

1991

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Recommended Citation

Duffy, Timothy J. (1991) "The Law v. the IRA: The Effect of Extradition Between the United Kingdom, the Republic of Ireland and the United States in Combatting the IRA," *Penn State International Law Review*: Vol. 9: No. 2, Article 5.
Available at: <http://elibrary.law.psu.edu/psilr/vol9/iss2/5>

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The Law v. the IRA: The Effect of Extradition Between the United Kingdom, the Republic of Ireland and the United States in Combatting the IRA

[U]ntil the British Government, which legislates for and sustains the occupation of the six counties [of Northern Ireland], abandons its futile military campaign, ends partition and recognizes the Irish people's right to self-determination and democracy, the I.R.A. will continue to strike whenever the opportunity arises.¹

I. Introduction

On April 9, 1990, four British soldiers were killed near Downpatrick, Northern Ireland in an Irish Republican Army (IRA) bomb attack on the armored vehicle in which they were riding.² On June 25, an explosion, for which the IRA claimed responsibility, devastated the Carlton Club in London.³ Former British Prime Minister Margaret Thatcher is a member of the Club, as are other senior members of the ruling Conservative Party.⁴ The London Stock Exchange was damaged by an IRA bomb on July 20.⁵ Three members of the Royal Ulster Constabulary and Sister Catherine Dunn, a nun in a passing car, were killed on July 24, 1990 near Armagh, Northern Ireland, when a bomb planted in the road by the IRA was detonated by remote control.⁶ Ian Gow, a Conservative Member of Parliament and close personal friend of Mrs. Thatcher, condemned the Armagh killings as futile and odious, saying, "[t]he message that should go out from all decent people is that we will never, never surrender to people like this."⁷ Five days later Mr. Gow was killed at his home by a car bomb planted by the IRA.⁸ Finally, in the deadli-

1. N.Y. Times, Aug. 1, 1980, at A3, col. 4. From a statement issued by the IRA claiming responsibility for the "execution" of Ian Gow.

2. N.Y. Times, Apr. 10, 1990, at A3, col. 1.

3. N.Y. Times, Apr. 21, 1990, at A3, col. 1.

4. *Id.*

5. *Id.*

6. N.Y. Times, July 25, 1990, at A5, col. 1.

7. The Times (London), July 31, 1990, at 1, col. 1.

8. *Id.* Gow was the fourth sitting member of Parliament killed by IRA terrorists. *Id.* Gow's murder has not weakened the resolve of the British government not to give in to the IRA. Former Prime Minister Thatcher, speaking of Gow, said, "[i]f he could speak to me now, he would say 'We fight that battle against them [the IRA] and we bring them to jus-

est incident in Northern Ireland in the past two years, six British soldiers and a civilian were killed on October 24 at security checkpoints near Londonderry and Newry in Northern Ireland.⁹ In the Londonderry and Newry incidents the IRA held the families of alleged "collaborators" hostage and forced a male member of each family to drive a car packed with explosives to security checkpoints.¹⁰ 1990 has been a particularly bloody year in the IRA's battle, launched in 1969, to force the British out of Northern Ireland.

Terrorists, by definition, have contempt for the law.¹¹ Yet civilized states must abide by the law in combatting terrorism.¹² A democratic society cannot exist as such if its government disregards the law. However, the ability of a government to bring to justice terrorists who have committed acts of terrorism in its country is frustrated when the accused terrorist flees that state, and thus prevents the state from exercising jurisdiction. Extradition is a means of bringing fugitive offenders to justice,¹³ yet the use of extradition law in its traditional form¹⁴ has not always been effective in bringing terrorists to justice. The British, especially, have been frustrated by the failure of Ireland and the United States to extradite IRA members to the United Kingdom.¹⁵ Extradition laws have been revised in response to the failure of traditional extradition law against the IRA.

This Comment will examine the domestic legislation of and the treaties between the United Kingdom, the Republic of Ireland, and the United States which provide for the extradition of fugitive of-

tice." *Id.*

9. N.Y. Times, Oct. 24, 1990, at A1, col. 2. Fourteen soldiers, two policemen, and at least twenty-one civilians were wounded in the attacks.

10. *Id.*

11. An "act of terrorism" is defined by American Law as an activity that (A) involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and (B) appears to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping.

18 U.S.C. § 3077 (1984).

12. "[I]n a democracy such as the United Kingdom violence should never be deemed an acceptable part of the political process. To even permit courts in the United States to consider political motives as justifying murder or other violent crimes showed a lack of respect for the democratic process . . ." 132 CONG. REC. S9147 (daily ed. July 16, 1986) (statement of Senator Lugar, Chairman of the Senate Foreign Relations Committee).

13. "Extradition may be sufficiently defined to be the surrender by one nation to another of an individual accused or convicted of an offense outside its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." *Terlinden v. Ames*, 184 U.S. 270, 289 (1901) (cited favorably in 18 HALSBURY'S LAWS OF ENGLAND (4th ed. para. 201, n.1 (1977))).

14. "Traditional form" here refers to extradition law which recognizes a broad political offense exception to extradition, generally enacted before the increase in terrorism over the past twenty years.

15. N.Y. Times, Apr. 10, 1990, at A3, col. 1.

fenders. This Comment will begin with an examination of the extradition law of the three states in its traditional form, that is, as recognized before the start in 1969 of the IRA's terrorist campaign. It will continue by discussing the reasons this law was an ineffective tool against the IRA, and how this failure was the impetus for the evolution of extradition law between the three states. The treaties and legislation specifically aimed at combatting terrorism, drafted in response to the failure of traditional extradition law, will then be examined. This Comment will conclude by evaluating the effectiveness of these instruments as used against the IRA.

II. Background

The United Kingdom formerly comprised Great Britain, that is England, Scotland and Wales, and the whole of the island of Ireland.¹⁶ The Republic of Ireland, originally called the Irish Free State, was established as an independent state by a constitutional process beginning in 1921, and comprises the twenty-six predominantly Roman Catholic counties of the island's thirty-two counties.¹⁷ A majority of the population in the six predominantly Protestant counties of the north wanted to remain part of the United Kingdom, and Northern Ireland today remains a part of Her Majesty's dominions and of the United Kingdom.¹⁸ A significant Catholic minority exists in Northern Ireland, and hostilities between the Protestants and Catholics have been the source of the continued state of virtual civil war in Northern Ireland.¹⁹ While some legislative and executive responsibility has devolved to the Northern Ireland Assembly and Executive, the Government of the United Kingdom retains control over many important matters.²⁰ For instance, Her Majesty's Secretary of State for Northern Ireland, acting for the Government of the United Kingdom, retains responsibilities for the international relations of Northern Ireland, including the conclusion of treaties.²¹ Spe-

16. Northern Ireland Constitution Act, 1973, ch. 36, § 1.

17. *Id.*; Groarke, *Revolutionaries Beware: The Erosion of the Political Offense Exception Under the 1986 United States-United Kingdom Supplementary Extradition Treaty*, 136 U. PA. L. REV. 1515, 1532 (1988).

18. Northern Ireland Constitution Act, 1973, ch. 36, § 1 (reaffirming the Royal and Parliamentary Titles Act, 1927, § 2(2), which provided that in every public document "United Kingdom" should thereafter mean Great Britain and Northern Ireland); *see also* The Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland on Northern Ireland, Nov. 15, 1985, 1985 U.K.T.S. No. 62 (Cmd. 9657), 24 I.L.M. 1582 [hereinafter *Anglo-Irish Agreement*]. The two Governments . . . recognise that the present wish of a majority of the people of Northern Ireland is for no change in the status of Northern Ireland . . . " *Id.* at A, art. 1(b); Groarke, *supra* note 15.

19. Groarke, *supra* note 17.

20. *See* Northern Ireland Constitution Act, 1973, ch. 36, § 2(1), (2).

21. *Id.* sched. 2, para. 3. However, the surrender of fugitives between Ireland and the Republic is locally controlled. *Id.* sched. 2, para. 3(a). *See* The Backing of Warrants (Republic

cial powers and provisions for dealing with terrorism or subversion are also within the exclusive control of the Government of the United Kingdom.²²

The Constitution of the Republic of Ireland claims as the national territory of the State the whole island of Ireland, and seeks the reintegration of the national territory of Ireland.²³ The method by which the national territory is to be reintegrated is a matter of national policy and is exercised by the national government on the authority of the Constitution.²⁴ The Irish government recognizes the current status of Northern Ireland as part of the U.K. and has chosen to pursue the reintegration of the national territory by peaceful and constitutional means.²⁵

The Irish Republican Army also pursues a policy of reintegration of the national territory, but by force of arms.²⁶ The IRA "emerged" in 1918 out of the pre-independence civil strife in Ireland²⁷ advocating a political philosophy of independence for the whole of Ireland.²⁸ Since independence was granted to the Irish Republic, the IRA has pursued a policy of reunification of Ireland, with varying degrees of popular support.²⁹ By 1969, "a state of civil disorder had been reached [in Northern Ireland] that had threatened the viability of the Northern Irish government. As a consequence, the Prime Minister [of Northern Ireland] requested assistance from the United Kingdom and British troops were sent in to maintain order."³⁰ In response to the army being sent in, as well as to Protestant retaliation against Catholic civil rights activists, the Provisional IRA (PIRA) was formed as a splinter group of the IRA.³¹ Since that time, the claimed objective of the IRA, and more particularly of the PIRA, has been "to inflict a military defeat [on the British in North-

of Ireland) Act, 1965, ch. 45, discussed *infra* p.5. The Backing of Warrants Act permits judges in Northern Ireland to endorse warrants issued in the Republic of Ireland without recourse to the Government of the United Kingdom); *cf.* The Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 8, 1972, 28 U.S.T. 229, T.I.A.S. No. 8468 [hereinafter 1972 Extradition Treaty] (extradition from or to the United States is conducted by the Government of the United Kingdom, even for person wanted in, or found in, Northern Ireland); for a discussion of the 1972 Extradition Treaty, see *infra* p. 24-30.

22. Northern Ireland Constitution Act, 1973, ch. 36, sched. 1, para. 14.

23. IR. CONST., arts. 1 and 2; see also *Russell v. Fanning*, 1988 I.L.R.M. 333 (LEXIS, Ireln library, cases file, at 6), and *Finucane v. McMahon*, 1990 I.L.R.M. 505 (LEXIS, Ireln library, cases file, at 10).

24. IR. CONST., arts. 6(1), (2).

25. Anglo-Irish Agreement, *supra* note 18, at A, art. 1.

26. *Finucane v. McMahon*, 1990 I.L.R.M. 505 (LEXIS, Ireln library, cases file, at 8).

27. Walker, *Political Violence and Democracy in Northern Ireland*, 51 MOD. L. REV. 605, 608 (1988).

28. *Finucane v. McMahon*, 1990 I.L.R.M. 505 (LEXIS, Ireln library, cases file, at 11).

29. *Id.*

30. *In re the Matter of Doherty by the Government of the United Kingdom*, 599 F. Supp. 270, 273, n.1 (S.D.N.Y. 1984).

31. Groarke, *supra* note 17, at 1532.

ern Ireland] or to demonstrate that the government of the area is unable effectively to govern the area," forcing the British to relinquish control of Northern Ireland, and thus reunite the island.³² Members of the Northern Ireland security forces, including the Royal Ulster Constabulary (RUC) and British Army, as well as civilians have been the targets of IRA violence.³³ Between 1972 and 1979 the use of violence by the IRA and loyalist groups (groups supporting the inclusion of Northern Ireland in the United Kingdom) claimed over 1,770 lives, 1,300 of which were civilians.³⁴ The United Kingdom, the Republic of Ireland, and the United States have recognized the IRA as a terrorist organization.³⁵

The violence has not abated. In the mid-1980s the IRA struck up a friendship with Libya which has resulted in gifts of explosives, guns, and cash from Col. Qaddafi.³⁶ In 1988, the IRA launched a new campaign of terror against the British in Great Britain and on the European Continent, widening its targets to include military bases, politicians, and other representatives of the British establishment.³⁷ In December, 1988 British authorities found a list of more than 100 prominent figures, including Mrs. Thatcher, on an IRA "death list" at a clandestine bomb factory in Campham, England.³⁸ Also on the Campham hit-list was Ian Gow.³⁹

III. Extradition Treaties and Legislation

A. The United Kingdom and Ireland

1. *The Backing of Warrants Act of 1965 and the Extradition Act of 1965.*—Extradition between the United Kingdom and Ireland is conducted pursuant to domestic legislation of each state.⁴⁰ The United Kingdom's Backing of Warrants Act⁴¹ and Part III of the

32. *Finucane v. McMahon*, 1990 I.L.R.M. 505 (LEXIS, Ireln library, cases file, at 11).

33. Groarke, *supra* note 17, at 1532; *see also* The Times (London), Aug. 1, 1990, at 2, col. 1 (187 members of the Ulster Defense Regiment have been killed since 1969; fifteen people murdered in a Belfast bar in 1971; eighteen soldiers killed at Warrenpoint, Northern Ireland, and Lord Mountbatten killed in 1979).

34. *In re Doherty*, 599 F. Supp. at 273.

35. Northern Ireland (Emergency Provisions) Act, 1978, ch. 5, sched. 2 (the IRA is a proscribed organization in the United Kingdom); Offenses Against the State Act, No. 13 (Ir. 1939) (the IRA is illegal in Ireland by virtue of Order SI No. 162 (1939) issued in pursuance of the Act); *Doherty v. Immigration and Naturalization Service*, 908 F.2d 1108 (2d Cir. 1990) (*citing* UNITED STATES DEPARTMENT OF STATE, PATTERNS OF GLOBAL TERRORISM: 1988, 33-34, 74-75 (1989), stating that the IRA is a proscribed terrorist organization in the United States).

36. *The IRA: Spreading a Wider Net*, ECONOMIST, June 23, 1990, at 52.

37. N.Y. Times, July 31, 1990, at A1, col. 1.

38. *Id.*

39. *Id.*

40. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45 [in the United Kingdom]; Extradition Act, No. 17 (Ir. 1965) [in the Republic of Ireland].

41. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45 (applies only to warrants issued in the Irish Republic. *Id.* Preamble).

Irish Extradition Act⁴² provide for the execution, in the state enacting the legislation, of warrants of arrest issued in the other state. Both Acts apply to offenses committed, or alleged to have been committed, before, as well as after, the enactment of the Acts.⁴³ Since both Acts were enacted prior to the commencement in 1969 of the IRA terror campaign, the retroactive effect of the Acts has not been at issue in extradition proceedings initiated under these Acts for crimes committed since 1969.

