

In re Atta

United States District Court for the Eastern District of New York

June 17, 1988, Decided and Filed

No. 87-0551-M

Reporter

1988 U.S. Dist. LEXIS 6001 *; 1988 WL 66866

In the Matter of the Extradition of Mahmoud Abed Atta, a/k/a "Mahmoud El-Abed Ahmad", Defendant

Core Terms

extradition, settlers, settlements, treaty, arrest, rights, territory, uprising, international law, accomplices, military, probable cause, kidnapped, violent, attacks, confessions, charges, argues, roads, circumstances, immigration, civilians, terrorist, purposes, courts, region, cases, incidental, homeland, violence

Case Summary

Procedural Posture

Petitioner, the government of Israel, submitted a request to extradite defendant pursuant to 18 U.S.C.S. § 3184 and the Extradition Treaty, 1962, U.S.-Isr. Israel sought to prosecute defendant in connection with an attack on a bus in the West Bank. Defendant claimed extradition violated due process and that it should not be done due to a lack of jurisdiction and the political offense exception to extradition.

Overview

In connection with the Arab-Israeli conflict in the West Bank of Israel, defendant acted with others in connection with the bombing of a bus. After defendant went to Venezuela, officials from the United States procured his arrest, and he was brought to the United States. Israel filed a petition for defendant's extradition. The court denied the petition, holding that there was probable cause to believe that defendant took part in the bombing. However, the bombing was connected to a political uprising designed to change the composition of the government in the region, and defendant was protected by the political offense exception. Furthermore, jurisdiction did not properly lie because

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defendant was brought to the United States in a constitutionally impermissible manner. In reaching that conclusion, the court noted that the rights and protections afforded by international law in the area of extradition belonged to the sovereigns themselves, and not to its citizens. Because defendant was not to be tried in the United States, and the extradition proceedings only offered limited due process, the court could not guarantee that defendant would not be deprived of his constitutional rights.

Outcome

The court denied the application for extradition.

LexisNexis® Headnotes

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Governments > Courts > Authority to Adjudicate

HN1  **Jurisdiction & Venue, Jurisdiction**

See § 7(a) of the Penal Law, L.S.I. 5737 (1977).

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

International Law > Treaty Interpretation > General Overview

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

HN2  **Preliminary Proceedings, Extradition**

See art. 9 of the Extradition Treaty, 1962, U.S.-Isr.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > General Overview

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > General Overview

Criminal Law & Procedure > ... > Murder > Attempted Murder > Penalties

HN3  **Sentencing, Imposition of Sentence**

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18 U.S.C.S. § 2331(e) provides that when a national of the United States has become the victim of murder, an attempt or conspiracy with respect to homicide or other acts of physical violence, the perpetrator shall receive the sentences enumerated in that statute except that no prosecution for any offense described in § 2331 shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > Procedural Matters

International Law > Treaty Interpretation > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

International Law > ... > Extradition Treaties > Procedures > General Overview

HN4 **Extradition, Procedural Matters**

The Extradition Treaty, 1962, U.S.-Isr. states, in part, that when the offense had been committed outside the territorial jurisdiction of the requesting-party, extradition need not be granted. The treaty does not prevent the requested state from granting extradition if it so chooses.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > Evidence

International Law > Treaty Interpretation > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

HN5 **Extradition, Evidence**

See art. 4 of the Extradition Treaty, 1962, U.S.-Isr.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > Evidence

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

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[Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview](#)

[Criminal Law & Procedure > Preliminary Proceedings > Extradition > Probable Cause](#)

[Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution](#)

[HN6](#)  Extradition, Evidence

The scope of the probable cause hearing in an extradition case is rather limited. The function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction. The standard has been regularly described as evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. For the purposes of making the probable cause determination, the court assumes that the evidence contained in the Request for Extradition is true, and the defendant may offer only explanatory evidence designed to clarify ambiguities or doubtful elements in the prima facie case made against him.

[Criminal Law & Procedure > ... > Possession of Weapons > Unregistered Firearm > Elements](#)

[Criminal Law & Procedure > ... > Weapons Offenses > Use of Weapons > General Overview](#)

[Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview](#)

[Criminal Law & Procedure > Preliminary Proceedings > Extradition > Evidence](#)

[Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > General Overview](#)

[Criminal Law & Procedure > Trials > Witnesses > Presentation](#)

[Evidence > Weight & Sufficiency](#)

[International Law > Individuals & Sovereign States > Extradition Treaties > General Overview](#)

[HN7](#)  Unregistered Firearm, Elements

Accomplice testimony has been held to be of particular importance in extradition cases where all the alleged criminal activity occurred in a distant country. Furthermore, where the statements in question are admissions against the accomplices' own penal interest, they are thus deemed reliable. Additionally, where an accomplice's confession is corroborated by other evidence, there is sufficient evidence to support a finding of probable cause.

[Criminal Law & Procedure > Preliminary Proceedings > Extradition > Evidence](#)

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Evidence > Rule Application & Interpretation

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

HNS **Extradition, Evidence**

There may be cases where, in the interest of fairness and the furtherance of the policy behind the political offense exception, the burden of proof may need to be altered. There may be instances where a person, sought to be extradited, is denied access to the information necessary to prove the exception applies in light of the fact neither the Federal Rules of Evidence, Fed. R. Evid. 1101(d)(3), or Criminal Procedure, Fed. R. Crim. P. 54(b)(5), apply to such cases, and because discovery is generally denied. For the purposes of certain opinions therefore, with respect to each element of the political offense exception, the extraditee must prove by a preponderance of evidence that the crime for which extradition is sought is of a political character.

Criminal Law & Procedure > Trials > Jury Instructions > Requests to Charge

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Terrorism > General Overview

Criminal Law & Procedure > ... > Terrorism > Terroristic Acts > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

International Law > ... > Extradition Treaties > Extraditable Offenses > General Overview

International Law > Individuals & Sovereign States > Human Rights > Terrorism

International Law > Treaty Interpretation > General Overview

HNS **Jury Instructions, Requests to Charge**

The language of the treaty embodying the political offense exception is broad and suggests that the political offense exception is to be viewed as a flexible concept whose parameters can be measured only by factual application. The

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exception itself, however, has at times during recent history, been somewhat stretched as courts have attempted to grapple with the distinction between political offenses and terrorism. After reviewing the history of the exception, the United States District Court for the Eastern District of New York has determined that the "incidence" test has been, and continues to be, the test applied in the circuit. In so doing, the court specifically adopts the Quinn court's description of the incidence test and the purposes behind it.

[Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview](#)

[International Law > Treaty Interpretation > General Overview](#)

[International Law > Individuals & Sovereign States > Extradition Treaties > General Overview](#)

HN10 Preliminary Proceedings, Extradition

The United States District Court for the Eastern District of New York does not adopt Quinn's apparent requirement in the context of the political offense exception that the charged acts occur within the territory in which the "change in government" is sought. However, there may be times when territorial proximity of the acts requires, at a minimum, liberal consideration.

[Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview](#)

[International Law > Individuals & Sovereign States > Extradition Treaties > General Overview](#)

HN11 Preliminary Proceedings, Extradition

The "political offense," as historically described by American courts encompass those acts or offenses which are incidental to severe political disturbances such as war, revolution, and rebellion. Although there is no uniform language which has been used to describe the elements of the political offense, courts have generally noted the existence of two requirements: first, that there be a political uprising, and; second, that the act was incidental to or in furtherance of a political goal or objective.

[Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview](#)

[International Law > Individuals & Sovereign States > Extradition Treaties > General Overview](#)

HN12 Preliminary Proceedings, Extradition

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In extradition proceedings involving the political crime exception, one of the major questions for the magistrate is whether there existed violent political turmoil at the site and time of an individual's alleged illegal activities. The existence of violent political disturbance is an issue of past fact: either there was demonstrable, violent activity tied to political causes or there was not.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

HN13 Preliminary Proceedings, Extradition

The political offense exception is designed to protect those engaged in internal or domestic struggles over the form or composition of their own government, including, of course, struggles to displace an occupying power.

Criminal Law & Procedure > ... > Disruptive Conduct > Riot > General Overview

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

HN14 Disruptive Conduct, Riot

Once a court determines that a political uprising was occurring at the time the acts charged were committed, the court must next find that the acts were done in furtherance of or were incidental to a political objective in order for the exception to apply. United States courts have applied a rather liberal standard when determining whether this part of the test had been met and have been willing to examine all of the circumstances surrounding the crime.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

HN15 Preliminary Proceedings, Extradition

There are three purposes which the political offense exception is designed to fulfill. First, and perhaps foremost, the exception is designed to afford protection to those who have sought to promote political change. The second purpose is to protect individuals from receiving unfair treatment in the requested state. The third purpose of the political offense exception is to protect the requested state from appearing to take a position in favor of one side or

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the other on the underlying political conflict in the requesting country, in other words, to allow the requested state to remain neutral.

[Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview](#)

[International Law > Individuals & Sovereign States > Human Rights > General Overview](#)

[International Law > Individuals & Sovereign States > Extradition Treaties > General Overview](#)

HN16 Preliminary Proceedings, Extradition

The political offense exception is a recognition by countries throughout the world that political change for the better is often accomplished by less than desirable means, and that political crimes have greater legitimacy than common crimes. The political offense exception is justified by an acceptance of the right to political self-determination as well as by humanitarian concerns.

[Criminal Law & Procedure > Preliminary Proceedings > Extradition > Evidence](#)

[International Law > ... > Extradition Treaties > Procedures > Evidence](#)

[Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview](#)

[International Law > Individuals & Sovereign States > Extradition Treaties > General Overview](#)

[International Law > ... > Extradition Treaties > Extraditable Offenses > General Overview](#)

[International Law > ... > Extradition Treaties > Procedures > General Overview](#)

[International Law > Treaty Interpretation > General Overview](#)

HN17 Extradition, Evidence

See art. 1 of the Extradition Treaty, 1962, U.S.-Isr.

[International Law > Individuals & Sovereign States > Extradition Treaties > General Overview](#)

[International Law > Sources of International Law](#)

[International Law > Individuals & Sovereign States > General Overview](#)

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HN18  **Individuals & Sovereign States, Extradition Treaties**

The provisions of the convention, and international law, are designed to protect the sovereignty of states, and it is plainly the offended states which must in the first instance determine whether a violation of sovereignty occurred, or requires redress.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

International Law > Foreign & International Immunity > Sovereign Immunity > General Overview

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

HN19  **Preliminary Proceedings, Extradition**

The rights and protections afforded by international law in the area of extradition belong to the sovereigns themselves, and not to its citizens.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

International Law > ... > Extradition Treaties > Procedures > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

International Law > Treaty Interpretation > General Overview

HN20  **Procedural Due Process, Scope of Protection**

A court cannot extradite a citizen it has no jurisdiction over. The United States government must, in carrying out its treaty obligations, conform its conduct to the requirements of the U.S. Constitution, and that treaty obligations cannot justify otherwise unconstitutional governmental conduct. Additionally, there may be proceedings previous to the trial, in regard to which the prisoner could invoke in some manner the due process clause of the Constitution.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

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HN21 Preliminary Proceedings, Extradition

In the area of interstate extradition the rule has long been that one state still has jurisdiction to try a criminal defendant even where the defendant was forcibly abducted from another state by agents of the state which eventually tried him.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

HN22 Procedural Due Process, Scope of Protection

Due process of law is satisfied when one present in court is convicted of a crime after being fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. In an extradition proceeding designed to send the defendant out of the United States, the court cannot assure that the accused will receive due process. For this reason, application of the Ker-Frisbie Doctrine to extradition cases involving requests by other countries to extradite U.S. citizens who have been brought illegally into the United States violates the due process clause.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Grand Jury Requirement

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN23 Procedural Due Process, Grand Jury Requirement

The constitutional guarantee of due process is complied with when the party is regularly indicted by the proper grand jury in the state court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled. Where defendants are being tried in the United States, the court could ensure that the defendants would receive due process. However, where

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the defendant is not to be tried in the United States, the court cannot guarantee that he will not be deprived of his constitutional rights.

[Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection](#)

[Criminal Law & Procedure > Preliminary Proceedings > Extradition > Procedural Matters](#)

[International Law > Individuals & Sovereign States > Extradition Treaties > General Overview](#)

[Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview](#)

HN24 **Procedural Due Process, Scope of Protection**

The United States District Court for the Eastern District of New York does not find the limited process which is afforded in an extradition hearing to be sufficient to comply with due process in a situation where an American citizen is brought to the United States illegally from another country for the sole purpose of extraditing them abroad.

[Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination](#)

[Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection](#)

[Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview](#)

[Criminal Law & Procedure > Preliminary Proceedings > Extradition > Evidence](#)

[Criminal Law & Procedure > Preliminary Proceedings > Extradition > Probable Cause](#)

[International Law > Individuals & Sovereign States > Extradition Treaties > General Overview](#)

HN25 **Examination of Witnesses, Cross-Examination**

The limited process which a defendant can take advantage of in an extradition setting is documented by the fact there is no inherent right to confrontation and cross-examination of witnesses, and the exclusionary rule does not apply. Additionally, the Federal Rules of Civil and Criminal Procedure do not apply, instead unique rules of wide latitude govern the reception of evidence in hearings under 18 U.S.C.S. § 3184. Hearsay is not only admissible, but so are unsworn statements of absent witnesses, and a determination of probable cause to extradite can be made on the basis of this information alone.

[Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection](#)

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Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

International Law > ... > Extradition Treaties > Procedures > General Overview

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

International Law > Treaty Interpretation > General Overview

HN26 Procedural Due Process, Scope of Protection

Where it does not violate due process to bring a defendant illegally from one state to another so long as the process which is due is eventually given, the same cannot be said when the court is asked to give up its ability to assure that due process is afforded. It is not sufficient to argue that another country may be penalized by the improper conduct of United States agents. The rights of a United States citizen, under the U.S. Constitution, must take precedence over the extradition treaty.

Counsel: [*1]

For the Government: ANDREW J. MALONEY, United States Attorney, by: Jacques Semmelman, Asst. U.S. Attorney, Murray R. Stein, Special Attorney.

For the Defendant: RAMSEY CLARK, ESQ., PETER MEADOW, ESQ., New York, N.Y.

Opinion by: CADEN, Magistrate

Opinion

MEMORANDUM AND ORDER

JOHN L. CADEN, U.S. Magistrate

On June 26, 1987 the government of Israel submitted to the United States, through diplomatic channels, a request to extradite "Mahmoud Abed Atta" (hereinafter Ahmad).¹ Either by way of translation, typographical error or mistake, Ahmad has been referred to by a variety of names in the Extradition papers. The list includes, but is not limited to "Mohoud Abed Ata", "Abed Ata", "Mohammed Abed Mohammed Ata", "Mahmud 'Abed Mahmud' Ata", "Mahmoud Elabed Mahoud Ata", and "Mahmoud Elabed Mahmud Ahmad Ata." On the basis of the following, the court finds that all these names refer to the defendant, who shall, hereinafter be referred to as "Ahmad."

On February 14, 1974, a Laissez-Passer (Govt. Exh. 1, Sub-Exh. C, Attachment 6) was issued which allowed its holder to leave Israel and visit the United States. The applicant's name was Mahmoud Abed Atta. In his statement (defendant's Exh. A), Ahmad does not deny that he was the person who filled out the Laissez-Passer, rather he denies that it is his true name. He offers an explanation that the name "Atta" is the name of a large Palestinian clan. He denies membership to the clan and alleges that he was forced to use the name "Atta" on the Laissez-Passer because the Israelis used the same name on his father's Israeli

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identification papers. Consequently, when he initially registered with the Israeli authorities, at age 16, he was required to use his father's identification which bore the name "Atta." While it is true, as Ahmad alleges, that all other documents (including all forms of identification used in the U.S. Naturalization process, passports, and driver's licenses) reflect the name Mahmoud El-Abed Ahmad, this does not negate the fact that Ahmad is known to the Israeli government as "Atta." (Defendant's Exh. A, p. 8). Additionally, the name used to refer to defendant by Israel is similar to the name Ahmad states is his own. Most of the documents submitted during the hearing have been translated at least once, and often from languages which have an alphabet which is different from our own. (One example of the number of translations which the submitted documents underwent is found in the statements of the alleged co-conspirators. The statements were given in Arabic, written down in Hebrew, re-read to the affiant in Arabic, and later translated into English). For this reason, the discrepancy in the names may in part be due to difficulties or errors made in the translation process, and are not, therefore, indicative of existence of two persons.

On May 5, 1987, the undersigned issued a warrant, pursuant to 18 U.S.C. Sec. 3184 and the 1962 treaty of extradition between the United States and Israel (hereinafter "the treaty") for Ahmad's provisional arrest.

[*2]

On May 5, 1987, the undersigned issued a warrant, pursuant to 18 U.S.C. Sec. 3184 and the 1962 treaty of extradition between the United States and Israel (hereinafter "the treaty") for Ahmad's provisional arrest. ²Recent extradition cases have thoroughly reviewed and explained the procedure by which a Magistrate acquires statutory authority to hear and decide extradition matters. Reiteration of the same information is not now necessary. *See generally Eain v. Wilkes*, 641 F.2d 504, 508 and 513 (7th Cir. 1981).

The warrant was supported by the affidavit of John Gleeson, an Assistant United States Attorney appointed to the Eastern District of New York. Ahmad was turned over to United States officials at the Caracas Airport, Venezuela, and was arrested at some point thereafter, during a flight to New York. ³Because Ahmad alleges that he was kidnapped from Caracas, Venezuela, the circumstances surrounding his being brought to the United States are addressed in more detail *infra*.

The charges against Ahmad stem from the April 12, 1986 attack on an Egged Bus at the Dir Abu Mishal Intersection in the West Bank of the Occupied Territories of Israel. Ahmad is charged [*3] with murder, attempted murder, causing serious bodily injury with aggravating intent, attempted arson, and conspiracy to commit a felony. ⁴In pertinent part, Article II of the treaty reads:

Persons shall be delivered up according to the provisions of present Convention for prosecution when they have been charged with . . . any of the following offenses:

. . .

1. Murder.
2. Manslaughter.
3. Malicious wounding; inflicting grievous bodily harm.

. . .

24. Arson.

. . .

Extradition shall also be granted for attempts to commit or conspiracy to commit any of the offenses mentioned in this Article provided such attempts or such conspiracy are punishable under the laws of both Parties by a term exceeding three years.

Extradition shall also be granted for participation in any of the offenses mentioned in this Article.

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The charges enumerated in the text are extraditable under paragraphs 1, 3, and 24 of Article II of the Treaty. According to the extradition request, the charges are all "ordinary criminal charges under Israel's Penal Law, 5737-1977," and will be tried in an "ordinary Civil Court."

There are several issues before the court. ⁵ Ahmad argues that Israel had failed to provide copies of all the laws necessary to determine whether the civilian court in Jerusalem had jurisdiction to try this case. However, Ahmad cites us to Benvenisti (Defendant's Exh. J, p. 38) which states:

Israeli magistrate and district courts are empowered by emergency regulations enacted by the Knesset, to judge offenses committed in the occupied territories. Israeli courts may try only Israeli and foreign tourists, but not Arab residents.

Ahmad apparently ignores the fact that he is an American citizen and apparently can qualify as a foreign tourist for the purpose of trial. (*See infra* "Physical Movement").

The first is whether, under Article III's [^{*4}] limitation of jurisdiction, Ahmad was found within the "territorial jurisdiction" of the United States. Additionally, under Article V, the court must assess whether there is sufficient evidence to justify Ahmad's committal to trial. Third, the court must consider, under Article VI, paragraph 4, whether Ahmad's extradition must be denied because the acts in question are of a political character. Article IX requires that the determination of whether extradition "should or should not be granted shall be made in accordance with the domestic law of the requested Party . . ." The court, therefore, has also considered United States law in determining the issues resolved herein. Hearings were held on the 16th and 17th of December, 1987 and the 22nd of February, 1988.

[^{*5}] *FACTSAs will be discussed in greater detail infra*, most of the issues which arise in an extradition hearing are centered on the unique facts and circumstances of the parties and the acts in question. For this reason, the facts are set forth below in considerable detail. How those facts affect the outcome of the issues will be addressed in each substantive area raised. ⁶ Unless otherwise noted, all factual information was taken from the request for extradition provided by the government of Israel.

During the hearing, the court reserved its decision on whether to admit certain evidence. The court's decision in that regard is set out below.

Defendant's exhibits D, I and J are all admitted. While the court finds defendant's exhibit D to have very little probative value, the exhibits are all historical information which is relevant to the political uprising in the West Bank.

Defendant's exhibit J. MERON BENVENISTI, 1986 REPORT, Demographic, Economic, Legal, Social and Political Developments in the West Bank, (1986) will hereinafter be referred to as defendant's Exh. J, with page cites as appropriate.

Defendant's exhibit A, the unsigned affidavit of Ahmad, is admitted for the limited purpose of establishing Ahmad's family/biographical information. In making this determination, the court notes that most of the information in this exhibit is corroborated by Ahmad's passport, the Laissez-Passer, and the information submitted by the government of Israel.

Government's exhibits 12B, 18, 21 and 23 are all admitted. However, Government exhibit 23 was submitted untimely (both after the close of the hearings and after the court was informed that the government would not be presenting a witness on the issue of the political offense exception). Moreover, the witness whose affidavit the government sought to admit was either unwilling or unable to appear in person, although the court indicated it was willing to reopen the hearings to accommodate the government. The court has considered the document carefully, but is unable to find it to be of much value. It is based on facts and principles which contradict the substantial weight of the other evidence presented. The court simply cannot lend credence to an affidavit which has not been the subject of cross examination to determine the veracity or reliability of the information contained therein.

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In discounting the exhibit, the court notes that this is a submission by the United States government, and not the Government of Israel, and therefore, its rejection places no burden on foreign relations.

[*6]

According to the Request of Extradition, Ahmad carried out the attack with two accomplices. Both of these accomplices gave sworn statements and have since been tried and convicted for their participation in the acts charged. One of the accomplices, Salah Yousef Ahmad Hariz, (hereinafter Ahmad Hariz) first admitted participation, but later claimed to have falsely admitted participation only in an effort to protect his cousin. (See "Statement of (identity no.) 96722171" dated September 9, 1986).⁷ Mohammed Hariz stated in part, "I admitted, in my first investigation, the shooting at the bus because I had reached such a situation and I had intended to go out with the police . . . and I had planned to commit suicide in a water well and to take the secret with me to the grave as to who had taken part, together with Mahmoud [Ahmad], in the shooting. The well was without water."

The other alleged accomplice, Salah Mohammed Yousef Hariz, (hereinafter Mohammed Hariz) made three contradictory or supplemental affidavits, and participated in a video reenactment of the incident, which was viewed by the court. The bulk of the facts recited herein, come from these sworn statements.

According [*7]

to Ahmad Hariz,⁸ Ahmad Hariz, in his second statement, reaffirmed the portion of his first affidavit as to his conscription in the terrorist organization and as to the threatening letters. However, in the first statement Ahmad Hariz stated that Izaat A. Wahad proposed that Ahmad Hariz write the threatening letters, but the second statement states that Mahmoud [Ahmad] told him to write the letters.

his cousin Ahmad came from America to visit. During that visit, Ahmad Hariz told Ahmad of the threatening letters he had written to "workers" who were working on the road between the village of Abud and Dir Abu Mishal "so that they would stop working on the road." Ahmad asked Ahmad Hariz to join the terrorist organization he belonged to. Whether Ahmad Hariz's application to that organization was ever acted upon is unclear, although he was apparently convicted of being a member of an illegal association. See Verdict, Military Court, Ramallah, before: Colonel Dani Guetan, Major Elf Wolf, Sgan Aluf Shmuel Finiulman, p. 5. Ahmad Hariz stated that he, along with Ahmad, participated in the burning of a truck at the site where the workers were working on the road, and later, by himself burned the wheel of another vehicle and left a threatening letter for the road workers. Subsequently, again with the help of Ahmad, the two burned the road workers' tools which had apparently been transferred to the back yard of someone connected with the building of the road.

