THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION: DEFINING THE ISSUES AND SEARCHING A FEASIBLE ALTERNATIVE *

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1. INTRODUCTION

Without too much exaggeration, the political offence exception to extradition can be said to be the most discussed problem in extradition law today (1). The controversies around this rule mainly result form its paradoxical character, which lies in its being both one of the most universally accepted and one of the most universally contested rules of international law. Its universal acceptance can be deduced from the fact that almost every extradition law and treaty contains the rule (2), thus witnessing the preparedness in principle of states to refuse extradition for political crimes. When looking at the practice, however, one may find that it is also one of the most contested rules: each concrete application of the rule provokes discussions and debates, within both the legal discipline and the general public. Today, one may get the impression that this is essentially a contemporary problem, mainly

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(1) *See* for example the discussions with respect to the proposed new extradition statute in the United States. BASSIOUNI, M.C., «The 1983 Extradition Act: legislative history and critical appraisal» (in print).

(2) *Inter alia,* the following countries have enacted the principle in their domestic laws: Algeria, Argentina, Australia, Belgium, Brazil, Burma, Canada, Columbia, Cyprus, Costa-Rica, Denmark, Ecuador, Finland, France, Federal Republic of Germany, Ghana, Greece, Great Britain, Haiti, Ireland, Iran, Israel, Italy, Japan, Lebanon, Liberia, Libya, Luxemburg, Malaysia, Marocco, New Zealand, The Netherlands, Norway, Pakistan, Peru, Portugal, Somalia, Spain, Syria, Sweden, Sri Lanka, Switzerland, Thailand, Togo, Tunesia, Uganda, United Kingdom, United States. GRÜTZNER, H., *Internationaler Rechtshilfverkehr in Strafsachen* (1955).

arising from the current invocation of the political offence exception by «terrorists». This is, however, only apparently so: ever since its inception in extradition law, practical applications of the rule have given rise to reactions and often also to international tensions (3). Each political conflict situation has produced its asylum seekers, who, successfully or unsuccessfully claimed protection against extradition by raising the political offence exception. Each of these conflicts gave rise to different types of political offences and political offenders, which in turn led the courts throughout Europe to different interpretations of the political offence exception to extradition.

For example, whereas the Russian revolution had produced a specific type of political offenders, claiming asylum in various European countries (4), the late Twenties and Thirties, in a general atmosphere of rising totalitarianism, brought a new profile of political offenders: «fascists» and «communists» who, in combatting each others, used methods which can easily be compared to contemporary «terrorism» (5). After the Second World War, two totally different generations of political offenders arose: on one hand the «collaborators» and «quislings», claiming to be purely political offenders (6) on the other the war criminals who, often successfully, raised the political offence exception against their extradition (7). With the Cold War, another type of political criminals emerged: those having fled from the East and therefore claiming to be «passive» political offenders because their crimes were no active offences against the State but just acts having as their sole objective escaping from oppression and totalitarianism (8). The Sixties brought, among other colonial wars, the Algerian conflict, producing a new generation of political offenders who, to a certain extent, were the predeces-

(3) For example, the conflict between Iran and the United States concerning the extradition of the Shah.

(4) For example, *Gaivas,* Court of Appeal, Brussels, Belgium, 9 July 1910, *Pasicrisie* II, p. 288; *Chimansky,* id., 11 April 1911, *Journal des Tribunaux,* p. 462 (1911); *Keresselidze and Magaloff,* Federal Tribunal, Switzerland, 12 February 1907, 33 *Arrêts du Tribunal Fédéral suisse* (A.T.F.), I, p. 169; *Wassilieff,* id., 13 July 1908, 34 *A.T.F.,* p. 533; *Jung,* The Netherlands, 1921, *Het Volk,* 16 June 1921.

(5) For example, *Bartholomei,* Court of Appeal, Brussels, Belgium, 3 Januari 1929, 56 *Journ. D. int.,* p. 773 (1929); *Pavan,* Federal Tribunal, Switzerland, 15 June 1928, 54 *A.T.F.,* I, p. 207; *Ragni,* id., 14 July 1923, 49 *A.T.F.,* I, p. 267; *Giovanni Gatti,* Court of appeal, Grenoble, France, 13 Januari 1947, *Rec. Sirey* II, p. 44 (1947).

(6) For example, *Talbot,* Court of Appeal, Paris, France, 18 March 1947, *Gaz. Pal.,* II, p., 17 (1947); *Spiessens,* Court of Appeal, Colmar, France, 7 May 1953, *Dalloz,* 1953, p. 605; *De Serclaes,* Supreme Court, Italy, 28 May 1952, *Foro Italiano,* 1952, II, p. 129; *De Bernonville,* Supreme Court, Brazil, 28 September 1955, 22 *I.L.R.,* p. 527 (1955).

