Denver Journal of International Law & Policy

Volume 15
Number 2 *Winter/Spring*

Article 4

January 1987

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Keywords
Extradition, Political Crimes, Crimes, International Criminal Law, States

CRITICAL ESSAYS

The "Political Offense Exception" Revisited: Extradition Between the U.S. and the U.K.- A Choice Between Friendly Cooperation Among Allies And Sound Law and Policy

M. CHERIF BASSIOUNI*

PREFACE

The *Denver Journal of International Law and Policy* is to be complimented for its initiative in exploring the thorny question of the "political offense exception" to extradition, in light of the ratification of the "Supplementary Treaty Concerning Extradition Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, signed at London on June 1972," of 25 June 1985 (hereinafter the Supplementary Treaty).[1] The two articles by State Department Legal Adviser Abraham Sofaer and Professor Christopher Blakesley reflect the dual scope of this *Journal:* Law and Policy. Mr. Sofaer advocates a policy, which he largely shaped, on extradition as an instrument of combating "terrorism." Professor Blakesley describes with scholarship and insight the history, evolution, and application of the "political offense exception." Both articles are significant contributions to understanding respectively, the Administration's policy and the legal jurisprudential significance of the "political offense exception" in the law and practice of extradition. Mr. Sofaer's ardent advocacy of a certain policy is counter-balanced by Professor Blakesley's equally convincing legal analysis. Intellectually, the articles are distinguishable as to the depth of their respective analyses and the breadth of their research. More significantly however, the basic values embodied in each article differ in many respects. The reader will no doubt readily note these differences, but what may need further reflection are the future im-

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1. The Supplementary Treaty was ratified by the Senate on July 17, 1986. It supplements the Treaty on Extradition between the United States and the United Kingdom of June 8, 1972, *entered into force*, January 21, 1977, 28 U.S.T. 227, T.I.A.S. No. 8468. *See* Recent Development, *Extradition: Limitation on the Political Offense Exception*, 27 HARV. INT'L L.J. 266 (1986).

plications of the policy advocated by Sofaer and the description of the law and jurisprudence provided by Blakesley. This article will seek to develop a bridge between law and policy, in an effort to assess the implications of the Administration's policy on the law and practice of extradition through the paradigm case of the Supplementary Treaty.

INTRODUCTION

Individual terror-violence has increased over the last two decades, as has state-sponsored terror-violence.[2] Notwithstanding the greater harm caused by state-sponsored terror-violence, the United States and most Western European countries have focused their attention and directed their efforts against individual terror-violence,[3] while treating the greater depredations caused by state-committed terrorism with benign neglect.[4] Only one state that has supported individual terror-violence, Libya, has been the target of United States reaction.[5] Understandably, governments find it difficult to deal with state-committed and state-sponsored terror-violence because of a variety of political and economic considerations, although this difficulty is hardly justifiable on moral or ethical grounds.[6]

In the United States, the contemporary debate on terror-violence, regardless of its source, origin, or cause, selectively centers on the Palestinian-Israeli conflict, and to a lesser extent, on the conflict in Northern Ireland. The focus on the Middle East is due to the pressures of a strong domestic constituency, the pro-Israel lobby, and on Northern Ireland be-

