts of different states.”); Phillips, *supra* note 16, at 342-43 (explaining that relative political offences are problematic because of the dual element of crime and political, so that three main tests have arisen to deal with this problem).

93 See WIJNGAERT, *supra* note 23, at 108-10 (noting a rough common law—civil law divide in terms of whether nations focus on objective or subjective criteria).

ated the predominance or proportionality test.<sup>94</sup> The Swiss courts surrender, “only those fugitives whose acts were out of proportion to the political end sought or whose acts were not closely related with purely political ends.”<sup>95</sup> To meet the political predominance test, the political offence must be directly related to attaining the political group’s goal, and the political component to the action must predominate over the criminal element or be proportionate to meeting the political objective.<sup>96</sup> These principles were first announced in the case of *V.P. Wassilief*.<sup>97</sup> In *Wassilief*, the murder of Chief of Police of Penza was predominantly criminal in character because “it did not prepare the way for popular representation the guarantee of individual liberty.”<sup>98</sup>

The Swiss further developed their concept of a relative political offence in the political motivation predominance test, which appeared first in *In re Ockert*.<sup>99</sup> In that case, the Prussian Ministry of Justice requested extradition of an individual who had shot a Nazi Party member.<sup>100</sup> Since the violence in Germany paralleled that of a civil war the offence was deemed to be proportionate and politically sufficient in nature, so that the extradition request was denied.<sup>101</sup> Under the Swiss test, violence that appears aimless in nature and is directed predominately at civilians is not sufficiently political and the individual will be extradited.<sup>102</sup> The more violent the alleged action, the greater the need for a “direct relationship between the crime and the political goal . . . .”<sup>103</sup> German and Belgian courts have generally followed a similar approach.<sup>104</sup> The Swiss political motivation predominance test looks to the motivation of the political offender and seeks to balance the objective with the proportionality of violence.<sup>105</sup>

The French objective test for determining if conduct is a political offence warranting the political offender exception differs from the Swiss test.<sup>106</sup> The French objective test declares “an offence

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94 See Perry, *supra* note 11, at 718-22 (separating the various interpretations of the political offender exception into three general categories, Swiss, French, and Anglo-American).

95 BEDI, *supra* note 28, at 183.

96 Perry, *supra* note 11, at 718-22; see also BEDI, *supra* note 28, at 183 (setting out a three element test similar to V.P. Wassilief).

97 BEDI, *supra* note 28, at 182-83 (citing The V.P. Wassilief Case, reported in FOREIGN REL. OF THE U.S. 520-21). (1909)).

98 *Id.*

99 Duane K. Thomposon, *The Evolution of the Political Offense Exception in an Age of Political Violence*, 9 YALE J. WORLD PUB. ORD. 315, 321 (1982-1983) (citing *In re Ockert*, 7 ANN. DIG. 369 (Switz. Fed. Trib. 1933)).

100 *Id.*

101 *Id.*

102 See Perry, *supra* note 11, at 720-21 (citing *In re Kaphengst*, 5 ANN. DIG. 292 (Switz.. Fed. Trib. 1930)) (individual accused of planting several bombs that injured civilians was a violence not proportionate to the desired goal).

103 Perry, *supra* note 11, at 721.

104 See BEDI, *supra* note 28, at 183-84 (citing *In re Fabijan*, 1933-34 ANN. DIG. 360 (1933)(Ge.); *In re Barratini*, 1938 ANN. DIG. 412 (1936)(Be.)

105 See WIJNGAERT, *supra* note 23, at 120-21 (Swiss employs primarily a proportionality theory); see also BEDI, *supra* note 28, at 183 (“[T]he Swiss courts surrendered only those fugitives whose acts were out of proration to the political end sought or whose acts were not closely connected with purely political ends.”).

106 See WIJNGAERT, *supra* note 23, at 120-26 (France looks primarily to the target).

political only if the actor directly injures the state.<sup>107</sup> Regardless of the circumstances or the motivation of the potential political offender, French courts only decide if the target is substantially political in nature.<sup>108</sup> The French objective test protects those who commit acts in the course of civil war or revolution, as long as the actions are not prohibited by the law of war, even if there are characteristics of a common crime.<sup>109</sup>

*In re Giovanni Gatti* is the controlling case for the French objective test.<sup>110</sup> In the case, Gatti attempted to murder a communist and sought protection from extradition in France.<sup>111</sup> Taking a narrow view of political offence, the court held that “the offence does not derive its political character from the motive of the offender but from the nature of the rights it injures.”<sup>112</sup> In *Gatti*, the court chose to focus on the rights of the injured rather than motives of the perpetrator.<sup>113</sup> In its pure form, the French objective test looks only to the nature of the target to determine if it is political, so that the crime may also be deemed political.<sup>114</sup>

The French courts have at times adopted subjective elements, similar to the Swiss, but this appears to only be a momentary divergence.<sup>115</sup> Recently, the French seem to be retreating from a subjective element in the “objective” test and have focused again on the affected targets.<sup>116</sup> The Court of Appeal of Paris recently declared in a political offender exception case, “[w]hatever the purpose pursued or the context in which such acts are located, they cannot, taking into account their seriousness, be considered as being of a political character.”<sup>117</sup>

A critique of the French model is that the political offender exception is denied to those who do not commit attacks against political institutions.<sup>118</sup> There is also the potential that an individual with purely financial or other criminal motives may be deemed a political offender simply because he or she attacks a state institution.<sup>119</sup> However, in criminal law the motivation of the offender, or further consequences of the action, is rarely taken into account; the primary focus is on the *mens rea*

107 Perry, *supra* note 11, at 721 (citing L.F.E. Goldie, *The ‘Political Offense’ Exception and Extradition Between Democratic States*, 13 OHIO N.U.L. REV. 53, 62 (1986)).

108 See WIJNGAERT, *supra* note 23, at 120-21 (noting that, for a time, France exclusively followed objective test).

109 BEDI, *supra* note 28, at 184.

110 Perry, *supra* note 11, at 721.

111 BEDI, *supra* note 28, at 181-84 (citing *In re Giovanni Gatti*, 1947 Ann. Dig. 145 (1947)(Fr)).

112 *Id.* at 184.

113 See WIJNGAERT, *supra* note 23, at 120-21 (using collaboration with the enemy as an example of injured political rights).

114 *Id.*

115 In the *Da Palma* case, the robbing of the Portuguese National Bank was considered a political crime because it was committed by a revolutionary movement. 3 *Da Palma Inacio*, Court of Appeal of Paris. 14 December 1967, *La Semaine Juridique* No 15387. (1968), cited and discussed in Wijngaert, *supra* note 23, at 122-23.

116 Perry, *supra* note 11, at 722-23 (“[T]he French test concentrates on the affected target; the state.”).

117 WIJNGAERT, *supra* note 23, at 124.

118 See *id.* at 122 (“[O]n the one hand, the political character is denied to acts which do not constitute a direct attack against the political institutions.”).

119 See *id.* at 122 (“[N]o distinction is made with respect to absolute political crimes committed from strictly personal motivation and no attention is paid to the seriousness of the facts.”).

and the *actus reus*.<sup>120</sup> By focusing purely on whether a target is sufficiently political, the French courts are adhering closely to the norms of criminal law.<sup>121</sup> Regardless of the benefits of the French test versus the Swiss test, the divergence of views demonstrates why it is difficult to reach a uniform definition.<sup>122</sup>

The relative political offence test in England has developed almost entirely through case law and is referred to as the “political incidence” test.<sup>123</sup> English political thinkers first considered what was political, and found that there should be a political disturbance and the act should be part of it.<sup>124</sup> This theory was put to practice in the landmark case *In re Castioni*.<sup>125</sup> In 1890, Castioni was accused by Switzerland of killing a public official during an armed political uprising and the Swiss requested that England extradite him for prosecution.<sup>126</sup> Without providing an exact definition, the court found that Castioni’s conduct was a political offence because it was *incidental to and part of* political uprising.<sup>127</sup>

The definition of political offence was further refined in *Meunier* case, in which France wanted extradition of an anarchist who was allegedly responsible for two explosions that resulted in two individuals’ deaths.<sup>128</sup> The Queen’s Bench refused to apply the political offence exception because the action did not involve “two or more parties in the state” and the offence was not in pursuit of a political objective.<sup>129</sup> For sixty years the definition of political offence in England required strict adherence to the requirement that a political action involve a conflict between two political parties or ideologies that were incident to that political uprising.<sup>130</sup>

The incidence test was broadened slightly in response to what the English courts perceived as a

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120 *Id.* at 126.

121 *See id.* at 125-26 (highlighting the fact that criminal law does not take motivation into account); *see also* Perry, *supra* note 11, at 722-23 (noting that, in *Piperno*, the motivation of a murder was not considered on the question of extradition).

122 *See* BEDI, *supra* note 28, at 184 (“[T]here is no single criterion to determine the nature and scope of . . . relative political offenses . . .”).

123 WIJNGAERT, *supra* note 23, at 111.

124 *Id.* John Stuart Mill defined political crimes as “one committed in the course of a civil war or common commotion.” *Id.* (citing Ivan A. Shearer, EXTRADITION IN INTERNATIONAL LAW 169 (1971)). Judge Stephen surmised that in addition a ‘political’ crime should be ‘incidental to’ and ‘part of political disturbances’. *Id.* (citing 2 J. STEPHEN, HISTORY OF CRIMINAL LAW 70-71 (1833)).

125 *Id.* (citing *In re Castioni*, 1 Q.B.149 (1891), 5 BRIT. INT’L L. CASES, 556 (1967)).

126 *Id.*

127 *Id.*

128 *Id.* at 111-12 (citing *In re Meunier*, 2 Q.B. 415 (1894), 5 BRIT. INT’L. L. CASES, 572 (1967)).

129 *Id.* (“[T]here must be two or more parties in the States, each seeking to impose the Government of their own choice on the other and that offence is committed by one side or the other in pursuance of that object . . .”).

