Marquette Law Review

Volume 60
Issue 3 *Spring 1977*

Article 5

1977

The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland

Charles L. Cantrell

Follow this and additional works at: https://scholarship.law.marquette.edu/mulr

 Part of the Law Commons

Repository Citation
Charles L. 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 (1977).
Available at: https://scholarship.law.marquette.edu/mulr/vol60/iss3/5

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

THE POLITICAL OFFENSE EXEMPTION IN INTERNATIONAL EXTRADITION: A COMPARISON OF THE UNITED STATES, GREAT BRITAIN AND THE REPUBLIC OF IRELAND

CHARLES L. CANTRELL*

INTRODUCTION

The cornerstone in the law of international extradition of fugitives from justice is a policy of cooperation between nations.[1] This cooperation must take into account both the differences in the domestic legal systems and the advancements of technology in areas that directly affect the criminal justice system. This principle became apparent as scientific developments in mass transportation and communication made it easier for a criminal to seek asylum in a foreign nation.[2] The increasing use of terrorism by politically motivated persons has combined with the rapid scientific advances in transportation and communication to present a very real danger to the control and suppression of international crime. These factors have pointed to a need for revision and modernization of the extradition laws and treaties of Ireland, Great Britain and the United States.

The needed revision has been delayed for a variety of reasons. The main factor has been the failure of nations to renegotiate bilateral extradition treaties. Ireland, Great Britain and the United States have recently recognized their respective shortcomings with respect to the control of international crime, especially terrorism, and have entered into some bilateral

* J.D. 1972, Baylor University; LL.M. 1976, University of Texas; Assistant Professor of Law, Marquette University Law School.

1. Ireland, Great Britain and the United States adhere to the principle that extradition will be granted only in the event of a treaty. For references see I. SHEARER, EXTRADITION IN INTERNATIONAL LAW at 24 (1971) [hereinafter cited as SHEARER].

2. *Harvard Research in International Law, Extradition,* 29 AM. J. INT'L L. SUPP. 35, 37 [hereinafter cited as *Harvard Research*]. The advances in the technologies of transportation and communication are set forth in this section, but offer no preview of the remarkable changes that would occur in the forty-one years subsequent to the publishing of this treatise.

treaties and arrangements tightening the controls over such criminal acts.[3]

This article will deal with one of the central subjects in the international extradition problem — the political offender. Traditional definitions of "political offenses" and "political offenders" have been found to be inappropriate for dealing with the terrorism that the international political offenders sometimes produce. The politically oriented terrorist has been one of the targets of recent treaties and enactments in all three countries under consideration.

This article's comparison of the domestic laws regarding the political offense exemption in extradition will proceed in three general sections. The first section will discuss the political offender's general position in international extradition. The second section will trace the historical development of each nation's case and statutory law up to its present status. Finally, the last section will discuss the recent developments in Ireland, Great Britain and the United States in regard to new legislation and renegotiated treaties. Appropriate emphasis will be placed on the elusive definition of "political offense" in these jurisdictions.

I. POLITICAL OFFENSES AND OFFENDERS

There is no universally acceptable definition of what constitutes a "political offense."[4] However, there is a generally accepted rule which states that political offenders are not subject to international extradition.[5] The fundamental difficulty in arriving at a universally acceptable definition of a political offense results from the wide variety of tests used by the var-

3. SHEARER, *supra* note 1, at 42. Shearer maintains that the practice of a few states to denounce all their extradition treaties in anticipation of a major revision of their municipal extradition laws has impeded the progress of international cooperation in this area. He cites the residual legal effects of wars and state successions as major factors causing the gap in the international network of extradition treaties. *Id.* at 43-51.

4. M. GARCIA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT 73-102 (1956).

5. The acceptance of this principle is regarded as the result of the nineteenth century political revolutions in Europe. The different political systems which emerged from the ideological struggles during that period developed the proposition that a person should enjoy the freedom of political action in his homeland. McCall-Smith & Magee, *The Anglo-Irish Law Enforcement Report in Historical and Political Context*, 1975 CRIM. L. REV. 200 (Eng.) [hereinafter cited as McCall-Smith & Magee]. *See also* SHEARER, *supra* note 1, at 166.

ious nations' judicial or executive branches in attempting to measure the offender's motivations and political goals.[6] Taking into account the various approaches in existence, it is now considered by one authority that a political offense can be broadly defined as an offense against the security of the state.[7]

Motivations of the Political Offender

Traditional theory of political offender motivation assumes that penal sanctions will not deter his actions.[8] The political offender allegedly is committed to the principle of political change through his act, and does not consider his actions blameworthy. He attacks the status quo through his act, and denies the legitimacy of the particular laws, claiming instead an allegiance to a "superior legitimating principle."[9] For him this "higher principle" or political cause justifies the violation of penal law.[10] Whether the political offender's values are considered appropriate so as to preclude extradition is a test of pure subjective intent. In determining his intent, courts have traditionally admitted all evidence of the offender's political history and police records.[11]

---

6. *Harvard Research, supra* note 2, at 113. The commentary to the draft convention on extradition related that prior treaties and statutes offered no assistance in defining political offenses. The tests used excluded crimes from the realm of nonextraditable political offenses and are summarized on pages 114-15.

7. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962) [hereinafter cited as Garcia-Mora].

8. M. BASSIOUNI, CRIMINAL LAW AND ITS PROCESSES: THE LAW OF PUBLIC ORDER 11-38 (1969).

9. Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exception in Extradition — A Proposed Juridical Standard for an Unruly Problem*, 19 DEPAUL L. REV. 217, 228 (1969) [hereinafter cited as Bassiouni].

10. *Id.* at 229. This rule is only valid in its most elementary sense if it does not employ some type of proportionality doctrine. This doctrine deals not with the relevance or connection of the act to the political goal, but rather with the nature and extent of the crime committed in relation to the actor's political goal. For example, murder has uniformly been held to constitute a political crime, but a mass murder would certainly shed a different light on the same occurrence. The mass murder could be committed against governmental officials during a civil war, and otherwise be classified as a political offense in the strict sense of the term. However, if the extent of the mass murder so shocked the conscience as to render it "brutal" by its method of commission or by its intended range of applicability, it should arguably be considered nonpolitical through the proportionality test. For further discussion regarding the use of this doctrine, see S. BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE 183 (1968) [hereinafter cited as BEDI]. Reasons for the doctrine's non-use and ultimate rejection are found in *Harvard Research, supra* note 2, at 117-18.

11. The recent Irish case of State (Magee) v. O'Rourke [1971] Ir. R. 205 is an example of the length to which a court will go in order to consider relevant evidence

Classes of Political Offenses

The requirement of proof regarding the offender's subjective intent varies greatly with the type of political offense. The closer he strikes at the government the greater the proportionate increase in the weight of the presumption that his act was politically motivated.

The "pure" political offense is customarily directed against the government. It has been described by one authority as constituting "[A] subjective threat to a political ideology or its supporting structures without any of the elements of a common crime. It is labeled a 'crime' because the interest sought to be protected is the sovereign."[12] These "pure" political crimes have usually been limited to treason, sedition and espionage.[13] Authorities and courts have consistently held that such "pure" offenses are political crimes, and will not subject the offender to extradition.[14]

The "relative" political offense is characterized by the presence of one or more common crimes which are related to a political goal of the offender.[15] This type of political crime has traditionally caused the most problems for the courts in their attempt to define the act as a political one. The degree of closeness between the common crime and political objective is subject to the interpretation of the domestic courts of each nation. As a result, there is no accepted rule applicable in all nations, but rather a hodgepodge collection of principles often dictated by political events and changing circumstances.[16]

---

of intent. The defendant successfully opposed his extradition by convincing the Irish Supreme Court that he would be prosecuted for a political offense if he was extradited to Northern Ireland. His warrant listed four nonpolitical and scheduled offenses, but he miraculously convinced the Court through his oral testimony that Northern Ireland authorities were prepared to violate their treaty obligations and initiate a political prosecution. *See also* Blaghd, *The Extradition Position,* Part VIII, 107 Ir. L.T.R. 301-02 (1973).

12. Bassiouni, *supra* note 9, at 245. "[T]here are to be identified purely political offenses, which are directed against the form and political organization of the State. . . ." *Re* Campora, 25 I.L.R. 518 (Supreme Court, Chile 1957).

13. *Harvard Research, supra* note 2, at 113; Garcia-Mora, *Treason, Sedition and Espionage as Political Offenses Under the Law of Extradition,* 26 U. PITT. L. REV. 65 (1964); and Deere, *Political Offenses in the Law and Practice of Extradition,* 27 AM. J. INT'L L. 247 (1933).

14. *See* Garcia-Mora, *supra* note 7, at 123-39 for a complete list of references to various jurisdictions and authorities.

15. Bassiouni, *supra* note 9, at 248 and Garcia-Mora, *supra* note 7, at 1239.

16. I. OPPENHEIM, INTERNATIONAL LAW 707 (8th ed. H. Lauterpacht, ed., 1958)

There are three factors which are considered by all courts when determining whether an offense is political. The first factor is the offender's past participation and involvement with the political movement, and his personal belief as to whether the crime was justified by his purported political objective. The second factor is the existence of a connection or link between the crime and the political objective. Finally, an examination is made of the relation or proportion between the crime and its method of commission and the political objective.[17] It is also uniformly held that to constitute a political offense the political element must dominate the intent of the offender to commit the crime, and outweigh the apparent significance of the common crime.[18]

The final category of classification of political offenses are those which are generally termed "international" crimes. Included in this category are such crimes as slavery,[19] war crimes,[20] genocide,[21] piracy on the sea and in the air,[22] and offenses against the peace and security of mankind.[23] These types of crimes are forbidden by international law because they are considered to be inimical to the very concept of a civilized world order. Offenders committing war crimes and genocidal acts are excluded by many treaties from consideration as politi-

---

[hereinafter cited as OPPENHEIM]. *See also* the discussion on the development of British case law, *infra* at 784.

17. Bassiouni, *supra* note 9, at 250. *See also* note 10 *supra* for a discussion of the doctrine of proportionality as required in the third element.

18. Bassiouni, *supra* note 9, at 250.

19. Fischer, *The Suppression of Slavery in International Law,* 3 INT'L L.Q. 28 (1950); and Gutteridge, *Supplementary Slavery Convention,* 1956, 6 INT'L & COMP. L.Q. 449 (1957).

20. Garcia-Mora, *War Crimes and the Principle of Non-Extradition of Political Offenders,* 9 WAYNE L. REV. 269 (1963); Green, *Political Offenses, War Crimes and Extradition,* 11 INT'L & COMP. L.Q. 329 (1962); Neumann, *Neutral States and the Extradition of War Criminals,* 45 AM. J. INT'L L. 495 (1951).

21. Bassiouni, *The War Power and the Law of War: Theory and Realism,* 18 DEPAUL L. REV. 188 (1968); Lemkin, *Genocide as a Crime under International Law,* 41 AM. J. INT'L L. 145 (1947).

22. *Harvard Research, supra* note 2, at 563; OPPENHEIM, *supra* note 16, at 609; VanPanhuys, *Aircraft Hijacking and International Law,* 9 COLUM. J. TRANSNAT'L L. 1 (1970); Horlock, *The Developing Law of Air Hijacking,* 12 HARV. INT'L L.J. 33 (1971); Mankiewicz, *The 1970 Hague Convention,* 37 J. AIR L. & COM. 195 (1971).