(7) For example, *Artucovic,* Court of Appeals, United States, 24 June 1957, 24 *Int. L. Rep.,* p. 516. It is also noteworty that Interpol refused its assistance for war crimes on the basis of article 3 of its statute concerning political crimes. For a criticism, see L.C. GREEN, «Political offences, war crimes and extradition», 11 *I.C.L.Q.,* p. 348 (1962).

(8) For example, *Kavic, Bjelanovic, Arsenijevic,* Federal Tribunal, Switzerland, 30 April 1952, 78 *A.T.F.,* I, p. 39; *Kolczynski et al.,* Queen's Bench, United Kingdom, 1955, 1 *All. E.R.,* p. 31.

sors of the «terrorists» emerging from the post-colonial wars and minority conflicts in the Seventies, i.e. «freedom fighters» or «terrorists» depending on the point of view of thoses judging the case (9). In addition to these, having become the prototype of the political offender in the Seventies and Eighties (10), the political offence exception was also invoked by drug offenders (11), economic criminals (12) and religious offenders (13).

The foregoing plainly illustrates that the political offence exception can be invoked and has in fact been applied for very different types of crimes, in very different overall political settings arising from very different political situations. It is therefore difficult to draw general conclusions from positions taken by the courts on the issue of defining the term «political offence», because courts have very often adapted their interpretation of the rule to the case(s) under consideration, taking into account various contextual elements which often remained implicit in the formal decision.

This flexibility — arbitrariness to some — has unvariably led to discussions about the definition of the term «political offence». The crucial importance of this problem lies in the fact defining the term is tantamount to determining the criteria between extraditable and non-extraditable offenders in cases where the exception is raised.

In modern times, more and more attention has been paid to the practical inconvenients of the political offence exception, not only arisIng from the — sometimes overly broad — application of the rule, but mainly emerging from its factual implication: offenders who successfully invoke the political offence exception remain unpunished, notwithstanding the seriousness of their acts. This has led to a number of efforts aiming at coping with these inconvenients.

This article wil briefly explore the problem of definiting the term «political offence» and subsequently discuss the practical alternatives which have

(9) For example, *Ktir,* Federal Tribunal, Switzerland, 17 May 1961, 87 *A.T.F.,* I, p. 134 and 24 January 1962 (not published); *Watkin,* id., 7 October 1964, 90 *A.T.F.,* I, p. 208; *Zaouche Tahar et al.,* Court of Appeal, Brussels, Belgium, 1960 (not published, see DE KOCK, M. et al., *Les extraditions des Algériens ou le chemin de la guillotine,* 96 p., Brussels, s.d.); *Curuchet,* Senegal, 1963, *Le Monde,* 1-2 December 1963; *Arndt,* District Court, The Netherlands, 1961, *Ned. jur. bl., p. 907-911 (1961).*

(10) For example, Croissant, Court of Appeal, Paris, France, 16 November 1977, 93, *J.T.,* p. 52 (1978); *Piperno,* id., Oct. 17, 1979, not published, see *Le Monde,* 19 October 1979; *Bilandzic,* Bundesgerichtshof, 17 August 1978, 28 *BGHSt.,* p. 110; *Folkerts,* Tribunal of Maastricht, The Netherlands, 25 Januari 1978 and Supreme Court, 8 May 1978, *Ned. Jurispr.,* No 314 (1978); *Della Savia,* Federal Tribunal, Switzerland, 26 November 1968, 95 *A.T.F.,* I, p. 462; *Mackin,* U.S. Court of Appeals, 2nd Circ., 23 December 1981, 668 *F 2nd 122; Eain,* U.S. Court of Appeals 7 Circ., 20 February 1981, *641 F 2nd 504.*

(11) For example, *Lynas,* Switzerland (not published), appealed before the European Commission of Human Rights, application no. 7311/75.

(12) For example, *Sindona v. Grant,* U.S. Court of Appeals, 2nd Circ., *619 F 2d 167.*

(13) *Budlong and Kember,* Queen's Bench, United Kingdom, 12-30 November 1979, (1980) 1 *All. E.R.,* p. 714.

been developed to overcome the major difficulties resulting from the application of the political offence exception. Thereafter, an alternative solution *de lege desiderata* will be proposed and shortly analysed. These points summarize some of the items which are developed more at length in this author's doctoral dissertation (14).

2. THE PROBLEM OF DEFINING THE TERM «POLITICAL CRIME»

The term «political offence» does not refer to a well-determined criminal transaction which can be specified in terms of a moral and a material element. It is rather a *descriptive label* which can be adhered to each offence (15) which subjectively (*i.e.* in the author's intention) or objectively (*i.e.* as far as the nature of the interests injured or the consequences of the act are concerned) affects the *polis, i.e.* existing sociopolitical order. Therefore most definitions of the term political offence are *tautologous,* in the sense that the term «political» is usually defined by reference to the *polis* (16).