130 *See id.* (“[T]here must be two or more parties. . . each seeking to impose the Government of their own choice on the other . . .”); *see also* Perry, *supra* note 11, at 723-24 (noting that Great Britain added the “two-party struggle” test in *In re Meunier*).

new international world order in which countries could be in conflict without the outbreak of war.<sup>131</sup> In *Kolczyński*, seven Polish seamen mutinied and brought their ship into an English port seeking political asylum.<sup>132</sup> Even though there was no political uprising in Poland in which the actions could be viewed as incident to, the court ruled the political exception applied because the crew was trying to protect themselves from prosecution of a political nature.<sup>133</sup> Thus, for England, a political offence no longer needs to be associated with a specific uprising, but merely relate to a political opposition between the fugitive and the requesting state.<sup>134</sup>

The English incidence test was transported across the Atlantic to the United States, similar to development and basis of American common law.<sup>135</sup> The American courts have developed a definition of political offence, largely on *Castioni*, defining it as “any offence committed in the course of or furtherance of civil war, insurrection, or political commotion.”<sup>136</sup> However, American courts have not shown the same flexibility in expanding the incidence test as the English have, by sticking to the requirement that the offence must be incidence to a political struggle between two political parties.<sup>137</sup>

In *Jimenez v. Aristeguieta*, the ex-President of Venezuela, who was overthrown in a coup d’etat, was wanted by the new regime for prosecution for murder, attempted murder, and financial corruption during his presidency.<sup>138</sup> The court held the financial crimes are not political offences because “[t]here is no evidence that the financial crimes charged were committed in the course of and incidentally to a revolutionary uprising or other violent political disturbance.”<sup>139</sup> Under the American incidence test more is needed than politically motivated conduct.<sup>140</sup> The political offender’s actions must be tied to a specific political uprising for him or her to have the political offender exception apply.<sup>141</sup>

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131 See WIJNGAERT, *supra* note 23, at 112 (citing *Regina v. Governor of Brixton Prison*, 21 I.L.R. 240 (1954) (UK) (at the time of *Castioni*, it was not treason for a citizen to leave his country and countries were not regarded as enemy countries when no war was in progress).

132 *Id.*

133 *Id.*

134 See Perry, *supra* note 11, at 724 (“English ‘incidence’ test no longer demanded a specific uprising; only evidence of ‘political opposition . . . between fugitive and requesting’ state.”).

135 See *id.* at 724-25 (“The United States has generally followed the *Castioni* ‘incidence test’”).

136 See WIJNGAERT, *supra* note 23, at 116 (citing *In re Ezeta*, 62 F. 978, 978 (N.D. Cal. 1894) (asserting that the *Castioni* principle was adopted “by analogy” in American jurisprudence).

137 See *id.* at 116 (“The case law in the United States has not known the same flexible development as the British and is still anchored to the strict nineteenth century criteria of *Castioni* and *Mennier*.”); see also Littenberg, *supra* note 56, at 1217-18 (arguing that American courts are heavily focused on the uprising prong of the political ‘incidence’ test).

138 *Jimenez v. Aristeguieta*, 311 F.2d 547, 553 (5th Cir. 1962).

139 *Id.*

140 See *Escobedo v. United States*, 623 F.2d 1098, 1104 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980). Mexico wanted the extradition of an individual accused of murder and attempted kidnapping of the Cuban consul in Mexico. *Id.* The court admitted the defendant’s actions were politically motivated, but granted extradition because of the lack of connection to a political uprising. *Id.*

141 See WIJNGAERT, *supra* note 23, at 117-18 (the United States, unlike Britain, has not evolved since *Castioni* and there is an overemphasis on the requirement of political uprising).

Although there is some international consensus regarding the definition of political offence, especially pure political offences, the definition is far from uniform for relative political offences.<sup>142</sup> The French test focuses on the objective target of the potential political offender, while the Swiss test is much more subjective in nature because it looks to the individual's intent and proportionality of the actions to that intent.<sup>143</sup> The American and English incidence tests vary in strict adherence to the political uprising element.<sup>144</sup> It is possible that what can be considered a relative political offence by the courts of one country may be considered a common crime by other countries.<sup>145</sup> Therefore, there is no a single criterion to determine the nature and the scope of the relative political offence.<sup>146</sup>

The current lack of a uniform political offence definition prevents the achievement of the goals of the political offender exception. The political offence exception is necessary to preserve neutrality to international struggles, support individuals in their attempts to form democratic and liberal governments, and prevent the potential unjust treatment that political offenders usually receive.<sup>147</sup> These goals are currently not being fully achieved.<sup>148</sup> First, without a uniform definition it is hard for a nation to appear neutral because there is at least the perception that the definition of political offence will be molded to fit the political objectives of the state denying or granting extradition.<sup>149</sup> Second, a lack of consensus on the political offender exception prevents full support of citizens trying to change their government.<sup>150</sup> Wavering on whether to apply a subjective or objective test and on whether to require the movement be part of an uprising, the political offence exception at times excludes individuals wishing for a liberal democracy and includes individuals supporting oppressive states.<sup>151</sup> Finally, a state can surrender a political offender without violating any rules of international human rights law, so there is not always adequate protection for individuals facing an unjust judicial system.<sup>152</sup>

States are weary of applying the political offence exception in an age of increased terrorism and

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142 See BEDI, *supra* note 28, at 182 (there is noteworthy cleavage concerning the definition of relative political offence among different States).

143 See *supra* notes 84-109 (discussing the French test for the political offence exception).

144 See *supra* notes 110-128 (discussing the British-American test for the political offence exception).

145 See BEDI, *supra* note 28, at 184 ("It is quite probable that what is a relative political offence to the courts of one country may be a common crime to those of others.").

146 See *id.* at 184 ("[T]hese expositions clearly demonstrate that there is no single criterion to determine the nature and scope of *delits complexes* or relative political offences.").

147 See Antje C. Petersen, *Extradition and the Political Offence Exception in the Suppression of Terrorism*, 67 IND. L.J. 767, 775-76 (1992).

148 See Terry Richard Kane, *Prosecuting International Terrorists in the United States Courts: Gaining the Jurisdictional Threshold*, 12 YALE J. INT'L L. 294, 317 (1987) (arguing that the explanation that states remain neutral in the internal power struggles of the neighbors ignores that the decisions are made by the Executive and judiciary, partially political reasons).

149 See *id.* (noting that a state may, under international law, always extradite criminals).

150 See *id.* (pointing out that some believe that people are entitled to "participate in political activity to change their government").

151 See *id.* ("[T]he political offense exception, however, makes no theoretical distinction between rebels against oppressive states and political offenders in liberal democracies . . .").

152 See *id.* at 316-17 (citing Codification of International Law (Harvard Research in International Law Project), 29 AM. J. INT'L L. 15, 66 (Supp. 1935) (Extradition)).

civil war that leads to even less uniform political offender definitions.<sup>153</sup> Also, the lack of consensus may lead to dangerous individuals finding safe haven and contributing to the destabilization of their country, even if their nation is a democratic one.<sup>154</sup> Recognition of the failure to uniformly define political offence will allow for the definition of terrorism to be more clearly defined, because this demonstrates the reasons for the divergence in defining terrorism.<sup>155</sup>

#### IV. POLITICAL OFFENCE EXCEPTION IN IRA CASES IN THE UNITED STATES

One of the best examples of the inability to come to a consensus on who is a legitimate political offender and who is a terrorist can be seen in the Irish Republican Army (IRA) cases in the United States.<sup>156</sup> In these cases, two nations have a very similar definition of political offender based on bilateral treaties.<sup>157</sup> Nonetheless, the United States refused on several occasions to extradite members of the IRA who sought refuge due to the political offender exception.<sup>158</sup> England was infuriated that the political offender exception was being applied to individuals they considered terrorists.<sup>159</sup> Looking at these cases and the bilateral treaty response will reveal how terrorism has consumed the political offender exceptions and the difficulties on coming to a consensus on definitions for both.<sup>160</sup>

An overly simplistic understanding of the conflict surrounding the IRA is that it is based on whether six counties in Northern Ireland should remain in the United Kingdom or become part of the Republic of Ireland.<sup>161</sup> Depending on who is referencing the IRA, the organization is either a group of freedom fighters engaged in a political struggle that comports exactly with the ideals of

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153 See Yakooob, *supra* note 53, at 563 (the resolve of states to protect political offenders in the age of terrorism and civil wars has weakened).

154 See Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond*, 25 LOY. L.A. INT'L & COMP. L. REV. 457, 471 (2003) ("Preventing terrorists from enjoying safe haven, thereby obtaining impunity for past and future crimes, is an objective of counterterrorism.").

155 It is widely contested whether terrorism is a true international crime or as merely a condemned action that may be crystallized into an international crime in the future. See generally Creegan, *supra* note 3, at 243-45.

156 See generally Banoff, *supra* note 27, at 169-70 ("Much of the debate has focused on three recent decisions involving extradition of accused terrorists.")

157 The United Kingdom and the United States both rely on the political incidence test to define a relative political offence. See WIJNGAERT, *supra* note 23, at 117-18 (the United States and the United Kingdom's use the political incidence test); see also Banoff, *supra* note 27, at 169-70 (political offender exception is based on treaty law between the United Kingdom and the United States).

158 *Id.*

159 See Margaret I. Branick, *Extradition and the Conflict in Northern Ireland: The Past, Present and Future of an Intractable Problem*, 25 HASTINGS INT'L & COMP. L. REV. 169, 169-70 (2002) (noting how "British government resentment" and "foreign policy concerns" prompted the United States to eliminate the political offence exception for many types of crimes).

160 See Fitzpatrick, *supra* note 154, at 468-71 (noting that extradition law and terrorism have a complex relationship in which the political offence exception has been transformed due revisions in statutes and jurisprudence based on concerns that terrorists would escape prosecution).

161 *Id.* at 170. The conflict also involves history, identity, religion, culture, security, and human rights. *Id.*

political offender exception or a group of terrorists.<sup>162</sup>

The United States and the United Kingdom share a long history of cooperation, as well as overlap, in the area of extradition.<sup>163</sup> Britain's landmark extradition case for the political offender exception became the cornerstone for American extradition law.<sup>164</sup> In 1889, England and the United States signed a Supplementary Treaty that prevented extradition of political offenders.<sup>165</sup> The preclusion of extradition of political offenders remained mostly intact in the 1972 Supplementary Treaty, which stipulated that extradition did not extend to political offences.<sup>166</sup>

Complications in applying the political offender exception began to occur due to the rising prevalence of the IRA.<sup>167</sup> The United Kingdom wanted to extradite several IRA members who fled to the United States and labeled the actions of the members outside of the scope of the political offender exception.<sup>168</sup> The United States judiciary applied the political offence exception in these situations based on the 1972 Treaty and previous case law surrounding the incidence test and refused extradition.<sup>169</sup> The United States may have also been influenced by the Irish community in the United States, which sympathized with the IRA's cause.<sup>170</sup> For some, it was particularly baffling that the United States was willing to shelter several IRA members while extraditing members of the Palestine Liberation Organization.<sup>171</sup> At the height of the IRA cases, three major cases for extradition were tried in the United States courts.<sup>172</sup>

In the first of the three major cases, Britain sought the extradition of Peter McMullen, a former British army officer accused of bombing a British army barrack in 1974 as a member of the IRA.<sup>173</sup> A federal magistrate denied the extradition request because his actions were within the scope of the

162 See *id.* at 171-72 (identifying the different perceptions of the IRA, both domestically and internationally).

163 See *id.* at 180-85 (the United Kingdom and the United States have a series of extradition treaties); see also WIJNGAERT, *supra* note 23, at 112 (the United States and United Kingdom both use political incidence test).