[*8]

According to Mohammed Hariz's second statement to the authorities,⁹ The statement begins as follows: "About a week ago, I gave evidence to a policeman and should like to give additional evidence about things that I did not say in my previous testimony." For whatever reasons, the first statement was not included in the Request for Extradition.

he spoke to his "friend" Mahmoud Elabed Mahmoud Ata [Ahmad]¹⁰ Although the Request for Extradition indicated that Ahmad was a cousin to the two alleged conspirators, the statements at times refer to Ahmad as a friend rather than a relative. The spelling and format of Ahmad's name also differs throughout the documents submitted.

concerning his membership in the Al-Fatah organization of Abu Mussa, early in 1986. This conversation took place in Puerto Rico where Mohammed Hariz worked. Apparently, at about this time, the Abu Mussa split into two organizations and the men decided to join Fatah Abu Nidal because it was better organized. Mahmoud [Ahmad]

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told Mohammed Hariz that he could receive military training in Syria, where Ahmad had received his, and Ahmad provided to Mohammed Hariz reading materials and pamphlets supplied by Fatah Abu Nidal. Also contained in Mohammed Hariz's statement are the names of other members of the Fatah Abu Nidal organization, their aliases, occupations and in some cases physical descriptions.

[*9]

In June of 1985, Mohammed Hariz went to Syria for weapons training and Ahmad went to the West Bank to recruit other Palestinians to the organization. In February, 1986, after receiving extensive training, Mohammed Hariz went to Israel and reported immediately to Ahmad. Ahmad told Mohammed Hariz that they were to carry out attacks in the area of Dir Abu Mishal at Ein Zarqa. According to the findings of the Military Court, (Ramallah, court case: 4247/86) the first planned attack to kill settlers as they boarded buses did not occur because "no suitable targets were located [despite five attempts] and, in instances where targets were found, they did not manage to perform the shooting in time." Another attempt, this time to assassinate a spy, also failed.

Ahmad next suggested that they shoot at an Egged Bus passing the Dir Abu Mishal junction. The two "went to the place 4 times in order to see what times the buses arrived. In the middle of April, between the 10th and the 14th, we, Mahmoud [Ahmad] and I, went, Mahmoud [Ahmad] having the Uzi ¹¹ An Uzi sub-machine gun, 9 mm. caliber, serial no. 053119, was later given to Israeli officials by Mohammed Hariz. In the *Opinion Of An Expert*, dated August 27, 1986, the Uzi, claimed by the alleged accomplice to have been used in the incident, was in fact the weapon which discharged the bullets recovered from the driver and Porat.

and I with two Molotov cocktails that Mahmoud [Ahmad] had prepared from petrol, diesel and tar, and also a small bag with black pepper to pour on [*10] the ground and wipe out the tracks so that the dogs would not know where we had fled to. We learnt [sic] this in Syria. At about 18:30 - 19:00 we came to the east of the Dir Abu Mishal junction and we later stood to the north of the junction; I stood at a distance of about 50 metres [sic] from Mahmoud [Ahmad]. The bus would travel from east to west and at the bend the bus would slow slightly and I would see it at a distance of 25 - 30 metres.[sic] I would first throw the Molotov cocktails at the bus and then Mahmoud [Ahmad] would shoot at the bus with the Uzi. The bus arrived at 19:30. I lit the bottle and threw it at the bus and the bottle hit the front part of the bus and a small fire broke out in the grass by me and immediately afterwards Mahmoud [Ahmad] began to shoot with the Uzi. The bus continued travelling. I did not throw the second bottle because the bus had journeyed on and there was a fire by me and they could see me and I did not scatter the pepper, and we both fled, at first each separately, and only after 50 metres [sic] did we meet each other." (See Statement No.2, Statement of (forename) Sallah (surname) Hariz, dated September 2, 1986, p. 6).

[*11]

According to one of the passengers, Yitzchak Porat, the bus was on route 468, heading from the direction of Neve Tsuf and toward Aabud. On the bus were the driver, Solomon Hatukha, and three passengers: Rachael Luberman, Yitzchak Porat and a male whose name was not supplied, but who was from Nahliel. Porat, a cadet at a military boarding school, was slightly injured by "flack" in his right shoulder, and the driver received serious injuries which ultimately resulted in his death. (See Statement of Alex Borowsky, physician who treated Porat, they managed to drive the bus to Aabud. In his statement Porat stated that "the inhabitants [of the area] gathered round the bus and

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appeared indifferent to the incident. I asked them if there was an ambulance near-by and they replied in the negative. The response was similar with respect to a doctor and a telephone."

Ahmad apparently fled from Israel shortly thereafter.

*ARTICLE III JURISDICTION*¹² Other jurisdictional issues are addressed *infra*.

Ahmad argues that the offenses he is charged with were committed outside the territorial jurisdiction of Israel and beyond the extraterritorial jurisdiction provided by United States Law [*12] under similar circumstances. The Dir Abu Mishal junction is located outside the traditional borders of Israel in an area commonly known as the West Bank or Samaria. Israel asserts that authority for its jurisdiction over Ahmad is found in Section 7(a) of the Penal Law of Israel, 5737-1977 which provides:

HN1 [↑] The courts of Israel shall be competent to try under Israeli Law a person who committed an act which would have been an offense had it been committed in Israel and which injured or was intended to injure the life, person, health, freedom or property of an Israeli national or resident of Israel.

(See Request for Extradition, p. 7, para. 22.).

Ahmad contends that this law exceeds the recognized limitations of extraterritorial jurisdiction under both International Law and the laws of the United States. Under Article 9¹³ Article 9 of the Treaty states:

HN2 [↑] The determination that extradition based upon the request therefore should or should not be granted shall be made in accordance with the domestic law of the requested Party and the person whose extradition is sought shall have the right to use such remedies and recourse as are provided by such law.

of the treaty, this court need only consider United States law, and therefore, this court has not considered whether, under International Law or Israeli Law, Section 7 would be over broad.

[*13]

The government contends that Section 7 is similar to 18 U.S.C. sec. 2331, and thus conforms to the jurisdiction the United States would exercise under analogous circumstances. The court does not agree. *HN3* [↑] Section 2331 provides that when a national of this country has become the victim of murder, an attempt or conspiracy with respect to homicide or other acts of physical violence, the perpetrator shall receive the sentences enumerated in that statute *except that*

no prosecution for any offense described in this section shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.

18 U.S.C. sec. 2331(e).

Section 7 provides no such limitation, and therefore exceeds the scope of U.S. law. This determination alone,

however, does not bar Ahmad's extradition. HN4 [↑] *The treaty states, in part, "when the offense had been committed outside the territorial jurisdiction of the requesting-party, extradition* [*14]

need not be granted . . ." [emphasis added]. The treaty does not prevent the requested state from granting extradition if it so chooses. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 581 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1198 (1986). Clearly here the United States government has expressed its desire to honor Israel's request to

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extradite Ahmad. ¹⁴ The government argues that para. 2 of Article III of the treaty defines "territorial jurisdiction" as including territory "under the control of one of the contracting parties." Because, the government argues, the West Bank is under the control of Israel, there is no genuine territorial jurisdiction dispute presented. The court disagrees. The treaty must be read to mean "lawful control of." Because the court is unwilling to address the issue of whether Israel's control of the West Bank is lawful, the government's argument cannot be considered.

ARTICLE IV PROBABLE CAUSE Article IV of the Treaty reads as follows:

HN5 [↑] *Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, either to justify his committal for trial if the offense of [*15] which he is accused had been committed in that place or to prove that he is the identical person convicted by the courts of the requesting Party.*

During the hearing, both the probable cause issue and the identity question were raised, however, in his post hearing brief, Ahmad conceded the identity issue. **HN6** [↑] *The scope of the probable cause hearing in an extradition case is rather limited. "The function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction." Collins v. Loisel, 359 U.S. 309, 316 (1922). The standard has been regularly described as "evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." Coleman v. Burnett, 477 P.2d 1187, 1202 (D.C. Cir. 1973).*

For the purposes of making the probable cause determination, the court assumes that the evidence contained in the Request for Extradition is true, ¹⁵ The admissibility of evidence in extradition cases is governed by 18 U.S.C. sec. 3190, which states in part:

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence . . . if they shall be properly and legally authenticated . . . and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

See also Cucuzzella v. Keliikoa, 638 F.2d 195 (9th Cir. 1981). Neither the Federal Rules of Criminal Procedure (Fed. R. Crim. P. 54(b)(5)) nor the Federal Rules of Evidence apply to extradition hearings. (Fed. R. Evid. 1101(d)(3).

and the defendant may offer only explanatory evidence designed to clarify "ambiguities or doubtful elements in the *prima facie* case [*16] made against him." *Collins v. Loisel, 259 U.S. at 315-16. See also Matter of Sidona, 450 F. Supp. 672, 685 (S.D.N.Y. 1978) (a full and extensive hearing on the facts in an extradition hearing is not appropriate).*

The court finds there is probable cause to believe the accused is guilty of the crimes charged. Contained within the Request for Extradition are: 1) an affidavit before Judge Sivan of the Jerusalem [*17] Magistrates Court by Inspector Asher Huri of the Israel Police charging Ahmad with participation in the attack on the Egged bus on April 12, 1986; 2) an affidavit before Judge Kuma of the Jerusalem Magistrates Court by Salah Yousef Ahmad Hariz (Ahmad Hariz) which implicates both his own participation in the attack and Ahmad's; 3) an affidavit before Judge Kuma of the Jerusalem Magistrates Court by Salah Mohammed Yousef Hariz (Mohammed Hariz) which implicated both his own participation in the attack and Ahmad's; 4) an affidavit before Judge Sivan of

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the Jerusalem Magistrates Court by Police Officer Ephraim Levi of the Israel Police verifying the video taped re-enactment of the attack by Mohammed Ahmad; 5) an affidavit before Judge Kubal of the Jerusalem Magistrates Court by Police Officer Rafi Shitrit, who was one of the Police investigators in the attack; 6) an affidavit before Judge Timan of the Kfar Saba Magistrates Court by Yitzhak Porat, one the passengers on the bus who was wounded; 7) an affidavit before Judge Kubal of the Jerusalem Magistrates Court by Rachael Luberman, one of the passengers on the bus which was attacked; 8) an affidavit before Judge Ravid of the Jerusalem [*18] Magistrates Court by Dr. Alex Borovsky, the doctor who treated the driver and injured passenger immediately after the attack, and; 9) an affidavit before Judge Timan of the Kfar Saba Magistrates Court by Drt. [sic] Carlos Grozman, doctor at Tel Hashomer Hospital who treated the wounded driver. Other documentary evidence was also attached to the Request. Although the evidence presented is somewhat contradictory, as a whole it presents an adequate description of the events in question.

Ahmad argues, however, that the evidence does not sufficiently support a finding of probable cause to believe Ahmad committed the offenses charged primarily because the evidence submitted by Israel is not worthy of belief. Ahmad points out that both Hariz's made several contradictory statements, that the statements were made after long periods of imprisonment, that according to the Landau Report, the periods of imprisonment were probably accompanied by various means of abuse and coercion, and that the statements contradicted statements of other witnesses in several important aspects. The most significant discrepancies/inconsistencies noted are that 1) Ahmad Hariz, in his statement to Israeli police on [*19] August 22, 1986 was unable to sign a declaration that he had received the warning of his rights given by police, but was able on the same date and time to sign the statement he gave to the police, and 2) that Ahmad's alleged accomplice stated that he was shot at by the occupants of the bus, but none of the witnesses indicated that they fired upon the attackers. Also of concern is the fact that the statements which were signed by the Hariz's were written in a language which they did not understand, and in signing them they were forced to rely on oral translations.

Accomplice Testimony Ahmad argues that co-defendant confessions implicating a defendant are inherently suspect and entitled to little if any evidentiary weight. The confessions in question, Ahmad argues, are especially suspect because they are self-contradictory on their face and arguably the product of coercion. However, HNJ [↑] accomplice testimony has been held to be of "particular importance in extradition cases where all the alleged criminal activity occurred in a distant country." *Eain*, 641 F.2d at 510, citing *Curreri v. Vice*, 77 F.2d 130, 132 (9th Cir. 1935). Furthermore, the statements in question were admissions [*20] against the accomplices' own penal interest and are thus deemed reliable. *United States v. Haris*, 403 U.S. 573, 583-84 (1971); *United States v. Boyce*, 594 F.2d 1246, 1249 (9th Cir. 1979). Additionally, where an accomplice's confession is corroborated by other evidence, as are the confessions here by the statements of the doctor, a victim and the police involved, and the confirmation that the gun in the accomplice's possession was the gun used in the attack, there is sufficient evidence to support a finding of probable cause. *Id.*

Translations In *Eain* the court rejected the petitioner's argument that the confession of his co-conspirator who had recanted the statement was inherently suspect because, as here, they were transcribed in Hebrew rather than the

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conspirator's native Arabic. *Eain*, 641 F.2d at 511 n.7. This conclusion was based upon the fact that the Magistrate's Court of Jerusalem, in which both languages were spoken, addressed that issue and questioned the declarant. The court determined that the declarant understood his statement and made it of his own free will. *Id.*

Here, the co-conspirators were not afforded such protection, but nor have they recanted [*21] their statements.