Apart from this problem, which has led various authors to the conclusion that the term is indefinable (17), the major difficulties in using the concept in extradition cases mainly result form two elements. Firstly, extradition laws and treaties almost never define the term political offence, and consequently, the definition is unvariably a matter of judicial interpretation and administrative discretion. Secondly, the decision as to whether or not a given offence qualifies as political is taken unilaterally by the requested state.

The consequence of this unilateral characterisation is that each state for itself determines the scope of the political offence exception. Accordingly, each country has developed its own judicial — but also political — criteria for defining the term political crime, with the result that the question as to whether a crime is political or non-political may be differently answered from one state to another.

In *legal doctrine,* a variety of terms has been devised to classify political offences. The classical distinction is that between purely and relatively political crimes (18). In addition, various other terms have been used, including the following: absolutely political crimes, complex and connex offences,

(14) *The political offence exception to extradition. The delicate problem of balancing the rights of the individual and the international public order,* Kluwer (1980), 263 pp., hereinafter referred to as «*The political offence exception to extradition*».

(15) BASSIOUNI, M.C., «The political offence exception in extradition law and practice», in BASSIOUNI, M.C. (ed.), *International Terrorism and Political Crimes,* p. 408 (1975).

(16) *See in extenso, The political offence exception to extradition,* p. 95-105.

(17) OPPENHEIM-LAUTERPACHT, *International Law,* Vol. I, p. 707-708 (1955); Cf. HAMMERICH, F., «Rapport général sur la définition du délit politique», in *Actes de la Sixième Conférence Internationale pour l'Unification du Droit pénal,* p. 61 (1938).

(18) Purely political crimes are characterized by two interdependant factors: (a) they are exclusively directed against the State, without injuring private persons, property or interests and (b) they are not accompanied by the commission of common crimes.

mixed offences and predominantly political offences (19). With some exceptions most of these terms have remained doctrinal concepts with no fixed content and which may even vary from one author to another. They have seldom been used as such by the courts (20).

In the *judicial interpretation* of the term « political crime », various approaches can be noted. It is impossible to give an analysis-in-depth within the scope of this article. Roughly speaking, a distinction can be made between the subjective approach, the objective approach, and the mixed approach.

The *subjective* approach focuses on the intentions of the author. If it is established that the latter acted with a political motive or for a political purpose, his crime is deemed to be political. This theory has been followed in France for a number of cases. For example, in the *Holder-case,* an aircraft hijacking, committed by a number of American nationals who made vague allusions to Angela Davis but who, at the same time, extorted five hundred thousand dollars from the aircraft company, was considered as a political crime because the motives of the preparators were political (21). In the 1980 *McCan-case,* the same criterion was used to consider as political a bombing, committed by an IRA-member in a public cinema near the headquarters of the British army in the German Federal Republic (2). Extradition to the latter was refused (23).

The *objective approach* focuses on the act, without looking at the motivation of the author. Different models may be distinguished. Firstly, the so-called *« injured rights theory »,* followed in France during a certain period of time, which deduces the political character of the crime not from the motives for the act but from the nature of the rights injured by the act (24). Secondly, the *model of « connexity »,* by which an ordinary crime may be considered political by reason of its being connected to (*connexe*) a purely political offence. This theory is followed in Switzerland and has also been applied in Ireland in the Bourke case. In that case, a person who, for personal motives, namely friendship and compassion, had assisted a convicted spy in escaping from prison, was held non-extraditable because his act, through

(19) *See The Political offence exception to extradition,* p. 105 *et seq.*

(20) *Ibid.*

(21) *Holder and Kerhow,* Court of Appeal, Paris, 14 April 1975, unpublished, reported by McDOWELL, E., *Digest of United States Practice in International Law,* p. 168 (1975).

(22) *McCann,* Court of Appeal, Aix-en-Provence, December 13, 1978, unpublished, English translation by CARBONNEAU, T. in *1983 Michigan Yearbook of Int. Legal Studies,* p. 341 (1983).

(23) Other examples of the subjective approach are *Da Palma,* Court of Appeal, Paris, 14 December 1967, *La Semaine Juridique,* No. 15387 (1968) (extradition requested by Portugal); *Hennin,* Court of Appeal, Paris, 3 July 1967, *La Semaine Juridique,* No. 15274 (1967).

