

THE U.S.-U.K. SUPPLEMENTARY EXTRADITION TREATY: JUSTICE FOR TERRORISTS OR TERROR FOR JUSTICE?*

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There is an almost irresistible tendency to react to terrorism by enacting laws that diminish the rights of the accused or increase the authority of the state. . . . [W]e must guard against overbroad, unjustified, non-productive or counter-productive changes. . . . Hopefully, our long traditions protective of due process will support an attitude of caution if the U.S. is ever forced to consider comparable changes.¹

INTRODUCTION

Acts of international terrorism directed against civilians, whether perpetrated by governments or liberation movements, pose serious threats to world public order. Unwarranted, seemingly senseless bombings of public places, airplanes, or embassies cause needless loss of hundreds of lives and massive property damage. These activities threaten human rights and democratic values as much as government suppression of dissident views. Commentators have thus challenged international terrorist activities, whether perpetrated by individuals or by gov-

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1. HOUSE SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, REPORT ON DOMESTIC AND INT'L TERRORISM, H.R. REP. NO. 6, 97th Cong., 1st Sess. 4 (1981).

ernments, as being beyond the scope of traditional human dissent or revolution in quest of liberty.²

The desire to bring terrorists to justice, however, often conflicts with the desire to provide asylum for political dissidents. The line of demarcation between protected political acts and insidious terrorist behavior is finely drawn and may be blurred. Consequently, terrorists may invoke the political offense exception to their advantage in United States proceedings for their extradition. Recently the United States attempted to remedy this situation by reforming existing extradition legislation to more narrowly define the political offense exception and to place the determination of this exception exclusively in the hands of the executive branch.³

Having failed in this effort, in 1985 the United States unsuccessfully attempted to accomplish similar goals in its relations with one state through the development of the U.S.-U.K. Supplementary Extradition Treaty,⁴ which consisted of revisions of the extradition treaty currently in effect with the United Kingdom.⁵ The objective of this original Supplementary Treaty was to enhance law enforcement efforts to combat terrorism by severely narrowing the nature of offenses excludable under the political offense exception, so that terrorists who commonly commit the excludable offenses could be brought to justice in the requesting country.⁶

Critics of the original Supplementary Treaty challenged both the provisions of the treaty as well as the hasty attempt to forcibly push the

2. See M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 416-29 (1974); Saddy, *International Terrorism, Human Rights, and World Order*, 5 TERRORISM 325 (1982); W. WAUGH, INTERNATIONAL TERRORISM 21-67 (1982); Friedlander, *Coping With Terrorism: What is to be Done?*, 5 OHIO N.U.L. REV. 432, 438 (1978).

3. Bassiouni, *Extradition Reform Legislation in the United States: 1981-1983*, 17 AKRON L. REV. 495, 502 (1984).

4. The U.S.-U.K. Supplementary Extradition Treaty will be referred to in the text in one of three ways because the two versions of the document differ in some respects. "The original Supplementary Treaty" will refer to the first Supplementary Treaty that was signed in Washington, D.C. on June 25, 1985 and formally transmitted to the Senate on July 17, 1985. S. Doc. No. 8, 99th Cong., 1st Sess. (1985) [hereinafter *Treaty Doc. No. 8*]. "The compromise Supplementary Treaty" will refer to the revised Supplementary Treaty prepared by the Senate Foreign Relations Committee and ratified in the Senate through a resolution on July 17, 1986. S. Doc. No. 17, 99th Cong., 2d Sess. (1986) [hereinafter *Treaty Doc. No. 17*]. The term "Supplementary Treaty" will be used to refer to either version of the document in instances when the two versions of the document are conceptually alike.

5. Extradition Treaty between the United States and the United Kingdom, June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468.

6. Letter from President Reagan to the Senate (July 17, 1986), *reprinted in Treaty Doc. No. 8, supra* note 4, at iii.

treaty through the Senate.⁷ As a result of political pressures from within and without Congress, the Senate Foreign Relations Committee held hearings on the Supplementary Treaty on August 1, 1985, September 18, 1985, and October 22, 1985.⁸ Given the major controversy surrounding the attempt to effectively eliminate the political offense exception in the extradition process and to make provisions of the Supplementary Treaty apply retroactively to those whose extradition had already been denied by the courts, the original Supplementary Treaty remained in committee during the balance of 1985.

The Senate Foreign Relations Committee considered the original Supplementary Treaty in April and June of 1986, discussing and rejecting several amendments.⁹ After much effort, the Committee prepared a compromise proposal for the Supplementary Treaty that was presented to the Senate in July, 1986. Following two days of debate and discussion, the Senate agreed to a resolution of ratification for the compromise Supplementary Treaty.¹⁰

The original Supplementary Treaty would have effectively eliminated the political offense exception, minimized the role of the judiciary in the extradition process, and enabled the executive branch to de-

7. Congressmen such as Mario Biaggi criticized the elimination of the political offense exception, inclusion of the retroactivity clause, and changes in extradition procedures through renegotiation of an extradition treaty, when these changes should have been made by comprehensive legislative reforms. 131 CONG. REC. E5098 (daily ed. Nov. 12, 1985) (statement of Rep. Mario Biaggi). As Congressman Gilman pointed out, the original Extradition Treaty with the United Kingdom required four years to negotiate. Yet this revision, despite its controversial provisions, was "considered within a time period of just over one month." 131 CONG. REC. E4227 (daily ed. Sept. 26, 1985) (statement of Rep. Benjamin Gilman). Congressman Gilman further commented that the elimination of the political offense exception is a "matter of grave concern" that "deserves a long, careful study prior to any action by the Senate." *Id.* at E4226. Due to the public outcry against the Supplementary Treaty, Congressman Biaggi sponsored a House resolution in September, 1985 that opposed the elimination of the political offense exception, the retroactivity clause, and the renegotiation of extradition treaties on a state by state basis and called for joint consideration of changes in extradition law by both houses of Congress. H.R. 271, 99th Cong., 1st Sess. (1985).

8. *United States and United Kingdom Supplementary Extradition Treaty: Hearings on Treaty Doc. No. 8 Before the Senate Committee on Foreign Relations*, 99th Cong., 1st Sess. (1985) [hereinafter *Hearings on Treaty Doc. No. 8*].

9. These included proposals to exclude some acts as political offenses regardless of whether the victim was a military person or a civilian, to differentiate attacks against military personnel and citizens, and to eliminate the retroactivity clause which applied the Supplementary Treaty to offenses committed both before and after the Supplementary Treaty takes effect. *Treaty Doc. No. 17, supra* note 4, at 3-4.

10. 132 CONG. REC. S9119-71 (daily ed. July 16, 1986); 132 CONG. REC. S9251-73 (daily ed. July 17, 1986).

cide extradition issues on its own.¹¹ In contrast, the compromise Supplementary Treaty attempts to balance individual rights with the fight against terrorism and expands the judicial role in the extradition process beyond that provided in the earlier version. Whether or not the compromise Supplementary Treaty will effectively bring terrorists to justice is unclear; however, the provisions of the Treaty pose problems that must be addressed.

This article describes the political offense exception as interpreted in three recent United States court cases involving the extradition of members of the Provisional Irish Republican Army [PIRA], outlines the provisions of both versions of the Supplementary Treaty, and examines the implications of the historic compromise Supplementary Treaty in light of the balance between individual rights and international world public order.

I. THE POLITICAL OFFENSE EXCEPTION

Extradition is the process whereby one state complies with the request of another state to return a person charged with a criminal offense in the requesting state in order to try or punish the individual.¹² The political offense exception is based on the clause in an extradition treaty that allows the requested state to deny return of the person sought if the alleged crime is of a political nature. What constitutes a "political crime," however, has never been defined in extradition treaties.¹³ Rather, interpretations of the doctrine focus on the motivations of the actor or on the context in which the act was undertaken.¹⁴ De-

11. The determination of probable cause, however, would remain with the judiciary.

12. Bassiouni, *Two Models of Extradition in Law and Practice*, in *A TREATISE ON INTERNATIONAL CRIMINAL LAW. VOLUME II: JURISDICTION AND COOPERATION* 347 (M. Bassiouni & V. Nanda eds. 1973); Freestone, *Legal Responses to Terrorism: Towards European Cooperation?*, in *TERRORISM: A CHALLENGE TO THE STATE* 205 (J. Lodge ed. 1981).

13. Garcia-Mora has differentiated "pure" and "relative" political crimes. The former refer to acts perpetrated directly against the state, such as treason, espionage or sedition. The latter, however, refer to common crimes such as murder or carrying firearms that have taken on a political character because of the circumstances surrounding the commission of the act, such as killing someone during a political revolt. A political offense, then, may be broadly defined as an offense against the security of the state. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962).

14. Wijngaert, for instance, has described three approaches to understanding relative political crimes in the theory and practice of extradition law. The "subjective approach" focuses on the subjective intent or political motivation of the actor and the issue of the political or common elements of the act regardless of whether a political outcome ensues. The "objective approach" emphasizes the political context of the act and its consequences rather than the intentions of the actor. If the interests that are injured are of a political nature, then the act is a political offense.

spite the lack of a clear legal definition, the concept determines extraditability for crimes which would have otherwise been automatically extraditable under the treaty. Further, the concept allows the requested state to evade a treaty obligation if it has reason to believe that the person sought will be tried unfairly in the requesting state.

The political offense exception embraces two sets of legal interests—those of the individual and those of world public order. From the standpoint of the individual, the exception has a humanitarian function, protecting the person from trial by his adversaries through denial of his extradition. From the standpoint of world public order, the rationale underlying the exception is that political crimes do not violate international law and thus do not require suppression by the world community. Since political crimes are directed against the government of the requesting state, they have only a local character and do not endanger the world public order. Moreover, the deeds are not essentially “criminal” since the perpetrator acts not out of personal motives but out of a desire to benefit society as a whole. This altruistic motivation presumably makes the conduct less reprehensible and distinguishes the political offender from the common criminal.¹⁵

The exception does, however, threaten the international community by providing immunity from prosecution to those accused of very serious criminal acts. Given the upsurge of terrorism within recent years,¹⁶ balancing these two competing legal interests has taken on

The third category, a “mixed approach,” combines both the subjective and objective approaches. To be a political crime, the offense must take into account the political motivation of the actor (subjective approach) and the context within which the act was done (objective approach). Common law countries generally use the objective approach while civil law countries, the subjective. C. WIJNGAERT, *THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION* 109 (1980).

15. *Id.* at 3.

