CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

INTRODUCTION TO INTERNATIONAL CRIMINAL LAW

MOOC taught by Professor Michael P. Scharf

Module #6:

Gaining Custody of the Accused

International Criminal Law
Module #6
Gaining Custody of the Accused

Part. I. Luring

Simulation #1:

Assume the following facts: Emanual Rutagonda is a dual national of Canada (where he was born and has lived for the past fifteen years) and Rwanda (where his parents are from, where he did military service, and where he lived the first fifteen years of his life). He has Hutu ethnicity. When Emanual was 14 years old, his father died and he was recruited into the *Interhamwe* militia. The next year, when genocide broke out in Rwanda, 15 year-old Emanual allegedly participated in a terrible atrocity: According to an indictment issued in 2001 by a Rwandan District Court, Emanual and several other members of Rwanda's *Interhamwe* militia locked 275 Tutsi children in the Boutaire High School, and then set the building on fire, killing all the Tutsis.

When the Hutu government fell to the Tutsis in August 1994, Emanual fled to Canada. Since 2001, the Rwandan government has been requesting that Canada surrender Emanual to Rwanda for prosecution on 275 counts of murder in an ordinary Rwandan District Court (not a *Gacaca* court), but Canada has denied these requests because: (1) Canada does not have an extradition treaty with Rwanda, (2) Canada views Emanual as a child soldier and therefore a victim not a criminal, and (3) Canada believes that the courts of Rwanda are not able to give Emanual a fair trial. At the request of Rwanda, Interpol has issued an international "wanted persons" notice for Emanual (a copy of this "Red Notice" document is attached to the Corrections/Clarifications).

The United States learned that Emanual was living in Canada when he was the subject of an episode of the reality TV series, "The Wanted." In July 2009 the United States government found out that Emanual's mother was having a heart procedure at the Detroit Clinic, and decided to try to lure Emanual from Canada to the United States so that he could be arrested and surrendered to Rwanda for trial. US agents sent Emanual an email purporting to be from the Detroit Clinic, telling him to come right away because his mother was about to die. Emanual borrowed a passport from a Canadian friend, entered the United States, was arrested by US agents, and subjected to "removal" (deportation) proceedings for transfer to Rwanda. All appeals have been exhausted.

Although the United States initially rebuffed Canada's protests, Canada convinced the United States to agree to have the dispute settled by the International Court of Justice by threatening to withdraw the Canadian troops from Afghanistan a year earlier than previously agreed.

Members of **Group A** (last names that begin with the letters A-H) will represent the Applicant, Canada. Members of **Group B** (last names that begin with the letters I-Z) will represent the Respondent, the United States. Based on the facts above and the reading material below, you are invited to upload a submission that argues the case from the point of view of your assigned country, addressing whether the "luring of a Canadian citizen from Canada violated international law, and in particular (1) Canada's territorial sovereignty; (2) the US-Canada Extradition Treaty and the January 11, 1988 Exchange of Letters Between Canada and the US on Transborder Abduction; and (3) Emanual's internationally protected human rights under the International Covenant on Civil and Political Rights.

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for "on-line simulations." The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.

Readings

From 2010 Niagara Moot Court Competition, BENCH MEMORANDUM, written by Michael P. Scharf

I. Did the luring and arrest of Emmanuel Rutaganda violate Canada's territorial sovereignty or Rutaganda's human rights?

This issue raises two main questions: First, is "luring" the equivalent of "abduction," which is generally viewed as a violation of territorial sovereignty and the human rights of the abducted person? Second, if they are equivalent, is this a case in which release of the individual would nevertheless not be appropriate because of the gravity of the charges?

Transborder abduction occurs when an individual is forcibly transferred across a State's borders without that State's consent. With the exception of cases falling within the self-defense exception contained in Article 51 of the UN Charter, "nations consider abduction illegal."

Despite this view, historically, courts did not inquire into the means by which the accused was brought into their jurisdiction. Europe and the British Commonwealth in particular were governed by the rule of *mala captus bene detentus* – which said that even if wrongly captured, the accused was rightly kept and tried. The rule was first stated in 1829 in the English case of *Ex parte Scott,* and was generally applied by countries across the globe until the 1990s. One of the most famous cases of application of this rule was that of Adolf Eichmann, a leading architect of the Nazi's genocidal policies during World War II. When Israel abducted Eichmann from Argentina, the UN Security Council condemned Israel's violation of Argentina's sovereignty. But the Security Council did not require Israel to return Eichmann to Argentina, and Israel

proceeded to try, sentence, and execute Eichmann for his genocidal crimes without protest by the Security Council.

In recent decades, courts around the world have increasingly departed from the *mala captus bene detentus* principle. A developing emphasis on individual rights, extradition treaties, and deterring abuses of process have all contributed to this evolution. Today, where law enforcement officers from one state cross into another state to abduct a suspect, the courts of most States would dismiss the case because of the violation of state sovereignty and the individual's rights. The law is much less settled as to Rutaganda's situation, which involves luring and trickery, rather than a direct breach of a national border and forcible abduction.

A. Territorial Sovereignty

The first major issue related to luring a suspect from one nation to another for arrest is whether or not territorial sovereignty has been violated. In the present case, the United States will argue that luring does not violate state sovereignty and is an acceptable alternative to abduction when an asylum state is reluctant to extradite. Luring is not a violation of state sovereignty because the United States law enforcement officers did not enter Canada to arrest Rutaganda. There was no reason for them to make an extradition request since they were able to get the suspect to enter the U.S. voluntarily (although on false pretenses). Luring is seen by some as a way for nations to avoid the adverse impact on international relationships and reputation typically caused by transnational abduction, while still bringing international criminals to justice.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) exercised jurisdiction in the *Dokmanovic* case on the basis of a distinction it drew between abduction and luring. The ICTY opined that abduction might well have provided grounds for dismissal, but "the trickery used by the Prosecution to arrest Dokmanovic did not amount to a 'forcible abduction or kidnapping' and such 'luring' was consistent with principles of international law and the sovereignty of the FRY." The ICTY developed its approach further in the *Nikolic* and *Tolimir* cases. In those cases, the Tribunal weighed the severity of violations against the importance of prosecuting the individual. According to the ICTY, the more egregious the violation of territorial sovereignty or individual rights, the more likely the ICTY will be to dismiss the case. However, when dealing with crimes like genocide, war crimes, and crimes against humanity (universally condemned offenses), the Tribunal said dismissal would be appropriate only in the most extreme cases involving torture or other severe abuses. The ICTY thus did not dismiss either case, despite the fact that the defendants had been abducted by agents of the ICTY.

Given that Rutaganda is accused of 275 counts of murder in the context of genocide, the United States will argue that the international community has a strong interest in not releasing him despite the questionable way in which he was apprehended. Genocide is a universally condemned offense, while luring is accepted by many nations as a legitimate way to bring persons accused of serious crimes to trial. In *ex rel Lujan v. Gengler*, a U.S. court foreshadowed the ICTY approach when it said that the circumstances of the accused's arrest must, among other things, "shock the conscience" to warrant dismissal.

On the other hand, Canada will argue that its territorial sovereignty was in fact violated because the deception by U.S. law enforcement amounted to an abduction by trickery. As one commentator has put it:

> "[I]t may prove difficult to distinguish the forcible abduction of a fugitive from the coerced or fraudulent luring of a fugitive into a jurisdiction. Force and fraud should be viewed as being on a continuum of coercion. While abduction by force will almost certainly create a strong presumption in favour of issuing a stay, the status of an abduction by fraud is less clear… The real question is how far the police may go before their conduct becomes objectionable."

Getting a suspect to enter the jurisdiction through threats to the person's family, for instance, is clearly extremely coercive and more likely to result in dismissal. Luring someone for their own personal gain (such as a lucrative drug deal) is less offensive, and the accused will most likely still face trial. Rutaganda's case is situated somewhere in between. Lying to him about the health of his mother put him in a very difficult position, and certainly moved this incident farther down the "continuum of coercion." The stress and emotional impact of receiving such information should also be considered. "The key question is the degree of duress imposed by the police upon the fugitive: the greater the duress, the more likely it is that a stay will be appropriate."

Additionally, the perpetration of the lie itself may constitute a crime committed in Canadian territory by the U.S. authorities:

> "The force-fraud distinction has been supported on the basis of policy arguments, namely, that fraud does not violate the territorial sovereignty of foreign states, and does not present the risk of violence to the fugitive or third parties. While the latter point may be accurate, it is not determinative of the issue. Further, the former point is simply untrue. According to conflict of laws rules, a fraud perpetrated upon a person located in a foreign state occurs in that state. Although fraud is not strictly equivalent to sending police agents into the territory of a foreign state, it still amounts to a wrong committed by domestic authorities in that foreign state."

Even if luring is acceptable in some instances, Canada has a strong argument that it should not have been used against Rutaganda. The purpose of overlooking abuses and retaining jurisdiction is to bring to justice individuals that have committed heinous crimes and are a threat to the international community. Rutaganda was not a threat. He was living peacefully and without incident in Canada. The state sovereignty of Canada was violated without a valid excuse or justification. Finally, Canada may argue that the United States authorities should have tried other means, for example entering into negotiations with Canada for the trial of Rutaganda in Canada, or for Canada's cooperation for his transfer to a third state or the ICTR for trial.