164 See *supra* notes 123-29 (discussing the British creation and American importation of the *Castioni* test).

165 John Patrick Groarke, *Revolutionaries Beware: The Erosion of the Political Offense Exception Under the 1986 United States-United Kingdom Supplementary Extradition Treaty*, 136 U. PA. L. REV. 1515, 1517 (1988).

166 See *id.* (noting that the 1972 treaty contains twenty-nine extraditable offences, but excludes political offenders); Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 8, 1972, U.S., art. V, 28 U.S.T. 227 [hereinafter 1972 Treaty]. The 1972 Treaty entered into force on January 21, 1977 ("Extradition shall not be granted if . . . the offense for which extradition is requested . . . one of a political character."). *Id.*

167 See Branick, *supra* note 159, at 180-82 (identifying the applications of the 1972 Treaty regarding the IRA).

168 *Id.* at 181-82.

169 *Id.*

170 See Aaron J. Noteboom, *Terrorism: I Know It When I See It*, 81 OR. L. REV. 553, 558 (2002) ("[T]he Irish Republican Army openly collected hundreds of thousands of dollars in funds each year from Irish-Americans through Irish Northern Aid (NORAID) until pressure by the British government forced the United States to crack down on the organization.>").

171 See Petersen, *supra* note 147, at 787 (contrasting the decision to shelter IRA members while continuing to extradite PLO members).

172 See generally *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986) (questioning whether an IRA members act of violence were sufficiently linked to the organization's political objective); *In re Mackin*, 668 F.2d 122 (2d Cir. 1981) (same); *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984) (same).

173 *McMullen*, 788 F.2d at 593.

political offence exception of the 1972 Treaty.<sup>174</sup> The magistrate based his decision on the incidence test, finding that McMullen was a member of the IRA and the violence was for political ends, so that the crimes were “incidental to and formed as part of a political disturbance, uprising or insurrection in furtherance thereof.”<sup>175</sup> The finding of the court angered the British government, which argued that there was not a state of insurrection in the United Kingdom, and thus the actions fell outside of the scope of the political offender exception.<sup>176</sup>

England became frustrated with the application of the political offender exception again in *In re Mackin*.<sup>177</sup> In that case, Desmond Mackin was wanted for the attempted murder of a British soldier in Belfast in 1978.<sup>178</sup> Once again the magistrate denied the request, citing the incidence test to find that the political offence exception was not limited to pure political offences, but also extended to relative political offences.<sup>179</sup> Furthermore, Mackin’s offences were incidental to his role in the IRA’s uprising in Belfast.<sup>180</sup> Again, the United States refused extradition of an alleged terrorist by England’s standards.<sup>181</sup>

In one of the final applications of the political offender exception in the IRA cases, a federal court refused extradition of an IRA member in *In re Doherty*.<sup>182</sup> Joseph Doherty had escaped from a prison and was convicted in absentia of murdering a British soldier.<sup>183</sup> The court attempted to narrow the traditional political incidence test, finding that it was not enough there was a political conflict in Northern Ireland and Doherty’s offence was in furtherance of the conflict.<sup>184</sup> The court added an additional step to the analysis: it would look to “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 circumstance of the place where the act takes place.”<sup>185</sup> However, the court still denied extradition by applying the political incidence test and finding Doherty met the additional requirement based on the circumstances of the offence.<sup>186</sup>

Besides the additional constriction of the political offence exception that the Southern District Court of New York imposed, the United States judiciary appeared to be willing to restrict the

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174 *Id.*

175 Branick, *supra* note 159, at 180-82 (citing McMullen, reprinted in 132 Cong. Rec. S16,585-86). Eventually, the Ninth circuit granted extradition stating McMullen was ineligible for asylum or withholding deportation. *McMullen*, 788 F.2d at 592.

176 *See* Banoff, *supra* note 27, at 185 (the court’s finding of a state of insurrection in one of the United State’s closest allies angered the British, as well as the U.S. Departments of Justice and State).

177 *See id.* (the U.S. court again refused to extradite a member of the IRA).

178 *Mackin*, 668 F.2d at 124.

179 *Id.* at 125.

180 *Id.* The Second Circuit refused to issue a writ of mandamus to reverse the holding finding the magistrate’s decision was not appealable. *Id.* at 137.

181 *See* Banoff, *supra* note 27, at 185 (stating that the United Kingdom denied there was a state of insurrection).

182 *Doherty*, 599 F. Supp. at 270.

183 *Id.* at 272.

184 *Id.* at 274-75.

185 *Id.* at 275.

186 *Id.* Eventually, Doherty was deported after the Supreme Court review the case. *See generally* *INS v. Doherty*, 502 U.S. 314 (1992).

incidence test in certain circumstances.<sup>187</sup> In *Quinn v. Robinson*,<sup>188</sup> a magistrate found that the conflict in Northern Ireland did not meet the requirement of the political incidence test.<sup>189</sup> A district court reversed the magistrate court's finding, but the Ninth Circuit reinstated the decision, finding there was no uprising because the violence had been exported outside of a set geographic region.<sup>190</sup> This would be one of the last applications of the political offender test based on the 1972 Supplementary Treaty.<sup>191</sup>

Pressure began to mount on multiple fronts for the United States to restrict the political offender exception.<sup>192</sup> There was growing concern among the Justice Department and within the Reagan administration that terrorists would seek safe haven in the United States.<sup>193</sup> Also, the United States was in jeopardy of damaging relations with Britain and potentially other nations.<sup>194</sup> Britain and the United States generally enjoyed a close relationship,<sup>195</sup> but the U.S. application of the political offender exception threatened Britain's willingness to surrender fugitives to the United States and the American-English pact in extradition.<sup>196</sup>

To counter the potential fallout, and at the urging of England, a Supplementary Treaty was added to existing extradition treaty in 1985.<sup>197</sup> The 1985 Supplementary Treaty narrowed the political offender exception to exclude the crimes of murder, assault causing grievous bodily harm, kidnapping, abduction, the taking of hostages, and any offence involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device to endanger a person.<sup>198</sup> There was no distinction made whether the acts are directed at a soldier or civilian or if the acts are committed

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187 *Quinn v. Robinson*, 783 F.2d 776, 783 (9th Cir. 1986).

188 *Id.*

189 *Id.* at 813-14.

190 *Id.*

191 *See* Branick, *supra* note 159, at 184-86 (asserting that the tensions between the United States and the United Kingdom led to a limited application of the political offender exception).

192 *See id.* (considering that President Reagan worried about the relations between Britain and the United States concerning extradition issues); *see also* Banoff, *supra* note 27, at 185 (noting the United Kingdom's concern over the lack of IRA extradition).

193 *See* Branick, *supra* note 159, at 185 (the Reagan administration did not want the United States to become a terrorist "haven").

194 *See id.* (stating the administration was concerned about "foreign relations in general").

195 *See* Banoff, *supra* note 27, at 185 (noting that Britain was a "long-standing ally" to the United States).

196 *See id.* (stating that the *McMullen*, *Mackin*, and *Doherty* decisions "angered the British government").

197 *See* Todd M. Sailer, *The International Criminal Court: An Argument to Extend Its Jurisdiction to Terrorism and a Dismissal of U.S. Objections*, 13 TEMP. INT'L & COMP. L.J. 311, 336 (1999) (stating that the treaty revisions were urged by the British, to enable them to better pursue IRA members who committed acts of violence).

198 Supplementary Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, T.I.A.S. 12050, 1556 U.N.T.S. 369 (eff. Dec. 23, 1986) [hereinafter 1985 Supplementary Treaty].

pursuant to a political revolution.<sup>199</sup> Essentially, the 1985 Supplementary Treaty only allows for the political offender exception to apply to nonviolent political actions, which are basically pure political offences.<sup>200</sup>

The 1985 Supplementary Treaty is an overreaction to the failure to properly come to a consensus on a definition the political offender exception and terrorism.<sup>201</sup> The United States attempted to negotiate similar agreements with other democratic nations.<sup>202</sup> “[I]t all but erodes the peoples’ right to self-determination embodied in Article 1 of the U.N. Charter.”<sup>203</sup> The 1985 Supplementary Treaty also takes the power to make decisions out of the hands of the judiciary by limiting an examination of the accused’s political motives.<sup>204</sup> Finally, the 1985 Supplementary Treaty politicizes the extradition process by moving the process to purely bilateral agreements.<sup>205</sup> If the Supplementary Treaty is further extended to other nations, it could eventually lead to the destabilizing of foreign relations because nations would be applying an emaciated political offender exception to allies while preserving it for others.<sup>206</sup> The lack of definition of the political offender exception, like the failure to define terrorism, leads to uncertainty and a lack of uniform application.<sup>207</sup>

#### V. ASYLUM LAW AND THE POLITICAL OFFENDER EXCEPTION

Asylum law in many ways intertwines with the political offender exception, both in its ideal form and in its application.<sup>208</sup> Asylum law developed largely out of the political offender exception.<sup>209</sup> However, there are certainly some differences between the two areas.<sup>210</sup> The lack of uniformity in

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199 *See id.* The words “civilian” and “soldier” are never mentioned in the 1985 Supplementary Treaty and instead numerous violent offences are merely listed as being outside of the scope of the political offence exception. Therefore, on the face of the statute it does not appear to matter whether an individual commits a violent offence against a civilian or a soldier. *See Sailer, supra* note 197, at 336 (The 1985 Supplementary Treaty “makes no distinction based upon whether the acts are directed at a civilian or a soldier, or whether the acts are committed in the midst of a political revolution”).

200 *See id.* at 336 (the political offence exception between the two nations effectively restricts the exception to nonviolent political action).

201 *See id.* (“The subsequent U.S.-U.K. response to these decisions exemplifies the troublesome role that politics sometimes plays in the international legal arena.”).

202 *Id.*

203 *Id.* at 337 (citing U.N. Charter art. 1, para. 2). Article 1 reads, “The Purposes of the United Nations are: To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.” *Id.*

204 Branick, *supra* note 159, at 192.

205 *See id.* (the Supplementary Treaty usurps the judiciary’s tradition role in evaluating extradition requests and politicizes the extradition process).

206 *See id.* (“[T]he Treaty bars crimes commonly committed by paramilitary groups from being political offenses.”)