23. Johnson, *The Draft Code of Offenses Against the Peace and Security of Mankind,* 4 INT'L L. & COMP. L.Q. 445 (1955); Garcia-Mora, *Crimes Against Humanity and the Principle of Nonextradition of Political Offenders,* 62 MICH. L. REV. 927 (1964).

cal offenders. Indeed, most military codes refer to violations of the Laws of War as military crimes.[24]

Justifications For Not Extraditing Political Offenders

The concept of prohibiting the extradition of political offenders is a recent development in international law. Prior to the nineteenth century, extradition treaties were signed for the specific purpose of surrendering political offenders to their homeland.[25] No exemption for political offenders existed during this period because the medieval states were preoccupied with insulating themselves from political enemies. The prohibitive costs and problems involved in the return of fugitives seldom made it worthwhile for the requesting state to pursue extradition procedures.[26]

The reversal of attitudes following the French Revolution and the increased awareness of the international world order were the two main factors responsible for the introduction of the political offense exemption. The traditional justification for the exemption has been the presumption that the delivery of political enemies to a requesting state would result in their trial being influenced by political considerations.[27] This historical presumption was bolstered by an unwillingness to become entangled in the requesting state's internal affairs, and an increased acceptance of the democratic view that a person should be entitled to resort to political activity in his quest for governmental change.[28]

The political differences between democratic, communistic and third-world nations have further widened the differences which were accountable for the initial disintegration of the shared interests of sovereigns following the French Revolution.

---

24. Bassiouni, *supra* note 9, at 243.

25. Deere, *Political Offenses in the Law and Practice of Extradition*, 27 AM. J. INT'L L. 247, 249 (1933).

26. *Harvard Research*, *supra* note 2, at 108.

27. *See* 2 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1019 (2d ed. 1947), wherein Professor Hyde states that: "It seemed inequitable that the fate of a revolutionist, who had sought refuge in a foreign land, should hang upon the success or failure of the uprising in which he had been a participant."

28. An additional justification is that the political offender is no longer a threat to the internal structure of the requesting state. This should be considered suspect at best in an age of underground terrorism and highly developed transportation. McCall-Smith & Magee, *supra* note 5, at 201; O'Higgins, *Extradition — Offense of a Political Character — Terrorism*, 32 CAMB. L.J. 181, 182 (1973).

This lack of identity has led to the situation where a nation on one side welcomes the political refugees from the other side, and thereby becomes known as a haven for the oppressed. It is sometimes doubtful whether the courts are actually guided by a humanitarian concern for the offender,[29] but there can be no doubt as to the importance of the political ramifications of granting asylum to refugees from another country.[30]

The Duty to Extradite and International Cooperation

Historically, there has existed a divergence of opinion as to whether a state was under a duty to extradite fugitives to another state. Grotius held the view that a state was under a duty either to punish an international fugitive or extradite him to the requesting state.[31] He was supported in this view by an impressive array of authorities.[32]

The opposing view was that the state was under only an imperfect obligation to surrender the fugitive.[33] This latter view has now been adopted as customary state practice.[34] While the right of a state to grant asylum and refuse extradition is established, a state may also voluntarily relinquish this general right for a specific treaty obligation that requires extradition.[35] This practice of entering into extradition treaties, and thereby incurring the obligation to extradite fugitives, has usually been approached through the bilateral treaty method.[36] Other meth-

29. It is wise to remember that the self-perceived national interests of the states will be the predominant factor in any conceptual framework in international law. The concern for world order will also take precedence over the individual's rights in the extradition proceedings. Bassiouni, *supra* note 9, at 223; O'Higgins, *Unlawful Seizure and Irregular Extradition,* 36 Y.B. INT'L L. COMM'N 279 (1960); McDougal, Lasswell, & Reisman, *The World Constitutive Process of Authoritative Decisions,* 19 J. LEGAL ED. 253 (1967).

30. The recent example of the reluctance of the President of the United States to receive the Soviet refugee Aleksandr Solzhenitsyn is an indication of the political influences present in political refugee matters.

31. *Harvard Research, supra* note 2, at 41.

32. H. WHEATON, ELEMENTS OF INTERNATIONAL LAW 188 (5th ed. 1916) [hereinafter cited as WHEATON] lists Burlemaqui, Heineccius, Kent, Rutherford and Schmelzing as sharing this position.

33. *Id.*, listing such authorities as Heffter, Kluber, Leyser, Luit, Martens, Mittermaier, Saalfeld, Schmaltz and Voet.

34. *Harvard Research, supra* note 2, at 41.

35. BEDI, *supra* note 10, at 31; WHEATON, *supra* note 32, at 193.

36. M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 13-18 (1974). Professor Bassiouni maintains that the bilateral system is especially important to those nations whose internal laws or policies prohibit extradition. However, the overall international scheme of the extradition treaty network is riddled with loop-

ods of extradition, such as a state enacting municipal laws,[37] entering into reciprocal arrangements,[38] or demanding extradition through principles of morality,[39] have gained acceptance in the international community. However, it appears that these separate processes are being incorporated into the bilateral framework, at least to the extent that such elements are not present initially.

Multilateral treaties and conventions have been entered into by some nations in an effort to replace bilateral treaties or to compel reciprocal legislative action in the party-states.[40] These multilateral treaties are customarily entered into by groups of nations sharing either a mutual geographical or political interest. The advantages of multilateral treaties are a lack of divergence in national rendition laws and a strong, cohesive legal system which can be turned to when the natural attrition of bilateral agreements begins to take its toll. A further long-term benefit resulting from such treaties is that they contribute to the creation of a "common law of extradition."[41]

II. STATUTORY LAW AND CASE DEVELOPMENT: GREAT BRITAIN

The Act of 1870

In 1870, two years after a select committee had issued its report on extradition, the Extradition Act of 1870[42] was enacted in Great Britain. This basic act, with only a few amendments,

holes. The factors contributing to this problem are discussed in SHEARER, *supra* note 1, at 43-51.

37. BEDI, *supra* note 10, at 40-48 discusses and lists the nations which have adopted either the enumerative system of listing extraditable offenses or the eliminative method of defining extraditable offenses by reference to terms of punishment.

38. SHEARER, *supra* note 1, at 31-33, wherein the author discusses both the necessity of acquiring reciprocal binding assurances in both general statements and *ad hoc* declarations. BEDI, *supra* note 10, at 48-53 should be referred to for a list of statutes and cases in various nations where the reciprocity principle has been incorporated.

39. BEDI, *supra* note 10, at 53-60.

40. The European Extradition Convention, Council of Europe, Europ. T. S. No. 24, 359 U.N.T.S. 273, is an example of the replacement type. *See generally* O'Higgins, *The European Convention on Extradition,* 9 INT'L & COMP. L.Q. (1960). An example of a treaty requiring reciprocal legislation is the scheme of extradition for the Commonwealth States. SCHEME RELATING TO THE RENDITION OF FUGITIVE OFFENDERS WITHIN THE COMMONWEALTH, CMND. No. 3008 (1966); for an example of the domestic enactment in Great Britain see Fugitive Offenders Act, 1967, c. 68.

41. SHEARER, *supra* note 1, at 51-66; *see* M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 627-28 (1974) for a list of 22 such international conventions and multilateral treaties.

42. Extradition Act, 1870, 33 & 34 Vict., c. 52.

remains the law of Great Britain today.

The following section of the Act sets forth the procedure for dealing with suspected political offenders:

> 3. Restrictions in surrender of criminals. The following restriction shall be observed with respect to the surrender of fugitive criminals:
>
> (1) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character or if he prove 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 to punish him for an offence of a political character.[43]

The phrase "offence of a political charcter" was not defined in the Act. The only two interpretations of the phrase were offered by John Stuart Mill and Mr. Justice Stephen. The former was of the opinion that a political offense was any offense committed in the course of or furthering a civil war, insurrection or riot.[44] The latter's view was that a political offense was one committed during a political disturbance, and was incidental to and formed a part of such a disturbance.[45]

The initial judicial interpretation of this vague phrase occurred in the landmark case of *In re Castioni.*[46] The court declared that a murder of a government official during the heat of a political riot was an "offence of a political character" within the intended meaning of the phrase. The decision adopted Mr. Justice Stephen's definition and created what is now termed the "political-incidence" test when it stated: "The question really is, whether . . . 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 part of the political movement and rising in which he was taking part."[47]

The *Castioni* case set up the two-part test which was destined to remain the British rule for sixty-four years: (1) there must be a political disturbance, and (2) the political offense

43. *Id.* § 3(1).
44. SHEARER, *supra* note 1, at 169-70.
45. II J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 71 (1883).
46. [1891] 1 Q.B. 149.
47. *Id.* at 159.

must be incidental to or form a part of that disturbance.[48]

That definition was subject to another interpretation and apparent mutation three years after *Castioni* in the case of *In re Meunier.*[49] The applicant was identified as a French anarchist who bombed a cafe and army barracks in France before fleeing to England. The court rejected the contention that the crime was political because only one explosion destroyed the government's army barracks. In extraditing the applicant to France the court expanded the *Castioni* test by stating:

> [I]n order to constitute an offence 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 . . . if the offence is committed by one side or the other in pursuance of that object, it is a political offence. . . .[50]

The elucidation of the *Castioni* test resulting from the two party requirement was unfortunately diluted by the court's failure to mention the necessity of a political disturbance in the state. *In re Meunier* is considered to be the first judicial rejection of anarchism or terrorism as a legitimate international political method of protest.[51]

The greatest liberalization in the test for the determination of political offenses occurred in the case of *Ex parte Kolczynski.*[52] The English court recognized that a political offense must be examined according to the particular political circumstances existing at the time. gjustice Cassels noted that the totalitarian government in Poland considered it treason merely to seek asylum in the Western World. He felt that the type of trial the political offenders would receive subsequent to their return would be meaningless because they would ultimately be punished for their political crime.[53] This opinion,

48. Wortley, *Political Crime in English Law and in International Law,* 45 BRIT. Y. B. INT'L L. 219, 227 (1971); M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 388-89 (1974).

49. [1894] 2 Q.B. 415.

50. *Id.* at 419.

51. *Id.*: "[T]he party of anarchy is the enemy of all government. Their efforts are directed primarily against the general body of citizens."

52. [1955] 1 Q.B. 540. The facts of the case were that the crew of a Polish ship committed mutiny against their captain for the purpose of gaining asylum in England. Although the extradition demand consisted of five different scheduled and prima facie nonpolitical offenses, the crew insisted that they committed the alleged acts solely to escape from a future political prosecution in their homeland. The case was said to be in the process of preparation by the ship's political officer when the mutiny occurred.

53. *Id.* at 549.

along with Chief Justice Goddard's, extended the categories of possible political offenses by holding that there was no requirement of a political disturbance or uprising when the country from which the offender fled had a totalitarian government.[54]

The most important aspect of the case was its handling of the assumption that Poland would violate its treaty obligations by prosecuting the sailors for a political offense,[55] the assumption often ignored in extradition cases. The court stated that a political offense could emerge either from the evidence in support of the requisition or from the applicant's evidence adduced in answer.[56] This dictum allowed the court to find for the sailors, and presume an illegal intention from Poland's otherwise legal requisition.[57]

The necessary relationship between the offender and a totalitarian state was established in *Kolczynski,* but there remained some doubt as to whether this liberal rule would apply to an offender and a non-totalitarian state. All doubts were answered in a short time with the decision in *Schtraks v. Government of Israel.*[58] In that case, Lord Radcliffe analogized to the use of the term "political" in the same sense as when it was used to modify the words "refugee," "asylum" and "prisoner." This analysis led him to the conclusion that the requesting state must want the fugitive for some other purpose than the enforcement of its penal laws in order to constitute a political prosecution. He further stated that this was the principle that the courts were attempting to express in the earlier cases of *Castioni*[59] and *Meunier*[60] when they required a political uprising or disturbance in the state where the offense was committed. He concluded that the adoption of this liberal view of

54. *Id.* at 549-50.

55. *Id.; see also* State v. O'Rourke [1971] Ir. R. 205, *supra* note 11.

56. *Id.* at 550.

57. For general commentaries on this case see 31 BRIT. Y.B. INT'L L. 430, 435 (1954); Amerasinghe, *The Schtraks Case, Defining Political Offenses and Extradition,* 28 MOD. L. REV. 27, 44 (1965); SHEARER, *supra* note 1, at 172-73; S. SINHA, ASYLUM AND INTERNATIONAL LAW 176 (1971).