B. Human Rights

In addition to the sovereignty issue, Canada will argue that the luring violated Article 9(1) of the International Convention on Civil and Political Rights (ICCPR), which states:

> "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established in law."

If a person is subject to an unlawful arrest or detention, that person may sue for release and/or compensation. But, the ICCPR gives limited guidance as to when and how a remedy would be applied.

The US will argue that it did not violate Rutaganda's human rights. He voluntarily entered the US. He entered illegally (with someone else's passport) and so the arrest should not have been a surprise. The arrest was not unlawful. As a result, his arrest and detention were not arbitrary and were consistent with the standard set forth in Article 9 of the ICCPR.

Even if it is established that the trickery used to lure him into the U.S. was a violation of his right to liberty and due process, the U.S. will argue that the violations were not serious enough to require the release of Rutaganda. The ICTY asserted in *Nikolic* that jurisdiction should be exercised unless the human rights violations were of an "egregious nature" – such as serious mistreatment, cruel, inhuman, or degrading treatment, or torture. This is consistent with the U.S. Federal Court of Appeals opinion in *Toscanino*. In that case, the suspect was abducted and tortured prior to being brought to trial. The court declined jurisdiction so as not to "reward police brutality and lawlessness". The International Criminal Tribunal for Rwanda in the *Barayagwiza* case held that a court should not exercise jurisdiction when there are "serious and egregious violations of the accused's rights." Absent such extreme circumstances, refusal to exercise jurisdiction is a "disproportionate" response, when considering the interest of the international community in bringing criminals to justice.

On the other hand, Canada will respond that Rutaganda's arrest and intent to return him to Rwanda to be tried for mass murder (rather than just the passport violation) was a complete surprise. Law enforcement used extremely coercive and deceitful means to lure him. So, the arrest and detention should be viewed as unlawful and arbitrary. As such, it was a violation of Rutaganda's basic right to liberty and due process under the ICCPR. It is also important to note that the U.S. intends to give up Rutaganda to the Rwandan justice system where he may be subject to other violations of his rights. Canada provided him de facto asylum (and refused to send him to Rwanda), in part based on the risks that he faced in Rwanda from an overzealous justice system.

II. Does the Canada-US Extradition Treaty and January 11, 1988 Exchange of Letters Between Canada and the US on Transborder Abduction prohibit Luring?

The US Supreme Court considered whether an abduction violated the US-Mexico extradition treaty in the case of *United States v. Alvarez Machain*. Although Supreme Court precedents are not binding on the International Court of Justice. The Court can choose to treat

either the majority opinion or the dissenting opinion as persuasive authority. In the *Alvarez Machain* case, the US Supreme Court ruled that even though the "forcible abduction from Mexico to the United States of a Mexican citizen who had been indicted on federal criminal charges may have been shocking and in violation of international law, the abduction was not in violation of the Extradition Treaty" and thus that the U.S. did not have to dismiss the case as a violation of the Treaty. However, (consistent with several Amicus Briefs including one submitted by Canada) the dissent in that case opined that the extradition treaty had been violated, providing grist for Canada's argument in this case before the International Court of Justice.

Similar to the dissent in *United States v. Alvarez Machain*, Canada is likely to argue that there is an implied term in the Extradition Treaty prohibiting the prosecution of a lured individual. Here, Canada will contend that it is true that there is no express promise within the Extradition Treaty to refrain from luring but it is incorrect for one to conclude that the parties reserved this right. Explicitly, Canada will argue that just because certain means exist of circumventing the formalized process of extradition, this does not mean that those means constitute equally available methods within a consensual agreement which on its face appears to have been "intended to set forth a comprehensive and exclusive rules concerning the subject of extradition."

To further this argument, Canada could bring up an analogy: assassination may be a more effective and efficient means of dispensing justice than extradition; but, just because it is not explicitly included within the extradition treaty does not mean that it is a permissible way to deal with fugitives located across the Canada-US border. This analogy, which was utilized by the dissent in *Alvarez-Machain*, is extreme but highlights that it would be counter to the object and purpose of the Extradition Treaty if it could be avoided in this manner. Similarly, Canada can argue that allowing luring would run counter to a treaty whose purpose is to transfer alleged defendants through a formalized process in order to protect the rights of the accused and the sovereignty of the States.

Thus, Canada might argue that although the current treaty does not explicitly include luring, the implicit reasons behind the treaty, cooperation between the two nations, would be frustrated. According to this argument, reading the Extradition Treaty to not include luring is a "highly improbable interpretation" of an agreement that is supposed to signify a cooperative relationship. Canada would urge one to look at the intent of the parties in drafting the Extradition Treaty, especially after it was clarified through the "January 11, 1988 Exchange of Letters Between Canada and the United States on Transborder Abduction" to spell out that transborder abductions by bounty hunters was an extraditable offense. Canada is likely to argue, much like Justice Stevens in *Alvarez- Machain*, that "in looking to the party's expectations when making the Treaty [one would assume that] the drafters of the Treaty would not have imagined that the Treaty" would allow the United States to lure individuals, especially "given its stated purpose of fostering cooperation and mutual assistance."

The United States will argue in turn that, while the January 11, 1988 Exchange of Letters Between Canada and the United States on Transborder Abduction clarifies that private transborder abductions, such as those committed by bounty hunters, constitute an extraditable offense, the Treaty is silent on the concept of luring. The United States may argue that Canada

had the opportunity, when it explicitly exchanged letters with the United States regarding transborder abductions, to include similar language on luring. Because it did not, the United States will offer, it must have meant that luring was not intended to be disallowed within the treaty. If luring does not violate the Treaty, "the treaty thereby [would] not prevent the United States Court from obtaining personal jurisdiction over the defendant" through luring. The reasoning of the majority in *Alvarez-Machain* supports the position of the United States. The Court in *Alvarez-Machain* read the Treaty between Mexico and the United States strictly, finding that because transborder abduction was not explicitly mentioned, it was not disallowed.

Part II. The Case Study of Osama Bin Laden

Simulation #2: The leader of al Qaeda, Osama bin Laden, was killed by US commandos on May 1, 2011. Assume it is a week earlier, April 25, 2011. The CIA has just confirmed that it has reliable intelligence that Osama Bin Laden is holed up in a private residential compound in the town of Abbottabad, Pakistan. The President has convened a high level team of his advisers to the White House Situation Room in order to determine the legal and practical implications of the following options: (1) requesting Pakistan to arrest and extradite Bin Laden, (2) Abducting Bin Laden, or (3) killing Bin Laden.

Based on the materials below, you are invited to upload a submission discussing what you think the pros and cons of these three options would be.

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A. Abduction

Frederic L. Kirgis, Alleged CIA Kidnapping of Muslim Cleric in Italy, ASIL Insight, July 7, 2005

Introduction

In late June 2005, it was reported that an Italian judge had issued arrest warrants for 13 U.S. CIA agents accused of kidnapping imam Hassan Mustafa Osama Nasr in Italy in 2003, and sending him to Egypt for questioning regarding possible terrorist activities. Nasr apparently is an Egyptian national, although he was living in Italy when he was abducted. Allegedly, when he arrived in Egypt he was imprisoned and tortured during interrogations. The Italian government has denied that it condoned his abduction, but former CIA agents have said that an Italian intelligence official gave his implicit approval.

The case raises several questions under international law. Did the United States violate Italy's sovereignty if CIA agents abducted Nasr in Italy, as alleged? Did the United States violate its international legal obligations if it delivered Nasr to the control of a government that would be likely to torture him or to acquiesce in acts of torture against him? Could Italy obtain extradition of the CIA agents (who apparently are no longer in Italy)? If Italy does get custody of them, would they be immune under international law from prosecution in Italian courts?

Italy's Sovereignty

In 1927 the World Court set forth a basic rule: "the first and foremost restriction imposed by international law upon a State is that -- failing the existence of a permissive rule to the contrary -- it may not exercise its power in any form in the territory of another State." Agents of one State who abduct someone in another State would be exercising State power. There is no general rule

of international law permitting that kind of State power in the territory of another State. Nevertheless, the latter State --Italy in this case -- could waive its right to object, by consenting to the exercise of power. If Italian officials did consent, even tacitly, that should do away with the violation-of-sovereignty issue.

The Torture Issue

Torture is universally regarded as a violation of international law. No government openly asserts that torture is lawful. It is condemned under several treaties, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a multilateral treaty to which 139 States (including Egypt, Italy and the United States) are parties. Article 3 of the Convention against Torture says, "No State Party shall expel, return (*"refouler"*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." It goes on to say that the existence of a consistent pattern of gross, flagrant or mass violations of human rights should be taken into account in ascertaining whether that standard is met. The United States understands "substantial grounds for believing that he would be in danger of being subjected to torture" to mean "if it is more likely than not that he would be tortured."

It could be argued that even if U.S. agents kidnapped Nasr and had him delivered to Egypt for questioning, the United States did not "expel, return or extradite him" within the meaning of the Convention. Clearly, the United States did not extradite him, and it probably could not be said to have "expelled" him within the meaning of the Convention. The question then would be whether it "returned" him to Egypt. Arguably not, since he apparently was living in Italy and had not come there from Egypt. But the contrary argument could also be made, since he apparently is an Egyptian national who lived in Egypt at some time in the past.