The endorsement process under both Acts begins with the issuance of a warrant by a judicial authority in one state for the arrest of a person accused or convicted of an offense against the laws of that state.⁴⁴ Under the Backing of Warrants Act a British constable must then make an application for the endorsement of the warrant issued in Ireland to a justice of the peace in the United Kingdom, to whom the constable must swear he has reason to believe the person sought is in the area under the justice's jurisdiction.⁴⁵ The justice is then obligated to endorse the warrant which may be executed only in that part of the United Kingdom for which the justice acts.⁴⁶

In Ireland, the Commissioner of the Garda Síochána (National Police) receives the warrant and he, subject to certain provisions, must endorse the warrant for execution if it appears to him that the person sought may be found in Ireland.⁴⁷ Any member of the Garda Síochána may then execute the warrant anywhere in the State.⁴⁸ Warrants endorsed for execution pursuant to the Backing of Warrants Act and the Extradition Act are treated in the state requested as if they were originally issued by a judicial authority of that state.⁴⁹

In the United Kingdom, a magistrate's obligatory endorsement of a properly produced warrant is not subject to second guessing, and mandates the arrest of the person sought.⁵⁰ Determinations as to

42. Extradition Act, No. 17, §§ 41, 43 (Ir. 1965). The Extradition Act is the extradition law of Ireland. Part I deals with preliminary matters. Part II covers the general extradition law in regard to international agreements and conventions, and provides for their enactment into domestic legislation. Part III provides for the endorsement and execution of warrants issued by judicial authorities in Northern Ireland, England, Scotland, and Wales. *Id.* § 41.

43. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 13(3); Extradition Act, No. 17, § 1(2), (Ir. 1965).

44. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 1(1)(a); Extradition Act, No. 17, § 43(1)(a), (Ir. 1965).

45. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 1(1)(b).

46. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 1(1)(b). A "part of the United Kingdom" refers to England and Wales, Scotland, or Northern Ireland. *Id.* § 10(2).

47. Extradition Act, No. 17, § 43(1)(b), (Ir. 1965). *Contra id.* §§ 25, 26 which require a formal application process.

48. *Id.* § 43(2).

49. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 1(4); Extradition Act, No. 17, § 43(2) (Ir. 1965).

50. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 1. "Person sought"

whether extradition is for some reason precluded in a particular case are not made until a later time.⁵¹ In Ireland, however, a warrant sent to the Commissioner for endorsement shall not be endorsed by the Minister of Justice, or the High Court, if the issue is referred to it, so directs.⁵² An order not to endorse the warrant for execution shall be given where the Minister or the High Court is of the opinion that the offense charged in the warrant is a political offense or an offense connected with a political offense.⁵³ The Minister or the High Court may also give an order not to endorse where there are substantial reasons for believing that the person sought, if returned to the requesting state, will be prosecuted for a political offense or an offense connected with a political offense.⁵⁴

Upon being arrested pursuant to the endorsed warrant, the person claimed is brought before either a magistrate's court in the United Kingdom or a district court in Ireland.⁵⁵ After receiving the arrestee, a magistrate's court in the United Kingdom generally must order the arrestee to be delivered over to the Garda Síochána.⁵⁶ It is at this point, however, that the magistrate must determine whether the offense charged is a political offense and thus non-extraditable.⁵⁷ If the magistrate determines the political offense exception does not apply, she must remand the person claimed either in custody or on bail until delivered.⁵⁸ If a district justice in Ireland is not available, the Extradition Act provides that a person claimed may be brought before a local peace commissioner who shall remand the fugitive offender in custody or on bail until a district justice can make the order to deliver him over to the United Kingdom.⁵⁹ After the district justice makes his delivery order he must remand the fugitive in custody or on bail.⁶⁰ It seems unwise to grant bail to a fugitive from justice, especially one accused or convicted of terrorist activity. In order to ensure the delivery of a fugitive terrorist to the requesting state, bail should not be granted.⁶¹

and "person claimed" mean a person whose extradition is requested. Extradition Act, No. 17, § 3(1), (Ir. 1965).

51. See *infra* text accompanying note 58.

52. Extradition Act, No. 17, § 44(1) (Ir. 1965).

53. *Id.* § 44(2)(a). The section also permits an order prohibiting endorsement when the offense charged is "(b) an offense under military law which is not an offense under ordinary criminal law, or (c) a revenue offense." The political offense is the only exception relevant to this discussion. The political offense exception is discussed *infra* pp. 7-13.

54. Extradition Act, No. 17, § 44(2) (Ir. 1965).

55. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 2(1); Extradition Act, No. 17, § 45(2) (Ir. 1965).

56. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 2(1).

57. *Id.* § 2(2).

58. *Id.* §§ 2(1), 5(1)(a)(b).

59. Extradition Act, No. 17, §§ 45(3), 46(1) (Ir. 1965).

60. *Id.* § 47(1).

61. Carron v. McMahon, 1989 Nos. 139 and 146 (Transcript), 6 April 1990 (LEXIS,

Both the Backing of Warrants Act and the Extradition Act provide that a fugitive on remand awaiting extradition may not be delivered for fifteen days.⁶² During this period of time the person remanded may petition the courts for a writ of habeas corpus, and may not be delivered up while his petition is pending.⁶³ A fugitive detained in the United Kingdom may raise the political offense exception on a petition for habeas corpus even though the political offense issue has been previously considered by the magistrate who ordered the fugitive's surrender.⁶⁴ A fugitive awaiting extradition in Ireland may also petition the court for release from detention on grounds relating to the political offense exception.⁶⁵ Persons arrested and remanded pending delivery under the both the Backing of Warrants Act and the Extradition Act, then, are provided two opportunities for review of their case on the political offense issue.⁶⁶

The "political offense exception" is not a single exception to extradition. Rather, the term encompasses many defenses to extradition that are grounded in the political nature of the offense committed or alleged to have been committed. The most general embodiment of the exception is found in the Backing of Warrants Act, which directs that a magistrate's court shall not order an Irish fugitive to be delivered over to the Garda Síochána if it is shown "to the satisfaction of the court" that "the offence specified in the warrant is an offence of a political character."⁶⁷ Similarly, an Irish court or the Minister of Justice may release a person arrested in Ireland if either "is of the opinion that . . . the offense to which the warrant relates is . . . a political offence."⁶⁸ Refusing extradition on the grounds of the "political offense exception," as developed in the late 19th century by the courts of Great Britain, was viewed as analogous to granting "political asylum" or "political refuge" to a person who

Ireland library, cases file). Owen Carron was granted bail in Northern Ireland after being charged with a weapons possession offense, but fled to the Republic before being tried. James Maguire, the passenger in Carron's car who had actual possession of the firearms, was not granted bail and was tried and convicted by the Northern Irish courts. *Id.* at 1.

62. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 3(1)(a); Extradition Act, No. 17, § 48(2) (Ir. 1965).

63. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, §3(1)(b); Extradition Act, No. 17, § 48(2) (Ir. 1965).

64. *R. v. Governor of Winson Green Prison, Birmingham, ex parte Littlejohn*, [1975] 3 All E.R. 208 (Q.B.).

65. Extradition Act, No. 17, § 48(2) (Ir. 1965).

66. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, §§ 2(1)(2); 3(1)(b); Extradition Act, No. 17, §§ 44(1)(2) (Ir. 1965). *See also R. v. Governor of Winson Green Prison, Birmingham, ex parte Littlejohn*, [1975] 3 All E.R. 208 (Q.B.).

67. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, §2(2)(a). This section also disallows a delivery order if it is shown that the offense specified is an offense "under military law which is not an offence under the general criminal law, or an offence under an enactment relating to taxes, duties or exchange control." *Cf.* Extradition Act, No. 17, § 44(2)(a) (Ir. 1965).

68. Extradition Act, No. 17, § 50(1), (2)(a)(i) (Ir. 1965).

had committed an offense in furtherance of his design to escape from a political regime he had found intolerable.⁶⁹ Yet, as the use of violence by those in political opposition to governments has escalated and become more random this century, courts have found it increasingly difficult to define "political offenses." Because the changing nature of violence used by groups in opposition has made it more difficult to draw a line between terrorism and the use of force as a legitimate form of political opposition, the effective operation of extradition regimes which recognize the political offense exception have been severely handicapped: the political offense exception has become a legal loophole through which terrorists can escape justice.

The Irish Supreme Court, instead of deciding what constitutes a political offense, has determined that an offense cannot properly be considered political in nature if the purpose of the act is "to subvert the [Irish] Constitution or usurp the functions of the organs of State established by the Constitution."⁷⁰ However, the Court has held that although the objective of the IRA is the reintegration of the national territory "by force of arms," in opposition to the peaceful method decided upon by the Irish government, membership in the IRA of a fugitive offender alone is not enough to take his actions outside the protection of the political offense exception.⁷¹ At the opposite ex-

69. *Schtraks v. Government of Israel and Others*, [1962] 3 All E.R. 529, 540 (H.L.) (per Viscount Radcliffe).

In my opinion the idea that lies behind the phrase "offence of a political character" is that the fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of the country . . . It is this idea that the judges were seeking to express in the two early cases of *Re Castioni* [1891] 1 Q.B. 149 and *Re Meunier* [1894] 2 Q.B. 415 when they connected a political offence with an uprising, a disturbance, an insurrection, a civil war or struggle for power: an in my opinion it is still necessary to maintain that connexion [sic].

Id. at 540.

70. *Finucane v. McMahon*, 1990 I.L.R.M. 505 (LEXIS, IreInd library, cases file, at 9) (quoting *Russell v. Fanning*, 1988 I.L.R.M. 333 (LEXIS, IreInd library, cases file)). In *Russell* the Supreme Court began its consideration of the applicability of the political offense exception to the case with a presumption that the Oireachtas (Parliament), in passing the Extradition Act, could not have intended the provisions of the Act, including the political offense exception, to offend the Constitution. Pursuant to articles 6.1 and 6.2 of the Constitution, decisions as to the method for achieving the reintegration of the national territory are matters for the Government, and that the carrying out of those decisions is exercisable only by or on the authority of the Government. The Court continued that while any person or group is entitled to *advocate* any particular policy of reintegration, a person or group which takes over or seeks to take over the *carrying out* of a policy of reintegration themselves, without the authority of the Government, is, by their actions, subverting the Constitution and usurping the functions of the organs of State. This principle was first set out by the Supreme Court in *Quinn v. Wrenn*, 1985 I.R. 322. The principle that offenses, the purpose of which is to subvert the Constitution and usurp the powers of the State, may not be considered political offenses has been recognized as manifestly correct in subsequent cases. *Finucane v. McMahon*, 1990 I.L.R.M. 505 (LEXIS, IreInd library, cases file, at 9). Each extradition case must be decided on its own particular facts and circumstance. *Id.* (LEXIS, IreInd library, cases file, at 10).

71. *Finucane v. McMahon*, 1990 I.L.R.M. 505 (LEXIS, IreInd library, cases file, at 9); compare *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981) where the court noted that simply noting membership in the PLO, but not tying the membership to the

treme, the Irish Supreme Court has suggested that since indiscriminate attacks and killings of the civilian population are contrary to international law and the laws of war, and can be classified as crimes against humanity even if they have a political objective, persons committing such crimes should not be permitted to avail themselves of the protection of the political offense exception.⁷² The legal loophole through which terrorists may escape justice is found in the no-man's land between the extremes of mere membership in a terrorist organization and the indiscriminate killing of civilians.

On September 25, 1983, Dermot Finucane, a member of the IRA, escaped from the Maze Prison in Northern Ireland where he was serving an eighteen year sentence on a firearms offense.⁷³ In 1987 twenty warrants for his arrest were issued in Northern Ireland for offenses alleged to have been committed by him in the course of his escape.⁷⁴ The Commissioner of the Garda Síochána endorsed the warrants, and Finucane was arrested and brought before a district justice who ordered his extradition to Northern Ireland.⁷⁵ Pursuant to section 50 of the Extradition Act, Finucane brought proceedings in the High Court seeking his release on the grounds that the offenses to which the warrants related were political offenses.⁷⁶ The court then held that since the IRA is a group which is carrying out a policy of national reintegration without the authority of the government, IRA members whose extradition is sought by the United Kingdom cannot avail themselves of the protection of the political offense exception in section 50 of the Act.⁷⁷ The High Court held that because Finucane is a member of the IRA he could not avail himself of the political offense exception, and that he should be extradited to Northern Ireland.⁷⁸ On appeal the Supreme Court reversed.⁷⁹ The Court reaffirmed the doctrine that activities subversive of the Irish Government and usurpacious of the government function cannot properly be held to be political offenses, and are therefore

specific act alleged was insufficient to satisfy the burden petitioner must shoulder in order to invoke the political offense exception. Absent a direct tie between the PLO and the specific act of violence alleged, the act involved here, without more, was not the sort which may be reasonably 'incidental to' a political disturbance.

Id. at 520.

72. *Finucane v. McMahon*, 1990 I.L.R.M. 505 (LEXIS, Ireln library, cases file, at 14, 15).

73. *Id.* (LEXIS, Ireln library, cases file, at 3).

74. *Id.* (LEXIS, Ireln library, cases file, at 7).

75. *Id.*; This procedure was followed pursuant to Extradition Act, No. 17, § 45(2) (Ir. 1965).

76. *Finucane v. McMahon*, 1990 I.L.R.M. 505 (LEXIS, Ireln library, cases file, at 7, 8); see *supra* text accompanying note 68.

77. *Finucane v. McMahon*, 1990 I.L.R.M. 505 (LEXIS, Ireln library, cases file, at 6).

78. *Id.* (LEXIS, Ireln library, cases file at 8).

79. *Id.*

extraditable.⁸⁰ Yet the court, reversing a prior case, held that

[t]he fact that the policy or activities followed by persons outside the jurisdiction of the State is opposed to or contrary to the policy adopted by the government of Ireland in relation to the unity of the country is not . . . sufficient to equate it to a policy to overthrow this State or to subvert the Constituion [sic] of this State.⁸¹

The Court concluded that the firearms possession offenses of which Finucane was originally convicted would have qualified as political offenses and that the offenses for which his extradition was being sought were so related to the firearms offenses as to qualify as political offenses.⁸² Therefore, Finucane's petition for release under section 50 was granted, and a convicted IRA terrorist was set free.⁸³

In the United Kingdom a magistrate shall not order a fugitive offender delivered to the Garda Síochána if it is shown to the satisfaction of the court that the offense charged is of a political character.⁸⁴ The motivation of the wrongdoer is highly relevant in determining whether an offense is of a political character.⁸⁵ The wrongdoer must have had some "direct ulterior motive of a political kind" when she committed the act for it to be classified as a political offense.⁸⁶ In *Ex Parte Littlejohn*⁸⁷ the petitioner, a member of the IRA, was accused in Ireland of participating in an armed robbery in Ireland organized by, and for the purpose of obtaining money for, the IRA.⁸⁸ Pursuant to the Backing of Warrants Act the petitioner was arrested in England on an Irish arrest warrant endorsed in England.⁸⁹ After a magistrate ordered Littlejohn extradited to Ireland,⁹⁰ the magistrate remanded Littlejohn in custody for fifteen days⁹¹ during which the Littlejohn exercised his right under section 3 of the Backing of Warrants Act to apply for a writ of habeas corpus.⁹² Littlejohn sought relief on the grounds that the robbery of which he was

80. *Id.* (LEXIS, Irlnd library, cases file at 9).

81. *Finucane v. McMahon*, 1990 I.L.R.M. 505 (LEXIS, Ireln library, cases file, at 16).

82. *Id.* (LEXIS, Irlnd library, cases file at 17).

83. *Id.*

84. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 2(2)(a).

85. *R. Governor of Winson Green Prison, Birmingham, ex parte Littlejohn*, [1975] 3 All E.R. 208, 211 (Q.B.).