16. The U.S. State Department estimates that in 1984 there were some 650 terrorist incidents, an increase of about 30% over 1983. Western Europe had more than 250 incidents, an increase of about 33%; the Middle East had about 200 incidents, up about two-thirds; Latin America had about 120. Total casualties declined 31.5% from 1,900, with 650 dead in 1983, to 1,300, with 450 dead in 1984. Oakley, *Combatting International Terrorism*, 85 DEP'T ST. BULL. 73 (June 1985). Interestingly, these data on the number of incidents are in contrast to the decline in the number of terrorist attacks reported in 1981. Between 1980 and 1981, the number of incidents and number of resulting deaths reportedly declined, with the number of deaths dropping 73% from 642 in 1980 to 173 in 1981. United States Department of State, *Patterns of International Terrorism*, in *TERRORISM, POLITICAL VIOLENCE AND WORLD ORDER* 15 (H. Han ed. 1984). Two points about these data are worthy of note. First, there has been an overall increase in the number of terrorist incidents from 100-200 in 1968, to 700-800 in 1981. *Id.* at 15. Thus, the long-term trend suggests an increase in the number of international terrorist incidents, despite notable declines between any two years. Second, these data should be interpreted with caution, as many more incidents may have occurred, particularly in Eastern bloc countries, than are reported by United States sources.

added significance. Although genuine dissidents need political asylum, there is a growing fear that asylum states will become safe havens for terrorists.

II. THE POLITICAL OFFENSE EXCEPTION IN THREE RECENT PIRA CASES

A. *The Cases*

Three recent extradition cases have influenced the development of the U.S.-U.K. Supplementary Extradition Treaty:¹⁷ *In re McMullen*,¹⁸ *In re Mackin*,¹⁹ and *In re Doherty*.²⁰ In each case, the court based its denial of extradition on the political character of the alleged offense. In determining this "political character," each court used a variant of the "political incidence test"²¹ first employed in the British case *In re Castioni*:²² whether an individual was acting as one of a number of persons

17. 131 CONG. REC. 10,787-88 (daily ed. Aug. 1, 1985) (statement of Deputy Attorney General Lowell Jensen); 131 CONG. REC. 10,788-90 (daily ed. Aug. 1, 1985) (statement of Department of State Legal Adviser Abraham Sofaer).

18. *In re McMullen*, No. 3-78-1099-MG (N.D. Cal. May 11, 1979), reprinted in *Hearings on the Extradition Act of 1981: Hearings on S. 1639 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 294-96 (1981) [hereinafter *Hearings on S. 1639*]. The Board of Immigration Appeals [BIA] reversed the magistrates' granting of a stay of deportation. Subsequently, the Ninth Circuit Court of Appeals, in *McMullen v. I.N.S.*, 658 F.2d 1312 (9th Cir. 1981), reversed the BIA, finding that McMullen had demonstrated an adequate showing of probable persecution to avoid deportation. The BIA then reconsidered the decision and again decided that McMullen should be deported, finding that McMullen's claimed persecution was not based on political opinion and that, in addition, McMullen was statutorily ineligible for asylum as a refugee because he participated in the persecution of others on account of race, religion, nationality or political opinion. The Ninth Circuit affirmed this decision in *McMullen v. I.N.S.*, 788 F.2d 591 (9th Cir. 1986).

19. *United States v. Mackin*, 668 F.2d 122 (2d Cir. 1981), *aff'g In re Mackin*, 80 Cr. Misc. 1 (S.D.N.Y. Aug. 13, 1981), reprinted in *Hearings on S. 1639*, *supra* note 18, at 140-239.

20. *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984). A fourth case not discussed in this article is *Quinn v. Robinson*, No. C-82-6688 RPA (N.D. Cal. Oct. 3, 1983), *vacated and remanded*, 783 F.2d 776 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 271. For a discussion of the *Quinn* case, see Recent Decisions, *The Political Offense Exception to Extradition: A 19th Century British Standard in 20th Century American Courts*, 59 NOTRE DAME L. REV. 1005 (1984).

21. Mr. Justice Stephen in 1883 noted that a political offense was one committed "incidentally to" and as "part of a political disturbance." This definition was first employed in British case law in *In re Castioni*, 1 Q.B. 149 (1891). I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 169-70 (1971).

22. *In re Castioni*, 1 Q.B. 149 (1891), *construed in In re Ezeta*, 62 F. 972, 998 (N.D. Cal. 1894). In *Castioni*, Switzerland requested the extradition from Great Britain of Castioni, who was charged with the murder of a member of the state council of a Swiss canton. Castioni and several of the townspeople had been dissatisfied with the government operations of the canton. Just before the incident, their request for a referendum to revise the constitution was rejected by the govern-

engaged in acts of violence of a political character, with a political objective and as a part of the political movement and uprising in which he was taking part.²³ Although the *Castioni* court did not specifically define the boundaries of the political offense, it noted that "one cannot . . . weigh in golden scales the acts of men hot in their political excitement. . . . [A]n act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act that may be deplored and lamented, as even cruel and against all reason."²⁴

The *Castioni* criteria were purportedly used "by analogy" in *In re Ezeta*,²⁵ the first United States case to discuss the political offense exception. In fact, however, the court employed a definition of political crimes set forth earlier by John Stuart Mill²⁶ and rejected by the *Castioni* court. The *Ezeta* court held that Ezeta and his forces could not be extradited to Salvador because their acts were "associated . . . with the actual conflict of armed forces and were thus of a political character."²⁷ Since *Ezeta*, American courts have consistently regarded a political offense as one done "in the course of" or "in furtherance of" a political objective.²⁸

In applying this test, the courts in each of the three recent cases involving the extradition of PIRA members determined, first, whether there was a political disturbance at the time of the alleged act; second, whether the accused was part of an organization with legitimate political objectives; third, whether the organization was involved in a politi-

ment. Several citizens then seized the arsenal, stole weapons and ammunition, disarmed the guards and marched to the municipal palace, pushing several bound or handcuffed government personnel in front of them. When their entrance was refused, the mob stormed the gates and forced their way inside. During the ensuing fracas, Castioni, one of the first inside, shot a state councilman. *In re Castioni*, 1 Q.B. at 150. Each of the three judges sitting on the *Castioni* bench decided to issue the writ of habeas corpus and deny Castioni's extradition. *Id.* at 160, 167-68.

23. *Castioni*, 1 Q.B. at 159.

24. *Id.* at 167.

25. *In re Ezeta*, 62 F. 972, 999 (N.D. Cal. 1894).

26. Mill defined a political offense as "any offense committed in the course of or furthering of civil war, insurrection, or political commotion." 184 HANSARD'S DEBATES 2115 (1866), quoted in *In re Ezeta*, 62 F. at 998. Mill gave this definition in the House of Commons in 1866 while discussing an amendment to the act of extradition on which the treaty between England and France was founded.

27. *In re Ezeta*, 62 F. at 999.

28. C. WIJNGAERT, *supra* note 14, at 116; I. SHEARER, *supra* note 21, at 179; Cantrell, *The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain, and the Republic of Ireland*, 60 MARQ. L. REV. 777, 795 (1977); Gilbert, *Terrorism and the Political Offense Exemption Reappraised*, 34 INT'L & COMP. L.Q. 695, 699 (1985).

cal disturbance; and fourth, whether the act of the accused was in furtherance of that disturbance.

The *McMullen* court described two elements of the standard in determining whether the defendant's act fell within the political offense exception:²⁹ first, that "the act must have occurred during an uprising and the accused must be a member of the group participating in the uprising";³⁰ and second, that "the accused must be a person engaged in acts of political violence with a political end."³¹

In determining whether there was a political uprising at the time of the incident, the *McMullen* court noted that the violence in Northern Ireland at the time of the incident was characteristic of the long-standing conflict between the Irish and British.³² Moreover, the court pointed out that Britain itself had acknowledged a political uprising when it declared a state of emergency threatening the life of the nation, when it sought derogation from the European Convention on Human Rights to allow it to forego its obligations under the Convention,³³ and when "highly placed officials made direct admissions that an insurrection was occurring in Northern Ireland in 1970 and 1974."³⁴ The court, however, failed to describe precisely the nature of these admissions. The court also indicated that PIRA activities had extended beyond Northern Ireland into Great Britain. Yet the court failed to describe what these activities included beyond the alleged bombing of a British barracks by McMullen. Finally, the court noted that the presence of British troops in Northern Ireland and the end of home rule there indicated that an insurrection existed at the time of the incident. With regard to McMullen's membership in the PIRA, the court simply noted that the defendant's statement as well as the complaint filed against him substantiated his involvement in the PIRA.³⁵

The court found evidence of the political nature of McMullen's deed in that McMullen had not acted on his own but was directed by

29. *In re McMullen*, reprinted in *Hearings on S. 1639*, supra note 18, at 294. The defendant in *McMullen* had participated in the bombing of a British Army installation in England in 1974 and had fled to the United States, from which Great Britain sought his extradition. *Id.* at 295.

30. *Id.* at 294.

31. *Id.*

32. *Id.* The court noted: "Sporadically since 1921 and particularly in the decade commencing in 1970 the conflict, political and nationalistic in concept and objective has flared and erupted between certain groups in Northern Ireland and Her Majesty's government." *Id.*

33. *Id.* at 294-95.

34. *Id.* at 295.

35. *Id.*

“persons in authority in the PIRA.”³⁶ Moreover, the court characterized the PIRA as a “political terrorist organization with an objective of nationalizing Northern Ireland.”³⁷ Taken collectively, the court concluded that McMullen’s act was incidental to and formed a part of the political upheaval embroiling Northern Ireland and that the act, as a means of guerrilla warfare, was in furtherance of the political goals of the PIRA.

The *Mackin* court employed a similar standard to determine whether the defendant’s act fit into the political offense exception:³⁸ “(1) whether there was a war, rebellion, revolution or political uprising at the time and site of the commission of the offense; 2) whether Mackin was a member of the uprising group; and 3) whether the offense was ‘incidental to’ and ‘in furtherance of’ the political uprising.”³⁹

In determining whether a political uprising existed at the time of the offense in 1978, the *Mackin* court undertook an extensive analysis of the historical conflict which has engulfed Northern Ireland since its partition in 1921.⁴⁰ Based on this evidence, the court concluded that there was a political uprising at the time of the incident “fluctuating in intensity, but nonetheless of sufficient severity to satisfy the first prong

36. *Id.*

37. *Id.*

38. The defendant in *Mackin* had scuffled with two plainclothes British soldiers at a bus stop in Andersonstown, Northern Ireland when one of the soldiers was shot. Mackin was arrested and put on bail. He later fled to the Republic of Ireland because of constant surveillance of his home. The PIRA then sent him to the United States to lobby with Irish-American groups and gain support for the reunification of the 32 counties of Ireland. While Mackin was in the United States, Great Britain began extradition proceedings. *In re Mackin*, reprinted in *Hearings on S. 1639*, *supra* note 18, at 226-29.

39. *Id.* at 186.