It could also be argued that there were not substantial grounds for believing that Nasr would be in danger of being subjected to torture, even if Egypt had tortured some prisoners in the past. But here again, a counter-argument could be made -- particularly if the United States had substantial grounds for believing that Egypt in the past had consistently tortured prisoners, or had in particular tortured prisoners like Nasr (for example, those suspected of terrorist activities). If there were substantial grounds, it would not matter for purposes of Article 3 of the Convention whether he was actually tortured once he got there. If there were not substantial grounds in advance to believe he would be in danger of torture, Article 3 would not be violated even if he was actually tortured after he arrived. Article 3, in other words, looks to what could be expected rather than to what actually happened after the individual has been turned over.

Extradition

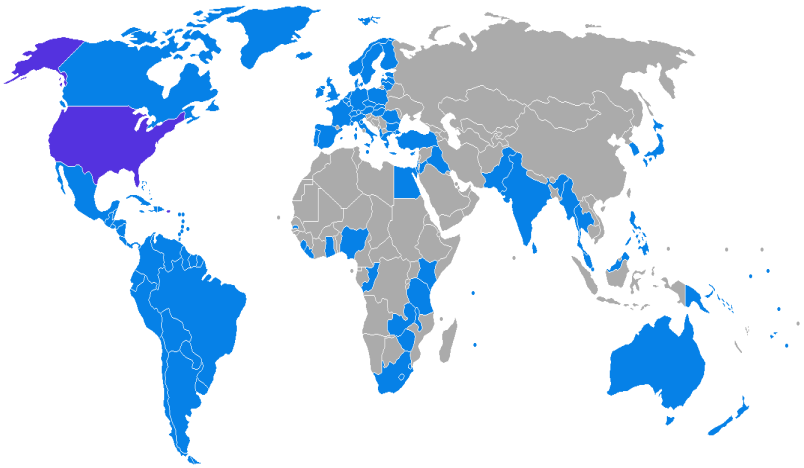
News reports have not indicated where any of the 13 CIA agents are now. Since they apparently are not in Italy, the Italian prosecutors are hoping to have them extradited back to Italy for trial if they can be located. Extradition is normally accomplished under an extradition treaty between the requesting and the requested State. Extradition requests are made through diplomatic channels, not directly by prosecutors or by the judge who issued the arrest warrants. If the Italian government acquiesced in the kidnapping, it is unlikely that it would request extradition of those who carried it out. That would end the matter, at least if none of the 13 return to Italy on their own.

If an extradition request were made to the United States government, and if any or all of the 13 agents are in the United States, the controlling international legal instrument would be the 1984 Extradition Treaty between the United States and Italy. It says that an extraditable offense is one that is punishable under the laws of both States by a prison sentence of one year or more. Assuming that the conduct of the 13 agents would be treated as kidnapping under Italian law, the next question would be whether it would fall within a relevant kidnapping statute in the United States. Looking just at the federal kidnapping statute (which does provide for sentences of at least one year), it applies to "[w]hoever unlawfully . . . kidnaps . . . or carries away and holds for ransom or reward or otherwise any person . . . when the person is willfully transported in interstate or foreign commerce . . . ." Because of the words "or otherwise," the statute has been held not to require that the abductors' purpose be pecuniary gain. But the U.S. Supreme Court has said that Congress' evident purpose in adding the words "or otherwise" was to reach abductors who seek some benefit for themselves, even if it is non-pecuniary. That probably would not be the case with respect to the CIA agents, who presumably would not have been seeking direct benefits for themselves if they were carrying out instructions from their superiors in the U.S. government.

The United States-Italy Extradition Treaty does not permit either State party to decline extradition simply because the person sought to be extradited is its own national. But the Treaty does say that extradition shall not be granted when the offense for which extradition is requested is a political offense. Many other extradition treaties say the same thing. There is doubt about just how far the "political offense" exception extends. It has been said that "[t]he purpose of the political offense exception is to shield persons whose prosecution or punishment by the requesting state is politically motivated or for an offense whose genesis is the criminalization of conduct which constitutes an expression of political or religious belief." It has also been noted that in practice, the political offense exception is rarely used successfully. The exception certainly could be asserted in the case of the CIA agents, but whether it would be successful (assuming that the kidnapping is otherwise covered by the Treaty) is hard to predict.

A. Extradition

Countries with which the U.S. has extradition treaties (in blue)



Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986) (edited by Michael Scharf)

Pursuant to the Extradition Statute, 18 U.S.C. Sec. 3184 (1982), and the governing treaty between the United States and the United Kingdom, the United Kingdom seeks the extradition of William Joseph Quinn, a member of the Irish Republican Army ("IRA"), in order to try him for the commission of a murder in 1975 and for conspiring to cause explosions in London in 1974 and 1975. The district court determined that Quinn cannot be extradited because a long-standing principle of international law which has been incorporated in the extradition treaty at issue--the political offense exception--bars extradition for the charged offenses. The United States government, on behalf of the United Kingdom, appeals.

In the case before us, we find, for reasons we will explain in full, that the charged offenses are not protected by the political offense exception. We vacate the writ of habeas corpus and remand to the district court.

I. BACKGROUND

The right of a foreign sovereign to demand and obtain extradition of an accused criminal is created by treaty. In the absence of a treaty there is no duty to extradite, and no branch of the United States government has any authority to surrender an accused to a foreign government except as provided for by statute or treaty.

The extradition treaty between the United States and the United Kingdom provides for the reciprocal extradition of persons found within the territory of one of the nations who have been accused or convicted of certain criminal offenses committed within the jurisdiction of the other nation. Murder and conspiracy to cause explosions, the offenses with which Quinn has been charged, are extraditable offenses under the Treaty..

United States citizenship does not bar extradition by the United States. However, under the doctrine of "dual criminality," an accused person can be extradited only if the conduct complained of is considered criminal by the jurisprudence or under the laws of both the requesting and requested nations. In addition, there must be evidence that would justify committing the accused for trial under the law of the nation from whom extradition is requested if the offense had been committed within the territory of that nation. United States courts have interpreted this provision in similar treaties as requiring a showing by the requesting party that there is probable cause to believe that the accused has committed the charged offense. The doctrine of "specialty" prohibits the requesting nation from prosecuting the extradited individual for any offense other than that for which the surrendering state agreed to extradite.

The treaty between the United States and the United Kingdom provides certain exceptions to extradition, notwithstanding the existence of probable cause to believe that the accused has committed the charged offense. In particular, the treaty specifies that "[e]xtradition shall not be granted if ... the offense for which extradition is requested is regarded by the requested party as one of a political character...."

II. THE DEVELOPMENT OF THE POLITICAL OFFENSE EXCEPTION

A. Origin of the Exception

The first-known extradition treaty was negotiated between an Egyptian Pharaoh and a Hittite King in the Thirteenth Century B.C. However, the concept of political offenses as an exception to extradition is a rather recent development. In the centuries after the first known extradition treaty, and throughout the Middle Ages, extradition treaties were used primarily to return political offenders, rather than the perpetrators of common crimes, to the nations seeking to try them for criminal acts. It was not until the early nineteenth century that the political offense exception, now almost universally accepted in extradition law, was incorporated into treaties.

The French and American revolutions had a significant impact on the development of the concept of justified political resistance, as did the political philosophers of the time. In 1834, France introduced the political offense exception into its treaties, and by the 1850's it had become a general principle of international law incorporated in the extradition treaties of Belgium, England, and the United States as well.

The political offense exception is premised on a number of justifications. First, its historical development suggests that it is grounded in a belief that individuals have a "right to resort to political activism to foster political change." This justification is consistent with the modern consensus that political crimes have greater legitimacy than common crimes. Second, the exception reflects a concern that individuals--particularly unsuccessful rebels--should not be returned to countries where they may be subjected to unfair trials and punishments because of their political opinions. Third, the exception comports with the notion that governments--and certainly their nonpolitical branches--should not intervene in the internal political struggles of other nations.

B. Comparative Legal Standards

None of the political offense provisions in treaties includes a definition of the word "political." Thus, the term "political offense" has received various interpretations by courts since the mid-nineteenth century. Not every offense that is politically motivated falls within the exception. Instead, courts have devised various tests to identify those offenses that comport with the justifications for the exception and that, accordingly, are not extraditable.

Within the confusion about definitions it is fairly well accepted that there are two distinct categories of political offenses: "pure political offenses" and "relative political offenses." Pure political offenses are acts aimed directly at the government. These offenses, which include treason, sedition, and espionage, do not violate the private rights of individuals. Because they are frequently specifically excluded from the list of extraditable crimes given in a treaty, courts seldom deal with whether these offenses are extraditable, see id., and it is generally agreed that they are not.

The definitional problems focus around the second category of political offenses--the relative political offenses. These include "otherwise common crimes committed in connection with a

political act," or "common crimes ... committed for political motives or in a political context," Courts have developed various tests for ascertaining whether "the nexus between the crime and the political act is sufficiently close ... [for the crime to be deemed] not extraditable." The judicial approaches can be grouped into three distinct categories: (1) the French "objective" test; (2) the Swiss "proportionality" or "predominance" test; and (3) the Anglo-American "incidence" test.

