# In re REQUESTED EXTRADITION OF DESMOND MACKIN

United States District Court for the Southern District of New York

August 13, 1981

No. 80 Cr. Misc. 1, p. 54

### Reporter

1981 U.S. Dist. LEXIS 17746 *

IN THE MATTER OF THE REQUESTED EXTRADITION OF DESMOND MACKIN, BY THE GOVERNMENT OF THE UNITED KINDGOM OF GREAT BRITAIN AND NORTHERN IRELAND.

## Core Terms

Northern, Soldier, extradition, Army, violence, uprising, Treaty, terrorist, disturbance, bullet, probable cause, violent, arrest, bombing, severe, gun, incidental, fired, rebellion, organizations, offenses, courts, civilian, shooting, shot, revolution, Republic, residue, cuff, Protestant

## Case Summary

### Procedural Posture

Defendant challenged an application for extradition brought by petitioner, the United Kingdom of Great Britain and Northern Ireland.

### Overview

The United Kingdom requested extradition of defendant under Extradition Treaty, January 21, 1977, U.S.-The United Kingdom of Great Britain and Northern Ireland, 28 U.S.T. 227. Defendant challenged the extradition proceedings. Based upon testimony of a sworn eyewitness that defendant fired a gun at a soldier and the failure of defendant's expert witness to negate this testimony, the court found the United Kingdom showed probable cause to accuse defendant of the crime of attempted murder. Defendant argued that the extradition was barred by the political offense exception in the Extradition Treaty. The court found that defendant met the first prong of the two-prong test for the exception. Defendant showed that there was a political crisis in the United Kingdom meeting the

first prong of the test. Defendant also showed that he was a participant in the uprising that resulted in the political crisis and there was a correlation between defendant's acts and the uprising. Upon the facts presented by defendant, he made a prima facie showing the crime for which he was charged was a political offense that warranted the denial of extradition.

**Outcome**

The court denied the extradition request.

## LexisNexis® Headnotes

Criminal Law & Procedure > Preliminary Proceedings > Extradition > Evidence

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

***HN1***[] **Extradition, Evidence**

See Extradition Treaty, January 21, 1977, U.S.-The United Kingdom of Great Britain and Northern Ireland, Art. IX(1), 28 U.S.T. 227.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

International Law > ... > Extradition Treaties > Procedures > General Overview

***HN2***[] **Preliminary Proceedings, Extradition**

The United States will honor an extradition request only pursuant to its treaty obligations. While most states might nevertheless grant extradition requests in the absence of an express agreement, the United States will not even consider extradition unless pursuant to a treaty.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

***HN3***[] **Preliminary Proceedings, Extradition**

See Extradition Treaty, January 21, 1977, U.S.-The United Kingdom of Great Britain and Northern Ireland, Art. V(1)(c), 28 U.S.T. 227.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

Criminal Law & Procedure > Commencement of Criminal Proceedings > Initial Appearances > Procedural Requirements

Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > General Overview

***HN4*** **Preliminary Proceedings, Extradition**

The probable cause standard utilized to sustain an indictment or in preliminary examinations to hold an accused to answer in district court under Fed. R. Crim. P. 5.1 is regularly employed in extradition cases. Likewise, United States national procedural law is applied and not state procedural law.

Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > General Overview

***HN5*** **Preliminary Proceedings, Preliminary Hearings**

Probable cause has been described as evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > Evidence

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > Evidence

Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > Procedural Matters

***HN6*** **Extradition, Evidence**

By statute, 28 U.S.C.S. § 3190, the proof of the demanding country in an extradition hearing may be hearsay as may the Government's evidence in a domestic preliminary hearing. The respondent has a limited right to introduce evidence on the issue of probable cause. His evidence may explain ambiguities or doubtful elements in the prima facie case made against him.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > Evidence

Evidence > ... > Procedural Matters > Preliminary Questions > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Extradition > Probable Cause

*HN7*[] **Extradition, Evidence**

In admitting "explanatory evidence" at an extradition hearing, the intention is to afford an accused person the opportunity to present reasonably clear-cut proof which would be of limited scope and have some reasonable chance of negating a showing of probable cause. The scope of this evidence is restricted to what is appropriate to an extradition hearing.

Evidence > ... > Procedural Matters > Preliminary Questions > General Overview

*HN8*[] **Procedural Matters, Preliminary Questions**

It is largely within the discretion of the committing judicial officer to determine the extent that the respondent may offer explanatory proof.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > Evidence

Evidence > Types of Evidence > Documentary Evidence > Completeness

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

Evidence > Rule Application & Interpretation

*HN9*[] **Extradition, Evidence**

Fed. R. Evid. 1101(d)(3) makes the Federal Rules of Evidence inapplicable to extradition proceedings. That rule relaxes the evidentiary standard at an extradition proceeding; it does not mean that evidence admissible under strict rules of evidence may not be admitted.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

*HN10*[] **Preliminary Proceedings, Extradition**

See Extradition Treaty, January 21, 1977, U.S.-The United Kingdom of Great Britain and Northern Ireland, Art. V, 28 U.S.T. 227.

Criminal Law & Procedure > ... > Disruptive Conduct > Riot > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

*HN11*[] **Disruptive Conduct, Riot**

A political offense under the extradition treaties, must involve an "uprising" or some other violent political disturbance. Moreover the act in question must have been incidental to the occurrence in order to justify the exclusion.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > Procedural Matters

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

*HN12*[] **Extradition, Procedural Matters**

Generally speaking, for purposes of an extradition hearing, it is an offense against the government itself or incident to political uprisings. It is not a political offense because the crime was committed by a politician. The crime must be incidental to and form a part of political disturbances. It must be in furtherance of one side or another of a bona fide struggle for political power.

Governments > Legislation > Enactment

*HN13*[] **Legislation, Enactment**

Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

Governments > Legislation > Interpretation

*HN14*[] **Preliminary Proceedings, Extradition**

In the absence of any major statutory amendment and in the absence of any legislative history that would preclude the judiciary from determining the applicability of the political offense exception to the extradition statutes, the district court may infer that Congress intended to incorporate the judicial interpretation of 18 U.S.C.S. § 3184 into the plain words of the statute.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

*HN15*[] **Preliminary Proceedings, Extradition**

The judiciary determines whether the alleged offense falls within the ambit of the "political offense" exception, presumably relying on 18 U.S.C.S. § 3184.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

International Law > ... > Extradition Treaties > Procedures > General Overview

International Law > Individuals & Sovereign States > Extradition Treaties > General Overview

*HN16*[] **Preliminary Proceedings, Extradition**

The Secretary of State has sole discretion to determine whether the criminal charge is a subterfuge for political action, i.e., whether the request has been made with a view to try to punish the extradite for an offense of a political character under Extradition Treaty, January 21, 1977, U.S.-The United Kingdom of Great Britain and Northern Ireland, Art. V(1)(c)(ii), 28 U.S.T. 227, and sole discretion to consider due process safeguards and the political climate in the demanding country in determining whether extradition should be denied.

Criminal Law & Procedure > Preliminary Proceedings > Extradition > Evidence

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

*HN17*[] **Extradition, Evidence**

An extraditee has the burden to establish a prima facie case with respect to each element of the political offense exception and that ultimately, the extraditee must prove by a preponderance of evidence that the crime for which extradition is sought is of a "political character."

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

***HN18*** **Preliminary Proceedings, Extradition**

See Section 10 of the 1973 Emergency Provisions Act.

Criminal Law & Procedure > ... > Disruptive Conduct > Riot > Elements

Criminal Law & Procedure > ... > Disruptive Conduct > Riot > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Extradition > General Overview

***HN19*** **Riot, Elements**

The political offense doctrine requires that the act be committed "in furtherance of" the political uprising. There must be a substantial tie between the specific act and the political activity and goals of the uprising group. Absent this direct link isolated acts of social violence undertaken for personal reasons would be protected simply because they occurred during a time of political upheaval, a result the political offense exception was not meant to produce.

**Opinion by:** *[*1]*

BUCHWALD

## Opinion

OPINION

NAOMI REICE BUCHWALD

UNITED STATES MAGISTRATE

The United Kingdom of Great Britain and Northern Ireland ("United Kingdom") has formally requested the extradition of Desmond Mackin ("Mackin") pursuant to the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland that entered into force on January 21, 1977 (the "Treaty"). * In accord with Article XIV of the Treaty, the United Kingdom was represented in this proceeding by the United States Attorney's Office for the Southern District of New York.
28 U.S.T. 227, T.I.A.S. 8486. Mackin, a native of Northern Ireland, has been indicated on charges of (a) attempted murder, contrary to common law; (b) wounding with intent to do grievous bodily harm, contrary to section 18 of the Offenses Against the Person Act of 1861 and (c) possession of firearms and ammunition with intent, contrary to

section 14 of the Firearms Act (Northern Ireland) 1969. (Complaint, P5). After being released on bail, Mackin failed to appear for trial on September 25, 1979 and a bench warrant was issued for his arrest. (Complaint, P6).

*[*2]*

Mackin was arrested in this district on October 6, 1980 pursuant to a provisional arrest warrant issued by the Honorable Irving Ben Cooper on the basis of a provisional extradition complaint. (Treaty, Article VIII). On November 19, 1980 a formal complaint requesting the extradition of Mackin was filed and a warrant of arrest issued on the same day by the Honorable Richard Owen. Mackin's motion for bail was denied by the Honorable Kevin Thomas Duffy on February 7,1981. Thus, Mackin has been held without bail since his initial arrest.

The parameters of this extradition proceeding are established by the Treaty * "It is now well-established that *HN2*[] the United States will honor an extradition request only pursuant to its treaty obligations." Lubet and Czackes, The Role of the American Judiciary in the Extradition of Political Terrorists, 71 J. Crim. L. & Criminology 193, 197 (1980) (hereinafter referred to as "Lubet and Czackes"). And "[w]hile most states might nevertheless grant extradition requests in the absence of an express agreement, the United States will not even consider extradition unless pursuant to a treaty." Note, American Courts and Modern Terrorism: The Politics of Extradition, 13 N.Y.U.J. Int'l. & Pol. 617, 619 (1981). See also, Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir.), cert. denied, 364 U.S. 851 (1960).

** By notice of motion, dated February 11, 1981, Mackin moved to dismiss the extradition request.

* Transcripts of the hearings and oral arguments held have been filed with the Clerk of the Court.

There is no dispute that a proper request for extradition was made by the United Kingdom. There is no challenge to the authenticity or certification of the documents submitted by the United Kingdom in support of its extradition request nor is there any question that the crimes charged are within the Schedule of Offenses referred to in Article III of the Treaty. Moreover, no challenge has been raised about the identity of Mackin, i.e., that the person arrested is the individual indicted in Northern Ireland.

and Chapter 209 of Title 18 of the United States Code, 18 U.S.C. §§ 3181-3185. The first issue raised in this proceeding ** As noted earlier, no question of identity has been raised here.

is whether Article IX(1) of the Treaty has been satisfied, i.e., has the United Kingdom submitted sufficient evidence for the court to establish probable cause to believe that Mackin committed the crimes for which he has been indicated. Article IX(1) provides:

> *HN1*[] Extradition shall be granted only if the evidence be found sufficient according to the law of the requested Party either to justify the committal for trial of the person sought if the offense *[*3]* of which he is accused had been committed in the territory of the requested Party or to prove that he is the identical person convicted by the courts of the requesting Party.

*[*4]*

The second issue is whether the provisions of Article V(1) (c), the so-called political exception, bar Mackin's extradition. Article V(1) (c) provides:

*HN3*[] (1) Extradition shall not be granted if:

* * *

(c) (1) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or

(ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character.

With the concurrence of counsel, these two issues were treated separately.The probable cause issue was heard first. An all-day hearing was held on February 20, 1981 and a decision finding probable cause rendered following oral argument on March 5, 1981. Thereafter, a seven-day hearing was held with respect to the political exception question. The transcript from the hearings totalled 1621 pages in length. Following submission of post-trial memoranda and proposed findings of fact and conclusions of law, post-hearing argument on the political exception issue was held on June 18, 1981. This opinion will set forth in detail, greater than was done at the March 5 argument, the Court's finding *[*5]* on the probable cause issue and will set forth our reasoning and holding on the applicability of the political exception. *

PROBABLE CAUSE

It is well established that *HN4*[↑] the probable cause standard utilized in this country to sustain an indictment or in preliminary examinations to hold an accused to answer in district court (Fed. R. Cr. P. 5.1) has been "regularly employed in extradition cases in the past." Sindona v. Grant, 619 F.2d 167, 175 (2d Cir. 1980) (citations omitted). ** See also, Application of D'Amico, 185 F. Supp. 925, 928 (S.D.N.Y. 1960). Likewise, it is established in this Circuit at least that in determining the probable cause issue, United States national procedural law is applied and not the procedural law of New York. Sindona v. Grant, supra, 619 F.2d at 175. *HN5*[↑] Probable cause has been described as "evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." Coleman v. Burnett, 477 F.2d 1187, 1202 (D.C. Cir. 1973). The Supreme Court has described the probable cause standard in *[*6]* the following manner:

In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicains, act. The standard of proof is correlative to what must be proved.

Brinegar v. United States, 338 U.S. 160, 174-75 (1949). Evidence to "block out" the essential elements of the crime is sufficient. Collins v. Loisel, 259 U.S. 309, 317 (1922).

*HN6*[↑] By statute, 28 U.S.C. § 3190, the demanding country's proof may be hearsay as may the Government's evidence in a domestic preliminary hearing. The respondent has a limited right to introduce evidence on the issue of probable cause. His evidence may explain "ambiguities or doubtful elements in the prima facie case made against him." Collins v. Loisel, supra, 259 U.S. at 315-16. Explaining further, the Court stated:

> The distinction between evidence properly admitted in behalf of the defendant and that improperly admitted is drawn in Charlton v. Kelly, supra, between evidence rebutting probable *[*7]* cause and evidence in defense. The court there said, "To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the Government."

Id. at 316-17. * Consistent with these principles, proof that another was the perpetrator of the fraud is irrelevant to a finding of probable cause, ( Peroff v. Hylton, 542 F.2d 1247 (4th Cir. 1976)), as is evidence that other co-conspirators were acquitted. ( Freedman v. United States, 437 F. Supp. 1252, 1267 (N.D. Ga. 1977).

See also, Shapiro v. Ferrandina, 478 F.2d 894, 905 (2d Cir. 1973).

Recently, Judge Griesa in Matter of Sindona, 450 F. Supp. 672, 685 (S.D.N.Y. 1978) framed well the distinction between contradictory evidence and explanatory evidence and cited the established authority for the proposition that an extradition hearing should not be transformed into a full trial on the merits.

The distinction between "contradictory evidence" and "explanatory evidence" is difficult to articulate. However, the purpose behind the rule is reasonably clear. *HN7*[↑] In admitting "explanatory evidence," the *[*8]* intention is to afford an accused person the opportunity to present reasonably clear-cut proof which would be of limited scope and have some reasonable chance of negating a showing of probable cause. The scope of this evidence is restricted to what is appropriate to an extradition hearing. The decisions are emphatic that the extraditee cannot be allowed to turn the extradition hearing into a full trial on the mierts. The Supreme Court has twice cited with approval a district court case which aptly summarizes the relevant considerations. The Supreme Court decisions are Collins v. Loisel, 259 U.S. 309, 316, 42 S.Ct. 469, 66 L.Ed. 956 (1922), and Charlton v. Kelly, 229 U.S. 447, 461, 33 S.Ct. 945, 57 L.Ed. 1274 (1913). The district court opinion is In re Wadge, 15 F. 864, 866 (S.D.N.Y. 1883), in which the court dealt with the argument of an extraditee that he should be given an extensive hearing in the extradition proceedings:

"If this were recognized as the legal right of the accused in extradition proceedings, it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, *[*9]* both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties."

However, *HN8*[↑] it is largely within the discretion of the committing judicial officer to determine the extent that the respondent may offer explanatory proof. United States ex rel. Petrushansky v. Marasco, 325 F.2d 562, 567 (2d Cir. 1963) cert. denied, 376 U.S. 952 (1964) (and cases cited therein).

The United Kingdom's Evidence On The Issue Of Probable Cause

In accordance with Article VII of the Treaty the United Kingdom filed with the complaint a packet of documents, under seal of the Consul General of the United States at London, England, including the Bench Warrant *[*10]* for Mackin's arrest issued after he failed to appear for trial, depositions taken in the course of preliminary hearing proceedings in Northern Ireland before a magistrate, other sworn statements of witnesses and documents (hereinafter referred to as "Documentary Evidence" or "Doc. Ev."). In toto, five depositions recorded at the preliminary hearing were submitted and twenty five other statements, which were taken for use at the preliminary hearing. In accordance with the provisions of 18 U.S.C. § 3190, the documents submitted under the certificate of the principal consular officer of the United States resident in the demanding country may be offered in evidence. The United Kingdom's version of the shooting incident which gives rise to this request for extradition is contained in the deposition testimony of Soldier A (identified as Stephen Wooten) * Soldiers A, B, C and D are members of British Army stationed in Northern Ireland as part of the Security Forces.

taken before the Resident Magistrate in Belfast. Since this deposition is the focal point for the United Kingdom's probable cause submission, the statement protion will be quoted in full.