In addition to the foregoing, the documentation relating to Ahmad's travels corresponds to the information contained in the conspirator's statements. Ahmad traveled extensively in to the regions in which the conspirators indicated they saw him and in which they received their training. Moreover, Ahmad was in the West Bank at the time of the incident and left Israel, as indicated by the Israeli government, in May of 1986. ¹⁶To the best of its ability the court determines that Ahmad traveled as is indicated below:

2/14/74 -Ahmad left Israel and moved to Puerto Rico. (Laissez-Passer, Govt. Exh. 1, C, attachment 6; Defendant's exh. A, p. 1)

4/17/74 -Registers as an immigrant in Puerto Rico. (Govt. Exh. 12, Immigrant Visa and Alien Registration).

5/11/75 -Left Puerto Rico

5/28/75 -Returned to Puerto Rico on Iberia Airlines. (Govt. Exh. 12, Naturalization Application which asked for places applicant traveled to outside U.S. No mention of this trip was made by Ahmad).

7/10/76 -Traveled to the West Bank.

9/10/76 -Returned to Puerto Rico. (Govt. Exh. 12; Defendant's Exh. A, p. 2, purpose of trip to renew Israeli I.D. card and bring wife back with him).

8/25/80 -Left Puerto Rico to visit family in Ramallah, proposed length of visit three months. (Govt. Exh. 12, Issuance of Permit to reenter the United States).

6/29/81 -Asked for extension to extend stay in Ramallah. (Govt. Exh. 12, Issuance of extension of permit to reenter U.S.).

1981 -Returned to Puerto Rico. (Defendant's Exh. A, p. 2).

1/27/82 -Applied for Naturalization. Naturalized 3/30/82. (Certificate of Naturalization, Govt. Exh. 12).

1982 -Returned to West Bank after becoming a U.S. citizen.

1985 -Again traveled, in later part of year, to West Bank and Israel.

April, 1986 -Visit's family in West Bank.

May, 1986 -Leaves Israel, flies to Zurich, then to N.Y., then to Puerto Rico. (Defendant's Exh. A, pp. 2-4).

The following is a list of Ahmad's travels as determined by his passport. (Govt. Exh. 11) When a stamp was not of sufficient quality to decipher, the "gap" is so indicated. (Page references are to the Passport page numbers).

8/28/86 Enters Venezuela

10/29/86 Leaves Venezuela

10/30/86 Enters Madrid, Spain

11/14/86 Leaves Madrid, Spain

gap

11/22/86 Enters Spain

11/26/86 Leaves Spain

11/26/86 Enters Venezuela

1/16/87 Leaves Venezuela

1/16/87 Enters Colombia

2/4/87 Leaves Colombia

gap

3/16/87 Enters Spain

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3/19/87 Leaves Madrid, Spain

gaps

3/22/87 Enters Spain

3/23/87 Leaves Bogota, Spain

gap

3/27/87 Enters Cyprus

3/30/87 Leaves Cyprus

3/30/87 Enters Barcelona, Spain

4/1/87 Leaves Madrid, Spain

4/1/87 Enters Venezuela

4/7/87 Leaves Venezuela

4/7/87 Enters Colombia

4/13/87 Leaves Colombia

gap

[According to Ahmad he then traveled to Mexico]

5/6/87 Leaves Venezuela

5/6/87 Enters United States

[*22]

Accordingly, although the language discrepancy is of considerable concern to this court, that fact that the statements have not been recanted and that there is other corroborating evidence, the court has determined that there is probable cause to believe that Ahmad committed the acts charged.

Torture

Ahmad argues that the evidence submitted indicates that Israel routinely tortures prisoners in order to secure confessions, and therefore, the confessions contained in the Request for Extradition should be afforded no weight. The court, however, is not in a position to make a determination of whether Israel does or does not torture its prisoners. Nor would such a decision, in this case, affect the outcome of the probable cause determination. The court must look at the circumstances as a whole to determine whether probable cause exists. Here probable cause exists. The confessions, whether or not induced by long periods of confinement or torture, are full of factual detail, are against the declarant's penal interest, have not been recanted, and are corroborated by significant other evidence. The confessions are, therefore, worthy of belief. POLITICAL OFFENSE EXCEPTION

Burden [*23]

*of proof*¹⁷ For an explanation why the political offense exception is the nature of an affirmative defense rather than an issue of jurisdiction, see generally *Karadzole v. Artukovic*, 355 U.S. 393 (1958).

Magistrate Buchwald noted that "allocations of burdens of production, burdens of proof and standards of proof in American jurisprudence have consistently been used to achieve policy goals with a view toward elementary fairness and furthering the purpose of the underlying substantive law." *In re Mackin*, 80 Cr.Misc. 1, p. 54 at 43 (S.D.N.Y. Aug. 13, 1981, *appeal dismissed*, 668 F.2d 122 (2d Cir. 1981). In accepting the allocation of the burden set out in

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Mackin for the purposes of this decision, the undersigned notes that *HN8* there may be cases where, in the interest of fairness and the furtherance of the policy behind the political offense exception, the burden may need to be altered. The court can foresee instances where a person, sought to be extradited, is denied access to the information necessary to prove the exception applies in light of the fact neither the Federal Rules of Evidence ¹⁸ Fed. R. Evid. 1101(d)(3).

or Criminal Procedure ¹⁹ Fed. R. Crim. P. 54(b)(5).

apply to such cases, and because discovery *[*24]*

is generally denied.

For the purposes of this opinion therefore, the court finds that "with respect to each element of the political offense exception . . . , the extraditee must prove by a preponderance of evidence that the crime for which extradition is sought is of a 'political character.'" *Id.* With that standard in mind, the court now turns to Ahmad's allegations that the political offense exception bars his extradition to Israel.

Elements of the political offense exception Ahmad contends that the acts charged in the Request for Extradition by the State of Israel are acts of a political character and are thus outside the purview of the extradition treaty. *HN9*

The language of the treaty embodying the political offense exception is broad and therefore suggests "that the political offense exception is to be viewed as a flexible concept whose parameters can be measured only by factual application." *In re Mackin*, 80 Cr.Misc. at 23; See also, *In re Gonzalez*, 217 F. Supp. 717, 721 n.9 (S.D.N.Y. 1963).

The exception itself, however, has at times during recent history, been somewhat stretched as courts have attempted *[*25]*

to grapple with the distinction between political offenses and terrorism. See generally *Quinn v. Robinson*, 783 F.2d 776, 801-03 (9th Cir. 1986). After reviewing the history of the exception, this court has determined that the "incidence" test has been, and continues to be, the test applied in this circuit. In so doing, this court specifically adopts the *Quinn* court's description of the incidence test and the purposes behind it, and notes in so doing, that this is the test which was applied by Magistrate Buchwald in *Mackin*. ²⁰ The court in *In re Doherty*, 599 F. Supp 270, (S.D.N.Y. 1984), which was decided in this circuit after *Mackin*, suggests that a more restrictive test should be formulated. *Id.* at 274-75. However, because *Doherty* was presented with the classical political offense, it did not define what the more restrictive test should be. This court does not see the need to further restrict the incidence test.

Moreover, the only time the Supreme Court reviewed the political offense exception, it affirmed the use of the "incidence" test. *Ornelas v. Ruiz*, 161 U.S. 502 (1896).

HN10 This court, however, does not adopt Quinn's apparent requirement *[*26]*

that the charged acts occur within the territory in which the "change in government" is sought. It is enough to note that Ahmad's acts occurred within the West Bank, and therefore, if a territorial proximity requirement exists, it is satisfied here. The court notes, however, as the *Quinn* court itself recognized (*Quinn* 783 F.2d at 807), that there may be times when territorial proximity of the acts requires, at a minimum, liberal consideration. For example, the PLO does not recognize, rightly or wrongly, Israel's right to exist at all. They view the entire region -- both pre and post 1967 borders -- as being their own territory. ²¹ In *Quinn*, the accused was fighting for a unified and independent Ireland in England, and did not question England's right to exist. Here Ahmad was fighting for an independent and unified Palestine, which in his mind apparently meant the non-existence of Israel as the PLO vision of Palestine includes all of what is now Israel.

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An act, therefore, which qualifies as political may require protection even if it was carried out in Israel proper. However, because that issue is not before this court, a final resolution of that issue is not now possible.

[*27]

M. Cherif Bassiouni, a well respected scholar on the subject of the political offense exception noted that: Even though widely recognized, the very term "political offense" is seldom defined in treaties or national legislation, and judicial interpretations have been the principal source for its meaning and application. This may be due to the fact that whether or not a particular type of conduct falls within that category depends essentially on the facts and circumstances of the occurrence. Thus, by its very nature, it eludes a precise definition which could restrict the flexibility needed to assess the facts and circumstances of each case.

Bassiouni, *International Extradition United States Law and Practice*, chapter VIII section 2-7 (1983). [footnotes omitted] ²² The distinction between pure and relative political offenses has no effect on the determinations necessary to this case. For a description of this distinction see *Bassiouni, supra* at sec. 2-19.

The American judiciary, as Magistrate Buchwald noted, adopted the standard laid out in the landmark English case *In re Castioni*, [1891] 1 Q.B. 149. *Mackin*, 80 Cr.Misc. at 32. *HN11* [↑] The "political offense," as ²⁸ historically described by American courts encompass those acts or offenses which are "incidental to severe political disturbances such as war, revolution, and rebellion." *Sindona v. Grant*, 619 F.2d 167, 173 (2d Cir. 1980) citing, e.g., *Garacia-Guillern v. U.S.*, 450 F.2d 1189, 1192 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972). Although there is no uniform language which has been used to describe the elements of the political offense, courts have generally noted the existence of two requirements: first, that there be a political uprising, and; second, that the act was "incidental to" or "in furtherance of" a political goal or objective. ²³ Some commentators view these as three elements: 1) the uprising; 2) the nexus between the act and the political motive; and 3) the political motive. *Bassiouni, supra* note, at sec. 2-25. Whether the establishment of a political motive or objective is a separate category or not, it is clear that it must be established in order for a nexus or incidence between the acts and the objective to be proven.

[*29]

See generally *Gargia-Guillern*, 450 F.2d at 1192; *Ramos v. Draz*, 179 F. Supp. 459 (S.D. Fla. 1959). As noted, some circuits vary the description of these elements or add new components to them. ²⁴ In *In re McMullen*, for example, the court denied extradition for the bombing of military facilities by a member of the Provisional Irish Republican Army hereinafter PIRA. Magis. No. 3-78-1099 MG (N.D. Cal., filed May 11, 1979) In reaching this conclusion, the court made three findings: 1) that there was an uprising of a political nature; 2) that military facilities were the main targets of PIRA attacks, and; 3) that the accused was a member of PIRA. *Id.* at 5-6, thus seemingly focusing on whether the was a group whose attacks (of which one was at issue) were politically motivated and that the accused was a member of that group. The court in *Eain*, however, denied extradition finding that the acts charged were not incidental to the uprising by characterizing the attack as one directed to the civilian structure rather than the political structure of the state. *Eain*, 641 F.2d at 520. The *Eain* court discounted Abu Eain's membership in the PLO stating: simply noting membership in the PLO, but not tying the membership to the specific act alleged was insufficient to satisfy the burden petitioner must shoulder in order to invoke the political offense exception. *Eain*, 641 F.2d at 520.

[*30]

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For example, in this circuit, membership in a political organization, or lack of it, is not an element of the offense but merely a factual issue to be considered. So also must a court consider whether the nature of the attack is such that a nexus between it and the political objective can be found. The court agrees with the determinations of the *Quinn* court that modifying the "test" (rather than applying it with a view towards its objectives) is neither helpful nor appropriate. The court, therefore, will address the issue of whether a political uprising existed and then will address the issue of whether the acts charged can be said to have been done in furtherance of or were incidental to the uprising. ²⁵ This court will not consider whether Israel's request to extradite Ahmad is made with a view to punish him for a political crime, i.e. membership in a political organization. Although this appears to be one of the offenses Ahmad's co-conspirators were charged with, a resolution of this issue is within the sole discretion of the Secretary of State. *In re Lincoln*, 228 F. 70 (E.D.N.Y. 1915), *aff'd per curiam*, 241 U.S. 651 (1916).