The early French test considered an offense non-extraditable only if it directly injured the rights of the state. Applying this rigid formula, French courts refused to consider the motives of the accused. The test primarily protects only pure political offenses, and is useless in attempts to define whether an otherwise common crime should not be extraditable because it is connected with a political act, motive, or context.

In contrast to the traditional French test, Swiss courts apply a test that protects both pure and relative political offenses. The Swiss test examines the political motivation of the offender, but also requires (a) a consideration of the circumstances surrounding the commission of the crime, and (b) either a proportionality between the means and the political ends, or a predominance of the political elements over the common crime elements. [This is the predominant test across the globe.]

The "incidence" test that is used to define a non-extraditable political offense in the United States and Great Britain was first set forth by the Divisional Court in In re Castioni, [1891] 1 Q.B. 149 (1890). In that case, the Swiss government requested that Great Britain extradite a Swiss citizen who, with a group of other angry citizens, had stormed the palace gates and killed a government official in the process. Castioni did not know the victim or have a personal grudge against him. The habeas court considered:

> [W]hether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and [up]rising in which he was taking part.

The court denied extradition, finding that Castioni's actions were "incidental to and formed a part of political disturbances," and holding that common crimes committed "in the course" and "in the furtherance" of a political disturbance would be treated as political offenses.

American courts have continued to apply the incidence test set forth in Castioni with its two-fold requirement: (1) the occurrence of an uprising or other violent political disturbance at the time of the charged offense, and (2) a charged offense that is "incidental to" "in the course of," or "in furtherance of" the uprising.

The American approach has been criticized as being "both underinclusive and overinclusive,", and as "yield[ing] anomalous ... results". Although these criticisms have some merit, neither flaw in the American incidence test is serious. Some commentators have suggested that the test is underinclusive because it exempts from judicially guaranteed protection all offenses that are not contemporaneous with an uprising even though the acts may represent legitimate political resistance. For example, the attempted kidnapping of a Cuban consul, allegedly for the purpose

of ransoming the consul for political prisoners held in Cuba, was held by a court not to be a political offense because the act was not "committed in the course of and incidental to a violent political disturbance."

There are several responses to the charge of underinclusiveness. First, in their critiques, the commentators fail to give sufficient weight to the existence of a number of ameliorative safeguards. For example, review of certifications of extradition by the Secretary of State serves partially to remedy any underinclusiveness problem. If a court finds the accused extraditable, the Secretary has, at the very least, broad discretion to review the available record and conduct a de novo examination of the issues and, if necessary, to consider matters outside the record in determining whether to extradite. The potential underinclusiveness dangers of the uprising requirement are also mitigated by the fact that purely political offenses are never extraditable. Additionally, because of the rule of dual criminality, individuals accused of offenses that constitute protected activity under the First Amendment will not be extradited. Second, it is questionable whether the incidence test is, in fact, underinclusive. While it does not protect all politically motivated offenses, it protects those acts that are related to a collective attempt to abolish or alter the government--the form of political offense that the exception was initially designed to protect, see supra pp. Third, any effort to protect all crimes that are in some way politically motivated would either require the abandonment of the objective test for determining which offenses fall within the exception--in our view a most undesirable result--or would result in the protection of innumerable crimes that fall far outside the original purposes underlying the exception.

A number of commentators suggest, on the other hand, that the American test is overbroad because it makes non-extraditable some offenses that are not of a political character merely because the crimes took place contemporaneously with an uprising. They all cite Karadzole v. Artukovic, 247 F.2d 198 (9th Cir.1957)--"one of the most roundly criticized cases in the history of American extradition jurisprudence”--to support their argument. In Artukovic, the Yugoslavian government sought the extradition of a former Minister of the Interior of the puppet Croatian government which took over a portion of Yugoslavia following the German invasion in April 1941. Artukovic was charged with directing the murder of hundreds of thousands of civilians in concentration camps between April 1941 and October 1942. Prior to a hearing by an extradition magistrate, the district court granted habeas relief, concluding that the charged offenses were non-extraditable political offenses. We affirmed, applying the Castioni language and noting that the offenses occurred during the German invasion of Yugoslavia and subsequent establishment of Croatia. We considered but were unpersuaded by the argument that because war crimes are so barbaric and atrocious they cannot be considered political crimes. We do not believe that Artukovic adequately supports the commentators' suggestion that the incidence test is overinclusive. We think it more likely that the problem lies not in the test itself but in the fact that we erred by applying it in that case.

The offenses with which Artukovic was charged fall within that very limited category of acts which have been labeled "crimes against humanity." In Artukovic we erroneously assumed that "crimes against humanity" was synonymous with "war crimes," and then concluded in a somewhat irrelevant fashion that not all war crimes automatically fall outside the ambit of the political offense exception. Our analysis was less than persuasive. We did not need then, and do

not need now, to reach a conclusion about whether all war crimes fall outside the bounds of the exception. The offenses with which Artukovic was charged were crimes against humanity; it matters not whether or not they were also war crimes; either way, crimes of that magnitude are not protected by the exception.

Crimes against humanity, such as genocide, violate international law and constitute an "abuse of sovereignty" because, by definition, they are carried out by or with the toleration of authorities of a state. While some of the same offenses that violate the laws and customs of war are also crimes against humanity, crimes of the latter sort most notably include "murder, extermination, enslavement, ... or persecutions on political, racial or religious grounds ..." of entire racial, ethnic, national or religious groups

Wholly aside from the Artukovic court's confusion of "war crimes" and "crimes against humanity," we do not believe that the political offense exception, even if meant to protect the acts of representatives of a former government, should have been extended to protect those carrying out a governmental policy calling for acts of destruction whose "nature and scope ... exceeded human imagination." These crimes are simply treated differently and are generally excluded from the protection of many normally applicable rules. They are certainly in our view to be excluded from coverage under the political offense exception.

Accordingly, we do not consider the "underinclusiveness" and "overinclusiveness" problems of the incidence test to have been as severe as has been suggested by some of the commentators. Rather, we believe that the incidence test, when properly applied, has served the purposes and objectives of the political offense exception well. More recently, a number of courts have begun to question whether, in light of changing political practices and realities, we should continue to use the traditional American version of that test. They have suggested that basic modifications may be required and, specifically, that certain types of conduct engaged in by some contemporary insurgent groups, conduct that we in our society find unacceptable, should be excluded from coverage. For the reasons we explain below, we believe that the American test in its present form remains not only workable but desirable; that the most significant problems that concern those advocating changes in the test can be dealt with without making the changes they propose; and that efforts to modify the test along the lines suggested would plunge our judiciary into a political morass and require the type of subjective judgments we have so wisely avoided until now.

C. The Recent Political Offense Cases

Recently, the American judiciary has split almost evenly over whether the traditional American incidence test should be applied to new methods of political violence in two categories--domestic revolutionary violence and international terrorism--or whether fundamental new restrictions should be imposed on the use of the political offense exception.

In both In re McMullen (N.D.Cal. May 11, 1979), and In re Mackin (S.D.N.Y. Aug. 13, 1981, extradition magistrates applied the traditional United States incidence test despite expressing serious concern over the nature of the charged offenses. In McMullen, the United Kingdom sought the extradition of a former PIRA member accused of murder in connection with the

bombing of a military barracks in England. Finding that McMullen's acts took place during a state of uprising throughout the United Kingdom and were incidental to the political disturbance, the magistrate denied extradition noting that "[e]ven though the offense be deplorable and heinous, the criminal actor will be excluded from deportation if the crime is committed under these pre-requisites." The magistrate's formulation of the test for the political offense exception in Mackin was similar. In that case, the United Kingdom's request for the extradition of an IRA member accused of murdering a British soldier in Northern Ireland was denied.

In contrast, although asserting that the existing incidence test "is sufficiently flexible to avoid [the] abuses [noted by commentators]," and while ostensibly applying the traditional test, the Seventh Circuit in Eain v. Wilkes (7th Cir. 1981), superimposed a number of limitations on the exception that had not previously been a part of United States law. Abu Eain, a resident of the occupied West Bank and a member of the PLO, was accused by the State of Israel of setting a bomb that exploded in the Israeli city of Tiberias in 1979, killing two boys and injuring more than thirty other people. A magistrate granted Israel's extradition request, the district court denied habeas corpus relief, and the Seventh Circuit affirmed.

First, the Eain court distinguished between conflicts that involved "on-going, organized battles between contending armies," and conflicts that involved groups with "the dispersed nature of the PLO," noting that in the former case, unlike the latter, a clear distinction can be drawn between the activities of the military forces and individual acts of violence. Second, although acknowledging that motivation is not determinative of the political character of an act, and characterizing its next requirement as that of a "direct link" between the offense and the conflict, the court examined the motivation for and political legitimacy of the act. The court appears to have concluded that, according to the evidence presented, the PLO's objectives were not politically legitimate: the PLO sought changes in "the Israeli political structure as an incident of the expulsion of a certain population from the country," and its activities were therefore more properly characterized as aimed at Israel's "social structure" rather than its "political structure," Third, the court held simply that regardless what the political objective is, "the indiscriminate bombing of a civilian population is not recognized as a protected political act."