On the 16th March *[*11]*

1978 I was stationed at Lisburn. At that time I was attached to the 39th infantry Brigade. On the 16th March 1978 I was on plain clothes duty in Andersonstown Belfast. I was carrying a Browning 9mm pistol I had 2 magazines of 13 rounds each with me. At approximately 1-20, pm I was standing at a bus stop in the Glen Road on the North side opposite the junction with Ramoan Gardens. When I was standing there I did not see any person or persons which attracted my attention. I saw 2 persons coming from an ally way between 82 Rossnareen Avenue and 300 Glen Road. These persons crossed the road and walked towards me.I recognized these 2 persons as Mackin and Gamble, when these 2 persons walked towards me I turned my back to them. When I did this the one, Mackin touched me on my shoulder and turned me around to face him, when I turned round Gamble was about one pace behind Mackin. Mackin asked me who I was and what I was doing in the area, and he told me to remove my hands from my pockets. I removed my hands from my pockets and stepped back about 5 paces, when I did this Mackin put his right hand in his within his jacket as if to make a cross draw.

Gamble also was moving forward *[*12]*

and seemed to be going for a cross draw. I drew my own weapon when I saw this.Gamble initially made the move to tackle me and I fired one aimed shot. We then fell to the ground in a struggle, my pistol was in my left hand when I fell to the ground in the struggle, I did not see any weapon in Gambles hands. During the course of the struggle I felt what appeared to be the barrell of a pistol against my right thigh. Gamble and I were fighting when I felt this. I felt a thump as if I had been kicked in the vicinity of my right thigh. Following this it became confusing and I remember ending up on the side walk on my own. As we struggled I did fire some more shots. When I found myself alone on the side walk I tried to stand up and fell back down again. The second time I tried I got to my feet. When I got to my feet I saw Soldier B covering a man lying on the grass in Ramoan Gardens. This area is marked with the word Green on the map in front of me marked exhibit 18. Soldier B had his weapon out. I saw Mackin running across toward 100 Ramoan Gardens, I walked around the outside of the green and sat down outside no. 76 Ramoan Gardens.As I walked around I took one aimed shot at *[*13]*

Mackin. Soldier B told me to cover the man lying on the ground. I was sitting at house no 76 on the map marked exhibit 18. I was covering the man named Gamble. Soldier B was attempting to keep the civilians out of the area whilst I was covering Gamble. There were civilians in my immediate area, the number of civilians increased rapidly from about 5 to 30 or 40. A patrol from the Para Batallion arrived. When the patrol arrived I was told to wait by one of the patrols' land rovers. I was then taken in an ambulance to Musgrave Park Hospital. In the ambulance I handed my pistol to the Medical Orderly. The serial number of that pistol was 2T 965 and that is referred to as exhibit 11. I also handed over my ammunition and I ascertained I had fired 13 shots on that occasion. I ascertained I had received a gunshot wound through the right thigh and a bullet in my inside left thigh. I was in Hospital approximately 3 weeks.

(Doc. Ev. 10-12). Also included in the submission of the United Kingdom is a sworn statement of Soldier A taken at an earlier date in which Soldier A stated:

As they approached, I recognized them as Mackin and Gamble.Mackin was wearing a blue bomber jacket, *[*14]*

and Gamble was wearing a blue snorkel jacket. I was able to recognize them because I had been operating in the Andersonstown area, and have been familiarised with the photographs and descriptions of persons who were of relevance to me duties.

(Doc. Ev. 16).

Soldier B was also on plain clothes duty in the Andersonstown area of Belfast on March 16, 1978. From a parked vehicle he recognized Mackin and Gamble and saw the exchange between them and Soldier A. He states that Mackin:

produced the gun form [sic] inside his coat from the area of his waistband. When he produced the gun he fired. I heard two or possibly three shots. Mackin fired the gun in the direction of Soldier "A." Soldier "A" was struggling with Gamble on the ground when these shots were fired at him.

(Doc. Ev. 19). Upon seeing Mackin fire at Soldier A, Soldier B left his vehicle and shot at Mackin who started to run away under fire from Soldier B. When Mackin was out of range, Soldier B began shooting at Gamble, who fell after he was hit. Soldier B asked Soldier A to cover Gamble and then went down the alleyway in the direction that Mackin had taken. He found Soldier C and Soldier D guarding Mackin. *[*15]*

Soldier B had fired sixteen rounds. The deposition of Soldier B appears at pages 18-25 of the United Kingdom's Documentary Evidence submission.

Soldier C, also in plainclothes and armed, was patrolling the area in a car. When he saw the scuffle between Soldier A, Mackin and Gamble in his rear view mirror he reversed his car and jumped out of it. He chased the man (Mackin) whom Soldier B had been shooting at. He confronted Mackin, whom he recognized, at the rear of a row of houses. (Doc. Ev. 30, 37). Soldier C fired two shots at Mackin who was behind a coal bunker and shouted at him to stand up.Before Mackin stood up, Soldier C testified that "he said something to the effect that "Don't shoot me I've thrown my gun away in the grass."" (Doc. Ev. 30). * No guns were ever found.

Soldier D then joined Soldier C, keeping Mackin under guard until other members of the Security Forces arrived and took him into custody. Soldier C's statement appears at pages 29-38 of the Documentary Evidence.

Soldier D, similarly in plainclothes and armed, heard shots and saw Soldier B leave his car with his gun drawn. Nearing the area where where the shots were coming from he "saw a *[*16]*

man that I recognized as Mackin . . . holding a handgun in his right hand, Mackin seemed to fall towards the ground as he fell toward the ground he fired a single shot toward a body on the ground." (Doc. Ev. 39). Upon seeing Mackin start to run, he tried to block a possible escape route. He then saw Soldier C and followed him down a small alleyway where he observed Mackin behind a coal bunker and saw Soldier C fire a shot at Mackin. With Soldier C he guarded Mackin until he was handed over to other members of the Security Forces. Soldier D's testimony may be found at pages 39-50 of the Documentary Evidence.

The documentary material submitted by the United Kingdom also included the sworn statement of the doctor who treated Soldier A who described the bullet path as "entered below and behind right hip, exited on innerside right thigh and re-entered left Buttock." (Doc. Ev. 59). Other statements were submitted to establish custody of exhibits.

The deposition and statement of James Smyth Wallace, a forensic scientist with the Northern Ireland Forensic Science Laboratory, and the statement of Leo Rossi, also on staff at the same laboratory, figured prominently in the hearing on *[*17]*

the probable cause issue. Wallace's testimony was on the subject of firearms residue and Rossi's on the subject of ballistics.

Also included in the documentary evidence were statements of Royal Ulster Constabulary police officers who interviewed Mackin while he was hospitalized after the shooting incident. (Doc. Ev. 87-100). Statements by Mackin and Gamble taken at the hospital seven days after the shooting are found at pages 101-04 of the Documentary Evidence.

The Probable cause Hearing

Respondent Mackin called Dr. Dominick J. DiMai;, formerly Chief Medical Examiner of the City of New York (2), * All pages references in parenthesis are to the transcript of the hearings held on the probable cause and political exception issues. The Government's exhibits are referred to as "Gov't. Ex." and the respondent's as "Resp. Ex."

** Dr. DiMaio, who specializes in forensic science and medicine, is a certified pathologist with certification in pathological anatomy, clinical pathology, forensic pathology and is a diplomate in nuclear medicine. (19-20). He has personally performed over 20,000 autopsies and supervised, assisted or reviewed an additional 45,000 autopsies, including thousands of gunshot cases. (23-24). In connection with his work as a medical examiner, Dr. DiMaio became familiar with firearms (26) and specifically with .38 caliber weapons and bullets. (32-33). He has testified at several thousand trials involving the shooting of and wounding by firearms. (35).

*** Special Agent Asbury is an examiner in the FBI Laboratory, Washington, D.C., currently and for the last three years assigned to the elemental analysis unit and previously assigned to the ballistics unit. (152-53). His prior background is unrelated to his testimony. (153-54).

* Agent Asbury testified that he has no experience on how bullets react inside bodies. (178).

Dr. Blackbourne teaches and lectures on the subject of forensic pathology and has testified in court approximately 250 times on matters of forensic evidence and the effect of gunshot wounds. (222-23).

as his expert witness. ** The Government established on cross-examination that there are a number of variables, such as barrel length and manufacturer, which can affect the velocity of the bullet. However, the Government's ballistics witness, FBI Special Agent Rodger A. Asbury, could not say how much the velocity would be affected. (176). Further, Agent Asbury agreed with Dr. DiMaio's statement that under normal circumstances a .38 caliber bullet travels at least at 750 feet per second. (171). He testified that the rifling pattern on the bullet was consistent with a cheaper weapon, which has a somewhat slower velocity. (174).

* One of the issues at the probable cause hearing was whether it was proper to draw certain negative conclusions from the absence of contrary information in the United Kingdom's submission. One example of this problem was whether Dr. DiMaio, and ultimately the Court, could conclude that the bullet which entered Soldier A did not strike bone given that Soldier A's treating physician's report (Doc. Ev. 59) contained no such mention. Dr. DiMaio testified that the striking of bone is a significant item to an investigator, that such information should have been included in a report of this type (144), and therefore ruled out the possibility that the bullet hit the spine, for example. (101). Dr. Blackbourne, on the other hand, did not feel in a position to make a conclusion on this subject given the lack of detail in the report.(224). We conclude that in an appropriate instance, it is permissible for an inference to be drawn against the demanding country given the burden of proof on the issue of probable cause and the opportunity for the demanding country to supplement its submission. In this instance, we conclude that the inference drawn by Dr. DiMaio is an appropriate one.

The Government called FBI Special Agent Rodger A. Asbury, as its ballistics expert *** At an earlier point in its judgment, the European Court noted that based on the figures cited before the Commission by the United Kingdom, "over 1,100 people had been killed, over 11,500 injured and more than # 140,000,000 [pounds] worth of property destroyed. . . ." (Resp. Ex. S, P12).

and Dr. Brian W. Blackbourne, Deputy Chief Medical Examiner for the District of Columbia as its expert in forensic pathology. *

*[*18]*

Dr. DiMaio's testimony proceeded on the assumed truth of the Documentary Evidence submitted by the Government of Great Britain and his opinions were proffered under the same standard of accuracy he utilized as Chief Medical Examiner. (148). Dr. DiMaio was called to establish two propositions: first, that Mackin could not have fired the bullet that lodged in Soldier A, and, second, that the forensic evidence did not support a conclusion that Mackin had a gun.

Dr. DiMaio testified that a .38 caliber bullet is discharged from a .38 caliber revolver at a velocity ranging from 750 to 1090 feet per second. ** Based on the United Kingdom's submission, Dr. DiMaio assumed that Mackin fired the bullet from 20 feet away, and concluded that the bullet not having hit bone in Soldier A's body, would have passed through the soft tissue * and exited. Dr. DiMaio stated further that the minimum distance from which the bullet would have had to have been fired in order to have remained in Soldier A's body was 100 feet. Interestingly, Agent Asbury found that to be a very conservative opinion since bullets do not slow down significantly in 100 feet. (18--82). The suggestion was advanced on cross-examination *[*19]*

that the bullet could have lodged in Soldier A's body because it richcheted off another surface before entry or because it was hollow-nosed. Dr. DiMaio concluded based on the United Kingdom's ballistics report, which did not describe the bullet as damaged or hollow-nosed, that the bullet did not ricochet off another surface prior to enterin; Soldier A's body (117) and that the bullet was solid. (105). Again, we agree with the respondent's position on the inferences which may be drawn from the ballistics report. Both Dr. DiMaio and Special Agent Asbury agree that damage to the bullet is important to a ballistics investigator. (137, 199). Likewise, whether a bullet is hollow-nosed is also significant as it is designed to mushroom upon impact (223), causing another type of deformity which would be important to a ballistics investigator. Thus, Dr. Blackbourne also testified in response to a question as to whether he would so state in an autopsy report: "In an autopsy report I routinely describe the bullet as to its caliber and to any special things like metal jacket or deformity or flattening or whatever, yes." (239).

*[*20]*

The Government's rebuttal on this aspect of Dr. DiMaio's testimony was twofold. First, as indicated earlier, the Government established that there are a number of variables which affect the velocity of a bullet, although no evidence was offered on precisely what the effect was. Second, the Government proffered the testimony of Dr. Blackbourne who disputed Dr. DiMaio's deduction that the bullet must have travelled a distance considerably more than 20 feet, given that it had lodged in Soldier A. * The only specific example which Dr. Blackbourne relied upon was a case in his office the week before. As the cross-examination of Dr. Blackbourne established, the case referred to involved a hollow-nosed bullet, which is designed to lodge in the body (233), and which travelled through the body in a considerably different way from the bullet which hit Soldier A. (237-38). Thus, I find Dr. DiMaio's testimony unrefuted by Dr. Blackbourne's.

Mackin also attacks Great Britain's submission on the ground that it failed to demonstrate probable cause to believe that Mackin had a gun. Although *[*21]*

I have held, and adhere to my earlier ruling, that the eyewitness testimony of the British soldiers, in particular Soldiers A and B, is sufficient to find that there is probable cause to believe that Mackin had a gun and fired it,

nevertheless, I will review the forensic testimony on this issue so that any reviewing body can have a complete understanding on the record.

Respondent's proof on this issue was in two parts: first, the testimony of Dr. DiMaio and, second, his proffer of the trial testimony of the United Kingdom's forensic expert, James Smythe Wallace, at the retrial of Mackin's co-defendant, Robert Gamble.

Dr. DiMaio reviewed the Wallace deposition testimony and his statement, which were included in the Documentary Evidence. Based on Wallace's statement that no firearms residue (i.e., residues of lead, antimony and barium) was detected after testing on Mackin's trousers or on the right cuff of his jacket, * Mackin's jacket and gloves were heavily contaminated with residue. All the witnesses agreed that those residues were consistent with Macklin's employment as a taxi driver and his consequent contact with car batteries.

Dr. DiMaio concluded that there was no gun in Mackin's trousers and that he had not fired a gun right-handed, as the eyewitness had testified. (51). In Dr. DiMaio's view, the absence of residue was decisive given that a revolver was involved in the shooting incident. *[*22]*

(70, 120-21). However, Dr. DiMaio had not considered the possibility that Mackin's right cuff had been turned up (126) nor did he have any ready explanation for why the car residue was not on Mackin's cuff. (131-32). He conceded that a failure to test the inside would support the hypothesis that the right cuff of Mackin's jacket was turned up. (132).

As noted above, on the issue of weapon possession, Macking also relied on the trial testimony of James Smythe Wallace, whose earlier testimony before the magistrate in Northern Ireland and sworn statement had been submitted by the United Kingdom. Wallace's testimony was received over the Government's objection. (2-17).

* There were three grounds for the objection: first, that Mackin had not obtained the proper certification in accordance with 18 U.S.C. § 3190 and that he could not avail himself of the evidentiary benefits of that section; second, that it was improper for the Court to rely on the Federal Rules of Evidence to admit the testimony since Rule 1101 thereof makes them inapplicable to extradition proceedings; and third, that the material was outside the proper scope of the extradition hearing. Taking each argument in turn, the first became moot when Mackin eventually obtained a certification from the Vice Consul of the United States at Belfast, Northern Ireland. And having obtained that certification, the issue in the Court's view was one of evidence admissibility alone. Second, I cannot agree with the Government's reading at Fed. R. Ev. 1101(d) (3), *HN9*[ ] which makes the Federal Rules of Evidence inapplicable to extradition proceedings. That rule relaxes the evidentiary standard at an extradition proceeding; it does not mean that evidence admissible under strict rules of evidence may not be admitted. Weinstein and Berger, Weinstein's Evidence, P1101 (1978). Specifically, the trial testimony was received under Rules 106 and 804 of the Federal Rules of Evidence. Finally, with respect to the Government's last argument, that the Wallace testimony is irrelevant as being outside the scope of an extradition hearing, I have ruled that the testimony is relevant as explanatory, and not contradictory, of the earlier statements submitted by the United Kingdom. It should be noted that the testimony was not admitted on the ground that Great Britain had to produce exculpatory material. Matter of Sindona, supra, 450 F. Supp. at 687. Moreover, we recognize that 18 U.S.C. § 3500 does not apply to preliminary hearings in this country, e.g., Robbins v. United States, 476 F.2d 26 (10th Cir. 1973).

*[*23]*

Wallace's testimony (Resp. Ex. A) contained the following questions and answers which are of particular relevance:

Q.22 Do you know of any circumstances in this case which would cause you to be less surprised that you did not find any residue on the right-hand cuff? A. In this case, I know of no circumstances where the residue should not be detected.

Q.34 If you would have expected to find residues in the waistband where the gun had been and you did not find any, what does that allow you to say? A. We cannot take it as far as to say there was never a gun in the waistband of the trousers. All we can say is that nothing was found to suggest that there was ever a gun in the waistband of the trousers.

Q.59 But in that event you would then have a high concentration on the inside of the cuff? A. We do not actually examine the inside of the cuffs, My Lord.

Q.60 Did you look to see if there was any evidence of the cuffs having been turned back? A. No. They were not turned back when we received them.

In sum, Wallace's testimony, while not in accord with DiMaio's that negative results are dispositive, nevertheless offered no positive basis to conclude that Mackin had *[*24]* a gun or shot one.

Special Agent Asbury disputed Dr. DiMaio's conclusion that the absence of residue is dispositive. (162-69; 184-88). However, he did agree in response to a question from the Court and on cross-examination that it is more likely than not that residue would be found if a gun had been fired. (188-89; 212-13).