86. *Id.*

87. *Id.*

88. *Id.* at 209.

89. *R v. Governor of Winson Green Prison, Birmingham, ex parte Littlejohn*, [1975] 3 All E.R. 208, 209 (Q.B.); see Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, §1.

90. See Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 2.

91. See *id.* § 3(1)(a).

92. *R v. Governor of Winson Green Prison, Birmingham, ex parte Littlejohn*, [1975] 3 All E.R. 208, 209 (Q.B.); see Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 3(1)(b).

accused was a political offense and therefore non-extraditable.⁹³ In denying his writ and ordering his extradition, the court held that although . . . Littlejohn "had been concerned with the IRA, and although . . . [his] interest in robbing this bank was not simply to obtain money on . . . [his] own account, yet that was not a sufficient political association to make the offence an offence of a political character within the Act."⁹⁴

The standard by which a magistrate determines whether the political offense exception is available is whether, accepting all that the applicant has said, it is a case where a reasonable court *must* come to the conclusion that there are substantial grounds for believing the fugitive will be prosecuted for a political offense.⁹⁵ The magistrates, however, are not to inquire into the merits of the offender's charges that the offense committed was of a political character.⁹⁶ The Schedule to the Backing of Warrants Act provides that "proceedings shall be conducted as nearly as may be in the like manner, as if the court were acting as examining justices inquiring into an indictable offence alleged to have been committed by that person."⁹⁷ This does not require any inquiry as to the merits of the charges against the fugitive which he claims are political offenses.⁹⁸

The Extradition Act, but not the Backing of Warrants Act, also allows for the inclusion in the general "political offense exception" of those offenses connected with a political offense.⁹⁹ An offense does not necessarily need to be of a political nature in order to be capable of being connected with an offense of a political nature within the meaning of the clause.¹⁰⁰ The test is whether there is a "causal or factual relationship of sufficient strength to be described as a connection between the two offenses concerned."¹⁰¹

The Supreme Court applies this test in *Carron v. McMahon*.¹⁰² In December, 1985 The RUC arrested Owen Carron and a passenger in his car, James Maguire, in Northern Ireland when the RUC found Maguire in possession of an assault rifle and ammunition.¹⁰³ Both Carron and Maguire were charged with firearms offenses, but

93. *R v. Governor of Winson Green Prison, Birmingham, ex parte Littlejohn*, [1975] 3 All E.R. 208, 209-10 (Q.B.).

94. *Id.* at 211.

95. *Keane v. Governor of Brixton Prison*, [1971] 1 All E.R. 1163, 1167 (H.L.).

96. *Id.*

97. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, sched. para. 3.

98. *Keane v. Governor of Brixton Prison*, [1971] 1 All E.R. 1163, 1167 (H.L.).

99. Extradition Act, No. 17, § 50(2)(a)(i) (Ir. 1965).

100. *Carron v. McMahon*, 1989 Nos. 139 and 146 (Transcript), 6 April 1990 (LEXIS, Irlnl library, cases file).

101. *Id.*

102. *Id.*

103. *Id.* (LEXIS, Irlnl library, cases file, at 1).

only Carron was granted bail.¹⁰⁴ Carron skipped bail and fled to the Republic before he could be tried in Northern Ireland.¹⁰⁵ In November, 1987, judicial authorities in Northern Ireland issued warrants for Carron's arrest, which were subsequently endorsed in Ireland by the Deputy Commissioner of the Garda Síochána, pursuant to section 43 of the Extradition Act.¹⁰⁶ After his arrest, Carron was brought before a district justice who ordered Carron's extradition.¹⁰⁷ Carron petitioned the High Court for release under section 50 of the Extradition Act which permits the Minister of the High Court to order the release of an arrested person if either is of the opinion that the offense to which a warrant relates is an offense connected with a political offense.¹⁰⁸ The High Court granted the relief sought, and on appeal the Supreme Court was first required to determine whether Maguire's offense was a political offense.¹⁰⁹ Concluding that Maguire's possession of firearms was a political offense, the court found that the connection between Maguire's offense and those with which Carron was charged was sufficiently strong to allow Carron to avail himself of the political offense exception.¹¹⁰ The Court refused to extradite Carron to Northern Ireland where a judicial authority had already determined that Carron should be tried for offenses against the laws of Northern Ireland. The "connected with a political offense" clause has widened the political offense loophole. One wonders how tenuous a connection courts would allow before connected offenses would no longer be exempted. The "connected with a political offense" clause does not aid in the crackdown on terrorism.

Both the Backing of Warrants Act and the Extradition Act provide, under the "political offense exception" umbrella, that a fugitive offender may not be extradited when the court reviewing his case finds substantial grounds for believing that he will, if removed from the requested state, be prosecuted or detained for an offense other than that specified in the warrant, that other offense being a political offense.¹¹¹ The Irish Supreme Court has interpreted this clause to mean that Ireland should not order delivery to the United Kingdom under the Extradition Act "if it was established as a matter of probability that the real purpose of the delivery was not to bring the

104. Carron v. McMahon, 1989 Nos. 139 and 146 (Transcript), 6 April 1990 (LEXIS, Ireln library, cases file, at 1).

105. *Id.*

106. *Id.*

107. *Id.*; see Extradition Act, No. 17 (1965), § 47.

108. Carron v. McMahon, 1989 Nos. 139 and 146 (Transcript), 6 April 1990 (LEXIS, Ireln library, cases file, at 2); see Extradition Act, No. 17, § 50(1), (2)(a)(i) (Ir. 1965).

109. Carron v. McMahon, 1989 Nos. 139 and 146 (Transcript), 6 April 1990 (LEXIS, Ireln library, cases file, at 2).

110. *Id.*

111. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 2(2)(b), Extradition Act, No. 17, § 50(2)(b) (Ir. 1965).

person delivered before a court so as to charge him with an offense . . . but rather to interrogate him."¹¹² The British courts have interpreted this clause similarly. In *Keane v. Governor of Brixton Prison*,¹¹³ Keane, who had been politically active all his life and was a former member of the IRA, was wanted in Ireland for the murder of a member of the Garda S-rioch-rana and for armed robbery.¹¹⁴ Keane was arrested in England on a provisional warrant¹¹⁵ at the request of the Irish, and was ordered extradited by the magistrate before whom he was brought.¹¹⁶ While on remand in custody pending his extradition, Keane applied for a writ of habeas corpus claiming that the magistrate's extradition order was contrary to section 2(2)(b) of the Backing of Warrants Act.¹¹⁷ Specifically, Keane argued that the new political organization he had recently founded in the Republic of Ireland may become illegal in the Republic sometime in the future and that if he persisted in his political activities, his actions would then be political offenses.¹¹⁸ The Divisional Court refused Keane's application, but granted him leave to appeal to the House of Lords.¹¹⁹ In refusing to extend the protection of section 2(2)(b) of the Backing of Warrants Act to Keane, the Lords held the section would only give protection "if there were a likelihood of prosecution or detention for a political offense whether in substitution for or in addition to the non-political offenses charged in the warrants."¹²⁰ The House of Lords held Keane's application was correctly refused and permitted his extradition.¹²¹

In cases of urgency, provisional warrants are permitted to be issued by both the Backing of Warrants Act and the Extradition Act.¹²² The requirement for issuance of a provisional warrant under both Acts is three-fold. A justice of the peace in the United Kingdom or a justice of the District Court in Ireland must receive a sworn application from either a constable or member of the Garda

112. *Russell v. Fanning*, 1988 I.L.R.M. 333 (LEXIS, Ireln library, cases file, at 10).

113. [1971] 1 All E.R. 1163 (H.L.).

114. *Id.* at 1165.

115. For a discussion of provisional warrants, see *infra* p. 13.

116. *Keane v. Governor of Brixton Prison*, [1971] 1 All E.R. 1163, 1165 (H.L.); see Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 2(2)(b).

117. *Keane*, [1971] 1 All E.R. at 1165; see Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 2(1); *Keane* applied for writ of habeas corpus as of right under Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 3(1)(b).

118. *Keane*, [1971] 1 All E.R. at 1167. "In other words . . . [the petitioner] is really saying: I am a political animal, I am watched very closely, and if I carry on my political activities, as I am going to, I may from time to time be detained." *Id.* at 1168.

119. *Id.* at 1166.

120. *Id.* at 1168. "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 on himself prosecution or detention for future political offenses or alleged political offenses." *Id.*

121. *Id.*

122. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 4; Extradition Act, No. 17, § 49 (Ir. 1965).

Síochána, respectively, (1) that she has reason to believe a warrant has been issued by a judicial authority in the state which will eventually request extradition, but that the warrant is not yet in her possession, (2) that she has received a request made on the ground of urgency by or on behalf of the other state, and (3) that she has reason to believe the person may be found in the requested state.¹²³ If the person sought is in the United Kingdom, the justice of the peace may issue a provisional warrant for execution in the part of the United Kingdom in which the justice sits, or if the person is in Ireland, the district justice may issue the provisional warrant for execution anywhere in Ireland.¹²⁴ The warrants last five days.¹²⁵ If the justice in the requested state receives the warrant issued in the requesting state (the "original warrant") and properly endorses it before the arrest, upon the arrest of the person sought, the extradition process will proceed as if the arrest were made on an endorsed warrant.¹²⁶ If the original warrant is not produced by the time the fugitive offender is arrested and brought before the justice, the fugitive must be remanded, in custody or on bail, for no more than three days.¹²⁷ If, at the end of the three day remand period, the justice has still not received the original warrant, the justice must order the fugitive released.¹²⁸ A justice should not grant bail to a person arrested on a provisional warrant as the circumstances of his arrest, by the very nature of a provisional warrant, are urgent. This is especially true of fugitive terrorists, who have already fled justice, and would most likely do so again.

2. *The Suppression of Terrorism Act of 1978.*—British frustration with the political offense "loophole" led the United Kingdom, in 1978, to enact domestic legislation giving effect to the European Convention on the Suppression of Terrorism, to which it was a party.¹²⁹ The Backing of Warrants Act sets out the general law for extradition to Ireland, and the British may extradite any criminal wanted in Ireland under its provisions.¹³⁰ The Suppression of Terror-

123. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 4(1); Extradition Act, No. 17, § 49(1) (Ir. 1965).

124. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 4(2); Extradition Act, No. 17, § 49(8) (Ir. 1965).

125. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 4(2); Extradition Act, No. 17, § 49(8) (Ir. 1965).

126. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 4(3)(a); Extradition Act, No. 17, § 49(5) (Ir. 1965).

127. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 4(3)(b); Extradition Act, No. 17, § 49(6) (Ir. 1965).

128. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 4(3)(b); Extradition Act, No. 17, § 49(6) (Ir. 1965).

129. Suppression of Terrorism Act, 1978, ch. 26.

130. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 1(1)(a). Applies to warrants issued "for the arrest of a person accused or convicted of an offence against the laws

ism Act, however, is specifically aimed at the extradition of terrorists.

The most important characteristic of the Suppression of Terrorism Act, as regards the establishment of an effective system for the extradition of terrorists, is its limitation of those offenses which may be regarded as of a political character.¹³¹ Unlike the Backing of Warrants Act, under which British courts did not inquire into the merits of the charges against the fugitive offender and made no independent determination as to the legality of a person's actions, the Suppression of Terrorism Act requires the courts to determine whether the actions constitute offenses under the law of the United Kingdom.¹³² Additionally, the focus of the court is on the act constituting the offense.¹³³ The term by which the offense is referred to in the requesting state is not determinative of whether the Act applies, but rather it is the "conduct of the accused which is the test."¹³⁴ The motivation of the terrorist is no longer relevant as it was under the Backing of Warrants Act.¹³⁵

The Act provides that for the purposes of the Backing of Warrants Act, offenses listed in Schedule One of the Act should not be regarded as offenses of a political character.¹³⁶ Among those offenses which courts may no longer consider political offenses are murder, manslaughter, kidnapping, false imprisonment, assault, and certain firearms and explosives offenses.¹³⁷ Thus, while under the Backing of Warrants Act the murder of a British soldier or of a Member of Parliament could arguably have been considered a political offense, under the Suppression of Terrorism Act no type of murder may be considered political. In addition, a terrorist accused or convicted of murder or possession of firearms with the intent to injure, could not avail herself of the political offense exception regardless of her motivation. Under such terms, however, it also seems that a person who,

of the Republic, being an indictable offence or an offence punishable on summary conviction with imprisonment for six months."

131. Suppression of Terrorism Act, 1978, ch. 26, § 1.

132. *Id.* § 1(1); see Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 1(1)(a).

133. Suppression of Terrorism Act, 1978, ch. 26, § 1(1).

134. *United States Government v. McCaffery*, [1984] 2 All E.R. 571, 573 (H.L.) (per Lord Diplock).

135. See *supra* text accompanying notes 85 & 86.

136. Suppression of Terrorism Act, 1978, ch. 26, § 1(2)(a), (3)(c).

137. *Id.* § 1(2)(a), sched. 1, paras. 1 (murder), 2 (manslaughter or culpable homicide), 4 (kidnapping, abduction or plagium), 5 (false imprisonment), 6 (assault occasioning actual bodily harm or causing injury), 12 (causing gunpowder to explode causing bodily injury or with the intent to do grievous bodily injury, or placing gunpowder near a building with the intent to cause bodily injury), 13 (causing explosion likely to endanger life or property, or doing an act with an intent to cause an explosion, including making or possessing explosives with intent to endanger life or property), 14 (possession of a firearm with intent to injure, or using a firearm to resist arrest), 15 (possession of a firearm or ammunition with intent by means thereof to endanger life, or to enable another person to endanger life).

in the course of a domestic uprising, the purpose of which was to establish a more democratic government, killed a member of the government incidental to the general uprising, could not avail himself to the political offense exception. The government against whom he revolted would then be able to secure his return and prosecute him for his participation in the uprising. The purpose of the political offense exception as traditionally recognized would thereby be frustrated.¹³⁸

The Suppression of Terrorism Act does not eliminate all protection to the politically oppressed. The Act amends the Backing of Warrants Act by adding two grounds on which the magistrate may refuse to issue an order for delivery of the fugitive to the Garda Síochána.¹³⁹ An order shall not be issued if it is shown to the satisfaction of the court that there are reasonable grounds for believing (1) "that the warrant was in fact issued in order to secure the return of the person named . . . in it to the Republic for the purpose of prosecuting him on account of his race, religion, nationality or political opinions; or " (2) "that he would, if returned there, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions."¹⁴⁰ So, in the hypothetical given above, if the court found substantial grounds for believing the warrant issued for the fugitive's arrest was in fact aimed at securing his return so that the government could prosecute him for his anti-government opinion, the court would not surrender the fugitive. The court must be satisfied, however, that there are substantial grounds for believing the fugitive will in fact be prosecuted for his political opinions.¹⁴¹ Therefore, terrorists accused of acts of violence may not so easily avail themselves of this defense.

Section four of the Suppression of Terrorism Act permits the United Kingdom to exercise jurisdiction over persons who have committed crimes in any other convention country.¹⁴² A person who has committed an act in a convention country, which act would have made the offender guilty of certain offenses if it had been committed

138. *In Re Castioni*, [1891] 1 Q.B. 149, 168 (per Judge Hawkins); see *supra* text accompanying note 69.