(24) *Giovanni Gatti,* Court of Appeal, Grenoble, 13 Januari 1947, *Rec. Sirey,* II, p. 44 (1947). The injured rights theory was frequently used in cases involving World War II-collaborators whose extradition was sought by Belgium, although the Courts were very much divergent on the matter. No ex-collaborator was extradited to Belgium. *See The political offence exception to extradition,* p. 146.

its connection with a purely political crime (the espionage of the person he assisted) was political (25). The most important model of the objective approach is the so-called *«political incidence theory»*, which is being followed in the United Kingdom and the United States (26). In order to qualify as political according to this theory, the act must be part of and incidental to a political struggle. For example, in the 1980 *Mackin-case* an attempted murder of a British soldier in Northern Ireland by a member of the IRA was deemed political because of its beings connected with the overall conflict situation in Northern Ireland (27). In the *Sindona-case,* the crime of fraudulent bankrupcy was considered non-political because of the lack of a link with a political conflict situation in Italy (28).

Both the subjective and the objective approach have been heavily criticized because of their one-sidedness. The subjective criterion is overly broad because it renders political any crime, however serious, for which a political motivation is invoked. Moreover, the political motive underlying is not necessarily «noble»: the purpose may well be the bringing to power of a group which better serves the personal (*e.g.* economic interests) of the offender. Conversely, the objective theory has the drawback of being very radical in its categoric refusal to look at the motives for the act. The political incidence theory has been criticized for its over-emphasizing of the requirement that there should be a violent political struggle, and it has also been considered to be somewhat arbitrary in the sense that the question as to whether or not a given act «is incidental to» a given conflict may, in many cases, be debatable (29).

Reacting against such drawbacks, courts in many countries have developed an approach which can be termed *mixed* in that it combines the two latter, sometimes adding new criteria tot the judicial interpretation of the term «political offence».

In France, some courts have recently been re-emphasizing the *doctrine de gravité* which had been promoted by the Institut de Droit International already at the end of the last century (30). According to this theory, extremely serious crimes cannot qualify as political. In some instances, the term

(25) *Bourke v. Attorney General,* 107 *Irish Law Times,* p. 296 (1973).

(26) *See in extenso,* SHEARER, I.A., *Extradition in International Law,* p. 178 *et seq.;* BASSIOUNI, M.C., *International Extradition United States Law and Practice,* VIII, § 2, New York (1983).

(27) *Mackin,* Court of Appeal, 2 Circ., 23 December 1981, *668 F 2d 122.* Cf. *Mc Mullen,* 74 *Am. J. Int. L.,* p. 434 (1980); *Eain,* 74 *A.J.I.L.,* p. 435 (1980); *Budlong and Kember,* Queen's Bench, U.K., 12-30 November 1979 (1980), *All. E.R.,* p. 714. *See* BASSIOUNI, *op. cit.,* VII, § 2/55-2/57.

(28) *Supra,* note 12.

(29) *See in extenso The political offence exception to extradition,* p. 111-126. Cfr. STEIN, T., *Die Auslieferungsausnahme bei politischen Delikten,* p. 180 *et seq.* (1983).

(30) Institut de Droit International, Oxford Session, 1880, V *A.I.D.I., Annuaire* p. 127 (1981-82); Id., Geneva Session 1892, XII *A.I.D.I., Annuaire* p. 182 (1892-94). *See The political offence exception to extradition,* p. 16 *et seq.*

délits sociaux is used to express the same idea. This criterion was used by the Court of Appeal of Paris in a number of German (*Croissant* (31), *Winter* (32), *Hoffmann* (33)), Italian (*Piperno* (34), *Pace* (35), *Affatigato* (36), *Biancorosso* (37)) and Spanish (*Linzana Echevarria* (38), *Achega Aguire* (39)) cases. It is, however, not consistently used by the other courts. For example, the crimes of the two Bascs *Azcargorta* and *Elorriaga* whose extradition was requested by Spain, were deemed political «*no matter how serious they were*» (40).

In various countries, Courts have considered that the political character of an offence should be interpreted in relationship to the Requesting State. For example, in the 1980 *Escobedo*-case, the attempted kidnapping of the Cuban consul in Mexico was considered non-political *inter alia* because extradition was requested, not by the target state (Cuba), but by a third state (Mexico) (41). The same criterion has been used in Belgium (42), the United Kingdom (42), the Netherlands (44), Switzerland (45), Sweden (46) and the German Federal Republic (47).

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(31) *Supra,* note (10), English translation by T. CARBONNEAU, *op. cit.,* p. 349.

(32) Court of Appeal of Paris, 20 December 1978, translation by T. CARBONNEAU, *op. cit.,* p. 344.

(33) Court of Appeal of Paris, 9 July 1980, unpublished, *see* CARBONNEAU, *op. cit.,* p. 358.

(34) Court of Appeal of Paris, 17 October 1979, unpublished, *see* CARBONNEAU, *op. cit.,* p. 376.