40. The court specifically detailed the upheaval characteristic of Northern Ireland from 1969 onwards and Great Britain’s attempts to deal with the continuous violence. The court pointed out that Great Britain had enacted emergency legislation in 1973 that created special non-jury Diplock courts and procedures to try terrorists and that these measures were still in effect in 1978 at the time of the incident. Moreover, this court, like the *McMullen* court, noted that Great Britain had executed derogation before the European Human Rights Convention to forego its obligations under the Convention. The court cited statistical evidence that showed a high level of violence concentrated particularly in the Catholic section of Belfast. A careful perusal of the data chart included in the opinion, however, shows that the peak year for fatalities (467) and terrorist incidents (12,481) was 1972. After that year the trend suggests an overall decline in the number of deaths and incidents through 1978. In response to the government argument regarding the decline, the court noted that the data still generally reflected a state of unrest and disruption throughout the period and that the “1978 statistics can hardly be called ‘normal.’” *Id.* at 204-05.

The court also cited the presence of some 13,000 British army personnel in Northern Ireland in 1978 to assist police forces in quelling outbursts of violence, and the establishment of three British army forts in the Andersonstown area, where the incident occurred. *Id.* at 222-23.

of the political offense exception."⁴¹

Moreover, the court noted that contrary to the government's position, the PIRA was not simply an unorganized, widely dispersed terrorist organization such as the Palestinian Liberation Organization [PLO] with little community support.⁴² Rather, the court characterized the PIRA as an "organized group of 500 'hard core' experienced and high calibre members . . . committed to the traditional aim of Irish nationalism . . . [by] engaging in armed conflict with the forces of the state."⁴³

Based on Mackin's testimony regarding his life, the court concluded both that he was a bona fide member of the PIRA at the time of the incident and that his actions were not done out of personal malice but "were in conformity with his general functions as a member of the Republican movement and the PIRA."⁴⁴

In deciding whether Mackin's act was "in furtherance of" the uprising, the court stipulated that there had to be a direct link between the act and the political activity or goals of the PIRA to avoid the situation where isolated acts of violence might be protected simply because they occurred at the same time as a political uprising. The court decided that such a direct link existed in this case,⁴⁵ and ultimately concluded that Mackin's act, aimed expressly at the British military opposition and conducted under the general supervision of the PIRA, an organized force seeking the independence and unification of Ireland through the use of violence, fell squarely within the political offense exception.

The *Doherty* court, in determining whether the defendant's act was of a political character,⁴⁶ indicated that the traditional two-part

41. *Id.* at 222. In making this determination, the court specifically rejected the government's argument that at the exact time of the incident, there were no outbursts of violence that could qualify as an "uprising." Instead, the court noted that the uprising in Northern Ireland was "continuous . . . spanning at least a decade, with historical antecedents," *id.* at 217, and that this kind of "uprising" was sufficient to satisfy the first element of the political offense exception test. *Id.* at 222.

42. *Id.* at 217-18.

43. *Id.* at 219. As evidence for its conclusion, the court cited organized funerals conducted for deceased PIRA members and widespread passive support among Catholics who hide PIRA members sought by British authorities. *Id.*

44. *Id.* at 230.

45. Initially, Mackin had begun an innocent search for his taxi when he came upon the nonuniformed British soldiers. In this situation, the court commented that although unplanned, his search turned into "a reconnaissance mission, a function of any military or paramilitary personnel." *Id.* at 235.

46. In *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984), the defendant and three others took

test—that the act was “in the course of” and “in furtherance of” a political uprising—was the beginning rather than the end of the analysis.⁴⁷ The court summarily acknowledged the existence of a political uprising at the time of the incident.⁴⁸ It then proposed a different standard, noting that every act committed during a political upheaval or for political reasons should not properly fall within the political offense exception. Were that the case, argued the court, many violations of international law, such as the atrocities which occurred in Nazi concentration camps, would be acceptable under this standard.⁴⁹ The court’s alternative standard included an assessment of “the nature of the act, the context in which it is committed, the status of the party committing the act, the nature of the organization on whose behalf it is committed, and the particularized circumstances of the place where the act takes place.”⁵⁰

This standard, however, is at best confusing for at least three reasons. First, the distinctions among the elements are obscure. The court provides no guidance to distinguish the “context” of the act from the “particularized circumstances of the place” where the act occurs. Second, the court’s application of the standard to the facts is unclear. Rather than a straightforward explication of how the facts fit into each element, the court only described what Doherty’s acts were *not*.⁵¹ Third, the court failed to address the “status of the party committing the act.” If by “status” the court meant Doherty’s involvement in the PIRA, the court may have simply assumed his membership, since his act was undertaken at the behest of the organization.

Despite the statement of an alternative standard for the political

over a house and attempted an ambush of a British convoy at the direction of the PIRA. During the exchange of gunfire, a British officer was killed. Doherty was arrested, tried and convicted but escaped before sentencing and fled to the United States. Great Britain sought his extradition for murder, attempted murder, and illegal possession of firearms and ammunition and offenses committed in the course of his escape. *Id.* at 272. For the subsequent history of this case, see *United States v. Doherty*, 615 F. Supp. 755 (S.D.N.Y. 1985), *aff’d*, 786 F.2d 491 (2d Cir. 1986), *petition for reh’g denied sub nom. Doherty v. Meese*, 808 F.2d 938 (2d Cir. 1986).

47. *Id.* at 274.

48. The court cited the “centuries old hatreds and political divisions which were spawned by England’s conquest of Ireland in medieval times” and remarked that the “offenses which give rise to this proceeding are but the latest chapters in that unending epic.” *Id.* at 273.

49. *Id.* at 274.

50. *Id.* at 275.

51. For instance, in terms of the nature of the act, the court observed that the defendant did not bomb civilian populations. With respect to the context of the act, the court pointed out that no other territory was affected by the act except that area in which the political change was sought. *Id.* at 275-76.

offense exception, the court's rationale for its decision appears to rest on two facts: first, that the incident occurred in the context of a military operation, which the court referred to as "the political offense exception in its most classic form";⁵² and, second, that the PIRA—a well-organized though radical group seeking political change—rather than Doherty himself, directed the actions taken.⁵³ Given these factors, the court concluded that Doherty's act was a political crime which was not extraditable under the political offense exception.

B. *The Implications and Effects of These Decisions*

These three decisions have at least two implications. First, the judicial interpretation of the political offense exception is too liberal, or, as Department of State Legal Adviser Abraham Sofaer has noted, "expansive and unreasonable."⁵⁴ In essence, as critics of the American judiciary have argued, the courts pay too much attention to the formalities of the political disturbance and too little attention to the motivation of the offender in perpetrating the act.⁵⁵ All three courts acknowledged the conflict in Northern Ireland that began in earnest in 1921 when Great Britain partitioned the country. However, they all considered this decades-old conflict sufficient to be a "political disturbance," whether or not actual hostilities to further the cause of independence from British rule were occurring at the time of the defendant's alleged criminal acts. Under a definition this broad, almost any act, no matter how vicious or despicable, undertaken against a military target, would qualify as a political crime, whether or not it was intended to promote the cause for unification.⁵⁶ The slightest relationship between the offense and the political objective would serve to satisfy the "in the course of"

52. *Id.* at 276.

53. *Id.* The court depicted the PIRA as a well-defined organization with an internal discipline and command structure that distinguished it from other fanatic, lawless groups who engage in violence to further their goals. *Id.* at 276. As evidence of this organized structure, the court cited the PIRA's instructions to Doherty to effect the ambush initially, and later, the PIRA's plan and direction for Doherty to escape from prison. *Id.* at 272, 276-77.

54. 131 CONG. REC. S10,789 (daily ed. Aug. 1, 1985) (statement of Department of State Legal Adviser Abraham Sofaer).

55. In fact, the mechanical application of this "political disturbance" test suggests that the senseless assassination of Lord Mountbatten and his family might easily fall within the exception despite condemnation of this brutality by the world community. See Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 COLUM. J. TRANSNAT'L L. 381, 401 (1979).

56. Cantrell, *supra* note 28, at 797; Lubet & Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & CRIMINOLOGY 193, 203 (1980).

criterion.

These cases have a second implication. In basing their decisions at least partially on the nature of the PIRA as a well-defined, structured organization, United States courts inadvertently have legitimized the PIRA and its use of violence to effect political change in Northern Ireland. The *Mackin* and *Doherty* courts distinguished the acts of the defendants before them from the acts of random terrorist violence against civilian populations such as that described in *Eain v. Wilkes*.⁵⁷ In that case, the defendant planted a bomb in the midst of a crowd of citizens, many of whom were injured by the explosion. The *Eain* court noted that such acts aimed at defenseless civilians could not be regarded as directed against the State to effect political change and thus could not fall within the political offense exception.⁵⁸ In contrast, the defendants' targets in the PIRA cases were military installations or personnel and thus were regarded by the courts as legitimate objects in a struggle to gain control of the reins of government.⁵⁹ The *Mackin* court further sanctioned the PIRA's activities by suggesting that the organization's attempt to replace the governmental structure could not have been deemed a political uprising if it reflected a move towards social anarchy.⁶⁰ Similarly, the *Doherty* court attributed credibility to the PIRA as a legitimate agent to effect political change by differentiating it from more nebulous terrorist groups: "[the PIRA has] an organization, discipline, and command structure that distinguishes it from more amorphous groups such as the Black Liberation Army or the Red Brigade."⁶¹

However, legitimacy of the PIRA as a mechanism for change in a democratic state such as Great Britain runs counter to the United States' position. The United States government considers the PIRA as simply another malevolent terrorist group.⁶² Given the attitude of the

57. 641 F.2d 504 (7th Cir. 1981).

58. *Id.* at 523.

59. The *Mackin* court, for instance, saw the defendant's acts as "aimed directly at a member of the British Army, the opposition force." *In re Mackin*, reprinted in *Hearings on S. 1639*, supra note 18, at 237. Moreover, the court viewed the encounter between Mackin and the nonuniformed soldier as a confrontation between "two parties in the State as to which is to have the government in its hands." *In re Castioni*, 1 Q.B. 149 (1891), quoted in *In re Mackin*, reprinted in *Hearings on S. 1639*, supra note 18, at 237.

60. *In re Castioni*, 1 Q.B. 149 (1891), quoted in *In re Mackin*, reprinted in *Hearings on S. 1639*, supra note 18, at 237.

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

62. Ambassador Robert Oakley described the PIRA as "the most deadly of the lot" after its killing of some 50 people in 1984. Oakley, supra note 16, at 74. Secretary of State Schultz de-

United States toward the PIRA, the denial of the extradition of three avowed terrorists has contributed substantially to the development of the Supplementary Extradition Treaty. Moreover, in discussing the PIRA extradition cases in the context of the Supplementary Treaty, Department of State Legal Adviser Sofaer commented that the law itself required revision to deal with the terrorist threat: "The basic problem is with the law itself, insofar as it is being applied so that the United States has become a sanctuary for terrorist murderers."⁶³ Following recent unsuccessful attempts to amend the extradition statute,⁶⁴ the administration's proposal of the Supplementary Extradition Treaty was an effort to more narrowly circumscribe the political offense exception on a bilateral basis.