139. Suppression of Terrorism Act, 1978, ch. 26, § 2(2).

140. *Id.*, adding provisions (e)(i) and (ii) to Backing of Warrants Act, 1965, ch. 45, § 2(2). Cf. Extradition Act, No. 17, § 11(2) (Ir. 1965) which provides extradition shall not be granted

if there are substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that that person's position may be prejudiced for any of those reasons.

Yet this section is in Part II of the Extradition Act, and therefore not applicable to the United Kingdom.

141. Suppression of Terrorism Act, 1978, ch. 26, § 2(2).

142. *Id.* § 4.

in the United Kingdom; will be guilty of that offense in the United Kingdom.¹⁴³ If for some reason the extradition requested of the United Kingdom pursuant to this Act should fail, the United Kingdom could conceivably prosecute the fugitive offender found within its territory in its courts. This section further provides that the term "in a convention country" applies to the ships, aircraft, and hovercraft registered in a convention country.¹⁴⁴ Thus, under this section, acts committed aboard ships at sea, or airplanes in flight may fall under the jurisdiction of the United Kingdom. Although the IRA preys almost entirely on land targets, other terrorist organizations have targeted ships and airplanes, and there is no guarantee that the IRA will not change targets.

Ireland was not an original signatory to the European Convention on the Suppression of Terrorism, and did not become a party until 1987.¹⁴⁵ The British Secretary of State is empowered to apply section 4 of the Act to the Republic at any time the Republic is not a party to the Convention.¹⁴⁶ Yet between 1978 and 1985 the United Kingdom did not order the Act applicable to Ireland, or any other country.¹⁴⁷ Thus, while the political offense exception was abated as a defense to extradition from the United Kingdom to Ireland, the political offense "loophole" was still recognized in Ireland. The British were offended and gravely concerned about the continued availability in Ireland of the political offense exception to terrorists wanted in the United Kingdom.¹⁴⁸ British authorities expressed concern that the continued recognition of the political offense exception was making it easier for Ireland to be used as a refuge by the IRA.¹⁴⁹

In 1985 the Governments of the United Kingdom and the Republic of Ireland concluded an agreement on Northern Ireland.¹⁵⁰ By the terms of the Anglo-Irish Agreement an Intergovernmental Conference was established through which the Irish government may put forward its views and proposals concerning Northern Irish affairs relating to political, security, and legal matters, as well as to the promotion of cross-border cooperation.¹⁵¹ Among those legal matters with which the Conference is to be concerned is extradition.¹⁵² In

143. *Id.*

144. *Id.* § 4(7).

145. Extradition (Suppression of Terrorism) Act, No. 1 (Ir. 1987).

146. Suppression of Terrorism Act, 1978, ch. 26, § 5(2).

147. Suppression of Terrorism Act, 1978, ch. 26 § 5.

148. *Patrick Ryan: No Go*, *ECONOMIST*, Dec. 17, 1988, at 63, col. 2; *N.Y. Times*, Apr. 10, 1990, at A3, col. 1.

149. *N.Y. Times*, Apr. 10, 1990, at A3, col. 1; "The Irish Republic was perceived in Britain as a safe haven for terrorists, Mr. Ian Gow . . . said yesterday in a [House of] Commons Easter adjournment debate . . ." *The Time* (London), Apr. 6, 1990, at 7, col. 1.

150. Anglo-Irish Agreement, *supra* note 18.

151. *Id.* B, art. 2, paras. (a), (b).

152. *Id.* E, art. 8.

this regard, then Taoiseach (Prime Minister of Ireland) Garret Fitzgerald stated that his government intended to accede as soon as possible to the European Convention on the Suppression of Terrorism.¹⁵³

3. *The Extradition (Suppression of Terrorism) Act of 1987 and the Extradition (Amendment) Act of 1987.*—In December, 1987, the Oireachtas (Irish Parliament) passed legislation giving effect to the European Convention on the Suppression of Terrorism.¹⁵⁴ The Irish Suppression of Terrorism Act does not supersede previous legislation, but rather amends and qualifies the 1965 Extradition Act.¹⁵⁵ Like the British Suppression of Terrorism Act, the Irish Suppression of Terrorism Act limits those offenses which may be considered political in nature.¹⁵⁶ Part III of the Extradition Act concerns the endorsement and execution in Ireland of warrants issued in the United Kingdom.¹⁵⁷ For the purposes of Part III of the Extradition Act, certain offenses listed in the 1987 Act may not be regarded as political offenses or offenses connected with political offenses.¹⁵⁸ Although both the British and Irish Suppression of Terrorism Acts were enacted to give effect to the European Convention, important differences exist between the two Acts.

The difference between the British and Irish Suppression of Terrorism Acts which has proved to be the most significant and damaging in the fight against the IRA involves retroactivity. The British Suppression of Terrorism Act allows retroactive application of the limitation on those offenses which may be considered political.¹⁵⁹ Yet as concerns warrants endorsed pursuant to Part III of the Extradition Act, the limitation imposed by the Irish Suppression of Terrorism Act of 1987 on which offenses may be considered political offenses applies only to those warrants issued after the commencement of the 1987 Act, even though the offense for which extradition is sought may have been committed prior to the passing of the Act.¹⁶⁰

In the case of Dermot Finucane, the IRA terrorist who escaped from the Maze Prison,¹⁶¹ the Irish Supreme Court refused the British request for his extradition, holding that the offenses for which his

153. Anglo-Irish Summit Meeting Joint Communique, Nov. 15, 1985, 24 I.L.M. 1579, 1581.

154. Extradition (Suppression of Terrorism) Act, No. 1 (Ir. 1987).

155. *Id.* § 12(3).

156. *See id.* §§ 3, 4.

157. Extradition Act, No. 17, § 3 (Ir. 1965).

158. Extradition (Suppression of Terrorism) Act, No. 1, § 3(1)(a), (2)(b), (Ir. 1987).

159. Suppression of Terrorism Act, 1978, ch. 26, § 1.

160. Extradition (Suppression of Terrorism) Act, No. 1, § 3(2)(b), (Ir. 1987).

161. *See supra* text accompanying notes 73 & 74.

extradition was requested were political offenses.¹⁶² Though the Supreme Court did not decide Finucane's fate until March 13, 1990, over two years after the enactment of the 1987 Act, the warrants for his arrest were issued in Northern Ireland on October 5, 1987, two months prior to the enactment of the 1987 Act.¹⁶³ Because the 1987 Act does not allow for retroactive application, Finucane was permitted to avail himself of the protection of the political offense exception embodied in the Extradition Act, and Finucane, a convicted IRA terrorist, was permitted to walk away scot-free.¹⁶⁴ The Court's refusal to extradite Finucane, compelled by the Irish Suppression of Terrorism Act, infuriated British officials and highlighted a serious flaw in the Act.¹⁶⁵

Owen Carron, arrested for firearms offenses in Northern Ireland, skipped bail in Northern Ireland and fled to the south.¹⁶⁶ On April 6, 1990, the Irish Supreme Court held that the offenses for which Carron's extradition was requested were connected to a political offense, denied his extradition, and thus freed another fugitive accused of terrorist activity.¹⁶⁷ As a result of the Court's refusal to extradite Carron, and three weeks after its refusal to extradite Finucane and a compatriot, Anglo-Irish relations "plumbed new depths."¹⁶⁸ These refusals to extradite took on new meaning when, three days after the Carron decision, four British soldiers were killed near Downpatrick, Northern Ireland.¹⁶⁹

Section three of the 1987 Act sets out those offenses which may not be considered political for the purposes of Part III of the Extradition Act.¹⁷⁰ Among those offenses which are not to be regarded as political offenses under section three are: offenses within the scope of the Conventions for the Suppression of Unlawful Seizure of Aircraft¹⁷¹ and for the Suppression of Unlawful Acts Against the Safety of Civilian Aviation;¹⁷² serious offenses against internationally pro-

162. *Finucane v. McMahon*, 1990 I.L.R.M. 505 (LEXIS, IreInd library, cases file, at 18); see *supra* text accompanying notes 75-85.

163. *Finucane v. McMahon*, 1990 I.L.R.M. 505 (LEXIS, IreInd library, cases file, at 7).

164. *Id.* (LEXIS, IreInd library, cases file, at 18).

165. N.Y. Times, Apr. 7, 1990, at A3, col. 5.

166. *Carron v. McMahon*, 1989 Nos. 139 and 146 (Transcript), 6 April 1990 (LEXIS, IreInd library, cases file, at 1); see *supra* text accompanying notes 103-05.

167. *Carron*, (LEXIS, IreInd library, cases file, at 1); see *supra* text accompanying notes 108-10.

168. The Times (London), Apr. 7, 1990, at 1, col. 1. Peter Brooke, Secretary of State for Northern Ireland stated that the refusal to extradite Carron was "a matter of gravest concern" that had "damaging implications all around." *Id.* Mrs. Thatcher, more to the point, said, "[v]iolent crime is not political. It is common criminal." *Ireland: Bad Old Law*, ECONOMIST, Apr. 14, 1990, at 64, col. 1.

169. N.Y. Times, Apr. 10, 1990, at A3, col. 1.

170. Extradition (Suppression of Terrorism) Act, No. 1, § 3 (Ir. 1987).

171. Convention for the Suppression of the Unlawful Seizure of Aircraft, *opened for signature* 16 December 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192.

172. Convention for the Suppression of Unlawful Acts against the Safety of Civil Avia-

tected persons; kidnapping or serious false imprisonment; and offenses involving the use of an explosive or an automatic firearm, if such use endangers persons.¹⁷³ Murder, manslaughter, and assault are not included in this section. While "false imprisonment" is not to be considered a political offense under the British Suppression of Terrorism Act,¹⁷⁴ only "serious" false imprisonment may be excluded from the political offense exception under the 1987 Act.¹⁷⁵ The British Suppression of Terrorism Act does not regard as a political offense any act, including conspiracy and possession, which involves explosives, with the intent to endanger life, or the use of a firearm or the possession of a firearm with intent to injure.¹⁷⁶ The 1987 Act covers only those offenses involving the use of an explosive or an automatic firearm, if such use endangers persons.¹⁷⁷

In June, 1990, two Northern Ireland police officers were shot and killed by the IRA while patrolling a crowded Belfast street.¹⁷⁸ Under section three, offenses involving automatic weapons shall not be regarded as political, yet offenses involving semi-automatic or single-shot weapons apparently may be considered political offenses. If the IRA terrorist who committed these crimes had used a semi-automatic or single-shot weapon and was found in the Republic, she conceivably could escape extradition under section three by being permitted to avail herself of the political offense exception. Likewise, possession of explosives is not excluded from consideration as a political offense under this section.¹⁷⁹ In the summer of 1990, both the Carlton Club in London¹⁸⁰ and the London Stock Exchange¹⁸¹ were devastated by IRA bombs. Had any of the terrorists involved in these bombings, or those who killed Ian Gow,¹⁸² been apprehended in the United Kingdom before they had the opportunity to plant their bombs there, but subsequently escaped to the Republic, it is questionable whether they would be extradited to the United Kingdom, as possession of explosives may be considered a political offense under section three of the 1987 Act. Because the IRA relies so heavily on the use of firearms and explosives¹⁸³ in its terrorist campaign

tion, *opened for signature* 23 September 1971, 24 U.S.T. 565, T.I.A.S. No. 7570.

173. Extradition (Suppression of Terrorism) Act, No. 1 § 3(3)(a)(i), (ii), (iii), (iv), (v) (Ir. 1987).

174. Suppression of Terrorism Act, 1978, ch. 26, sched. 1, para. 5.

175. Extradition (Suppression of Terrorism) Act, No. 1 § 3(3)(a)(iv) (Ir. 1987).

176. Suppression of Terrorism Act, 1978, ch. 26, sched. 1, paras. 13(a), (b), 14.

177. Extradition (Suppression of Terrorism) Act, No. 1, § 3(3)(a)(v) (Ir. 1987).

178. N.Y. Times, July 25, 1990, at A5, col. 17.

179. Extradition (Suppression of Terrorism) Act, No. 1, § 3(a)(v) (Ir. 1987).

180. N.Y. Times, July 21, 1990, at A3, col. 1.

181. *Id.*

182. The Times (London), July 31, 1990, at 1, col. 1.

183. Finucane v. McMahon, 1990 I.L.R.M. 505 (LEXIS, Ireland library, cases file, at 11).

against the British, the 1987 Act should have broadened instead of limited the scope of those offenses involving firearms and explosives which may not be considered political in nature, in order to ensure that the political offense "loophole" could not be further manipulated by IRA terrorists.

The 1987 Act is not as weak as it appears on preliminary examination. Section three, as discussed above, sets out those offenses which are not to be considered *prima facie* political offenses. Section four sets out certain other offenses which may not be regarded as political in certain circumstances. Section four applies to "any serious offense . . . (i) involving an act of violence against the life, physical integrity, or liberty of a person, or (ii) involving an act against property if the act created a collective danger for persons."¹⁸⁴ In determining whether certain of these serious offenses should be considered political offenses or offenses connected with political offenses, the court or the Minister of Justice must first take into consideration certain aspects of the offense, including: whether it created a collective danger to the life, physical integrity or liberty of persons; whether it affected persons foreign to the motives behind it; whether cruel or vicious means were used in the commission of the offense.¹⁸⁵ The Supreme Court of Ireland in *Finucane v. McMahon*¹⁸⁶ pointed out how this consideration to be made under section four can strengthen the application of the 1987 Act as against terrorists:

The reference to "collective," "persons foreign to the motives," and "cruel and vicious means" are recognised elements of terrorism. The court is empowered to form the opinion by reason of these elements that the offence could not properly be regarded as a political offence or an offence connected with a political offence.¹⁸⁷

After this consideration under section four, if either the court or the Minister is of the opinion that the offense cannot properly be regarded as a political offense, then it will not be so considered.¹⁸⁸ Murder, manslaughter, possession of firearms, and simple false imprisonment, which are not specifically excluded under section three, may all be excluded from consideration as political offenses under section four if, in light of the unique circumstances of the particular offense, the court or Minister makes the appropriate determination. Had the 1987 Act been applicable to Owen Carron, the offense with which he was accused — possession of firearms — would not have

184. Extradition (Suppression of Terrorism) Act, No. 1, § 4(2)(a)(i)(I),(II) (Ir. 1987).

185. *Id.* § 4(2)(a)(i)-(iii).

186. *Finucane v. McMahon*, 1990 I.L.R.M. 505 (LEXIS, IreInd library, cases file).

187. *Id.* (LEXIS, IreInd library, cases file, at 13).

188. Extradition (Suppression of Terrorism) Act, No. 1, § 4(1)(a) (Ir. 1987).

been covered under section three as an offense which is *prima facie* nonpolitical. Yet he may have been found extraditable for his offense under section four.

