THE POLITICAL OFFENSE EXCEPTION: RECENT CHANGES IN EXTRADITION LAW APPERTAINING TO THE NORTHERN IRELAND CONFLICT

INTRODUCTION

Both the Republic of Ireland and the United States, like many other democracies, have traditionally remained sympathetic to the pleas of refugees. Consequently, in the years following the rebirth of conflict in Northern Ireland in the late 1960s, the courts of both the Republic of Ireland and the United States have consistently refused representations from the British government for the extradition of alleged terrorists who had fled from Northern Ireland or Great Britain, seeking refuge in the United States or Ireland.

On March 17, 1984, St. Patrick's Day, the Irish Supreme Court met and agreed to uphold the extradition order for Dominic McGlinchey,[1] a member of the Irish National Liberation Army (INLA),[2] for the alleged murder of a 63-year-old postmistress in Northern Ireland. This was a major change in policy, especially in light of the fact that since 1970, 48 such extradition applications had been rejected.[3]

On December 13, 1984, Justice John E. Sprizzo of the Federal District Court in Manhattan, ruled that Joseph Doherty, a Provisional Irish Republican Army (PIRA)[4] member who had been convicted of killing a British officer in Northern Ireland in 1980, subsequently escaping a year later, was exempt from extradition to Britain as his offense was "political." It was the fourth British extradition request rejected by the United States since 1979.[5]

This decision provoked strong reactions both domestically and, not surprisingly, in Britain. The court's refusal to grant extradition proved

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[1]For a brief biographical sketch of McGlinchey see "Boasted of 30 Killings," Manchester Guardian Weekly, March 25, 1984, at 3.

[2]The Irish National Liberation Army is the armed wing of the Irish Republican Socialist Party (IRSP), a faction which split off from the official IRA in 1975 because of the latter's publicly declared and indefinite cease-fire since May 1972. See K. Kelley, *The Longest War: Northern Ireland and the IRA*, 229-32 (1982) for the origins of the INLA.

[3]Economist, March 24, 1984, at 45. McGlinchey was the first Republican activist to be extradited since the Southern state (the Republic of Ireland) was set up in 1922. See M. Farrell, *Sheltering the Fugitive: the Extradition of Irish Political Offenders* 93 (1985).

[4]One of the effects of the outbreak of civil strife in Northern Ireland in the late 1960s was the splitting of the revived IRA into two factions, the "Officials," and the new, more militant and nationalistic "Provisional" wing. See Kelley, *supra* note 2, at 127-34. *See also*, London Sunday Times Insight Team, Northern Ireland: A Report on the Conflict 176-97 (1972).

[5]Belfast Telegraph, December 14, 1984, at 1.

politically embarrassing, given the Reagan administration's often-repeated pronouncements against terrorism. [6] On June 25, 1985, the United States and the United Kingdom signed a Supplementary Treaty[7] amending their current extradition treaty.[8] President Reagan explained in his Letter of Transmittal to the Senate that the Supplementary Treaty ". . . represents a significant step in improving law enforcement cooperation and combatting terrorism, by excluding from the scope of the political offense exception serious offenses typically committed by terrorists . . . ."[9] On July 17, 1986, the Treaty was ratified by the Senate, entering into force on December 23, 1986.[10]

This comment provides an overview of international law as it relates to the extradition of political offenders, briefly examining the key principles that have evolved in English, Irish, and United States' law. The remainder of the comment focuses on the Northern Ireland conflict and recent changes in Irish and United States' extradition laws appertaining to it.

EXTRADITION AND THE POLITICAL OFFENSE EXCEPTION

The practice of extradition has an ancient lineage.[11] The first known extradition treaty was negotiated between an Egyptian Pharaoh and a Hittite Prince in the 13th century.[12]

Prior to the 19th century, states entered into extradition treaties, but not for common crimes, as this kind of deviant behavior affected only

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[6]Stephen S. Trott, head of the Justice Department's Criminal Division, was moved to announce publicly that he was "outraged" that a judge could make the United States a haven for a terrorist sought by one of its closest and most democratic allies. N.Y. Times, December 14, 1984, at 1. On the other side of the Atlantic, a senior British official involved in the *Doherty* case was quoted as saying: "We believe there is scope for change in the extradition treaty or in American extradition law." Belfast Telegraph, December 14, 1984, at 4.