In contrast with the United States position, critics of the Supplementary Treaty see the conflict in Northern Ireland not as an anarchistic insurrection against a democratic monarchy, but as a justifiable revolution for freedom from oppressive British rule. Quoting Sean McBride, Nobel Peace Prize Winner, Congressman Biaggi stated, "the struggle for the independence, Sovereignty and Unity of Ireland is a very old standing dispute between Great Britain and Ireland, and is in no way related to present day international terrorism."⁶⁵ For these crit-

picted the PIRA as a group of people who play

on popular grievances, and political and religious emotions, to disguise their deadly purpose. They find ways to work through local political and religious leaders to enlist support for their brutal actions. . . . [The organization] has killed—in cold blood and without the slightest remorse—hundreds of men, women and children in Great Britain and Ireland; . . . has assassinated senior officials and tried to assassinate the British Prime Minister and her entire cabinet; [it is] a professed Marxist organization which also gets support from Libya's Qadhafi and has close links with other international terrorists.

Shultz, *Terrorism and the Modern World*, 84 DEP'T ST. BULL. 12, 14 (Dec. 1984).

63. 131 CONG. REC. S10,790 (daily ed. Aug. 1, 1985) (statement of Department of State Legal Adviser Abraham Sofaer).

64. The Extradition Act of 1981 (S. 1639) would have placed responsibility for determination of a political offense in the hands of the Secretary of State. Amendment to Title 18 (S. 1940) would have given the Secretary of State guidelines to follow in ascribing political offense status and would have allowed judicial review of his decision in the courts of appeal. *Hearings on S. 1639, supra* note 18; Amendments to Title 18 of the United States Code Relating to International Extradition, S. Doc. No. 331, 97th Cong., 2d Sess., SC55.4 (1981). For an analysis of these legislative reforms, see Bassiouni, *Extradition Reform, supra* note 3.

65. 131 CONG. REC. E4988 (daily ed. Nov. 5, 1985) (statement of Rep. Mario Biaggi, quoting Sean McBride, Nobel Peace Prize recipient). McBride further remarked that the conflict "has been raging since Ireland was partitioned by Great Britain in the year 1920. Under the cloak of wishing to stamp out international terrorism, the British administration in fact, is seeking to secure the support of the United States in Britain's claim to exercise sovereignty over the North-East corner of Ireland, known as 'Northern Ireland.'" 131 CONG. REC. E4987 (daily ed. Nov. 5, 1985) (statement of Rep. Mario Biaggi, quoting Sean McBride, Nobel Peace Prize recipient).

ics, the Supplementary Treaty reflects an attempt by Great Britain to end the United States' neutral stance and to force the United States to support British rule in Northern Ireland under the guise of eliminating terrorism.⁶⁶

III. THE U.S.-U.K. SUPPLEMENTARY EXTRADITION TREATY

A. *Rationale for the Supplementary Treaty*

The rationale for the Supplementary Treaty parallels that for the European Convention on the Suppression of Terrorism,⁶⁷ with which the Supplementary Treaty is, to some extent, consistent.⁶⁸ States generally recognize that terrorist acts could be misinterpreted as political offenses for which extradition should not be granted. Moreover, in the absence of a widely accepted definition of a "political offense", each state interprets the term for itself. These two problems create a serious gap in international agreements regarding the extradition of persons accused or convicted of terrorist acts. Both the European Convention on the Suppression of Terrorism and the Supplementary Treaty aim at bridging this gap by eliminating or restricting the ability of the requested state to invoke a political offense exception and deny extradition.

In both documents, political asylum for terrorists is restricted by specifically delimiting the offenses that may be considered political and thus nonextraditable. The justification for this approach is that since the parties to the treaty or convention have similar political institutions (i.e., they are all democracies), it would be illogical to protect terrorists who jeopardize the institutions of a member of the alliance.⁶⁹ In other words, a threat to one of the democracies constitutes a threat to the others. Moreover, with respect to the Supplementary Treaty, since both parties to the Treaty are democracies, judicial procedures and processes should accord fair treatment to the extradited party in either state. Abraham Sofaer outlined the rationale of the Supplementary Treaty as follows: "With respect to violent crimes, the political offense exception has no place in extradition treaties between stable democracies in

66. N.Y. Times, Aug. 22, 1985, at A22, col. 3.

67. European Convention on the Suppression of Terrorism, *opened for signature* Jan. 27, 1977, reprinted in 15 I.L.M. 1272 (1976) and TRANSNATIONAL TERRORISM: CONVENTIONS AND COMMENTARY 120-34 (R. Lillich ed. 1982).

68. Sofaer, *The U.S.-U.K. Supplementary Extradition Treaty*, 8 TERRORISM 327, 328 (1985).

69. C. WIJNGAERT, *supra* note 14, at 150; I. SHEARER, *supra* note 21, at 188.

which the political system is available to redress legitimate grievances and the judicial process provides fair treatment."⁷⁰

B. *Comparison of the Supplementary Treaty with the European Convention on the Suppression of Terrorism*

In contrast with Sofaer's contention that the Supplementary Treaty establishes "virtually identical"⁷¹ limits on the political offense exception to those imposed by the European Convention on the Suppression of Terrorism, there are at least two major differences between the agreements. The first difference is that, unlike the Supplementary Treaty, the European Convention on the suppression of Terrorism does not include a retroactivity provision. Second, there is a difference in the scope of the limitation placed on the political offense exception. Both documents list the offenses which cannot be considered as political and thus are exempt from extradition. However, in the European Convention on the Suppression of Terrorism, article 13 enables a state at the time of signature to reserve the right to refuse extradition if it considers an offense listed in article 1 to be of a political nature. At the time it determines the character of the offense, a state making this reservation must promise to take into account three principles: whether the act "created a collective danger to the life, physical integrity or liberty of persons, or . . . affected persons . . . foreign to the motives behind it" or involved the use of "cruel or vicious means."⁷² In effect, then, the European Convention on the Suppression of Terrorism removes the political offense exception in one article, but allows it back in another. There is no similar reservation in the Supplementary Treaty. In that agreement, both states must extradite an alleged offender for the crimes enumerated in article 1.⁷³

In addition to these differences, one drawback of the European Convention on the Suppression of Terrorism is that not all the European states wholeheartedly endorse the severe restrictions on the political offense exception.⁷⁴ The obligatory language of article 1 requiring

70. 131 CONG. REC. S10,790 (daily ed. Aug. 1, 1985) (statement of Department of State Legal Adviser Abraham Sofaer).

71. *Id.*

72. See European Convention on the Suppression of Terrorism, *supra* note 67; TRANSNATIONAL TERRORISM: CONVENTIONS AND COMMENTARY 120-34 (R. Lillich ed. 1982); Milte, *Extradition and the Terrorist*, 11 AUSTRAL. & N.Z.J. CRIMINOLOGY 89, 92-93 (1978).

73. With the compromise Supplementary Treaty, however, extradition may be denied under the provisions of article 3(a), discussed *infra*.

74. A more widely accepted European perspective on the political offense exception is embod-

extradition for certain offenses has met with significant resistance by signatories to the Convention. Despite the apparent flexibility afforded by article 13, five of the eighteen states that signed the Convention reserved the right to determine for themselves whether an offense was political in character.⁷⁵ France, for instance, signed the Convention with the reservation that it would protect both human rights and the right to asylum enshrined in the Preamble to the French Constitution.⁷⁶ Portugal signed the Convention subject to the safeguards embodied in the provisions of its Constitution dealing with nonextradition on political grounds. By 1982, only eight members had become State Parties to the Convention.⁷⁷ Among these states, two had expressed reservations to the mandatory extradition language incorporated in article 1; the other signatories had not yet ratified it. Thus, the extent to which this

ied in the European Convention on Extradition, *opened for signature* Apr. 18, 1960, 359 U.N.T.S. 273. The purpose of this convention is to establish uniform rules regarding extradition among members of the Council of Europe. This Convention articulates the political offense exception. Article 3(1) provides that extradition "shall not" be granted if the offense is regarded by the requesting state as a "political offence or as an offence connected with a political offence." Article 3(3) limits the political offense exception by stipulating that the only offense that will not be deemed political is "the taking or attempted taking of the life of a Head of State or a member of his family." Yet sensitive to the loophole the political offense exception creates for terrorists, the Committee of Ministers of the Council of Europe adopted a resolution in January, 1972 which noted that the "political motive alleged by the authors of certain acts should not have as a result that they are neither extradited nor punished." European states are thus urged to take into account the serious nature of terrorist acts in applying the European Convention on Extradition. The resolution further recommended that if extradition is refused, and if jurisdictional rules allow, the requested state should prosecute the offender and the states lacking jurisdiction to try accused persons "should envisage the possibility of establishing it." *Res. 474(3), adopted by the Council of Europe*, Comm. of Ministers at the 53rd Sess., Eur. Ass. Doc., 25th Sess., Doc. No. 3425, at 16 (1972).

75. The 17 states signing the Convention in 1977 included Austria, Belgium, Cyprus, Denmark, the Federal Republic of Germany, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Sweden, Switzerland, Turkey, and the United Kingdom. Of these states, France, Italy, Norway, Portugal and Sweden declared reservations. European Convention on the Suppression of Terrorism, *supra* note 67, at 8-10. More recently, in his comments before the Senate, Senator Kerry said that 20 countries had signed the Convention, nine (45%) with reservations, and that three more countries might ratify it with reservations. In addition to the five states already mentioned, Kerry cited Cyprus, Denmark, the Federal Republic of Germany, Ireland, the Netherlands, and Switzerland as signing with reservations. 132 CONG. REC. S9257 (daily ed. July 17, 1986) (statement of Sen. Kerry).

76. The Preamble to the French Constitution reads: "Anyone persecuted on account of his action for the cause of liberty has the right to asylum on the territory of the Republic." European Convention on the Suppression of Terrorism, *supra* note 67, at 8.

77. States Parties to the Convention by March, 1982 included Austria, Cyprus, Denmark, the Federal Republic of Germany, Luxembourg, Norway, Sweden, and the United Kingdom. See European Convention on the Suppression of Terrorism, *supra* note 67; see also TRANSNATIONAL TERRORISM: CONVENTIONS AND COMMENTARY 129 (R. Lillich ed. 1982).

Convention will succeed in deterring terrorism may be severely impaired by the lack of unanimity among signatories in restricting the scope of the political offense exception. Some states may choose to extradite terrorists while others may not.

C. *Provisions of the Supplementary Treaty*

The provisions of the original and compromise versions of the Supplementary Treaty share many common features. The compromise version, however, introduces significant changes designed to address criticisms that prevented approval of the earlier agreement. This section briefly outlines the provisions of each version and notes differences between them.