While abating the applicability of the political offense exception, the 1987 Act does not leave the politically oppressed helpless.¹⁸⁹ The 1987 Act amends section 44 of the Extradition Act which specifies circumstances in which a warrant shall not be endorsed, and section 50 which specifies circumstances in which a person arrested shall be released.¹⁹⁰ The Minister or the High Court may now refuse to endorse a warrant¹⁹¹ or may release the arrestee if "there are substantial grounds for believing that the warrant was in fact issued for the purpose of prosecuting or punishing . . . [the fugitive offender] on account of his race, religion, nationality or political opinion or that his position would be prejudiced for any of these reasons."¹⁹²

In 1987, the Oireachtas also passed an amendment to Part III of the Extradition Act of 1965 called the Extradition (Amendment) Act [the Amendment Act].¹⁹³ Section 44 of the Extradition Act provides that the Commissioner of the Garda Síochána shall not endorse a warrant if the Minister or High Court is of the opinion that the warrant relates to a political offense or that the person sought will be prosecuted for a political offense if returned to the United Kingdom.¹⁹⁴ The Amendment Act amends section 44 by adding section 44A which provides that "[a] warrant . . . shall not be endorsed for execution . . . if the Attorney General so directs."¹⁹⁵ The Amendment Act also adds section 44B to the Extradition Act which provides that the Attorney General shall order that a warrant not be endorsed, unless, after considering all appropriate information, he is of the opinion that there is a clear intention, founded on the existence of sufficient evidence, to prosecute the person sought for the offense specified in the warrant.¹⁹⁶ This provision seems aimed at two scenarios: the prosecution of the person sought once return to the United Kingdom for crimes other than those set out in the warrant; and, the interrogation, as opposed to prosecution, of the person sought once returned. The determinations to be made by the Attorney General under section 44B are determinations which are essentially political in nature, and properly to be made by the Executive

189. *Id.* §§ 8,9.

190. *Id.*

191. *Id.* § 8 (amending § 44 of the Extradition Act, No. 17 (Ir. 1965)).

192. Extradition (Suppression of Terrorism) Act, No. 1, § 9 (Ir. 1987) (amending § 50 of the Extradition Act, No. 17 (Ir. 1965)).

193. Extradition (Amendment) Act, No. 25 (Ir. 1987).

194. Extradition Act, No. 17, § 44 (Ir. 1965).

195. Extradition (Amendment) Act, No. 25, § 2(1)(a) (Ir. 1987).

196. *Id.*

Branch of the government.¹⁹⁷ Yet allowing political considerations to play such a determinative role in which is essentially a legal proceeding sometimes wreaks havoc.

Father Patrick Ryan, an Irish priest, was wanted in the United Kingdom for terrorist offenses.¹⁹⁸ Ryan was found in Belgium from where the British tried unsuccessfully to extradite him.¹⁹⁹ The Belgians released Ryan and sent him to Ireland.²⁰⁰ The British then submitted four warrants issued in London for Ryan's arrest to the Commissioner of the Garda Síochána for endorsement.²⁰¹ Pursuant to the Amendment Act, the Irish Attorney General, John Murray, took the endorsement request under advisement.²⁰² In respect to the charges in two of the warrants, Murray, after considering all appropriate information, concluded that there was a clear intention on the part of the British government to prosecute Ryan for the offenses charged.²⁰³ Yet Murray reached no conclusion on the other two warrants because, as he claimed in a statement issued by his office,

the effect of the material [concerning Fr. Ryan] published [and televised in the United Kingdom] has, manifestly and inescapably, been to create such prejudice and hostility to Patrick Ryan that, were he to be extradited to Britain, it would not be possible for a jury to approach the issue of his guilt or innocence free from bias . . . No direction to the jury by the trial judge to ignore the prejudicial matter to which they have been exposed could be effective in removing the bias which has been created.²⁰⁴

Murray therefore directed the Commissioner of the Garda Síochána not to endorse the warrants.²⁰⁵ The British were outraged.²⁰⁶ And

197. See *infra* text accompanying notes 274 & 275.

198. *The Legacy of Father Ryan*, *ECONOMIST*, Dec. 10, 1988, at 59.

199. *The Times* (London), Dec. 14, 1988, at 6, col. 1.

200. *Id.*

201. *Id.*; see Extradition Act, No. 17, § 43 (Ir. 1965).

202. *The Times* (London), Dec. 14, 1988, at 6, col. 1; see Extradition (Amendment) Act, No. 25, § 2(a) (Ir. 1987).

203. *The Times* (London), Dec. 14, 1988, at 6, col. 3.

204. *Id.* at 6, col. 6.

British television news reports showed the scenes of the aftermath of a number of explosions which had occurred in Britain previously and linked them to the charges on . . . [Ryan's] warrants . . . [R]eferences to Patrick Ryan . . . have appeared in newspapers . . . and on radio and television, over a protracted period. They consisted, inter alia, of attacks on Patrick Ryan's general character, often expressed in intemperate language . . . and also assertions of his guilt of the offences comprised in the warrants An equally serious matter is the making of certain statements in the House of Commons. The tone, tenor and contents of much of what was said carried an assumption or inference of guilt on the part of [Father Ryan] . . . [T]he statements in the House of Commons must, because of their origin, carry particular weight with potential jurors.

Id. at 6, cols. 3-6.

205. *Id.* at 6, col. 6.

206. *Patrick Ryan: No Go*, *ECONOMIST*, Dec. 17, 1988, at 63. Not all thought the Brit-

rightly so. Under section 44B of the Amendment Act, the Attorney General is merely to decide whether there is a clear intention on the part of the United Kingdom to prosecute the person sought for the offenses claimed.²⁰⁷ While the 1987 Act requires the Minister or the High Court to make an inquiry into whether the person sought would be prejudiced, if returned, on account of his race, religion, nationality or political opinions,²⁰⁸ neither the Extradition Act, nor the 1987 Act, nor the Amendment Act requires any inquiry into the fairness of any resulting jury trial in the United Kingdom. The Irish Supreme Court has held that it is for the judiciary to "safeguard the constitutional rights of the fugitive and [to] ensure that there will be no rendition which would subject the fugitive to injustice or to any treatment or procedure which would be inconsistent with the norms of our concept of fair procedures."²⁰⁹

Both the British Suppression of Terrorism Act and the 1987 Act have abated the applicability of the political offense exception in extradition proceedings.²¹⁰ This has been the most important step in amendment extradition laws in such a way as to deny to terrorists the protection historically due only to those who have used violence legitimately in the course of liberating themselves from political oppression. The fact that the 1987 Act does not provide for retroactive application will continue to be a problem only insofar as there are outstanding arrest warrants, issued before the December 6, 1987 enactment of the Act.²¹¹ Should the killers of Ian Gow, of the three soldiers and Sister Catherine Dunn in Armagh, and of the four soldiers in Downpatrick flee to Ireland, there should be no problem applying the 1987 Act, and they will not be permitted to avail themselves of the protection of political offense exception. So long as they are not granted bail, and the Irish Attorney General does not make determinations he is not empowered to make, these killers will be brought to justice.

ish blameless in this matter:

Too often, British newspaper (widely read in Ireland) and television (widely watched there) have discussed the Ryan case as if the Irish could not speak English. And anyone who thinks that the House of Commons has discussed the Ryan case with the fastidious care that should apply to legal proceedings has not been to Westminster in the past two weeks. Baying for blood belongs on the foxhunt; it has no place in such delicate negotiations.

Id.

207. Extradition (Amendment) Act, No. 25, § 2(a) (Ir. 1987).

208. Extradition (Suppression of Terrorism) Act, No. 1, §§ 8, 9 (Ir. 1987).

209. *Finucane v. McMahon*, 1990 I.L.R.M. 505 (LEXIS, Ireland library, cases file, at 17).

210. Suppression of Terrorism Act, 1978, ch. 26, § 1; Extradition (Suppression of Terrorism) Act, No. 1, §§ 3, 4 (Ir. 1987).

211. See Extradition (Suppression of Terrorism) Act, No. 1, § 3(2)(b) (Ir. 1987).

B. The United States and the United Kingdom

1. *The 1972 United States-United Kingdom Extradition Treaty.*—Extradition between the United Kingdom and the United States is conducted pursuant to the 1972 Extradition Treaty between the governments of the two states.²¹² The Treaty requires that three basic criteria be met before extradition shall be granted for acts which constitute an offense to which the Treaty applies.²¹³ The offense must first be punishable under the laws of both the United Kingdom and the United States by not less than one year imprisonment or by death.²¹⁴ This "dual criminality" requirements is satisfied if the essential character of the acts is made criminal in both states.²¹⁵ Exact correspondence between the definitions of a crime in each state is not required.²¹⁶

The second requirement is that the offense be extraditable under the law of the United Kingdom.²¹⁷ This requirement has been determined by British courts to be satisfied if the act which the accused has committed would have amounted to the commission of a crime under the law of the United Kingdom if it had been committed in the United Kingdom.²¹⁸ The final requirement is that the offense constitute a felony under the law of the United States.²¹⁹

The United Kingdom must provide a statement of the legal provisions which establish that the offense for which extradition is requested is an extraditable offense under British law when the United

212. 1972 Extradition Treaty, *supra* note 21.

213. *Id.* art. III(1).

214. *Id.* art. III(1)(a).

215. *R v. Governor of Pentonville Prison, ex parte Budlong*, [1980] 1 All E.R. 701, 711 (Q.B.) (quoting *Wright v. Henkel*, 190 U.S. 40 (1902)); *see also* *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1404 (9th Cir. 1988) ("To satisfy dual criminality, the name by which the crime is described in the two countries need not be the same, nor does the scope of liability for the crime need to be the same.").

216. *Ex Parte Budlong* [1980] 1 All E.R. at 709. The extradition of the petitioners was sought by the United States for charges of burglary. Under the relevant American law entry as a trespasser is not an essential element of burglary, whereas trespass is an essential element of the crime under English law. *Id.* at 708. The 1972 Treaty requires the offense for which extradition is sought be extraditable under the laws of the United Kingdom. 1972 Extradition Treaty, *supra* note 21, article III(1)(b). For an offense to be extraditable under the laws of the United Kingdom it must be an "extradition crime" as defined in the Extradition Act of 1870. *Ex parte Budlong*, [1980] 1 All E.R. at 712 (citing Extradition Act, 1870, 33 & 34 Vict., ch. 52). An "extradition crime" is defined by the Extradition Act of 1870 as "a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act." *Id.* (citing Extradition Act, 1870, 33 & 34 Vict., ch. 52, § 26). The court interpreted this definition to mean that an "extradition crime" has been committed if that which the accused has done would have amounted to the commission of one of the crimes listed in the schedule had it been done in the U.K. *Id.* The actions of the accused, if committed in the U.K., would have constituted the crime of burglary under English law, so the requirement of dual criminality was met.

217. 1972 Extradition Treaty, *supra* note 21, art. III(1)(b).

218. *R v. Governor of Pentonville Prison, ex parte Budlong*, [1980] 1 All E.R. 701, 712 (Q.B.); *see supra* note 216 and accompanying text.

219. 1972 Extradition Treaty, *supra* note 21, art. III(1)(c).

Kingdom is requesting extradition.²²⁰ When the United States is the requesting state, it must provide a statement that the offense constitutes a felony under American law.²²¹ Requests must be made through the diplomatic channel.²²² In addition to the statements establishing the offense as extraditable under British law or as a felony under American law, the request for extradition must also be accompanied by a description of the person sought; a statement of the facts of the offense charged; and the text, of any, of the law defining the offense, prescribing the maximum penalty, and imposing any statute of limitations.²²³ If the request relates to an accused person, the request must also be accompanied by an arrest warrant issued by a judge in the requesting state.²²⁴ This warrant is not endorsed, as it would be under the Backing of Warrants Act and the Extradition Act,²²⁵ but is considered only as evidence upon which the extradition decision is made.²²⁶ If the extradition of a convicted person is requested, the requesting state must provide a certificate or judgment of conviction.²²⁷

In the United Kingdom, the materials accompanying the request are first considered by the legal advisers in the Home Office, who then advise the Secretary of State whether to refer the request, by order, to a magistrate.²²⁸ Upon his preliminary consideration and at his discretion, the Secretary of State may refuse to send an order to a magistrate and discharge the fugitive offender from custody.²²⁹ At this time, he may consider whether the offense charged is of a political character and thus non-extraditable.²³⁰ When the magistrate receives an order, it is his duty to examine the evidence before issuing an arrest warrant.²³¹

The system in the United States is different. The initial request for the arrest of the person sought is made to a federal justice, judge, or authorized magistrate.²³² When the fugitive is apprehended, he is brought before the issuing justice, judge, or magistrate, who must then conduct a hearing to determine whether the evidence is sufficient to sustain the charge under the provisions of the relevant extra-

220. *Id.* art. VII(2)(d)(i).

221. *Id.* art. VII(2)(d)(ii).

222. *Id.* art. VII(1).

223. 1972 Extradition Treaty, *supra* note 21, at VII(2).

224. *Id.* art. VII(3).

225. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 1; Extradition Act, No. 17, § 43 (Ir. 1965).

226. 1972 Extradition Treaty, *supra* note 21, art. VII(5).

227. *Id.* art. VII(4).

228. *R v. Governor of Pentonville Prison ex parte Budlong* [1980] 1 All E.R. 701, 705 (Q.B.).

229. *Id.*

230. *Id.*

231. *Id.*

232. 18 U.S.C. 3184 (1948).

dition treaty.²³³ If the justice, judge, or magistrate finds the evidence sufficient, she *must* certify her finding to the Secretary of State so that arrangements for the fugitive's surrender may be made with the proper foreign authorities.²³⁴ The fugitive offender is then remanded in custody, *not* on bail, until he is surrendered.²³⁵ Under the American system, the magistrate *must* certify to the Secretary of State that the fugitive is extraditable if the evidence supports this determination.²³⁶ The ultimate decision to surrender the person, however, rests with the Secretary of State.²³⁷ The court's *legal* determination that a person is extraditable does not bind or control the Secretary of State's subsequent *political* determination.²³⁸

The Treaty provides several situations in which extradition shall not be granted. Procedurally, extradition shall not be granted if the person sought would be entitled to a discharge on the grounds of a previous acquittal or conviction in the requesting or requested state, or in a third state.²³⁹ A court shall also refuse to extradite a person if the prosecution of the offense charged would be barred by "lapse of time" under the law of either the requesting or requested state.²⁴⁰ In *In re McMullen*²⁴¹ respondent McMullen, an Irish citizen and former member of the PIRA, was wanted in the United Kingdom in connection with several bombings that took place in March, 1974 in North Yorkshire County, England.²⁴² A warrant was issued in the United Kingdom for his arrest in June, 1978, but McMullen had fled to the United States.²⁴³ A request for his extradition from the United States was filed by the United States Government on behalf of the United Kingdom, pursuant to article XIV of the 1972 Treaty,

233. *Id.*

234. *Id.*

235. *Id.*; see *Quinn v. Robinson*, 783 F.2d 776, 786 n.3 (9th Cir. 1986). Because of the limited function of an extradition hearing, there may be no appeal from an extradition order by either the government or the fugitive offender. Instead, the Government may reinstate an extradition request with another magistrate, and the fugitive offender may seek review by filing a petition for habeas corpus. *Contra* Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 3(1) and Extradition Act, No. 17, § 48(1)(2) (Ir. 1965) which require the person sought not be surrendered for fifteen days in order that he may appeal the order for delivery made by the magistrate below.