Thus, the Seventh Circuit in Eain redefined an "uprising" as a struggle between organized, non-dispersed military forces; made a policy determination regarding the legitimacy of given political objectives; and excluded violent acts against innocent civilians from the protection afforded by the exception. As part of its justification for the new limitations it imposed on the applicability of the exception, the Eain court expressed concern that, in the absence of these restrictions, nothing would prevent an influx of terrorists seeking a safe haven in America.... Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States and live in our neighborhoods and walk our streets forever free from any accountability for their acts. We do not need them in our society.... [T]he political offense exception ... should be applied with great care lest our country, become a social jungle....

The District Court for the Southern District of New York has recently rejected portions of the Eain analysis but accepted some of the new restrictions propounded by the Seventh Circuit. In In re Doherty, (S.D.N.Y.1984), the court denied the United Kingdom's request that a PIRA member accused of attacking a convoy of British soldiers in Northern Ireland be extradited. The

extradition court rejected the notion that the exception protects only "actual armed insurrections or more traditional and overt military hostilities." Noting that "political struggles have been ... effectively carried out by armed guerillas," id., the court concluded that a dissident group's likelihood of success and its ability to effect changes by other than violent means were not determinative factors. Nevertheless, the court agreed with the Seventh Circuit's tacit conclusion that the traditional incidence test is "hardly consistent with ... the realities of the modern world,"

III. THE POLITICAL OFFENSE EXCEPTION AND THE REALITIES OF CONTEMPORARY POLITICAL STRUGGLES

A. The Political Reality: The Contours of Contemporary Revolutionary Activity

The recent lack of consensus among United States courts confronted with requests for the extradition of those accused of violent political acts committed outside the context of an organized military conflict reflects some confusion about the purposes underlying the political offense exception. The premise of the analyses performed by modern courts favoring the adoption of new restrictions on the use of the exception is either that the objectives of revolutionary violence undertaken by dispersed forces and directed at civilians are by definition, not political, or that, regardless of the actors' objectives, the conduct is not politically legitimate because it "is inconsistent with international standards of civilized conduct." Both assumptions are subject to debate.

A number of courts appear tacitly to accept a suggestion by some commentators that begins with the observation that the political offense exception can be traced to the rise of democratic governments. Because of this origin, these commentators argue, the exception was only designed to protect the right to rebel against tyrannical governments, and should not be applied in an ideologically neutral fashion. These courts then proceed to apply the exception in a non-neutral fashion but, in doing so, focus on and explicitly reject only the tactics, rather than the true object of their concern, the political objectives. The courts that are narrowing the applicability of the exception in this manner appear to be moving beyond the role of an impartial judiciary by determining tacitly that particular political objectives are not "legitimate."

We strongly believe that courts should not undertake such a task. The political offense test traditionally articulated by American courts, as well as the text of the treaty provisions, is ideologically neutral. We do not believe it appropriate to make qualitative judgments regarding a foreign government or a struggle designed to alter that government.

A second premise may underlie the analyses of courts that appear to favor narrowing the exception, namely, that modern revolutionary tactics which include violence directed at civilians are not politically "legitimate." This assumption, which may well constitute an understandable response to the recent rise of international terrorism, skews any political offense analysis because of an inherent conceptual shortcoming. In deciding what tactics are acceptable, we seek to impose on other nations and cultures our own traditional notions of how internal political struggles should be conducted.

The structure of societies and governments, the relationships between nations and their citizens, and the modes of altering political structures have changed dramatically since our courts first adopted the Castioni test. Neither wars nor revolutions are conducted in as clear-cut or mannerly a fashion as they once were. Both the nature of the acts committed in struggles for self-determination, and the geographic location of those struggles have changed considerably since the time of the French and American revolutions. Now challenges by insurgent movements to the existing order take place most frequently in Third World countries rather than in Europe or North America. In contrast to the organized, clearly identifiable, armed forces of past revolutions, today's struggles are often carried out by networks of individuals joined only by a common interest in opposing those in power.

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 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.

Politically motivated violence, carried out by dispersed forces and directed at private sector institutions, structures, or civilians, is often undertaken--like the more organized, better disciplined violence of preceeding revolutions--as part of an effort to gain the right to self-government. We believe the tactics that are used in such internal political struggles are simply irrelevant to the question whether the political offense exception is applicable.

B. Relationship Between the Justifications for the Exception, the Incidence Test, and Contemporary Political Realities

One of the principal reasons our courts have had difficulty with the concept of affording certain contemporary revolutionary tactics the protection of the political offense exception is our fear and loathing of international terrorism. The desire to exclude international terrorists from the the coverage of the political offense exception is a legitimate one; the United States unequivocally condemns all international terrorism. However, the restrictions that some courts have adopted in order to remove terrorist activities from coverage under the political offense exception are overbroad. As we have noted, not all politically-motivated violence undertaken by dispersed forces and directed at civilians is international terrorism and not all such activity should be exempted from the protection afforded by the exception.

Although it was not accepted as international law, the position of the United States, not only on international terrorism but also on the extradition of international terrorists, was made clear in 1972 when it introduced its Draft Convention on Terrorism in the United Nations. The Draft Convention calls either for trial of international terrorists in the State where found or for their extradition. The policy and legal considerations that underlie our responses to acts of

international terrorism differ dramatically from those that form the basis for our attitudes toward violent acts committed as a part of other nations' internal political struggles. The application of the political offense exception to acts of domestic political violence comports in every respect with both the original justifications for the exception and the traditional requirements of the incidence test. The application of that exception to acts of international terrorism would comport with neither. First, we doubt whether the designers of the exception contemplated that it would protect acts of international violence, regardless of the ultimate objective of the actors. Second, in cases of international terrorism, we are being asked to return the accused to the government in the country where the acts were committed: frequently that is not a government the accused has sought to change. In such cases there is less risk that the accused will be subjected to an unfair trial or punishment because of his political opinion. Third, the exception was designed, in part, to protect against foreign intervention in internal struggles for political self-determination. When we extradite an individual accused of international terrorism, we are not interfering with any internal struggle; rather, it is the international terrorist who has interfered with the rights of others to exist peacefully under their chosen form of government.

There is no need to create a new mechanism for defining "political offenses" in order to ensure that the two important objectives we have been considering are met: (a) that international terrorists will be subject to extradition, and (b) that the exception will continue to cover the type of domestic revolutionary conduct that inspired its creation in the first place. While the precedent that guides us is limited, the applicable principles of law are clear. The incidence test has served us well and requires no significant modification. The growing problem of international terrorism, serious as it is, does not compel us to reconsider or redefine that test. The test we have used since the 1800's simply does not cover acts of international terrorism.

1. The "Incidence" Test

As all of the various tests for determining whether an offense is extraditable make clear, not every offense of a political character is non-extraditable. In the United States, an offense must meet the incidence test which is intended, like the tests designed by other nations, to comport with the justifications for the exception. We now explain the reasons for our conclusion that the traditional United States incidence test by its terms (a) protects acts of domestic violence in connection with a struggle for political self-determination, but (b) was not intended to and does not protect acts of international terrorism.

2. The "Uprising" Component

The incidence test has two components--the "uprising" requirement and the "incidental to" requirement. The first component, the requirement that there be an "uprising," "rebellion," or "revolution," has not been the subject of much discussion in the literature, although it is firmly established in the case law. Most analyses of whether the exception applies have focused on whether the act in question was in furtherance of or incidental to a given uprising. Nevertheless, it is the "uprising" component that plays the key role in ensuring that the incidence test protects only those activities that the political offense doctrine was designed to protect.

As we have noted, the political offense doctrine developed out of a concern for the welfare of those engaged in a particular form of political activity--an effort to alter or abolish the government that controls their lives--and not out of a desire to protect all politically motivated violence.

The uprising component serves to limit the exception to its historic purposes. It makes the exception applicable only when a certain level of violence exists and when those engaged in that violence are seeking to accomplish a particular objective. The exception does not apply to political acts that involve less fundamental efforts to accomplish change or that do not attract sufficient adherents to create the requisite amount of turmoil. Thus, acts such as skyjacking (an act that has never been used by revolutionaries to bring about a change in the composition or structure of the government in their own country) fall outside the scope of the exception.

Equally important, the uprising component serves to exclude from coverage under the exception criminal conduct that occurs outside the country or territory in which the uprising is taking place. The term "uprising" refers to a revolt by indigenous people against their own government or an occupying power. That revolt can occur only within the country or territory in which those rising up reside. By definition acts occurring in other lands are not part of the uprising. 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. It was not designed to protect international political coercion or blackmail, or the exportation of violence and strife to other locations--even to the homeland of an oppressor nation. Thus, an uprising is not only limited temporally, it is limited spatially.

In his concurring opinion, Judge Duniway points out that the limitation to acts occurring within the territory in which there is an uprising means that persons committing acts of piracy, terrorism, or other crimes on the high seas will be unable to invoke the protection of the political offense exception. His observation is correct. Just as skyjackers and other international terrorists are not protected under the exception, neither are persons who commit or threaten to commit violent crimes on the high seas. The political offense exception was never intended to reach such conduct.

While determining the proper geographic boundaries of an "uprising" involves a legal issue that ordinarily will be fairly simple to resolve, there may be some circumstances under which it will be more difficult to do so. We need not formulate a general rule that will be applicable to all situations. It is sufficient in this case to state that for purposes of the political offense exception an "uprising" cannot extend beyond the borders of the country or territory in which a group of citizens or residents is seeking to change their particular government or governmental structure.