[7]S. Doc. No. 8, 99th Cong., 1st Sess. 1 (1985), *reprinted in* 24 I.L.M. 1105 (1985) [hereinafter cited as *Supplementary Treaty*].

[8]Treaty of Extradition, June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468.

[9]United Kingdom - United States: Extradition Treaty Limiting the Scope of Political Offenses to Exclude Acts of Terrorism; done at Washington, June 25, 1985 (Letter of Transmittal to the U.S. Senate, July 17, 1985), *reprinted in* 24 Int'l Legal Materials 1104 (1985).

[10]U.S. Dept. of State Treaties in Force. A List of Treaties and Other International Agreements of the United States in Force on January 1, 1987.

[11]There is evidence to suggest that it originated in earlier non-Western civilizations such as the Egyptian, Chinese, Chaldean, and Assyro-Babylonian civilizations. M. Bassiouni, *International Extradition and World Public Order* 1 (1974).

[12]The Peace Treaty between Ramses II and Hattusli III (c. 1280 B.C.) I. Shearer, *Extradition in International Law* 5 (1971).

other individuals and did not present a threat to public order.[13] Indeed, states negotiated extradition agreements explicitly for the surrender of political criminals.[14] Although the surrender of political offenders continued through the beginning of the 19th century, the public began to deplore the idea of such surrenders.[15] Thus, the concept of a political offense exception to extradition is a relatively recent development.

As the new century unfolded, states started to remove political offenses from extradition treaties. For liberal and democratic governments, in the aftermath of the French and American Revolutions, the notion of giving up political offenders into the hands of despotic or dictatorial regimes was anathema.[16] In 1834, France introduced the political offense exception into its treaty with Belgium and the notion continued to appear regularly in French extradition treaties.[17] By the 1850s, it had become a general principle of international law, incorporated into the extradition treaties of France, Belgium, England, and the United States.[18]

Britain

The principle of the non-extradition of political offenders was given legislative shape in Great Britain with the passage of the 1870 Extradition Act,[19] Section 3(1) of which provides:

> A fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded is one of a political character, or if he proves to the satisfaction of the police magistrate or the court before whom he is brought on Habeas Corpus or to the Secretary of State that the requisition for his surrender has, in fact, been made with a view to try and punish him for an offense of a political character.[20]

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[13]Bassiouni, *supra* note 11, at 4.

[14]England, for example, signed treaties with Denmark (in 1661) and Holland (in 1622) for the surrender of regicides. V. Hartley-Booth, *British Extradition Law and Procedure* 74 (1980).

[15]*Id.*

[16]As early as 1816 Lord Castlereagh, the British Foreign Secretary, "declared that there would be no greater abuse of the law than to allow it to be the instrument of inflicting punishment on foreigners who had committed political crimes only." Hartley-Booth, *supra* note 14, at 74.

[17]Shearer, *supra* note 2, at 167.

[18]Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986).

[19]*See* Cantrell, *The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain, and the Republic of Ireland*, 60 Marq. L. Rev. 777, 784 (1977).

[20]Quoted in Hartley-Booth, *supra* note 14, at 76.

The phraseology of the 1870 Act, most notably the phrase "offense of a political character," is indicative of the ambiguity surrounding the nature and breadth of the principle.[21]

Over time the courts have attempted to provide further clarification. The "incidence" test was formulated in the landmark case of *In re Castioni*,[22] where it was found that the murder of a government official during the melee surrounding the storming of a building fell within the political offense exception. The position was accepted that a political offense was one committed incidentally to and as part of a political disturbance.[23]

Three years later the court's test received further refinement in the case of *In re Meunier*.[24] In *Meunier*, it was held that a French anarchist, charged with bombing a cafe and military barracks, was extraditable. The court's position was now that:

> . . . in order to constitute an offense of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offense is committed by one side or the other in pursuance of that object, it is a political offense . . . .[25]

Further elucidation came with *R. v. Governor of Brixton Prison ex parte Kolczynski*.[26] Decided in 1955, this case relaxed the political disturbance standard in holding that the mutiny by members of the crew of a Polish fishing trawler was a political offense irrespective of the fact that it was not incident to a political uprising. A further dimension was added by the case of *Schtraks v. The Government of Israel*.[27] Henceforth the new incident test would require evidence of an individual being at odds with the state applying for extradition.