A brief discussion of the purposes of the political offense exception will follow. First however, the court will address the issue of Ahmad's citizenship.

[*31]

Ahmad's citizenship The *Quinn* court questioned whether the political offense exception "should apply when the accused is not a citizen of the country or territory in which the uprising is occurring. In the absence of a tangible demonstration that he or she had more than a transitory connection with that land, the acts of a foreign national may simply not qualify for protection." *Quinn*, 783 F.2d at 808. This court need not decide whether citizenship or close ties need always exist for the political offense exception to apply. Here Ahmad, although not a citizen of Israel (as apparently most Palestinians are not), was born in the region and lived nearly all his life in approximately the area where the attack occurred. Moreover, Ahmad's wife and children remain in the West Bank. It is apparent to this court that Ahmad has significant familial and geopolitical ties to the area, and thus may properly seek the protection of the political offense exception.

HISTORICAL BACKGROUND

According to the *Eain* court:

HN12 [↑] In extradition proceedings involving the political crime exception, one of the major questions for the magistrate is whether there existed violent political turmoil ^[*32]

at the site and time of an individual's alleged illegal activities. The existence of violent political disturbance is an issue of past fact: either there was demonstrable, violent activity tied to political causes or there was not.

Eain, 641 F.2d at 514.

In determining whether or not a political uprising was occurring during the period in question, the court reviewed both the recent past and the events which led up to the alleged attack.

The West Bank, also referred to as Samaria, is an area located between the Jordan River and the Mediterranean Sea. Although both Israelis and Palestinians raise claims to the West Bank, it is the Israeli government which is now in military control of the region, and has been since 1967.

The most recent attempt to create a Jewish homeland began in the late nineteenth century. The Nationalistic movement, called Zionism, was motivated in part by a renewed rise in anti-Semitism and corresponded with the advent of the Russian pogroms of 1881-82. H. Sachar, *A History of Israel* 10-17, (1979). The Zionist leaders, led primarily by Theodore Herzl, ²⁶ Sachar describes Herzl as "an author and journalist of international reputation." *Id.* at 36.

chose Palestine, which was then under the rule of the Ottoman Empire, for a homeland. *Id.* at 43-71. ^[*33]

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The first wave of Jewish settlers entered between 1882-1903. *Id.* at 26. The initial influx, described as the "First Aliyah," brought approximately 25,000 Jews to Palestine. *Id.* Land was purchased from the Turks and by the end of the century nearly 50,000 Jews resided in Palestine. *Id.* at 34.

Political and economic oppression, however, continued against Jews in Europe. As a result, a "Second Aliyah" brought more Jewish settlers into Palestine. *Id.* at 72-80. The attempts of the Jewish communities to establish a representative body in the region for themselves, however, was thwarted by the outbreak of World War I. *Id.* at 86. Great Britain eventually gained control of Palestine through the peace negotiations which followed the war. ²⁷ A compromise was struck between France and England, in which it was agreed that England would be entrusted with Palestine and Iraq and France would be given Lebanon and Syria. *Id.* at 92-96.

At the time Palestinian Arab population comprised ninety percent of the total population in the region. Defendant's Exh. B, p. 1. ²⁸ Defendant's Exh. B is an affidavit of Ann Mosely Lesch, an expert in this area, which was stipulated into evidence.

[*34]

The British government became receptive to the views and needs of the Jews. H. Sachar, *A History of Israel* 109, (1979). This support was based on multiple reasons but especially the desire to achieve universal support from the Jewish people and was designed to court the Jewish aristocracy to aid in Britain's war effort. *Id.* at 108-9. The alliance between the Jews and Great Britain resulted in a formal agreement expressed in a letter sent from British Foreign Secretary James Balfour to Lord Rothschild, president of the British Zionist Federation. The letter called for the establishment of a "national home for the Jewish people." ²⁹ The letter, which had an enormous impact stated: Dear Lord Rothschild, I have much pleasure in conveying to you, on behalf of His Majesty's Government, the following declaration of sympathy with Jewish Zionist aspirations which has been submitted to, and approved by, the Cabinet: "His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country." I should be grateful if you would bring this declaration to the knowledge of the Zionist Federation. Balfour Declaration, 2 November 1917.

Although the Balfour Declaration, as it has become known, was widely accepted by Jews, its vague language eventually led to Jewish-Palestinian conflicts. The Declaration failed to outline a border for a Jewish homeland or to define what was meant by "it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine." *Id.* at 109-15. Nevertheless, the language of the

Balfour declaration was incorporated into the Palestine mandate established by the League of Nations. [*35] *Id.* at 116-29.

Over the next few years, under British Rule, Palestine became a land in which the Jewish population solidified into a community which isolated itself from the Arab population. Defendant's Exh. B, p. 2. According to Lesch,

Zionist leaders rejected the idea that the Palestinians had an equally legitimate national movement [*36] and argued that the Jews' need for a state to solve the problems of dispersion and anti-Semitism overrode the needs of the indigenous Arab population. Despite mounting Palestinian opposition to their presence, the Zionists were able to consolidate their community substantially during the thirty years of British rule.

Id.

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Moreover, the Jewish population had grown to thirty two percent of the residents and had "established proto-state institutions, its own armed forces called Haganah, and industries, banks and commercial farms that refused to employ Arab Workers." *Id.*, citing Simha Flapan, *Zionism and the Palestinians* (1979); J.C. Hurewitz, *The Struggle for Palestine* (1976).

The Jewish-Palestinian hostility grew due to the nationalistic goals of both sides. The frequent attacks by Arabs on Jewish settlers began in 1936 and triggered the escalation of Jewish self-defense groups. H. Sachar, *A History of Israel* 213-19 (1979). The Palestinian fears over the loss of their land was renewed by the heavy immigrations of Jews into Palestine, which continued despite efforts by the British government to curtail immigration. In 1939, the British government formally established [*37] a quota system through a document called the White Paper of May 17, 1939. The White Paper provided a limit of 10,000 Jewish immigrants a year for the next five years plus an additional 25,000 refugees and included a ban of the sale of land to Jews. After this period, no further Jewish immigration would be permitted without Arab acquiescence. H. Sachar, *A History of Israel* 223, (1979).

With the conclusion of World War II, the newly formed United Nations took on the rather formidable task of attempting to appease the disputes and claims to the land by the rival groups. *Id.* at 279. In 1947, Great Britain withdrew as the mandatory power in the area and a partition of the area was thus proposed by the United Nations. *Id.* at 292-95; defendant's Exh. B, p. 2.

A plan for a partition was passed by the requisite amount of votes needed by the General Assembly. *Id.* at 294. According to the terms of the plan, the land, which was comprised of pre-1967 borders of Israel, was to be divided into a 4,500 square mile Arab state for 804,000 Arabs and 10,000 Jews, and a 5,500 square mile Jewish state comprised of 538,000 Jews and 397,000 Arabs. *Id.* at 292. In order for the partition [*38] to be binding it required both the Jews and Arabs to consent to the agreement. However, the Arabs, which consisted of two thirds of the population, rejected the resolution which granted it only forty five percent of the land and refused to acknowledge the existence of a Jewish state. Defendant's Exh. B, p. 2. The Palestinians adhered to the principle that the land which is now Israel was rightfully theirs, and it was being taken improperly by the Jews. The Jewish people, nevertheless, declared Israel to be their homeland. *Id.* at 301-14.

A violent war erupted between Israel and its Arab neighbors. *Id.* at 315-53. The Jews were able to hold their defenses (*Id.* at 319-27) and in January, 1949 a cease-fire was called, and borders were created through United Nations negotiations. *Id.* 327-36. Peace was not long lasting, however, and in 1956, through the encouragement and aid of Great Britain and France, Israel attempted to take the Suez Canal. Despite a successful campaign, international pressure, predominately brought by the United States, demanded the withdrawal of the Israeli troops.

Israel withdrew from the area. *Id.* at 347-53. As a result, more than half of Arab residents [*39] were displaced as their territory was now reduced to less than one quarter of the area. Defendant's Exh. B, p. 3. The Arab resentment over the loss of their homeland spawned the creation of the Palestine Liberation Organization (hereinafter the PLO) which had as one of its objectives, the eradication of Jews from Israel. A plan to wear down the Jews, commonly referred to as the War of Attrition, was mounted during the 1960-70's.

The Arab-Israeli military conflict was renewed in the Six Day war of 1967. Egypt, through its leader Gama Aba al-Nasser, attempted to rally its Arab neighbors against Israel. Although Jordan was hesitant about entering a conflict between Israel and Egypt, it was heavily pressured by Nasser and its other Arab neighbors. Unbeknownst to

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Jordan, Israel, fearing an attack, struck first and was able to effectively wipe out the Egyptian air force while it was still on the ground. Egyptian propaganda told of Egyptian successes rather than the numerous defeats it was suffering in the Sinai offensive launched by Israel. Based on this incorrect information Jordan's King Hussein entered into a war he quickly lost. A cease-fire was accepted, after Israel had gained control [*40] over the remainder of Palestine, i.e. the West Bank and Gaza. Defendant's Exh. B, p. 3

The people residing in the West Bank in 1967 were predominantly the Arab refugees who had fled Palestine during the 1948 war, and had subsequently become Jordanian citizens. Ahmad was fourteen years old at this time and living in the region. According to Israel, the immigration from its pre-1967 Israeli borders was primarily voluntary (*Id.* at 669), but Palestinians claim they fled in fear of their lives, and once in Jordan they were greatly inhibited from returning to Israel. See *generally* D. Stipler, *Arab and Jew*, ch.1 (1986).

Regardless of the motives of the Palestinian refugees in immigrating, Israel was faced with close to 1.2 million Palestinian Arabs living within its newly occupied territory, of which nearly 700,000 lived in the West Bank. Defendant's Exh. B, p. 3. Israel instituted a military government in the occupied territories of the West Bank and Gaza strip pursuant to the Geneva Conventions for the Protection of Persons in Occupied Territories (1949). Defendant's Exh. B, p. 3. The United Nations once again intervened in an effort to bring peace to the Middle-East. Resolution [*41]

242 was passed and called for the end of Arab hostilities against Israel, in return, once peace was established, Israel was to withdraw to "secure and recognized boundaries." S.C. Res. 242, 22 U.N. SCOR (1382d mtg. (1967)), *reprinted in* 17 INT'L LEGAL MATERIALS 1469 (1978). The Arab states, rejected the plan incorporated in Resolution 242. Instead they continued their policy of insisting upon the rights of the Palestinians to their own country and steadfastly refused to acknowledge the State of Israel.

A further impact of the newly acquired territories by Israel was an influx of settlers. The settlement of the West Bank area can be classified by three distinct phases, the Allon Plan, Gush Emunim (Bloc of the Faithful) and most recently the "Suburban Era."

The first phase, the Allon Plan, spanned from 1967-1973, under the Labor parties administration. The Allon plan was designed to establish a buffer or security zone from any potential Jordanian attacks. Incident to the Allon Plan, Israel seized "absentee" or "abandoned" property and Jordanian government lands. Defendant's Exh. J at p. 25.

The more desirable and fertile lands were seized by Military requisition orders and in turn [*42] given to the settlers. *Id.* According to Lesch, "[t]hese settlements were formed by army units; many of the soldiers remained at the site after they ended their tour of duty and were joined by other demobilized soldiers and civilian families." Defendant's Exh. B, p. 4.

The response to the Israeli government supported settlements was a revival of PLO insurgency on the borders. By this time the PLO was under the leadership of Yasser Arafat's al-Fatah organization. The Israeli government responded with a heightened military presence, and by 1969, Israeli soldiers were seen patrolling the streets throughout the major villages, including Ramallah. H. Sachar, *A History of Israel* 683-84 (1979). The Allon settlement plan was halted with the outbreak of the Yom Kippur War of 1973 in which Egypt and Syria launched a surprise attack on Israel.