Article 1 of both versions specifically limits the political offense exception included in article 5, paragraph (1)(c)(i), of the current Extradition Treaty by listing the crimes that shall not be considered offenses of a political nature. These crimes include aircraft hijacking and sabotage, crimes against internationally protected persons such as diplomats, hostage-taking, murder, manslaughter, kidnapping, unlawful detention, and offenses relating to explosives, firearms, and serious property damage. Article 1 of the compromise version deletes references to property damage, possession, intent, and conspiracy, and specifies "voluntary" manslaughter and "serious" unlawful detention.⁷⁸

Article 2 of the original Supplementary Treaty amended article 5, paragraph (1)(b) of the existing treaty by providing that extradition shall be denied if prosecution would be barred by the statute of limitations of the requesting state. In the existing treaty, the statute of limitations of either state applies. The rationale for this change was that the law of the place where the crime was committed should govern whether there is a bar to prosecution. Moreover, an offender should not be allowed to flee to another state which has a shorter statute of limitations in order to avoid prosecution.⁷⁹ The Senate Foreign Relations Committee deleted this article and replaced it with a reaffirmation of extradition procedures. The thrust of the revised article is to assure critics that all persons sought will be afforded a full and fair hearing.⁸⁰

The Senate Foreign Relations Committee added article 3 to the compromise Supplementary Treaty. This article contains two parts. Ar-

78. *Treaty Doc. No. 17, supra* note 4, at 4.

79. 131 CONG. REC. S10,788 (daily ed. Aug. 1, 1985) (statement of Department of State Legal Adviser Abraham Sofaer).

80. *Treaty Doc. No. 17, supra* note 4, at 5-6.

ticle 3(a) empowers the courts to deny extradition if the persons sought can establish persuasively that the requesting state has devised charges simply to gain judicial authority over them for trial or punishment, or if they would be prejudiced at trial because of their race, religion, national origin, or political opinions. Article 3(b) limits the applicability of article 3(a) to the crimes enumerated in article 1.⁸¹ In addition, article 3(b) allows either party to the extradition to appeal the decision within thirty days after it is rendered.

Article 4 of the compromise Supplementary Treaty, formerly article 3 of the original version, amends article 8, paragraph 2 of the existing extradition treaty by changing the length of time a person may be held by the requested state from forty-five to sixty days before release if an extradition request has not been received.

Article 5, the retroactivity clause, formerly article 4 of the original Supplementary Treaty, provides that the Supplementary Treaty shall apply to any offense that was committed before or after the agreement takes effect. If the offense was committed before the Treaty enters into force, the Treaty will only apply if the offense was an offense in both the United States and the United Kingdom when it was committed.

Articles 6 and 7 are technical provisions that set forth the territorial application of the treaty, its entry into force, and the manner of its termination.

In discussions of the original Supplementary Treaty, significant controversy developed over the elimination of the political offense exception and over the retroactivity clause. The debate over article 1 (elimination of the political offense exception) led to the inclusion of article 3 in the compromise Supplementary Treaty. Given their importance, articles 1, 3(a), and 5 need to be discussed individually.

D. *Article 1: Elimination of the Political Offense Exception*

1. Who Decides the Extraditability of Political Offenders

Under current United States extradition practice, the judicial and executive branches jointly determine what is a political crime on a case-by-case basis.⁸² The courts make the initial determination.⁸³ Once

81. That is, persons committing crimes other than those listed in article 1, such as drug trafficking or larceny, would not be permitted to demonstrate that extradition is unwarranted through the procedures outlined in article 3(a).

82. There are, however, at least three recent extradition treaties in which the executive branch is vested with exclusive authority to determine the applicability of the political offense exception.

the courts have resolved the issue, the executive branch may have discretion to reverse the decision. If the court rules that the political offense exception is not applicable and that extradition is permissible, the executive branch may nevertheless refuse to surrender the individual for any reason. However, if the court finds the political offense exception applicable and extradition impermissible, the executive branch is bound by the decision and must withhold the individual from the requesting state.⁸⁴

Under the original Supplementary Treaty, the determination of the political offense exception would in essence have been shifted exclusively to the executive branch. By specifying the crimes that would no longer be subject to the political offense exception, article 1 would effectively have eliminated the exception from the court's purview. The list of offenses in article 1 was so comprehensive that the courts would have had little to decide. Under statutory procedure, the courts simply certified extradition cases to the Secretary of State who would have then decided if extradition should occur.

Moreover, under the original Supplementary Treaty, the executive branch would have still determined whether the underlying motivation of the requesting state was political. Generally, the determination of an ulterior motive by the requesting state is a decision within the province of the executive branch,⁸⁵ since it implies a question as to whether the requesting state is honestly abiding by the provisions of the extradition treaty. A politically motivated extradition request constitutes a violation of the treaty, as extradition for the alleged crime could simply be a

These treaties include the Extradition Treaty with Mexico, May 4, 1978, United States-Mexico, 31 U.S.T. 5059, T.I.A.S. No. 9656; the Extradition Treaty with the Kingdom of the Netherlands, June 24, 1980, United States-Netherlands, T.I.A.S. No. 10733; and the Extradition Treaty with the Republic of Colombia, Sept. 14, 1979, United States-Colombia, S. Doc. No. 33, 97th Cong., 1st Sess. (1981) (Senate ratification of U.S.-Colombia Treaty). In the extradition treaty with Colombia, for instance, article 4 delineates the political offense exception. Article 4(3) then reads: "The Executive Authority of the Requested State shall decide the application of this Article, unless otherwise provided by the laws of that State." The letter of transmittal from the Department of State to the President makes it quite clear that in the United States, this paragraph means that the executive branch will administer the political offense exception provision.

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

84. I. SHEARER, *supra* note 21, at 199.

85. In *Eain v. Wilkes*, 641 F.2d at 518, the court considered the petitioner's claim that Israel's extradition request was made as a pretext to "try him for his political beliefs" an inappropriate area for the court to rule. The court's role was to inquire as to the offense in the context within which it was committed. As the court noted, it had "no jurisdiction to determine the requesting country's motives" under the treaty between Israel and the United States. Rather, this decision was "within the sole province of the Secretary of State." *Id.*

pretext for the return of an individual for other reasons.⁸⁶

Whether or not the executive branch is the most appropriate one to determine extraditability is open to question. Although it may more effectively evaluate sensitive international situations⁸⁷ than the courts, critics contend that the executive branch, its primary focus being foreign policy implications, may not adequately consider the individual's right to fundamental fairness.⁸⁸ Moreover, given that Great Britain is a close ally, it is unlikely that the executive branch would rule against this state.⁸⁹ Judicial wisdom, on the other hand, balances issues of consistency and fairness against those of expediency and policy.⁹⁰ The courts might thus provide a more appropriate forum for determining the political nature of an offense.

2. Arguments Against Eliminating the Political Offense Exception

Opponents of both the original and compromise versions of the Supplementary Treaty object to the elimination of the political offense exception on several grounds. One argument is that elimination of the exception in the Supplementary Treaty would begin a trend in American extradition law that would reverse over 300 years of jurisprudence in many countries and over 140 years of practice in the United States.⁹¹ Moreover, in contrast with the contention that use of the political offense exception would create a haven for terrorists in the United States, critics note that the exception has been used as a defense seventy-six times over the past 140 years, and has been granted only four times within the last thirty years.⁹²

More specifically, opponents of the Supplementary Treaty contend that elimination of the political offense exception will be a step toward eliminating political asylum in the United States for those seeking refuge from political oppression in their native lands, particularly Northern Ireland. As one critic observed:

86. Note, *State Department Determinations of Political Offenses: Death Knell for the Political Offense Exception in Extradition Law*, 15 CASE W. RES. J. INT'L L. 137, 144 (1983).

87. Hannay, *supra* note 55, at 411.

88. Banoff & Pyle, *To Surrender Political Offenders: The Political Offense Exception to Extradition in United States Law*, 16 N.Y.U.J. INT'L L. & POL. 169, 209 (1984); Note, *supra* note 86, at 154.

89. Note, *supra* note 86, at 154.

90. *Id.* at 158.

91. *Hearings on Treaty Doc. 8*, *supra* note 8, at 136 (statement of M. Cherif Bassiouni, Professor, Notre Dame Law School).

92. *Id.*

The United States have always boasted, with justice, that it was the land of freedom in which those who were politically oppressed elsewhere would receive asylum and shelter. For close on 200 years at least, Irishmen charged with offenses arising from the insurrectionary situation in Ireland have never been extradited. . . . Had the proposed Amending Treaty been in existence, they would all have been handed over to the British for imprisonment or execution.⁹³

Other critics fear that the adoption of this treaty by the United States could set a precedent other countries would follow, thus ending a long, internationally accepted tradition of allowing political asylum.

A second argument against the abolition of the political offense exception is that patriots as well as terrorists would be swept away as criminals. Consider the effect of such an extradition treaty during the American Revolution. Washington, Jefferson, and other patriots would have been branded as terrorists by British authorities. Had they been forced to seek asylum in a country party to such an extradition treaty with Britain, their guerrilla tactics and use of bombs, rockets, and fire-arms would have been regarded as offenses under article 1. As a result, they might have been extradited to Britain to die on the gallows.⁹⁴ In our own times, as Senator Helms has noted, freedom fighters such as the Afghan Mujahideen, Savimbi's UNITA fighters, or members of the resistance movements in Nicaragua and Cambodia would also have difficulty claiming asylum.⁹⁵

A third argument against elimination of the political offense exception in the Supplementary Treaty is that it sets a dangerous precedent for changing the extradition process on a country-by-country basis.⁹⁶ Opponents of the Supplementary Treaty claim that this approach to extradition reform will undermine the legislative process and promote inconsistent application of extradition laws based on the status of the requesting country.⁹⁷ Extradition laws favoring our friends or allies could backfire, since political winds shift quickly and friendships can evaporate seemingly overnight, as in the cases of Nicaragua and Iran.

93. 131 CONG. REC. E4988 (daily ed. Nov. 5, 1985) (statement of Rep. Mario Biaggi, quoting Mr. Sean McBride, recipient of Nobel Peace Prize).

94. 132 CONG. REC. S9161 (daily ed. July 16, 1986) (statement of Sen. Jesse Helms).

95. *Id.*

96. *Hearings on Treaty Doc. 8, supra* note 8, at 49 (statement of Rep. Mario Biaggi).

97. *Id.*; *Hearings on Treaty Doc. 8, supra* note 8, at 71-72 (statement of Rep. William J. Hughes).