The relationship between the fugitive and the state requesting extradition was examined in *Tzu-Tsai Cheng v. Governor of Pentonville Prison*.[28] The House of Lords took the position that the political offense exception could not be applied unless the politically motivated act in question was directed at the requesting state.[29]

It is clear that in Great Britain there has been a considerable evolution of opinion as to what constitutes a political offense in the

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[21]*Id.* at 78.
[22][1891] 1 Q.B. 149.
[23]Shearer, *supra* note 12, at 169.
[24][1894] 2 Q.B. 415.
[25]*Id.* at 419.
[26][1955] 1 Q.B. 540.
[27][1962] 3 All E.R. 529.
[28][1973] 2 All E.R. 204.
[29]*Id.*

context of extradition. In recent years statutory limitations have been introduced to delineate areas where the political offense exception does not apply. The Genocide Act (1969), for example, specifically excludes genocide from the scope of political offenses.[30] Most significantly, Great Britain has amended British extradition law in order to comply with the various international conventions which she has signed concerning terrorism. In particular, the British Parliament has enacted the Suppression of Terrorism Act (1978), which implements the European Convention on the Suppression of Terrorism.[31] According to V.E. Hartley-Booth, "this Act has arguably made the most important change in extradition law since 1870."[32]

Ireland

Prior to the establishment of the Irish Free State in 1921, statutory provisions governed the backing and execution of warrants issued in one part of the United Kingdom for execution in any other part.[33] In 1965 the Republic of Ireland enacted the Irish Extradition Act. The Act sought both to resolve the problems which had emerged in the existing extradition machinery between Great Britain and Ireland, and to remove the uncertainties surrounding the extent to which Ireland might or might not be bound by pre-1921 British extradition treaties to which she was a successor state.[34]

For purposes of this comment, the relevant clause of the Act is Section 11, which exempts from extradition "a political offense or an offense connected with a political offense." Clearly, this represents a departure from the approach to political offenders taken in the Extradition Act of 1870, which refers to an offense "of a political character." In addition, Section 11 appears based on the phraseology

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[30]*See* Genocide Act, s.2(2), (3) (1969).

[31]Signed January 27, 1977 and entered into force August 4, 1978. For text of convention see European Treaty Series No. 90. Under the Suppression of Terrorism Act, 1978, the following offenses listed in Article 1 of the Convention are no longer to be regarded as political offenses for the purpose of extradition: attacks upon internationally protected persons, kidnapping and hostage taking, offenses endangering persons involving the use of a bomb, and offenses under the Hague and Montreal Conventions. In addition, by way of implementing Article 2 of the Convention, the United Kingdom accepts that certain other offenses "involving acts of violence, other than one covered in Article 1, against the life, physical integrity or liberty of a person" are also extraditable. R. Lillich (ed.), *Transnational Terrorism: Conventions and Commentary* 268 (1982).

[32]Hartley-Booth, *supra* note 14, at 83.

[33]O'Higgins, *The Irish Extradition Act 1965*, 15 Int'l & Comp. L.Q. 369, 369 (1966).

[34]*Id.*

of the European Convention on Extradition,[35] which, like the Irish Act, does nothing to define what constitutes a political offense.[36] The Irish courts, then, were left with a large measure of discretion in interpreting the meaning of the 1965 Act.

United States

The political offense exception was examined for the first time in the United States in *In re Ezeta*.[37] Quoting *Castioni*[38], the court applied the political incidence test, adopting the view that a political offense was any offense committed in the course of or furthering a civil war, insurrection, or political commotion. Two years later the United States Supreme Court addressed the political offense exception, for the first and only time, in *Ornelas v. Ruiz*.[39] In *Ornelas*, a Mexican extradition request for an individual wanted for murder, arson, robbery, and kidnapping in a Mexican border town was upheld. The court reasoned that even though there was revolutionary activity going on at that time, the petitioner's acts were not of a political character or related to that uprising. These two judgments, *Ezeta* and *Ornelas*, became the foundation for all future American extradition rulings.

The two-fold requirement that 1) there must be the occurrence of an uprising at the time of the charged offense, and 2) the charged offense must be incidental to that uprising, has come under criticism.[40] Some critics have made the general comment that there has been little judicial development of the political offense exception to accommodate contemporary conditions, in particular, the threat posed by international terrorism. Others have singled out the American test specifically for being both over-inclusive and under-inclusive. It is said to be too broad because it appears to cover virtually any crime that occurs during the course of, and related to, an uprising.[41] On the other

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[35]Europ. T.S. No. 24, 395 U.N.T.S. 273.