58. [1962] 3 All E.R. 529. The applicant was charged with child stealing and perjury in Israel for his part in refusing to return a boy to his parents upon demand some two years after they had left him in his grandfather's care. The applicant's political "connection" was that he was afraid that the boy would not be educated as an orthodox Jew, and that the role of orthodox teaching in the schools was a volatile political issue in Israel at that time.

59. *In re* Castioni, [1891] 1 Q.B. 149.

60. *In re* Meunier [1894] 2 Q.B. 415.

"disturbance" would not drastically depart from the earlier cases so long as there was some political oppostion between the fugitive and the state.[61]

The court ultimately found that the offender's act was related to the political and religious struggle taking place in Israel, but was committed for personal motives and not as a part of any movement and was not committed with the intention of furthering any movement's goals. Lord Radcliffe felt that without this basic political opposition between the fugitive and the state, two competing political groups unassociated with the central government could commit criminal infractions and claim that they were part of a "political disturbance."[62]

The position of the fugitive and the requesting state was further explored in the 1973 House of Lords decision in *Tzu-Tsai Cheng v. Governor of Pentonville Prison.*[63] In a three to two decision, the court held that although an offense could be politically motivated, it would not be considered a political offense unless the act had been directed at the requesting state. Since the United States was the requesting state and the Nationalist Chinese government was the national entity at whom the act was directed it was not a political offense.

Lord Diplock interpreted "political" as requiring the act to be either (1) an attempt to overthrow the government, (2) an attempt to induce it to change one of its policies, or (3) an escape attempt from the country to better accomplish either of the foregoing objectives.[64] In the opinion, Lord Diplock relied on the concept of territoriality in criminal law. He felt that the essence of a criminal offense was the establishment of the state and the offender as the only two participating parties in the transaction. Carrying the argument to its logical conclusion, the term "political offense" would connote the existence of a political conflict between the state and the offender. He was of the opinion that when the political purpose sought is directed toward a third state, the logical nexus ceased, and the offense could not be "political" within the meaning of the phrase.[65]

61. Schtraks v. Government of Israel, [1962] 3 All E.R. 529, 540.

62. *Id.*

63. [1973] 2 All E.R. 204. Cheng, a Taiwanese radical, was convicted in the United States of attempting to murder a leading governmental figure of the Nationalist Chinese government.

64. *Id.* at 209.

65. *Id.*

In addition to advancing this theory of territoriality, a concurring opinion emphasized that it would be unrealistic to believe that any civilized state would support a rule whose effect would be an invitation to murderers to take their best shot and head for the borders. This possible encouragement offered to political criminals seeking refuge in England was more than enough to dissuade the British jurist from supporting such a rule.[66]

It can be observed from the foregoing cases that the English judges exhibited a propensity to freely interpret the "political offence" phrase anew in each case arising under the 1870 Act, thereby resulting in many possible readings of the true state of the law. However, there are some precepts which can be drawn from these cases which will help construct a permanent definition of a political offense. They are as follows:

(1) There must exist a close connection between the crime committed and the political motivation of the actor (*Schtraks*).
(2) The political object sought to be achieved is a limited and specific one, and not one of terroristic qualities (*Meunier*).
(3) The crime must take place in the course of a political struggle (*Castioni*), unless a political struggle is, as a practical matter, not feasible under a totalitarian government. Cases involving a totalitarian government will be examined in the light of a liberal humanitarian policy toward the offender (*Kolczynski*).
(4) The act, even if arising during a political controversy in the state, must be committed with the goal of furthering the movement, and not committed for personal or selfish motivations (*Schtraks*).
(5) The political crime must be directed at the state requesting extradition (*Cheng*).

Backing of Warrants (Republic of Ireland) Act 1965

In 1965, the decision of the House of Lords in *Regina v. Metropolitan Police Commissioners, ex parte Hammond*[67]

66. *Id.* at 223. Lords Simon and Wilberforce joined in a well-reasoned dissent which cited many rules of statutory construction and other sources. An excellent example of how the political offense would change depending upon which side of a bridge the act occurred taxed the majority's rule to an unsatisfactory conclusion. For a critical review of the *Cheng* case see O'Higgins, *Extradition — Offence of a Political Character — Terrorism*, 32 CAMB. L.J. 181 (1973).

67. [1965] A.C. 810.

emphasized the need for a more efficient system concerning the issuance and execution of arrest warrants from the Republic of Ireland. The issue in the case was of a technical nature, but it exposed the fact that the prior system of summarily endorsing warrants between Ireland and Great Britain had remained unchanged since the establishment of the Irish Free State.[68] The Irish Court made a concurrent finding the same year that the practice of the mutual backing of warrants with Great Britain was unconstitutional because a properly endorsed warrant authorized the removal of a fugitive without allowing him the opportunity to seek release under the provisions of the Irish Constitution.[69]

These two independent developments quickly led to the dual promulgation of the Backing of Warrants (Republic of Ireland) Act 1965[70] in Great Britain, and the Extradition Act[71] in the Republic of Ireland. The section of the British Act which relates to the political offense exemption provides as follows:

> 2. Proceedings before magistrates' court (2) . . . Nor shall such an order be made if it is shown . . .
>
> (a) that the offence specified in the warrant is an offence of a political character . . .
> (b) that there are substantial grounds for believing that the person . . . will . . . be prosecuted or detained for another offence, being an offence of a political character. . . .[72]

The only new addition to the standard political offense definition is the language in section 2(2)(b) which allows the magistrate or court to determine whether the fugitive should be granted an exemption from extradition if there appears substantial grounds for believing that he will suffer a prosecution for "another" political offense upon his rendition. This language was interpreted by the House of Lords to include a possible prosecution for an offense not listed in the warrant.[73] Lord

68. For a detailed account of this system see O'Higgins, *Irish Extradition Law and Practice*, 34 BRIT. Y.B. INT'L L. 274 (1958).

69. State (Quinn) v. Ryan [1965] Ir. R. 70.

70. 1965, c. 45.

71. Extradition Act, 1965, No. 17 of 1965. *See* O'Higgins, *The Irish Extradition Act*, 1965, 15 INT'L & COMP. L.Q. 369 (1966).

72. Backing of Warrants (Republic of Ireland) Act, 1965, c. 45.

73. Keane v. Governor of Brixton Prison [1971] 2 W.L.R. 1243, 1248. Keane produced evidence that he had been detained several times in Ireland for political offen-

Pearson's opinion in the *Keane* case upheld the decision of the Queen's Bench Divisional Court in refusing the fugitive's application for a writ of habeas corpus, but rejected the lower court's narrow interpretation of "another offence" to mean only one in substitution for the offense in the warrant, and not an additional one in the future.[74]

However, the Divisional Court was upheld in rejecting Keane's contention that a possible political prosecution should be assumed because the legislature might bar his political activist organization: "It is not enough to show that the applicant if returned to his own country is likely so to conduct himself in the future that he will bring upon himself prosecution or detention for future political offences or alleged political offences."[75]

This holding can be generally regarded as allowing the fugitive to show that the requesting state has the intent to prosecute him for an offense not listed in the warrant. He may show the political nature of the additional offense through his evidence, but the offense must be one which he has committed, and cannot be an act which may perchance be declared an offense in the future.

There has been only one other significant decision construing the Backing of Warrants Act. In the *Littlejohn*[76] case, the Queen's Bench Divisional Court found that an armed bank robbery was not a political offense—even though its ostensible purpose was to obtain funds for Irish Republican Army activities. The court placed significant reliance upon the dicta of Lord Diplock in the *Tzu-Tsai Cheng v. Governor of Pentonville Prison*[77] decision regarding the requisite mental element of the offender when he commits the crime. Lord Widgery ultimately held:

---

ses, and once imprisoned for his political activity. He alleged that he was a member of a new political organization named "Free Ireland," and that he might be arrested at any time if the organization was declared illegal under the Offences Against the State Act, 1939.

74. Lord Parker's approach in the lower court can be found in Regina v. Governor of Brixton Prison, *ex parte* Keane [1970] 3 All E.R. 741, 745.

75. Keane v. Governor of Brixton Prison [1971] 2 W.L.R. at 1248. It must be noted that an affidavit from the Attorney-General of the Republic of Ireland was admitted into evidence, and that it contained an undertaking that Keane would be prosecuted only on charges named in the warrant. This would not be regarded as conclusive in the matter, but was properly admissible before the magistrates' court.

76. Regina v. Governor of Winson Green Prison, Birmingham, *ex parte* Littlejohn [1975] 1 W.L.R. 893.

77. [1973] 2 All E.R. 204.

> Thus one reaches the stage now on the weight of authority, and a considerable weight it is, that an offence may be of a political character, either because the wrongdoer had some direct ulterior motive of a political kind when he committed the offence, or because the requesting state is anxious to obtain possession of the wrongdoer's person in order to punish him for his politics rather than for the simple criminal offence referred to in the extradition proceedings.[78]

The Divisional Court did give more consideration to Littlejohn's claim that the political character of the bank robbery was shown by the transference of his trial to the "special criminal court" in Ireland. This decision reflected the liberal and openminded position of the English Courts as to proving political offenses, but it ultimately held that a trial in the "special criminal court" of Ireland did not constitute the showing of a political offense.[79]

The Fugitive Offenders Act 1967

In 1967 Great Britain enacted a new Fugitive Offenders Act,[80] which provided for a uniform method of extradition between the states of the British Commonwealth. The decision to replace the old Fugitive Offenders Act of 1881,[81] came about as a result of several highly publicized cases which caused political repercussions throughout the Commonwealth. These cases led to the adoption of a general plan of extradition requiring reciprocal legislation by all Commonwealth members.[82]

The relevant provisions of the Fugitive Offenders Act are as follows:

---

78. 1 W.L.R. at 897. The court was able to deal with the question of intent in its abstract sense because Littlejohn had escaped from Ireland after he was extradited there by this same court in 1973. Therefore, the court only examined the new evidence in the case, and did not re-examine their initial determination concerning the evidence of the bank robbery.

79. *Id.* at 901. The applicant did produce an expert witness who generally testified in accordance with this contention, but the Court questioned the competence of the expert to offer an opinion as to the inference that the special criminal courts specialized in trying cases of political offenses because juries were too prejudiced to return fair verdicts. The Court found no evidence to support this position and rejected Littlejohn's contention.

80. 1965, c. 68.

81. 44 & 45 Vict., c. 69. *See* Samuels, *The English Offenders Act,* 1967, 18 U. TORONTO L.J. 198 (1968); O'Higgins, *Reform of Intra-Commonwealth Extradition,* 1966 CRIM. L. REV. 361 (Eng.).

82. SCHEME RELATING TO THE RENDITION OF FUGITIVE OFFENDERS WITHIN THE COMMONWEALTH, CMND. No. 3008 (1966).

> 4. General Restrictions on Return
>
> A person shall not be returned under this Act to a designated Commonwealth country, or committed to or kept in custody for the purposes of such return, if it appears to the Secretary of State, to the court of committal or to the High Court . . . on an application for habeas corpus or for review of the order of committal—
>
> (a) that the offence of which that person is accused or was convicted is an offence of a political character;
>
> (b) that the request for his return (though purporting to be made on account of a relevant offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or
>
> (c) that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.[83]

Subsection (c) adds the only new element to the political offense exemption in British practice. This section employes the vague terminology of "might be prejudiced at his trial" because of his political opinions. The House of Lords in *Fernandez v. Government of Singapore*[84] interpreted this phrase as adopting a lesser burden of persuasion on the fugitive.