Moreover, relationships between successive administrations and other countries may change and require revisions in extradition treaties following each Presidential election. This constant need to revise treaties would be an inefficient use of congressional resources. Critics of this piecemeal approach to extradition reform counsel that congressional dialogue should be continued to revise outdated extradition processes in a unified effort.⁹⁸

3. The Question of Fairness in Northern Ireland Judicial Proceedings

Another argument against abolition of the exception questions the fairness of the judicial system in Northern Ireland. One of the assumptions underlying the Supplementary Extradition Treaty is that both the United States and Great Britain are democracies that share common political and judicial institutions. Given the similarity of the two systems, one would expect that a defendant would be treated with equal fairness in either state. However, critics such as the American Civil Liberties Union [ACLU] argue that changes over the past decade or so in the judicial processes in Northern Ireland call the fairness of these proceedings into question and jeopardize "the liberty of citizens and other persons."⁹⁹

The Emergency Provisions Act, adopted in 1973 and revised in 1978,¹⁰⁰ substantially changed the criminal justice process in Northern Ireland. Under this act, trial by jury has been effectively abolished for those charged with "scheduled offenses," which include murder, kidnapping, use of explosives and membership in illegal organizations such as the PIRA.¹⁰¹ Instead, judges sit without juries in "Diplock courts"¹⁰² to decide these major cases. Moreover, with the evolution of the "supergrass system," uncorroborated evidence of an accomplice, which

98. *Hearings on Treaty Doc. 8, supra* note 8, at 73 (statement of Rep. William Hughes).

99. *Hearings on Treaty Doc. 8, supra* note 8, at 412 (statement of Morton H. Halperin, Director, Washington, D.C. Office, American Civil Liberties Union).

100. Northern Ireland (Emergency Provisions) Act 1978, 1978 ch. 53. This act consolidated provisions of the earlier Emergency Provisions Act of 1973. These acts apply only to Northern Ireland. See Foley, *Public Security and Individual Freedom: The Dilemma of Northern Ireland*, 8 YALE J. WORLD PUB. ORD. 284 (1982).

101. SDLP LAWYERS' GROUP, "JUSTICE" IN NORTHERN IRELAND I (1985), reprinted in *Hearings on Treaty Doc. 8, supra* note 4, at 661-77.

102. Under section 7 of the Emergency Provisions Act (1973), defendants may be tried for major offenses by a single judge without a jury in a Diplock Court. SDLP LAWYERS' GROUP, *supra* note 101, at 664, 667, 670-71. Diplock Courts were named after the jurist Lord Diplock, who was appointed in 1972 by the British government to head a commission to consider alternative legal procedures to control terrorism in Northern Ireland. Foley, *supra* note 100, at 291-92.

would be considered unreliable and unsafe evidence in American courts, may be the sole evidence upon which a conviction rests.¹⁰³ Observers of the judicial system in Northern Ireland also note that confessions of guilt induced under psychological pressure¹⁰⁴ are acceptable as evidence; that the judge who rules on the admissibility of the confession as evidence also rules on the guilt or innocence of the accused; that persons suspected of being terrorists may be detained for as long as two years without trial; that bail may be arbitrarily denied; that police often insist that they must be present during presumably privileged communications between solicitors and clients; and that the right of the accused to speak with his solicitor is sometimes flatly rejected.¹⁰⁵

Given the civil strife prevalent throughout the Belfast area, critics contend that extradition decisions made by the United States to Northern Ireland must be carefully weighed to protect the rights of those who justly rebel against their government. As ACLU Director Morton Halperin put it, the question facing the United States is whether "this nation will abandon its two hundred year old tradition of refusing to return unsuccessful revolutionaries to their homeland to suffer victor's justice."¹⁰⁶ Critics contend that rather than effectively eliminate the political offense exception, a better means of addressing terrorism would be to enact comprehensive reforms of the existing extradition legislation, which would include guidance to the judiciary as to what acts are defined as terrorism¹⁰⁷ and thus not within the political offense exception.

103. "Supergrasses" are persons who are hired by the police to provide testimony at trial. Evidence from these witnesses would be considered unreliable and unsafe in American courts because the credibility of these witnesses is suspect. They may have little or no familiarity with the defendant or the case. The information they provide may not be based on personal knowledge. An observational study of the supergrass system conducted in 1983 indicated that those who take on the role of supergrass generally do so to avoid subsequent prison terms; they are then paid for their time or given immunity, and are coached exhaustively by police personnel to tailor the evidence to meet the needs of the state. They may implicate persons for revenge, and the police may provide supportive evidence. They maximize the number of people involved and minimize their own role. Since they are highly motivated to lie, their testimony has been characterized by observers as unreliable. L. GIFFORD, *SUPERGRASSES* (1983).

104. Foley, *supra* note 100, at 300-03.

105. SDLP LAWYERS' GROUP, *supra* note 101, at 664-71.

106. *Hearings on Treaty Doc. 8*, *supra* note 8, at 411 (statement of Morton H. Halperin, Director, Washington, D.C. Office, ACLU).

107. *Id.* at 411-18.

4. Constitutional Guarantees in Extradition

In his testimony on the Supplementary Treaty before the Senate Foreign Relations Committee, Abraham Sofaer noted that "legal principles such as the political offense exception . . . do not create 'rights' in the individuals that assert them."¹⁰⁸ Whether or not the legal principles underlying extradition create rights for the individuals, case law suggests that constitutional guarantees may be limited.

As early as 1902, the Supreme Court suggested that individuals have constitutional rights in the extradition process when it stated that "extradition treaties should be faithfully observed and interpreted with a view to fulfilling our just obligations to other powers, without sacrificing the legal or constitutional rights of the accused."¹⁰⁹ Moreover, later in the opinion the Court noted that "[c]are should doubtless be taken that the treaty be not made a pretext for . . . forcing the surrender of political offenders."¹¹⁰

Since that time, other courts have held that extradition cannot be allowed when the procedures employed violate an individual's constitutional rights. For instance, in holding that the district court had jurisdiction to issue a writ of habeas corpus against unlawful federal detention for purposes of international extradition, the Fourth Circuit in *Plaster v. United States* declared that "the United States government must, in carrying out its treaty obligations, conform its conduct to the requirements of the Constitution, and that treaty obligations cannot justify otherwise unconstitutional governmental conduct."¹¹¹

Similarly, the Fifth Circuit in *In re Geisser* plainly stated that extradition could not proceed if the defendant's constitutional rights would be violated.¹¹² Likewise, in denying three petitioners the right to rescind an agreement to serve their sentences (imposed by Mexican courts) in American prisons—an agreement they had made pursuant to a treaty between the United States and Mexico—the court in *Rosado v. Civiletti* stated that to the extent the United States detains an individual pending extradition, it must accord him due process.¹¹³ Further-

108. 131 CONG. REC. S10,789 (daily ed. Aug. 1, 1985) (statement of Department of State Legal Adviser Abraham Sofaer).

109. *Grin v. Shine*, 187 U.S. 181, 184 (1902).

110. *Id.* at 185.

111. *Plaster v. United States*, 720 F.2d 340, 348 (4th Cir. 1983).

112. *In re Geisser*, 554 F.2d 698, 704-06 (5th Cir. 1977); *In re Geisser*, 627 F.2d 745, 749-50 (5th Cir. 1980), *cert. denied*, 450 U.S. 1031 (1981).

113. *Rosado v. Civiletti*, 621 F.2d 1179, 1195 (2d Cir. 1980), *cert. denied*, 449 U.S. 856 (1980), *reh'g denied*, 449 U.S. 1027 (1980).

more, the Supreme Court in *Reid v. Covert* noted that the mere presence of treaty obligations is insufficient to override the constitutional right to a trial by civilian courts of dependents who are not in military service.¹¹⁴

Although the United States Constitution guarantees that an individual's rights must be protected during extradition proceedings, the nature of these rights is limited. The Constitution does not, for example, guarantee that once extradited to another country a person will receive a trial with the same procedural safeguards as those provided in the United States. The Court in *Neely v. Henkel* commented that those Constitutional provisions "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."¹¹⁵ Thus, the Court held that an individual cannot prevent his extradition simply by alleging that the criminal process of the requesting country falls short of guarantees granted by the United States Constitution.¹¹⁶

Courts in this country generally assume that under an extradition treaty, the judicial process afforded in the requesting state will be fair. In a decision early this century, the Supreme Court asserted in *Glucksman v. Henkel* that courts are "bound by the existence of an extradition treaty to assume that the trial will be fair."¹¹⁷ More recently, both the *Mackin* and *Doherty* courts discussed the alleged unfairness in the administration of justice in Northern Ireland. The *Doherty* court flatly rejected the notion that judicial processes in Northern Ireland were unfair.¹¹⁸ The *Mackin* court somewhat more coolly reasoned that by its

114. 354 U.S. 1, 17-23 (1956). The Court held that a defendant could not be tried by a military tribunal for killing her husband, a sergeant in the United States Air Force, at an air base in England. At the time of the incident, an executive agreement with Great Britain granted exclusive jurisdiction to United States military courts over all offenses committed in Great Britain by American servicemen or their dependents. The Court, however, said that this jurisdiction is limited to servicemen and does not cover civilian dependents. Under the "grand design of the Constitution", dependents of servicemen have a right to trial in civilian courts, with all the constitutional protections that may not be afforded in military tribunals. Therefore, the Court concluded that an international agreement cannot abrogate this right. For a discussion of the extraterritorial application of the United States Constitution in criminal matters, see Stephan, *Constitutional Limits on International Rendition of Criminal Suspects*, in *INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE WORLD COMMUNITY* 34 (R. Lillich ed. 1981).

115. *Neely v. Henkel*, 180 U.S. 109, 122 (1901).

116. *Id.* at 122-23; see also *Rosado v. Civiletti*, 621 F.2d at 1195 (interpreting *Neely v. Henkel*, 180 U.S. 109 (1901)).

117. *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911); see also *Rosado v. Civiletti*, 621 F.2d at 1195 (quoting *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911)).

118. The court stated that it

decision it did not "pass judgment on judicial process respondent would face in the requested country."¹¹⁹ Rather, it recognized that denial of extradition on humanitarian grounds, such as suspicion of an unfair trial in the requesting state, is not within the purview of the court but must be decided by the Department of State.¹²⁰

Thus, given the limitations on the nature of constitutional guarantees in extradition proceedings, the Constitution may not provide a basis for a challenge to the Supplementary Treaty on grounds of unfairness in the criminal justice procedures employed in Northern Ireland.

E. *Article 3(a): Denial of Extradition*

Unlike the original Supplementary Treaty, the compromise agreement tries to balance the need to combat terrorism against the need to maintain basic individual safeguards and democratic traditions. Both versions of the Supplementary Treaty effectively eliminate the political offense exception. However, the more recent version attempts to counteract the elimination of this historically-recognized exception by providing persons sought the opportunity to present evidence in court to show that extradition should be denied.