[36]*Id.* at 382, and Jackson, *Anglo-Irish Extradition*, II Irish Jurist 46 (1967).

[37]62 F. 972 (N.D. Cal. 1894).

[38][1891] 1 Q.B. 149.

[39]161 U.S. 502 (1896).

[40]*See generally* Cantrell, *supra* note 19, at 795-97; Gilbert, *Terrorism and the Political Offense Exemption Reappraised*, 34 Int'l & Comp. L.Q. 700 (1985); Hannay, *Legislative Reform of U.S. Extradition Statutes: Plugging the Terrorist's Loophole*, 13 Den. J. Int'l Law & Pol'y 55-56 (1983); Shearer, *supra* note 12, at 178-81.

[41]Criticisms based on overbreadth have tended to focus very heavily on Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957). In this case an extradition request by the Yugoslavian government for a former official of the puppet Croatian regime, established by the Nazis in World War II, was denied based on the political offense exception, even though the official in question was charged with directing the murder of hundreds of thousands of civilians in concentration camps.

hand, it is said to be too narrow because if no judicially recognized uprising is in progress at the time, the political offense exception cannot be invoked.[42]

RECENT CHANGES IN IRISH AND UNITED STATES' LAW

In 1967 the Northern Ireland Civil Rights Association was founded to pressure the Northern Ireland government into addressing the grievances of the Catholic minority population.[43] Consequently, a number of limited reforms were made, but even these were enough to send members of the Protestant Loyalist majority community into a paroxysm of rage. By the summer of 1969, the British government was forced to commit troops to protect the Catholic population from attack. The troops were welcomed at first by the Catholics, who had become deeply suspicious of the largely Protestant, Royal Ulster Constabulary and its exclusively Protestant auxiliary force, the Ulster Special Constabulary or 'B' Specials.[44] This enthusiasm began to dissipate when it became clear that no fundamental changes were to take place, and it became obvious that the troops were there to stay.

Many younger Catholics believed that the only answer to their problems lay in a united Ireland, and that the only way of achieving this goal was through the use of violence. Into this maelstrom stepped the Irish Republican Army, which had lain comparatively dormant since its heyday in the early 1920s. Before long the IRA, in particular, the Provisional IRA, was engaged in an all-out conflict with the security forces in Northern Ireland and elsewhere in the United Kingdom.

Ireland

In the eyes of the British military authorities and the Unionist leadership in Northern Ireland, it was imperative that something be done to deal with the problem of IRA members who, after perpetrating violent crimes in the North, fled across the border to rest and regroup. A report prepared by the army in 1978 summed up the prevailing view:

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[42]Thus in Escobedo v. United States, 623 F.2d 1098, 1104 (5th Cir. 1980), *cert. denied* 449 U.S. 1036 (1980), a court refused to apply the political offense exception to the attempted kidnapping of a Cuban consul, allegedly for the purpose of ransoming the consul for political prisoners held in Cuba. The court held that the act was not "committed in the cause of and incidental to a violent political disturbance."

[43]Catholic grievances are examined in Disturbances in Northern Ireland: Report of the Commission Appointed By the Governor of Northern Ireland, 1969, CMND. No. 532, at 91-3, popularly called the "Cameron Report" after its chairman Lord Cameron.

[44]*Id.* See also Palley, *The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution*, 1 Anglo-Am. L. Rev. 368, 415 (1972).

> The headquarters of the Provisionals is in the Republic. The South also provides a safe mounting base for cross-Border operations and secure training areas. PIRA's logistic support flows through the Republic, where arms and ammunition are received from overseas. Improvised weapons, bombs and explosives are manufactured there. Terrorists can live there without fear of extradition for crimes committed in the North. In short, the Republic provides many of the facilities of the classic safe haven so essential to any successful terrorist movement. And it will probably continue to do so for the foreseeable future.[45]

To the chagrin of Britain, however, the Republic's judges proved time and again that they were prepared to use their discretion to rule in favor of those fugitives who claimed their offenses were political. At the Sunningdale Conference in December 1983, attended by the British and Irish governments, it was made clear that the *quid pro quo* for greater Irish participation in the affairs of the North was a tightening up of Dublin's policies towards IRA members who had fled south across the border. Consequently, at the conclusion of the meeting, a joint communique was released in which "they voiced their unanimous concern at the ease with which persons who had committed crimes of violence in Ireland successfully evaded being held to account for their crimes through the normal judicial process by simply crossing the border from one jurisdiction in Ireland to the other."[46] Moreover, the two governments agreed to set up a commission to examine the problem.[47]