207 *See Petersen, supra* note 147, at 788 (arguing that attempting to locate terrorism on a “scale of acceptable political struggle” causes “uncertainty [to] clash[] with uncertainty”).

208 *See* Matthew E. Price, *Politics or Humanitarianism? Recovering the Political Roots of Asylum*, 19 GEO. IMMIGR. L.J. 227, 305 (2005) (noting that asylum has been seen as a “haven” for political dissidents).

209 *See id.* at 305-09 (noting that France was the first state to assert a “principle of asylum for political offenders”).

210 *See id.* at 308-09 (highlighting how asylum and extradition are now independent doctrinal fields).

both the political offender exception and asylum law opens up the possibility of unjust prosecution of legitimate political offenders.<sup>211</sup> The failure to have a uniform policy of asylum and a political offender exception also prevents the opportunity to support the human rights of those caught up in an oppressive regimes.<sup>212</sup>

There is no duty to extradite under international law, so the exception not to extradite is mostly carved out as part of extradition bilateral treaties.<sup>213</sup> The development of asylum law, in the modern international order, was established out of the political offender exception law in treaties during the nineteenth century.<sup>214</sup> Asylum law became intertwined with the political offender exception because the original purpose of both was to prevent persecution of individuals for political offences they committed in their home countries.<sup>215</sup>

However, asylum law has developed a broader scope than the political offender exception by protecting refugees from all forms of persecution.<sup>216</sup> For example, Canada offers protection to “persons in needs of protection” who face a substantial risk of torture or other individual risk to their lives.<sup>217</sup> In addition, immigration policy has tightened peoples’ ability to migrate; asylum law has developed as a relief to the restrictions on migration when individuals are in serious harm to threats of life or freedom.<sup>218</sup> There are numerous other reasons for asylum beyond the political offender exception, such as promotion of religious freedom, stopping gender persecution, and easing birthing restrictions.<sup>219</sup> While this paper cannot go into all the points of divergence, it is worth noting that asylum law has expanded beyond the political offender exception to include multiple forms of human rights protections.<sup>220</sup> The protection of individuals from prosecution and potential abuse is the basic component that remains true to the political offender exception and asylum law.<sup>221</sup>

The development of asylum law is partially due to the failure of the political offender exception to adequately protect individuals from prosecution from oppressive regimes.<sup>222</sup> However, the focus

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211 *See id.* (“[I]n a world of closed borders, a refusal to admit can be functionally equivalent to a decision to extradite . . .”).

212 *See* PRICE, *supra* note 22, at 70-73 (worrying that nations might be unwilling to grant asylum to people persecuted by friendly countries “for fear of damaging good relations”).

213 *See* Kane, *supra* note 148, at 315 (no rule of customary international law requires a state to comply with an extradition request and it usually arises out of a bilateral treaty).

214 Yakoob, *supra* note 53, at 550-51. Asylum also has its roots in ancient Greece for those that had to travel outside of their own state. *See* PRICE, *supra* note 22, at 26-30. Under Roman law, which was carried into the Middle Ages, asylum was also granted to slaves in certain circumstances. *See id.* at 31-35.

215 *See id.* at 52 (noting that the original purpose of asylum law was to prevent “unjust punishment” of fugitives).

216 *See id.* at 69-73 (showing that asylum law can also be used to condemn oppressive nations).

217 Immigration and Refugee Protection Act ch. 27, § 97(1) (2012).

218 *See* Price, *supra* note 22, at 107-08 (defining persecution as the threat of “serious harm”).

219 *See id.* at 108-22 (demonstrating the importance of the ability to criticize a governmental regime without the fear of punishment).

220 *See id.* at 47-53, 200 (noting the shift in asylum law away from criminal justice, towards the “promotion of substantive political morality”).

221 *See* PRICE, *supra* note 22, at 308-09 (noting that asylum decisions turned on the justification for the punishment).

222 *See id.* at 52-57 (asserting that sheltering individuals from persecution can be seen as a “legitimate response to pervasive autocracy”).

on asylum is now vested more in protection from deportation rather than showing support of the political struggles of individuals over nondemocratic regimes.<sup>223</sup> There is a high potential for restrictions to be placed on asylum for reasons beyond support of political offenders, such as economics or anti-immigrant fervor because asylum laws are so heavily based in immigration policy.<sup>224</sup> This leads to legitimate political offenders being barred from protection and thereby potentially preventing them from spreading democratic ideals.<sup>225</sup>

On the other side of the spectrum, the rise of asylum law at the submergence of the political offender exception leads to concern that potential terrorists will seek haven in nations due to the flood of asylum applications and confusion over the benefits of supporting political offenders.<sup>226</sup> Asylum law is beneficial to the ideal that certain refugees deserve protection.<sup>227</sup> Yet, the broadening of asylum law, due to the vague and mostly inoperable political offender exception has led to the rise of asylum, which fails to adequately support the ideals of the exception of extradition for political offenders.<sup>228</sup>

## VI. THE EXCEPTION TO THE EXCEPTION: DEFINING TERRORISM

As international terrorism becomes more pervasive, the trouble in defining the political offence exception leads to difficulty in prosecution and international cooperation.<sup>229</sup> The divergence of views for the political offender exception partially reveals why there is a lack of consensus on the definition of terrorism.<sup>230</sup> States are unable to agree on what constitutes a political crime that is worthy of the political offender exception partially because of the development of case law, but also because the views of which offenders meet the ideal of a revolutionary figure fighting against tyranny.<sup>231</sup> Currently, there are multiple exceptions to the political offender exception, including the exclusion of certain nonpolitical crimes, war crimes, genocide, collaboration with the enemy, and *acts*

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223 See *id.* at 58 (arguing that the function of the two is the same).

224 See *id.* at 85-93 (illustrating the danger of the politicizing of asylum).

225 See *id.* at 93-94 (humanitarian approach to asylum has encouraged the perception that asylum offers nothing to the receiving states other than moral satisfaction).

226 See Sailer, *supra* note 197, at 346 (“Fairness for the accused would be greatly enhanced, and distrust among nations would no longer result in “safe havens” for terrorists.”).

227 See Fitzpatrick, *supra* note 154, at 473 (“Irregular rendition, especially when it takes the form of summary expulsion or abduction, deprives the subject of an opportunity to enjoy protection from potential persecution and serious human rights violations.”).

228 See Price, *supra* note 208, at 308 (“today extradition and asylum have developed as doctrinally separate area of law”); *id.* at 299. (“This approach dampens the need for moral-political judgment by allowing states of refuge to remain agnostic about whether a suppliant actually deserves protection. In other words, it counsels a systematic overprotection of fugitives for the purpose of reducing political conflict.”).

229 Perry, *supra* note 11, at 730 (“As transactional terrorism spreads, it becomes increasingly apparent that the mechanisms of international law relating to the control and punishment of such acts are in disarray.”).

230 See *id.* at 731 (acknowledging that the current state of the definition does not please anyone).

231 See BEDI, *supra* note 28, at 184 (decisions by courts for the political offender exception are clearly influenced by the policies of their respective governments).

of terrorism.<sup>232</sup>

Terrorism, the exception to the exception, arose almost immediately after the political offender exception was formed, as discussed previously in section III, in the *attentat clause*.<sup>233</sup> In the 1890s, anarchists, who sought the overthrow of government in all forms, were deemed to be outside of the political offender exception.<sup>234</sup> However, the exception to the exception was not limited to anarchists; anyone who attempted to take the life of a head of state was deemed not to be engaged in a sufficiently political action.<sup>235</sup>

The desire to protect heads of states and extradite individuals who attempted assassinations can be seen as the international community's first attempt to define terrorism in the League of Nations' Convention for the Prevention and Punishment of Terrorism.<sup>236</sup> The Convention was also in response to the political pressure the League of Nations faced after the assassination by Croatian separatists of King Alexander I of Yugoslavia.<sup>237</sup> Article 2 of the Convention states that terrorism constitutes "any willful act causing death or grievous bodily harm or loss of liberty" to head of states, the wives or husbands of heads of states, and persons charged with public functions (or holding public positions) when the act is directed against them in their public capacity.<sup>238</sup> After first addressing attacks on the heads of states, the Convention also deemed acts of terrorism to include the willful destruction of public property and willful acts intended to endanger the lives of the members of the public.<sup>239</sup> It is noteworthy that states were careful to implicitly exclude armed forces and actions committed during civil wars from the Convention.<sup>240</sup> The Convention also required the criminalization of terrorism by each nation, a reflection that persists in modern international terrorism treaties.<sup>241</sup>

The Convention failed on multiple fronts to truly address how to deal with terrorism and recon-

232 See Yakooob, *supra* note 53, at 562 ("Crimes such as attempts on the lives of heads of state, war crimes, genocide, collaboration with the enemy, and acts of terrorism generally trump the political offence exception.").

233 See *supra* notes 49-51; see also Phillips, *supra* note 16, at 341 ("This new definition carved out several 'exceptions to the exception,' with the most notable being the attentat clause which stated that attempts on the life of the head of state was not sufficiently political so as to refuse extradition.").

234 See *id.* at 341 (arguing that states "solved" the problem of anarchists by adopting a restrictive definition of "political").

235 See *id.* (attempts on the life of the head of state was not sufficiently political so as to refuse extradition).

236 Convention for the Prevention of Terrorism League of Nations, Nov. 16, 1937, L.N. Doc. C.546M.383.1937 (this Convention was never entered into force)[hereinafter Convention for the Prevention of Terrorism].

237 See SAUL, *supra* note 6, at 171 (noting that this was the "most significant early modern attempt to define terrorism"). In 1934 King Alexander, was assassinated by Croatian separatists while on a State visit to France. The suspects fled to Italy and sought protection from extradition under the political offender exception. The Court of Appeal of Turin refused to extradite the suspects and held "the assassination of a sovereign is a political crime if it is promoted by political motives." *Id.* (citing *In re Pavelic* 1933-1934 Ann. Dig. 372 (1934)(It.); BENJAMIN FERENCZ, 1 AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE – A DOCUMENTARY HISTORY AND ANALYSIS, HALF A CENTURY OF HOPE 48 (1980).