Article 3(a) provides two separate bases upon which a person may challenge the request: first, under the "Aquino clause,"¹²¹ that the requesting state has devised "trumped up charges" to gain judicial control over an undesirable individual for punishment;¹²² and second, under the "fair trial clause,"¹²³ that the judicial process of the requesting state will not guarantee a fair trial.¹²⁴ In effect, the compromise Supplementary Treaty enables the person sought to avoid extradition by persuasively and factually showing one of two distinct situations

specifically rejects respondent's claim that the Diplock Courts and the procedures there employed are unfair, and that respondent did not get a fair trial and cannot get a fair trial in the courts of Northern Ireland. . . . The Court concludes that both Unionists and Republicans who commit offenses of a political character can and do receive fair and impartial justice and that the courts of Northern Ireland will continue to scrupulously and courageously discharge their responsibilities in that regard.

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

119. *In re Mackin*, reprinted in *Hearings on S. 1639*, supra note 18, at 207.

120. See *In re Lincoln*, 228 F. 70, 74 (E.D.N.Y. 1915), *aff'd per curiam*, 241 U.S. 651 (1916); *In re Sindona*, 450 F. Supp. 672, 694 (S.D.N.Y. 1978), *aff'd sub nom. Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980).

121. 132 CONG. REC. S9262 (daily ed. July 17, 1986) (statement of Sen. Biden).

122. *Treaty Doc. No. 17*, supra note 4, at 4.

123. 132 CONG. REC. S9262 (daily ed. July 17, 1986) (statement of Sen. Biden).

124. *Treaty Doc. No. 17*, supra note 4, at 4.

that prohibit a fair and impartial trial in the requesting country. Article 3(a) specifically stipulates that the court may deny extradition if the person sought demonstrates through a preponderance of the evidence that extradition has been requested to punish that person because of race, religion, nationality, or political opinions, or that the judicial system in the requesting state will not provide a fair trial.¹²⁵

The significance of article 3(a) is twofold. First, it indicates that the Senate recognizes the inequities of the judicial system in Northern Ireland, and will not approve a mechanism that almost automatically guarantees extradition to that country simply to enhance the political alliance with Great Britain. In this respect, the compromise Supplementary Treaty reflects a healthy concern for individual rights in the judicial process.

Second, in contrast with the original Supplementary Treaty that would have minimized the role of the judiciary in the extradition process, this provision grants the courts additional authority in two ways. First, with the Aquino clause, the courts have the authority to determine if the extradition request is a subterfuge to try or punish the individual for his political opinions, race, religion, or nationality. In essence, this provision empowers the courts to examine the motives of the requesting state when these motives undermine the potential for a fair trial.¹²⁶ Second, with the "fair trial clause," for the first time in United

125. The text of article 3(a) is as follows:

Notwithstanding any other provisions 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.

Treaty Doc. No. 17, supra note 4, at 10.

To ensure that the intent and meaning of this article were clear, the Senate Foreign Relations Committee incorporated a colloquy into their report to the Senate that specifically stated the rights of an individual against whom probable cause had been established for an extraditable offense under the Supplementary Treaty for which the political offense doctrine would not otherwise apply. This colloquy stated in part:

[T]he defendant will have an opportunity in Federal court to introduce evidence that he or she would personally, because of their race, religion, nationality, or political opinion, not be able to get a fair trial because of the court system or any other aspect of the judicial system in the requesting country, or that that person's extradition has been requested with a view to try and punish them on account of their race, their religion, nationality, or political opinion.

Treaty Doc. No. 17, supra note 4, at 5.

126. The "Aquino clause" evolved from a concern that the original Supplementary Treaty

States history, the courts will have a right to inquire into the fairness of the judicial process in foreign courts.¹²⁷

However, the drafters of this provision caution that the fair trial clause is narrowly drawn in two respects. First, the clause does not give the courts blanket permission to investigate the fairness of each and every aspect of the judicial procedures in Northern Ireland when one extradition request is made. Rather, the clause enables the courts to ascertain whether the judicial processes of Northern Ireland will be fair for a particular individual.¹²⁸ Second, the courts cannot simply speculate that the trial or treatment of the person sought *might*¹²⁹ be prejudiced by the person's race, religion, nationality, or political opinions, but that that person *would* be so prejudiced. This means that by a preponderance of the evidence, the person sought must convince the court of the outcome of the extradition.¹³⁰

However, article 3(a) leaves some issues unresolved. First, the article does not articulate specific standards to guide the courts in determining the conditions under which the judicial system of the requesting country will provide a fair trial for the person sought. However, the legislative history indicates that at the very least an inquiry should ask

provided no safeguards against bogus prosecutions by the requesting state. Opponents of the original Treaty feared that the requesting state could fabricate charges to force the extradition of a political adversary who would not be allowed to use the political offense exception as a defense or to question the motives of the requesting state. In particular, critics cited the example of Senator Benigno Aquino. Had a similar treaty been in effect with the Philippines when Aquino was exiled in the United States, the Marcos regime could have devised allegations of, for example, conspiracy in a bombing, that would have required the United States to extradite him, since the political offense exception was effectively eliminated as a defense and there was no provision for Aquino to challenge the motives of the Marcos regime underlying the request. 132 CONG. REC. S9166 (daily ed. July 16, 1986) (statement of Sen. Eagleton).

127. *Treaty Doc. No. 17, supra* note 4, at 7-8. As noted earlier, the principal role of the magistrates in the extradition process to date has been to ascertain whether an act has been committed that was an offense under the laws of both the requesting and the requested states.

128. Senator Eagleton specifically stated on the floor of the Senate that "article 3(a) is not intended to give courts authority generally to critique the abstract fairness of foreign judicial systems. It is directed at the treatment to which this particular person will be subjected." 132 CONG. REC. S9167 (daily ed. July 16, 1986) (statement of Sen. Eagleton).

129. An earlier version of the compromise Supplementary Treaty more broadly stated the fair trial clause. Under this version, the courts could deny extradition if the person sought proved "to the satisfaction of the competent judicial authority of the United States . . . that he *might*, if surrendered, be prejudiced at his trial or punished, detained or restricted in his liberty by reason of his race, religion, nationality or political opinion." *Id.* at S9166 (emphasis added). The committee narrowed the focus of the clause by substituting the word "would" for "might."

130. As Senator Eagleton put it, "In connection with the 'preponderance of the evidence requirement', this provision imposes a significant evidentiary burden on the requested person." *Id.* at S9167.

whether the administration of justice in the requesting state "would be so unfair as to violate fundamental notions of due process"¹³¹ or "meets even minimal standards within a democratic context".¹³² Absent these "minimal standards", the courts are obliged to refuse extradition. With respect to Northern Ireland, the legislative history strongly suggests that on a case-by-case basis the courts should condemn the system of justice: "[t]he Committee on Foreign Relations is sending a strong signal to the court system of our Nation that the standard of justice in Northern Ireland is unacceptable to us, until changed to reflect basic safeguards for the individual."¹³³

However, this directive suggests that terrorists who perhaps should be returned to Northern Ireland may remain free because the court system there will deny them a fair trial. In other words, the United States courts are to regard the judicial system in Northern Ireland as "unacceptable" until substantial reforms are made to guarantee a fair trial for *all* persons extradited from the United States; therefore, by the terms of article 3(a), persons suspected of terrorism, along with others, may avoid extradition if they can persuasively show in court that Northern Ireland devised trumped-up charges to extradite them for trial or punishment, or that they will be prejudiced in their trial or treatment in Northern Ireland by reason of their race, religion, nationality, or political opinions.

The Senate Foreign Relations Committee anticipated this problem. It clearly stated in its report to the Senate that it condemned terrorism and did not intend article 3(a) to create new loopholes. In the words of the report: "[i]t would be a perversion of the committee's intent were article 3(a) used to impede the extradition of those sought for acts of terrorism."¹³⁴ Moreover, the Committee included article 3(b), which allows either party to the agreement to appeal a decision with which they are dissatisfied. Presumably this article, which gives the government a right it does not now have under United States extradition law, will give the United Kingdom a second opportunity to obtain the extradition of a terrorist when the court initially denies it based on the provisions of article 3(a). In the final analysis, however, the extent to which the Committee's intent is carried out can only be determined after the implementation of the compromise Supplementary Treaty.

131. 132 CONG. REC. S9167 (daily ed. July 16, 1986) (statement of Sen. Eagleton).

132. 132 CONG. REC. S9257 (daily ed. July 17, 1986) (statement of Sen. Kerry).

133. *Id.* at S9258.

134. *Treaty Doc. No. 17, supra* note 4, at 4.

A second unresolved issue is that the compromise Supplementary Treaty provides the courts little guidance in differentiating a terrorist from a nonterrorist.¹³⁵ Since no one may raise the political offense exception as a defense to extradition, the distinction between legitimate acts of armed rebellion and wanton acts of violence remains blurred. This distinction is important, however, because the intent of the Supplementary Treaty is that only nonterrorists should be able to successfully employ the provisions of article 3(a) to avoid extradition. Conceptually, at least, terrorists may continue to avail themselves of legal means to avoid extradition and patriots fighting for independence may be returned to their adversaries.

F. *Article 5: The Retroactivity Clause*

The retroactivity clause stipulates generally that the Supplementary Treaty will apply to offenses committed both before and after the treaty enters into force. However, for acts committed before it takes effect, article 5 indicates that the Supplementary Treaty will only apply if the acts were regarded as offenses by both parties to the treaty at the time they were committed.

Although critics of the Supplementary Treaty have raised the issue of retroactivity as one reason to forego ratification,¹³⁶ supporters argue that there is insufficient legal justification for this position. Constitutional challenges seem inappropriate. Since an extradition hearing does not involve the adjudication of guilt or innocence, there is no issue of double jeopardy.¹³⁷ Moreover, American extradition practices al-

135. Senator Dodd put it somewhat more forcefully in his remarks about the compromise Supplementary Treaty in the Senate: "The underlying proposition in this agreement is that all acts of political violence are wanton crimes and acts of terrorism. It equates all political violence with terrorism, and that is a bogus proposition." 132 CONG. REC. S9252 (daily ed. July 17, 1986) (statement of Sen. Dodd). Similarly, Senator Helms argued in the Senate Foreign Relations Committee that the compromise Supplementary Treaty "makes no legal distinction between terrorists who kill and maim innocent men, women and children, on the one hand, and freedom fighters who are engaged in military or paramilitary actions in just wars for the reestablishment of traditional moral, cultural and religious values." *Treaty Doc. No. 17, supra* note 4, at 11 (statement of Sen. Jesse Helms).

136. 131 CONG. REC. E5098 (daily ed. Nov. 12, 1985) (statement of Rep. Biaggi).