In affirming the Divisional Court's interpretation of section 4(1)(c), Lord Diplock stated:

> I do not think that the test of the applicability of paragraph (c) is that the court must be satisfied that it is more likely than not that the fugitive will be detained or restricted if he is returned. A lesser degree of likelihood is, in my view, sufficient; and I would not quarrel with the way in which the test was stated by the magistrate or with the alternative way in which it was expressed by the Divisional Court. "A reasonable chance," "substantial grounds for thinking," "a serious possibility"—I see no significant difference between these various ways . . . .[85]

This holding allows an applicant to prove how the political characteristics of his country would prejudice him at the time of his return and trial. Rather than adopting the requirement that the offender must commit a political offense to be exempt

83. Fugitive Offenders Act, 1967, c. 68, § 4(1).
84. [1971] 1 W.L.R. 987.
85. *Id.* at 994.

from extradition to Commonwealth members, the court held that he needs only to show that his political opinions would tend to prejudice the possibility of receiving a fair trial.[86]

Summarizing the British practice under regional agreements, the Backing of Warrants (Republic of Ireland) Act 1965 adds no new elements to the existing definitions of what constitutes a political offense under the 1870 Act governing international extradition. Court decisions have extended the Act's provisions to a logical point where the fugitive is allowed to prove that he will be politically prosecuted for another political offense in addition to those listed in the formal warrant. The only restrictive judicial construction has been the requirement that the commission of the offense occur at a point in time prior to his habeas corpus hearing. The courts have further recognized that the conduct of Irish authorities towards an extradited fugitive will be examined, but that the "special criminal courts" of Ireland are not per se political courts.

The Fugitive Offenders Act of 1967 has been the subject of only one important judicial decision concerning the political offense exemption. The court extended the concept significantly by allowing the fugitive a lesser burden of proof in showing that his political opinions might prejudice the possibility of receiving a fair trial upon rendition.

In the United States, judicial development of the political offense exemption in international extradition law has not advanced in the progressive manner exhibited in Great Britain. There exists no legislative enactment exempting political offenders from extradition to foreign nations. The entire collection of written law concerning political offenders is to be found in treaties negotiated between the United States and other nations.[87]

The present position of the United States can be traced to the early case of *In re Ezeta,*[88] in which the Salvadorean government attempted to extradite General Ezeta on charges of mur-

86. This lower burden of proof combined with the showing of radical political opinions is a significant liberalization of the political offense exemption. Consider, for example, the various loud political radicals who commit crimes, and later seek refuge and allege that they are unable to receive a fair trial in their homeland.

87. For a complete list of all the bilateral extradition treaties to which the United States is a party, *see* Appendix.

88. 62 F. 972 (N.D. Cal. 1894).

der and robbery. In denying the request for extradition, the court found the crimes to be political offenses because they were committed "during the progress of actual hostilities between the contending forces . . . ."[89] The court cited the English case *In re Castioni,*[90] and adopted the principle that an offense committed during a civil war, insurrection or political commotion was to be considered a political offense.

This holding has been consistently adhered to by the American courts, with the sole exception of dicta in *In re Gonzalez.*[91] In that case, the court did not find that the fugitive committed a political offense, but it did recognize that the *Castioni* rule was intended to be a flexible one.[92] The court also noted that the English law had progressed to the point of eliminating the absolute requirement that the political offense occur in the course of a political uprising. *Ex parte Kolczynski* was interpreted as embodying this principle,[93] and also the closely related rule which states that the political offense exception can be applied with greater liberality when the requesting state is a totalitarian regime.[94]

One of the most troublesome aspects of the American position regarding political offenses is the liberal application of the political-incidence test developed under British law.[95] It appears that American courts will seize upon the slightest connection between the crime and political act or objective in order to find a political offense.[96] This liberal tenet is laudable from a humanitarian standpoint, but can result in grave abuse as the case of *Artukovic v. Boyle*[97] attests. That case concerned the Yugoslavian Government's request[98] to extradite a former

89. *Id.* at 997.

90. [1891] 1 Q.B. 149.

91. *In re* Gonzalez, 217 F. Supp. 717 (S.D.N.Y. 1963).

92. *Id.* at 721, n. 9, *quoting In re* Castioni [1891] 1 Q.B. 149, 155: "I do not think it is necessary or desirable that we should attempt to put into language in the shape of an exhaustive definition exactly . . . every state of things which might bring a particular case within the description of an offence of a political character."

93. 217 F.2d at 721 n.9, *interpreting Ex parte* Kolczynski, [1955] 1 Q.B. 540.

94. *Id.*

95. *See* note 45 and accompanying text, *supra.*

96. Neumann, *Neutral States and the Extradition of War Criminals,* 45 AM. J. INT'L L. 495, 503 (1951).

97. 140 F. Supp. 245 (S.D. Cal. 1956), *aff'd sub nom.* Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *vacated and remanded,* 355 U.S. 393 (1958), *surrender denied on remand sub nom.* United States v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959). The case is noted in 43 MINN. L. REV. 587 (1959).

98. The request was made pursuant to Article VI of the Treaty with Servia. Treaty

official of the Croation Government who was charged with the commission of war crimes including the execution of 1,293 named and 200,000 unnamed persons.

The Court of Appeals for the Ninth Circuit considered whether the district court was correct in its holding that the offenses in the complaint and indictment were clearly of a political character. Surprisingly, the appellate court affirmed, stating that war crimes were not necessarily excluded from the classification of political offenses.[99] Many references were made to various authorities and United Nations General Assembly resolutions for the proposition that war criminals should not be exempt from extradition, but the court dismissed these by stating that they had insufficient force as law, and suggested that nations should change the terms of their treaties in order to accomplish this purpose.[100] The case was remanded to the district court for a full hearing on the political offense issue, and the crimes were again found to be political in nature.

The other major problem with the United States position is that it fails to take into account procedurally the fact that a "relative" political offense usually arises from facts which can be viewed in a number of ways. Since habeas corpus review of the findings of the extradition magistrate is limited to the question of whether the evidence showed a reasonable ground to believe the accused guilty—the reviewing court is generally limited to interpreting the law and its application to the facts.[101]

With Servia on Extradition, Oct. 25, 1901, art. VI, 32 Stat. 1890, T.S. No. 406 (effective June 12, 1902). The treaty with Servia remains in effect between the United States and Yugoslavia. Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir. 1954), *cert. denied*, 348 U.S. 818, *rehearing denied*, 348 U.S. 889 (1954).

99. Karadzole v. Artukovic, 247 F.2d at 204.

100. *Id.*

101. 18 U.S.C. § 3184 (1968) states:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered.

See Garcia-Guillern v. United States, 450 F.2d 1189 (5th Cir.), *cert. denied* 405 U.S.

In summary, the United States judicial development of the political offense exemption has been non-existent since the early decision of *In re Ezeta.*[102] Despite the dicta in *Gonzalez* acknowledging the progressive English position, the only extradition decision subsequent to that case followed the rather short list of decisions strictly adhering to the political-incidence test enunciated in *Castioni.*[103]

Both the limited scope of review in habeas corpus appeals and the notion that the slightest connection between the crime and political objective will suffice, have combined to distort the original political-incidence test. The present status of the rule placed undue emphasis on the necessity of a political uprising or disturbance, and far too little emphasis on the political motivation of the individual. It is hoped that when the American judiciary confronts a case involving a totalitarian government requesting an offender under facts similar to *Kolczynski,* it will possess the foresight to redefine the muddled principle of *Artukovic* in a progressive manner.[104]

III. THE IRISH POSITION

The Irish Extradition Act 1965

The Irish Extradition Act 1965[105] was enacted largely because a total breakdown occurred with Great Britain regarding the extradition of fugitives.[106] The Irish Supreme Court held that section 29 of the Petty Sessions (Ireland) Act 1851 was unconstitutional to the extent that it authorized the extradition of a fugitive without affording him an opportunity to challenge his arrest and detention.[107] The coincidence of the *State*

989 (1971); M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 400 (1974).

102. 62 F. 972 (N.D. Cal. 1894).

103. Garcia-Guillern v. United States, 450 F.2d at 1192, held that "A political offense . . . must involve an 'uprising' or some other violent political disturbance." The following cases are not discussed in the text, but follow the *Ezeta* and *Castioni* rule of requiring a political uprising and a political objective connected with the criminal act. Jiminez v. Aristequieta, 311 F.2d 547 (5th Cir. 1962), *vacated as moot sub nom.* Aristequieta v. First National Bank, 375 U.S. 48 (1963); Ramos v. Diaz, 179 F. Supp. 459 (S.D. Fla. 1959); Ornelas v. Ruiz, 161 U.S. 502 (1896).

104. For criticisms of the American position see SHEARER, *supra* note 1, at 178-81; Garcia-Mora, *supra* note 7, at 1244-49; Green, *The Nature of Political Offences,* 3 SOL. Q. 213, 231 (1964).

105. No. 17 of 1965.

106. O'Higgins, *The Irish Extradition Act, 1965,* 15 INT'L & COMP. L.Q. 369 (1966).

107. *Id.* at 372.

(Quinn) v. Ryan[108] with *Metropolitan Police Commissioner v. Hammond,*[109] an English decision, exposed a problem that demanded the attention of both Parliaments.

The Irish Act was heavily influenced by the European Convention on Extradition,[110] which Ireland had ratified. The Convention's influence was examined in detail by the Irish Supreme Court in the landmark decision of *Bourke v. Attorney General.*[111]

The issue in the *Bourke* case was whether a "political offence or an offence connected with a political offence"[112] had been committed by Bourke. Bourke had assisted Blake, a Soviet spy, to escape from an English prison where they were both serving terms. Bourke's counsel contended that the offense of aiding in the escape became a political offense, because Blake had been imprisoned for a political offense. In the alternative, he argued that Bourke's offense was connected with a political offense. Counsel for Bourke relied on the following provision:

> 50. (1) A person arrested under this Part shall be released if . . .
>
> (2)(2) the offence to which the warrant relates is . . .
> (i) a political offence or an offence connected with a political offence . . . .[113]

Bourke maintained that he was never a communist, but had assisted in the escape because he felt compassion for Blake's "savage" sentence of forty-two years, and because their ideas of a "just" society were identical.[114] Bourke further claimed that he did not wish to aid the Soviet Union, but rather aid Blake, whom he considered to be a political prisoner.

In the Court's exhaustive analysis of whether Bourke's offense constituted an "offence connected with a political off-

108. [1965] Ir. R. 70.

109. [1964] 3 W.L.R. 1.

110. 395 U.N.T.S. 273. For commentaries see Honig, *Extradition by Multilateral Convention,* 5 INT'L & COMP. L.Q. 549 (1956); Note, *European Convention on Extradition,* 9 INT'L & COMP. L.Q. 491 (1960).

111. 107 Ir. L.T.R. 33 (1973).

112. Irish Extradition Act, 1965, No. 17 of 1965, § 50(2)(a)(i).

113. *Id.* This section is included in Part III of the Extradition Act and is applied specifically between Ireland and the United Kingdom. Part II encompasses those provisions which deal with extradition to and from all countries except the United Kingdom. Part II's counterpart provision is found in section 11 of the Act and is a reproduction of Article 3 of the European convention.

114. Bourke v. Attorney General, 107 Ir. L.T.R. at 42.

ence," the court placed significant reliance on the *travaux preparatoires* for the European Convention on Extradition.[115] The final draft proposed for Article Three of the European Convention defined "connected offences" as those having a political character of their own. A mere connection would not suffice. It was also required that the offense be "committed with a view to preparing for, to ensuring the commission of, to concealing or to preventing such a political act."[116] However, the parties to the European Convention rejected this language limiting the connecting offense. Chief Justice O'Daly interpreted this action as follows: "The effect of the omission of the limitation is to widen the character of the connection which satisfies the requirements of article 3. The connection need not necessarily be of a political character."[117]

The Chief Justice stated that he would have reached this decision without reference to the *travaux preparatoires* because the Irish statute did not require that the connecting offense be political. The logical conclusion is that the Oireachtas allowed the courts to define the connecting offense in the "widest possible manner."[118]

The Supreme Court held in a four-to-one decision that Blake's escape was a political offense, and Bourke's assistance in that escape was an offense connected with a political offense. The crucial evidence that made Blake's escape "political" was his immediate return to Moscow to further serve the Soviet cause.[119] Additionally, the Court considered a different offense in connection with the escape. If the necessary connection with the political offense of escaping had not been demonstrated, the Court was prepared to decide whether the escaping was connected with Blake's original offense of spying. The Court noted that Bourke could be an accessory after the fact, but declined to decide the issue.[120]

In *State (Magee) v. O'Rourke,*[121] the applicant was permit-

115. *Id.* at 42-46.