238 Convention for the Prevention of Terrorism, art. 2.

239 *Id.*

240 SAUL, *supra* note 6, at 173.

241 See *id.* (Article 2 enumerates the criminal acts which States must criminalize).

cile it with the political offence exception.<sup>242</sup> It only attracted signatories from twenty-four nations, including only one colonial state.<sup>243</sup> The Second World War also took attention from the Convention, and it was never entered into force with the demise of the League of Nations.<sup>244</sup> Even if it did succeed, the Convention's usefulness was always doubtful because the "extradition provisions did not exclude terrorism from the political offence exception."<sup>245</sup> States were unwilling to restrict their sovereignty for extradition matters, including political offences, despite the fact that the political offence exception is a matter compromised in treaty law.<sup>246</sup> However, the Convention was still the first, and arguably the best, attempt ever made at reaching an international consensus on terrorism.<sup>247</sup> It is significant that Convention was created specifically to respond to problems with the political offender exception and that the potential complications in implementing the Convention were based largely on differing views on extradition.<sup>248</sup>

The International Law Commission (ILC) made the next major attempt to codify an international definition for terrorism in the 1954 Draft Code of Offences against the Peace and Security of Mankind.<sup>249</sup> Some ILC members found references to terrorism too vague and believed that the League of Nations Convention failed to comport with modern understandings of terrorism.<sup>250</sup> Despite the obvious need to reform the definition of terrorism, the ILC was unsuccessful in reaching a consensus.<sup>251</sup> The ILC was able to pass a resolution condemning terrorism and made an attempt to address terrorism on an international level.<sup>252</sup> However, the failure to come to a consensus on a definition of terrorism is a feature of international law that continues to this day.<sup>253</sup>

An attempt was made again to define terrorism on the international level in the drafting of the

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242 See SAUL, *supra* note 6, at 175 (claiming that the utility of the convention was "always doubtful").

243 *Id.* at 173 (the Convention was ratified by twelve European States, seven Caribbean, Central or South American States, and five other major states from other regions. India is the only colonial state to ratify the treaty).

244 *Id.*

245 *Id.* at 175.

246 See *id.* ("[m]any states were reluctant to confine their sovereign discretion in extradition matters, including the scope of political offences . . .").

247 See *id.* (the Convention served as a definitional benchmark in later debates).

248 See *id.* at 173 (stating that the Convention was ratified by twelve European States, seven Caribbean, Central or South American States, and five other major states from other regions. India is the only colonial state to ratify the treaty).

249 See generally 1954 ILC Draft Code of Offences Against the Peace and Security of Mankind (Part I), *in* ILC 6th Sess. Report (3 Jun-28 July 1954), UN Doc A/2693, as requested by UNGA Resolution 177(II) (1947) [hereinafter: 1954 ILC Draft Code].

250 See SAUL, *supra* note 6, at 177. "[S]ome ILC members found references to terrorism too vague unless linked to the 'excellent' 1937 definition. *Id.* (citing Summary Records of the 2d Sess., 1 Y.B. INT'L L. COMM'N 127, U.N. Doc. A/CN.4/SER.A/1950 (Hudson, Francois)). A 1951 draft that included the League of Nations disappeared after it was determined to be antiquated, especially when compared to modern terrorist activities. *Id.* (citing Summary Records of the 2d Sess., 1 Y.B. INT'L L. COMM'N 127, U.N. Doc. A/CN.4/SER.A/1950, 63 (Alfaro and Kerno, respectively)).

251 See *id.* at 178 (the ILC could not reach a consensus on the definition of aggression).

252 See *id.* at 176-78 (the article on terrorism was adopted by ten votes to zero, with three abstentions).

253 See *id.* at 180-90 (the General Assembly resolution makes no reference to terrorism).

1998 Draft Rome Statute at the 1998 Rome Diplomatic Conference.<sup>254</sup> However, the attempt to define terrorism on an international level was dropped because there was no internationally accepted definition of the crime of terrorism and no universal jurisdiction for crimes of terrorism.<sup>255</sup> The main reason articulated for the lack of definition was that “[c]rimes that do not carry universal jurisdiction are fundamentally different from those that do”; no universal jurisdiction crimes, like terrorism, do not deserve the “. . . lofty place in the hierarchy of inherently criminal acts.”<sup>256</sup> It is striking that the exception to the political offender exception is not considered, by some in the international community, to rise to the level of a universal international crime.<sup>257</sup>

## VII. WHY DEFINE TERRORISM?

At this point it is fair to ask whether it is really worth it to define terrorism on the international level? After all, the international community has functioned without a consensus on an international definition of terrorism for decades.<sup>258</sup> Terrorism often has features of a common crime that are difficult to splice from a political action, so it might best be handled at the state level.<sup>259</sup> However, there are at least five major reasons to define terrorism.<sup>260</sup>

First, the failure to define terrorism leads to the straining of international relations. Similar to the inability to define the political offender exception, specifically in the IRA cases in the United States, foreign relations are damaged when real differences arise on how to define terrorism.<sup>261</sup> Without at least some consensus on a definition of terrorism, the political offender exception runs the risk of being largely eliminated replaced with an overly broad definition of terrorism that includes any form of unconventional political action.<sup>262</sup> For example, the 1985 Supplemental Treaty, which gutted the political offender exception between the United States and England, is even broader than the European Convention on the Suppression of Terrorism, which has been labeled as overly broad.<sup>263</sup>

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254 See Rome Statute of the International Criminal Court., July 17, 1998-Dec. 31, 2000, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; see also 1998 Draft Rome Statute, Art 5, in *Official Records of the UN Diplomatic Conference of Plenipotentiaries on an ICC*, Rome, 15 June-17 July 1999, UN Doc A/CONF.183/12, vol. III, 21 [hereinafter Draft of Rome Statute].

255 See Creegan, *supra* note 3, at 244-45 (stating that including crimes which did not have a clear status would prevent the ratification of the Rome Statute).

256 *Id.* at 245.

257 See *id.* (noting that the negotiators of the Rome Statute recognized that terrorism and treaty crime is not universally recognized as a violation of the law).

258 See SAUL, *supra* note 6, at 12-13 (positing that the definition of terrorism has changed over time based on historical and political context).

259 *Id.* at 11 (claiming that there must be an explanation as to why the international community should classify terrorism as an international crime).

260 See generally Sailer, *supra* note 197, at 333-36 (analyzing the short-comings of an ad hoc approach to the definition of terrorism).

261 See *id.* at 336 (describing the United States' actions during the time of IRA and PLO bombings, and impact of these actions on international relations).

262 See *id.* at 336-37 (elaborating on the failed efforts to eliminate the political offender exception).

263 *Id.* at 336.

Second, without a universal definition of terrorism, the field of asylum law becomes even more vague, increasing the possibility that those who threaten the lives and safety of people the world over will not be prosecuted.<sup>264</sup> Asylum law submerges the political offender exception because courts are less likely to examine whether an individual is truly a terrorist who does not deserve protection, or rather an individual who has committed a political offence that is a legitimate form of political violence.<sup>265</sup> Thus, asylum law becomes vaguer without a uniform definition of terrorism, making it more likely terrorists will not be properly extradited.<sup>266</sup>

Third, failing to define terrorism prevents a classification of activities that are legitimate forms of violent resistance to political oppression.<sup>267</sup> Democratic nations will still seek to protect those who are persecuted by granting asylum, but this goal will be hindered as these nations will be pressured into limiting who is classified as political offenders since they will be lumped into the same category as other potential refugees and migrants.<sup>268</sup> Defining the limitations of terrorism gives states the ability to discourage excessive means of reaching political goals.<sup>269</sup> Terrorists frequently attempt to bring a voice to their cause, and if their actions are condemned by the international community as being improper means of political action, they may be motivated to pursue nonviolent means.<sup>270</sup> Defining terrorism also allows the true revolutionaries, who fight against oppressive regimes, to be considered separately from the damning label of terrorists.<sup>271</sup> Some might say that a definition of terrorism is too political. Yet, it is a mistake for any law against terrorism to “remain neutral in respect to competing values, and claims.”<sup>272</sup>

Fourth, a loose definition of terrorism allows for any potential political opposition to a country to be painted as a terrorist group, even if those individuals are pursuing legitimate means of op-

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264 *See id.* at 333 (elaborating on the “incidence test” used to constitute a political offence as an intentionally vague test to allow judicial discretion).

265 *See id.* at 335 (stating that politics would play a larger role in interpretation of the political offender exception than ordinary criminological considerations).

266 *See id.* at 335 (claiming that the strong political influence in the interpretation of the political offender exception would lead states to deny extradition to further their own political objectives).

267 *See SAUL, supra* note 6, at 317 (“Unless a pacifist position is accepted, any international definition of terrorism must ensure that legitimate forms of violent resistance to political oppression are not internationally criminalized.”).

268 *See PRICE, supra* note 22, at 93-94 (declaring humanitarian approach to asylum has encouraged the perception that asylum offers nothing to the receiving states other than moral satisfaction).

269 *See SAUL, supra* note 6, at 316-17 (providing that limitations on the definition of terrorism would allow regular legal responses).

270 *See id.* at 316 (stating that the political process discourages violence).

271 *See* NICHOLAS N. KITTRIE, *REBELS WITH A CAUSE: THE MINDS AND MORALITY OF POLITICAL OFFENDERS* 340 (2000) (stating that it is important to distinguish revolutionaries from terrorist by creating typology outlines of political offenders which can “be concretely and objectively applied to virtually all categories of actors taking part in political conflicts . . .”).

272 SAUL, *supra* note 6, at 16 (citing M. CHERIF. BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 485 (1992)).

position.<sup>273</sup> “[A] government that defines the term [terrorism] vaguely or overly-broad risks having its applications of the term ignored.”<sup>274</sup> While this is similar to the last point, some nations go too far and label even pure political acts as terrorism.<sup>275</sup> These nations label those engaged in political protests through nonviolent means or even opposition party members as terrorists.<sup>276</sup> Those that fall under the umbrella of what some wish to call terrorists could even include industrial activists or migrants.<sup>277</sup> Without a definition of terrorism, the category can encompass those who should be protected under the political offender exception to extradition, including those who have committed a pure political offence.<sup>278</sup>

Finally, there cannot be prosecution for a crime without a definition of the offence.<sup>279</sup> Without a definition of both terrorism and permissible conduct, individuals are not on sufficient notice as to what conduct is prohibited.<sup>280</sup> This final reason touches on the previous four reasons for defining terrorism. After all, one cannot base international policy and consensus, asylum and extradition law, and treaties and agreements on vague definitions without granting an excessive amount of discretion to those who are currently in a position of power.<sup>281</sup> The lack of an immutable characteristic of terrorism, and the political nature in definition, demonstrates that a definition should be pursued.<sup>282</sup> A definition of terrorism is necessary and it can be reached by looking to the original purpose of defining terrorism: the political offender exception.

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273 See Colin Warbrick, *The European Response to Terrorism in an Age of Human Rights*, 15 EUR. J. INT’L L. 989, 1002-03 (2004) (“[T]he looser the definition, the more useful the concept to tar the political opponent, the industrial activist, the unpopular migrant as ‘terrorist’ and then proceed against him without restraint: or not.”).