Following the war and its aftermath, the settlement process was renewed. A second movement, "Gush Emunim," was proposed in 1974 with the hope of establishing a defensive wall against possible Arab attacks. Defendant's

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Exh. B, p. 4. However, in 1977 the Labor Party lost control of the government and was replaced by the right-wing Likud party under [*43] the leadership of Prime Minister Menachem Begin. The Gush Emunim proposal thereafter became a reality, and thus the second phase of settlement began, adding eighteen settlements to the then-existing thirty-six in only one year. Defendant's Exh. B, p. 4-5; Defendant's Exh. J, p. 46. The objective behind the Gush Emunim plan was to densely populate what the Israeli government now referred to as "Greater Israel." Defendant's Exh. B, p. 5. Between 1977-1980, the population of Jewish settlers more than doubled from 5,023 to 12,424 (Defendant's Exh. J, p. 46), and was accomplished through procedures and mechanisms which made land acquisition easy for the settlers. Although approximately 4,000 settlers were entering each year between 1980-82 (*Id.* at 46), the settlement process had slowed in part by the Lebanon war and a faltering currency (which resulted in budgetary cutbacks for the subsidiary of housing).³⁰ By 1983 there were 27,500 settlers. *Id.*

Coinciding with the initiation of the Gush Emunim phase of the 1970's, was the founding of the Abu Nidal Organization, officially known as the Fatah-Revolutionary Council which broke from Arafat's Fatah Organization. Government exh. [*44] 17, p. 2. The organization prefers more aggressive tactics over diplomatic measures to achieve its goal of a Palestinian nation. *Id.* There is probable cause to believe that Ahmad was a member of this organization. The third and most recent phase of West Bank Settlement process is sometimes referred to as the "Suburban Era." Between the years 1983-85, the settlor population had soared to 52,000 an increase of 27,500 people in three years -- which nearly equals what Israel had previously taken over seven and one half years to achieve. Defendant's exh. J at 46. The settlers have concentrated themselves in apartment housing near the larger metropolitan areas. The goal of the Israeli government, which subsidizes the settlor movement, (*Id.* at 51-62), was to have 100,000 settlers in the West Bank and Gaza combined by the end of 1986. *Id.* at 48. Although they have fallen short, the idea of dense population has been accomplished and continues to grow.

The huge influx of settlers into the West Bank area owes its success to the ability of the Israeli government to acquire land from the Palestinians. *Id.* at 25-36. The first properties to be taken were the "abandoned" or "absentee" lands, and the Jordanian government lands.³¹ Lesch, in her affidavit states:

The government uses various legal basis in order to acquire land for Israeli settlements. Until 1979, the primary methods were to seize "absentee" land (where the owner was outside the West Bank in June 1967) and to requisition private property on the grounds of security. Technically, these seizures were temporary: the land would have to be returned to the owner once the occupation would end. This qualification was based on the Hague Convention of 1907, Article 52, which states that the occupier can only requisition private land, not confiscate or expropriate it. In a series of decisions in 1979, the Israeli high court reemphasized that there must be a military (rather than a political) justification for settlements and that land seizure is temporary. (Ian Lustick, "Israel and the West Bank after Elon Moreh," *The Middle East Journal*, 1981.) Subsequently, the government began to utilize an additional method, seizing large tracts of land on which the title deeds had never been distributed by the Jordan government before 1967. Israel argued that these lands remained in the public domain and therefore could not be used by Israel as the successor government to Jordan.

Defendant's Exh. B, p. 7.

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The burden of proof of ownership or tenancy to "absentee" land, was placed upon the Palestinian claimant. In all, 430,000 dunams of land ³²A dunam is a land measurement which equals 1,000 square meters or approximately one quarter acre.

and 11,000 houses and stores were classified as abandoned. Defendant's Exh. J, p. 27. Most of that land has now been leased to Israeli settlers. *Id.* The land which previously belonged to the government of Jordan totals approximately 700,000 dunams. *Id.*

In 1980 Israel acquired land by a new method whereby land was "declared" in the name of Israel. The process is similar to the one followed by the "absentee" method. *Id.* at 27. The process is troubling to Palestinians because they claim the decision of which lands are to be claimed is made without any proper forum for judicial redress.

³³ Lesch notes that:

The only recourse a claimant could have against seizure would be to appeal within twenty-one days to a three-person advisory committee composed of military reserve officers. This committee would recommend to the military commander whether or not the claimant had title. The leading Israeli newspaper *Ha'aretz* termed the process a "legal caricature, with the military government as judges as well as litigants." (Editorial, 23 March 1981). Less than five percent of the claimants have been able to retain their land as a result of such appeals, according to Benvenisti. Since this form of seizure was instituted, the alienation of land from the Palestinians has accelerated and Arab villages have lost large tracts of orchards and olive groves as well as grazing land, thereby undermining the livelihood of villagers and intensifying their hostility toward Israeli rule.

Defendant's Exh. B, p. 7.

By 1985, the total amount of land seized by Israel had escalated to 1,700,000 dunams. Defendant's Exh. J, p. 27.

[*47]

In addition to the actual seizure of land, the Israeli government had established an elaborate system of expropriating land for public use. Under Jordanian law (no. 2. 1953) as amended by military orders (*Id.* at p. 27), the Israeli government is able to expropriate the land for public benefit. Even though settlements cannot be built on this land, it is used primarily to create a system of roads which link the Israeli settlements together, while also bypassing the Arab settlements. *Id.* at pp. 27-8; defendant's Exh. B pp. 7-8. It is these roads the accomplices sought to impair the building and use of. The roads have thus become a symbol to the Palestinians as a dual effort by the Israeli government to disenfranchise the Palestinian people and to enable greater ease for further settler development. *Id.* at pp. 30-36.

Benvenisti noted that:

as the number of Israeli settlers increases, traffic between settlements provides even more targets for hostile acts. Israeli settlers react, with retaliatory raids on Palestinian towns, which may involve gunfire, smashing windshields of Arab cars and beating up passers-by.

The increase in violence perpetrated by civilians on both sides [*48]

points to a new phase in the conflict, had escalated to 1,700,000 dunams. Defendant's Exh. J, p. 27.

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Israeli government to disenfranchise the Palestinian people and to enable greater ease for further settler development. *Id.* at pp. 30-36.

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The increase in violence perpetrated by civilians on both sides points to a new phase in the conflict, one which may be defined as violent communal conflict. Defendant's Exh. J at 64. ³⁴ Further, Lesch also noted the importance of the roads to Israel and their impact on the Palestinians:

The principal new roads run East-West, connecting the settlements to the pre-1967 territory of Israel. However, a major highway has been under construction running North-South the entire length of the West Bank, located in the foothills just west of the Jordan River. Many sections of the highway, which was begun in the early 1970s, are complete and used. This grid of roads not only assists the settlers but also facilitates rapid movement by the armed forces throughout the West Bank. The roads are therefore an integral part of the military control system.

Defendant's Exh. B, p. 8.

The restriction on Palestinian use of their own land has also served to foster Palestinian contempt towards the Israeli government. These restrictions are accomplished by three major methods. Any military commander can, at his discretion, prohibit building or construction, call [*50] for the closure of areas (by classifying them as combat zones or nature reserves), and restrict cultivation of the land. Defendant's Exh. J, pp. 28-29. In fact, Palestinians allege there is an overall plan to physically arrange West Bank Israeli settlements and roads to meet the needs of the Israeli government while systematically abridging the needs of the Arabs.

Benvenisti said of the settlers "[a]ll carry personal arms and possess an arsenal of weaponry which, as they have declared on numerous occasion they are ready to use if need be. Disarming them, especially in light of the dangerous security situation, would be quite out of the question." *Id.* at 75. In addition he notes that "[i]t is hard to avoid the conclusion that the much-vaunted "pioneer settlers" are, in fact, public servants engaged in a campaign of ideological indoctrination aimed at spreading the "Greater Israel" message, a campaign wholly financed by the state and the World Zionist Organization." *Id.* at 62.

As a result of these policies, and other factors which will be discussed subsequently, the number and nature of violent attacks in the West Bank was on the rise just prior to the incident in question.

If statistics [*51]

on violent acts committed in the occupied territories can serve as an indicator of the intensity of Israeli-Palestinian confrontation there is no doubt that since 1982, there had been a considerable heightening of confrontation. *Id.* at 63.

There were three events in 1985 which primarily lead to the escalation in the political uprising. *Id.* at 64. These events were the Hussein-Araf agreement, the trial of members of the Jewish terrorist underground and asymmetric prisoner exchange of Arab prisoners for Israeli PoWs. ³⁵ The court notes that the fact well respected

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historians consider the Israeli soldiers exchanged to be 'PoW's supports the allegation that the uprisings then and previously occurring were in the nature of civil war.

The demand for the release of Jewish terrorists, which was intensified by the prisoner exchange, culminated in a wave of settler raids on West Bank towns and villages, lawlessness to which the authorities turned a blind eye for some weeks. Later in the summer of 1985, as the spate of attacks on unarmed Israelis and their vehicles gathered momentum, the calls for the release of the Jewish underground gave way to militant demands for the deportation of rock-throwers and the death penalty for Arab terrorists.

[*52]

The foregoing provided fertile ground for the vehement rejection by the settlers of any prospect of peace talks arising out of the Hussein-Arafat agreement.

Id. at 65.

The heightened violence, within the last few years, between the settlers and the Palestinians in the West Bank is evidenced by the fact that, according to Israeli government statistics there were 10,871 "disturbances of the peace" such as demonstrations, barricades, Palestinian flag hoistings or incidents of rock throwing between 1977 and 1984. More than 7,100 cases were counted between mid-1985 and May of 1987." Nairn, *The Occupation*, The Village Voice, March 1, 1988, at 26.

It is evident, given the above, that an uprising was occurring in the West Bank when the acts charged took place. Moreover, the court finds that the nature of the struggle engaged in is such that acts done in furtherance of it are of the kind the political offense exception was designed to protect.

HN13 [↑] The political offense exception was designed to protect those engaged in internal or domestic struggles over the form or composition of their own government, including, of course, struggles to displace an occupying power.

Quinn, 783 [*53]

F.2d at 807.

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

RELATIONSHIP OF ACTS CHARGED TO UPRISING **HN14** [↑] *Having determined that a political uprising was occurring at the time the acts charged were committed, the court must next find that the acts were done in furtherance of or were incidental to a political objective in order for the exception to apply. "We [United States courts] have applied a rather liberal standard when determining whether this part of the test had been met and have been willing to examine all of the circumstances surrounding the crime." [cites omitted] Quinn, 783 F.2d at 809.*

[*54]

Here Ahmad, a Palestinian, engaged in acts against Israelis within the borders of a body of land to which each party claims a right to own, occupy and govern. Since the political objective of both sides is to gain not only the right

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to govern the territory, but also the right to the land as homeland, acts which impair the other side's abilities to govern and inhabit, while furthering its own abilities to do the same, are incidental to the uprising.³⁶ Although the test in *Eain* is not followed in this circuit, the court finds that even under this more stringent test, Ahmad's acts are protected by the political offense exception. *Eain v. Wilkes*, 641 F.2d 501 (7th Cir. 1981). In determining whether the acts in question were incidental to or in furtherance of a political goal or objective, the *Eain* court focused on its finding that the acts were done "without regard for the political affiliation or governmental or military status of the victims." *Eain*, 641 F.2d at 522. The court stated: It should be pointed out that our discussion resolves around the population to which the violent act was directed. The fact that the explosive was placed on a busy public street during a public holiday in a resort city [within the pre 1967 borders of Israel] and that it is alleged petitioner said he would avoid all contact with the Israeli Military makes it clear that the explosion was meant to snare civilians citizens.

Eain, 641 F.2d at 522-23, n.23.

Here, however, Ahmad's acts were carried out within the occupied territories, occurred after prior attacks on the same road -- which the Palestinians argue was designed to encourage and facilitate further settlement -- and, were directed toward the settlers whom the Palestinians see as unlawful occupiers of Palestinian lands. The acts cannot, therefore, be described as an indiscriminate attack on the civilian population in general.

Unlike Abu Eain, Ahmad was not cautioned to "avoid military vehicles," *Eain*, 641 F.2d at 509, rather the attack was against what can be characterized as a "tool" used by the government of Israel to further the settlement process.

Ambassador Fields, who testified as an expert in both the *Eain* case and here, noted the distinction between the cases and concluded that Ahmad did engage in political acts. (T. 12/17/87 at pp. 137-40).