116. *Id.* at 44.

117. *Id.* at 45-46.

118. *Id.*

119. *Id.* at 47. The Court commented that the President of the High Court should have admitted evidence of a conversation between Blake and the K.G.B. which Bourke overheard in Moscow. The Court considered Blake's activities after his escape important in determining whether his escape was a political offense.

120. *Id.*

121. [1971] Ir. R. 205.

ted to show "substantial reasons" that he would be prosecuted for a political offense, or an offense connected with a political offense, if he were returned to Northern Ireland. Magee had been arrested in Ireland on a warrant listing charges of housebreaking, using a motor vehicle without insurance, malicious damage to property and assault on a police officer.

Magee testified that on three separate occasions he had been arrested or detained in Northern Ireland for questioning in regard to a raid on a certain military barracks. A large quantity of arms and explosives had been stolen in the raid, and the police considered it to be the work of the I.R.A. He testified that the police considered him a prime suspect because of certain secret information the raiders possessed which only Magee could have known. Magee feared that he would be prosecuted for participation in the raid because of the discovery of certain photographs which were secretly taken out of the barracks by a person in Magee's company. After being warned of possible self-incrimination, Magee declined to answer a straightforward question regarding his participation in the raid.

The Court held that Magee had confessed to being involved in the preparation of the raid even though he refused to admit any actual participation because of fear of incrimination. The opinions of both Chief Justice O'Dalaigh and Justice Budd[122] emphasize that the respondent declined the opportunity to present evidence contrary to Magee's. The majority held that there was no reason to reject Magee's evidence when absolutely nothing was shown to the contrary. A well-reasoned dissent by Justice Fitzgerald, joined by Justice Teevan, argued that the controlling factor should be whether there was an actual probability of political prosecution and not whether the defendant could conjure up fears of prosecution. Fitzgerald further stated:

> The Act of 1965 was passed in this country as a counterpart to a corresponding statute in Britain in the same year. The obvious purpose of both Acts was to facilitate the extradition of persons charged with normal criminal offences from one country to the other, and that it should not be resorted to by a requesting country in respect of political, military or fiscal offences. Unless and until statutes are abused by a requesting country, I consider that it should be assumed that

122. *Id.* at 211 and 213 respectively.

> it will be properly used. On extradition subsequent to a decision of the High Court or the Supreme Court in this country, I am not prepared to hold that the requesting country is likely to be guilty of a breach of faith by prosecuting or detaining the alleged offender for a political offence. I would allow the appeal.[123]

This dissent correctly identifies the presumption that another nation will not violate her treaty commitments.[124]

Magee accomplished no small feat. He presented a case against himself, and convinced the Irish Supreme Court through oral testimony and two affidavits that Northern Ireland would prosecute him for raiding the military barracks. It is even more of an accomplishment in light of the fact that all four offenses in his warrant were prima facie non-political and ordinary crimes.

This case can be analyzed in one of three ways. First, the dissent could be correct in their presumption that countries will not violate treaty commitments. Unless Magee overcame that presumption the majority opinion would be erroneous. Second, the majority could be following a principle similar to *Keane,*[125] by allowing a great deal of leeway in handling cases on an individual basis. Finally, the case may be the result of a dreadfully poor presentation by the respondent. The Court strongly intimated that it felt compelled to accept the evidence presented, since the other side refused to produce contrary evidence and failed to discredit the prior evidence. The case could have had a substantially different result if the respondent had met his burden of proof.

The *O'Rourke* decision, coupled with the increasing terrorism of the seventies, prompted the leaders of Ireland and Great Britain to convene a conference at Sunningdale. The result of that conference was a joint communique which stated that their mutual goal was to bring to trial all persons committing violent crimes in Ireland. The parties were particularly careful to word this principle to include persons who were acting through political motivation.

Multilateral Treaties

The astounding increase in the number of aircraft hijack-

123. *Id.* at 216.
124. Blaghd, *The Extradition Position Part VIII,* 107 Ir. L.T.R. 301, 312 (1973).
125. *In re* Castioni, 1 Q.B. at 159.

ings and offenses against diplomats has led to three conventions concerning the unlawful seizures of aircraft and one convention relating to the protection of diplomatic personnel.[126] Both the United States and Great Britain have been parties to the three major conventions dealing with aircraft hijacking. On the other hand, the Republic of Ireland has chosen not to sign the conventions.

These conventions produced substantial changes in the international practice of granting asylum to political offenders. A brief review of the three conventions will outline the major changes, and also pinpoint some problems which have not been resolved.

The Tokyo Convention

Prior to the adoption of the Tokyo Convention on Aviation: Offences and Certain Other Acts Committed on Board Aircraft,[127] there had been no uniform set of rules regulating the disposition of criminals who committed offenses on board aircraft.[128] The Tokyo Convention was the initial undertaking of the world community to establish a uniform system of dealing with offenses committed in the air.

However, the Tokyo Convention did not directly address the issue of punishing the hijacker or requiring his extradition.[129] Because of the failure to mandate either a compulsory

126. *See generally* Evans, *Aircraft Hijacking: What Is To Be Done?* 66 AM. J. INT'L L. 819 (1972). The author relates that the traditional motivation of seeking political asylum remains a frequent cause of many aircraft hijackings, despite the fact that more of the incidents are being used for extortion schemes, and as catalysts in increasing tensions between certain states. A lengthy list of crimes committed against diplomatic personnel during the year 1970-71 appears in Note, 14 VA. J. INT'L L. 703, 704 n.5 (1974).

127. September 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219 (effective December 4, 1969) [hereinafter cited as the Tokyo Convention]. For a complete list of signatory parties see 1976 United States Treaties in Force 332.

128. Fitzgerald, *The Development of International Rules Concerning Offenses and Certain Other Acts Committed on Board Aircraft,* 1 CAN. YRBK. INT'L L. 230 (1963); Horlick, *The Developing Law of Aircraft Hijacking,* 12 HARV. INT'L L.J. 33 (1971).

129. Article 11 states:

> 1. When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.
>
> 2. In the cases contemplated in the preceding paragraph, the Contracting State in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its

punishment or extradition, the determination of criminality was left solely to the host state. As a result, aircraft hijackings did not decrease, and further measures were needed.[130]

The Hague Convention

The Hague Convention for Suppression of the Unlawful Seizure of Aircraft was adopted in December of 1970.[131] This treaty defined aircraft hijacking as an offense,[132] and required each contracting state to provide for "severe penalties."[133]

The Hague Convention requires that the offender either be extradited or prosecuted by the host country.[134] The words "without exception whatsoever" exclude any discretion by the host country in deciding whether the case should be referred to prosecuting authorities. Although it is unclear whether the non-discretionary obligation to prosecute implies a concurrent obligation to disregard the offender's political motivation, the United States interprets this provision as forbidding any inquiry into the motivation of the offender.[135]

---

cargo to the persons lawfully entitled to possession.

The Tokyo Convention did not provide any specific punishment for hijackers, but stressed the principle of cooperation between the contracting states for the purpose of restoring control to the commander and allowing the flight to continue to its destination.

130. *See Hearings on Resolutions Concerning Aircraft Hijacking and Related Matters Before the House Comm. on Foreign Affairs,* 91st Cong., 2nd Sess., 6 (1970); Mendelsohn, *In-flight Crime: The International and Domestic Picture under the Tokyo Convention,* 53 VA. L. REV. 509, 513 (1967).

131. December 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192 (effective October 14, 1971) [hereinafter cited as the Hague Convention]. For a list of the 76 states that have ratified the Convention see 1976 UNITED STATES TREATIES IN FORCE 332.

132. Article 1 of the Convention states that:

Any person who on board an aircraft in flight:

(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or

(b) is an accomplice of a person who performs or attempts to perform any such act

commits an offence. . . .

133. *Id.* art. 2.

134. Article 7 provides as follows:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

135. ICAO Doc. 8979-LC/165-I at 9; 60 DEP'T STATE BULL. 212, 213 (1969).

Article 8 of the Hague Convention contains the general extradition scheme, and, as such, represents a carefully worded compromise between the parties to the Convention.[136] The provisions of the article automatically include aircraft hijacking as a scheduled offense in existing extradition treaties between contracting states.[137]

There is nothing in the Convention, however, which prevents the host country from declaring that the hijacker is a political offender and not subject to the extradition process. Furthermore, the host nation may lawfully refuse extradition, if municipal authorities will prosecute the hijacker in accord with Article 7's mandate.

The article further provides that if a nation requires an existing treaty with another nation to honor a request of extradition, it may honor such a request on the basis of the terms of the Hague Convention.[138] In this respect, the Convention can be regarded as an "optimal" multilateral extradition treaty for those nations which require an extradition treaty, but for some reason, have not concluded one with the other nation in interest.

Unfortunately, the Convention poses a multi-jurisdictional problem for the host state in that several states may move to extradite the offender under the provisions of Articles 8(4) and 4(1).[139] Since the Convention is silent as to priority in extradi-

136. Abramovsky, *Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft — Part I: The Hague Convention*, 13 COLUM. J. TRANSNAT'L L. 381, 402 (1974). The United States, Soviet Union and its Eastern European allies were the chief proponents of a mandatory extradition scheme. In contrast, the Western European and Arab nations opposed any mandatory scheme. The considerations of the various blocs were entirely different, but generally depended on the previous activity of hijackers in a particular country and the traditional political concerns of the communist block nations.

137. Article 8 (1) provides that:

> The offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States. Contracting States undertake to include the offence as an extraditable offence in every extradition treaty to be concluded between them.

138. Article 8 (2) states:

> If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested state.

139. The pertinent sections are as follows:

> Article 8(4). The offence shall be treated, for the purpose of extradition

tion, the host country can select the recipient country from the several who apply for the hijacker's return. The grounds for such a choice could run the gamut from political to humanitarian—depending upon each requesting nation's laws and probable penalties.

In conclusion, the Hague Convention does present a necessary and worthwhile step towards uniformity in international hijacking laws. However, it does not require the extradition of a hijacker to another nation. Instead, it allows an election by the host country either to extradite or to refer the case to proper authorities for prosecution. Therefore, the political offense exemption remains a viable defense to extradition under the Hague Convention. Moreover, a practical examination of the world political atmosphere would suggest that a mandatory extradition scheme would result in only a small number of states ratifying the Convention.[140] It is undoubtedly wiser to narrow the gap gradually in the nations' treatment of politically motivated hijackers, rather than risk the permanent establishment of several havens for hijackers. Mandatory extradition could thus hinder the creation of a "common law of extradition," and erect obstacles to the ultimate goal of a uniform international practice.[141]

---

between Contracting States, as if it had been committed not only in the place in which it occurred, but also in the territories of the states required to establish their jurisdiction in accordance with Article 4, paragraph 1.

Article 4(1). Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases:

(a) When the offence is committed on board an aircraft registered in that state;

(b) When the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;

(c) When the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business, or, if the lessee has no such place of business, his permanent residence, in that state.