274 Perry, *supra* note 2, at 274.

275 See Petersen, *supra* note 147, at 769 (stating current definitions of terrorism make it virtually impossible to distinguish between nonviolent political actors and terrorists).

276 See *id.* (arguing that terrorists can pursue a broad range of goals).

277 See Warbrick, *supra* note 273, at 1002-03 (recognizing the usefulness of a looser definition of terrorism that allows for an easier attack on political or social minorities and migrants).

278 *Id.* at 990.

279 See Perry, *supra* note 11, at 270 (“[C]onflicting definitions [of terrorism] create a problem of notice because individuals are uncertain if which definition applies to them and thus when conduct is prohibited” of terrorism applies to them).

280 See *id.* (stating that with conflicting definitions, individuals will not be able to identify actions that could be terrorism).

281 See Creegan, *supra* note 3, at 244-45 (attention for defining terrorism has waned leading to negative stating that the lack of an consensus on the definition of terrorism prevented its inclusion in the Rome Statue); Sailer, *supra* note 197, at 336 (suggesting vague definitions of terrorism has led to a category that encompasses almost any form of political struggle); PRICE, *supra* note 22, at 93-94 (noting the humanitarian approach to asylum has encouraged the perception that asylum offers nothing to the receiving states other than moral satisfaction); Warbrick, *supra* note 273, at 1002-03 (reasoning that nonviolent political actors and those fighting against oppressive regimes are being included in the definition of terrorism).

282 See SAUL, *supra* note 6, at 16 (advocating that the international community needs to have certain definitions to properly label certain conduct as just and other conduct as unjust).

## VIII. DEFINITION OF TERRORISM

Terrorism is the exception to political offender exception.<sup>283</sup> A definition of terrorism can be reached by looking to the original purposes for the creation of the exception to the political offender exception, as well as current definitions of political offence.<sup>284</sup> The definition of terrorism can further be developed by analyzing where there has been some consensus on a definition of terrorism.<sup>285</sup> Finally, additional considerations, such as the modern nature of terrorism and the political reality of coming to a consensus, will be taken into account when forming a definition. The task of defining terrorism additionally requires identifying what is *not* terrorism by defining political offence.<sup>286</sup>

The restrictions of the political offence exception and attempts to suppress terrorism have been mostly spread through bilateral treaties.<sup>287</sup> The definition of political offender that has recently arisen out of the treaties is extremely broad, such as the definition in the 1985 Supplementary Treaty.<sup>288</sup> The major criticism of the 1985 Treaty is that a political offence is too narrow, making the definition of terrorism too broad.<sup>289</sup> The minimum elements of a definition of terrorism can be parsed out by starting from an overly broad definition of political offence found in the 1985 Treaty.<sup>290</sup> Amended Article 1 States that:

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

- (a) an offence for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;
- (b) murder, voluntary manslaughter, and assault causing grievous bodily harm;
- (c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;
- (d) an offence involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers and person; and
- (e) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.”<sup>291</sup>

By excluding multiple types of conduct, the 1985 Supplementary Treaty essentially leaves the

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283 See *supra* section IV (discussing the evolution of the political offender exception and the conflict between the United States and the United Kingdom on the extradition of IRA members).

284 See BEDI, *supra* note 28, at 180, 186-92 (describing the political offender exception as arising from individual revolt and the rise of constitutionalism and democracy).

285 See *id.* at 186-92 (comparing the different uses of the political offender exception).

286 See Liam G.B. Murphy, *A Proposal on International Legal Responses to Terrorism*, 2 *TOURO J. TRANSL. L.* 67, 86 (1991) (“A definition of terrorism must also answer whether or not the nature of an act qualify as terrorism.”).

287 Petersen, *supra* note 147, at 787.

288 See 1985 Supplementary Treaty (preventing extradition for common crimes).

289 See Sailer, *supra* note 197, at 336 (“[The Supplemental Treaty of 1985] substantially narrowed the application of the political offence exception between the two nations by effectively restricting it to nonviolent political action.”).

290 See generally 1985 Supplementary Treaty, *supra* note 198 (using the political offence as a starting point).

291 *Id.*

definition of political offence only to nonviolent political action.<sup>292</sup> Nonviolent political offences have classically fallen under the rubric of pure political offences.<sup>293</sup> A political offence, and what is clearly not terrorism, involves two elements: (1) actions directed against the state or political organization *without* injuring private persons, property, or interests, and; (2) actions not accompanied by the commission of common crimes.<sup>294</sup> Therefore, violence, and at least the threat or support of it, is a necessary element of terrorism.<sup>295</sup>

What differentiates terrorism from normal violent crimes is that there is a political motive in the violence.<sup>296</sup> It may seem odd that the term political is used to define terrorism, while the political offender exception seeks to define political as that which is permissible conduct.<sup>297</sup> After all, terrorism is a political action.<sup>298</sup> However, the “political” in the political offender exception is seen as legitimate unconventional political conduct; whereas the political motivation in defining terrorism is considered crossing the line into illegitimate unconventional political conduct.<sup>299</sup> Nations generally do not find the political nature of relative political offences and terrorism actions objectionable in and of themselves.<sup>300</sup> Rather, it is the mixing of the common crime and violent elements that requires an analysis of the relative political offence to determine if the political offender exception applies or it is an act of terrorism.<sup>301</sup> Thus, terrorism involves at least two elements: violence and political motivation.<sup>302</sup>

The debate over what is a relative political offence centers on the motivation component, by

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292 See Sailer, *supra* note 197, at 336 (the political offence exception between the two nations effectively restricts the exception to nonviolent political action).

293 See *id.* (noting that the United States and the United Kingdom narrowed the definition of political offence to include only nonviolent activity).

294 WIJNGAERT, *supra* note 23, at 106; (emphasis added); see also BEDI, *supra* note 28, at 181-82 (defining pure political offences as “offences directed against the political organization or government of a state, containing no element of a common crime whatsoever, and... to ‘relative political offences’... offences of common character, but closely connected with political acts or events that are regarded as political.”).

295 See, e.g., BLACK’S LAW DICTIONARY 1611 (9th ed. 2009) (emphasis added) (defining terrorism as “The use or threat of *violence* to intimidate or cause panic, esp. as a means of affecting political conduct.”).

296 See SAUL, *supra* note 6, at 41-42 (differentiating the motive of a normal offender from that of a political offender).

297 See WIJNGAERT, *supra* note 23, at 106; (defining the characteristics of a purely political crime); see also BEDI, *supra* note 28, at 181-82 (describing the two general ways courts view pure political offences).

298 See Christopher C. Joyner, *International Extradition and Global Terrorism: Bringing International Criminals to Justice*, 25 LOY. L.A. INT’L & COMP. L. REV. 493, 496 (2003) (“An act of terrorism is generally a political act.”).

299 See Price, *supra* note 22, at 49 (describing the political offender exception as impartial to the actors ideological goals).

300 See *id.* at 50 (“[T]errorists who indiscriminately harmed innocents in pursuit of a political objective would enjoy protection from extradition.”).

301 See BEDI, *supra* note 28, 180-82; see also Phillips, *supra* note 16, at 341 (stating that during the struggle to determine which offences merit protection, there was a division labeling some political offences as pure and others as relative).

302 See BEDI, *supra* note 28, at 182 (“[A]n ordinary offence assumes the character of a political offence when the aim of the author of the offence is to injure the political regime.”).

looking at either the subjective intent of the individual or objective tactics and methods.<sup>303</sup> This can be seen in the difference between Swiss and French political offender tests and the American and English incidence test.<sup>304</sup> Generally, the French political offence test is objective, but it contains a subjective element by looking towards if the political target is sufficiently political for the potential political offender.<sup>305</sup> The Swiss political motivation or predominance test, that looks to the motivation of the political offender and seeks to balance the objective element with the proportionality of violence, has a substantial subjective component.<sup>306</sup> In contrast, the American and English incidence test focuses on whether an action is part of an uprising based partially on the choice of target and the political climate in the region in which the offence is committed.<sup>307</sup>

An exclusively objective approach is too narrow because it denies political attacks against non-political institutions.<sup>308</sup> However, the purely objective approach is also too formal in that no distinction is made between political crimes and those committed on political target for personal motives.<sup>309</sup> For these reasons, the objective test is rarely applied in its purest form and most political offence tests contain some subjective element.<sup>310</sup>

A pure subjective approach is also problematic because a person can have only a slight political motive and commit disproportionate actions for that motive to be barred from extradition.<sup>311</sup> Thus, most nations that focus on the subjective component of a political offence also look to the proportionality of the political action.<sup>312</sup> In defining political offences, states generally either start from an objective point of view and infuse a subjective element, or start from a subjective point a view an infuse an objective element.<sup>313</sup>

It could be said that the by focusing solely on whether a target is sufficiently political, the French courts are following the norms of criminal law.<sup>314</sup> This argument is based on the concern that by focusing on the subjective component that is not part of criminal law, states may avoid harmonizing their criminal laws.<sup>315</sup> However, even the French have infused a subjective component in their

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303 See Philips, *supra* note 15, at 343-48 (elaborating on the different relative political offence tests); see also WIJNARGERT, *supra* note 23, at 108-10 (“The category of “related” political crimes is very wide and can in fact apply to each common crime which is politically motivated or which is related to a political conflict situation.”).

304 See *id.* at 120-23 (comparing objective, subjective, and mixed theories of the political offender test).

305 See *id.* at 122-23 (describing the subjective theory).

306 See *id.* at 126-27 (explaining the proportionality theory).

307 See *id.* at 111-19 (elaborating on the Great Britain political incidence theory).

308 See *id.* at 122 (identifying the limits of the pure political approach).

309 See *id.* (noting that political character is denied to acts that do not “constitute a direct attack” on a “political institution”).

310 *Id.* at 120.

311 See *id.* at 122 (arguing that the objective standard is “too radical and too formal in practice”).

312 See Perry, *supra* note 11, at 718-22 (Swiss employ a proportionality test).

313 See WIJNGAERT, *supra* note 23, at 126-29 (discussing the divergent frameworks that states can employ).

314 See Perry, *supra* note 11, at 722-23 (noting that the French approach considers only the “nature of the affected target”).

315 See Joyner, *supra* note 298, at 498 (discussing the politically sensitive nature of defining terrorism).

objective test.<sup>316</sup> Also, motivation is largely what distinguishes political offences and acts of terrorism from common crimes.<sup>317</sup> Finally, motivation by definition lends itself to a subjective analysis.<sup>318</sup> Since the definition of what is politically motivated conduct combines subjective and objective elements in the political offender exception,<sup>319</sup> the political motivation element in defining terrorism should contain both subjective and objective elements.