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2. The number of international incidents rose from approximately 500 per year for the period 1979 - 1983, to approximately 600 for 1984, and to nearly 800 for 1985, but is likely to be lower in 1986. The number of casualties from 1984 was 1279 with 312 deaths to 2177 and 877 deaths in 1985, but 1986 is expected to fall between these two figures. *See* U.S. DEP'T OF STATE, Pub. No. 744, TERRORISM: OVERVIEW & DEVELOPMENTS (1985). The figures reflected are based on the Department of State's classification which is under "premeditated, politically motivated violence perpetrated against noncombatant targets by substantial groups or clandestine state agents, usually intended to influence an audience." International terrorism is defined by the U.S. as "terrorism [as defined above] involving citizens or territory of more than one country." *Id. See also*, PUBLIC REPORT OF THE VICE PRESIDENT: TASK FORCE ON COMBATTING TERRORISM (1986). *See* J. MURPHY, PUNISHING INTERNATIONAL TERRORISTS 109-15 (1986); M. Bassiouni, *International Control of Terrorism: Some Policy Proposals*, 37 INT'L REV. CRIM. POL'Y 44 (1981) (U.N. Doc. ST/ESA/SER.M/37 (1985); M.C. Bassiouni, *A Prolegomenon to Terror-Violence*, 12 CREIGHTON L. REV. 745 (1979). *See generally*, M.C. BASSIOUNI, INTERNATIONAL TERRORISM AND POLITICAL CRIMES (1975) [hereinafter BASSIOUNI, INTERNATIONAL TERRORISM]; Friedlander, *The Implausible Dream: International Law, State Violence and State Terrorism*, in GOVERNMENT VIOLENCE AND REPRESSION (G. Lopez & M. Stohl eds. 1986); R. FRIEDLANDER, TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL (Vols. I-II 1979; Vol. III 1981).

3. *See* J. MURPHY, *supra* note 2.

4. *See* Bassiouni & Beres, *Panel on Terrorism*, 1985 A.S.I.L. PROC.

5. *See e.g.*, Church, *Hitting the Source*, Time, Apr. 26, 1986, at 16-27; Doerner, *In the Dead of the Night*, Time, Apr. 26, 1986, at 28-31; Church, *Forgetting Gaddafi*, Time, Apr. 21, 1986, at 18-27; Thomas, *Week of the Big Stick*, Time, Apr. 7, 1986, at 14-15; Stengel, *Sailing in Harm's Way*, Time, Apr. 7, 1986, at 18-24.

6. *See e.g.*, Church, *The U.S. and Iran*, Time, Nov. 17, 1986 at 12-26.

cause an external ally, the United Kingdom, presses for U.S. cooperation against IRA militancy. The issues in this article focus primarily on the debate surrounding the latter conflict.

The conflict in Northern Ireland is unofficially reported as having caused 25,000 casualties over the last four decades. Since the early 1980's, both the U.K. and the U.S. have focused their efforts on enhancing the extradition of accused IRA "terrorists" from the U.S. to the U.K. Since 1985, these efforts have centered on the Supplementary Treaty. As a bilateral treaty, that instrument has no effect on the general law and jurisprudence of the United States concerning the limits of the "political offense exception," except insofar as relations with the U.K. are concerned.[7] The Supplementary Treaty is, however, a landmark in the history of the United States extradition law and policy for a number of reasons. The signing of the Supplementary Treaty was to have signaled the end of the Administration's support for years of legislative efforts to revise and update U.S. extradition law, which, for all practical purposes, has remained virtually unchanged since 1848.[8] In addition, it indicated that the Administration favors the selective bilateral treaty approach exemplified by the Supplementary Treaty.[9] Such an approach relies on politically convenient bilateral treaties with friendly states and political allies, and denies similar favored-state treatment to less friendly or inimical states. In some respects, such a policy is a reminder of the time when only friendly sover-

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7. The Report of the Committee on Foreign Relations, submitted with the Supplementary Treaty, states that Article III(b) applies only to the United States. It does two things: First, it limits the scope of Article III(a) in U.S. extradition proceedings to offenses listed in Article I of the Supplementary Treaty. In other words, if an individual is to be extradited to the United Kingdom for fraud, drug smuggling, or some other offense not listed in Article I, that individual may not invoke Article III(a) before a federal magistrate or judge. Article III(b) also gives either party to the extradition proceeding the right to appeal a finding under Article III(a). S. EXEC. REP 17, 99th Cong., 2d Sess. 5(1986).