A high-powered Law Enforcement Commission was duly formed, with four British and four Irish representatives, to investigate and produce a report of their findings. A number of different options were discussed including: the creation of an all-Ireland court with judges from both the North and the Republic sitting together with jurisdiction over the whole of Ireland; a "mixed-courts method" which would entail special criminal courts sitting in either the North or the South, depending on where the fugitive had fled to, composed again of judges from both sides of the border; the method of simple extradition; and the "extra-territorial method" which required legislation investing

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[45]Cited in Cole, Chapter 7, in *The Constitution of Northern Ireland* 135 (J.Watt ed. 1981).

[46]Connelly, *Non-Extradition for Political Offenders: A Matter of Legal Obligation or Simply a Policy Choice?*, XVII Irish Jurist 59 (1982).

[47]*Id.* at 59-62. *See also* Costello (Irish Attorney-General), *International Terrorism and the Development of the Principle Aut Dedere Aut Judicare*, IX Irish Jurist 220-22 (1974); Kyle, *Sunningdale and After: Britain, Ireland and Ulster* 31 World Today 445 (1975); O'Brien, *Irish Terrorists and Extradition: The Tuite Case*, 18 Tex. Int'l L.J. 249, 254-60 (1983).

domestic courts with jurisdiction to try people who had allegedly committed certain scheduled offenses in Northern Ireland and had then fled to the Republic, or vice versa. Agreement could only be reached on one plan, the "extra-territorial method." As a result of the recommendations of the joint commission, the Irish Parliament passed the Criminal Law (Jurisdiction) Act of 1976.[48] At the same time a reciprocal measure for Northern Ireland was enacted by the British Parliament.

The various accounts of the deliberations of the Law Enforcement Commission indicate that much discussion centered around the issue of whether extradition of political offenders was compatible with the Irish Constitution, in particular, with Article 29.3 which reads: "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other states." The view held by some members of the Commission in 1974, and by the Irish government of the day, was that there was indeed a generally accepted principle of international law prohibiting the extradition of political offenders. Yet there is considerable debate as to the extent of the legal obligation which the existence of such a principle need necessarily impose upon states. At any rate, events were soon to show that the Irish Republic was quite capable of taking a more flexible position.

During the period of the hunger strikes (October 1980 to October 1981), when IRA prisoners fasted to death in an effort to bring about changes in British policy, the government of Prime Minister Thatcher came under increasing international pressure from the United States and the European Economic Community to which both the United Kingdom and Ireland belong. In an effort to appease and defuse foreign opinion and, furthermore, to gain the Republic's assistance on security matters, the British government sought to improve its relations with Dublin. Beginning in December 1980, a series of annual Anglo-Irish summit meetings were inaugurated.

This high level cooperation in the political realm was paralleled by similar collaboration in judicial matters. In July 1982, the trial and conviction of IRA activist Gerard Tuite[49] in Dublin's special criminal court made legal history as it was the first time that the Criminal Law (Jurisdiction) Act had been used to prosecute anyone for offenses committed outside Northern Ireland. Tuite had been arrested in London in 1979 for allegedly masterminding the London Christmas

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[48]The Criminal Law (Jurisdiction) Act, 1976 (No.14) (Ir.) [hereinafter cited as *Criminal Law Act*].

[49]For a succinct analysis of the *Tuite* case and its impact see O'Brien, *supra* note 47, at 260-72.

bomb blitz of 1978. While awaiting trial in Brixton prison, he tunnelled to freedom and returned to his native country, the Republic of Ireland. In March of 1982, he was arrested under the Criminal Law (Jurisdiction) Act of 1976[50] on the charge of possessing explosive materials with the intent to use them to endanger life or damage property. He was also indicted for conspiring with others to cause explosions in England. Tuite stood trial before a special criminal court consisting of three judges sitting without a jury.