It follows from what we have said that an "uprising" can exist only when the turmoil that warrants that characterization is created by nationals of the land in which the disturbances are occurring. Viewed in that light, it becomes clear that had the traditional incidence test been applied in Eain, the result would have been identical to that reached by the Seventh Circuit. When PLO members enter Israel and commit unlawful acts, there is simply no uprising for the acts to be incidental to. The plain fact is that the Israelis are not engaged in revolutionary activity directed against their own government. They are not seeking to change its form, structure, or

composition through violent means. That the PLO members who commit crimes are seeking to destroy Israel as a state does not help bring them within the political offense exception. In the absence of an uprising, the violence engaged in by PLO members in Israel and elsewhere does not meet the incidence test and is not covered by the political offense exception. To the contrary, the PLO's worldwide campaign of violence, including the crimes its members commit in the state of Israel, clearly constitutes "international terrorism."

In short, the Eain and Doherty courts' objective that this country not become a haven for international terrorists can readily be met through a proper application of the incidence test. It is met by interpreting the political offense exception in light of its historic origins and goals. Such a construction excludes acts of international terrorism. There is no reason, therefore, to construe the incidence test in a subjective and judgmental manner that excludes all violent political conduct of which we disapprove. Moreover, any such construction would necessarily exclude some forms of internal revolutionary conduct and thus run contrary to the exception's fundamental purpose. For that reason, we reject the Eain test and especially the concept that courts may determine whether particular forms of conduct constitute acceptable means or methods of engaging in an uprising.

IV. THE INCIDENCE TEST APPLIED TO THE CHARGED OFFENSES

The magistrate correctly concluded that there was an uprising in Northern Ireland at the time of the offenses with which Quinn is charged. PIRA members, although a minority faction, sought to change the structure of the government in that country, the country in which they lived. Criminal activity in Northern Ireland connected with this uprising would clearly fall within the political offense exception. We cannot conclude, however, that the uprising extended to England. We do not question the fact that throughout the time of the alleged conspiracy, some politically motivated violence was taking place in England as well as in Northern Ireland. However, as the magistrate noted, in general the violent attacks and the responses to them were far less pronounced outside of Northern Ireland. It is clear from the record that the magistrate correctly concluded that the level of violence outside Northern Ireland was insufficient in itself to constitute an "uprising."

In light of the justifications for the political offense exception, the formulation of the incidence test as it has traditionally been articulated, and the cases in which the exception has historically been applied, we do not believe it would be proper to stretch the term "uprising" to include acts that took place in England as a part of a struggle by nationals of Northern Ireland to change the form of government in their own land. Because the incidence test is not met, neither the bombing conspiracy nor the murder of Police Constable Tibble is a non-extraditable offense under the political offense exception to the extradition treaty between the United States and the United Kingdom.

A. Targeted Killing

A License to Kill? The assassination of Osama Bin Laden: Has the USA gone too far in acting as a policeman or was the raid justified? **Tuesday, Peace Palace Library, May 17, 2011, available at*: http://peacepalacelibrary-weekly.blogspot.com/2011/05/licence-to-kill-assasination-of-osama.html**

Osama Bin Laden (OBL) is dead. After he had been assassinated by a special ops team from the United States of America (USA.), the special team of SEALS took the deceased body of the dangerous mastermind terrorist and several hard drives from the compound in Abbottabad. Bin laden had been hiding there with his family for several years without being noticed. When the Pentagon researched the hard drives, it appeared that OBL had been planning new attacks, at least on several US cities and also on European locations. Upon hearing this news so many have sighed with relief that the secret services of the USA found out about these planned attacks before they could actually take place.

On May 2nd, 2011, U.S. President Barack Obama told the American people in an official statement that Al-Quaeda leader and terrorist Osama Bin Laden was killed in a special military operation "after a firefight". This statement led to divergent responses.

At Ground Zero, New York, and lots of other places in the USA people cheered loudly and celebrated the death of the terrorist that masterminded the attack on the Twin Towers. In other parts of the world the death of the terrorist OBL was also celebrated by many. In an official statement the UN Security Council (UNSC) welcomed the death of OBL. It stated that he will "never again be able to perpetrate such acts of terrorism". The UNSC reaffirmed its call to states to "work together urgently to bring to justice the perpetrators, organizers and sponsors of terrorist attacks." The UNSC also reaffirmed that its Member States should ensure that in combating terrorism they "comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law".

Secretary-General of the UN expressed his relief in a formal statement: "I am very much relieved by the news that justice has been done to such a mastermind of international terrorism". German Chancellor Angela Merkel paid her respects to president Obama for the operation. She expressed her gladness that OBL has been killed by the US navy SEALS. Merkel regarded the killing of

OBL as an important strike against terrorism. Palestinian politician Ghassan Khatib was of the opinion that "getting rid of bin Laden is good for the cause of peace worldwide". But he believed that what really counts is "to overcome the discourse and the methods -- the violent methods -- that were created and encouraged by bin Laden and others in the world".

Not everybody reacted with relief and cheer to the killing of Bin Laden. Former Italian Prime Minister Massimo D'Alema for example, did not agree with the enthusiasm felt among so many over the death of OBL: "You don't rejoice at the death of a man. Maybe if Bin Laden had been captured and put on trial it would have been an even more significant victory".

There were warning voices, exhorting to remain vigilant because of a fear of reprisals from Al-Qaeda, stressing that terrorism does not just end by killing OBL. And there were the disapproving voices. Worldwide there have been people questioning the legality and proportionality of targeting and killing OBL. Was the Obama Administration wrong in killing OBL? Was it the only option? The USA could have chosen to capture and try OBL in court instead of killing him. Besides this, it also has been questioned whether the USA violated the sovereignty of Pakistan by entering Pakistan in order to target OBL. The USA did warn the Pakistani government about the raid but not until the operation was about to take place.

As a candidate during the 2008 election campaign, Obama Barack already stated: "We will kill Osama bin Laden". The military operation was not intended to capture OBL in order to put him on trial. He was to be eliminated. A US national security official stated that it "was a kill operation".

Justice

President Obama stated that "justice had been done" by executing OBL. Geert-Jan Knoops, Professor of International Criminal Law at Utrecht University, The Netherlands, wonders "what kind of justice" was referred to. "Justice by revenge or justice by law"? The killing of OBL has been compared to a Wild West scene from a movie and American rough, Wild West-style justice and the 'rule of the jungle'.

Human rights lawyer Geoffrey Robertson does not regard the killing of OBL as 'justice being done', but as a perversion of the term. "Justice means taking someone to court, finding them guilty upon evidence and sentencing them [...] This man has been subject to summary execution, and what is now appearing after a good deal of disinformation from the White House is it may well have been a cold-blooded assassination".

Dov Jacobs, a post-doctoral researcher at the University of Amsterdam, the Netherlands, questions the ambiguous attitude of the UNSC regarding international criminal justice as far as the killing of OBL is concerned. He disapproves of how the UNSC could defend values such as the rule of law and due process on the one side and then could approve "actions that run counter to them in the same breath". He states: "if you believe in the rule of law and due process, then you cannot approve the killing of Bin Laden, however politically or logistically justified it may be."

In order to assess whether the assassination of OBL on Pakistani soil was legal or not, three areas of law are of importance: international human rights, international humanitarian law and *jus ad*

bellum (the right to wage war – in this case it concerns the use of force by the navy SEALS on Pakistani soil against OBL). In the case of the assassination of OBL, international human rights law refers to the question whether the action violated the human rights of OBL. International humanitarian law is concerned with the question whether the killing was part of an armed conflict or not and whether Al-Qaeda leader OBL should be considered as a combatant. If the raid is understood as an action which took place during an armed conflict with Al-Qaeda, OBL can be considered as a combatant and killing him during warfare would therefore be legal.

Why the act was considered to be *contra legem* (against the law)

Why would the targeted military operation which led to the killing of OBL be *contra legem*? Which arguments are put forward? Many claim that instead of killing OBL, he should have been captured and extradited to the USA or an international criminal tribunal to be tried in court. Others claim that the action was lawful. Why?

In the opinion of Geert-Jan Knoops, killing terrorists is *contra legem.* According to international law, OBL should be apprehended and tried in court. He is of the idea that the operation was an "extrajudicial killing which is in principle not permissible under international law". Geert-Jan Knoops warns for a wrongful interpretation of the earlier mentioned UNSC resolutions because this might lead to a situation in which "the whole world becomes one gigantic battlefield where every nation has the right to eliminate foreign nationals if they are suspected terrorists". This could lead to questionable situations which should be avoided. According to Knoops, the selectivity in how politicians apply international law should "perhaps be one of our biggest concerns" after the 2nd of May.

Shooting OBL, while he was unarmed is, according to Helmut Schmidt, Former West German Chancellor, "quite clearly a violation of international law" which also could have an incalculable impact on the Arab world in these turbulent times. Navi Pillay, UN High Commissioner for Human Rights stated that the USA should give the UN more detailed information about the raid: "The United Nations has consistently emphasized that all counter-terrorism acts must respect international law".