[*55]

The court finds that Ahmad's acts were incident to the uprising and were done in furtherance of the Palestinian goal to acquire the lands and the right to govern them. There are several factors which lend support for this conclusion. First, Ahmad's acts deter settler use of the roads and impair their ability to reach the protection of other settlements and Israel proper. By cutting off or limiting the access of settlers, the Palestinians strengthen their own hold on the land. The PLO's objective with respect to the roads is established by the repeated attacks with which Ahmad and his accomplices were charged.³⁷ Moreover, the fact that there were multiple attacks, which grew in severity, takes the incident out of the line of cases which denied extradition on the basis of the attack being an indiscriminate attack on civilians. The settlers in this region of the occupied territories should have been on notice that the Egged Busses were an objective of the PLO's fight for control of the region.

Further, the multiplicity of attacks supports the conclusion that the attack was not designed to further a personal objective of Ahmad's, but rather the Palestinian political objectives. Additionally, the Foreign Broadcast Information Service reported that:

The Abu Nidal Palestinian group had announced that it used machineguns and Molotov cocktails yesterday to attack a bus transporting Israeli soldiers and civilians between the villiages of (Abu Mash'al) and (Abbud). In a statement released in Beirut, the group said that the Kamal' Adwan group had carried out the attack, [*56] which left a number of people killed or wounded.

Government Exh. 18.

Ambassador Louis G. Fields, Jr., who testified as an expert witness on behalf of Ahmad, concluded the acts in question were political. This court credits his conclusions and the underlying facts and principles upon which Ambassador Fields' conclusion was based. In reaching his conclusion, Ambassador Fields noted that the buses are

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a part of the "line of supplies" for the settlements (T 12/17/87 at p. 136), and that the settlers "in this area [the West Bank] are generally presumed to be armed." *Id.* Further, Ambassador Fields noted that an attack on "buses operating to and between settlement areas in the dark of night with what you would assume to be armed settlers aboard that bus could be legitimate targets for an insurgency [*57] group operating for the purpose of trying to terminate this period of occupation." (T. 12/17/87 at p. 139).

The court agrees that the settlers cannot be characterized as mere civilians. They resided in an area of ongoing conflict, and where the right to govern the lands is and has been one of the foremost issues. PLO actions to gain control are common occurrences and violence has become a way of life. While the settlers may not fit the description of military personnel as it is commonly thought of, it is clear that at a minimum they are willing participants in a civil war or a violent community conflict designed to acquire a long sought after homeland.

Professor William T. Mallison, who also testified as an expert on behalf of Ahmad, said of the settlers:

The Israeli defense force provided weapons and training to people in settlements and advises them that they should carry their weapons at all times. And a great many settlers are reserve[] personnel of the Israeli Army. When they are called to active duty they are frequently called to active duty in the areas where settlements have been constructed so that there is a cooperation on a functional standardized basis between the Israeli [*58] Army and those para-military settlements and the settlers, (T. 12/16/87 at 72).

While this court does not approve the actions taken by Ahmad, nor does it desire to express support for either side in this conflict, the fact remains that the conflict exists and that the political offense exception was formulated to protect the rights of those, whose philosophy may differ from ours, to fight for a way of life they believe in. Professor Mallison concluded that the acts charged were "unquestionably political, as the term is used in the extradition treaty." (T. 12/16/87 at p. 99). The court agrees with this conclusion. ³⁸ Professor Mallison noted in regard to the settlers that

The military occupation of the Government of Israel in the occupied territories is so characterized by force and systematic violations of various provisions of the Geneva Convention, some of which I mentioned, that the resistance characterizing the uprising in the West Bank, have reason to believe that they are dealing with a coercive well-armed settlers, who are regular member of the Israeli military.

(T. 12/16/87 at p. 96)

POLICY BEHIND THE POLITICAL OFFENSE EXCEPTION Judge Harlington Wood, in [*59]

Eain, stated with reference to his concern that unrestrained application of the political offense exception would result in "an influx of terrorists seeking a safe haven in America:"

We do not need them [terrorists] in our society. We have enough of our own domestic criminal violence with which to contend without importing and harboring with open arms the worst that other countries have to export. We recognize the validity and usefulness of the political offense exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorist everywhere.

Eain, 641 F.2d at 520.

While this court embraces this philosophy, it is perhaps time to describe the "validity and usefulness of the political offense exception" in a manner which relates to present American thought.

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It has been said that *HN15* [↑] there are three purposes which the political offense exception is designed to fulfill.

First, and perhaps foremost, the exception is designed to afford protection to those who have sought to promote political change. The second purpose, which is not at issue here, is to protect individual(s) from receiving unfair

treatment in the requested [*60]

state. ³⁹ This issue arises when the defendant alleges that his extradition is being sought solely because of his political beliefs. It is an issue which for foreign policy reasons is addressed by the State Department, and is never an issue before the magistrate in an extradition hearings. *See supra* note 25.

The third purpose of the political offense exception is to protect the requested state from appearing to take a position in favor of one side or the other on the underlying political conflict in the requesting country, in other words, to allow the requested state to remain neutral. *See generally Quinn v. Robinson (Quinn III)*, 783 F.2d 776, 793 (9th Cir), *cert. denied*, 107 S. Ct. 271 (1986).

The Right to Promote Political Change *The right to promote political change is one that may be taken for granted in countries, like ours, in which free speech coupled with the right to vote provide easy means for political expression and change.* ⁴⁰ Professor Mallison noted, for example, that except for one series of municipal elections, which the government of Israel allowed, which resulted in the wrong people being associated with the PLO, the wrong people from the standpoint of the Government of Israel being elected, other than that one instance, they [the Palestinians] have had no opportunity to express their political views and their desires through self-government or through any of the ways that are open to Americans who want to elect a new or different administration or want to replace their existing senator or congressman or governor with someone else.

There is a whole range of political alternatives which we, the citizens of the United States have. There is no Palestinian Government of the occupied territory to express their [the Palestinian] political activity in a peaceful way analogous to what is done in a very common way place in the United States.

(T. 12/16/87 at pp. 72-3).

[*62]

From that perspective it is not easy to accept the protection of acts which on the surface appear to be senseless violence against unsuspecting civilians. But the purpose of the exception is not to judge the motives or the [*61]

quality of political or judicial fairness of the requesting country, nor is it to judge the legitimacy of the political change which the charged acts were done in furtherance of. HN16 [↑] *The political offense exception is a recognition by countries throughout the world* ⁴¹ The political offense exception is "now almost universally accepted in extradition law." *Quinn III*, 783 F.2d at 792. Moreover, the purpose behind was acknowledged in The Declaration of Independence:

[W]hensoever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it . . . Declaration of Independence para. 1 (U.S. 1776).

that political change for the better is often accomplished by less than desirable means, ⁴² One need only look to our own civil war to find an example.

and that "political crimes have greater legitimacy than common crimes." *Quinn III*, 783 F.2d at 793. "The political offense exception . . . is justified by an acceptance of the right to political self-determination as well as by humanitarian concerns." *Id.*, note 11.

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It is understandable that Americans are offended by the tactics used by many of those seeking to change their governments. Often these tactics are employed by persons who do not share our cultural and social values or mores. Sometimes they are employed by those whose views of the nature, importance, or relevance of individual human life differ radically from ours. Nevertheless, it is not our place to impose our notions of civilized strife on people who are seeking to overthrow the regimes in control of their countries in contexts and circumstances that we have not experienced, and with which we can identify only with the greatest difficulty. It is the fact that the insurgents are seeking to change their governments that makes [*63] the political offense exception applicable, not their reasons for wishing to do so or the nature of the acts by which they hope to accomplish that goal.

Quinn, 783 F.2d at 804-05.

This is not to say that there may not be acts the nature of which are so violent or destructive that they cannot be afforded protection under the political offense exception. And although this is not the case presently before the court, it may well be that such acts are simply too hideous for a court to conclude that they were done for purely political purposes rather than for personal gain or revenge, motives which the exception does not protect.

*Preservation of Neutrality*In formulating its holding, this court enjoys the protection afforded by the political offense exception -- namely neutrality. Today's rebels in the West Bank may be tomorrow's rulers there, and it is not this court's objective or purpose to impair future foreign relations by prejudging the legitimacy of the Palestinian objectives. For the purposes of this holding, the court need only find that there was a political conflict or uprising and that the acts charged were incidental to the conflict or were done in furtherance of [*64] the actors political motives. This is the sole finding of this court in this regard. It expresses no opinion as to the legitimacy of the Palestinian objectives, the Israeli treatment of the Arabs or the legitimacy of the occupancy of the West Bank; nor does the court approve of or wish to encourage the advancement of political objectives by violent means. This opinion addresses one unique person under one unique set of facts. The court is bound to apply the law as it finds it to be.

*ARTICLE III JURISDICTION*Even if, however, the court did not find the political offense exception protected Ahmad, this court nevertheless would be unable to certify Ahmad for extradition on jurisdictional grounds. Ahmad argues that "the circumstances of his unlawful arrest in Venezuela, his forced turnover to U.S. agents in Venezuela, forced departure from Venezuela, arrival in the United States, and his arrest here, raise significant issues under the Constitution and International Law directly implicating the validity of the jurisdiction asserted pursuant to Article I of the Treaty of Extradition." *Evidentiary Hearing Memorandum on Behalf of Mahmoud Ahmad*, p. 2 (hereinafter *Ahmad's Pre-hearing Brief*). [*65]

HN17 [↑] Article I provides that the parties to the Treaty agree "reciprocally to deliver up persons found in its territory [who have committed extraditable offenses] . . . within the territorial jurisdiction of the other, or outside thereof under the conditions specified in Article III of the present Convention." [Emphasis added]. Ahmad argues that he was not "found" in the United States by virtue of the fact he allegedly was kidnapped by U.S. officials and brought illegally into the United States. Initially, the court, assuming that the *Ker-Frisbie* doctrine applied and in response to the government's request not to provide any discovery concerning this or other matters, told the parties

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that it would assume that Ahmad was kidnapped unless the government presented evidence to contradict that presumption. On the basis of that representation, Ahmad presented no evidence during the hearing on the issue of his kidnapping. The government, however, presented both documentary and witness testimony.

In the government's affidavit supporting its request for the arrest warrant, A.U.S.A. Gleeson stated that Ahmad was arrested in Venezuela "on immigration charges and ordered deported to the [*66] United States." Ahmad alleges, on the other hand, that United States agents had him under surveillance prior to his arrest in Venezuela and that his arrest came about solely because the United States requested the same. To support his claim, Ahmad states that he was shown a picture of himself taken without his knowledge in Mexico several days prior to his arrest. He also states that on the occasion of his arrest in Venezuela, he was never questioned about Venezuelan immigration charges, but rather was questioned in depth about his life story and his associations in the occupied territory of the West Bank, the United States, Puerto Rico, Mexico and Venezuela. *See* Ahmad's Pre-hearing Brief, p. 4. He alleges that he was interrogated by U.S., Israeli and Venezuelan authorities, that he was denied access to an attorney or his friends. This seems to be in accord with the documents submitted by the government from Venezuela which indicate that Ahmad was processed at the direction of "counterintelligence" on the basis of his being a "suspected terrorist of the Abu Nidal Group." Government Exh. 8, translation. The documents presented make no mention of deportation. In those same documents, [*67] Ahmad asserted he was a native of Jordan, and he signed a statement stating that he did not want to return to the United States.

Ahmad further alleges that he was beaten and that he was forced to sign a statement in Spanish admitting he was a member of Fatah Abu Nidal. Additionally, he alleges that the Israeli interrogator, a man named "Shlomo," who worked at the Israeli Embassy, asked to be permitted to take Ahmad directly to Israel. *See* Ahmad's Pre-hearing Brief, pp. 2-5. ⁴³ Ahmad never testified during the hearings, and the affidavit submitted on his behalf was never signed. Where these circumstances pose problems with veracity of the above statements, the court does not discredit them entirely.

The request was apparently denied due to the lack of an extradition treaty between Israel and Venezuela. The lack of such a treaty, in the government's view, probably impacted on Venezuela's decision to return Ahmad to the United States. (T. 2/22/87 at p. 84).

While the United States government denies any participation in Ahmad's arrest, it is clear from the testimony of F.B.I. Special Agent James R. Lyons, supervisor of the New York Terrorism Squad, that Ahmad was securely [*68] in the custody of U.S. officials while still at the Caracas Airport, and long before his eventual "arrest." It remains unclear whether Ahmad's "arrest" occurred while in the plane and over international airspace, or after the plane landed in New York. Ahmad was never informed of his *Miranda* rights. (T.131).