The *Tuite* case is important for a number of reasons. The very fact that the trial took place at all was significant, given the often-voiced complaints of Northern Unionist and British authorities that the Irish government was apathetic or even sympathetic to fugitive terrorists who cared to raise the clarion call of political offense. In this instance the Irish government clearly worked very closely with the British, to the extent of bringing over prosecution witnesses from England and providing them with maximum security during their stay. Furthermore, and no doubt of comfort to the British, the court found the accused guilty and sentenced him to ten years in prison.

In the aftermath of the *Tuite* judgment, the newsmedia in both Northern and Southern Ireland were generally favorable in their comments about the case, yet some concerns were raised as to the nature of the precedent that had been set.[51] Due to the costly nature of such trials, extradition, the alternative most preferred by the Unionists and the British, reared its head again. In December 1982, the Irish Supreme Court reached a decision which amounted to something of a judicial revolution. The court ruled in *McGlinchey v. Wren*[52] that the Irish government was not compelled to refuse extradition of any person who simply claimed that his crime in another country was politically motivated. In the *McGlinchey* opinion, Chief Justice O'Higgins argued for a consideration of the nature of the act committed, not just the motivation:

> It would no longer be enough, he held, that there should exist the conditions of insurrection or organized violent conflict and that the person accused claimed to have been acting in furtherance of a political objective. Earlier judicial authority had been rendered obsolete in many respects by the fact that modern terrorist violence "is often the antithesis of what could be reasonably regarded as political." The question to be asked in each case was whether the

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[50]*Criminal Law Act*, *supra* note 48.
[51]*See* O'Brien, *supra* note 47, at 267.
[52]3 Ir.L.R. 169 (1983).

> particular circumstances showed that the person charged was at the relevant time engaged in "what reasonable, civilized people would regard as political activity."[53]

As a result of this decision an extradition order was granted for Dominic McGlinchey, a member of INLA, who duly became the first person to be extradited from the Republic to Northern Ireland for alleged terrorist offenses. On December 24, 1984, the Belfast Crown Court, in a controversial and politically sensitive decision, sentenced McGlinchey to life imprisonment for the 1977 murder of Mrs. Helen McMullen.[54]

Barely two months after the Irish Supreme Court's March, 1984, reformulation of the political offense exception, the report of the New Ireland Forum was published.[55] This report contained proposals from the four main nationalist parties in the North and South of Ireland for constitutional change in Northern Ireland. Although the recommendations were initially dismissed by the British government,[56] speculation abounded that London and Dublin were about to launch a joint constitutional initiative.[57]

On November 15, 1985, the anticipated move emerged in the shape of the Hillsborough agreement.[58] By its terms, the British and Irish governments agreed to establish an Inter-ministerial Conference which would facilitate joint consultation on the administration of Northern Ireland. In return for being given a voice in the province's affairs, the Irish Republic formally acknowledged British sovereignty over

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[53]Cited in The Times London, editorial, March 24, 1984, at 9.

[54]*See* Belfast Telegraph, December 10, 1984, at 1; Belfast Telegraph, December 27, 1984, at 3; and Fortnight, January 18, 1985, at 27. McGlinchey's trial in Belfast was unusual in a number of respects. After the case opened on December 10, 1984, the presiding judge, Lord Justice Kelly, dismissed himself because it had been brought to his attention that he had already been involved in a case in 1979 which concerned the 1977 killing at issue in this case. Secondly, the evidence against McGlinchey had changed dramatically from the evidence presented to the Supreme Court in Dublin in March 1984. Most importantly, in Dublin there had been no mention of McGlinchey's membership in a paramilitary organization or of the fact that his alleged victim, Mrs. Hester McMullen, was connected with the security forces (her son was a member of the Royal Ulster Constabulary (RUC) reserve and her daughter worked at the RUC station in Ballymena, Northern Ireland). Some lawyers have argued that had these facts been known while the jurisdiction warrant was being processed in the Republic's courts, there would have been little chance of McGlinchey's extradition.

[55]*See* Christian Science Monitor, May 4, 1984, at 9 for an analysis of the report's recommendations.

[56]Following the November 1984 Anglo-Irish summit meeting, Mrs. Thatcher dismissed each of the Forum's proposals with the words "That's out." Economist, January 5, 1985, at 13.

[57]Economist, August 3, 1985, at 45.

[58]1985 U.K.T.S. No. 62 (Cmd. 9690), *reprinted in* 24 Int'l Legal Materials 1579 (1985).