(35) Court of Appeal of Paris, 9 November 1979, unpublished, *see* CARBONNEAU, *op. cit.,* p. 367.

(36) Court of Appeal of Aix-en-Provence, 5 september 1980, unpublished, *see* STEIN, *op. cit.,* p. 250.

(37) Court of Appeal of Paris, 22 October 1980, unpublished, *see* STEIN, *op. cit.,* p. 248.

(38) Court of Appeal of Paris, 3 June 1981, unpublished, *see* STEIN, *op. cit.,* p. 249.

(39) Court of Appeal of Paris, 31 August 1981, unpublished, *see* STEIN, *op. cit.,* p. 249.

(40) Court of Appeal of Aix-en-Provence, 6 April and 16 May 1979, unpublished, *see* CARBONNEAU, «The political offence exception as applied in French cases dealing with the extradition of terrorists», *1983 Michigan Yearbook of Int. Leg. Studies,* p. 230 (1983).

(41) U.S. Court of Appeals, 5th Cire., 4 August 1980, *623 F.2d 1098.*

(42) *Abarca,* unpublished, *see The political offence exception to extradition,* p. 176 *et seq.*

(43) *Tzu-Tsai Cheng v. Governor of Pentonville Prison,* House of Lords, March 5-April 16, (1973), 2 *All.. E.R.,* p. 204.

(44) *H.J. alias M.R.,* Supreme Court, September 14, 1971, *Ned. Jurispr.,* No. 50 (1974).

(45) *Bodenan,* Federal Tribunal, August 13, 1973, unpublished, *see* FELCHLIN, P., *Das Politische Delikt. Entwicklung. Problematik und Wandel im Auslieseferungsrecht unter Berüchsichtiging der Rechtsprechung des Schweizerischen Bundesgerichtes,* p. 327 (1979).

(46) *Cheng,* Supreme Court, 22 August 1972, *Jurisdikt Arkiv. Avd. 1, Tidskrift för Lagskipning,* p. 358 (1972).

(47) *Bilandzic, supra,* note 10.

The most developed model of a «mixed approach» is the theory which has been developed by the Swiss courts known as the *proportionality theory.* Various criteria are used, the most important of which are the following: the act should be part of/linked with a political conflict situation; there should be a commensurateness between the act and the political objective of the act (extremely serious offences usually do not satisfy this criterion; for murder the courts even require that the crime should be the *ultima ratio, i.e.* the only possible means to reach the political goal aimed at); there should be a certain degree of effectiveness to the act in that it should be instrumental towards attaining its political objective (48). It is not surprising that the proportionality theory has appeared to be a very severe test in terrorist cases. In no such extradition case, the political offence exception has been successfully invoked by the requested person (49). The proportionality test has appeared to be an attractive test for courts in other countries. For example, the Netherlands Supreme Court has, under explicit reference to the Swiss jurisprudence, adopted the proportionality theory (50).

The proportionality theory has been criticised because of its potential for arbitrariness. Especially the requirement of the effectiveness of the act seems to be difficult if not impossible for a court to assess. On the other hand, the proportionality theory is the only one aiming at a certain balancing between various elements such as the seriousness of the act and the overall political situation in which it occurs (51).

One may discuss at length about the relative value of all these theories. What they have in common is that they all have as their main objective to define the term political crime. For example, the seriousness of an offence is often advanced as an element to demonstrate that it is *not* a political offence. Or the fact that extradition is requested by a third state, uninvolved in the conflict between the offender and the target state.

However, these characteristics do not say anything about the political or the non-political character of the act. A crime does not become more or less political because of its being serious or because of its being international. What is actually meant is that the crime concerned should be liable to extradition.

In other words, criteria such as the ones mentioned are advanced as *definitional* criteria whereas in reality they relate to be extraditability of a given offender in a given case. As such one may have the feeling when reading cases in which the exception is raised that the court's conclusion concerning the political or non-political nature of the act was in fact dictated by the conclusion one wanted to reach on the issue of extradition. This explains much

(48) *See in extenso,* FELCHLIN, *op. cit.*

(49) For example, *Della Savia, supra,* note 10, *Morlacchi,* Federal Tribunal, 12 December 1975, 101 *A.T.F.,* Ia, p. 605; *Castori,* Federal Tribunal, 19 March 1975, 101 *A.T.F.,* Ia, p. 65; *Bartolini, Cavina, Francosi, Rinaldi,* 30 July 1975, 101 *A.T.F.,* Ia, p. 416.

(50) *Folkerts, supra,* note 10.

(51) *See The political offence exception to extradition,* p. 131-132.

of the ambiguities surrounding judicial interpretation of the political offence exception to extradition (52).