140. Abramovsky, *supra* note 136, at 404-05.

141. The Montreal Convention for Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 23, 1971, 24 U.S.T. 564, T.I.A.S. No.7570 (effective January 26, 1973) has been ratified by both Great Britain and the United States. The Montreal Convention has an extradition scheme identical to the Hague Convention, but includes a list of offenses which are defined to be acts which unlawfully interfere with the safety of civil aviation. Such acts include those which damage or destroy the aircraft, the communication of false information endangering safety, and generally, any act of violence against a person on board an aircraft that is likely to endanger its safety. *See* Abramovsky, *Multilateral Conventions for the Suppression of Unlawful*

Problems Under the Refugee Convention

The United States and Great Britain are signatories to the Protocol Relating to the Status of Refugees.[142] This Refugee Protocol was taken from the older Refugee Convention, which contained the following provisions on the return of refugees to nations where they would be prosecuted:

> Prohibition of Expulsion or Return
> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his . . . political opinion.
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[143]

The obligation clearly undertaken by the United States and Great Britain under the above article is not to return (or extradite) one who would be regarded as a political offender. A conflict arises when the duty not to extradite a political offender under the Refugee Convention is contrasted against the obligation to extradite or refer for prosecution all aircraft hijackers under the Hague Convention.[144]

The ultimate determination of the conflict will depend, in large measure, on Article 1(F) of the Refugee Convention. That article states that a refugee may not be an actor who: (a) commits a crime against peace or humanity, (b) commits an act contrary to the principles and purposes of the United Nations, or (c) commits a nonpolitical crime outside the state of asylum. By definition, it seems clear that aircraft hijacking should not be considered a crime against peace or humanity,[145] or a crime

---

Seizure and Interference with Aircraft — Part II: The Montreal Convention, 14 COLUM. J. TRANSNAT'L L. 268, 296 (1975).

142. 19 U.S.T. 6225, T.I.A.S. No. 6577 [hereinafter cited as the Refugee Protocol]. The Refugee Protocol was taken to the Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 [hereinafter cited as the Refugee Convention]. The United States, Great Britain and Ireland are all parties to the Refugee Convention.

143. Refugee Convention, art. 33, para. 1.

144. Bassiouni, *supra* note 9, at 228.

145. Comment, *Skyjacking and Refugees: The Effect of the Hague Convention Upon Asylum*, 16 HARV. INT'L L.J. 93, 103 (1975).

against the purposes and principles of the United Nations.[146] However, it is probable that the hijacker committed a nonpolitical crime outside the state of asylum, and hence, could not be classified as a refugee.[147] Undoubtedly, a hijacker would violate several laws of civil aviation in the nation in which he hijacked the aircraft. If the controlling factor is the commission of a nonpolitical crime, it seems that only those hijackers who appropriated the aircraft for the sole purpose of escaping political persecution would qualify as "refugees" under the Convention.[148]

A problem which further clouds the obligations of the United States and Great Britain is the provision of the Hague Convention which requires that all contracting states use the same considerations in making their decision to prosecute as are employed with regard to any ordinary offense of a serious nature.[149] The provision clearly does not attempt to recommend light sentences for hijackers and, indeed, the drafting history of that particular section leads one to believe that the United States' interpretation of the article mandates "severe" punishment for hijackers.[150] Thus, it is apparent that treaty obligations requiring "severe" penalties for hijackers, when compared with other treaty provisions requiring that refugees or political offenders be granted asylum, present at least *prima facie*, conflicting goals for the United States and Great Britain.

Both Great Britain's vast reservoir of judicial decisions and her traditional posture of sympathy regarding political offenders will aid in the resolution of the conflicting duties under the Hague and Refugee Conventions. Recourse will undoubtedly be made to the *Kolczynski*[151] decision, and the obligations under

146. *Id.*

147. Refugee Convention, art. 1, para. F(b).

148. The International Law Association passed a resolution which supported the proposition that the hijacker should be granted asylum from political persecution by the host state, but should be tried and punished for offenses committed against air traffic regulations. INTERNATIONAL LAW ASSOCIATION, 55TH CONFERENCE, New York, at 34 (1972).

149. Bassiouni, *supra* note 9, at 228.

150. Comment, *Skyjacking and Refugees: The Effect of Hague Convention Upon Asylum*, 16 HARV. INT'L L.J. at 106-07 n. 94. The United States air piracy statute provides for a minimum sentence of twenty years imprisonment for the commission or attempted commission of aircraft hijacking, and a mandatory life imprisonment or death sentence if a death results from the commission or attempt, 49 U.S.C.A. § 1472(i)(n) (1974). *See* Comment, 16 So. TEX. L.J. 356 (1975).

151. See note 52 *supra* and accompanying text.

the Refugee Convention will predominate. *Kolczynski* will control all situations where the hijacking was committed in order to escape the political persecution of a totalitarian government. Asylum will surely be granted in such cases, with only the barest minimum (if any) punishment imposed.[152]

On the other hand, the United States will most certainly have a difficult time reconciling its conflicting obligations. The American judiciary has only paid lip-service to the principles set forth in *Kolczynski*.[153] The posture of various American delegates at conferences considering aircraft hijacking leads one to believe that political motivation will not be considered as a mitigating factor. It is unreasonable to believe that the United States will not extradite or severely punish a politically motivated hijacker because of the Refugee Convention's provisions. Since the American judiciary has not adopted the rule of *Kolczynski* in cases of ordinary political offenses, it is unlikely that a surge of humanitarianism will extend that principle to aircraft hijacking—an offense considered to be most serious by the often-victimized government of the United States.

The Diplomatic Convention

In response to the growing number of terrorist attacks against diplomats, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of Crimes against Diplomatic Agents and Other Internationally Protected Persons.[154] The Diplomatic Convention sought to deter terrorist acts against diplomats by defining "internationally protected persons"[155] and specifying certain crimes which would be subject to severe punishment or extradition.[156]

The draft articles to the Diplomatic Convention provided

152. *See In re* Kavic, Bjelanovic and Arsenijevic (1952) Ann. Dig. 371 (No. 80) (Fed. Trib., Switzerland). The case concerned an aircraft hijacking from a totalitarian nation, and expressed the principle that the necessity of preserving the political freedom and lives of the hijackers was sufficient to excuse the non-serious injuries committed against the crew and aircraft. This case is consistent with the reasoning in *Kolczynski*.

153. *In re* Gonzalez, 217 F. Supp. 717, 721 (S.D. N.Y. 1963).

154. Opened for signature December 14, 1973, G.A. Res. 3166, U.N. Doc. A/Res/3166 (XXVIII) (1974). Ireland, Great Britain and the United States are signatories to the Vienna Convention on Diplomatic Relations, April 18, 1961, 500 U.N.T.S. 95 (effective December 13, 1972). The text can be found at 55 AM. J. INT'L L. 1064 (1961) [hereinafter referred to as Diplomatic Convention].

155. Diplomatic Convention, art. 1.

156. *Id.* art. 2.

that the listed acts were to be considered crimes "regardless of [the] motive" of the accused.[157] Unfortunately, this language was deleted in the Convention's final draft. The deletion of this phrase eroded one of the main thrusts of the Convention, namely, to effectively prohibit the defense of political motivation by the criminal. The host state's municipal law will now control the determination of a possible political offense.

The section of the Diplomatic Convention which mandates that an accused must be extradited or referred to the proper authorities for prosecution is patterned after its counterpart provisions in the Hague and Montreal Conventions.[158] The provisions of the Convention which require referral of the case to the proper authorities do not create any obligation to punish the accused or even to conduct a trial. The state's obligation is satisfied when it has submitted the case to the proper authorities. The decision of the authorities is limited only by the requirement that it be made in good faith.[159]

The extradition scheme of the Diplomatic Convention contains the same provisions as the Hague and Montreal Conventions. The slight semantic differences appearing in the Diplomatic Convention merely reflect the fact that the crimes listed in the Diplomatic Convention have been commonly regarded as criminal offenses by all nations. On the other hand, aircraft hijacking and related offenses have not customarily been included in bilateral extradition treaties.[160]

The most interesting aspect of the Convention was the inclusion of an article which recognized the right of asylum between countries which have concluded a prior treaty on the subject:

---

157. The International Law Commission's report provided as follows: "[T]he expression 'regardless of motive' restates the universally accepted legal principle that it is [the] intent to commit the act, and not the reason that led to its commission that is the governing factor." Int'l L. Comm'n, Report 27 U.N. G.A.O.R., Supp. 10, U.N. Doc. A/8710/Rev. 1 (1972). *Reprinted in* Kearney, *Report on the Protection and Inviolability of Diplomatic Agents* (1972) 2 Y.B. Int'l L. Comm'n 316, U.N. Doc. A/CN.4/SER.A/1972/Add.1 (1972).

158. Article 7 of the Diplomatic Convention is very similar to Article 7 of the Hague Convention, which is identical to Article 7 of the Montreal Convention. The slight semantic changes are considered to be of no practical effect.

159. Int'l L. Comm'n. Report, 27 U.N. G.A.O.R., Supp. 10 at 97, U.N. Doc. A/8710/Rev. 1 (1972). *See also* the justifications given for the identical provisions in the Hague Convention. G. White, *The Hague Convention for the Suppression of Unlawful Seizure of Aircraft,* 6 REV. INT'L COMM'N JURISTS 42 (1971).

160. Quentin-Baxter, *Agenda Discussion* (1972) 1 Y.B. Int'l L. Comm'n 222, U.N. Doc. A/CN.4/SER.A/(1972).

> The provisions of this Convention shall not affect the application of the Treaties on Asylum, in force at the date of the adoption of this Convention, as between the States which are parties to those Treaties; but a State Party to this Convention may not invoke those Treaties with respect to another State Party to this Convention which is not a party to those Treaties.[161]

This provision was included in the Convention to gain approval from Latin American countries who were parties to many such treaties.[162] However, its application is specifically limited to the situation where two states have an asylum treaty in force. The right of asylum may not be invoked against a state not a party to an asylum treaty. The non-party state may hold the other state to its obligations to extradite or to refer for prosecution.[163]

The Diplomatic Convention follows the lead of the Tokyo, Hague and Montreal Conventions in that it leaves so many loopholes regarding the recognition of political offenses that it undermines the very purpose of the Convention. Generally, the sole duty of the host nation is to either extradite the offender or refer his case to the proper authorities for prosecution. If the case is referred to municipal authorities for action, their good faith determination as to his political offender status is conclusive.

This situation is especially troubling when one considers the usual motivations for committing criminal acts against diplomats. Usually such crimes are perpetrated because of the polit-

---

161. Diplomatic Convention, art. 12.

162. The Bolivian delegation proposed the wording for Article 12. U.N. Doc. A/C.6/L.943 (1973). He was strongly supported by eleven Latin American delegations who had previously proposed an alternative approach similar to the final Article 12 adopted. U.N. Doc.A/C.6/L.928 (1973).

163. Statement by United States Ambassador W. Tapley Bennett, Jr., Acting United States Representative, in Plenary, December 14, 1973. Press release USUN-134(73) December 14, 1973:

> The article states that this Convention shall not affect the application of treaties on asylum in force as between Parties to those treaties *inter se.* That is to say, even if the alleged offender is present on the territory of one Party to such a treaty and the State on the territory of which the crime has taken place is also a Party to such a treaty, if the internationally protected person attacked exercised his functions on behalf of a State not Party to such a treaty or the alleged offender was a national of a State not Party to such a treaty, the State where the alleged offender is present may not invoke that treaty with respect to the non-Party State. Thus, the non-Party State can hold the State where the alleged offender is present or its obligations under Article 7 and may, if it wishes, request extradition under Article 8.

ical persuasion which the diplomat represents in the eyes of the terrorist or political offender. This Convention is a necessary first step, but actually accomplishes nothing in those nations which maintain the position that political offenses can be committed even in the most brutal of circumstances.[164]

A meaningful second step can be the recognition that any acts of violence committed on "internationally protected persons" may not be regarded as political offenses. Whether it is justified under a doctrine of proportionality or through recourse to basic humanitarian values, the principle is both logical and necessary. Indeed, a "protected" person should not be stripped of his basic human right of life because of the political motivation or intent of his assailant. In no case should political murder or torture be excused on the basis that its commission was politically motivated.[165]

IV. Recent Developments: Great Britain and Ireland

The Law Enforcement Commission and Reciprocal Legislation

In May, 1974 the Report of the Law Enforcement Commission[166] was presented to Parliament by the Secretary of State for Northern Ireland. The Commission's main objective was to determine the most effective method of bringing fugitive political offenders to trial. The task of the Commission was difficult since two separate legal systems were involved, and because the necessary compromise would be acceptable only if limited to those areas directly affected by the problem. Therefore, it was decided that only fugitive political offenders and a limited range of specified offenses would be the subject of proposals in the Report.[167]

Four different procedures were considered by the Commission in its attempt to formulate a solution to the problem: (1) the all-Ireland court method, (2) the extradition method, (3) the extraterritorial method, and (4) the mixed courts method.