Northern Ireland and, furthermore, stated its intention of acceding to the European Convention on the Suppression of Terrorism,[59] which it hitherto had refused to do. Ireland's previous refusals had been based on its view that the convention effectively sought to put an end to the political exception to extradition for all offenses involving violence. As one commentator has put it: "The Convention effectively ruled out any form of armed political resistance to established governments."[60] Among the specific issues assigned to the Inter-ministerial Conference for discussion was the question of extradition and the operation of extraterritorial legislation.[61]

The United States

As in the Republic of Ireland, opinion in the United States was divided on the conflict in Northern Ireland. Not surprisingly, among Irish Americans there was a good deal of sympathy for the Nationalist cause. In time, the United States became an important source of funds and weapons for the IRA and an important place of refuge.[62] The British government responded by exerting pressure on the American authorities to take a tougher line on Irish Republican activities.[63]

Nevertheless, in a number of controversial decisions, United States' courts and magistrates continued to apply the much-criticized "incidence" test. In 1979, in *In re McMullen*,[64] a San Francisco magistrate turned down a request from the British authorities for the extradition of Peter McMullen for the bombing of a military barracks in England. The court held that a political uprising existed and that McMullen's actions were incidental to that uprising. Later, when the British government attempted to extradite Desmond Mackin for the attempted murder of a plain-clothed British soldier in Belfast, the incidence test was again used to deny the request.[65] One month after

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[59]1978 U.K.T.S. No. 93 (Cmd. 7031), *reprinted in* 15 Int'l Legal Materials 1272 (1976).
[60]M. Farrell, *supra* note 3, at 76.
[61]Article 8, *supra* note 58.
[62]Farrell, *supra* note 3, at 82.
[63]*Id.*
[64]*In re* Extradition of McMullen, No. 3-78-1099 MG, slip op. (N.D. Cal. May 11, 1979). Efforts were later made to deport McMullen because of his illegal entry into the United States and his undocumented status. In McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981) it was held that he was not deportable because his life would be threatened if he returned to the United Kingdom.
[65]*In re* Mackin, No. 80 Cr. Misc. 1 (S.D.N.Y. Aug. 13, 1981), *appeal dismissed*, 668 F.2d 122 (2d Cir. 1981). Mackin consented to be deported to the Republic of Ireland in December, 1981, after the initiation by the INS of deportation proceedings against him. Hannay, *supra* note 40, at 56.

the dismissal of Mackin's extradition application, William Quinn was arrested in California to face charges of murdering a London police constable and conspiring to cause explosions in London. Although at the lower court level a magistrate found Quinn extraditable, the case was reviewed and the decision overturned in the District Court for Northern California,[66] which held that Quinn's actions were incidental to PIRA's uprising against British rule in Northern Ireland.[67]

The *Doherty* case, as noted earlier,[68] resulted in yet another British extradition request being denied. The decision came after the United States Justice Department, acting on Britain's behalf, had put together a very strong case, including evidence from a British Home Office expert on extradition worldwide, and from a senior Royal Ulster Constabulary officer.[69] Judge Sprizzo found that the facts in *Doherty* "present[ed] the assertion of the political offense exception in its most classic form."[70] He noted that the case did not involve an attack upon a civilian target, such as a department store, tavern, or hotel. Nor was it aimed at civilian government officials. Rather, the death of the British soldier occurred as a result of an attempted ambush of a British army patrol. Judge Sprizzo continued:

> . . . Had this conduct occurred during the course of more traditional military hostilities there could be little doubt that it would fall within the political offense exception. The only issue remaining, therefore, is does the political exception become inapplicable because the Provisional Irish Republican Army [PIRA] is engaged in a more sporadic and informal mode of warfare.
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> . . . [W]hile it [the PIRA] may be a radical offshoot of the traditional Irish Republican Army, [it] has both an organization, discipline and command structure that distinguishes it from more amorphous groups such as the Black Liberation Army or the Red Brigade.[71]

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[66]Quinn v. Robinson, No. C-82-6688, slip op. (N.D. Cal. Oct. 3, 1983).