Why the act was considered to be "lawful, legitimate and appropriate"

Those in favor of the elimination of OBL claim that UNSC resolutions 1368 and 1373 (2001) offer a legal basis for a war on terror. Because the USA is at war with terrorists, terrorist mastermind OBL and as head of Al-Qaeda is regarded as an enemy combatant who may be killed. Because the USA had announced it is in an armed conflict with Al Qaeda, the special operation aimed at killing OBL was legal under international law. Kenneth Anderson, a professor of law and fellow in national security and law at the Hoover Institution, USA: "It's lawful for the United States to be going after Bin Laden if for no other reason than he launched an attack against the US". US legal official Ben Wittes also is of the opinion that the action was lawful. He stated that the people responsible for the action are "on extremely solid legal footing".

Many are of the opinion that OBL should have been tried before court. But before which court? Because of the gravity of the crimes committed by OBL people would have liked it if he would have been tried before the International Criminal Court (ICC).

However, the ICC only has a mandate to deal with crimes that took place after the ICC statute entered into force in 2002. So, OBL could never have been tried for masterminding the 9-11 attack on the twin towers - only for crimes he committed after 2002.

Besides, the USA would have to become signatory to the ICC Statute, in order to bring the case to the ICC. If OBL would have been captured alive, the Pakistani government would have had to make a decision whether OBL would have to face trial in a Pakistani court or whether they would want to extradite him to the USA.

It is clear that the Obama Administration carefully and thoroughly planned the operation aimed at eliminating Bin Laden. They thought everything through, and they even had a plan ready in case OBL would have surrendered. Obama gave the order to kill OBL but he made an effort to minimize collateral damage "and that is significant on the side of legality", Professor Laura Dickinson of the Arizona State University Sandra Day O'Connor College of Law, USA stated.

Obama did not give an order to eliminate OBL by just bombing the compound. During the operation three men and one female died but the youngest wife of OBL was not killed. She was only shot in the leg. Before OBL was buried at sea, he was given a proper Islamic burial rite according to Islamic custom. Obama decided to have OBL buried at sea in order to prevent that his body could be taken away and to prevent that a burial place could become a place of pilgrimage for OBL's followers.

By killing OBL and burying him at sea, the Obama Administration made sure that the curtain would forever fall for Osama Bin Laden disregarding the fact whether one is of the opinion that the raid was *contra legem* or whether one believes that it was legal.

Pakistan's Sovereignty and the Killing of Osama Bin Laden, ASIL Insight, May 5, 2011
By Ashley S. Deeks

Introduction

On May 2, 2011, U.S. forces entered Pakistan—without the Pakistani government's consent—to capture or kill Osama Bin Laden. In the wake of the successful U.S. military operation, the Pakistan Government objected to the "unauthorized unilateral action" by the United States and cautioned that the event "shall not serve as a future precedent for any state." Former President Musharraf complained that the operation violated Pakistan's sovereignty. The episode implicates a host of important legal and political issues. This *Insight* focuses on one of them: when may one state use force in another state's territory in self-defense against members of a non-state armed group, and what constraint does the principle of sovereignty impose on that action?

Non-state actors, including terrorist groups, regularly launch attacks against states, often from external bases. When a state seeks to respond with force to those attacks, it must decide whether to use force on the territory of another state with which it may not be in conflict. Absent consent from the territorial state or authorization from the United Nations Security Council, international law traditionally requires the state that suffered the armed attack to assess whether the territorial state is "unwilling or unable" to unilaterally suppress the threat. Only if the territorial state is unwilling or unable to eliminate the threat may the victim state lawfully use force. This *Insight* explores the scope of that test and considers what types of factors the United States might have taken into account in concluding that Pakistan was "unwilling or unable" to address the threat posed by Bin Laden.

Background

A. Armed Conflict with Al Qaeda

Both the Bush and Obama Administrations have taken the view that the United States is in an armed conflict with al Qaeda. In the U.S. Government's view, al Qaeda undertook an armed attack against the United States on September 11, 2001, which triggered the U.S. right of self-defense consistent with Article 51 of the U.N. Charter. Perhaps the most controversial aspect of this position is the U.S. argument that this conflict can and does extend beyond the "hot battlefield" of Afghanistan to wherever members of al Qaeda are found. For the United States (and others that adopt this position), once a state is in an armed conflict with a non-state armed group, that conflict follows the members of that group wherever they go, as long as the group's members continue to engage in hostilities against that state (either on the "hot battlefield" or from their new location).

Those who support the view that armed conflicts have geographic limits as a matter of international law usually begin with the proposition that one must determine the existence of an armed conflict based on the facts on the ground in a particular state. The hostilities there between a state and an organized non-state actor must be protracted and intense for an armed conflict to exist. If the level of violence is sporadic or the non-state actors lack a certain level of organization, no armed conflict exists, and any state wishing to address the threat posed by those non-state actors must use law enforcement tools.

These contrasting positions come into high relief in the Bin Laden case. If the U.S. conflict with al Qaeda is limited to the "hot battlefield" of Afghanistan (and possibly Yemen, Iraq, and the border regions of Pakistan), then the United States could not lawfully have targeted Bin Laden as a belligerent in an armed conflict. If, alternatively, the U.S. conflict with al Qaeda is not limited to "hot battlefields," then the United States could make a determination that Bin Laden was a lawful target under the laws of armed conflict, even when unarmed and at home in his compound in Abbottabad. The United States clearly made the latter determination. However, this does not end the inquiry about whether using force in Pakistan against Bin Laden was internationally lawful.

B. The "Unwilling or Unable" Test

International law restricts the situations in which a state may use force in the territory of another state. There are three situations in which such an act is lawful: pursuant to U.N. Security Council authorization under Chapter VII of the U.N. Charter; in self-defense; or (at least in some cases) with the consent of the territorial state. Once a state concludes that it has a right of self-

defense, it must assess what specific types of actions it can take in response, including whether it can use force. The standard inquiry has three elements: whether the use of force would be *necessary*; whether the level of force contemplated would be *proportionate* to the initial armed attack (or imminent threat thereof); and whether the response will be taken at a point sufficiently close to the armed attack (*i.e.*, whether it would be *immediate*).

In determining whether it is necessary to use force against a non-state actor operating in another state's territory, the victim state must consider not just whether the attack was of a type that would require force in response, but also the conditions within the state from which the non-state actor launched the attacks. In this latter evaluation, states, absent consent, employ the "unwilling or unable" test to assess whether the territorial state is prepared to suppress the threat. If the territorial state is either unwilling or unable, it is reasonable for the victim state to consider its own use of force in the territorial state to be necessary and lawful (assuming the force is proportional and timely). If the territorial state is both willing and able, the victim state's use of force would be unlawful. Thus, if the United States located a senior member of al Qaeda in Stockholm, it almost certainly would be unlawful for the United States to use force against that individual without Sweden's consent, because there is no reason to believe that the Swedish government would be unwilling or unable to take appropriate measures against that al Qaeda member.

Although the test is easy to state, international law gives the United States (or any state in a similar position) little guidance about what the "unwilling or unable" test requires. Considerable state practice supports the existence of the test and reveals its historical roots in neutrality law, but neither states nor scholars have discussed what the standard means. What facts should the United States have considered when evaluating Pakistan's willingness or ability to suppress the threat Bin Laden posed to the United States, NATO and Afghan forces, and the security of other states that have suffered al Qaeda attacks? Does international law require the United States to ask Pakistan to take measures itself before the United States lawfully may act? If so, how much time must the United States give Pakistan to respond? What if Pakistan proposes to respond to the threat in a way that the United States believes may not be adequate?

Based on an examination of state practice, it is possible to ascertain a few key principles that the international community might expect a state using force (the "acting state") to follow. The principles might include requirements that the acting state: (1) ask the territorial state to address the threat and provide adequate time for the latter to respond; (2) reasonably assess the territorial state's control and capacity in the region from which the threat is emanating; (3) reasonably assess the territorial state's proposed means to suppress the threat; and (4) evaluate its own prior interactions with the territorial state. However, an important exception to the requirement that the acting state request that the territorial state act arises where the acting state has strong reasons to believe that the territorial state is colluding with the non-state actor, or where asking the territorial state to take steps to suppress the threat might lead the territorial state to tip off the non-state actor before the acting state can undertake its mission.

Applying the Test

In an August 2007 speech, then-Presidential candidate Barack Obama asserted that, if elected, his Administration would take action against the leadership of al Qaeda in Pakistan if the United States had actionable intelligence about al Qaeda targets in Pakistan and then-President Musharraf failed to act. Obama later clarified his position, stating, "What I said was that if we

have actionable intelligence against bin Laden or other key al-Qaida officials . . . and Pakistan is unwilling or unable to strike against them, we should."

Based on the facts that have come to light to date, the United States appears to have strong arguments that Pakistan was unwilling or unable to strike against Bin Laden. Most importantly, the United States has a reasonable argument that asking the Government of Pakistan to act against Bin Laden could have undermined the mission. The size and location of the compound and its proximity to Pakistani military installations has cast strong doubt on Pakistan's commitment to defeat al Qaeda. The United States seems to have suspected that certain officials within the Pakistani government were aware of Bin Laden's presence and might have tipped him off to the imminent U.S. action if they had known about it in advance. Further, it would have been reasonable for the United States to question Pakistan's capacity to successfully raid Bin Laden's compound, given that he was known to be a highly sophisticated and likely well-protected enemy.