Were it not for the fact that the underside of Mackin's cuff had not been tested for firearms residue, the totality of testimony of the expert witnesses for both sides would lead to a conclusion that it was more likely than not that Mackin not have a weapon in the waistband of his trousers and did not fire one. However, the fact that the underside of his cuff was not tested leaves open the possibility that his cuff was turned up when he shot the revolver, a result consistent with the testimony of the eyewitnesses.

With respect to our reliance on the testimony of Soldiers A, B, C and D in finding probable cause, respondent has suggested that it is our obligation to weigh Mackin's statement against the soldiers' testimony since all were submitted by the United Kingdom. (322-30). We declined the invitation noting that the committing magistrate is not *[*25]* the trier of the fact and that a contrary conclusion would dissuade the requesting country from submitting a defendant's statement, a result that would not aid a full hearing of the relevant facts. Moreover, were respondent's position accepted, all a defendant need do was to take the stand in order to transform a probable cause hearing into a prohibited mini-trial. See discussion, supra, at 6-7.

In sum, if the sole issue was whether the bullet that lodged in Soldier A was fired from respondent's gun, we would find that the United Kingdom had not demonstrated probable cause. However, the other issue was whether Mackin had a gun and fired it. On that issue, we cannot say that the expert testimony of respondent negated the probable cause established by the sworn eyewitness statements of the demanding country.

THE POLITICAL OFFENSE EXCEPTION

Introduction

After a finding of sufficient probable cause was made to certify extradition, respondent Desmond Mackin was afforded the opportunity to submit evidence in support of his contention that extradition is nevertheless barred by the so-called political offense exception set forth in Article V, subsections (1) (c) (i) and (1) (c) *[*26]*

(ii) of the Treaty. Testimony was received from three expert witnesses and Mackin on behalf of the respondent and four expert witnesses on behalf of the United Kingdom.

The language in Article V embodying the political offense exception is as follows.

*HN10*[↑] (1) Extradition shall not be granted if:

(c) (i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or

(ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character. * It should be noted at the outset that our analysis and opinion in no way bears on subsection (1) (c) (ii) of Article V of the Treaty since a determination of whether the extradition is sought as a subterfuge to punish the respondent for a political offense is deferred to the Secretary of State and is not a matter which may be properly considered by the judiciary. Abu Eain v. Wilkes, 641 F.2d 504, 518 (7th Cir. 1981); Jhirad v. Ferrandina, 536 F.2d 478, 484-85 (2d Cir.), cert. denied, 429 U.S. 833 (1976). To the extent that Sindona v. Grant, supra, 619 F.2d at 173-74, can be read as requiring a judicial determination that there is an independent and "substantial" basis for the prosecution, we find that the showing has been made here.See also, jurisdictional discussion, infra, at 36-43.

*[*27]*

The drafters of the treaty did not provide any further definition of the exception, apparently following the opinion of Justice Denman in In re Castioni, [1891] 1 Q.B. 149, the landmark English case which construed the phrase "offence of a political character." Justice Denman stated that it was not "necessary or desirable . . . to put into language in the shape of an exhaustive definition exactly the whole state of things, or every state of things which might bring a particular case within the description of an offence of a political character." In re Castioni, supra, 1 Q.B. at 155. Thus, the broad language of the Treaty suggests that the political offense exception is to be viewed as a flexible concept whose parameters can be measured only by factual application. See, also, In re Gonzales, 217 F. Supp. 717, 721, n. 9 (S.D.N.Y. 1963), quoting, In re Castioni.

I. THE POLITICAL OFFENSE EXCEPTION A. "Pure" and "Relative" Political Offenses

Traditionally, the "political offense" concept has been applied to two factually different but related types of criminal acts, designated respectively as "purely political offenses" and "relative political offenses." "Pure" political offenses *[*28]*

"encompass acts directed against the state which contain none of the elements of ordinary crime." Garcia-Mora, "The Nature of Political Offenses: A Knotty Problem of Extradition Law," 48 Virginia L. Rev. 1225, 1230 (1962) (hereinafter referred to as "Garcia-Mora"). By its terms "pure" political offenses have usually been limited to treason, sedition and espionage. 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, 780 (1977) (hereinafter referred to as "Cantrell"). Since respondent Mackin does not contend that his acts fall within the narrow scope of this political offense exemption to extradition, no further discussion of the "pure" political offense is necessary.

Mackin does urge that his conduct as charged constituted a "relative" political offense and is therefore, as contemplated by the treaty drafters, a non-extraditable offense. A "relative" political offense is one "in which a

common crime is so connected with a political act that the entire offense is regarded as political." Garcia-Mora, supra, at 1230-31. There is no dispute that the test set forth *[*29]* by the English Court in In re Castioni frames the proper inquiry for determining whether in the case before this Court the offense shall be held a non-extraditable, "relative" political offense. the Court in In re Castioni stated that "fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances." supra, 1 Q.B. at 166. * The political offense question was presented to the In re Castioni Court in the context of interpreting the British Extradition Act of 1870 which provided in pertinent part that:

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

33 & 34 Vict., c. 52, § 3(1).

A comparison of the language of the British Extradition Act and the current Extradition Treaty in force between the United States and Great Britain reveals substantial similarity regarding the standard and terms of the political offender exemption to extradition. Stated another way, there are two conditions that must be met in order to conclude that an otherwise criminal act should be deemed a political offense: first, there must be ". . . a political matter, a political rising, or a dispute between two parties in the State, as to which is to have the government in its hands . . ." and second, the act for which extradition is requested must have been done in furtherance of or with the intention of assisting a political uprising. In re Castioni, supra, 1 Q.B. at 156.

*[*30]*

Accordingly, in In re Castioni, the Court denied the extradition of the petitioner, when faced with a request from the Swiss Government, which alleged that Castioni murdered a member of the Government in the course of an uprising by a number of citizens who broke into and took forcible possession of a municipal palace. Inquiring whether "the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part," id. at 159, the Court concluded that Castioni, was indeed a member of the uprising group and that there was a sufficient nexus between his acts and the political insurrection to regard his acts as "political" and therefore nonextraditable.

The standard enunciated in In re Castioni, was further clarified by the English courts in In re Meunier, [1894] 2 Q.B. 415. While consistent with the In re Castioni so-called "incidence" test, the Court in In re Meunier refused to countenance a perversion of the political offense exception and permit the acts of an avowed anarchist to go unsanctioned. * The French Government requested the extradition of Meunier for murder, attempted murder and willful damage to buildings which resulted from setting off various explosive devices at a cafe in Paris and certain military barracks.

In denying Meunier's habeas corpus petition the Court *[*31]* instructively reasoned:

in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not. In the present case there are not two parties in the State, each seeking to impose the Government of their own choice on the other; for the party

whom the accused is identified by the evidence, and by his own voluntary statement, namely the party of anarchy, is the enemy of all Government. Their efforts are directed primarily against the general body of citizens.

In re Meunier, supra, 2 Q.B. at 419.

B. The History Of The Political Offense Exception In American Jurisprudence

The American judiciary has adopted, without any substantial deviation, the standard set forth in In re Castioni and its clarification *[*32]*

in In re Meunier, beginning with its application in In re Ezeta, 62 F. 972 (N.D. Cal. 1894) * In grappling with the meaning of the term "offense of a political character," the Court in In re Ezeta, supra, 62 F. 997-99 quoted extensively and with approval the decision in In re Castioni.

** Abu Eain v. Wilkes is the first American case to adopt and rely on the clarification enunciated in In re Meunier.

*** The American judiciary has not followed the more recent approach of the British Courts, which have allowed the "political offense" excaption to be raised in the absence of a political disturbance in the requesting country, determining instead whether the defendant's acts were politically motivated and directed toward political ends. Regina v. Governor of Brixton Prison, ex parte Kolczynski, [1954] 1 Q.B. 540. Cf. Garcia-Guillern v. United States, supra, 450 F.2d at 1192; Escobedo v. United States, 623 F.2d 1098, 1104 (5th Cir. 1980); Abu Eain v. Wilkes, supra, 641 F.2d at 519. The only positive recognition of the "motive" analysis by American courts was dicta in In re Gonzalez, supra, 217 F. Supp. at 721, n. 9.

The narrow interpretation given the political offense exception by American courts has been severely criticized by several commentators Specifically, a commentary has asserted that it tends to be both "under inclusive and overinclusive, . . . exempt[ing] from extradition all crimes occurring during a political disturbance, but no offenses which were not contemporaneous with an uprising." Lubet and Czackes, supra, at 203. We mention this for the sake of the completeness of our discussion intending no departure from the well established In re Castioni standar adopted by our courts nor any judgment regarding the validity of the standard.

* Although the extradition treaty specifically interpreted in Ornelas v. Ruiz, excepted offenses of a "purely political character" from its application, supra, at 506, the Supreme Court's inquiry and discussion regarding the nature of the specific acts alleged, leaves no room for argument that the Court was, in reliance on the language of the treaty, simply construing the "pure" political offense rather than the "relative" political offense.

See also, Abu Eain v. Wilkes, supra, 64, F.2d at 518 (and citations therein).

and most recently in Abu Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981). ** The Assistant United States Attorney stated at oral argument, held on June 18, 1981 at 41, that his research yielded no legislative history on the question of whether the judiciary was empowered to determine the applicability of the political offense exception pursuant to 18 U.S.C. § 3184.

Thus, the term "political offense" has uniformly been construed to encompass those offenses that are "incidental to severe political disturbances such as war, revolution and rebellion." *** Sindona v. Grant, supra, 619 F.2d at ,73, citing, e.g., Garcia-Guillern v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971), cert. denied, 405 U.S. 989 (1972); Jimenez v. Aristequieta, 311 F.2d 547, 560 (5th Cir. 1962), cert. denied, 373 U.S. 914 (1963); In re Ezeta, 62 F. 972, 977-1002 (N.D. Cal. 1894) and generally citing Garcia-Mora at 1244-49. * It should be noted that in reciting the test various linquisitic formulations have been used to define the political offense exception. For example,

*HN11*[↑] [a] political offense under the extradition treaties, must involve an "uprising" or some other violent political disturbance. Moreover the act in question must have been incidental to the occurrence in order to justify the exclusion.

*[*33]*

Garcia-Guillern v. United States, supra, 450 F.2d at 1192 (emphasis added). Alternatively, a political offense has been described as:

[a]ny offense committed in the course of or furthering of civil war, insurrection, or political commotion.

In re Ezeta, supra, 62 F. at 998 (emphasis added), quoting John Stuart Mill, Hansard's Debates, Vol 184, p. 2115, and quoted in, Ramos v. Diaz, 179 F. Supp. 459, 462 (S.D. Fla. 1959). To attempt to harmonize these seemingly different definitions to arrive at the optimum combination of words which would crystallize the meaning of the political offense exception appears to be a rather fruitless effort which we shall not attempt. Rather, it is more instructive to review its application in some of the seminal cases which have been decided by the American courts.

In In re Ezeta the Government of Salvador sought the extradition of General Ezeta and others on charges of murder and robbery. In denying the extradition request and finding that the offenses with which the accused were charged were political offenses, the Court premised its decision on the testimony adduced which showed that the alleged acts were committed during the "progress *[*34]*

of actual hostilities between the contending forces, wherein Gen. Ezeta and his companions were seeking to maintain the authority of the then existing government against the active operations of a revolutionary uprising." Supra, 62 F. at 997. Thus, there can be no question that the Court in In re Ezeta found that the alleged acts were nonextraditable because they were incidental to a political uprising. Indeed, regarding one of the acts, which was allegedly committed four months before the revolution, the Court held that it was not within the scope of the "political offense" exception since it was "free from any political aspect. . . ." In re Ezeta, supra, 62 F. at 986.

Two years later the Supreme Court affirmed and significantly clarified the use of the "incidence" test in Ornelas v. Ruiz, 161 U.S. 502 (1896), which is the only statement from that Court regarding the political offense exception. In Ornelas the Republic of Mexico sought the extradition of three individuals who had crossed the Rio Grande from Texas into Mexico with a band of approximately 140 other armed men, and then acting as part of the group, attacked forty Mexican soldiers and terrorized a town and its citizens. *[*35]*

Specifically, the petitioners were charged with murder, arson, robbery and kidnapping, acts allegedly committed during the course of the raid. Despite the avowed aims of the petitioners, i.e., "to cross over the river and fight against the Government," id. at 511, the Court, noting that the band remained in Mexico for only a total of six hours before returning to Texas, Id. at 510, held that the offenses were not of a political character since the revolutionaries were not engaged in any combat with Mexican armed forces at the time the crime was committed. Id. at 510-11. Furthermore, given the "character of the foray, the mode of attack, the persons killed or captured, and the kinds of property taken or destroyed" the Court concluded that the acts of petitioners were not in aid of a political revolt, an insurrection or a civil war. . . ." Id. at 511. Thus, the Supreme Court interpreted the political offense exemption to require a showing that the defendants' actions were in furtherance of a political revolt in addition to being contemporaneous with the political disturbance. *

*[*36]*

With the exception of United States ex rel. Karadzole v. Artukovic, 170 F. Supp. 383, 392-93 (S.D. Cal. 1959) * This is the final decision in the history of decisions involving the extradition of Artukovic. See, Artukovic v. Boyle, 107 F. Supp. 11 (S.D.Cal. 1952), rev'd sub nom. Ivancevic v. Artukovic, 211 F.2d 565, (9th Cir.) cert. denied, 348 U.S. 818, rehearing denied, 348 U.S. 889 (1954); Artukovic v. Boyle, 140 F. Supp. 245 (S.D. Cal. 1956), aff'd sub nom. Karadzole v. Artukovic, 247 F.2d

198 (9th Cir. 1957), vacated, 355 U.S. 393 (1958), decision on remand sub nom. United States ex rel. Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959).

** The Government of Yugoslavia requested the extradition of Artukovic, the former Minister of Internal Affairs in Croatia for allegedly ordering the murder of 200,000 inmates of concentration camps during World War II. In the final decision, United States ex rel. Karadzole v. Artukovic, supra, 170 F. Supp. the Court held that the evidence was insufficient to support a finding of probable cause, but nevertheless adopted the earlier Court of Appeals decision with respect to the political offense exception. In both the District Court and Court of Appeals decisions the statement of the political offense exception test was consistent with In re Castioni, In re Ezeta and Ornelas v. Ruiz. Indeed, in defining the term the District Court aptly stated:

"Political character" or political offense has not been too satisfactorily defined.Generally *HN12*[⬆] speaking it is an offense against the government itself or incident to political uprisings. It is not a political offense because the crime was committed by a politician. The crime must be incidental to and form a part of political disturbances. It must be in furtherance of one side or another of a bona fide struggle for political power.

United States ex rel. Karadzole v. Artukovic, supra, 170 F. Supp. at 392. And, the decision of the Court of Appeals, Karadzole v. Artukovic, supra, 247 F.2d at 202-03, quoted extensively from In re Castioni. However, in applying the standard to the facts, the Ninth Circuit and District Court relied exclusively on the fact that the alleged offenses occurred during a period of rampant civil strife, subsequent to the German invasion of Yugoslavia, when "various factions representing different theories of government were struggling for power . . . in Croatia." Karadzole v. Artukovic, supra, 247 F.2d at 204. See, United States ex rel. Karadzole v. Artukovic, supra, 170 F. Supp. at 392-93.

While not the ultimate holding, this conclusion has been sharply criticized because "it places greater emphasis on the timing of the defendant's acts than on whether he in any sense furthered a political revolt. Both the circuit and district courts refused to interpret war crimes against civilians as being beyond the purview of the Castolini (sic) test." Lubet and Czackes, supra, at 205. Specifically as this commentary notes, neither court considered the civilian status of the defendant's alleged victims nor analyzed or considered the nexus between the genocide and the political struggle to determine whether the mass killing could be considered in furtherance of a political end. Id. at 204-05. See also, Cantrell, supra, at 795-96; Garcia-Mora, supra, at 1246-47. And indeed, the Court in Abu Eain v. Wilkes, supra, 641 F.2d at 522 seemed to recognize the problematic reasoning of the Artukovic Courts.

* It should be recalled that sections 3181-95 of Title 18 of the United States Code establish the procedures to be utilized in extradition proceedings.

It should be noted that the inquiry of the American courts with respect to the political offense exception has been less extensive and has not necessarily focused on the "in furtherance of" requirement where the defense has been raised to charges of financial crimes, which have consistently been held outside the scope of the political offense exemption. See, e.g., Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir.), cert. denied, 429 U.S. 833 (1976); Garcia-Guillern v. United States, supra, 450 F.2d at 1192; In re Locatelli, 468 F. Supp. 568 (S.D.N.Y. 1979); Gallina v. Fraser, 278 F.2d 77 (2d Cir.), cert. denied, 364 U.S. 851 (1960).