Perhaps the Swiss test is most illustrative because “the emphasis is laid upon the act itself and both the intentions behind it and its consequences are evaluated function of it.”<sup>320</sup> The proportionality test limits acceptable political offences to those that are necessary to carry out political objectives, and some actions, like killing civilians, are never proportional.<sup>321</sup> The Swiss test also ameliorates the concerns of focusing on the subjective component of political offences by placing conduct in categories, which partially removes the subjective component.<sup>322</sup>

In defining terrorism by focusing on motivation, it is beneficial to place conduct into categories focusing on the proportionality of the conduct to the action.<sup>323</sup> The first category will be always acceptable political motivated action.<sup>324</sup> The second will be occasionally acceptable political conduct, depending on the context and the proportionality of the goals; for example, killing a soldier during an armed conflict.<sup>325</sup> The final category will be conduct that is never condonable, such as intentionally killing civilians.<sup>326</sup> Thus, certain actions are always proportional if there is some political motivation, while others are never proportional despite their political motivation.<sup>327</sup>

To determine whether specific conduct is not proportional to a political cause, and to further develop the subjective component of political motivation, it is beneficial to look towards bilateral

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316 See Yakooob, *supra* note 53, at 554-55 (“Although the crimes charged were arson and murder, France found that the crimes, in light of the circumstances, were relative political.”).

317 See *id.* at 549 (motivation is a necessary component in defining political offences).

318 See *id.* (“The motivation driving the political offender distinguishes him or her from the common criminal . . .”)

319 See WIJNGAERT, *supra* note 23 at 120-23 (comparing objective, subjective, and mixed theories of the political offender test).

320 *Id.* at 132.

321 See Perry, *supra* note 11, at 719-22 (analyzing conduct based on its proportionality to the political objective).

322 See *id.* at 720 (citing *In re Kaphengst*, 59 BG 1 457, 5 ANN. DIG. 292 (Switz. Fed. Trib. 1930)) (individual accused of planting several bombs that injured civilians was a violence not proportionate to the desired goal because attacks on civilians are in a category that is never proportional to the goal of any political cause).

323 See *id.* at 721 (weighing the political motive against the criminal element).

324 See Petersen, *supra* note 147, at 788 (in defining terrorism, “uncertainty clashes with uncertainty when terrorism has to be located on a scale of acceptable political struggle in the context of deciding on protection from extradition.”).

325 See Joyner, *supra* note 298, at 536 (“military forces engaged in armed conflict are governed by the laws of war and international humanitarian law, as opposed to rules prohibiting terrorist activities.”).

326 See Perry, *supra* note 11, at 721 (citing *In re Kaphengst*, 59 BG 1 457, 5 ANN. DIG. 292 (Switz. Fed. Trib. 1930)) (individual accused of planting several bombs that injured civilians was a violence not proportionate to the desired goal because attacks on civilians are in a category that is never proportional to the goal of any political cause). *But see* Creegan, *supra* note 3, at 250 (“politically motivated attacks on civilians, while still detested, have not crystallized as totally impressible acts.”).

327 See Perry, *supra* note 11, at 718-20 (analyzing the flexible “predominance” test used by the Swiss).

treaties and multi-national conventions.<sup>328</sup> Some treaties and conventions focus on specific physical acts and tactics, while others emphasize broader definitions of politically motivated crimes.<sup>329</sup> Between 1963 and 2005, twelve treaties and five protocols were conducted to address terrorism, created largely in response to specific terrorist incidents.<sup>330</sup> For example, the 1997 Terrorist Bombing Convention was in response to the United States' interest in Saudi Arabia, gas attacks in Tokyo, and bombings in Sri Lanka, Israel, and the United Kingdom.<sup>331</sup> In defining terrorist actions, the focus ranges from emphasis on targets (international aircraft for instance), methods or means (such as hostage taking), and the use of particular weapons (for example, plastic explosives).<sup>332</sup> It is important in defining terrorism to specifically lay out which conduct, tactics, and weapons are not permissible political actions.<sup>333</sup>

There are several political actions that are generally not acceptable under the political offence exception and are clearly acts of terrorism.<sup>334</sup> These are based on either long-established definitions, or specific conduct that is generally agreed upon to be an act of terrorism based on a response to a specific incident or series of incident.<sup>335</sup> For example, the International Convention Against the Taking of Hostages was motivated in part by the 1976 taking of Israeli nationals by Palestinian terrorists.<sup>336</sup> The next step in defining terrorism will involve listing the generally agreed-upon acts of terrorism.<sup>337</sup>

There are numerous conventions and treaties that list acts of terrorism, and this has been one of the primary methods to contrast terrorist and political offences.<sup>338</sup> For example, the League of Nations deemed assassination attempts sufficiently nonpolitical acts of terrorism.<sup>339</sup> Because there are a growing number of conventions that list acts that are considered terrorism, or address a

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328 See SAUL, *supra* note 6, at 129-30.

329 See *id.* at 129-31 (stating that some treaties were reactions to “particularly egregious acts” while others were meant to fill “normative gaps”).

330 See *id.* at 130 n.10 (1963 Tokyo Convention; 1970 Hague Convention; 1971 Montreal Convention; 1973 Protected Persons Convention; 1979 Hostages Convention; 1980 Vienna Convention; 1988 Montreal Protocol; 1988 Rome Convention; 1988 Rome Protocol; 1991 Plastic Explosives Convention; 1994 UN Personnel Convention; 1997 Terrorist Bombing Convention; 1999 Terrorist Financing Convention; 2005 Nuclear Terrorism Convention).

331 *Id.* at 131 (citing S. Witten, *The International Convention for the Suppression of Terrorist Bombings*, 92 AM. J. INT'L L. 774 (1998)).

332 *Id.* at 131-32.

333 See *id.* at 131-32 (noting that the treaties prohibited that act, not the motivation).

334 See, e.g., Convention for the Prevention of Terrorism, art 2 (attacks on heads of state).

335 See, e.g., International Convention Against the Taking of Hostages, 17 December 1979, U.N. GAOR, 34th Sess., 6th Comm., Agenda Item 113, U.N. Doc. A/C.6/34/L.23(1979), reprinted in 18 I.L.M. 1456, 1457. Entered into force June 3, 1983; for the U.S. Jan. 6, 1985. TIAS 11081 (Hostage Taking).

336 See JOSEPH LAMBERT, TERRORISM AND HOSTAGES IN INTERNATIONAL LAW: A COMMENTARY ON THE HOSTAGES CONVENTION 1979 57-58, 65-67 (1990) (highlighting the “dramatic and well-publicized incidents of hostage taking”).

337 See Louis Rene Beres, *The Meaning of Terrorism: Jurisdictional and Definitional Clarifications*, 28 VAND. J. TRANSNAT'L L. 239, 249 (1995) (a definition of terrorism necessarily includes both permissible and impermissible forms of insurgency).

338 See SAUL, *supra* note 6, at 45 (one approach is to define terrorism not only by its political motivation, but a range of more objective public-orientated motives).

339 See Convention for the Prevention of Terrorism, Art 2.

specific concern of terrorism in the international community, one way to define terrorism is to cite to these other conventions and treaties.<sup>340</sup> The European Convention on the Suppression of Terrorism makes references to other conventions and enumerates additional examples of terrorism.<sup>341</sup> The Convention specifically deems that the following are to be regarded as acts of terrorism and are not political offences:

- a. an offence within the scope of the Convention of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;
- b. an offence within the scope of the Convention for the Suppression of Unlawful Acts against Civil aviation, signed at Montreal on 23 September 1971;
- c. a serious offence involving an attack against life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
- d. an offence involving kidnapping, the taking of hostages or serious unlawful detention;
- e. an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this endangers persons;
- f. an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.<sup>342</sup>

Additional international conventions have expanded what can be considered support to terrorists, beyond serving as an accomplice to a person who commits terrorism.<sup>343</sup> For instance, the International Convention for the Suppression of Financing Terrorism prohibits funding anyone who intends to commit an act of terrorism.<sup>344</sup> Also, additional tactics and weapons have been included as acts of terrorism to address the growing types of threats, such as nuclear terrorism.<sup>345</sup> The European Convention on the Suppression of Terrorism, with some modifications and additions, is a way to further elaborate on the definition of terrorism beyond violent and political motivated conduct.<sup>346</sup>

Before laying out the definition of terrorism, it is necessary to point out the complications that arise from enumerating certain tactics and targets, as well as those stemming from the European Convention for the Suppression of Terrorism. One problem with labeling attacks on specific targets

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340 See SAUL, *supra* note 6, at 212 (resolutions have been applied specific manifestations of terrorism including financing terror groups, involvement in organized crime, hostage taking and using explosives).

341 See European Convention on the Suppression of Terrorism, art. 1. Jan. 27, 1977, 27 I. 1997, ETS no. 090. [hereinafter European Convention on the Suppression of Terrorism] (referencing the Convention for the Suppression of Unlawful Seizure of Aircraft and the Suppression of Unlawful Acts against Safety of Civil Aviation, as well as attacks on life, physical integrity, or liberty; kidnapping; and offences involving the use of explosives).

342 *Id.*

343 International Convention for the Suppression of the Financing of Terrorism, G.A.Res. 54/109, *adopted* 9 December 1999, *opened for signature* 10 January 2000, *reprinted in* 39 I.L.M. 270 (2000) (resolution adopted measures against those who finance terror activities, not just those that commit them).

344 *Id.*, art. 2(1).

345 See International Convention for the Suppression of Acts of Nuclear Terrorism (adopted by UNGA Resolution 59/290 of 15 Apr 2005) (open for signature 14 Sep 2005-31 Dec 2006).

346 See Perry, *supra* note 2, at 251 (the vast majority of definitions of terrorism contain some reference to the two most common components of violence and a political purpose or motivation).

is that there is not a clear list of banned conduct.<sup>347</sup> For example, some may even find it justifiable to kill civilians in certain circumstances.<sup>348</sup> The reason for the uneasiness in banning certain tactics, even the killing of civilians, is that countries with a colonial history owe their independence to using such methods when faced against a superior military power.<sup>349</sup> Another complication with focusing on tactics and targets is that a group could feign political motives to mask financial ones in the hopes of gaining legitimacy.<sup>350</sup> Finally, the European Convention for Suppression on Terrorism is at points too broad, specifically when it lists the use of automatic firearms as a terrorist action.<sup>351</sup> While this may make sense for Europe, which has a general ban on automatic firearms, it does not make sense in nations that permit the use of such weapons.<sup>352</sup> Thus, there are complications with listing terrorist acts in general and with the European Convention itself beyond having to be updated to address new tactics and concerns.