236. 18 U.S.C. § 3184 (1948); see *In re United States*, 713 F.2d 105 (5th Cir. 1983) ("The court determines whether the fugitive is subject to extradition and, if so, *must* order the fugitive's commitment and certify the record to the Secretary of State. *Id.* at 108.).

237. 18 U.S.C. § 3186 (1948); see *In Re United States*, 713 F.2d at 108.

238. *Eain v. Wilkes*, 641 F.2d 504, 516 (7th Cir. 1981) (citing *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894)).

239. 1972 Extradition Treaty, *supra* note 21, art. V(1)(a).

240. *Id.* art. V(1)(b).

241. *In re the Requested Extradition of McMullen by the Government of the United Kingdom*, No. 86 CR. MISC. 1 (S.D.N.Y. June 24, 1988) (WESTLAW, Allfeds library) [hereinafter *McMullen II*].

242. *Id.* at 1.

243. *Id.*

in July 1978.²⁴⁴ McMullen's extradition was denied in 1979 on the grounds that the offense he allegedly committed was political in nature, and thus non-extraditable under the 1972 Treaty.²⁴⁵ The United States then successfully sought McMullen's deportation.²⁴⁶ In December, 1986, as McMullen was in the process of being deported, he was arrested in New York pursuant to a provisional warrant issued under the Supplementary Treaty and McMullen found himself fighting extradition once again, over twelve years since the bombings in which he was allegedly involved.²⁴⁷ McMullen moved for a dismissal on the grounds that his extradition was barred by the statute of limitations, because under Federal law, an indictment must be found or an information instituted within five years after a non-capital offense has been committed.²⁴⁸ The Government argued that his extradition was not barred because under section 3290 of Title 18 of the United States Code, statutes of limitations shall not apply to any person fleeing from justice.²⁴⁹ McMullen countered by arguing he had been living openly, and had been available for further extradition proceedings, in the United States since his extradition was denied in 1979, and had not been fleeing justice.²⁵⁰ The court held, however, that McMullen's failure to surrender to British officials, by whom McMullen knew he was wanted, constituted "constructive flight from justice," and that the statute of limitations had not tolled.²⁵¹ Therefore, the prosecution of McMullen would not be barred by "lapse of time," and the "lapse of time" defense could not be used to stop his extradition.

Extradition may be barred under the 1972 Treaty on more substantive grounds as well. If the offense charged is regarded by the requested party as one of a political character, the fugitive shall not be extradited.²⁵² In the United Kingdom this determination may be made preliminary by the Secretary of State, or by the courts on review of habeas corpus petitions.²⁵³ In the United States, the executive has claimed that the term "requested party" refers to the Secretary of State, not the judiciary, and that the Secretary should

244. *Id.*

245. McMullen II, *supra* note 241, at 1.

246. *Id.*

247. *Id.*; for a discussion of the Supplemental Treaty see *infra* note 279.

248. McMullen II, *supra* note 241, at 2; see also *id.* at n.3, quoting 18 U.S.C. 3282 (1948) ("Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information instituted within five years next after such offense shall have been committed.").

249. McMullen II, *supra* note 241, at 3.

250. *Id.* at 4.

251. *Id.*

252. 1972 Extradition Treaty, *supra* note 21, art. V(1)(c)(i).

253. *R. v. Governor of Pentonville Prison ex parte Budlong* [1980] 1 All E.R. 701, 705 (Q.B.) (citing Extradition Act, 1870, 33 & 34 Vict., ch. 52, § 7).

determine whether the fugitive may avail herself of the political offense exception.²⁵⁴ American courts have rejected the executive's position and have held the determination of whether an offense is of a political character is in the realm of the judiciary.²⁵⁵ The position of the American judiciary on this position was staunchly defended by the court in *In re Doherty*.²⁵⁶ Joseph Doherty was a member of the IRA who, along with three other IRA terrorists, attacked a convoy of British soldiers in Belfast in May, 1980.²⁵⁷ A British Army Captain was killed in the ambush.²⁵⁸ Doherty was arrested and charged with murder, attempted murder, and illegal possession of firearms among other offenses.²⁵⁹ While being held in prison pending trial, Doherty escaped and fled to the United States.²⁶⁰ Doherty was subsequently convicted *in absentia* and the United Kingdom requested his extradition under the 1972 Treaty.²⁶¹ The court to which the extradition request was made determined that the offenses with which Doherty was charged were political offenses and denied the United Kingdom's extradition request.²⁶² In doing so the court stated,

the Court is not persuaded by the fact that the current political administration in the United States as strongly denounced terrorist acts and has stated that to refuse extradition in this case might jeopardize foreign relations . . . The [1972] Treaty vests the determination of the limits of the political offense exception in the courts and therefore reflects a congressional judgment that that decision not be made on the basis of what may be the current view of any one political administration.²⁶³

In determining whether the political offense exception applies, American courts have generally considered whether there was a violent political disturbance or uprising in the requesting country at the time of the alleged acts, and whether the acts charged against the fugitive were recognizably incidental to the disturbance or uprising.²⁶⁴ This test has not been applied blindly, however. Courts have

254. *Eain v. Wilkes*, 641 F.2d 504, 517 (7th Cir. 1981); *Quinn v. Robinson*, 783 F.2d 776, 787 (9th Cir. 1986).

255. *Eain*, 641 F.2d at 513; *see also Quinn*, 783 F.2d at 788 ("[W]e . . . recognize the individual liberty concerns at stake in cases of this nature and note the Supreme Court's long accepted conclusion that 'extradition without an unbiased hearing before an independent judiciary . . . [is] highly dangerous to liberty, and ought never to be allowed in this country.'" (quoting *In re Kaine*, 55 U.S. (14 How.) 103, 112, 14 L.Ed. 345 (1852))).

256. *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984).

257. *Id.* at 272.

258. *Id.*

259. *Id.*

260. *In re Doherty*, 599 F. Supp. 270, 272 (S.D.N.Y. 1984).

261. *Id.*

262. *Id.* at 277.

263. *Id.* at 277, n.6.

264. *Eain v. Wilkes*, 641 F.2d 504, 515-16 (7th Cir. 1981); *Quinn v. Robinson*, 783 F.2d 776, 806 (9th Cir. 1986).

recognized that the crimes perpetrated by international terrorist organizations are not deserving of the concern and sympathy "for the cause of liberation for subjugated peoples" which originally gave rise to the political offense exception.²⁶⁵ Not every offense committed for a political purpose or during a political uprising "may or should properly be regarded by the courts as a political offense."²⁶⁶ Today, courts consider the nature of each act, the context in which it was committed, the status of the actors and victims, the particularized circumstances of the situs, as well as policy considerations.²⁶⁷ Yet, despite the standards and tests promulgated by courts in an attempt to extradite terrorists while still protecting those activities originally intended to be protected, terrorists still escaped extradition by manipulating the political offense exception.²⁶⁸ As has been the case between the United Kingdom and the Republic of Ireland, extradition of IRA members from the United States to the United Kingdom has been severely hampered by the provision for an unqualified political offense exception in the 1972 Treaty.²⁶⁹

The 1972 Treaty provides that courts shall refuse extradition if the fugitive offender proves the request for her extradition has in fact been made with a view to try or to punish her for an offense of a

265. *In re Doherty*, 599 F. Supp. 270, 275, n.4 (S.D.N.Y. 1984); *Eain*, 641 F.2d at 519-20; *Quinn*, 783 F.2d at 805-06. *Contra* Statement made by Senator Jesse Helms voicing concern over the emasculating of the political offense exception:

If this treaty had been in effect in 1776 . . . [its] language would have labeled the boys who fought at Lexington and Concord as terrorists. There is no question that the British authorities in 1776 would have considered the guerrilla operations of the Americans to be murder and assault. Their offenses included the use of bombs, grenades, rockets, firearms, and incendiary devices, endangering persons, as may be demonstrated by reference to our National Anthem.

Hannay, *An Analysis of the U.S.-U.K. Supplementary Extradition Treaty*, 21 INT'L LAW. 925, 930, n.22 (1987) (citing 132 CONG. REC. S9161 (daily ed. July 16, 1986)).

266. *Doherty*, 599 F. Supp. at 274.

Surely the atrocities at Dachau, Aushwitz [sic], and other death camps would be arguably political within the meaning of that definition. The same would be true of My Lai, the Bataan death march, Lidice, the Katyn Forest Massacre, and a whole host of violations of international law that the civilized world is, had been, and should be unwilling to accept.

Id.

267. *Id.* at 275; *Eain*, 641 F.2d at 520.

Terrorists who have committed barbarous acts elsewhere would [if the political offense exception were applied blindly] be able to flee to the United States and live in our neighborhoods and walk our streets forever free from any accountability for their acts. We do not need them in our society. We have enough of our domestic criminal violence with which to contend without importing and harboring with open arms the worst that other countries have to export. We recognize the validity and usefulness of the political offense exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere.

Id.

268. See *In re Mackin*, 668 F.2d 122 (2d Cir. 1981); *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984); *McMullen v. I.N.S.*, 788 F.2d 591 (9th Cir. 1986).

269. See *In re Mackin*, 668 F.2d 122 (2d Cir. 1981); *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984); *McMullen v. I.N.S.*, 788 F.2d 591 (9th Cir. 1986).

political character.²⁷⁰ In the United States, the determination of whether the request for extradition for common crimes amounts to a subterfuge by the requesting state to punish the fugitive for a political offense is within the sole province of the Secretary of State.²⁷¹ American courts view the question of whether an extradition request amounts to a subterfuge as involving political questions and judgments on the motivation of a foreign government and thus properly in the purview of the Executive.²⁷² Yet British courts do not assume a foreign state will not observe the terms of a treaty and commit a subterfuge, and thus interpret this section differently.²⁷³ As interpreted in the United Kingdom, this section "does no more than permit the accused to show by evidence that the offense for which extradition is asked is in truth of a political character, although it might not appear to be so from the evidence produced by the country requesting extradition."²⁷⁴ As a result of these different interpretations, courts in the United Kingdom may consider the motives and policies of the requesting state if such is submitted into evidence, while American courts leave policy determinations to the Executive.

If it is determined that none of the exceptions set out in article III applies, extradition may then be granted only if the evidence is found to be "sufficient according to the law of the requested Party either to justify the committal for trial of the person sought if the offense of which he is accused had been committed in the territory of the requested Party or to prove that he is the identical person convicted by the courts of the requesting Party."²⁷⁵ The clause "if the evidence [is] found [to be] sufficient according to the law of the re-

270. 1972 Extradition Treaty, *supra* note 21, art. V(1)(c)(ii).

271. *Eain v. Wilkes*, 641 F.2d 504, at 513, 518 (7th Cir. 1981).

272. *Id.* at 516-17.

273. *Re Kolczynski* [1955] 1 Q.B. 31. ("The court must not assume that the foreign state will not observe the terms of the treaty . . . [T]he section cannot, therefore, in my opinion, mean that the court may say that, if extradition is sought for crime 'A' we believe that, if the prisoner is surrendered, he will be tried and punished for crime 'B.'") *Id.* at 35 (per Lord Goddard.) The *Kolczynski* court was not considering the 1972 Treaty, but rather the Extradition Act of 1870 which provides that

[a] fugitive criminal shall not be surrendered . . . if he prove [sic] to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus . . . that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

Re Kolczynski, [1955] 1 Q.B. at 34 (citing Extradition Act, 1870, 33 & 34 Vict., ch. 52, § 3(1)). Yet this section is remarkably similar to that found in the 1972 Extradition Act, and the remarks of Lord Goddard are relevant.

274. *R. v. Governor of Pentonville Prison, ex parte Budlong* [1980] 1 All E.R. 701, 715 (Q.B.). See also *Re Kolczynski* [1955] 1 Q.B. at 35 ("If, in proving the facts necessary to obtain extradition, the evidence adduced in support shows that the offence has a political character, the application must be refused, but although the evidence in support appears to disclose merely one of the scheduled offences [and not a political offence], the prisoner may show that, in fact, the offence is of a political character.") (per Lord Goddard).

275. 1972 Treaty, *supra* note 21, art. IX(1).

quested party"²⁷⁶ has been interpreted to mean that the court or magistrate must be satisfied that probable cause exists with respect to the offenses charged in the extradition request.²⁷⁷

2. *The 1985 Supplementary Extradition Treaty*.—The 1972 Treaty was not working effectively in extraditing IRA members wanted for terrorist activities.²⁷⁸ In order to make the Treaty more effective, the United States and United Kingdom concluded a Supplementary Treaty.²⁷⁹ The Supplementary Treaty did not replace the 1972 Treaty, but rather augmented it, and both treaties are currently in force.²⁸⁰

The most important provision of the Supplementary Treaty is article one, which significantly restricts the offenses which may be regarded as political in character. As originally drafted, article 1 contained twelve subsections identifying those offenses which were not to be regarded as political.²⁸¹ Article one as amended by the

276. *Id.*

277. *In re Doherty*, 599 F. Supp. 270, 272 (S.D.N.Y. 1984); *Quinn v. Robinson*, 783 F.2d 776, 783 (9th Cir. 1986). *Cf. Ex parte Budlong* [1980] 1 All E.R. at 706 ("It is to the evidence that the magistrate is directed to look to see whether there are sufficient facts established to constitute an offence contrary to English law and not to any formal document.") (emphasis added).

278. *See In re Mackin*, 668 F.2d 122 (2d Cir. 1981); *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984); *McMullen v. I.N.S.*, 788 F.2d 591 (9th Cir. 1986).

279. Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of American and the Government of the United Kingdom of Great Britain and Northern Ireland signed at London on 8 June 1972, June 25, 1985, ____ U.S.T. ____, 24 I.L.M. 1105 [hereinafter Supplementary Treaty]. ("The Government of the United States of American and the Government of the United Kingdom of Great Britain and Northern Ireland[, d]esiring to make more effective the [1972] Extradition Treaty . . . [h]ave resolved to conclude . . . [this] Supplementary Treaty." *Id.* Preamble.)

280. *Id.* arts. 1 ("For the purposes of the [1972] Extradition Treaty"), and 6 ("This Supplementary Treaty shall form an integral part of the [1972] Extradition Treaty").

281. Original Draft of the Supplementary Treaty, *supra* note 279, *reprinted in* United States Extradition Treaties, at 920.18 [hereinafter Original Draft].

For the purposes of the [1972 Extradition Treaty, none of the following offenses shall be regarded as an offense of a political character: (a) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, [opened for signature 16 December 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192] . . . ; (b) an offense within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, [opened for signature 23 September 1972, 24 U.S.T. 565, T.I.A.S. No. 7570] . . . ; (c) an offense within the scope of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, [opened for signature 14 December 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532] . . . ; (d) an offense within the scope of the International Convention against the Taking of Hostages, [opened for signature 18 December 1979, U.N. Doc. A/RES/34/146] . . . ; (e) murder; (f) manslaughter; (g) maliciously wounding or inflicting grievous bodily harm; (h) kidnapping, abduction, false imprisonment or unlawful detention, including the taking of a hostage; (i) the following offenses relating to explosives: (1) the causing of an explosion likely to endanger life or cause serious damage to property; or (2) conspiracy to cause such an explosion; or (3) the making of [sic] possession of an explosive substance by a person who intends either himself or through another person to endanger life or cause serious damage to property; (j) the following offenses relating to firearms or ammu-

United States Senate and finally adopted by both States, has been narrowed to contain five subsections.