8. Act of June 22, 1860, ch. 184, 12 Stat. 84; Act of March 3, 1869, ch. 141, 15 Stat. 337; Act of June 19, 1876, ch. 133, 19 Stat. 59; Act of June 6, 1900, ch. 793, 31 Stat. 656; Act of June 28, 1902, ch. 1301, 32 Stat. 419, 475; Act of March 22, 1934, ch. 73, 48 Stat. 454; Act of June 25, 1948, ch. 645, 62 Stat. 822; Act of May 24, 1949, ch. 139, 63 Stat. 96; Act of Oct. 17, 1968, Pub. L. No. 90-578, Title III, § 301(a)(3), 82 Stat. 1115.

9. Originally the Administration's position, as reflected in the Extradition Act of 1981, S. 1639, was to have the political offense exception removed from judicial consideration and made discretionary with the Secretary of State. *See* Note, *State Department Determinations of Political Offenses: Death Knell for the Political Offense Exception in Extradition Law* 15 CASE W. RES. J. INT'L L. 137 (1983) [hereinafter cited as Note, *State Department Determination*]. Subsequent bills referred back to the judicial determination of a political offense. The administration's efforts with respect to those bills were aimed at limiting the discretion of the judiciary. *See generally, supra* note 8. When the Administration came to the conclusion that the individual would still have a right to claim the defense with respect to crimes of violence if "exceptional circumstances" could be demonstrated, the Administration's focus shifted to the development of bilateral treaties. *See United States and United Kingdom Supplementary Extradition Treaty: Hearings on Treaty Doc. 99-8 Before the Senate Comm. on Foreign Relations*, 99th Cong., 1st Sess. 71(1985) [hereinafter cited as *Hearings*] (statement of William J. Hughes) p. 23.

eigns and states practiced extradition.[10] Extradition was then viewed as a process designed to benefit the mutual interests of political allies, to be used against those individuals who affected the political order or stability of the cooperating monarch or state. The bilateral treaty approach also reflects a definite choice to revert back to the nineteenth-century view that extradition is a contract between states where individuals are deemed objects, rather than subjects, of the process.[11]

Congress may not accept such a short-sighted policy approach and may, instead, continue its efforts toward comprehensive reform of U.S. extradition law. Nevertheless, the reform of national extradition legislation would not have a significant impact on national policy if the Executive pursues a different policy of negotiating bilateral agreements that derogate from, or make major exceptions to, the provisions of national law. If that is the case, the Senate, in the exercise of its constitutional power of "advice and consent," would have to be the watchdog of national consistency, a role that is not well suited to the functions of that body. Even so, however, the Senate may be understandably reluctant to make discriminating judgments on a proposed bilateral treaty, or make significant reservations or even deny ratification of a treaty, after a President had authorized its signature. The establishment and preservation of a policy of national consistency is best entrusted to the Executive branch.

The tensions between the Executive and the Senate were all too apparent in the ratification of the Supplementary Treaty, which the Senate ratified with "amendments" in the nature of reservations, accompanied by a "Resolution of Ratification," which was a binding source for that treaty's interpretation in United States courts.[12] The Senate, in an unprecedented manner, re-drafted the text of the Supplementary Treaty signed by the U.S. and the U.K., adding new provisions, deleting existing ones, and rewriting what remained of the original text. To a great extent, the Senate departed from its constitutional role of advice and consent, and virtually took over the President's prerogative to make treaties by redrafting a treaty that had already been signed.[13] Should that procedure become a precedent, the powers of the Executive would be undermined, and diplomatic relations between the U.S. and other states could be strained if a country which signed a treaty found itself with new textual

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10. *See, e.g.*, 1 M.C. BASSIOUNI, INTERNATIONAL EXTRADITION IN U.S. LAW AND PRACTICE, at 1-7(1983) [hereinafter cited as BASSIOUNI, EXTRADITION].

11. *See generally* A. BILLOT, TRAITE DE L'EXTRADITION (1874); J.B. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION (1891). *See also Hearings, supra* note 9, at 100 n.7 (statement of Christopher Pyle).