The problem becomes even more complicated if one also takes into account the executive stage of the decision-making, *i.e.* the final decision to grant or to refuse extradition. This stage is often less known and also difficultly researchable because the final decisions on extradition cases, rendered by the Government, are usually not published. However, considerable difference between the judicial interpretation and the final executive discretion in a particular case may occur. Thanks to a special authorisation, this author, has had the possibility to study the matter on the basis of the extradition files kept by the Belgian government (53). In numerous cases, the Government departed form the Court's opinion that the offences were non-political by refusing extradition on the basis of the political offence exception. A good example is the Abarca-case (1965). Abarca, a Spanish national and a militant adversary of Franco, had committed an unsuccessfull attack against an Iberia aircraft in Geneva, Switzerland. To that end, he had placed a bomb in a suitcase which was about to be landed in the place when it was discovered. Abarca fled to Belgium and Switzerland requested his extradition. The Court of Appeal of Brussels before which brought did not accept Abarca's argument that the crime was political; the court considered the crime to be a common offence because of its inherent seriousness and because of its having been committed in the territory of a neutral state against innocent victims. Therefore, it found Abarca to be extraditable (54). The final decision was to be taken by the Minister of Justice. Part of Belgian public opinion was vividly interested in the case, in particular the Socialist Party, who organized demonstrations and voted an official manifest to refrain the Minister of Justice from extraditing Abarca. The Minister of Justice, who happened to be a Socialist, publicly declared that he refused the extradition on the grounds of the political offence exception. According to the Minister, Abarca's crime was political because of its being linked with other identical attacks committed throughout Europe by the anti-Franco organisation to which Abarca belonged (55).

In this case, the motive underlying the ultimate decision is clear: it could be termed as domestic political pressure on decision making in extradition cases. In other cases, however, factors affecting the decision making are much less evident, and therefore often a matter of speculation. Not only domestic, but international political pressure may be of great importance. The economic or political ties with the requesting state, or the economic or military

(52) *id.*, p. 96 *et seq.*, 100 *et seq.*, 196.

(53) These findings were published in «La Belgique et l'exception pour délits politiques. Analyse critique de la pratique judiciaire et administrative», 59 *Rev. D. pén. crim.*, p. 833-863 (1979).

(54) Court of Appeal of Brussels, 8 May 1974, unpublished.

(55) Actes Parlementaires, Chambre (1963-64), 25 June 1964, p. 6. *See also The political offence exception to extradition*, p. 176.

supremacy of the latter, may influence the decision of the government in the requested state. Understandable reasons of self-interest, wisely termed as «the wish to remain neutral» may affect the decision in cases where it is not clear who of the two contending parties within the requesting state — the government or the party to which the requested person belongs — will ultimately win. Other factors may be added to this list (56).

The Abarca-case very well illustrates the drawback of the political offence exception. On the one hand, there was no risk for an unfair trial conducted by his political adversaries, extradition being requested by Switzerland and not by Spain, on the other hand the practical implication of the rule was that a potentially very serious offence remained unpunished. The problem raised by this case and by many other comparable extradition cases throughout the two past decades are not new. Especially the second one, that of the impunity of the offender, has always existed, also when extradition had been refused on other grounds. However, in the contemporary situation of growing interdependence of nations and the relative shrinking of the globe resulting form the massive development of communications, the fight against criminality is being increasingly perceived as a problem common to mankind calling for a cooperative reaction on the part of states. In this context, the impunity of the offender as a practical result of the political offence exception, is much less acceptable that it was at the time the rule was developed.

3. PRACTICAL SOLUTIONS: DEPOLITIZATION AND «AUT DEDERE AUT JUDICARE»

In an effort to cope with these problems, states have used two methods, either isolatedly or in combination: the introduction of exceptions to the political offence exception by means of «*depolitization*» and the formula «*aut dedere aut judicare*» by which prosecutions are brought against the persons whose extradition was denied.

Depolitization consists of providing in extradition laws or treaties a formula stating that a given offence will not be considered political for the purposes of extradition. For example, art. VII of the Genocide Convention (57) provides that genocide and the other crimes enumerated shall not qualify as political offences. Other examples of this depoliticizing formula can be found in the widely spread *attentat clause* (depoliticizing the murder or attempted murder of a head of state) (58), in the *Apartheid Convention* (59)

(56) *id.*, p. 192 *et seq.*.

(57) 9 December 1948, 78 *U.N.T.S.*, p. 277.

(58) For example, Arab League Extradition Agreement (1952), art. IV (1) *League of Arab States Treaty Series*, p. 27; Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters (1962), art. 3 (2)a, *Moniteur belge*, 24 October 1962; European Convention on Extradition (1957), art. 3 (3), *E.T.S.*, No. 24.