* We mention that a contrary result was reached in In re Gonzalez, supra, 217 F. Supp. at 721, where the Court found that there was no "uprising" or "political disturbance" in the requesting country, the Dominican Republic, at the time the alleged crimes were committed. In that case the Government of the Dominican Republic had requested the extradition of Gonzalez, who had been acting in a military or quasi-military position under the regime of Generalissimo Rafeal Trujillo, for participating in the torture and killing of two prisoners. Apparently the Trujillo regime fell approximately nine months after the commission of the charged crime when Trujillo was assassinated. In re Gonzalez, supra, 217 F. Supp. at 719 & n. 1.

which in dicta adopted the earlier Ninth Circuit opinion, Karadzole v. Artukovic, supra, 247 F.2d, ** which found the political exception applicable without inquiring, as did the Supreme Court in Ornelas v. Ruiz as to whether the accused committed the offense in furtherance of a political revolt, American courts have consistently approached

the political offense exception as a two-part inquiry. * In Ramos v. Diaz, 179 F. Supp. 459 (S.D. Fla. 1959), the Government of the Republic of Cuba requested the extradition of two former soldiers who had escaped from a Cuban prison after having been convicted of murdering a prisoner, who had been mistakenly arrested as a Batista supporter, immediately after the fall of the Batista Government and the institution of the Communist regime of Fidel Castro. Finding that the commission of the alleged crime took place in the "early days of victory" of the revolutionary faction, that the defendants were active participants in that revoluntionary movement, and that the alleged crime was "part of a political uprising and disturbance," the Court *[*37]* concluded that the defendants "bore no ill will or malice toward their victim, who was just one of the many political prisoners captured in furtherance of the political rising." Ramos v. Diaz, supra, 179 F. Supp. at 463. (emphasis added). Accordingly, the Court held that the alleged crime was a nonextraditable political offense. * Id. at 463-64. *[*38]*

Furthermore, in the most current topical contexts the courts have interpreted the political offense exception to require a showing that the crime with which the extradites was charged was "incidental to" or "in furtherance of" a political uprising. In In re McMullen, Magis. No. 3-78-1099 MG (N.D. Cal., filed May 11, 1979) the Government of the United Kingdom sought the extradition of McMullen, an established member of the Provisional Irish Republican Army (the "PIRA") for the alleged bombing of a certain British Army installation.After restating the applicable test, the Court found that: (1) an "insurrection and disruptive uprising of a political nature" did exist at the time of the alleged bombing, In re McMullen, supra, at 4; (2) the British Army and its military facilities were main targets for the PIRA's activities; and that (3) with respect to the crime charged, McMullen acted as a member of the PIRA. The Court concluded that the defendant's acts were not a product of his own vengeance or personal motivation, but that the "bombing was a crime incidental to and formed as a part of a political disturbance, uprising or insurrection and in furtherance thereof." Id. at 5-6.

*[*39]*

And most recently in Abu Eain v. Wilkes, the Court was faced with a request from the State of Israel, seeking the extradition of Abu Eain, an alleged member of the Al Fatah branch of the Palestine Liberation Organization ("PLO"), charging that the defendant had set off a bomb in the marketplace of the Israeli city of Tiberius, killing two boys and maiming or otherwise injuring more than thirty other people. While the Court in Abu Eain questioned the Magistrate's finding of a "conflict" sufficient to establish that there was a violent political disturbance, such as a war, revolution or rebellion, in Israel at the time of the alleged bombing, the Court held that, in any event, the petitioner had failed to establish that the bombing was "incidental" to the PLO's objectives and that "[a]bsent a direct tie between the PLO and the specific violence alleged, the act involved here, without more, was not the sort which may be reasonably "incidental to" a political disturbance." Supra, 641 F.2d at 520. The Court, relying on the doctrine set forth in In re Meunier, recognized that the "political offense" doctrine should not be interpreted to legitimize anarchistic activities which by their *[*40]* nature impact on the citizenry and not directly upon the government. Abu Eain v. Wilkes, supra, 641 F.2d at 520-521. Thus, the Court reasoned:

[t]he exception does not make a random bombing intended to result in the coldblooded murder of civilians incidental to a purpose of toppling a government, absent a direct link between the perpetrator, a political organization's political goals, and the specific act. Rather the indiscriminate bombing of a civilian populace is not recognized as a

protected political act even when the larger "political" objective of the person who set off the bomb may be to eliminate the civilian population of a country. Otherwise, isolated acts of social violence undertaken for personal reasons would be protected simply because they occurred during a time of political upheaval, a result we think the political offense exception was not meant to produce.

Id. at 521.

II. THE THRESHOLD ISSUES

A. Jurisdiction Having thus treated the development and application of the political offense exception in American jurisprudence, we now turn to the argument advanced by the Government that the judicial branch is not the appropriate forum to determine whether *[*41]* the crime charged is a "political offense" under the Treaty but that such a determination should properly be made by the executive branch. Specifically, the Government submits that: (1) the language of 18 U.S.C. § 3184 * restricts the scope of the inquiry made by a judge or magistrate to a hearing on "evidence of criminality;" (2) the language of the Treaty which requires that the "political offense" exception be determined by the "requested Party" refers to the executive branch of the Government and not to the judicial branch; and (3) that the "political question" doctrine enunciated in Baker v. Carr, 369 U.S. 186 (1962), mandates judicial deference to the executive branch on the political offense exception issue. We reject the Government's argument for the reasons set forth in the discussion below.

There is simply no precedent for adopting the Government's narrow reading of 18 U.S.C. § 3184, limiting the courts' jurisdiction to a determination of "criminality" or probable cause only. Rather, all precedent is to the *[*42]* contrary. Throughout more than eighty years of jurisprudential history in every case in which the political offense exception has been squarely presented, whether raised under 18 U.S.C. § 3184 or its similarly worded predecessor, Rev. St. U.S. § 5270, * Rev. St. U.S. § 5270 provided in relevant part:

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

** It is interesting to note that in In re Ezeta, supra, 62 F. at 997, where the jurisdictional issue was raised, not by the United States Government, but by the government of the requesting country, the Court began its discussion of the political offense exception by simply stating, "[h]aving jurisdiction to determine whether the charges against the accused are of a political character or not, I proceed to the consideration of that question."

We note that we do not dispute the Government's position or the authority cited in so far as it supports the limited nature of the hearing on the probable cause determination. See discussion, supra, at 5-7. However, the cases cited by the Government in the "Government's Reply Brief," Bryant v. United States, 167 U.S. 104 (1897) and Charlton v. Kelly, 229 U.S. 447 (1913) did not address the scope of the hearing as it bears on the political offense exception.

* The Government submits that the Treaty distinguishes between the functions of the judicial and executive branches by referring to "judge," "magistrate," and "courts" or a "competent authority" to indicate the former and using the term "requested Party" to refer to the latter. In support of this argument, the Government directs our attention to specific articles of the Treaty.A review of

those provisions shows that the terms "judge," "magistrate," etc. have been used in the Treaty to refer to an authority of the requesting Party, the United Kingdom, and not the requested Party, the United States.We are thus totally unpersuaded by the Government's attempt to distinguish the roles of the judicial and executive branches of the United States based on this linguistic analysis.

We note, without passing on the merits of such statutory construction, that the Court in Abu Eain v. Wilkes seemed to endorse a reading of that portion of 18 U.S.C. § 3184, which requires a hearing to determine whether there is evidence "to sustain the charge under the provisions of the proper treaty," (emphasis added in Abu Eain v. Wilkes), to mean that a clause excepting political offenses is a "provision" of the treaty and thus, that a determination made under such a clause is within the scope of the hearing contemplated by the statute. Supra, 64, F.2d at 513.

the courts have never declined to receive evidence on and consider the applicability of the political offense exception. ** Furthermore, in Abu Eain v. Wilkes, the only case in which the Government raised the jurisdictional argument (1648), the Seventh Circuit wholly rejected the argument, which, in fact, was based on substantially the same reasoning posited here. *

*[*43]*

Moreover, assuming arguendo, that Congress initially intended the narrow reading of the statute suggested by the Government, it is well settled that ***HN13***[↑] "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . ." Lorillard v. Pons, 434 U.S. 575, 580-8, (1978) (and citations therein). Title 18 U.S.C. § 3184 has existed in its present form save minor changes in phraseology since it was initially codified as Rev. Stat. § 5270 by the First Session of the Forty-third Congress in 1873-74. Thereafter, R.S. § 5270 was re-codified as 18 U.S.C. § 651, and amended and re-enacted as 18 U.S.C. § 3184 in 1948 and 1968.Thus, ***HN14***[↑] in the absence of any major statutory amendment and in the absence of any legislative history ** which would preclude the judiciary from determining the applicabilty of the political offense exception, this Court may infer that Congress intended to incorporate the judicial interpretation of 18 U.S.C. § 3184 into the plain words of the statute.

*[*44]*

Thus, we adhere to the consistent precedent, whereby ***HN15***[↑] the judiciary has always determined whether the alleged offense falls within the ambit of the "political offense" exception, presumably relying on 18 U.S.C. § 3184.Likewise, we adhere to the settled rule memorialized in In re Lincoln, 228 F.70, 73-74 (E.D.N.Y. 1915), aff'd per curiam, 241 U.S. 651 (1916) whereby ***HN16***[↑] the Secretary of State has sole discretion to determine whether the criminal charge is a subterfuge for political action, i.e., whether the request "has been made with a view to try to punish . . . [the extraditee] for an offense of a political character," (Treaty, Art. V(1) (c) (ii)), and sole discretion to consider due process safeguards and the political climate in the demanding country in determining whether extradition should be denied. See, Sindona v. Grant, supra, 619 F.2d, at 173-75; Note, "Executive Discretion in Extradition," 62 Colum L. Rev. 1313, 1323 (1962).

We address next the Government's argument that the term "requested Party" as used in Article V of the Treaty refers to the executive branch of the government and not the judicial branch. The contracting parties to the Treaty, which was renegotiated *[*45]* and entered into force January 1, 1977, are charged with the knowledge of the way in which the Treaty has been interpreted. Absent an indication to the contrary, this Court has no basis upon which to assume that the parties

intended to change a practice of more than eighty years. * Indeed, the "Minutes of Extradition Negotiations United States/United Kingdom," London, October 30, 1969 and December 1-4, 1969, which were supplied by the Government at our request, do not indicate any dissatisfaction with the way in which the earlier treaty was interpreted or any intention to preclude the American judiciary from determining the applicability of the political offense exception. Moreover, the interpretation and jurisdictional approach of Article V of the Treaty by our Courts, which we adopt, is entirely consistent with British jurisprudence and, as shown above, has been modeled on the British application of the political offense exception.

*[*46]*

Finally, we are not persuaded that the Government's reliance on the "political question"-absention doctrine is proper. The Government suggests that determinations of the applicability of the political offense exception clause is within the realm of international affairs decisions that are generally deferred to the executive branch, requiring "an initial polity determination of a kind clearly for nonjudicial discretion. . . ." Baker v. Carr, supra, 369 U.S. at 217. We disagree, since a determination made under that clause of the Treaty relates only to past political fact, whether a political revolt existed at the time and site of the alleged crime, and not the present political climate in the requesting country. Thus, in rejecting the applicability of the political question doctrine, the Court in Abu Eain v. Wilkes stated: "[t]he existence of a violent political disturbance is an issue of past fact: either there was demonstrable, violent activity tied to political causes or there was not." Supra, 641 F.2d at 514. (footnote omitted).

Furthermore, although the Government stresses that only the executive branch has the available sources to provide complete, accurate and up-to-date *[*47]* information on the political situation in a foreign country, the State Department is, of course, free to share that information with the court in the course of extradition proceedings. Indeed, in this case, Mr. Perez, Deputy Director for the Office of Combatting Terrorism, Department of State, (1338), testified on behalf of the Government. And, in a case where particularly sensitive evidence is involved in camera review is an available alternative.

The Government also suggests that a determination of the applicability of the political offense exception made by the judiciary might embarrass the executive branch and this country's foreign policy decisions. However, in rendering such determinations the Courts are not being called upon to make delicate foreign policy decisions, to debate the political climate in a certain country, or to pass judgment on the merits or demerits of the political affairs of another nation. Resolving the political offense issue requires only a determination of an isolated issue, i.e., whether "there occurred violent acts and political tensions that resulted in the charged criminal acts." Abu Eain v. Wilkes, supra, 641 F.2d at 515. In fact, while we do *[*48]* not necessarily endorse this view, a commentary has noted, quite to the contrary of the Government's position, that:

[j]udicial determination of extradition issues permits the Executive Branch to remove itself from political and economic sanctions which might result if other nations believe the United States lax in the enforcement of its treaty obligations.

Lubet and Czackes, supra, at 200.

In sum, this Court recognizes that the Government's arguments are imaginative and cannot be dismissed summarily. We also recognize that modern international political affairs are becoming increasingly complex and correspondingly, that the number of "hard" cases in which the "political offense" exception may be raised is likely to

increase. Nevertheless, we adhere to to the long standing precedent which permits judicial determination of the political offense exception and defer any additional consideration and clarification which may be warranted to Congress and the treaty drafters.

B. Burden of Proof In order to place in context our discussion of the facts which are relevant to determining the applicability of the "political offense" exception under the American "incidence" test, *[*49]* we must first resolve issues relating to allocation of burdens of production, standards of proof and decide which party should bear the ultimate burden of proof when the "political offense" exception has been raised. The decisional law provides little guidance as few cases have squarely addressed these questions and those that have reached wholly inconsistent answers. Turning thus to general, well accepted doctrine, we recognize that allocations of burdens of production, burdens of proof and standards of proof in American jurisprudence have consistently been used to achieve policy goals with a view toward elementary fairness and furthering the purpose of the underlying substantive law. McCormick's Handbook on the Law of Evidence, at 785-89 (2d ed. 1972). With this in mind we must follow those rules which are appropriate in terms of the rationale underlying the political offense exception and the law of extradition. Indeed, a commentary has aptly stated:

[t]he burden of establishing the political offense exception . . . may be seen as a question of policy rather than one of constitutional rights or fundamental fairness. It is necessary to balance the competing considerations *[*50]* of international comity, enforcement of treaty provisions, and protection of political dissent, within a procedural framework that allows the defendant a fair opportunity to raise the defense without unduly burdening the requesting state.

Lubet and Czackes, supra, at 208.

The respondent, Mackin, urges that this Court adopt the liberal view of relative burdens and standards of production which was enunciated in the Court's conclusion in Ramos v. Diaz.

[W]hen evidence offered before the Court tends to show that the offenses charged against the accused are of a political character, the burden rests upon the demanding country to prove the contrary. (emphasis added).

Supra, 179 F. Supp. at 463, footnoting, Hyde's International Law Chiefly as Interpreted and Applied by the United States, Second Revision, Vol. II, page 1025. * It should be noted that in Ramos v. Diaz the requesting country presented no evidence to rebut the political offense defense.

On the other hand, the Government, relying in part on the Magistrate's decision in Abu Eain v. Wilkes, Magis. No. 79 M 175 (N.D. Ill., December 18, 1979) and in part in In re McMullen, supra, at 6, * We note that neither of these decisions is particularly illuminating in its discussion of relative burdens or standards of proof. First, it is not at all clear that the Magistrate in Abu Eain v. Wilkes rejected the "tends to show" standard enunciated in Ramos v. Diaz, supra, 179 F. Supp. at 463. The Magistrate merely stated that the defendant was required to show the link between the alleged crimes and their political objective. The decision in In re McMullen is even more obscure. In that case, after finding that the respondent had met each element of the political offense exception, the Magistrate cited Ramos v. Diaz in support of the conclusion that the government had failed to meet its burden, i.e., to present evidence that would contradict the applicability of the political offense exception. To add to the confusion, the Magistrate further concluded that the defendant had established by "preponderating" evidence that the crime charged was of a political character. Supra, at 6.

** This is also the view endorsed by commentators Lubet and Czackes, supra, at 209.

submits that HN17[] the *[*51]* extraditee has the burden to establish a prima facie case with respect to each element of the political offense exception and that ultimately, the extraditee must prove by a preponderance of evidence that the crime for which extradition is sought is of a "political character." For the reasons set forth below we adopt the Government's position. ** The testimony seems to indicate that the RUC and "B Specials" actually provoked more violence than they contained. (Holland, 411-13, 415; Masterson, 1305; Resp. Ex. S, P23).

*[*52]*

While the standard set forth in Ramos v. Diaz, supra, 179 F. Supp. at 463 is clearly the most advantageous to the respondent, concommitantly, it places an undue burden on the requesting country because it requires the requesting country to disprove all possible political connections without first requiring the defendant to establish a prima facie case with respect to the parameters of his claim.See, Lubet and Czackes, supra, at 208. Moreover, as the Government argued, under the Ramos v. Diaz scheme, the introduction of even the most minimal evidence by the respondent would result in a shifting of the of the burden. In contrast, the standard proposed by the Government places a greater burden on the defendant, but only to the extent that he is required to establish the specific elements of the political offense exception. Thus, the requesting country has ample notice to refute the defendant's claim and would not be required to negate all possible political connections to the crime charged. Furthermore, since the political offense exception is an affirmative defense, a collateral fact which, if successfully raised, will defeat a claim for extradition, * In Karadzole v. Artukovic, in vacating the writ of habeas corpus and remanding the case for hearing, 355 U.S. 393 (1958) (per curiam) the Supreme Court implicitly rejected the view that the "political offense" exception was a jurisdictional defense. When viewed as a jurisdictional defense, it is deemed to deprive the court of jurisdiction, i.e., the nexus between the crime charged and the political atmosphere render the offense nonestraditable. The requesting country would then be in the untenable position of having to include sufficient information in the extradition documents to remove the charged offenses from the political arens. See, Lubet and Czackes, supra, at 206-07.

the party asserting the *[*53]* claim should bear the ultimate burden of proving by a preponderance of the evidence that the crime with which he has been charged is of a political character. It should be noted that this standard is entirely consistent with the allocation of burdens of proof on the issue of inducement when a defendant asserts the defense of entrapment to a criminal charge. See, Model Penal Code § 2.13(2); U.S. v. Braver, 450 F.2d 799 (2d Cir. 197,). Moreover, it has been correctly recognized that:

[t]his conclusion will accomplish basic policy of international cooperation in extradition without seriously compromising political dissent. The placement of the burden of proof will not affect persons charged with either purely political offenses or with offenses involving speech and assembly. Those who have been charged with common crimes will be required to establish a political nexus, but proof of such a connection is uniquely under the control of the defendant.