[67]On appeal, the U.S. Court of Appeals, Ninth Circuit, held that the charges against Quinn of murder and conspiracy to cause explosions did not fall within the political offense exception because, although an uprising existed in Northern Ireland at the time the offenses were committed, there was no uprising in England. However, Judge Fletcher, in his partial dissent from the opinion, observed that the existence of longstanding ties between England and Northern Ireland, the fact that Northern Ireland is a part of the United Kingdom with representation in the British Parliament, and the continued occupation of the province by British troops, all mitigated against the majority's conclusion that Quinn's acts were not part of an uprising, but represented "terrorism or other criminal conduct exported to other locations." *See* Quinn v. Robinson, 783 F.2d 776, 817-820 (9th Cir. 1986).

[68]*See supra*, text accompanying notes 4 and 5.

[69]Belfast Telegraph, December 14, 1984, at 1.

[70]*In re* Doherty, 599 F. Supp. 270, 276 (S.D.N.Y. 1984).

[71]*Id.*

As indicated,[72] the immediate negative reactions of British and United States' officials signified that a major effort was underway to curb judicial discretion in the extradition area. The culmination of this process was the US-UK Supplementary Extradition Treaty.[73] The list of offenses no longer to be regarded as political is broadly similar to that which is contained in the European Convention on the Suppression of Terrorism. It includes murder and manslaughter, multiple offenses against the person, firearms and explosives offensives, and offensives created by various international treaties against terrorism.[74]

CONCLUSION

Current changes in Irish and United States' laws regarding the non-extradition of political offenders must be placed in the context of vigorous political pressure from the British government to obtain support for its security operations vis-a-vis the IRA.

Growing political cooperation between Britain and Ireland over the Northern Ireland situation, as evidenced most vividly by the 1985 Hillsborough agreement, has of necessity had judicial implications. In return for gaining a consultative role in Northern Irish affairs through the creation of the Interministerial Conference, Ireland agreed to sign the European Convention on the Suppression of Terrorism and to engage in discussions with British officials over the entire issue of extradition.

Changes in United States' law reflect the shared frustrations of the Thatcher and Reagan administrations in that their much-voiced opposition to international terrorism was being undercut by the propensity of U.S. courts to regard offenses committed by IRA members as inevitably "political." The result of that frustration is the Supplementary Treaty on Extradition, which severely circumscribes the operation of this exception to extradition. As the Secretary of State for Northern Ireland, Tom King, stated in a House of Commons debate: "This is an encouraging start and yet another demonstration of the United States' willingness now to stand against terrorism. In the context of Northern Ireland, the United States is an important ally."[75]

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[72]*See supra* note 6 and accompanying text.
[73]*Supplementary Treaty, supra* note 7, at 3.
[74]1978 U.K.T.S. No. 93 (Cmd. 7031) at 22, *reprinted in* 15 Int'l Legal Materials 1272 (1976).
[75]100 Parl.Deb., H.C. (6th ser.) 1157 (1986).

Nevertheless, there is cause for concern when hallowed and longstanding principles of international law are sacrificed on the altar of political expediency. That the political offense exception has existed for so long is testimony to the belief of courts that it fulfilled a vital function: the protection of political offenders engaged in struggles with their governments from the inevitable retribution that they would face on being forced to return. Moreover, in the context of the present conflict in Northern Ireland, this is of particular significance given the criticism that has been leveled at the way in which the judicial system operates in the province. Much of this criticism focuses on the role of the "Diplock Courts." These courts came about as a result of the recommendations of the Diplock Commission, which had been established to investigate the problems that had emerged in dealing with alleged terrorist crimes. To avoid the risk of partisan verdicts, trial by jury was suspended and replaced by special courts presided over by a single High Court judge and operating under special rules of procedure.[76]

With such criticism of the criminal justice system in Northern Ireland in mind, this author questions the wisdom of the recent changes in Irish and United States' extradition policies. It is clearly one thing to allow extradition of political offenders to a jurisdiction where there is widespread confidence in its fair and impartial operation. It is quite another matter to permit extradition when there is grave concern about judicial procedures and standards. After all, this is precisely why the political offense exception developed.

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[76]Paddy Hillyard, one of the authors of *Ten Years In Northern Ireland: The Legal Control of Political Violence*, writes:

> The long-established democratic tradition of trial by jury is not available for the long list of "scheduled offenses." Special rules of evidence apply. Over 85% of all convictions are based wholly or mainly on a statement or confession. In addition, there is now evidence to suggest that the judges are becoming case-hardened. As a result, the acquittal rate has declined sharply. A move away from these special courts is urgently required if there is to be any confidence in the administration of justice in Northern Ireland.

Christian Science Monitor, April 29, 1981, at 26.