(59) November 1973, *U.N. Doc. Res. A/3068 (XXVIII)*.

and in the «European Convention on the Suppression of Terrorism (60). Many criticisms have been raised against this formula, including the criticism of its hypocritical character (61). While having the advantage of making extradition possible (and mandatory) for certain political offences notwithstanding their being politically motivated, it has, nevertheless, the drawback of introducing a certain degree of automatism in the decision-making, due to the fact that courts and Ministers loose their power of discretion with respect to certain — potentially political — offences. This may in part explain the reluctance of states towards accepting the depoliticizing formula as a statutory or treaty obligation or to applying it in practice. For example, the *attentat clause,* although widely accepted in extradition treaties throughout the world, has been applied in only one single case over the more than hundred years of its existence (62).

As far as genocide is concerned, many states, including the U.K. and the U.S.A., have been reluctant towards adopting the formula and in practice, not one application of the clause has been made (63). In many other conventions, including the four Red Cross Conventions of 1949 (64) and the 1970 Hague Convention on the Suppression of Hijacking (65) the depoliticizing formula was proposed, but not accepted.

In view of the relative small success of this formula, another principle is increasingly adhered to in international criminal law conventions: the principle «*aut dedere aut judicare*». Looking at the number of recent conventions in which it was laid down over the past few decades, it may seem to be the more successful formula nowadays, at least politically more acceptable than depoliticization (66). While highly recommendable from a philosophical point of view, it remains to be seen, however, to what extent this

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(60) 27 January 1977, E.T.S., No. 90.

(61) For a discussion of the arguments, *see The political offence exception to extradition,* p. 148-158.

(62) *Cabanne de Laprade,* Court of Appeal, Brussels, 17 October 1963, unpublished. There are, it is true, other examples of extradition being granted for the crime of *lèse-majesté,* but these decisions were founded not on the attentat clause, but on other criteria. Conversely, extradition was also very often refused for this type of crime. *See The political offence exception to extradition,* p. 135-138.

(63) *See The political offence exception to extradition,* p. 140 *et seq.*

(64) 75 *U.N.T.S.,* p. 35, 85, 135 and 285.

(65) *I.C.A.O.* Doc. 8920.

(66) For example, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, *supra,* note (65), art. 7; Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, *I.C.A.O. Doc. 8966,* art. 7; Washington Convention of American States to Prevent and Punish Acts of Terrorism taking the form of Crimes against Persons and Related Extortion that are of International Significance, *U.N. Doc. A/AC/C.6/418 Annex IV,* art. 5; New York Convention on the Prevention and Punishment of Internationally Protected Persons, including diplomatic agents, *U.N. Doc. A/3166 (XXVII),* art. 7; International Convention against the taking of hostages, *U.N. Doc. A/Res. 34/146,* art. 8; The Vienna Convention on the physical protection of nuclear material, I.A.E.A., Vienna, art. 10.

formula can be successful in practice. There have been a number of hijacking cases in which alternative prosecutions were brought against persons whose extradition had been denied. So far, no systematic study of the operation of *aut judicare* in practice is available. At first sight, the result does not seem to be very positive. As far as wars crimes are concerned, there is, to this writer's knowledge, no single case in which prosecutions were brought against war criminals, notwithstanding the fact that in many of those instances, the Requested State was bound by the 1949 Red Cross conventions which had explicitly provided the duty either to extradite or to prosecute (67).

4. A SEARCH FOR A FEASIBLE ALTERNATIVE

Turning back to the political offence exception, it is noteworthy that, in trying to cope with the practical inconvenients of the rule, no real debate has been held concerning the desirability of keeping or abandoning the rule as such. For reasons fundamental in the last century and very expedient in the present one, the political offence exception is considered as an essential political dogma of liberal democracy. Rather than questioning the rule itself, practical solutions are sought to avoid the rule (depolitization) or even to avoid extradition as a legal process (by using «alternative devices» such as abduction or deportation). The problem, however, should be considered in a non-dogmatic manner, starting from an open, critical appraisal of the values sought to be protected by the political offence exception followed by an inquiry as to whether the rule as it stands really protects these values.

The values underlying the political offence exception are two, often conflicting principles. Firstly, the rule has a *humanitarian* objective, aiming at the protection of an offender against being judged by his political adversaries, the trial being likely to be retaliatory one. Secondly, the rule has a *diplomatic* objective, allowing states to «keep their hands free» with respect to conflict situations abroad. Classic extradition theory terms this the «neutrality» principle, because it allows states to remain «neutral» with respect to political conflicts abroad. One could, however, as well argue that the impunity granted to political offenders whose extradition has been denied factually amounts into effectively supporting foreign dissidents, and this is very far from «neutrality».