*[*54]*

Lubet and Czackes, supra, at 209.

III. THE APPLICATION OF THE POLITICAL OFFENSE EXCEPTION IN THE FACTUAL CONTEXT OF THIS EXTRADITION REQUEST Having traced the development of the political offense exception to extradition requests

in England and the United States and having resolved the preliminary issues of jurisdiction and burden of proof, we now turn to a recitation of the facts relevant to the inquiry that a court must conduct in determining the applicability of the political offense exception. Our analysis of the facts in terms of the substantive legal requirements of the exception, has led us to conclude that respondent Mackin has satisfied his burden of proof on each of the elements, thus barring his extradition. To this end we have distilled from the case law the following factors and will structure our analysis and conclusions accordingly: (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.

Briefly stating the parties' positions, Mackin contends *[*55]* that: (1) there was a political revolt in Northern Ireland, specifically, Andersonstown, Belfast, in March 1978 which was part of a continuous, albeit uneven, pattern of violent upsurgence by the Irish Republican Army (the "IRA") and its ideological successor, the Provisional Irish Republican Army (the "PIRA"); (2) he was a member of the PIRA; and that (3) proceeding under either the offense as charged in the extradition papers or respondent's version of the incident, the offense was "incidental to" and "in furtherance of" the political uprising. * In support of respondent's position testimony was adduced from Mackin and the following expert witnesses: (1) Edward J. Holland ("Holland"), a writer and reporter who was born in Belfast (Holland, 370); (2) Richard J. Harvey ("Harvey"), a barrister admitted to practice in England and Wales (Harvey, 568-69); and (3) Rona M. Fields ("Fields") a psychologist (Fields, 893). All references to the transcript will be preceded by the name of the witness.

** The Government also seems to suggest that Mackin's avowed membership in the Provisional Irish Republican Army is disingenuous. (Government's Brief at 18, n.)

In support of the Government's position testimony was adduced from the following witnesses: (1) Brian Garrett ("Garrett"), a solicitor in Northern Ireland and life-long resident of Belfast, Northern Ireland, (Garrett, 966); (2) Kenneth Masterson ("Masterson"), a barrister admitted to the bar of Northern Ireland and currently Superintendent of the Royal Ulster Constabulary ("RUC"), the civil police force for Northern Ireland, in Andersonstown, (Masterson, 1227-28, 1230); (3) Frank H. Perez, see, supra, at 411; and (4) Vincent A. Lynagh ("Lynagh"), legal advisor to the Chief Constable of the RUC and a solicitor of the Supreme Court of Northern Ireland, (Lynagh, 1573-74).

In contrast, the Government submits that: (1) there was no war, rebellion, revolution or "serious political disturbance . . . in any period remotely contemporaneous with the March 16th incident in Andersontown" (sic) (Government's Brief, at 75); and that (2) Mackin's affirmative denial of the commission of the offense charged in the extradition papers precludes his successful assertion of the defense and bars a finding that the crime was "incidental to" or "in furtherance of" any political uprising. **

*[*56]*

A. The Political Crisis (1) The Historical Conflict

In order to properly assess the political facts relevant to March 16, 1978-Andersonstown, Belfast, the time and site of the alleged crime, it is necessary to comprehend, in general terms, the political and historical heritage of Northern Ireland as well as the conflict of it more recent past. Violent rebellion to British domination has waxed and waned throughout the history of Ireland prior to its partition and in Northern Ireland since its creation in 1921 with particular continuity from 1969 onwards. Naturally, the "hard" facts are not contested, but the Government does contest the characterization of the political conflict in Andersonstown as qualifying for the application of the political offense exception.

Since 1921 the island popularly known as Ireland has contained two separate states: the southern portion, presently the Republic of Ireland (its predecessor was the Free State of Ireland), consisting of twenty-six counties, and the northern portion, Northern Ireland, part of the United Kingdom and presently under direct rule from the Westminster Parliament, consisting of six counties.

Prior to its partition, all *[*57]* of Ireland was part of the United Kingdom and subject to British rule. Since the 17th century the period of British rule was marked by violent uprisings and rebellions by the Irish in opposition to British domination, followed by British m;litary repression, significantly so in the years 17;8, 1803, 1867 and 1916.(Holland, 383-87; Masterson, 1289-90). The objective of all of these rebellions was the establishment of a democratic republic of thirty-two counties, free and independent from British rule. (Holland, 384-85). However, the so-called "Rebellion of 1916," subsequent guerilla warefare in 1919 and the so-called "War of Independence" or "Black and Tan War" in 1921 resulted in only a partial realization of the goal for independence, i.d., in accordance with the Treaty of 1921, the partition of Ireland and the creation of the two separate states only one of which was independent. (Holland, 392-93, Masterson, 1290). It is noteworthy that at some point during the period from 1916-1921, a new political group emerged, called Sinn Felin, * In rough translation from Gaelic, Sinn Fein means "ours alone." (Holland, 388).

* See footnote, supra at 51.

** Indeed, Ulster which was one of Ireland's four provinces at the time, was itself partitioned. (Holland, 394).

This is with the exception of that faction of the original IRA that supported the Treaty of 1921 which established the two separate states. The faction of the IRA, which did not form the Army of the Free State of Ireland, became an illegal organization led by Eamon de Valera in the early years. They viewed acceptance of the Treaty as a betrayal of their goals for a unified, thirty-two county Irish nation. (Holland, 399-401).

which enjoyed popular support for its goal for an independent, democratic Irish state. Indeed, in the general annual election held in 1918, *[*58]* encompassing the entire population of Ireland and the United Kingdom, in which Sinn Fein stood for the goal of a united, independent Irish State, Sinn Fein won a majority of seats in Ireland and thereafter established an independent government and parliament. (Holland, 389-91; Garrett, 1021). However, the British government refused to recognize and legitimize the Sinn Fein government, and instead proscribed its existence and put its Members of Parliament in jail. Nevertheless, the Sinn Fein parliament continued to function as a government, and it recognized the IRA as its military wing. (Holland, 391-92; Masterson, 1291). From the time of its formation until 1969 the IRA consistently advocated the overthrow of British rule by violent means and the establishment of an independent unified Irish state. * (Garrett, 1009-10; Masterson, 1291-92; Holland, 392, 399-400, 422-23). See, discussion, infra, at 58-59, regarding the schism of in 1969 and the development of the PIRA, which followed the violent tradition of the original IRA.

*[*59]*

In order to understand the political crisis that has plagued Northern Ireland since its existence through the present decade we must explore briefly the nature of the partition of the island and certain consequences which flowed therefrom. As noted above, the partition was established and Northern Ireland was created by an act of the British Parliament, known as The Government of Ireland Act of 1920, which was accepted by the Sinn Fein government and a certain portion of the IRA * as an element of the settlement negotiated with the British Government to end the

1921 "War for Independence" and to prevent a widespread civil war. (Holland, 393, 395; Garrett, 1003-04). The partition of Ireland did not conform to any known geographical or political unit, ** but instead was based on the sectarian and political division between the Catholic community, which was mainly concentrated in the southern portion of the Island, and the Protestant community, whose concentration was greatest in the northern sector. However, the partition did not create a homogeneous Protestant community in the north. At the time of its creation and to date about two-thirds of the population in Northern Ireland *[*60]* are Protestant, who have remained politically loyal to England, wishing to maintain a link with the United Kingdom and accordingly are known as Loyalists or Unionists. The remaining one-third are Catholic, who have tended to remain true to the long-standing tradition in support of political independence from Great Britain and the establishment of a unified Irish state. Those espousing those views are known as Nationalists or Republicans. (Holland, 397-98; Garrett, 976, 981-88, 1002-05).As Mr. Garrett, who testified on behalf of the Government, aptly summarized:

[t]here has been a lengthy disorder between the two communities, essentially centering around what they wish to see as the national situation, or the national condition of Northern Ireland, leaving out the republic of Ireland since 1920, and politics have been based on that.

(Garrett, 976; see also, Masterson, at 1297).

Northern Ireland was initially governed by a separate government and parliament administered from Stormont (Holland, 401-02; Masterson, 1290-91); *[*61]* in addition, the electorate of Northern Ireland sent twelve members to the Parliament of the United Kingdom. (Resp. Ex. S, P14). In 1972 the United Kingdom resumed "direct rule" of Northern Ireland, abolishing the Stormont Parliament which was unable to control the political situation. See, infra, at 62.

Moreover, the composition of Northern Ireland, with the Protestant sector holding a two-thirds majority and the Catholic electoral power correspondingly diminished, engendered and continues to engender great frustration among the Catholic community in regard to their socio-economic status, exacerbating the disparity in the quality of life between the groups and their long-standing animosities. (Garrett, 1002, 1007; Resp. Ex. S, PP15, 19). During the reign of Stormont the Catholic minority were the object of various discriminatory practices including discrimination in housing and employment. Accordingly, despite the fact that the two communities in Northern Ireland share a common heritage, Northern Ireland has often been described as a place of two communities, particularly with respect to schooling, religion, employment opportunities and patterns, and cultural background. *[*62]* (Holland, 402, 416-17; Garrett, 976, 979-80, 1001-02; Resp. Ex. S, P15). In short, as the Government's witness, Garrett, stated:

politics in northern Ireland, certainly, and to some extent outside northern Ireland and in the rest of Ireland, but essentially in northern Ireland, has been based on religion, not on the doctrine of religion, but on who you are and what you were born.

(Garrett, 975-76). Thus, since the partition of Ireland and the creation of the State of Northern Ireland in 1921, the animosity which developed between the Catholic and Protestant communities was grounded on social, economic and political differences. (Garrett, 1002; Resp. Ex. S. P15).

Furthermore, in every decade since the establishment of the Northern Irish state, the IRA and its ideological successor, the PIRA * See discussion, infra, at 58-59.

** These included an organization known as the "B Specials," which was a Protestant paramilitary organization, legitimized by an act of parliament, as an adjunct to the RUC to aid in containing IRA violence. The B Specials were abolished in 1969 after inquiries made by the British Government documented the fact that the B Specials were responsible for throwing bombs into Catholic homes and burning Catholic homes when they were mobilized to quell the 1969 Belfast riots. (Holland, 411-13; Garrett, 997).

has engaged in sporadic armed violence in opposition to British domination, in support of an independent, unified Irish nation, and, during the last fifteen years, in response to the Unionist Government's discrimination against the Catholic minority. (Holland, 399, 402-03; Garrett, 1010). Thus, the IRA continued to espouse ideological commitment to the tradition of violent opposition *[*63]*

to British rule in Ireland, which had its inception in about 1918 or 1919. (Holland, 405, Masterson, 1292). Indeed, the IRA launched a violent border campaign from 1956 to 1962, focusing on targets which they identified with the Unionist regime. (Holland, 405; Garrett, 997; Masterson, 1296). In response, both the Stormont Parliament and the Dublin government in the Republic introduced internment without trial, arresting people who were identified as members of the IRA. (Holland, 405-06). It should also be noted that since the 1920's, the Government of Northern Ireland has had various paramilitary wings of the police in addition to the presence of several underground organizations to aid in the containment of IRA violence. (Holland, 400). **

*[*64]*

In conjunction with the military activities of the IRA, Sinn Fein emerged as the political wing of the Nationalist movement. (Holland, 399). In addition to the violent resistance practiced by the IRA, the Catholic community manifested their discontent and objection to the existence of the State of Northern Ireland in a more passive fashion, e.g., Catholics who were elected to the Stormont Parliament refused to take their seats, denying recognition of the Stormont Parliament as a legitimate government and Catholics held mass civil rights protests, strategically modeled on the black movement in the United States in the late 1960's in Belfast and Londonderry (popularly referred to as Derry). (Holland, 403, 414; Garrett, 972-75; Masterson, 1302-03; Resp. Ex. S, PP20-23).

(2) The Years 1969 to Date

Mackin contends that there was a political conflict in Northern Ireland, Andersonstown, Belfast in March 1978 which was part of a continuous political uprising, occurring during the prior decade, and having its roots in the tradition of sporadic violent rebellion discussed above; and that the political conflict was of sufficient magnitude to allow this Court to conclude that there was *[*65]*

a war, rebellion, revolution or political uprising within the meaning of the political offense doctrine. To this end, the testimony adduced at the hearing in the presentation of respondent's political offense defense and in rebuttal by the Government, focused on the specifics relevant to the political situation from 1969 to the present day * Any reference in this opinion to the current situation in Northern Ireland has been included for the sake of providing a complete and accurate recital of the evidence presented to us, and is in no way meant to imply any judgment by this Court regarding the current political affairs in Northern Ireland nor does our decision in any fashion rely on any post-1978 facts.

with particular emphasis on the first quarter of 1978. In response to Mackin's assertion, the Government submits that the evidence is insufficient to allow us to conclude that there was a war, rebellion, revolution or political uprising

in Northern Ireland in 1978 since: (1) the incidence of violence during 1978 was lower than in the preceding years, notably 1972; and since (2) the revoluntionary force, the PIRA, has little community support and does not engage in systematic, organized warfare, but is a dispersed, terrorist organization.

*[*66]*

Based on our consideration of the evidence offered at the hearing, and our analysis of that evidence in terms of the political offense exception which follows, this Court rejects the Government's argument and concludes that there was a political conflict in Andersonstown, Belfast, Northern Ireland in March 1978, which was part of an ongoing political uprising, albeit fluctuating in intensity, but nevertheless of sufficient severity to sustain Mackin's burden of proof on the first prong of the political offense exception.

Nineteen hundred and sixty-nine marked the escalation of the passive-resistance, strategy of the civil rights movement into "very serious inter-community rioting and violence in Belfast," (Garrett, 973), * The Government's witness, Masterson, described the conflict in 1969 similarly, as "communal violence" and "intersectarian violence" between the two communities. (Masterson, 1302).

and in Derry, as the Protestant sector responded to the street protests of the Catholic minority by engaging in counter-demonstrations, thus sparking confrontation and violence between the groups. (Holland, 415). Indeed,

> [t]he riots in August 1969 greatly exceeded in severity any that had occurred in the previous years. Casualties and damage to property were extensive. In Belfast, for instance, a large number of houses and licensed premises, mostly Catholic *[*67]* owned or occupied, were burnt down, destroyed or damaged.

(Resp. Ex. S, P25). And in Derry, the Catholic sector barricaded themselves into their community area, waging combat against the RUC and soldiers using rocks, bottles and stones. (Garrett, 1015-16). Thus, on August 14, 1969, the Westminster Parliament sent the British Army into Northern Ireland to "keep the two communities apart" (Garrett, 1025), and to supplement the RUC, the approximately 2,000-man British Army garrison and the 6,000-man "B Specials," in containing the violence. ** (Holland, 415, 4,7-19; Garrett, 996-97; 1010-11, 1040).

> Towards the end of 1969 and in early 1970, in the wake of the communal riots, the IRA split into two wings: the official IRA, which sought to continue a course of political dissent and protest; and the Provisional *[*68]* Irish Republican Army, which sought to pursue the traditional strategy of the IRA, to engage in "armed conflict with the forces of the state," (Garrett, 1018), to bring about their aim of an independent, unified Irish state. * We note at this point for purposes of clarification of some portions of the following discussion that the "Republican Movement" is used to refer both to involvement in the political wing, Sinn Fein, and the military wing, the PIRA. They are distinguishable to the extent that a member of the Sinn Fein may not necessarily be a member of the PIRA. (Holland, 428-29).

(Holland, 422-23; Garrett, 1020; Masterson, 1234, 1310; Resp. Ex. S, P28).

By 1971 the incidence of violence had dramatically increased in Northern Ireland, as the terrorist campaign of the PIRA intensified in Belfast and Derry, and at a later stage in the Republic of Ireland, triggering some terrorist activity on the part of the Loyalists. (Masterson, 1310-12; Resp. Ex. S, PP29-30; see also, Resp. Ex. U). In an effort to contain the violence of the PIRA, which had reached "unprecedented proportions by the middle of 1971," (Resp. Ex. S, P36), on August 9, 1971 the Stormont Parliament *[*69]* introduced internment without trial. * In Its Judgment in the Case of Ireland v. The United Kingdom, the European Court of Human Rights mentions some additional reasons, cited by the United Kingdom, for the internment procedures.

Firstly, the authorities took the view that the normal procedures of investigation and criminal prosecution had become inadequate to deal with IRA terrorists; it was considered that the ordinary criminal courts could no longer be relied on as the sole process of law for restoring peace and order. The second reason given, which was closely related to the first, was the widespread intimidation of the population. Such intimidation often made it impossible to obtain sufficient evidence to secure a criminal conviction against a known IRA terrorist in the absence of an admissible confession or of police or army testimony. Furthermore, the conduct of police enquiries was seriously hampered by the grip the IRA had on certain so-called "no-go" areas, that is Catholic strongholds where terrorists, unlike the police, could operate in comparative safety. Thirdly, the ease of escape across the territorial border between Northern Ireland and the Republic of Ireland presented difficulties of control.

In addition to the three "security" reasons, there was, in the judgment of both the Northern Ireland Government and the United Kingdom Government, no hope of winning over the terrorists by political means, the reform programme initiated in 1969 having failed to prevent continuing violence.

The authorities therefore came to the conclusion that it was necessary to introduce a policy of detention and internment of persons suspected of serious terrorist activities but against whom sufficient evidence could not be laid in court. This policy was regarded as a temporary measure primarily aimed at breaking the influence of the IRA. It was intended that a respite would be provided so as to enable the political and social reforms already undertaken to achieve their full effects.