The first group of offenses exempted from consideration as political offenses are those for which both states have obligations pursuant to certain multilateral agreements.²⁸² The second subpart covers murder, voluntary manslaughter, and assault "causing grievous bodily harm."²⁸³ The original draft of the Supplementary Treaty, as well as the British Suppression of Terrorism Act, excludes "manslaughter" from consideration as a political offense.²⁸⁴ The term manslaughter was qualified by the term "voluntary" in the Supplementary Treaty in order to "cover crimes which have been held by the U.K. courts to be manslaughter and which in many U.S. states would amount to second degree murder."²⁸⁵

The third subpart covers kidnapping, abduction, or "serious" unlawful detention.²⁸⁶ The Irish Suppression of Terrorism Act (1987 Act) similarly qualifies unlawful detention which shall not be considered a political offense as "serious" unlawful detention,²⁸⁷ in contrast to the British Suppression of Terrorism Act which covers "false imprisonment."²⁸⁸ Yet under the 1987 Act, a particular case of unlawful detention may still be excluded from the political offense exception if it is determined by the court to be an act of violence against the liberty of a person, as set out in section four.²⁸⁹ The Supplementary Treaty does not permit any secondary considerations such as those provided for under section four of the 1987 Act. It is illogical in the fight against international terrorism to prohibit "serious" unlawful detention from being considered a political offense, while allowing simple unlawful detention to be considered as such, especially

dition: (1) the possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life; or (2) the use of a firearm by a person with intent to resist or prevent the arrest or detention of himself or another person; (k) damaging property with intent to endanger life or with reckless disregard as to whether the life of another would thereby be endangered; (l) an attempt to commit any of the foregoing offenses.

Original Draft, art. 1. *Compare* Suppression of Terrorism Act, 1978, ch. 26, sched. 1.

282. Supplementary Treaty, *supra* note 279, art. 1(a); *see* Comments and Recommendations of the Senate Foreign Relations Committee, *reprinted in* United States Extradition Treaties, 920.24 [hereinafter Committee Comments] at 920.27. The Committee stated that article 1(a) shall apply to the four multilateral conventions provided for in article 1(a)-(d) in the original draft of the Supplementary Treaty. *See supra* note 281. It is unclear as to why, if this was the intention of the Committee, the wording was changed.

283. Supplementary Treaty, *supra* note 279, art. 1(b).

284. Original Draft, *supra* note 281, art. 1(f); *contra* Suppression of Terrorism Act, 1978, ch. 26, scheds. 1 and 2.

285. Committee Comments, *supra* note 282, at 920.27.

286. Supplementary Treaty, *supra* note 279, art. 1(b); *contra* Original Draft, *supra* note 281, art. 1(h) (does not qualify unlawful detention as "serious").

287. Extradition (Suppression of Terrorism) Act, No. 1, § 3(3)(a)(iv) (Ir. 1987).

288. Suppression of Terrorism Act, 1978, ch. 26, sched. 1, para. 5.

289. Extradition (Suppression of Terrorism) Act, No. 1, § 4 (Ir. 1987); *see supra* text accompanying note 184.

in a treaty the aim of which is to make extradition of terrorists more effective. Both forms of unlawful detention should be excluded from consideration as political offenses. At the very least, the Supplementary Treaty should permit courts to make secondary considerations such as those provided for in section four of the 1987 Act.

The fourth subpart refers to offenses involving the *use* of bombs, firearms, and other incendiary devices, *if* this use endangers any person, as well as the attempt to commit any such offenses.²⁹⁰ The scope of this clause has been narrowed far too much. The original draft covered the causing of explosions, conspiracy to cause an explosion, and possession of an explosive substance intended to endanger life or damage property.²⁹¹ Also covered were the possession of a firearm or ammunition, and the use of a firearm in resisting arrest.²⁹² The original draft was clearly aimed at those offenses perpetrated most often by terrorists and would have provided a much stronger base from which to conduct extradition proceedings than does the Supplementary Treaty.²⁹³ The Committee offered a weak defense of the narrowed version of this clause by claiming that the use of explosives would be excluded from the political offense exception "if that use endangers *even one single person*."²⁹⁴ Yet if the terrorists who constructed the bombs which damaged the London Stock Exchange and the Carlton Club, and which killed Ian Gow, had been caught before the bombs could be deployed, no persons would have been endangered. The narrowed version approved by the United States Senate seems to allow those terrorists the benefit of the political offense exception. The Committee admitted as much when, in further attempting to justify its version, it stated that "an individual accused of helping to construct a bomb, the *use* of which *endangered* a person, would not be able to assert the political offense exception."²⁹⁵

Owen Carron and his passenger, Maguire, were convicted in Northern Ireland on weapons possession charges.²⁹⁶ Had both fled to the United States, it is doubtful they could have been extradited to the United Kingdom under the Supplementary Treaty, as their offense involved the possession, but not the use, of firearms which did not endanger any persons because they were caught before they could use the firearms.²⁹⁷ The United States Senate should not have narrowed the scope of article 1 as originally drafted, especially since

290. Supplementary Treaty, *supra* note 279, art. 1(d), (e).

291. Original Draft, *supra* note 281, art. 1(i)(1)-(3).

292. *Id.* art. 1(j)(1), (2).

293. *See supra* text accompanying note 183.

294. Committee Comments, *supra* note 282, at 920.27 (emphasis added).

295. *Id.* (emphasis added).

296. Carron v. McMahon, 1989 Nos. 139 & 146 (Transcript) 6 April 1990 (LEXIS, Ireland library, cases file, at 1).

297. *Id.*

the IRA uses firearms and explosives devices most often in its campaign against the British in Northern Ireland.²⁹⁸ The major purpose of the Supplementary Treaty, that is, the denial to terrorists of the benefit of the political offense exception, would have been better served had the original draft been adopted.

The Supplementary Treaty reiterates the requirement of the 1972 Treaty that a court shall grant extradition only where the evidence of criminality is such as, according to the law of the requested state, would justify committal for trial had the offense been committed in the territory of the requested state.²⁹⁹ Article two of the Supplementary Treaty goes further than the 1972 Treaty, however, by making it clear that a fugitive offender shall be permitted at her extradition hearing to present evidence on whether probable cause exists for believing she committed the offense charged or that she has been convicted of the offense.³⁰⁰ The fugitive may also present evidence on whether a defense to extradition is available, and whether the act for which her extradition is requested would constitute a punishable offense under Federal law.³⁰¹ The purpose of article two is to "insure that no individual is to be extradited without a fair hearing. It is designed to lay to rest any assumption that extradition under the Supplementary Treaty will be 'automatic' or that Federal magistrates and judges will not carefully evaluate the evidence presented in support of extradition."³⁰² The committing justice, judge, or magistrate is to consider only whether this evidence justifies holding the accused to await trial, not whether the evidence is sufficient to justify conviction.³⁰³ The extradition hearing is not the occasion for the adjudication of the fugitive's guilt or innocence.³⁰⁴ These provisions seem to reflect a concern among some parties in the United States that the restriction on the political offense exception not close off the United States as a refuge to "genuine rebels" and "freedom fighters."³⁰⁵

Article three of the Supplementary Treaty also includes provisions aimed at protecting against subterfuge, yet denying aid to those who commit "terrorist acts of violence," almost identical in form to such provisions found in the British and Irish Suppression of

298. *Finucane v. McMahon*, 1990 I.L.R.M. 505 (LEXIS, Ireln library, cases file, at 11).

299. Supplementary Treaty, *supra* note 279, art. 2; see 1972 Treaty, *supra* note 21, art. IX(1).

300. Supplementary Treaty, *supra* note 279, art. 2(1)-(3).

301. *Id.*

302. Committee Comments, *supra* note 282, at 920.25.

303. *McMullen II*, *supra* note 241, at 6.

304. *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1406 (9th Cir. 1988).

305. See *supra* note 265 and accompanying text (Statement of Senator Jesse Helms).

Terrorism Acts.³⁰⁶ Article three of the Supplementary Treaty seeks to protect from extradition dissidents against whom the requesting state has made "trumped-up" charges with a view to actually punishing him on account of his race, religion, nationality or political opinions.³⁰⁷ Under paragraph (a) of article three, a fugitive is entitled to present evidence to demonstrate that he will not receive fair treatment or that he will be prejudiced at trial, on account of his race, religion, nationality or political opinions if returned to the requesting state.³⁰⁸ Relief under this part is not so easily obtainable, as paragraph (a) requires the fugitive offender to prove his claim made under that paragraph by a preponderance of the evidence.³⁰⁹ This part also permits findings made under article 3(a) in the United States to be appealed immediately, by either party.³¹⁰ Further, paragraph (b) limits consideration under paragraph (a) to those offenses not permitted to be considered political under article one.³¹¹ This provision is not, therefore, a general defense to extradition, but rather a protective device for those who are otherwise extraditable because their offenses cannot be considered political in character.

The Supplementary Treaty, like the British and Irish Suppression of Terrorism Acts, seeks to deny to the IRA and other terrorist groups the protection of the political offense exception. Yet the Supplementary Treaty, as amended by the United States Senate, abates the applicability of the political offense "loophole" the least of the three. The political offense exception has been successfully manipulated in the past by the IRA, a fact that leads one to fear that a political offense "loophole" not closed tightly enough could prevent

306. Supplementary Treaty, *supra* note 279, art. 3(a).

Notwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

Id. Cf. Suppression of Terrorism Act, 1978, ch. 26, § 2(2), and Extradition (Amendment) Act, No. 25, § 9 (Ir. 1965) (amends Extradition Act, No. 17, § 50, (Ir. 1965), both of which contain almost exactly the same language.

307. Committee Comments, *supra* note 282, at 920.24.

308. See McMullen II, *supra* note 241, at 7 (McMullen had submitted numerous discovery requests, three of which sought to discover Britain's position with respect to the relationship between McMullen and the Provisional Irish Republican Army (PIRA). The Government claimed the information was irrelevant, as the Supplementary Treaty effectively eliminated the political offense exception. Yet the court held that under article 3(a) McMullen was entitled to demonstrate that he would not receive fair treatment if returned to the United Kingdom, and that the requested information would "shed light on the manner of treatment he could expect to receive upon extradition." Thus, although the respondent's motion to dismiss on account of the running of a statute of limitations was denied [see *supra* text accompanying notes 241-51], the Government was directed to respond to McMullen's discovery requests.).

309. Supplementary Treaty, *supra* note 279, art. 3(a).

310. *Id.* art. 3(b); *contra see supra* note 235 and accompanying text.

311. Supplementary Treaty, *supra* note 279, art. 3(b).

the Supplementary Treaty from being used in as effective a manner as it was originally intended to operate.

C. The United States and the Republic of Ireland

Extradition between the United States and the Republic of Ireland is presently carried out pursuant to a 1984 treaty.³¹² The Treaty deals with extradition in general, and is not specifically designed to combat international terrorism as are the British and Irish Suppression of Terrorism Acts, and the Supplementary Treaty between the United States and the United Kingdom.³¹³ Those offenses for which a person may be extradited under the United States-Ireland Treaty are any offenses which are punishable under the laws of both states by imprisonment of more than one year, or by a more severe penalty.³¹⁴ Where other treaties have left it to the courts to determine the issue of "dual criminality," the Treaty between the United States and Ireland provides that it is irrelevant whether the laws of the United States and of Ireland denominate the offense with the same terminology.³¹⁵ The Treaty also applies to offenses committed before and after the date the Treaty entered into force.³¹⁶ The retroactivity of the Treaty is an important provision in an extradition treaty which may be used to extradite terrorists, as was shown in the cases of Dermot Finucane³¹⁷ and Owen Carron.³¹⁸

The application procedure set out in the Treaty is similar to that set out in the 1972 United States-United Kingdom Treaty.³¹⁹ The request, which must be made in writing through the diplomatic channel, must contain the following: as accurate a description as possible of the person sought to assist in establishing his identity and nationality; the location of the person, if known; a statement of the pertinent facts of the case; a legal description of the offense, including a statement of the maximum penalties.³²⁰ Where the person sought has not yet been convicted in the requesting state, the request must be accompanied by an arrest warrant, or equivalent order, issued by a competent authority in the requesting state, as well as the

312. The Treaty on Extradition Between the United States of America and Ireland, July 13, 1983, ____ U.S.T. ____, T.I.A.S. No. 10813 [hereinafter United States-Ireland Treaty].

313. *Id.* Preamble.

314. *Id.* art. II(1). Extradition shall also be granted for attempt and conspiracy to commit, aiding, abetting, counseling, procuring, inciting, or otherwise being an accessory to the commission of an offense referred to in art. II(1). *Id.* art. II(3).

315. *Id.* art. II(2)(a).

316. United States-Ireland Treaty, *supra* note 312, art. XVIII.

317. See *supra* text accompanying notes 161-65.

318. See *supra* text accompanying notes 166-69.

319. United States-Ireland Treaty, *supra* note 312, art. VIII; see 1972 Extradition Treaty, *supra* note 21, art. VII.

320. United States-Ireland Treaty, *supra* note 312, art. VIII(2)(3).

complaint, information, or indictment.³²¹ The warrant is not endorsed, but is evidence.³²² When the request relates to a convicted person, the request must be accompanied by the judgment of conviction.³²³ The other treaties discussed above require that the complaint, information, or indictment accompany the request for extradition. This requirement could serve to protect against subterfuge, as it requires the requesting state to have already instituted proceedings against the person sought. This is a step which the state may not want to make if its real purpose in seeking extradition is to try or to punish the person for some other offense.

Part II of the Extradition Act sets out the general extradition law of Ireland in relation to countries other than the United Kingdom.³²⁴ Part II is applicable to countries with which Ireland has an extradition agreement.³²⁵ Under Part II, the request for extradition is received first by the Minister of Justice.³²⁶ If, after making some preliminary considerations, including whether the political offense exception is applicable, the Minister decides the person sought is extraditable, he is then required to issue an order directing a justice to issue an arrest warrant.³²⁷ In the United States, a federal justice, judge, or magistrate is the first to receive an extradition request, and she issues an arrest warrant at her discretion.³²⁸ The ultimate decision to extradite from the United States lies with the Secretary of State.³²⁹ Yet unlike the Irish Minister of Justice, a member of the executive branch, who makes the ultimate decision as to extradition from Ireland, the Secretary of State may not consider the political offense exception in deciding whether to extradite.³³⁰

Once arrested, the fugitive offender is brought before the issuing magistrate in either the United States or Ireland.³³¹ At this time a hearing is concluded to determine whether the person should be extradited.³³² If the court determines the person is extraditable, the person must be remanded in custody, not on bail, until his delivery to the proper authorities of the requesting state may be arranged.³³³ By not allowing the fugitive offender to be remanded on bail pending his

321. *Id.* art. VIII(4)(a)(b). Either the original or an authenticated copy of the warrant, or complaint, information, or indictment, is required. *Id.*

322. *Id.*

323. *Id.* art. VIII(5)(a).

324. Extradition Act, No. 17, § 8 (Ir. 1965).

325. *Id.* § 8(1).