There are several ways to address some of these complications. One way is to make a specific exception for acts of rebellion against racist or colonial regimes, considering these are more in the category of traditional political offences.<sup>353</sup> Moreover, even revolutionaries could be limited to actions that do not conform to justifiable international standards for violent conduct.<sup>354</sup> There can also be a general ban on the killing of civilians, with the exception that certain non-innocent civilians that are part of oppressive regimes or those that support genocide can lose their “innocent” status.<sup>355</sup> Also, by placing certain conduct in categories, determinations of motivation and justification can be made based on circumstances.<sup>356</sup> Finally, while helpful, the European Convention for Suppression of Terrorism is simply a starting point to work from to develop not the end of point of this discussion. The following proposal for a definition of terrorism incorporates the understanding

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347 See Creegan, *supra* note 3, at 250-51.

348 See *id.* at 250 (“Politically motivated attacks on civilians, while still detested, have not crystallized as totally impressible acts.”).

349 See *id.* (“Countries with colonial histories often owe their independence to national liberation groups who were willing to use such tactics to fight the superior military power of their oppressors.”).

350 See SAUL, *supra* note 6, at 42 (identifying the evidentiary issues in separating true political motives from private ones).

351 See European Convention on the Suppression of Terrorism (stating that any use of a bomb, rocket, grenade, parcel bomb or automatic firearm to endanger a person will not constitute a political act).

352 See generally Allen Rostron, *High Powered Controversy: Gun Control, Terrorism, and the Fight Over .50 Caliber Rifles*, 73 U. CIN. L. REV. 1415 (2005) (there is a long standing debate over the banning of .50 Caliber rifles in the U.S. considering their prevalent use in sport).

353 See KITTRIE, *supra* note 271, at 340 (typology outlines of political offenders can “be concretely and objectively applied to virtually all categories of actors taking part in political conflicts.”).

354 See SAUL, *supra* note 6, at 81-87 (stating that “classic revolutions often involved ‘terrorist’ methods,” but that there is no recognized right to rebel in international law, and thus rebellion creates a start of armed conflict in which the rebels are combatants).

355 See *id.* at 90-91 (noting that the argument of “non-innocence” is most persuasive for “voluntary” actors, such as police and government officials, or even Israeli settlers (in the conflict with Palestine)).

356 See Perry, *supra* note 11, at 721 (citing *In re Kaphengst*, 59 BG 1 457, 5 Ann. Dig. 292 (Switz. Fed. Trib.) (1930)) (individual accused of planting several bombs that injured civilians was a violence not proportionate to the desired goal because attacks on civilians are in a category that is never proportional to the goal of any political cause).

that defining terrorism is a solution to some of the problems with the political offender exception, is based on the development of mostly treaties in international law, and addresses some of the possible problems with enumerating a definition of terrorism:

Terrorism is not to be regarded as a political offence or an offence connected with a political offence or inspired by political motives, it is a violent action or support of a violent action with motives besides personal or financial gain:

The following are NEVER to be regarded as acts of terrorism:

- a. nonviolent political protest or speech;
- b. what is otherwise not considered a general crime in the nation in which the offence occurs if not for its political character.

The following MAY be considered acts of terrorism if committed outside an armed conflict unless a court or tribunal finds that the actions are proportional to a specific political motive, or as part of a rebellion opposing an oppressive or racist regime:

- a. a serious offence involving an attack against life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
- b. an offence involving kidnapping, the taking of hostages, or serious unlawful detention;
- c. an offence involving the use of a bomb, grenade, rocket, or letter or parcel bomb if this endangers persons;
- d. an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence;
- e. the financing of an individual or group participating in the above action as detailed in the International Convention for the Suppression of the Financing of Terrorism, adopted 9 December 1999.

The following are ALWAYS to be considered an act of terrorism if committed outside of an armed conflict:

- a. an offence within the scope of the Convention on the Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;
- b. an offence within the scope of the Convention for the Suppression of Unlawful Acts Against Civil Aviation, signed at Montreal on 23 September 1971;
- c. an offence within the scope of the International Convention for the Suppression of Acts of Nuclear Terrorism, adopted 15 April 2005;
- d. the intentional killing of an innocent civilian(s) who is clearly a noncombatant(s);
- e. an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence;
- f. the financing of an individual or group participating in the above action as detailed in the International Convention for the Suppression of the Financing of Terrorism, adopted 9 December 1999.

The definition listed above is by no means perfect, partially because it relies on a much more

subjective approach than an objective one.<sup>357</sup> It also does not address new concerns of terrorism not codified in international treaties, such as cyber terrorism.<sup>358</sup> Finally, it does not incorporate all the international treaties and agreements on terrorism, just some of the more widely accepted ones.<sup>359</sup> However, “[n]o definition can possibly cover all the varieties of terrorism that have appeared through history.”<sup>360</sup> The purpose of this definition is not to address every potential deficiency, but to create a working definition based on some established norms and adherence to the goals of creating the political offender exception. The method of defining terrorism by focusing on the political offender exception, as outlined above, is more beneficial to others than the exact definition itself. Thus, the process of defining terrorism should involve an examination of the political offender exception to determine who is a revolutionary and who is a terrorist.

#### IX. CONCLUSION

Defining terrorism has become nearly impossible for the international community and even within individual nations, like the United States.<sup>361</sup> The process is fraught with political overtones and belies concerns about ceding sovereignty to an international body in this area of law.<sup>362</sup> However, there needs to be an international consensus on terrorism. The lack of clear definition of terrorism or the political offender exception, as was the situation in the IRA cases with England and the United States, strains international relations.<sup>363</sup> Also, without a universal definition of terrorism the field of asylum law becomes even more vague.<sup>364</sup> The failure to define terrorism prevents the international community from distinguishing between actual terrorism and legitimate forms of violent resistance to political oppression.<sup>365</sup> In addition, a loose definition of terrorism allows for any potential political opposition to be painted as terrorists, even if those individuals are pursuing

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357 There are arguably greater problems in using a more objective approach. *See, e.g., SAUL, supra* note 6, at 65-66 (showing how the objective approach can be simultaneously under and over inclusive).

358 *See generally* Ruwantissa Abeyratne, *Cyberterrorism: The Next Great Threat to Aviation*, 24 NO. 1 AIR & SPACE LAW 4 (2011) (“cyberterrorism” is a rapidly expanding threat, especially to aviation, that has not yet been adequately addressed by the international community).

359 *See, e.g., SAUL, supra* note 6, at 134 (status of international treaties).

360 WALTER LAQUEUR, *THE AGE OF TERRORISM* 11 (1987).

361 The United Nations has not passed anything beyond condemnation measures. *See generally* G.A. Res. 3034 (XXVII), U.N. Doc. A/8967(Dec. 18, 1972; G.A. Res. 40/61, U.N. GAOR, 40th Sess., (Dec. 09, 1985). There is a definition of “terrorism” in the U.S. Code, but this is arguably only used for purposes of designating certain groups as terrorism for purposes of limit financing and immigration issues only. 18 U.S.C. §2331(1) (2006) (terrorism applies to any criminal action targeted or with the purpose of intimidating a civilian population or government).

362 *See* Joyner, *supra* note 298, at 498 (the politically sensitive aspect of defining terrorism has made many nations reluctant in harmonizing their criminal codes around a common definition of terrorism).

363 *See* Branick, *supra* at 159, at 169-70 (discussing the conflict between the United States and the United Kingdom over the refusal of U.S. courts to extradite members of the IRA).

364 *See* PRICE, *supra* note 22, at 93-94 (humanitarian approach to asylum has encouraged the perception that asylum offers nothing to the receiving states other than moral satisfaction).

365 *See* SAUL, *supra* note 6, at 317 (arguing that such legitimate violence should not be internationally criminalized).

legitimate means of opposition or fall outside the basic understanding of terrorism.<sup>366</sup> Finally, there cannot be prosecution for a crime without a definition of the offence.<sup>367</sup> Terrorism must be defined at the international level.

In order to define terrorism, it is beneficial to look first to the roots of defining it in the international community: the political offender exception, which is an exception to extradition.<sup>368</sup> By looking at the development of the political offender exception through the definition of relative political offences, the definition of terrorism can be more clearly established.<sup>369</sup> For example, the Swiss proportionality test lays out an objective test without shying away from the occasional subjective components.<sup>370</sup> The definition of terrorism, and by contrast the definition of political offences, can further be refined by looking towards international treaties and agreements on terrorism. The European Convention on the Suppression of Terrorism is particularly helpful for developing a definition of terrorism since it incorporates other generally agreed upon definitions and treaties and enumerates certain conduct generally agreed upon to be terrorist activity.<sup>371</sup> The complications of providing a specific enumerated list of terrorist actions, such as not adequately allowing for acts of rebellion against racist regimes, can be prevented by incorporating the proportionality test in the definition of terrorism.

The definition of terrorism in section VIII is not perfect. It may prove better to use a different political offender test, such as the American and English incidence test. It may also be better to exclude certain international definitions, such as the Convention for the Suppression of Terrorism Financing, and incorporate others, such as the 1998 Draft Rome Statute. However, the international community needs to move towards consensus on terrorism. “[T]he search for a single definition has come to resemble the quest for the Holy Grail.”<sup>372</sup> The quest to find a definition for terrorism can reach a conclusion by understanding and incorporating the political offender exception. After coming to a consensus for a definition of terrorism through the political offender exception, debates on who is a revolutionary and who is a terrorist will be more easily settled.

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366 See Warbrick, *supra* note 273, at 1002-03 (noting that the “political opponent, the industrial activist, [or] the unpopular migrant” could be labeled as a terrorist).

367 See Perry, *supra* note 2, at 270 (conflicting definitions create a problem of notice because individuals are uncertain if the definition of terrorism applies to them).

368 See BEDI, *supra* note 28, at 180-81 (noting that the political offence exception started as a general stipulation about the extradition of political offenders in bilateral treaties); see also Perry, *supra* note 11, at 716 (examining the “emerging doctrine” of the political offence exception).

369 See SAUL, *supra* note 6, at 42-43 (concluding that, while not definition can be exhaustive, the political offence exception usually excludes atrocious acts or violence that is far removed from the political goal).

370 See WIJNGAERT, *supra* note 23, at 126-29, 132 (noting how the Swiss definition developed over time to include features from a variety of theories).

371 See, e.g., European Convention for the Suppression of Terrorism, art. 1 (incorporating the Convention for the Suppression of Unlawful Seizure of Aircraft and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation).

372 OMAR MALIK, ENOUGH OF THE DEFINITION OF TERRORISM xvii (2000).