(Resp. Ex. S, P36).

* Silver City and Fort Monagh were vacated in August of 1980. (Masterson, 1277).

This statistic reflects the finding of the European Court of Human Rights in its Judgment in the Case of Ireland v. The United Kingdom. (Id. at P39).

Beginning at 4:00 a.m. the British Army acting in conjunction with the RUC, arrested 350 persons * suspected of involvement in the PIRA and took them to one of the three regional holding centers for purposes of interrogation. There is no question that the focal point of the operation was the Catholic community, and that it was not aimed at selected individuals but as a "sweeping-up" exercise directed at the entire PIRA. (Resp. Ex. S, PP38-39; Masterson, 1312-13; Holland, 424-25).During the period of internment, which spanned from 1971-1975, approximately 1,100 to 1,200 persons or 30-40 percent of the population of Andersonstown were interned at any one given time. (Masterson, 1314, 1316-17).

*[*70]*

Post-internment, in 1972, the scale of violence upsurged markedly, unquestionably signifying the peak period of shootings, bombings, and fatalities for the 1969-1979 decade. According to the official statistics compiled by the RUC, in 1972, there were 10,628 shootings, 1,853 bombings (including devices defused), and 467 fatalities, 146 non-civilians (including 103 British soldiers) and 321 civilians (including suspected terrorists). (Holland, 425; Resp. Ex. U). Furthermore, there is no dispute that the PIRA was identified as responsible for a great number of the violent incidents. In response, to supplement the 3,500-man RUC, in controlling the violence, the size of the standing British Army in Northern Ireland was increased to approximately 21,000-24,000 men during the years 1972-1974 and the Ulster Defence Regiment was created as an official regiment of the British Army, consisting of approximately 6,500-7,500 men. Indeed, the British Army maintained two bases, known as Silver City and Fort Monagh, * in Andersonstown as temporary housing facilities for its soldiers, in addition to a third facility west of Andersonstown, the Woodbourne Army Base. (Masterson, 1276-77, 1324-28, *[*71]*

1331; Garrett, 998). In sum, as Government witness Masterson observed ". . . it has to be appreciated that it requires a large number of personnel, unfortunately, to keep the two sides apart in Northern Ireland. For that

reason it is necessary to employ substantial numbers." (Masterson, 1327). The deterioration of the political fabric of Northern Ireland during the post-internment period of "very serious street violence," (Masterson, 1278), was also evidenced by the creation of so-called "no-go areas," i.e., barricaded areas insulating the Catholic community, excluding the entry of the RUC and British Army. (Holland, 426-27; Masterson, 1277-78).

Finally, in March 1972, in view of the rapidly declining ability of the Unionist Government to enforce "law and order" and the unparalleled high level of violence, the Stormont Parliament was abolished and the Westminster Parliament resumed direct rule of Northern Ireland. (Holland, 402, 430; Garrett, 1055-56; Resp. Ex. S, P49).Determined to end the escalating conflict and to avoid additional bloodshed, William Whitelaw (presently Home Secretary *[*72]* for the United Kingdom) met with representatives of the PIRA in England to negotiate a truce, which resulted, unfortunately, in only a temporary, two to three week cease-fire. (Holland, 430-32; Garrett, 1018-19).

Thus, the conflict, termed a "guerilla war" by the Government's witness, Garrett, continued through 1978 and to the present day. In clarifying his use of the term "guerilla war," Garrett further defined the political crisis as follows:

[i]t is a situation in which a group of very determined people are prepared to use violence in bringing about what they see as the proper course for Northern Ireland, that is to say, that it should be part of their united 32-county Ireland.

(Garrett, 1102). The visible evidence of this quasi-military conflict is quite vivid. From the initial introduction of the British Army in 1969 through 1978, when there were approximately 13,000 British soldiers in Northern Ireland, and continuing to date, soldiers have patrolled the streets of Belfast, especially the Catholic areas, in full battle gear, armed with self-loading automatic rifles. (Holland, 467-68; Garrett, 999). * Approximately 420 of the 13,000 were stationed in the Andersonstown area. (Masterson, 1331).

In addition, armed personnel carriers, armored cars, land rovers *[*73]* equipped with machine guns and helicopters equipped with search lights have been used for patrol purposes on a rather frequent basis. (Holland, 469-73; Garrett, 1011). Furthermore, although not quite as visible, personnel attached to the Special Services Regiment, the S.A.S., functioned as undercover agents in areas where there was suspicion of PIRA terrorist operations. (Holland, 454-61; Garrett, 1075). Indeed, as Government witness Garrett testified, there is an element of the Catholic community, albeit a small portion, that views the "British Army's role as that of an adversarial army. . . ." (Garrett, 1036). Moreover, it is absolutely clear that the PIRA perceives the British Army as an enemy force; the PIRA is committed to the traditional goal of Irish nationalism, the removal of British presence from Ireland and the unification of Ireland through the use of violent means, directed, to a large extent, against the security forces. (Holland, 487-92; Garrett, 984, 1017-18, 1073-74; Masterson, 1238-39, 1292). In fact, according to the British Army's own assessment, the PIRA consists of 500 "hard case" members, not "mindless holligans," but experienced terrorists,

committed *[*74]* to a long-term campaign of attrition against the British in the North of Ireland, with the overall objective of a nationalist state, an independent Ireland; with the overall objective of driving the British Army out of Northern Ireland and of joining the Northern Ireland state to make a united Ireland with the South.

(Holland, 487, 489).

In addition to engaging in so-called "terrorist" activities, the PIRA and the Republican Movement have maintained patrols for the purpose of monitoring the activity of strangers in the Catholic areas, thus acting as a crude local

police force, and the Sinn Fein wing has actually set up "incident centers" at which people can report minor crimes. (Holland, 479-80). A "people's taxi" service has also been implemented and operated by members of the Republican Movement as a shuttle service from the shopping areas in Belfast to the Catholic neighborhoods in the West Belfast area since transportation services had been withdrawn from those areas in response to the violence. (Mackin 798). The degeneration of the social fabric of Belfast society is *[*75]* further evidenced by the series of check-points established for entry into the downtown Belfast shopping areas and the civilian personnel search units which are required to search all persons and their baggage before entering the city center. (Masterson, 1430).

A review of the following official statistics compiled by the RUC, (Resp. Ex. U), shows a significant and steady decline in the level of violence from 1972 through 1978. Nevertheless, the political situation reflected in the 1978 statistics could hardly be termed "normal" as did the Government's witness Masterson. (Masterson, e.g., 1254-58; 1417-18; 1444-45).

**TABLE 6: The Security Situation -- 1969-78**

| Reference | 1969 | 1970 | 1971 | 1972 | 1973 | 1974 | 1975 | 1976 | 1977 |
|---|---|---|---|---|---|---|---|---|---|
| Fatalities | | | | | | | | | |
| RUC | 1 | 2 | 11 | 14 | 10 | 12 | 7 | 13 | 8 |
| RUC "R" | - | - | - | 3 | 3 | 3 | 4 | 10 | 6 |
| Army | - | - | 43 | 103 | 58 | 28 | 14 | 14 | 15 |
| UDR | - | - | 5 | 26 | 8 | 7 | 6 | 15 | 14 |
| [1] Includes "suspected terroritst." Civilian | 12 | 23 | 115 | 321 | 171 | 166 | 216 | 245 | 69 |
| TOTAL | 13 | 25 | 174 | 467 | 250 | 216 | 247 | 297 | 112 |
| Terrorists Incidents | | | | | | | | | |
| Shootings | - | 213 | 1756 | 10628 | 5108 | 3206 | 1805 | 1908 | 1081 |
| [2] Includes devices defused. Bombs | 8 | 170 | 1515 | 1853 | 1520 | 1113 | 635 | 1192 | 535 |
| Incendiaries | - | - | - | - | - | 270 | 56 | 239 | 608 |
| TOTAL | 8 | 383 | 3271 | 12481 | 6538 | 4589 | 2496 | 3339 | 2224 |
| Finds | | | | | | | | | |

**TABLE 6: The Security Situation -- 1969-78**

| Reference | 1969 | 1970 | 1971 | 1972 | 1973 | 1974 | 1975 | 1976 | 1977 |
|---|---|---|---|---|---|---|---|---|---|
| Weapons | - | 324 | 717 | 1264 | 1595 | 1260 | 825 | 837 | 590 |
| Explosives (tons) | - | 0.4 | 2.6 | 27.4 | 31.6 | 23.7 | 9.9 | 16.9 | 2.7 |
| Terrorists Charges | | | | | | | | | |
| All offences | - | - | - | 531 | 1414 | 1362 | 1197 | 1276 | 1308 |

*[*76]*

**TABLE 6: The Security Situation -- 1969-78**

| Reference | 1978 |
|---|---|
| Fatalities | |
| RUC | 4 |
| RUC "R" | 6 |
| Army | 14 |
| UDR | 7 |
| [1] Includes "suspected terrorists." Civilian | 50 |
| TOTAL | 81 |
| Terrorists Incidents | |
| Shootings | 755 |
| [2] Includes devices defused. Bombs | 633 |
| Incendiaries | 115 |
| TOTAL | 1503 |
| Finds | |
| Weapons | 400 |
| Explosives (tons) | 3.5 |
| Terrorists Charges | |

**TABLE 6: The Security Situation -- 1969-78**

| Reference | 1978 |
|---|---|
| All offences | 843 |

More specifically, during the first three months of 1978, there were 30 fatalities, 148 injuries, 235 shooting attacks and 90 bombings. (Masterson, 1248-49). In fact, witness Masterson admitted that the statistics taken at face value "convey an atmosphere of disruption throughout the community," but explained that large parts of Northern Ireland have been unaffected, since the terrorist violence has been largely concentrated in the Catholic area, namely, West Belfast, which includes the Andersonstown area. (Masterson, 1254-59). In addition, a review of the portion of the London Times index which was produced indicates that during the months of February and March there *[*77]* was a high incidence of reported crime, including shootings and bombings involving the PIRA and the British Army. (Resp. Ex. E).

Indeed, in summarizing the Catholic community's response to British domination and the partition of Ireland, the Government's witness Masterson stated:

I think Irish history indicates that two sort of parallel movements would have operated at any one time, one advocating sort of constitutional change and the other advocating overthrow of British rule by violence.

Masterson also agreed with the statement of Mackin's counsel that "the advocacy of violent overthrow has always been part and parcel of the IRA or a subdivision thereof." (Masterson, 1292; see also, Garrett, 976).

In addition to evidence of a military or quasi-military conflict, certain legislation and judicial procedures enacted by the Westminster Parliament, indicate the severity of the political commotion in Northern Ireland. * We take care to mention that in discussing the legislation and judicial procedures enacted specifically to deal with terrorist activities, this Court in no way means to pass judgment on the judicial process respondent would face in the requested country. This judgment is clearly within the exclusive jurisdiction of the Department of State. Sindona v. Grant, supra, 619 F.2d at 176 (and citations therein).

In this connection, Lord Diplock was appointed Chairman of the "Commission On Legal Procedures to Deal With Terrorist Activities in Northern Ireland." (Harvey, 615-17). The purpose of the Commission was to consider:

what arrangements for the administration *[*78]* of justice in Northern Ireland could be made in order to deal more effectively with terrorist organizations by bringing to book, otherwise than by internment by the Executive, individuals involved in terrorist activities, particularly those who plan and direct, but do not necessarily take part in, terrorist acts; and to make recommendations.

(Resp. Ex. M. ch. 1, P1). For the purposes of clarification of the scope of the reference, the "Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland," (the "Diplock Report"), defined "terrorist acts" as "the use or threat of violence to achieve political ends. . . ." (Id. at ch. 3, P3). The Diplock Report further stated that "[t]he object of the terrorist organizations which *[*79]* concern us is to bring about political change in Northern Ireland by violent means. . . ." (Id. at ch. 3, P5). Moreover, the Diplock Report specifically identified the IRA and PIRA as terrorist organizations with which it was concerned and in fact relied on information about the effects of "Republican terrorism" on the administration of criminal justice in developing its recommendations. * Indeed, the Diplock Report stated that:

[t]errorist acts are not the monopoly of extremists on one side only of the dispute which has long divided Northern Ireland. . . . Hitherto, however, the majority of terrorist acts about which the facts are known to the security authorities have been committed on the Republican side and by members of the Provisional or the Official IRA.

(Resp. Ex. M, ch. 3, P9).

(Id. at ch. 3, PP9-10).

As a result of the recommendations contained in the report, ** It is important to note the context in which Lord Diplock intended his recommendations to apply. He stated:

Although in one sense there has been an intermittent state of emergency in Northern Ireland since it first became a separate province we regard the emergency which led to our appointment as that which has resulted from the escalation of terrorist activities since 1969. Our recommendations are intended to deal with this situation and to continue in effect only so long as it persists.

(Id. at ch. 2, P6). The 1973 Emergency Provisions Act was consolidated with the Young Person Act 1974 and the Emergency Provisions Amendment Act 1975 and 1978 containing virtually all of the original provisions of the 1973 Act.

*** Since the 1973 Act was in effect at the time of the commission of the crime charged in this matter, all references will be to that Act.

the United Kingdom enacted the 1973 Emergency Provisions Act (the "Act"), (Harvey, 617-18), "to deal with what are loosely known as terrorist crimes but . . . not . . . defined as such. . . ." (Garrett, 1063). ***

*[*80]*

In essence, the Act sets forth a schedule of common law offenses which are processed and prosecuted by the authorities in a manner which differs from the normal criminal law procedures. With respect to some of the scheduled offenses, including two of those with which Mackin was charged, attempted murder and wounding with intent to cause grievous bodily harm, the Director of Public Prosecutions for Northern Ireland, acting on behalf of the Attorney General of Northern Ireland, has the option of treating the offense as either a scheduled or descheduled offense. (See, Resp. Ex. N, Schedule 4, Part I, section 1. & Notes 1 and 2, Part II, section 13(b); Harvey 621-24, 707-08; Masterson, 1510-11, Lynagh, 1599-1600). Thus, although there is no crime of "terrorism" the arrest of a "suspected terrorist" under Part II, section 10 ("section 10") of the Act, will channel the arrestee through the special procedures established by the Act rather than through the standard criminal law system. * Mackin was arrested under section 10 of the Act. See discussion, infra, at 97.

Section 10 provides in pertinent part:

*HN18*[] (1) Any constable may arrest without warrant any person whom he suspects of being a terrorist.

(2) For the purpose of arresting a person under this section a constable may enter and search any premises or other place where that person is or where the constable suspects him of being.

(3) A person arrested under this section shall not be detained in right of the arrest, and section 132 of the Magistrates' Courts Act (Northern Ireland) 1964 and section 50(3) of the Children and Young Person Act (Northern Ireland) 1968 (requirement to bring arrested persons before a magistrates' court not later than forty-eight hours after his arrest) shall not apply to any such person.

(Harvey, 624; Lynagh, 1599-1600).

*[*81]*

Most significantly, the differences between arrest and prosecution under the Act and under the normal criminal procedure laws are the following. First, an arrest made under section 10, allows the authorities to detain the

arrestee without counsel * It should be noted that there is no formal right to counsel anywhere in the United Kingdom, thus making the period of detention very important. (Harvey, 656-57).

** It is interesting to note, that, in essence, the "Diplock Report" determined that jury trials were "not practicable in the case of terrorist crimes in Northern Ireland" due to the difficulty in obtaining a fair trial for Republican terrorists. (Resp. Ex. M, ch. 5, P36).

* The derogation filed in 1971 is still in effect. (Harvey, 1145-46).

** In 1971, the Government of the Republic of Ireland filed a complaint against the United Kingdom with the European Commission of Rights, alleging violations of the European Convention on Human Rights in so far as members of the security forces inflicted ill-treatment at the initial arrest and subsequent interrogations of those arrested on August 9, 1971 under the United Kingdom's internment procedures.

Except for a difference in structure and sub-paragraphing, Part I, section 6 the 1973 Emergency Provisions Act is identical in language to Section 8 of the 1978 Emergency Provisions Act, about which witness Masterson testified.

Section 6 provides:

(1) In any criminal proceedings for a scheduled offence a statement made by the accused may be given in evidence by the prosecution in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance to subsection (2) below.

(2) If, in any such proceedings where the prosecution proposes to give in evidence a statement made by the accused, prima facie evidence is adduced that the accused was subject to torture or to inhuman or degrading treatment in order to induce him to make the statement, the court shall, unless the prosecution satisfies them that the statement was not so obtained, exclude the statement or, if it has been received in evidence, shall either continue the trial disregarding the statement or direct that the trial shall be restarted before a differently constituted court (before whom the statement in question shall be inadmissible).

In recommending this standard, the "Diplock Report" concluded that:

[i]t would not render inadmissible statements obtained as a result of building up a psychological atmosphere in which the initial desire of the person being questioned to remain silent is replaced by an urge to confide in the questioner, or statements preceded by promises of favours or indications of the consequences which might follow if the person questioned persisted in refusing to answer.

(Resp. Ex. M, ch. 8, P90).