326. *Id.* § 26(1).

327. *Id.* § 26(1), § 26(4).

328. 18 U.S.C. § 3184 (1948).

329. 18 U.S.C. § 3186 (1948).

330. See *supra* text accompanying notes 238-39.

331. 18 U.S.C. § 3184 (1948); Extradition Act, No. 17, §§ 28, 29 (Ir. 1965).

332. 18 U.S.C. § 3184 (1948); Extradition Act, No. 17, §§ 28, 29 (Ir. 1965).

333. 18 U.S.C. § 3184 (1948); Extradition Act, No. 17, § 29 (Ir. 1965).

surrender to the requesting state, the Treaty closes off one opportunity available in the Backing of Warrants Act and Part III of the Extradition Act for terrorists to flee justice again, after being initially apprehended.³³⁴

The Extradition Treaty between the United States and Ireland is the only extradition agreement currently in force between the United Kingdom, Ireland, and the United States which still recognizes the political offense exception.³³⁵ Under article IV, the requested state shall not grant extradition when the offense for which extradition is requested is a political offense. References to political offenses under the Treaty shall not include the taking or attempted taking of the life of a Head of State or a member of her family.³³⁶ This qualification has little worth in the fight against the IRA, which targets civilians, soldiers, and politicians. The political offense exception would be available to an IRA member who flees to the United States after committing an armed robbery in Ireland in order to get money for the IRA, or after killing a member of the British Parliament visiting Dublin for talks with the Irish government.

Brian Fleming and Charles Malone are members of Fianna Eireann.³³⁷ The group is allegedly the youth wing of the IRA, yet Fleming claims that the group, whose name means "Soldiers of Ireland," promotes moral values.³³⁸ Fleming and Malone were arrested in Alabama and have been charged in the United States Federal Court with conspiracy to export firearms, including M-16 assault rifles.³³⁹ If Fleming and Malone were to escape and flee to Ireland, the United States would likely have difficulty trying to extradite the two to the United States under the United States-Ireland Treaty. Considering that the political offense exception is still available to fugitive offenders under the Treaty,³⁴⁰ and that the Irish Supreme Court has recognized the possession of firearms³⁴¹ and the possession of firearms with the intent to cause serious injury and endanger

334. Backing of Warrants (Republic of Ireland) Act, 1965, ch. 45, § 5; Extradition Act, No. 17, § 46 (Ir. 1965).

335. United States-Ireland Treaty, *supra* note 312, art. IV(b). Extradition shall also be refused when the person sought has been convicted or acquitted, or has a prosecution pending against him, in the requested state, for the offense for which the extradition is requested. In addition, extradition shall not be granted when the offense for which extradition is requested is a military offense which is not an offense under the ordinary criminal law of the contracting parties. *Id.* art. IV(a), (d).

336. *Id.* art. IV(b).

337. The Times (London), Apr. 6, 1990, at 6, col. 3-4.

338. *Id.*; see also Northern Ireland (Emergency Provisions) Act, 1978, ch. 5, sched. 2 (lists "Fianna na hEireann" as a proscribed organization).

339. The Times (London), Apr. 6, 1990, at 6, cols. 3-4.

340. United States-Ireland Treaty, *supra* note 312, art. IV.

341. See Carron v. McMahon, 1989 Nos. 139 & 146 (Transcript), 6 April 1990 (LEXIS, Ireland library, cases file).

life³⁴² as political offenses, it seems highly probable that Fleming and Malone could escape extradition by availing themselves of the political offense exception. In order to prevent such a scenario, the Irish government could, pursuant to article 10 of the 1987 Act, direct that the provisions of the 1987 Act, including the limitations on the political offense exception,³⁴³ apply in relation to the United States.³⁴⁴ However, the Irish government has not yet ordered the Act applicable to the United States. Although the limitation on the political offense exception could be applied only in Irish courts when extradition is sought by the United States, even if just one of the two countries limits the political offense exception in relation to the other, this would be a step in the right direction.

The Treaty also protects against subterfuge by the requesting state. Extradition shall not be granted when there are "substantial grounds" for believing that the extradition requested for ordinary criminal offenses has actually been made for the purpose of prosecuting or punishing the person sought on account of his race, religion, nationality or political opinions.³⁴⁵ Whether this determination is one for the courts or for the executive has in the past, under different treaties, been a point of contention between the two branches in extradition proceedings.³⁴⁶ This Treaty sets out, however, that this determination is to be made by the executive authority of each state.³⁴⁷ The Treaty also provides two discretionary grounds for refusal of extradition. When the person sought has been convicted in a third state of the offense for which his extradition is requested, extradition may be refused.³⁴⁸ Extradition may also be refused when the "competent authorities" of the requested state have decided to refrain from prosecuting the person, apparently for any reason.³⁴⁹ The "competent authorities" to which this Article refers are the Attorneys General of the United States and of Ireland.³⁵⁰ Under the laws of the United States and of Ireland, the Secretary of State and the Minister of Justice, respectively, may refuse extradition at their discretion.³⁵¹ It is unclear, then, why these additional grounds for dis-

342. See *Finucane v. McMahon*, 1990 I.L.R.M. 505 (LEXIS, Ireln library, cases file).

343. Extradition (Suppression of Terrorism) Act, No. 1, §§ 3, 4 (Ir. 1987).

344. *Id.* § 10(1) ("The Government may by order direct that all or any of the provisions of this Act . . . shall apply . . . in relation to any country which is not a convention country and with which there is in force an extradition agreement.").

345. United States-Ireland Treaty, *supra* note 312, art. IV(c).

346. See *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981), and *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986) (holding that the determination of whether a request for extradition is in fact a subterfuge is to be made by the executive. *Id.* at 787).

347. United States-Ireland Treaty, *supra* note 312, art. IV(c).

348. *Id.* art. V(a).

349. *Id.* art. V(b).

350. *Id.* art. XV(1) ("The Department of Justice of the United States") and (2) ("The Attorney General of Ireland").

351. 18 U.S.C. § 3186 (1948); Extradition Act, No. 17 (1965), § 26(4); see *Eain v.*

cretionary refusal of extradition are provided. Perhaps this provision is merely a recognition that extradition proceedings are not strictly in the realm of foreign affairs, and thus the heads of domestic law enforcement are properly given the opportunity to refuse extradition on grounds relating to domestic policy which may not be in the consideration of the Secretary of State or the Minister of Justice. The Attorneys General, though, should not be allowed to exercise unbridled discretion in refusing extradition, and should recognize that some determinations, such as the fairness of the judicial system of each state, are properly within the purview of the judiciary.³⁵²

The United States-Ireland Treaty makes provision for the execution of provisional warrants in cases of urgency.³⁵³ Like the Extradition Treaty between the United States and the United Kingdom, the United States-Ireland Treaty requires that a request for a provisional warrant contain a description of the person sought, a statement of the existence in the requesting state of a warrant for arrest or judgment of conviction, and a statement that the requesting state intends to send a request for extradition.³⁵⁴ If the request for extradition is not received within forty-five days of the arrest of the person sought, that person shall be released from custody.³⁵⁵ The right of the requested state to institute extradition proceedings after the expiration of forty-five days shall not be prejudiced if the warrant is subsequently received.³⁵⁶

The Extradition Act provides that a member of the Garda Síochána executing an arrest warrant may seize and retain any property which appears to be reasonably required as evidence for proving the offense charged, and which appears to have been acquired as a result of the alleged offense.³⁵⁷ The United States-Ireland Treaty incorporates this provision.³⁵⁸ The property seized may be handed over to the requesting state, yet this delivery of property may be made conditional upon the property being returned to the requested state at a later date.³⁵⁹

Aside from the fact that the political offense exception is still

Wilkes, 641 F.2d 504, 513 (7th Cir. 1981).

352. See discussion of the Ryan affair, *supra* text accompanying notes 198-209.

353. United States-Ireland Treaty, *supra* note 312, art. X; compare Backing of Warrants Act, 1965, ch. 45, § 4 and Extradition Act, No. 17, § 49 (Ir. 1965) and 1972 Extradition Treaty, *supra* note 21, art. VIII (all allowing same procedure).

354. United States-Ireland Treaty, *supra* note 315, art. X(2).

355. *Id.* art. X(4); *contra* Supplementary Treaty, *supra* note 279, art. 4 (amended art. VIII(2) of the 1972 Extradition Treaty, *supra* note 21, which also required release after forty-five days, to now require release after sixty days.).

356. United States-Ireland Treaty, *supra* note 312, art. X(4).

357. Extradition Act, No. 17, § 36(1) (Ir. 1965).

358. United States-Ireland Treaty, *supra* note 312, art. XIV(1).

359. *Id.* art. XIV(2); compare Extradition Act, No. 17, § 36(3) (Ir. 1965) (allowing same procedure).

recognized in the United States-Ireland Treaty, the most significant impediment to its effective implementation has involved challenges in Ireland to its validity. Under the Extradition Act, where an international extradition agreement is made between Ireland and another country, Part II of the Act may be applied to that agreement by an appropriate order of the government.³⁶⁰ Such an order must then be laid before each House of the Oireachtas, and, if a resolution annulling the order is passed by either House within twenty-one days, the order shall be annulled.³⁶¹ In the case of the Treaty between the United States and Ireland, the Minister of Foreign Affairs ratified the Treaty and subsequently submitted an order to Dail Eireann (House of Representatives) and Seanad Eireann (Senate).³⁶² Neither House annulled the Treaty, yet Dail Eireann did not approve it.³⁶³ The Government of Ireland proceeded as if the order made the Treaty enforceable under the law of Ireland. Yet under article 29.5.2 of the Constitution of Ireland, the State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement have been approved by Dail Eireann.³⁶⁴ Under the Treaty, the Attorney General of Ireland is required to advise, assist, and represent, or provide for the representation of, the United States when it is the requesting state.³⁶⁵ The Treaty further requires the requesting state to bear all expenses relating to the transportation of the person sought from the requested state to the requesting state.³⁶⁶ The requested state is required to bear all other expenses arising out of the request for extradition and the extradition proceedings.³⁶⁷

Two fugitives were extradited to the United States under the terms of the Treaty before its validity was challenged.³⁶⁸ In *Gilliland* the Supreme Court interpreted article 29.5.2 of the Irish Constitution to require not that Dail Eireann approve the *nature and extent* of the charge upon the public fund, but only those *terms* of the agreement which involve such a charge.³⁶⁹ The Court found that article XVI of the Treaty, requiring the Attorney General of Ireland to

360. Extradition Act, No. 17, § 8(1) (Ir. 1965).

361. *Id.* § 4. The Oireachtas is divided into two Houses: the Dail Eireann (House of Representatives) and the Seanad Eireann (Senate). IR. CONST., art. 15.2.

362. *The State (James Hildage Gilliland) v. The Governor of Mountjoy Prison*, 1987 I.R. 226 (LEXIS, Ireln library, cases file, at 4).

363. *Id.*

364. IR. CONST., art. 29.5.2; *see also* *Gilliland*, 1987 I.R. 226 (LEXIS, Ireln library, cases file, at 11).

365. United States-Ireland Treaty, *supra* note 312, art. XVI(2).

366. *Id.* art. XVII(1).

367. *Id.*

368. *Ireland Prepares Law to Simplify Extradition of Terrorists*, Reuters North European Service, November 25, 1986 (NEXIS, Intl library, at 2).

369. *The State (James Hildage Gilliland) v. The Governor of Mountjoy Prison*, 1987 I.R. 226 (LEXIS, Ireln library, cases file, at 11).

advise, assist and represent the interests of the United States, *by its terms*, did not necessarily involve a charge upon the public funds, but instead imposed an obligation on the Attorney General.³⁷⁰ However, article XVII, which assigns certain pecuniary responsibilities to each state, was determined by the Court to involve, by its terms, a charge upon the public fund.³⁷¹ The Court held, therefore, that the order of the Minister of Foreign relations ratifying the Treaty was invalid, because the terms of the Treaty were not approved by Dail Eireann.³⁷² The Court refused to extradite Gilliland as it held that Ireland was not bound by the Treaty. Dail Eireann ratified the Treaty four months after the *Gilliland* decision, so those problems which prevented Gilliland's extradition no longer stand in the way of extradition between the United States and the Republic of Ireland.³⁷³

Although the most serious challenge to the Treaty, its validity, has been surmounted, the Treaty remains an ineffective regime through which to extradite IRA members wanted for activities related to the IRA's campaign of terror. The scope of the political offense exception must be limited. Although the Treaty applies retroactively and denies bail to those fugitives arrested and awaiting extradition, so long as the political offense exception is recognized without any limitations, this Treaty will not be effective in the fight against the IRA.

IV. Conclusion

As the law is the only legitimate weapon civilized states may use against international terrorism, lest they fall to the level of the terrorists, the law must be adapted in such a way as to be effective against terrorism. Courts must not be permitted to allow IRA members to avail themselves of the protection of the political offense exception, protection to which they are not legitimately entitled. The acts of indiscriminate violence committed by the IRA, by which it seeks to achieve its goals, were not in the contemplation of the early judges who formulated the political offense exception. The United Kingdom's Suppression of Terrorism Act and Ireland's Suppression of Terrorism Act (1987 Act) have tightened the political offense "loophole" to the extent that only those persons deserving of "political asylum" may fit through the hole. The Supplementary Treaty between the United Kingdom and the United States purports to be

370. *Id.*

371. *Id.* at 12.

372. *Id.*

373. *Ireland Prepares Law to Simplify Extradition of Terrorists*, Reuters North European Service, November 25, 1986 (NEXIS, Intl library, at 1).

aimed at the extradition of terrorists, yet leaves too many loopholes through which, past experience has shown us, terrorists have a knack for slipping. The Treaty between the United States and the Republic of Ireland is simply an unfit regime by which to bring fugitive IRA members to justice.

The Backing of Warrants Act and the Extradition Act should be further amended so as to deny bail to arrested terrorists awaiting surrender to the requesting state. This would close off another avenue by which terrorists may be tempted to escape justice. In addition, Ireland's Suppression of Terrorism Act should be amended so as to escape justice. In addition, Ireland's Suppression of Terrorism Act should be amended so as to be applicable to cases in which the warrant was issued before the enactment of the Act. Chances are there are not too many warrants outstanding dating from before December, 1987. Yet why take the risk and allow even a single person accused of terrorist activity to escape justice?

A delicate balance must be maintained between the need to protect the constitutional rights of persons accused of crimes and the rights in general of the politically oppressed, and the need to effectively combat terrorism. In the past, the balance has been tilted too much in the favor of the former need, to the detriment of the latter. This has been the source of much frustration. Only in the past five to ten years have extradition agreements responded to the need to effectively combat terrorism, and a more even balance has been struck by many. Yet the agreements in force today are not perfect, perhaps they will never be perfect, and most probably cases will arise which will frustrate the fight against terrorism. Although the law may not always work, it is the law by which civilized states must abide. Adherence to this principle, along with a heavy dose of Ian Gow's Churchillian determination to "never, never surrender,"³⁷⁴ will see our civilized societies through to the end, and the triumph of the democratic process over terrorism.

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374. The Times (London), July 31, 1990, at 1, col. 2; see *supra* text accompanying notes 6-8.