137. The United States Department of State Legal Adviser's Office pointed out that "the Fifth Amendment right to be free from double jeopardy does not attach until the individual's trial has begun. An extradition proceeding is not a trial, but more akin to such pretrial proceedings as an indictment or a grand jury. These pretrial proceedings do not implicate the right to be free from double jeopardy, and neither does an extradition proceeding. An extradition request may be refiled at any time and, in fact, often is." *Reprinted in* 132 CONG. REC. S9158 (daily ed. July 16, 1986) (letter from Deputy Legal Adviser Mary Mochary).

ready allow the requesting state to renew its demand for extradition following failure of the first proceeding.¹³⁸

Furthermore, inclusion of the clause is common practice in United States extradition treaties. Such a clause has generally been included in most United States extradition treaties signed over the past fifteen years, including the existing United States-United Kingdom Extradition Treaty.¹³⁹ Retroactivity clauses are also common among twenty-three supplementary treaties approved within recent years.¹⁴⁰ There are, however, two notable exceptions to the general inclusion of a retroactivity clause. Neither the extradition treaty with Uruguay nor the one with Canada contains such a clause. Instead, both treaties stipulate that crimes committed before the new treaties enter into force will be subject to the provisions of the treaties in force at the time the acts were committed.¹⁴¹

138. I. SHEARER, *supra* note 21, at 195.

139. Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom and Northern Ireland, June 8, 1972, United States-United Kingdom, art. XVI, para. 2, 28 U.S.T. 227, 234, T.I.A.S. No. 8468.

140. 132 CONG. REC. S9148 (daily ed. July 16, 1986) (statement of Sen. Lugar). For instance, article XIII of the recently signed Supplementary Extradition Convention with Sweden states: "This Supplementary Convention shall apply to offenses committed before as well as after its entry into force." Supplementary Convention on Extradition between the United States of America and the Kingdom of Sweden, Mar. 14, 1983, United States-Sweden, art. XIII, para. 2, S. Doc. No. 98-4, 98th Cong., 1st Sess. (1983). Similarly, article 20 of the extradition treaty with the Netherlands states: "This Treaty shall apply to offenses encompassed by Article 2 committed before as well as after the date this Treaty enters into force." Extradition Treaty between the United States of America and the Kingdom of the Netherlands, *supra* note 82, art. 20. Worded more closely to the retroactivity clause of the Supplementary Treaty is article 20 of the extradition treaty with Colombia, which specifically precludes application of the new Treaty to those acts done before the new Treaty takes effect that were not offenses in both states: "This Treaty shall apply to offenses encompassed by Article 2 committed before as well as after the date this Treaty enters into force. Extradition shall not be granted, however, for an offense committed before this Treaty enters into force which was not an offense under the laws of both Contracting Parties at the time of its commission." Extradition Treaty between the United States of America and the Republic of Colombia, *supra* note 82, art. 20.

Similar provisions to those in the Netherlands treaty are included in the extradition treaties with Finland, Australia, and Denmark. Extradition Treaty with Finland, June 11, 1976, United States-Finland, art. 23, para. 2, 31 U.S.T. 944, T.I.A.S. No. 9626; Extradition Treaty with Australia, May 14, 1974, United States-Australia, art. XX, 27 U.S.T. 957, T.I.A.S. No. 8234; Treaty on Extradition with Denmark, June 22, 1972, United States-Denmark, art. 20, 25 U.S.T. 1293, T.I.A.S. No. 7864.

141. The extradition treaty with Uruguay states: "This Treaty shall terminate and replace the Extradition Treaty between the United States of America and the Oriental Republic of Uruguay . . . crimes listed in that Treaty and committed prior to the entry into force of this Treaty shall nevertheless be subject to extradition pursuant to the provisions of that Treaty. . . ." Treaty on Extradition and Cooperation in Penal Matters between the United States of America and the Oriental Republic of Uruguay, Apr. 6, 1973, United States-Uruguay, art. 20, 35 Stat. 2028. Simi-

The arguments against retroactivity are based primarily on grounds of fairness. In essence, the argument is that once someone who has successfully avoided extradition under the treaty currently in effect by using the political offense exception, it would be unfair to subject him to these same proceedings again when this defense is unavailable under the compromise Supplementary Treaty. Supporters of a unified free Ireland fear that Doherty or others who have already successfully contested their extraditability to Northern Ireland might be subject to the proceedings again and will be unable to use the political offense exception as a defense. In that event, extradition may be more readily accomplished, and extradition law would provide little relief.¹⁴²

Exclusion of the clause might have resolved the issue and facilitated passage of the Supplementary Treaty. The absence of a retroactivity clause in the extradition treaties with Canada and Uruguay suggests that such a clause is not mandatory.¹⁴³ However, given the dissatisfaction with recent United States court decisions denying extradition for PIRA members, inclusion of this controversial clause was highly predictable.

IV. POLITICAL CONSEQUENCES OF THE SUPPLEMENTARY EXTRADITION TREATY

Aside from the legal issues raised by the elimination of the political offense exception, the Supplementary Extradition Treaty also raises

larly, the extradition treaty with Canada states: "This Treaty shall terminate and replace any extradition agreements and provisions on extradition in any other agreement in force between the United States and Canada except that crimes listed in such agreements and committed prior to entry into force of this Treaty shall be subject to extradition pursuant to the provisions of such agreements." Treaty on Extradition between the United States of America and Canada, Dec. 3, 1971, amended June 28-July 9, 1974, United States-Canada, 27 U.S.T. 983, 1017, T.I.A.S. No. 8237.

142. During discussions of the compromise Supplementary Treaty on the floor of the Senate, Senator D'Amato introduced an amendment to limit the applicability of the retroactivity clause to those persons whose extraditability is sought after the Supplementary Treaty enters into force. Had this amendment been approved, Doherty and others who had already faced extradition proceedings would not be subject to subsequent hearings for the same charges. 132 CONG. REC. S9153 (daily ed. July 16, 1986) (statement of Sen. D'Amato). The amendment was tabled by a vote of 65 to 33 with two Senators not voting. 132 CONG. REC. S9160 (daily ed. July 16, 1986).

143. An explication of the rationale underlying exclusion of a retroactivity clause from the extradition treaties with Uruguay and Canada is beyond the scope of this article. However, an examination of the background and development of each of these treaties would provide an interesting analysis of the conditions under which the retroactivity clause is omitted. Moreover, a comparison of these conditions with those surrounding the development of the United States-United Kingdom Supplementary Treaty might provide additional insight into the rationale for inclusion of the clause in the treaty with the United Kingdom.

an important political issue. In ratifying the treaty, the United States may be establishing two wholly different sets of standards for defining the political offense exception, one for friendly democratic states and one for all other countries. These dual standards may lead to awkward consequences.

How will a "stable democracy" be defined?¹⁴⁴ In the past administrations have considered the Philippines under Marcos, South Africa under apartheid and Nicaragua under Somoza as responsible democracies. What if we had entered into treaties similar to the Supplementary Treaty with each of these countries? Would we now regret it? Moreover, the administration would have difficulty explaining why one country qualified as a stable democracy to warrant elimination of the political offense exception while another neighbor did not.¹⁴⁵ States not granted this favored status might employ economic pressures or use negotiations over strategic military bases or precious resources to persuade the United States of their democratic character.¹⁴⁶

V. SUMMARY AND CONCLUSION

In a unified international effort to bring terrorists to justice, the United States and United Kingdom proposed a Supplementary Extradition Treaty. In effect, the Supplementary Extradition Treaty eliminates the political offense exception which has been accepted in the international community for more than three centuries as a means of obtaining asylum from political adversaries. In addition to arguments that the Treaty will in some measure curtail terrorism, there are other

144. In a written statement submitted to the Senate Foreign Relations Committee, one commentator noted that "if the political offense exception is to be abolished for one friendly democratic country, why not for another? And who is to decide which countries qualify as democracies? It could be a short step to abolishing the political exception for fugitives from the Philippines, South Korea, El Salvador, Guatemala, and Turkey. All of these countries have held elections of some sort recently and are friendly with the present United States Administration." FARRELL, SUPPLEMENTARY TREATY CONCERNING THE EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA, SIGNED AT LONDON ON JUNE 8, 1982: STUDY AS TO THE EFFECTS OF THE NEW TREATY IN REGARD TO POLITICAL FUGITIVES WHO MAY BE AFFECTED BY IT, reprinted in *Hearings on Treaty Doc. No. 8*, supra note 8, at 624. Similarly, Senator Helms raised the issue that "there is no commonly accepted definition of a 'democracy.' The word itself is claimed by both free countries and abysmal dictatorships. The history of even Western democracies sadly demonstrates that freedom is not forever, and that democracies, like republics, and other forms of free government, can fall prey to totalitarian forces." *Treaty Doc. No. 17*, supra note 4, at 11 (statement of Sen. Jesse Helms).

145. FARRELL, supra note 144, at 625.

146. *Id.*

reasons for its adoption. The United States courts have recognized the ongoing struggle for freedom in Northern Ireland as a "political disturbance," have denied extradition of three PIRA members embroiled in this struggle, and have differentiated the PIRA from more amorphous terrorist groups elsewhere. The Supplementary Treaty thus reflects a backlash against these recent court decisions with which the administration disagrees. Moreover, given unsuccessful attempts to revise extradition laws in Congress over the past six years, the Supplementary Treaty provides the administration with an opportunity to reform some practices, including the effective abolition of the political offense exception, which could not be accomplished through other means.

The original version of the Supplementary Treaty would have placed the entire extradition decision in the hands of the executive branch and effectively eliminated the participation of the judiciary in determining the political nature of the offense. However, absent the judiciary's perspective in balancing expediency against human rights, the principal consideration in making extradition decisions may well become political or foreign policy implications. Furthermore, since the United Kingdom is a friendly democracy, it seems unlikely that extradition requests would be denied. Yet given the questionable judicial practices which have evolved in Northern Ireland recently, extraditing someone to that jurisdiction for criminal prosecution may be condoning the violation of human rights.

In view of these issues, the Senate Foreign Relations Committee drafted a compromise Supplementary Treaty that reflects a concern for individual rights. This version expands the role of the United States courts beyond that of the earlier version. It empowers them to examine the fairness of the judicial system in the requesting country, and permits them to deny extradition if persuaded that the judicial processes will not guarantee a fair trial or treatment. In addition, the courts may deny extradition if persuaded that the requesting country has devised falsified charges to gain control over a dissident primarily for retribution. Furthermore, the compromise treaty allows for the retroactive extradition of those persons for whom extradition has already been refused by virtue of the political offense exception.

However, the compromise Supplementary Treaty leaves some issues unresolved. Although the Treaty ostensibly is designed to bring terrorists who commit wanton acts of violence to justice, it makes no provision for distinguishing "wanton" acts of violence from those that may have been committed justifiably. The Treaty bars the use of the

political offense exception as a defense by anyone who is accused of committing the enumerated acts and not simply to those who are labeled "terrorists." Moreover, in condemning the system of justice in Northern Ireland as unacceptable to democratic standards, the legislative history raises the question of whether terrorists may employ article 3(a) to avoid extradition despite the intent of the drafters to eliminate this possibility.

Given the legal and political issues that surround this groundbreaking yet controversial Supplementary Treaty, the extent to which it will bring terrorists to justice and at what price remains to be seen.