* The British Government abolished "political status" treatment for prisoners in March of 1976. Thus, anyone convicted of a crime after that date would automatically be treated as an "ordinary criminal." (Holland, 444).

for purposes of questioning for seventy-two hours rather than the maximum forty-eight hour period, applicable in standard criminal procedure, after which the arrestee must be presented before a magistrate.And moreover, a defendant prosecuted under the Act would necessarily be subject to trial in the so-called "Diplock Courts," one-judge courts sitting without juries, rather than in the "Crown Courts" where the defendant would be entitled as of right to a jury trial. ** It should be noted that in Sindona, the petitioner was seeking to invoke the "political offense" exception in the context of a charge of fraudulent bankruptcy and that the courts have consistently held that financial crimes are outside the scope of the "political offense" exception. See, footnote, supra, at 32.

* Both counsel for Mr. Mackin and the Assistant United States Attorney agree that the decision in Abu Eain does not include a holding of the court on the first element of the "political offense" exception.

(Holland, 446, 453; Harvey, 622-23; Lynagh, 1600). Furthermore, in conducting a trial in the Diplock Courts, the judge has the discretion to apply one of two legal standards regarding the admissibility of statements or confessions made by the defendant; the common law standard set forth in the "Judges' Rules" (Gov't. Ex. 15), or the more liberal standard for the admission of confessions in section 6 of the Act. * (Masterson, 1547-48). However, no court has specifically *[*82]*

determined whether the detailed guidelines for police interrogation procedures set forth in the "Judges' Rules" apply to interrogation and custody under the Emergency Provisions Act. (Masterson, 1550). It should also be noted that shortly after the introduction of internment through March of 1976, internees and prisoners arrested and convicted under the Act, who claimed a connection to one of the paramilitary organizations including the PIRA, or were convicted of a crime involving the PIRA or one of the other paramilitary groups, received "special category status" or "political status." * "Special category status" prisoners were housed in separate huts rather than cells, and were permitted to wear their own clothing, refuse to perform penal work, and to organize political groups among themselves. (Holland, 443-45; Mackin 781-82).

*[*83]*

Further evidence of the severity of political insurrection in Northern Ireland lies in the fact that in 1957, 1969 and 1971, the United Kingdom filed derogations to the European Convention on Human Rights (the "Convention") pursuant to Article 15 of the Convention which permits a Contracting Party to employ measures in derogation from its obligations under the Convention "in time of war or other public emergency threatening the life of the nation. . . ." (Resp. Ex. S, P203 (Article 15 of the Convention, P1); Harvey, 1143-45). * In its submission to the European Commission on Human Rights, in the Case of Ireland against The United Kingdom, ** The United Kingdom cited, in the words of the Convention, the reason for its derogation as the existence of a "public emergency threatening the life of the nation" due to the activities of the IRA in pursuit of its aim to destroy the existence of Northern Ireland as part of the United Kingdom. (Harvey, 1147). Indeed, in its judgment, issued in January of 1978, the European Court stated:

> Article 15 comes into play only "in time of war or other public emergency threatening the life of the nation." The existence of such an emergency is perfectly *[*84]* clear from the facts summarised above . . . and was not questioned by anyone before either the Commission or the Court.

(Resp. Ex. S, P205). ***

In terms of the political situation in Northern Ireland in 1978, the Government denies the import of the Diplock Court system and the derogations filed by the United Kingdom from the Convention, asserting that they relate to the 1972 peak period of violence rather *[*85]* than to 1978. (Government's Reply Brief, at 17-18). The Government is factually correct in recognizing that the recommendations made in the "Diplock Report" which resulted in the enactment of the 1973 Emergency Provisions Act were in response to the 1972 period of terrorist activities. The derogations, however, have been in effect since 1957 and have been renewed consistently thereafter. Regardless of the initial reasons for the enactment of the emergency legislation and the filing of the derogations, the reality is that the United Kingdom has not seen fit to abandon either of these measures and indeed they are still in force.

The Government advances two counter arguments based on the statistical evidence reflecting the degree of military or quasi-military conflict: (1) there was a marked, steady decline in the incidence of violence from 1972 to 1978 and (2) the level of the political violence in 1978 in Northern Ireland was insufficient to fulfill the first element of the political offense exception, i.e., the existence of a severe political disturbance such as a war, rebellion or revolution.

There is no quarrel that the statistical evidence provided by the RUC shows a significant *[*86]*

decline in the degree of violence from 1972 to 1978. However, a statistical comparison of the level of violence over the course of a decade is hardly dispositive of the political offense exception issue before this Court. We must still address the question of the level of conflict in 1978. Furthermore, in so far as we deem the political conflict in Northern Ireland in 1978 as part of an on-going, continuous uprising by the PIRA against British domination, with the goal of establishing a unified Irish nation, we view the statistics as one segment of the totality of evidence presented. * See discussion infra, regarding the contemporaneity requirement of the "political offense" exception, at 95-96.

The second thrust of the Government's argument requires a more detailed response. As the Government correctly points out the Second Circuit has not decided whether a political disturbance of a less violent character than a war, revolution or rebellion is sufficient to trigger the application of the "political offense" exception. Sindona v. Grant, supra, 619 F.2d at 173. ** Similarly, other recent cases construing the political offense exception in contexts where it is at least *[*87]*

arguably raised provide little guidance in this area. In Abu Eain v. Wilkes, the Court stated in dicta that: "[w]hen considering the political offense exception, a court need consider only whether some incidents of political violence have occurred, and not whether the violence has risen to a particular level." Supra, at 514 n. 14. However, the Seventh Circuit in Abu Eain issued no holding regarding whether there was a state of war, revolution or rebellion in Israel at the time of the commission of the offense charged in the extradition documents. * For example, the Courts have used the following descriptives in defining the requirements of the first element of the political offense exception: war, revolution, rebellion, insurrection, and uprising. See discussion, supra, at 28.

And in In re McMullen, supra, at 3-4, the Court apparently took judicial notice of the existence of an "insurrection and a disruptive uprising of a political nature" at the time McMullen committed the charged offenses. See also, Ramos v. Diaz, supra, 179 F. Supp. at 462 (where the Court took judicial notice of the political insurrection in Cuba between the Batista regime and Fidel Castro and his supporters).

*[*88]*

Thus, in view of the sparsity of American judicial precedent, we look to the language in In re Castioni for guidance in determining the level of violence required to find that the political situation is sufficiently severe to satisfy the first element of the political offense exception: there must be ". . . a political matter, a political rising, or a dispute between two parties in the State, as to which is to have the government in its hands. . . . ." Supra, 1 Q.B. at 156. In giving substance to this formulation, American courts have alternatively labeled the requirement for a severe political disturbance. *

Without belaboring the difference in the semantic variations that have been applied, we conclude that when viewed in the context of a continuous uprising spanning at least a decade, with historical antecedents, the level of violence in Andersonstown, Belfast, Northern Ireland in March 1978 was of sufficient severity and in the nature of *[*89]* the political uprising as contemplated by In re Castioni, and the subsequent American applications of the "political offense" doctrine, to satisfy the first element of the exception.

The Government also submits that this Court is precluded from finding that there was a severe political disturbance in Andersonstown, Belfast, Northern Ireland in 1978 since the PIRA is an unorganized, dispersed organization, rather than a structured army, engaged in terrorist activity with little community support. In this connection the Government cites Abu Eain v. Wilkes, supra, 641 F.2d at 519-20, in support of the proposition that a distinction

ought to be drawn between those cases in which extradition has been barred based on a finding of "on-going, organized battles between contending armies, . . ." and cases in which the conflict involved dispersed organizations, such as the PLO, engaged in "destructive efforts at a defined civilian populace." (See, Government's Brief, at 75-79 and see 1698). We reject the Government's argument as unsupported for the following reasons.

In support of its factual argument regarding the nature of the PIRA, the Government seeks to compare the PIRA with other *[*90]* contemporary terrorist groups, namely the Basque terrorists in Spain and the "Red Brigade" in Italy. (See generally, Perez, 1346-57). In attempting to draw this parallel, testimony was adduced which focused on: (1) the structure of the PIRA as a clandestine, cellular organization, consisting of approximately 200 to 250 members, with little community support; and (2) the similarity of the tactics employed by the PIRA and other terrorist organizations with specific emphasis on civilian directed attacks, e.g., assassinations, knee-cappings, kidnappings, bombings and shooting attacks. (Perez, 1350-52, 1356; Masterson 1241-42). In addition, the Government's witness, Perez stated that similar to other terrorist groups, the basis objective of the PIRA is to "create a very unstable political situation in the country." (Perez, 1345, 1357). * It is interesting to note that when Mr. Perez was asked for his definition of "terrorism" he stated:

Well there is no really agreed definition of terrorism. There is the old cliche that one man's terrorist is another man's freedom fighter.

(Perez, 1357).

As we observed at oral argument, we cannot engage in a world-wide survey comparing *[*91]* the structure and tactics of one terrorist organization to another to determine whether, as a general proposition, the PIRA's activities should be excluded from the application of the political offense doctrine. (1698). In addition, the facts relied upon by the Government in making this argument are not undisputed by other facts in the record. Indeed, the PIRA has been characterized not as a group of "mindless hooligans" but as an organized group of 500 "hard core," experienced and high caliber members. (Holland, 489; Masterson, 1522). Quite contrary to the image of the PIRA as a "dispersed" group, its members have conducted so-called "Republican funerals" for fellow members who have been killed in Northern Ireland. At a "Republican funeral," PIRA members march in formation, wearing distinctive uniforms, and fire volleys of ammunition over the grave of the deceased. (Holland, 536-38; Masterson, 1416-19). Likewise, Government witness, Garrett agreed with the description of the Provisional Movement as "committed to the traditional aim of Irish nationalism, that is, the removal of the British presence from Ireland," (Garrett, 1073), by engaging in "armed conflict with the forces *[*92]* of the state." (Garrett, 1018). And while the entire Catholic community does not necessarily support the terrorist activities of the PIRA, nevertheless it does provide widespread passive support such as the harboring of a member of the PIRA who is being sought by the authorities. (Holland, 518-20).

Moreover, the Government's reliance on Abu Eain v. Wilkes, is somewhat misplaced. As noted above, the Court in Abu Eain never determined whether the "conflict" in Israel was of sufficient severity to satisfy the first element of the political offense exception, nor addressed how the dispersed composition of the PLO related to determining whether there was a severe political disturbance. Supra, 641 F.2d at 519. Rather, the Seventh Circuit held that the specific violence alleged, the indiscriminate bombing of a civilian populace, was an "anarchist-like activity, i.e., the

destruction of a political system by undermining the social foundation of the government," id. at 521, without substantial ties to political activity and thus not "incidental to" a political disturbance. * Similarly, if the specific violence alleged in the case before this Court was of an anarchistic nature, directed at the civilian population, we would not conclude that the act was "incidental to" and in "furtherance of" a severe political disturbance. See discussion, infra, at 98-99.

*[*93]*

One matter not specifically raised but suggested by the Government ought to be addressed at this point. (Government's Brief, at 77). The testimony of Government's witness Masterson is scattered with references to the fact that the violence has not been widespread but has been concentrated in the West Belfast area. (See, e.g., Masterson, 1254-58). * For example, Masterson stated:

. . . it's possible in one day you can drive right across from Northern Ireland from north to south, east to west, and never see a member of the police or army or a terrorist. In a sense it's a very peaceful setting.

So far as the Belfast area is concerned, again, reading the newspapers or listening to television, one would imagine that the entire city of Belfast was consumed by terrorist violence. In point of fact, right through the situation, the majority of a great amount of the terrorist violence has been concentrated in the west part of the city.And in the parts of North Belfast, Southeast Belfast, and the surrounding area on those compass points have been relatively unaffected by it. That's not to say that occasional attacks haven't taken place, but by and large, the people in those areas have again, even though they live in at most five to six miles where the main terrorist violence has occurred, would be unaware of what was going on.

(Masterson, 1255-56).

First, it should be noted that Masterson's testimony is not controverted in so far as it designates the focal point of the violence. However, his assertion that large parts of Northern Ireland have been totally or relatively unaffected, including other parts of Belfast, seems somewhat arguable in light of the other testimony adduced at the hearing, which has been reviewed above. In any event, there is no requirement in the case law that there be a widespread, nationwide civil war in order to satisfy the first element of the "political offense" exception. In fact, In re Castioni involved a political uprising in one town in a canton in Switzerland, which Judge Denman described as a "small community," Supra, 1 Q.B. at 157. Thus, in so far as the evidence supports a finding of a severe political disturbance in the West Belfast area, where *[*94]* the alleged offense was committed, we need not determine the geographical scope of the disturbance nor alter our conclusion based on Masterson's testimony.

In light of *[*95]* the foregoing review of the evidence and having rejected the Government's arguments, the Court concludes that there was a political conflict in Andersonstown, Belfast, Northern Ireland in March of 1978 which was part of an ongoing political uprising, fluctuating in intensity, but nevertheless of sufficient severity to satisfy the first prong of the political offense exception.

In order to avoid any possible confusion as to the standard this Court has employed in reaching this conclusion, we shall in summary fashion reiterate the evidence specifically relevant to March of 1978, which has formed the basis for our decision.

1. The statistics supplied by the RUC indicate generally a high level of violence in 1978, and that the violence was concentrated in the Catholic areas of West Belfast and Derry;

2. There were 13,000 British Army personnel in Northern Ireland in 1978, approximately 420 of which, according to the Government, were stationed in Andersonstown, to aid the already ample police force in containing the violence.

3. There were three British Army forts established for the housing of soldiers, Fort Monagh, Silver City, and the Woodbourne Army base, all of which *[*96]* were in the Andersonstown area;

4.The United Kingdom enacted emergency legislation, the 1973 Emergency Powers Act, in effect in March, 1978, which included the establishment of special non-jury courts known as "Diplock Courts," in order to adequately deal with the rise in terrorism in Northern Ireland.

5. The United Kingdom filed derogations from the European Convention on Human Rights to allow it to forego its obligations thereunder, citing as its reason the existence of a "public emergency threatening the life of the nation."

6. The PIRA, which has been identified as the uprising group in 1978 and the ideological successor of the IRA, has maintained a campaign of violence aimed at the British Army and Loyalist forces against British domination of Northern Ireland and in support of a unified, independent Irish nation.

B. Respondent Mackin's Participation In The "Uprising Group" Having determined that there was a political insurrection in Northern Ireland, which has spanned a considerable period of time, up through and including March of 1978, and having identified the IRA and its ideological successor, the PIRA as the revolutionary force, we now consider the second *[*97]* element of the political offense exception, whether Mackin was a member of the "uprising group." * Throughout this discussion in referring to the "uprising group," both the terms PIRA and Republican Movement uill be used since the "Republican Movement" is made up of three branches including the PIRA (the other two branches are Sinn Fein, the political wing and "Na Fianna Eireann," the youth branch) and as such both terms have been used in the discussion above of the forces involved in the political uprising in Northern Ireland. (Mackin, 727; Holland, 428-29).

Based on the record before us, this Court concludes that Desmond Mackin has unquestionably sustained his burden of proof in establishing his long standing commitment to the Republican Movement and his membership in the PIRA on March 16, 1978, the date of the offense charged in the extradition papers.

Desmond Mackin was born on July 18, 1955 in West Belfast. (Mackin, 725). Mackin has a family heritage of activism in the Republican Movement (Mackin, 740), and not infrequently, as a child and young man, he was personally confronted with the violence and political unrest in his community. His grandfather, John Mackin, *[*98]* was a commander in the IRA in the 1920's in Fermanagh, one of the border counties in Northern Ireland. Mackin's grandmother was active in the Republican women's organizations as a young girl and through the 1940's; in approximately, 1942 she was arrested by the British after they seized "the newspaper of the Irish Republican Army in the back of her home." (Mackin, 740-41). And, in 1956, two of Mackin's uncles were arrested and imprisoned for IRA related activities during the 1956 border campaign. (Mackin, 741-42).

In 1963 Mackin and his family were driven out of their home in East Belfast, a largely Loyalist community, at gunpoint by a group of Loyalists. After this incident in search of a safer community, the Mackin family moved to the heart of West Belfast. (Mackin, 744). In 1969 Mackin and his family were again forced out of their home by a Loyalist group; this time, however, they were beaten and their house was one of the 500 burned by Loyalist mobs that night. (Mackin, 746-47).Subsequent to this, Mackin and his family lived in the barricaded area of the Catholic

community on relief funds until they received an emergency house in Andersonstown. He lived there for a period *[*99]*
of time and his mother has continued to live there to the present day. (Mackin, 748). In late 1969 and early 1970, at the time when the Westminster Parliament sent in the British Army to aid in containing the violence and the Catholic communities began to organize against the Loyalists and British, toward the achievement of nationalistic goals, Mackin joined "Na Fianna Eireann" ("Soldiers of Ireland"), which was the youth branch of the Republican Movement. (Mackin, 749-50). As a member of "Na Fianna Eireann," Mackin was active in street demonstrations and street riots and performed reconnaissance tasks and gathered intelligence in cooperation with the IRA. (Mackin, 760). In 1971, Mackin became active in the Republican Movement on a full-time basis. That year Mackin was arrested by British troops and interrogated at the Andersonstown barracks. As he was too young to be interned, he was released after having refused to answer any of the authorities' questions. (Mackin, 763-64).During the 1972 truce negotiations with the British Army, Mackin functioned as an intermediary and negotiator in Andersonstown with the British Army; he had face-to-face meetings on two occasions with *[*100]*
the local British Commander and was recognized as an officer in command of the First Battalion, Belfast Brigade, Irish Republican Army. (Mackin, 810-11). That same year Mackin was arrested, interrogated, tried and convicted on charges of membership in the IRA. At that proceeding, Mackin refused to recognize the jurisdiction and legality of the court and refused to take part in the trial, asserting that he was an Irish Republican. (Mackin, 765-72). He was sentenced to five years imprisonment at Long Kesh for the offense of membership in the PIRA. (Mackin, 773). At Long Kesh, Mackin was granted political status * According to Mackin, in order to be granted political status, one of the proscribed organizations, the Ulster Defence Association or PIRA, was required to claim that the prisoner was a member or supporter, and the offense committed had to be relevant to the contemporary political insurrection. (Mackin, 781).
and was commanding officer of one of the PIRA suborganizations within the prison. He also represented 90 PIRA prisoners in the compound in negotiations with the British prison authorities. (Mackin, 779, 781-83).