164. See the discussion of the doctrine of proportionality at note 10 *supra.*

165. The inclusion of the Belgian or *attentat* clause would satisfactorily accomplish this purpose by excluding the offenses of murder and attempted murder of a head of government or similar persons from being classified as political offenses. *See Harvard Research, supra* note 2 at 114; Oppenheim, *supra* note 16, at 709; M. Bassiouni, International Extradition and World Public Order 409-10 (1974); M. Garcia-Mora, International Law and Asylum as a Human Right 82-86 (1956).

166. Law Enforcement Commission, Cmnd. No. 5627 (1974) [hereinafter referred to as "Report"].

167. *Id.* at 1.

The all-Ireland court method contemplated the creation of a uniform code of substantive law and procedure, and the establishment of a new and separate court to deal with political fugitives and political criminals. The court would have jurisdiction over the entire island and all political crimes committed thereon. The Commission considered the all-Ireland court proposal to be attractive because of the uniformity it would bring to the problem. However, the idea of calling a referendum to set up an amendment to the Constitution of Ireland was thought to be too time-consuming for the problem at hand. Hence, the Commission did not urge its adoption.[168]

The extradition method was heavily debated in the report with the British delegates favoring this method, and the Irish delegates opposing it.[169] Because of their adamant position on the issue, the Irish delegates would not recommend extradition under any circumstances. As a result, the Commission could make no recommendation as to the merits of the proposal.[170]

The extraterritorial method consisted of each legislature conferring jurisdiction upon its domestic courts to try certain offenses which were committed in the other part of Ireland.[171] The underlying principle of such legislation was that an offense committed in one part of Ireland would also be considered an offense in the other part. The Commission further included a provision that a fugitive had the right to choose to be returned to the part of Ireland where his offense had been committed.

The most important factor considered in discussing the extraterritorial method was the feasibility of securing witnesses. It was agreed that compelling a witness to cross the border and give evidence was unacceptable. The more practical system of empowering the court to request that a witness give evidence "on a commission in the presence of the members of the court by a High Court judge of the jurisdiction of the place where the offense was committed," was adopted.[172] The trial court would retain the right to decide whether evidence should be taken on commission, and if so, whether it should be admissible upon trial. The accused would retain the right to be present at the

168. *Id.* at 3.

169. *Id.* at 14-40. *See also* McCall-Smith & Magee *supra* note 5, at 211 where the Irish reluctance was described as being a more fundamental political objection.

170. Report, *supra* note 166, at 41.

171. *Id.* at 7.

172. *Id.* at 8.

taking of such evidence on commission, and would be immune from arrest or charge in that jurisdiction while exercising his attendance right.

The Commission felt that the extraterritorial method could be introduced quickly and solve the pressing problem. The efficiency of such a method would be further increased if both parties undertook to create reciprocal legislation and administrative regulations designed to encourage potential witnesses to attend trial in the other part of Ireland.[173]

A variation of the extraterritorial method was the mixed courts proposal. The main difference was that one or two judges from the jurisdiction of the offense would sit as members of the trial court in the other jurisdiction.[174] The proposal had the dual benefits of boosting public confidence in the mixed courts system, and of creating an appropriate body to try violent offenses which are, in effect, committed against the entire island. However, the Commission rejected this proposal because of problems of efficiency, potential controversy, conflicts in the oaths of judges, and a general ignorance of the other jurisdiction's law and procedure. Initially, the proposal was rejected as having no legal or procedural advantage over the existing domestic courts.[175]

The Commission finally concluded that the extraterritorial method contained no legal objections, and the delegates who had initially favored the extradition method endorsed the extraterritorial method as the next best choice. Since the Irish delegates favored this method, a consensus was reached that it be adopted.

The scheduled offenses[176] listed in the report include the crimes of murder, manslaughter, kidnapping, false imprisonment and hijacking aircraft or other vehicles. Also listed are (1) causing or attempting to cause an explosion; (2) malicious damages to property; (3) possessing a firearm with criminal intent or under suspicious circumstances;[177] (4) robbery or aggravated burglary; (5) escape and prison rescue; (6) inciting, aiding, or conspiring to commit a scheduled offense; and (7)

173. *Id.* at 10.
174. *Id.* at 11.
175. *Id.* at 13.
176. *Id.* at 42.
177. See McCall-Smith & Magee, *supra* note 2, at 210, for a discussion on the firearms offense.

knowingly harboring a fugitive or impeding an arrest or prosecution of such a fugitive.

Both countries have undertaken to implement the recommendations of the Report. The Criminal Jurisdiction Act of 1975[178] received royal assent on August 7, 1975, and sections 12, 13, part of 14, and schedules 5 and 6 came into force at that time. The remaining provisions will come into force at other scheduled times. The Act created extraterritorial offenses, and gave Northern Ireland courts jurisdiction to try fugitive offenders accused of violent crimes in the Republic of Ireland.[179] Reciprocal legislation was approved in the Republic of Ireland with the Senate approving a bill that gave Irish courts extraterritorial jurisdiction to try political fugitives for crimes committed in Northern Ireland or Great Britain.[180]

While the main provisions of the Criminal Jurisdiction Act of 1975 are restricted to Northern Ireland, section 4(4), combined with schedule 3, establishes immunity in regard to double jeopardy for extraterritorial offenses. The Backing of Warrants (Republic of Ireland) Act 1965,[181] section 2(2), was amended to hold that a warrant from the Republic will not be executed in the United Kingdom if it is for an extraterritorial offense under the laws of Ireland, or if the fugitive has been previously convicted or acquitted of an extraterritorial offense arising out of the same act.

Section seven of the Criminal Jurisdiction Act of 1975 amends sections two and three of the Explosive Substances Act of 1883 by making it an offense to cause an explosion likely to endanger life or property in the Republic of Ireland. Along with the amended provision relating to attempts and conspiracies to cause explosions, liability attaching to the former amended provision applies only to citizens of the United Kingdom and Colonies.

V. UNITED STATES

Bilateral Treaties

The United States has traditionally conducted its international extradition procedures solely pursuant to treaty obliga-

178. Stat. Inst. 1975, No. 1347.
179. 1975 Halsbury's Abr. paras. 672, 2407.
180. THE TIMES (London), November 4, 1975 at 1.
181. *Supra* note 70.

tions since its courts have not recognized asylum and extradition as a part of customary international law.[182] The process of extradition is regarded as a function of domestic law exclusively. Because of its unwillingness to employ international law to interpret or to supplement ambiguous treaty provisions, the United States has developed a highly organized system of bilateral treaties pertaining to extradition.[183]

The British extradition problem has centered around the problems in the Republic of Ireland. The United States, on the other hand, has not been confronted with extradition problems arising in connection with any particular nation. Thus, the United States has been forced to resort to the process of renegotiating each of its bilateral extradition treaties, while Britain has been able to deal with the problem through reciprocal legislation.

Although the term "political offense" is still retained in the new extradition treaties, it remains undefined. Instead of relying on such a definition, a series of exclusions have been created which comprise the category of offenses which shall be considered extraditable. The treaties entered into since 1970 have included and stressed the two additional offenses of drug crimes and aircraft hijacking.[184] These two offenses have been added to the lists which customarily include murder, kidnapping, extortion, procuration, counterfeiting, fraud, piracy, slavery and arson. The new treaties now include more than thirty separate serious offenses which are extraditable.

Recent negotiations have added narcotic crimes, bankruptcy, mail fraud and aircraft hijacking to the treaty with France;[185] piracy and mutiny or revolt on an aircraft or vessel to the treaty with New Zealand;[186] assault upon a public official

182. Factor v. Laubenheimer, 290 U.S. 276, 287 (1933); United States v. Ranscher, 119 U.S. 407, 411-12 (1886). *See generally* 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 732 (1968).

183. M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 26 (1974).

184. Letter from President Gerald R. Ford to the Senate of the United States (February 3, 1976) *found in* Extradition Treaty with the United Kingdom of Great Britain and Northern Ireland, June 8, 1972, Exec. Doc. 94-A-2. *See also* Comment, 16 So. Tex. L.J. 356 (1975) for a review and summary of the Antihijacking Act of 1974.

185. Treaty on Extradition United States-France, February 12, 1970, 22 U.S.T. 407, 409, T.I.A.S. No. 7075 (effective April 3, 1971).

186. Treaty on Extradition United States-New Zealand, January 12, 1970, 22 U.S.T. 1, 3, T.I.A.S. No. 7035 (effective December 8, 1970).

and aircraft hijacking to the treaty with Paraguay;[187] and aircraft hijacking to the Spanish treaty.[188] In cases of international variations in the substantive elements of listed criminal offenses, definitions are set out in the treaties to avoid confusion.[189]

The problem of defining a "political offense" continues to haunt the treaty-making process. The new treaties continue to exempt the political offender without clarifying the definition. A comparison between some of the treaties recently renegotiated and those that have been in existence for some length of time reveals no major semantic changes. An excellent example of the language currently employed in the treaties is shown in the Canadian Treaty on Extradition:

> When the offense in respect of which extradition is requested is of a political character, or the person whose extradition is requested proves that the extradition request has been made for the purpose of trying or punishing him for an offense of the above-mentioned character [extradition shall not be granted]. If any question arises as to whether a case comes within the provisions of this subparagraph, the authorities of the Government on which the requisition is made shall decide.[190]

The Canadian treaty also continues the practice of permitting the host country to decide whether the offense shall be considered a political crime. This practice has been consistently included in all of the United States' recent extradition treaties.[191]

In summary, the United States' action in this area has centered around the renegotiation of several bilateral treaties of

187. Treaty on Extradition United States-Paraguay, May 24, 1973, 25 U.S.T. 967, 971, T.I.A.S. No. 7838 (effective May 7, 1974).

188. Treaty on Extradition United States-Spain, May 29, 1970, 22 U.S.T. 737, 739, T.I.A.S. No. 7136 (effective June 16, 1971).

189. Treaty on Extradition United States-Italy, January 18, 1973, art. II, para. 30, T.I.A.S. No. 8052 (effective March 11, 1975), states: "Extradition shall also be granted for the Italian offense of *associazione per delinquere* if the request establishes the elements of a conspiracy, as defined by the laws of the United States. . . ."

190. 121 CONG. REC. 20510 (daily ed. Nov. 20, 1975). The reprint of the new extradition treaty with Australia appears *id.* at S20499 and contains the identical provisions. Similar provisions are also included in Treaty on Extradition United States-Denmark, June 22, 1972, 25 U.S.T. 1293, T.I.A.S. No. 7864 (effective July 31, 1974) and the extradition treaties with Great Britain and Northern Ireland *supra* notes 184 and 189 respectively.

191. Evans, *Reflections Upon the Political Offenses in International Practice*, 57 AM. J. INT'L L. 1, 17 (1963); Evans, *The New Extradition Treaties of the United States*, 59 AM. J. INT'L L. 351, 360 (1965).

extradition. The only change regarding the political offense exemption is the inclusion of a few major crimes in the list which sets forth the extraditable offenses. In most cases, the political offense exemption can apply even to the newly listed crimes. These crimes generally fit into the scheme of "relative" political offenses, and the fugitive's burden of proof is to satisfy the requirements of such offenses.[192]

CONCLUSION

A review of three nations' judicial approaches to the issues involved in extraditing international offenders reveals that fundamental distinctions exist in the reasoning and purposes of the respective courts. These distinctions do not merely indicate different historical values and precepts, but also reflect different attitudes toward the struggles for political freedom around the world.