Another troubling aspect in determining whether Ahmad was brought into the United States in a constitutionally acceptable fashion, arises from the fact that Lyons did not inform the court of what participation Israeli officials had in Ahmad's arrest or questioning, or whether the United States approved of or encouraged Israeli participation. Lyons professed not to have knowledge of Israeli participation in the arrest and interrogation of Ahmad, nor in the decision to send him to the United States. However, the fact that the Israeli arrest warrant for Ahmad dated May 3, 1987 states that Ahmad was "presently in the United States" seems to indicate that Israel was aware of Ahmad's arrest and that Ahmad would be brought to the United States soon thereafter. Government exh. I(a). This fact also contradicts the testimony that the FBI was not made aware that Ahmad would be "expelled" [*69]

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from Venezuela until May 4 or 5, 1987. (T. 2/22/88 at pp. 104-05).

On the basis of the testimony of Agent Lyons, and on other evidence introduced, this court determines that Ahmad was brought to the United States unlawfully. He had been the subject of surveillance in Mexico, his home in Venezuela was searched and his records apparently were forwarded to the United States. In the court's view, Ahmad was arrested by Venezuela at the request of the United States and for the sole purpose of returning him for extradition to Israel, as Venezuela was unable to do so. No charges were ever brought against Ahmad in Venezuela or here despite his lengthy detention and incommunicado interrogation, nor does there appear to be any basis for his arrest in the evidence proffered by the government. After arriving in the United States, Ahmad was debriefed concerning his international activities," yet was never given his *Miranda* warnings.

The court started with the presumption that Ahmad was kidnapped, the government was informed of the presumption and, although the government did not concede Ahmad was kidnapped, it was not unduly resistant to the imposition of the presumption that Ahmad was kidnapped. [*70] (Rather, the presumption was formulated in response to the government's request to deny Ahmad any of the discovery he had requested). The testimony and evidence introduced supports the presumption that Ahmad was brought unlawfully into the United States.

*International Law*The government argues, however, that even if Ahmad was kidnapped, he is nevertheless extraditable under international law. The court agrees with the Government's description of International Law in this area. *International Law, as embodied in the United Nations Charter*⁴⁴ Article 2 paragraph 4 of the United Nations Charter provides:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity of political independence of any state, or in any manner inconsistent with the Purposes of the United Nations. 59 Stat. 1035.

and the Charter of the Organization of American States,⁴⁵ Article 17 of the Charter of the Organization of American States provides:

The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

proscribes one state's use of force against territory of another. If the United States indeed kidnapped Ahmad, then that act may violate Venezuela's sovereignty. *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975)

However, engaging in such an act does not violate International Law unless the state in which the act occurred protests. *HN18* [↑] The provisions of the convention, and International Law, "are designed to protect the sovereignty of states, and it is plainly the offended states which must in the first instance determine whether a violation of sovereignty occurred, [*71] or requires redress." *Lujan*, 510 F.2d at 67, quoting H. Kelsen, *Principals of International Law* 234 (Tucker ed. 1966); Restatement (Second) of the Foreign Relations Law of the United States sec. 1, comment f; sec. 163, comment d (1965). Venezuela has made no such protest. Because *HN19* [↑] the rights and protections afforded by International Law in this area belong to the sovereigns themselves, and not to its citizens, Ahmad cannot assert, under International Law, that his alleged kidnapping bars his extradition.

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United States Law The same result, the government argues, is reached when looking at United States domestic law. The court disagrees. Even if the act of bringing Ahmad to the United States does not itself violate International Law, **HN20** [↑] the court cannot extradite a citizen it has no jurisdiction over. "It is well-settled . . . that the United States government must, in carrying out its treaty obligations, conform its conduct to the requirements of the Constitution, and that treaty obligations cannot justify otherwise unconstitutional governmental conduct." *In re Burt*, 737 F.2d 1477, 1484 (7th Cir. 1984). Additionally, the court in *Ker* stated that there may be ". . . proceedings previous to the trial, in regard to which the prisoner could invoke in some manner the [due process] clause of the Constitution." *Ker*, 119 U.S. at 440. This is such a proceeding.

In *In Re David*, 390 F. Supp 521, 522 (1975), Judge Foreman stated:

HN21 [↑] In the analogous area of interstate extradition the rule has long been that one state still has jurisdiction to try a criminal defendant even where the defendant was forcibly abducted from another state by agents of the state which eventually tried [*73]

him. *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886).

This conclusion was reached based on the rationale that **HN22** [↑] "due process of law is satisfied when one present in court is convicted of a crime after being fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards." *Frisbie*, 342 U.S. at 522. In an extradition proceeding designed to send the defendant out of the United States, the court cannot assure that the accused will receive due process. For this reason, application of the *Ker-Frisbie* Doctrine to extradition cases involving requests by other countries to extradite U.S. citizens who have been brought illegally into the United States violates the due process clause.

In both *Ker* and *Frisbie*, the defendants were to be tried in the United States. *Ker*, who was abducted from Peru, was surrendered to the state of Illinois for trial, and the defendant in *Frisbie* was kidnapped from Illinois and taken to Michigan. The courts, in both cases, found that the defendant's due process rights had not been violated. **HN23** [↑]

The constitutional guarantee of due process ". . . Is complied [*74] with when the party is regularly indicted by the proper grand jury in the state court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled." *Ker v. Illinois*, 119 U.S. 440 (1886). In both cases, the defendants were being tried in the United States and the court could ensure that the defendants would receive due process. In the present case, however, the defendant is not to be tried in the United States, thus this court cannot guarantee that he will not be deprived of his constitutional rights. ⁴⁶ In that regard, Ahmad argues he may be deprived the judicial safeguards that Jews receive in Israel. Commentators have argued that ". . . acts committed against the members or property of the occupying power [Israel] . . . should be punished more severely than similar acts committed against local inhabitants." Reicin, *Preventive Detention, Curfews, Demolition of Houses & Deportations: An analysis of Measures Employed by Israel in the Administered Territories*, 8 Cardozo L. Rev. 515, 522 n.35 (1987) (quoting G. von Glahn, *The Occupation of Enemy Territory - A Commentary on the Laws and Practices of Belligerent Occupations* 98 (1957)).

Moreover, not only have some authors alleged that the Israeli government ". . . fails to arrest and punish those who commit acts of settlor violence against Palestinians," (Mallison, *Legal Postscript: The Law Applicable to Israeli Settlor Violence in Occupied Territories*, (Defendant's Exh. I) p. 80), but it has also been argued that the Israeli government has created and imposed a ". . . dual legal system in the occupied territories - one to be exclusively applied to Jews and the other only to Palestinians - [which] relegates the latter to the status of second class citizens." *Id.* at 79

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While this court notes that Ahmad's argument fails to address the fact that he is an American citizen and as such appears to be eligible for the same treatment as Jews (*See supra* note 5), the court is not inclined, nor capable on the basis of the record before it, to make a determination regarding the equities of the Israeli legal system. It is sufficient to note that this court can not guarantee that Ahmad would receive due process in the Israeli courts. Given this inability and the fact that Ahmad was brought into the United States in a constitutionally impermissible manner, the court would be required to divest itself of jurisdiction over Ahmad to determine whether he can be extradited to Israel.

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HN24[↑]] Nor does the court find the limited process which is afforded in an extradition hearing to be sufficient to comply with due process in a situation where an American citizen is brought to the United States illegally from another country for the sole purpose of extraditing them abroad. To do so would encourage improper conduct by American agents and would negate the right of American citizens to take up residence in countries which have, by enacting or by the failure to enact, created a legal setting which is beneficial to our citizens.

HN25[↑]] The limited process which a defendant can take advantage of in an extradition setting is documented by the fact there is no inherent right to confrontation and cross-examination of witnesses, and the exclusionary rule does not apply. *Simmons v. Braun*, 627 F.2d at 636. Additionally, the Federal Rules of Civil and Criminal Procedure do not apply, instead "unique rules of 'wide latitude' govern the reception of evidence in Section 3184 hearings." *Sayne v. Shipley*, 418 F.2d at 685. Hearsay is not only admissible, but so are unsworn statements of absent witnesses, *Simmons*, 627 F.2d at 636 and a determination of probable cause to extradite can [*76] be made on the basis of this information alone. *Shapiro v. Ferrandina*, 478 F.2d 894, 902 (2d Cir. 1973). Ahmad may not introduce evidence on the issue of guilt or innocence, *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978), nor may he admit evidence which contradicts the evidence submitted on behalf of Israel (*Messina v. United States*, 728 F.2d 77, 80 (2d Cir. 1984) or which impeaches Israel's witnesses (*Shapiro*, 478 F.2d at 905). Nor may Ahmad introduce evidence of an alibi. *Hooker*, 573 F.2d at 1368. These rules are in place to protect legitimate foreign relations interests, ⁴⁷ Those policies and the manner in which the rules serve to protect them have been thoroughly addressed by prior cases and law reviews and need not be further discussed here. and, in this court's opinion, are properly in place. However, this court cannot assume that the rules were meant to thwart the constitutional rights of Americans in the interest of foreign policy. It is one thing to surrender a resident American citizen for trial in a foreign country when there is probable cause to believe they committed a crime there, it is another circumstance altogether to kidnap an American citizen for the sole purpose of extraditing him. ⁴⁸ In reaching this conclusion, the court is not unaware of the fact that both the *Toscanino* defense and the exclusionary rule are held in some circuits to be inapplicable in extradition proceedings. *David v. Attorney General of U.S.*, 699 F.2d 411 (7th Cir. 1983), *cert. denied*, 464 U.S. 832 (1983). However, these defenses arise only after a court has acquired jurisdiction over the accused. The *Toscanino* defense, when accepted denies a district court jurisdiction over the defendant. In *Toscanino*, the defendant was kidnapped in Uruguay, brought to the United States and cruelly tortured for seventeen days. The court held that such egregious behavior constituted a violation of due process and thus required the court to divest itself of jurisdiction. *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

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Our constitution cannot be read to approve of such behavior for the mere purpose of taking [*77]

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advantage of our treaties, nor can allowing such an outcome foster foreign relations. Rather than encouraging neutrality by the courts, allowing a person who has been brought illegally into the United States to be extradited, admittedly because the requested state has no treaty with the state in which the accused was found, requires a court, in essence, to take sides by placing the interests of the requested state over the interests of a naturalized American citizen. ⁴⁹The court is mindful of the fact that "a surrender of an American citizen required by treaty for purposes of an American citizen required by treaty for purposes of a foreign criminal proceeding is unimpaired by an absence in the foreign judicial system of safeguards in all respects equivalent to those constitutionally enjoined upon American trials." *Homes v. Laird*, 459 F.2d 1211, 1219 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 869 (1979) (footnote omitted). However, before a court can "surrender" its citizens, it must first have obtained jurisdiction over that citizen. If the court has not acquired jurisdiction in a constitutionally permissible manner, it cannot constitutionally surrender that citizen. An exception to that rule based on the court's ability to insure that due process is afforded, cannot apply where the court is not empowered to make that assurance.

HN26 [↑] Where it does not violate due process to bring a defendant illegally from one state to another so long as the process which is due is eventually given, the same cannot be said when the court is asked, as it is in this kind of an extradition setting, to give up its ability to assure that due process is afforded. It is not sufficient to argue that Israel may be penalized by the improper conduct of United States agents. The rights of a United States citizen, under the Constitution, must take precedence over the extradition treaty. Moreover, Israel's rights are not minimized by upholding the rights of a U.S. citizen in this type of a situation. Israel had no extradition treaty with Venezuela, and therefore no rights. By divesting itself of jurisdiction this court would not reduce Israel's rights, but would merely prevent it from acquiring rights it would not otherwise have but for the illegal acts of U.S. officials. Thus, if the court were to exercise jurisdiction it would be encouraging conduct by U.S. officials which is not in accord with constitutional guidelines.

CONCLUSION

For the reasons expressed above, this court concludes that Ahmad is the person [*79] whom Israel seeks, and that there is probable cause to believe that Ahmad committed the acts charged. However, at the time of the incident in question, there was a political uprising designed to change the composition of the government in the region and, the acts charged were incidental to that uprising and done in furtherance of the political objective of the PLO. Accordingly, Ahmad is protected by the political offense exception and cannot properly be extradited.

Furthermore, jurisdiction does not properly lie with this court given the fact Ahmad was brought to the United States in a constitutionally impermissible manner.

The request for extradition is denied.

SO ORDERED.

DATED: Brooklyn, New York

June 17, 1988