In 1976 Mr. Mackin was released from prison *[*101]*
and he returned to his home in West Belfast. (Mackin, 784). During the years following his release, Mackin was the subject of continuous personal surveillance and harassment by the RUC and the British Army. Indeed, Mackin was stopped on the average of three times a week for identity checks by the military forces, and his home, which was in direct view of the Woodbourne Army base, was subject to constant camera surveillance, photographing anyone entering or leaving his home. (Mackin, 784-88, 792-97). Furthermore, the local British regiment made a number of threats on his life. (Mackin, 797). Indeed, Mr. Mackin rarely spent a night at home with his wife and child due to the constant photographic surveillance of his home. (Mackin, 814, 817). Also, during this time Mackin helped to establish and coordinate the efficient operation of the "people's taxi" system in Belfast.

At the hearing, Desmond Mackin testified that on March 16, 1978, he was (1) an active member of the "Provisional Wing of the Irish Republican Army . . . First Battalion, Belfast Brigade" (Mackin, 1162); (2) "chief organizer attached to Belfast Sinn Fein, Belfast executive" (Mackin, 813); and (3) a coordinator *[*102]*
for the Republican Movement. (Mackin, id.) Mackin described his function as coordinator for the Republican movement as one of organizing people to support the movement and the guerilla war and attempting to coordinate the activities of the anti-British troops in West Belfast. (Mackin, 813-14). Mackin also testified that he had been identified by the British army intelligence as a Republican activist and that his photograph had been carried by Army

members and taped to the butt of the rifles of some British Army intelligence officers. * Indeed, Mackin's testimony in this regard comports with the statements of the four soldiers. For example, Soldier A acknowledged:

I was able to recognize them because I had been operating in the Andersonstown area, and had been familiarised with the photographs and descriptions of persons who were of relevance to me duties.

(Doc. Ev. 16).

* According to Mackin, it is the fashion for Irish men to wear their hair slightly long. Thus, the strangers' short haircuts added to Mackin's suspicion that they did not belong in the area.(Mackin, 819).

However, Mackin entered this country illegally (Mackin, 875) and was at the time of the issuance of the warrant on this extradition complaint, under arrest by the Immigration and Naturalization Service and the subject of a deportation proceeding based on his entry into this country without a visa. (Gov't. Exs. 9, 10, 11 and 12). The deportation proceeding has been "held in abeyance during the pendency of the extradition" (1676) and an order of deportation is not outstanding. (1405). In fact, Mackin has disclaimed an interest in remaining in the United States and instead has expressed a desire to return to the Republic of Ireland (1677). In this connection, it may be noted that under the Dual Jurisdiction Act Mackin may be tried in the Republic of Ireland on the charges for which extradition is sought. (Garrett, 1059).

(Mackin, 814-15). Following the March 16, 1978 incident, (Mackin, 816-30), Mr. Mackin, having been released on bail, returned to his community and resumed his political activities in the Republican Movement, working out of the Sinn Fein office center in Andersonstown, organizing street demonstrations against the British military and governmental presence in Northern Ireland, and in protest against the brutal treatment of prisoners. (Mackin, 844, 846-48). After several attempts and threats were made on Mackin's life, having been subjected to frequent street interrogation, and after having his home searched on a rather routine basis, Mackin fled *[*103]* to the Republic of Ireland. (Mackin, 852-57). In the Republic, Mackin continued his commitment to nationalistic political activism and became involved in organizing the Republican Movement in several of the border counties. (Mackin, 857, 868). In July of 1980, Mr. Mackin was assigned to the Foreign Affairs Department of Sinn Fein and the Republican Movement and was sent to the United States to speak to Irish-American groups, lobbyists and journalists to publicize the Irish question and speak on behalf of Republican prisoners in Northern Ireland. * In fact, Mr. Mackin received a commendation from the Pennsylvania legislature for his determination and efforts in promoting civil and human rights. (Mackin, 868-71; Resp. Ex. J).

*[*104]*

In addition, Mackin testified that he is presently a member of the Republicans Movement (Mackin, 727), which he described as:

. . . a steady tradition of rebellion in Ireland against British rule. It has a traditional link going back to . . . 1798, when it was founded under the name of United Irishmen. . . .Irish Republicanism is a non-sectarian concept. It's anti-royalty and monarchist.

(Mackin, 728). And in clarifying the role of the PIRA as the present day military wing of the Republican Movement, Mackin further stated that the aims of the PIRA are identical to those of the IRA whose members rebelled in 1916, conducting a campaign of violence against the British Army and British military institutions, in opposition to British domination, and in the hope of establishing a democratic 32-county Irish Republic. (Mackin, 731-32).

In light of the foregoing recitation of the evidence, this Court concludes that it is beyond cavil that on March 16, 1978 Desmond Mackin was a committed activist in the Republican Movement and in the PIRA. Accordingly, to the

extent that Mackin's acts on March 16, 1978 were in conformity with his general functions as a member of the Republican *[*105]*

Movement and the PIRA, we find that Mackin bore no personal ill will or malice toward the victim-soldier, but acted in accord with the political activity contemplated by the political offense exception. See, Ramos v. Diaz, supra, 179 F. Supp. at 463.

C. The Requirement That The Act Be Committed "Incidental To and "In Furtherance Of" a Severe Political Disturbance Having determined that respondent Mackin has satisfied the first two elements of the political offense exception we now turn to the one remaining issue that must be analyzed: whether the act of March 16, 1978 was "incidental to" and "in furtherance of" the political uprising described above. With respect to this issue that Government's submissions are unclear as to whether they argue that: (1) Mackin's affirmative denial of the offense charged in the extradition papers precludes application of the political offense exception; or that (2) Mackin's affirmative denials of any overt act severs any arguable connection between his activities of March 16, 1978 and the political disturbance. We presume the latter, because requiring Mackin to admit to the commission of the charged offense would put him in the untenable position *[*106]*

of requiring him to either perjure himself or waive his Fifth Amendment privilege against self-incrimination or the corresponding British testimonial privilege in the hope that this Court would not extradite him. Furthermore, there is nothing in the case law which indicates that the respondent must admit to the commission of the charged offense in order to raise the political offense exception; in fact, in Ramos v. Diaz, the defendants denied the commission of the offense.

Moreover, based on the following discussion, this Court concludes that Mackin's acts either as alleged in the extradition papers or according to his version of the events were "incidental to" and "in furtherance of" a severe political disturbance such as a war, revolution, rebellion or uprising.

The sequence of events on March 16, 1978 recited in the extradition documents have been discussed in the probable cause section of this opinion and need not be reviewed again here.

According to Mackin, the events and circumstances of March 16, 1978 are as follows. As mentioned above, at that time Mackin was an active member of the PIRA, chief organizer attached to the Belfast Sinn Fein and a local coordinator for *[*107]*

the Republican Movement. (Mackin, 813, 1162). As such, Mackin was particularly familiar with the Rossnareen-Ramoan Gardens area and was "at all times prepared to take on a member of the British Army. . . ." (Mackin, 1174, 817-18).

On the morning of March 16, 1978 Desmond Mackin and his friend Robert Gamble ("Gamble") began their day by searching for and obtaining information regarding the whereabouts of Mackin's missing "people's taxi" service cab. They were directed to the Rossnareen-Ramoan Gardens area where they began an active search on foot. After walking in that vicinity for approximately fifteen minutes, Mackin and Gamble noticed a group of strangers, fairly young men with short haircuts, * conspicuously standing on certain street corners. Mackin was able to identify the group as "strangers" in the area, since he knew almost everyone in the community, at least by sight, and since the men acted in a manner which was, in general, out of the ordinary for residents of Andersonstown. Furthermore, the group of men appeared to be shadowing Mackin and Gamble, following them block by block. (Mackin, 816-20).

*[*108]*

Mackin and Gamble also became aware of other indications of unusual activity. The streets, usually crowded with children playing, were quiet and a mini-van travelled through the streets while someone inside the van was apparently taking photographs from its window. In addition, they observed two British Army helicopters hovering overhead, one over the Turf Lodge and the other over the area to the south. (Mackin, 820-22).

After approximately one-half hour, in an effort to escape from the circle of strangers being formed around them, Mackin and Gamble decided to proceed to Glen Road, a major, heavily-trafficked artery where the "people's taxi" operated, in the hopes of avoiding a confrontation or to position themselves in a more tactically desirable location. By this point Mackin had definitely concluded that the strangers were undercover British soldiers and naturally, the search for the missing taxi was abandoned. (Mackin, 822-23; 1165-67; 1178). When Mackin and Gamble reached Glen Road they noticed on the opposite side of the road one of the "strangers" who they had seen earlier (identified as Soldier A or Soldier Stephen Wooten in the extradition documents). Determining *[*109]* that he was the "weakest link" in the group of undercover soldiers, Mackin approached him and confronted him with a view towards establishing his identity and the purpose of his presence in the area in order to alert one of the local PIRA defense units which could properly deal with the situation. (Mackin, 824). Indeed, according to the sworn statement of Soldier A, Mackin inquired as to who he was and what he was doing in the area. (Doc. Ev. 16). In response, Soldier A, a specialist in anti-terrorism in Northern Ireland (Doc. Ev. 13), who had been operating in the Andersonstown area and was on plain clothes duty in Andersonstown on March 16, 1978, recognized Mackin and Gamble from "photographs and descriptions of persons who were of relevance" to his duties, (Doc. Ev. 16), and drew his pistol and began firing. (Mackin, 825).

Mackin and Gamble, who were both unarmed, began to assault Soldier A and both were severely wounded by the ensuing gunfire from Soldier A and the back-up members of his patrol. (Mackin, 825-826). In either their depositions or sworn statements Soldiers A, B, C and D stated that they recognized Mackin. (Doc. Ev. 10, 16, 18, 37, 49).

For the purposes *[*110]* of our analysis here, the similarity between Mackin's version of the events and that of the United Kingdom regarding the initial encounter between Mackin and Soldier A, the "overt act" which triggered the following sequence of events, obviates the need for this Court to choose between the two versions. * It is not surprising that in the statement given to the RUC, (Doc. Ev. 101-02), Mackin did not relate his initial verbal confrontation with Soldier A nor that the encounter was initiated by him as part of his duties as an active member of the PIRA since PIRA membership is a crime, punishable by a substantial term of imprisonment.

Contrary to the Government's suggestion, Mackin has not affirmatively denied committing any overt act, but denies the events following the initial confrontation, as recited in the extradition documents.

In so far as the exception requires that the act be "incidental to" a severe political disturbance and to the extent that this has been interpreted to require some degree of contemporaneity between the commission of the act and the political uprising we rely on our discussion above regarding the history and past decade of political violence in Northern *[*111]* Ireland. Based on that discussion this Court has already concluded that there was a political uprising in Andersonstown on March 16, 1978. Furthermore, as the court reasoned in In re McMullen

[a] political disturbance, with terrorist activity spanning a long period of time cannot be disregarded even if, in fact, the PIRA lifted not one single finger in either Northern Ireland or Great Britain to further its cause of nationalism of Ulster on the day Claro Barracks were bombed.

Supra, at 5.

*HN19*[↑] The political offense doctrine also requires that the act be committed "in furtherance of" the political uprising: there must be a substantial tie between the specific act and the political activity and goals of the uprising group. Abu Eain v. Wilkes, supra, 641 F.2d at 520-23. Absent this direct link "isolated acts of social violence undertaken for personal reasons would be protected simply because they occurred during a time of political upheaval, a result we think the political offense exception was not meant to produce." Id. at 521. In the case before this Court, although the act was neither pre-planned nor directed by the PIRA (Mackin, 1171-74), the necessity of the situation caused *[*112]*

Mackin's innocent search for his taxi to effectively become a reconnaissance mission, a function of any military or paramilitary personnel and as Mackin testified, "part and parcel" of his official duties as a member in the First Battalion of the PIRA. (Mackin, 1162).

In fact, while we are in no way bound by the way in which the United Kingdom, the requesting Party, views Mackin's act, we mention that he was arrested under section 10 of the 1973 Emergency Provisions Act, i.e., as a suspected terrorist, * Notably, the Act defines "terrorism" as follows:

the use of violence for political ends . . . includ[ing] any use of violence for the purpose of putting the public or any section of the public in fear.

The Act further defines "terrorist" as:

a person who is or has been concerned in the commission or attempted commission of any act of terrorism or in directing, organizing or training persons for the purpose of terrorism.

(Resp. Ex. N, section 28; see also, Lynagh, 1597).

and thus channeled into the Diplock court system for trial. The authorities made this conscious decision, having the option of treating Mackin's offense as a scheduled one, subject to the procedures established by the Emergency Powers Act or as a descheduled offense, which would be processed and prosecuted under the ordinary criminal procedures.(See discussion, supra, at 70). In fact, Government's witness Lynagh agreed that the probable reason for the election to proceed against Mackin under the emergency legislation was the fact that he was suspected as an active member of the PIRA. (Lynagh, 1603).

*[*113]*

Furthermore, given the quality of the overt act and the events which ensued, according to either the United Kingdom's version or Mackin's version of the incident, the pending case is easily distinguishable from Abu Eain v. Wilkes. Unlike the offense at issue in Abu Eain, which was an instance of random terrorism directed at the civilian population, Mackin's act was aimed directly at a member of the British Army, the opposition force, who was performing his duties as an intelligence gathering plainclothes soldier in Andersonstown on March 16, 1978. See also, Ornelas v. Ruiz. In short, it was a confrontation between "two parties in the State as to which is to have the government in its hands. . . ." In re Castioni, supra, 1 Q.B. at 156. And clearly, while this one act could not possibly bring to fruition the goals of the PIRA, it was undoubtedly free from personal motive and substantially linked to the traditional goal and strategy of the IRA and PIRA: an independent Ireland, free from British rule through the use of

violence. Indeed, if the offense committed was anarchistic in nature and focused toward the disruption of the social fabric rather than the political structure of the *[*114]* state, we would not conclude that the act bore any connection to the political activity nor that it was committed "in furtherance of" a political uprising. Yet, given the nature of Mackin's act and the totality of the incident, the well reasoned limitations circumscribing the application of the political offense exception set forth in In re Meunier and Abu Eain v. Wilkes are inappropriate in the case before this Court. We wish to make clear however, that this Court shares the concern expressed by the Seventh Circuit in Abu Eain that the political offense exception should not be applied so as to create a safe haven for terrorists in the United States.

One other matter ought to be addressed before we conclude our opinion.At oral argument, the Government, relying on In re Gonzalez, suggested that in any event extradition should not be barred because Mr. Mackin was not going to be extradited to a totalitarian government. (1679-82). The Government's reliance on In re Gonzalez, is misplaced, since in that case the Court considered the nature of the government of the requesting country in dicta only, holding however, that there was no "uprising" or political disturbance in the requesting *[*115]* country at the time the alleged crimes were committed. Supra, 217 F. Supp. at 721 & n. 9. * In re Gonzalez is the only case in American jurisprudence which mentioned the nature of the government of the requesting country in analyzing the applicability of the political offense exception.

Furthermore, to adopt the Government's argument would require this Court to engage in the analysis of a political question, to determine the nature of a present political structure in a foreign country, which the Government severely admonished against in its jurisdictional argument.

CONCLUSION

In conclusion the Court holds that while there was sufficient probable cause to certify extradition, respondent Mackin has satisfied the requirements of the political offense exception. Accordingly, the United Kingdom's request for the extradition of Desmond Mackin is denied under the provisions of the Extradition Treaty between the United States of America and the United Kingdom entered into force on January 21, 1977 and the warrant of arrest issued on November 19, 1980 is ordered vacated. * At oral argument the Government requested a stay of this decision pending appeal in the event that it was adverse to the United Kingdom. (1702). In light of our understanding of the law to the effect that extradition orders are sui generis and not appealable as of right, we requested further briefing on the Government's request. Jhirad v. Ferrandina, supra, 536 F.2d at 482. By letter, dated August 3, 1981, the Government appears to have withdrawn its request for a stay, relying instead on authority permitting it to refile its extradition request before another judicial officer. Indeed, the Government cites In re Gonzalez, 217 F. Supp. 717 (S.D.N.Y. 1063) in which a second request for extradition was filed, after the United States Commissioner denied extradition on the ground that the offenses charged were political offenses. While a holding that the Government be required to refile an extradition request rather than appeal makes eminent sense when the denial of the request turns on an issue of probable cause, we do not believe that the same rationale is necessarily appropriate to cases in which extradition is denied on the ground that the political offense exception applies. Traditionally the Government has the right to resubmit an indictment to a grand jury or a complaint to a magistrate, if the grand jury or magistrate rejected the initial submission on probable cause grounds. In contrast to the factual nature of a probable cause determination, a finding that the political exception applies is essentially a determination of law presenting a typical appellate issue. Nevertheless, we cannot disagree with the Government's conclusion that the relevant precedent supports refiling, rather than appeal.

*[*116]*

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