Great Britain and the Republic of Ireland have arrived at their respective postures on international extradition through entirely different routes. The British courts have systematically resorted to methodical reexamination of the original *Castioni* principles in an effort to recognize the changing faces of political oppression. This technique has been complemented by the regional treaties with the commonwealth states and the Republic of Ireland to provide an updated and realistic extradition system.

The Republic of Ireland has opted for the extradition scheme set forth in the European Convention on Extradition. This allows the courts of Ireland to employ the current judicial decisions of her ratifying sister nations, in addition to the utilization of her domestic interpretations of "political offenses." This approach permits the courts to consider and adapt to the changing political conditions on the European Continent.

The United States continues to suffer from the proliferation of bilateral extradition treaties which utilize the strict *Castioni* test announced eighty-five years ago. It is submitted that the *Castioni* test requires that an individual commit a meaningless (and often suicidal) act of uprising in a totalitarian state in order to qualify as a political offense. Such a requirement has little relevance to the true intent of the political offender in a

192. *See* note 15 and accompanying text *supra*.

totalitarian society. The United States' courts must seriously reexamine its position in such cases. If that reexamination occurs, there is little doubt that the dictá in the *Gonzalez* case will be adopted. The extension of the definition of "political offense" will provide the flexibility needed to treat such offences according to the realities of the twentieth century.

Appendix
UNITED STATES EXTRADITION TREATIES IN FORCE

Country	Cite	Date in Force	Supplementary Treaty Cite	Date in Force
Albania	49 Stat. 3313	Nov. 14, 1935		
Argentina	31 Stat. 1883	July 2, 1900	23 UST 3501 TIAS 7510	Jan. 2, 1972
Australia*	47 Stat. 2122	Dec. 22, 1931		
Austria	46 Stat. 2779	Sept. 11, 1930	49 Stat. 2710	Sept. 5, 1934
Bahamas*	47 Stat. 2122	June 24, 1935		
Barbados*	47 Stat. 2122	Dec. 22, 1931		
Belgium	32 Stat. 1894	July 14, 1902	49 Stat. 3276 15 UST 2252	Nov. 7, 1935 Dec. 25, 1964
Bolivia	32 Stat. 1857	Jan. 22, 1902		
Botswana*	47 Stat. 2122	Dec. 22, 1931		
Brazil	15 UST 2093	Dec. 17, 1964		
Bulgaria	43 Stat. 1886	June 24, 1924	49 Stat. 3250	Aug. 15, 1935
Burma*	47 Stat. 2122	Dec. 22, 1931		
Canada	8 Stat. 572*	Aug. 9, 1842	26 Stat. 1508*	July 12, 1889
			32 Stat. 1864*	Dec. 13, 1900
			34 Stat. 2903*	Apr. 12, 1905
			35 Stat. 2035	June 30, 1908
			42 Stat. 2224	Nov. 3, 1922
			44 Stat. 2100	July 27, 1925
			3 UST 2826	July 11, 1952

*Successor to treaty made with United Kingdom — 47 Stat. 2122.

APPENDIX (Contd.)

Country	Cite	Date in Force	Supplementary Treaty Cite	Date in Force
Ceylon*	47 Stat. 2122	Dec. 22, 1931		
Chile	32 Stat. 1850	June 26, 1902		
Colombia	26 Stat. 1534	Jan. 11, 1891	57 Stat. 824	July 6, 1943
Congo	37 Stat. 1526	Jan. 6, 1909	46 Stat. 2276	Jan. 15, 1929
			50 Stat. 1117	
Costa Rica	43 Stat. 1621	Apr. 27, 1923		
Cuba	33 Stat. 2265	Mar. 2, 1905	44 Stat. 2392	June 18, 1926
			Protocol	
			33 Stat. 2273	Mar. 2, 1905
Cyprus*	47 Stat. 2122	Dec. 22, 1931	Memorandum Note	Feb. 15, 1973
Czechoslovakia	44 Stat. 2367	Mar. 29, 1926	49 Stat. 3253	Aug. 28, 1935
Denmark	25 UST 1293	July 31, 1974		
Dominican Rep.	36 Stat. 2468	Aug. 2, 1910		
Equador	18 Stat. 199	Nov. 12, 1873	55 Stat. 1196	May 29, 1941
El Salvador	37 Stat. 1516	July 10, 1911		
Egypt (United Arab Republic)	19 Stat. 572	Apr. 25, 1875		
Estonia	43 Stat. 1849	Nov. 15, 1924	49 Stat. 3190	May 7, 1935
Fiji*	47 Stat. 2122	Dec. 22, 1931	TIAS 7707	Aug. 17, 1973
Finland	44 Stat. 2002	Mar. 23, 1925	49 Stat. 2690	Aug. 10, 1934

*Successor to treaty made with United Kingdom—47 Stat. 2122
**Successor to treaty made with Denmark—32 Stat. 1906

APPENDIX (Contd.)

Country	Cite	Date in Force	Supplementary Treaty Cite	Date in Force
France	37 Stat. 1526	July 27, 1911	22 UST 407 TIAS 7075	Apr. 3, 1971
Gambia*	47 Stat. 2122	Dec. 22, 1931		
Ghana*	47 Stat. 2122	Dec. 22, 1931		
Germany	47 Stat. 1862	Apr. 26, 1931		
Greece	47 Stat. 2185	Nov. 1, 1932	51 Stat. 357	Sept. 2, 1937
Grenada*	47 Stat. 2122	Dec. 22, 1931		
Guatemala	33 Stat. 2147	Aug. 15, 1903	55 Stat. 1097	Mar. 13, 1941
Guyana*	47 Stat. 2122	Dec. 22, 1931		
Haiti	34 Stat. 2858	June 28, 1905		
Honduras	37 Stat. 1616	July 10, 1912	45 Stat. 2489	June 5, 1928
Hungary	11 Stat. 691	Dec. 13, 1856		
Iceland**	32 Stat. 1906	Jan. 6, 1902	34 Stat. 2887	Feb. 19, 1906
India*	47 Stat. 2122	Dec. 22, 1931		
Indonesia***	26 Stat. 1481	July 11, 1889	33 Stat. 2257	Aug. 28, 1904
Iraq	49 Stat. 3380	Apr. 23, 1936		
Ireland*	26 Stat. 1508	July 12, 1889	32 Stat. 1864*	Dec. 13, 1900
			34 Stat. 2903*	Apr. 12, 1905
			8 Stat. 572*	Aug. 9, 1842

*Successor to treaty made with United Kingdom—47 Stat. 2122.
**Successor to treaty made with Denmark—32 Stat. 1906.
***Successor to treaty made with Netherlands—26 Stat. 1481.

APPENDIX (Contd.)

Country	Cite	Date in Force	Supplementary Treaty Cite	Date in Force
Israel	14 UST 1707	Dec. 5, 1963	18 UST 382	Apr. 11, 1967
Italy	15 Stat. 629	Sept. 17, 1868	16 Stat. 767	May 7, 1869
			24 Stat. 1001	Apr. 24, 1885
			61 Stat. 3687	May 1, 1946
			TIAS 8052	Mar. 11, 1975
Jamaica*	47 Stat. 2122	Dec. 22, 1931		
Japan	24 Stat. 1015	Nov. 26, 1886	34 Stat. 2951	Oct. 5, 1906
Kenya*	47 Stat. 2122	Dec. 22, 1931	16 UST 1866	Aug. 19, 1965
Latvia	43 Stat. 1738	Oct. 16, 1923	49 Stat. 3131	Mar. 12, 1935
Lesotho*	47 Stat. 2122	Dec. 22, 1931		
Liberia	54 Stat. 1733	Nov. 21, 1939		
Liechtenstein	50 Stat. 1337	June 28, 1937		
Lithuania	43 Stat. 1835	Aug. 23, 1924	49 Stat. 3077	Jan. 8, 1935
Luxembourg	23 Stat. 808	Aug. 13, 1884	49 Stat. 3355	Mar. 3, 1936
Malawi*	47 Stat. 2122	Dec. 31, 1931	18 UST 1822	Apr. 4, 1967
Malaysia*	47 Stat. 2122	Dec. 22, 1931		
Malta*	47 Stat. 2122	Dec. 22, 1931		
Mauritius*	47 Stat. 2122	Dec. 22, 1931		
Mexico	31 Stat. 1818	Apr. 22, 1899	44 Stat. 2409	July 11, 1926
			55 Stat. 1133	Apr. 14, 1941

*Successor to treaty made with United Kingdom—47 Stat. 2122.

APPENDIX (Contd.)

Country	Cite	Date in Force	Supplementary Treaty Cite	Date in Force
Monaco	54 Stat. 1780	Mar. 28, 1940		
Nauru*	47 Stat. 2122	Dec. 22, 1931		
Netherlands	26 Stat. 1481	July 11, 1889	33 Stat. 2257	Aug. 28, 1904
New Zealand	22 UST 1 TIAS 7035	Dec. 8, 1970		
Nicaragua	35 Stat. 1869	July 14, 1907		
Nigeria*	47 Stat. 2122	June 24, 1935		
Norway	28 Stat. 1187	Dec. 8, 1893	34 Stat. 2865 53 Stat. 1561	Apr. 4, 1905 Aug. 6, 1938
Pakistan*	47 Stat. 2122	Dec. 22, 1931		
Panama	34 Stat. 2851	May 8, 1905		
Paraguay	38 Stat. 1754	Jan. 17, 1914	25 UST 967	May 7, 1974
Peru	31 Stat. 1921	Feb. 22, 1901		
Poland	46 Stat. 2282	June 6, 1929	49 Stat. 3394	June 5, 1936
Portugal	35 Stat. 2071	Nov. 14, 1908		
Romania	44 Stat. 2020	July 23, 1924	50 Stat. 1349	July 27, 1937
San Marino	35 Stat. 1971	July 3, 1908	49 Stat. 3198	June 28, 1935
Sierra Leone*	47 Stat. 2122	Dec. 22, 1931		
Singapore*	47 Stat. 2122	Dec. 22, 1931	20 UST 2764	April 23 and June 6, 1969

*Successor to treaty made with United Kingdom—47 Stat. 2122.

APPENDIX (Contd.)

Country	Cite	Date in Force	Supplementary Treaty Cite	Date in Force
South Africa	2 UST 884	Apr. 30, 1951		
Spain	22 UST 737	June 16, 1971		
	TIAS 7136	May 29, 1970		
Surinam	26 Stat. 1481			
Swaziland*	47 Stat. 2122	Dec. 22, 1931	21 UST 1930	July 28, 1970
Sweden	14 UST 1845	Dec. 3, 1963		
Switzerland	31 Stat. 1928	Mar. 29, 1901	49 Stat. 3192	May 16, 1935
			55 Stat. 1140	Apr. 8, 1941
Tanzania*	47 Stat. 2122	Dec. 22, 1931		
Thailand	43 Stat. 1749	Mar. 24, 1924		
Tonga*	47 Stat. 2122	Dec. 22, 1931		
Trinidad*	47 Stat. 2122	Dec. 22, 1931		
Tobago*	47 Stat. 2122	Dec. 22, 1931		
Turkey	49 Stat. 2692	Aug. 18, 1934		
United Kingdom	47 Stat. 2122	Dec. 22, 1931		
Uruguay	35 Stat. 2028	June 4, 1908		
Venezuela	43 Stat. 1698	Apr. 14, 1923		
Yugoslavia	32 Stat. 1890	June 12, 1902		
Zambia*	47 Stat. 2122	Dec. 22, 1931		

*Successor to treaty made with United Kingdom—47 Stat. 2122.