With respect to its *humanitarian objective,* the political offence exception is, it is submitted, both too narrow and too broad. It is **too narrow** because only «political» offenders are protected, whereas other offenders lack this protection against an «unfair trial» in the requesting state. It is also too

(67) *See* «Les infractions graves aux conventions de Genève et à leurs Protocoles additionnels eu égard aux règles internationales concernant la prescription des crimes de guerre et de l'extradition, in *Recueils de la Société internationale de droit pénal militaire et de droit de la guerre, Lausanne, 1982* 452-462.

narrow for reasons relating to the overall problem of the position of the offender in general in extradition law, but which may be all the more important for political offenders being «the more wanted offenders» and as such more likely to being the victim of «alternative extradition devices» such as abduction and deportation. In practice, those «devices» have often been used for political offenders, including Argoud, Tchombé, Dapcevic, Amekrane, Soblen (68) and recently also Orton Shirva, the leader of the opposition in Malawi, who was kidnapped together with his wife on Tanzanian territory and subsequently sentenced to death (69).

On the other hand, the political offence exception is *too broad* because it also protects political offenders in cases where there is no risk for a retaliotory trial in the requesting state. The Abarca case is a good example (70). Most of all, the protection afforded by the rule is too broad because of the impunity of the offender, even if he has committed the most atrocious crimes. As such a rule protecting a person against a retaliatory trial amounts into protecting him against any form of criminal responsibility. Accordingly, it is submitted that the political or non-political character of the offence should no longer be the criterion to determine the extraditability of the offender. The criterion should rather be sought in the treatment the offender would be subjected to upon extradition. Extradition should be denied if this treatment would qualify as an «unfair trial». This concept could be defined in this context as a trial in which a person is prosecuted for reasons of race, religion, nationality, ethnic or tribal origin, membership of a particular social group or political opinion or as a trial in which the position of the person risks to be prejudiced for one of these reasons (71). This proposal of course amounts into the shifting of the already very vague criterion «political» or another equally difficult criterion of the infairness of the trial or the criminal justice system as a whole, Therefore, defined criteria should be developed to make the distinctions. It should also be examined to what extent decisions-makers should be given the possibility to ask opinions or expertise form the part of various governmental and non-governmental human rights organizations; evidence brought by such organisations could facilitate the fact finding. A more detailed scheme for the operation of such a system has been developed elsewhere (72).

(68) *See The political offence exception to extradition,* p. 51 *et seq.*.

(69) *Le Monde,* 7 May 1983, p. 6.

(70) *Supra,* 2 *in fine.*

(71) The terminology used is borrowed from art. 33(1) of the Convention relating to the Status of Refugees (1951), 189 *U.N.T.S.*, p. 137, art. 2(1) a of the 1977 U.N. Draft Convention on Territorial Asylum, and art. 3(2) of the European Convention on Extradition (1957), *E.T.S.*, No. 24.

(72) *The political offence exception to extradition,* p. 207-218.

The *diplomatic objective* of the political offence exception cannot, of course, be met with the proposed rule. Therefore, it is submitted that, for diplomatic reasons, the political offence exception should be maintained, but only in an optional manner. Subject to the right of the requested person not to be returned to a State where he risks to be subjected to an unfair trial, states should be free to determine their position by granting or refusing extradition of political offenders. There is indeed something paradoxical about states with similar political institutions and objectives giving shelter to their respective political ennemies. Moreover, if such states are linked by political or military alliances set up precisely to defend those common political goals, non-extradition of offenders who attack these goals may appear to be contradictory.

On the other hand, the impunity of the offender as a result of his extradition having been refused can no longer be upheld with the excuse that the requested state wants to remain «neutral» with respect to the political conflict taking place within the requesting state. In such cases, efforts should be made to develop a more generalized application of the principle *aut dedere aut judicare* (73).

These observations undoubtedly have raised more questions than that they supplied ready answers to the complex problem of the political offence exception. It is not this writer's pretention to have found *the* workable solution for the problem. An attempt has only been made to open the discussion on the real issue, that is to say, do we or do we not want to maintain the political offence exception as a bar to extradition, for example in small regional contexts such as the Council of Europe. Once this question has been raised, a more thorough discussion concerning the values to be protected becomes unavoidable. It is then difficult to find rules which better correspond to these values, because, being based on both humanitarian and diplomatic considerations, they are often contradictory. The more easy solution for states is therefore to keep the rule as it is, thus maintaining the wide discretion they have which allows them in some cases, to sacrifice the humanitarian objective of the rule on the altar of diplomatic expendiency. It is this writers submission that this should, in the interests of the requested person, no longer be possible. Hence the perhaps far-fetched solution proposed above and developed more at length in *The political offence exception to extradition.*

(73)*Ibid.*, p. 218-229.