Pakistan might argue that it would have been able to stage an effective mission against the compound, or that the United States at least should have constructed the mission as a joint operation, given that the two countries work closely together in other intelligence and military contexts. It also could point to the fact that it conducted searches for al Qaeda leaders in Abbottabad in 2003 and in subsequent years, and that it passed on information about the 2003 search to U.S. officials. On balance, however, Pakistan's defense of its sovereignty in this case, while understandable from a political perspective, seems weak as a matter of international law.

Conclusion

The facts and politics in this case make it unlikely that Pakistan's defense of its sovereignty will find significant international support. Nevertheless, it would be useful as a matter of international law for states to agree that the "unwilling or unable" test is the correct test for situations such as the U.S. raid against Bin Laden in Pakistan and to provide additional content to that test. Doing so potentially could serve international law's interests by minimizing legal disagreements at times when political and factual disagreements are running high.

The Lawfulness of the U.S. Operation Against Osama bin Laden by Harold Hongju Koh, Legal Adviser, U.S. Department of State, available at:

http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/

I write in response to those who have raised questions regarding the lawfulness of the recent United States operation against Al Qaeda leader Osama bin Laden. United States officials have recounted the facts of that well-publicized incident, most recently in the interview of President Obama on *CBS News 60 Minutes* on May 8, 2011. In conducting the bin Laden raid, the United States acted in full compliance with the legal principles previously set forth in a speech that I gave to the American Society of International Law on March 25, 2010, in which I confirmed that "[i]n …all of our operations involving the use of force, including those in the armed conflict with

al-Qaeda, the Taliban and associated forces, the Obama Administration is committed by word and deed to conducting ourselves in accordance with all applicable law." The relevant excerpts of that speech are set forth below:

The United States agrees that it must conform its actions to all applicable law. As I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day.

As recent events have shown, al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks. As you know, this is a conflict with an organized terrorist enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior simultaneously makes the application of international law more difficult and more critical for the protection of innocent civilians. Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses. In particular, this Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including:

• First, the principle of **distinction**, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and

• Second, the principle of **proportionality**, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.

In U.S. operations against al-Qaeda and its associated forces … great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.

…[S]ome have suggested that the **very act of targeting** a particular leader of an enemy force in an armed conflict must violate the laws of war. But individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law. During World War II, for example, American aviators tracked and shot down the airplane carrying the architect of the Japanese attack on Pearl Harbor, who was also the leader of enemy forces in the Battle of Midway. This was a lawful operation then, and would be if conducted today. Indeed, targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects.

…

[In addition] some have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes **unlawful extrajudicial killing**. But a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force. Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.

… Finally, some have argued that our targeting practices violate **domestic law**, in particular, the long-standing **domestic ban on assassinations**. But under domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute "assassination."

In sum, let me repeat: … this Administration is committed to ensuring that the targeting practices that I have described are lawful." (emphasis in original)

Given bin Laden's unquestioned leadership position within al Qaeda and his clear continuing operational role, there can be no question that he was the leader of an enemy force and a legitimate target in our armed conflict with al Qaeda. In addition, bin Laden continued to pose an imminent threat to the United States that engaged our right to use force, a threat that materials seized during the raid have only further documented. Under these circumstances, there is no question that he presented a lawful target for the use of lethal force. By enacting the AUMF, Congress expressly authorized the President to use military force "against … *persons* [such as bin Laden, whom the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 …in order to prevent any future acts of international terrorism against the United States by such … persons" (emphasis added). Moreover, the manner in which the U.S. operation was conducted—taking great pains both to distinguish between legitimate military objectives and civilians and to avoid excessive incidental injury to the latter—followed the principles of distinction and proportionality described above, and was designed specifically to preserve those principles, even if it meant putting U.S. forces in harm's way. Finally, consistent with the laws of armed conflict and U.S. military doctrine, the U.S. forces were prepared to capture bin Laden if he had surrendered in a way that they could safely accept. The laws of armed conflict require acceptance of a genuine offer of surrender that is clearly communicated by the surrendering party and received by the opposing force, under circumstances where it is feasible for the opposing force to accept that offer of surrender. But where that is not the case, those laws authorize use of lethal force against an enemy belligerent, under the circumstances presented here.

In sum, the United States acted lawfully in carrying out its mission against Osama bin Laden.

Why it's absurd to claim that justice has been done, by Geoffrey Robertson (former Judge of the Special Court for Sierra Leone), The Independent, May

3, 2011, available at: http://www.independent.co.uk/voices/commentators/geoffrey-robertson-why-its-absurd-to-claim-that-justice-has-been-done-2278041.html

America resembles the land of the munchkins, as it celebrates the death of the Wicked Witch of the East. The joy is understandable, but it endorses what looks increasingly like a cold-blooded assassination ordered by a president who, as a former law professor, knows the absurdity of his statement that "justice was done". Amoral diplomats and triumphant politicians join in applauding Bin Laden's summary execution because they claim real justice – arrest, trial and sentence would have been too difficult in the case of Bin Laden. But in the long-term interests of a better world, should it not at least have been attempted?

America resembles the land of the munchkins, as it celebrates the death of the Wicked Witch of the East. The joy is understandable, but in some respects, unattractive. It endorses what looks increasingly like a cold-blooded assassination ordered by a president who, as a former law professor, knows the absurdity of his statement that “justice was done”. Amoral diplomats and triumphant politicians join in applauding Bin Laden’s summary execution because they claim real justice – arrest, trial and sentence would have been too difficult in the case of Bin Laden. But in the long-term interests of a better world, should it not at least have been attempted?

That future depends on a respect for international law. The circumstances of Bin Laden’s killing are as yet unclear and the initial objection that the operation was an illegitimate invasion of Pakistan’s sovereignty must be rejected. Necessity required the capture of this indicted and active international criminal and Pakistan’s abject failure (whether through incompetence or connivance) justified Obama’s order for an operation to apprehend him. However, the terms of that order, as yet undisclosed, are all important. Bill Clinton admitted recently to having secretly approved teh assassination of Bin Laden by the CIA after the US embassy bombings in the1990s, while President Bush publicly said after 9/11 that he wanted Bin Laden’s head on a plate. Did President Obama order his capture, or his execution?

Details of the so-called “fire-fight” remain obscure. The law permits criminals to be shot in self-defence. They should, if possible, be given the opportunity to surrender, but even if they do not come out with their hands up, they must be taken alive, if that can be achieved without risk. Exactly how Bin Laden came to be shot (especially if it was in the back of the head, execution-style) therefore requires explanation. Why the hasty “burial at sea” without a post-mortem, as the law requires?

But the chorus celebrating summary execution is rationalised on the basis that this is one terrorist for whom trial would be unnecessary, difficult and dangerous. It overlooks the downsides – that killing Bin Laden has made him a martyr – more dangerous in that posthumous role than in hiding, and that both his legend and the conspiracy theories about 9/11 will live on undisputed by the evidence that would have been called at his trial.

Even worse, killing Bin Laden gave him the consummation he most devoutly wished, namely a fast-track to paradise. His belief system required him to die mid-Jihad, from an infidel bullet – not of old age on a prison farm in upstate New York. For this reason he would have refused any offer to surrender, and no doubt died with a smile on his lips.

I do not minimise the security issues at his trial or the danger of it ending up as a squalid circus like that of Saddam Hussein. But the notion that any form of legal process would have been too hard must be rejected. Khalid Sheikh Mohammed - also alleged to be the architect of 9/11 - will shortly go on trial and had Bin Laden been captured, he should have been put in the dock alongside him, so that their shared responsibility could have been properly examined.

Bin Laden could not have been tried for 9/11 at the International Criminal Court – its jurisdiction only came into existence nine months later. But the Security Council could have set up an ad hoc tribunal in The Hague, with international judges (including Muslim jurists), to provide a fair trial and a reasoned verdict.

This would have been the best way of de-mystifying this man, debunking his cause and de-brainwashing his followers. In the dock he would have been reduced in stature – never more remembered as the tall, soulful figure on the mountain, but as a hateful and hate-filled old man, screaming from the dock or lying from the witness box.

Since his videos exalt in the killing of innocent civilians, any cross-examination would have emphasised his inhumanity. These benefits flowing from justice have forever been foregone.

America's belief in capital punishment is reflected in its rejoicing at the manner of Bin Laden's demise. It is ironic to reflect that Bill Clinton secured his election by approving the execution of Ricky Roy Rector (a convict so brain-damaged that he ordered pumpkin pie for his last meal and said that he would "leave the rest until later"). And now Barak Obama has most likely secured his re-election approving the execution of Bin Laden. This may be welcome, given the alternatives. But it is a sad reflection on the continuing attraction of summary justice.

It was not always thus. When the time came to consider the fate of men much more steeped in wickedness than Bin Laden – the Nazi leadership – the British government wanted them hanged within six hours of capture. President Truman demurred, citing the conclusion of Justice Robert Jackson that summary execution "would not sit easily on the American conscience or be remembered by our children with pride…the only course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times will permit and upon a record that will leave our reasons and motives clear". He insisted upon judgment at Nuremberg, which has confounded Holocaust-deniers ever since.

Killing instead of capturing Osama Bin Laden was a missed opportunity to prove to the world that this charismatic leader was in fact a vicious criminal, who deserved to die of old age in prison, and not as a martyr to his inhuman cause.