12. 132 CONG. REC. S91119 (daily ed. July 16, 1986); 132 CONG. REC. S9251 (daily ed. July 17, 1986).

13. Article II, §2 of the United States Constitution states: "The President. . .shall have Power, by and with the Advice and Consent of the Senate, to make Treaties. . ." The Senate's function of advice and consent is distinct from the President's power to negotiate, or make, treaties. U.S Const. art.II,[2]. For a discussion of this principle *see* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 130-36 (1972).

language to which it had never agreed and about which it was never presented a choice. In this case, however, the U.K. did not protest or reject the ratified version of the Supplementary Treaty, but since treaties are non-self-executing in the U.K., it must yet be embodied in national legislation.

I. NATURE OF THE EXTRADITION PROCESS: A CONTRACT OF CONVENIENCE BETWEEN STATES OR AN INTERNATIONAL LEGAL PROCESS?

Before going into an analysis of the Supplementary Treaty, it is first necessary to state the premises articulated here concerning the nature of the extradition process in order to provide a basis for some subsequent appraisals. Extradition can be described as the legal process based on treaty, reciprocity, comity, or national law, whereby one state delivers to another the person charged or convicted of a criminal offense against the laws of the requesting state, or in violation of international criminal law, in order to be tried or punished in the requesting state for the particular crime stated in the request.[14]

Extradition is conducted by and between two or more sovereign states in accordance with international law and the national laws of the respective states. It is not an exclusively political process between governments designed to serve only their political interests. Some governments and writers have, however, taken the position that extradition is predominantly a political process between states that involves their foreign relations, and that it is, therefore, in the nature of a "contract" or "compact" between states.[15] The Supplementary Treaty reflects this orientation. The implication of that conception is that the individual is only an "object" and not a "subject" of this legal process.[16] Consequently, the individual would have no rights except those that each of the two states choose to concede, without regard to other sources of international rights and obligations, and sometimes even in derogation of rights under national laws.[17] State-granted concessions to individuals will, of course, depend on the degree of political closeness of the respective states, regardless of the rights of the individual under national or international law. Thus, states

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14. This definition is based on BASSIOUNI, EXTRADITION, *supra* note 10, ch. I, at 6-7.

15. *See supra* note 11.

16. Bassiouni, *World Public Order and Extradition: A Conceptual Evaluation*, in AKTUELLE PROBLEME DES INTERNATIONALEN STRAFRECHTS 10, 12, 13 (D. Oehler & P.-G. Potz eds. 1970).

17. For example, some cases in the United States have held that the right to claim a violation of the rule of specialty is a state's right, and that in the absence of a protest by the interested state, the individual does not have an independent right to protest a violation of the rule. *See* United States v. Najohn, 785 F.2d 1420 (9th Cir. 1986); United States v. Jetter, 722 F.2d 371 (8th Cir. 1983); Fiocconi V. Attorney General of United States, 462 F.2d 475(2nd Cir.), *cert. denied*, 409 U.S. 1059 (1972). These decisions rely on a strained interpretation of United States v. Rauscher, 119 U.S. 407 (1886), which established the principle. *See* BASSOUNI, EXTRADITION, *supra* note 10, ch. VII, section 6, at 6-10; Note, *Toward a More Principled Approach to the Principle of Specialty*, 12 CORNELL INT'L L.J. 309 (1979).

desiring to strengthen their respective public orders will make extradition easiest between themselves. They will also reduce or eliminate some or all the substantive and procedural rights of the relator, which they would otherwise uphold with respect to states not enjoying such favored treatment.[18] Individual rights would thus depend upon state interests, irrespective of the other values and policies that might be at stake.[19] The better view, however, is that individuals are legal subjects entitled to assert rights that inure to their benefit under international law, applicable treaties, and national laws.[20] This view requires that such rights be afforded to individuals uniformly and consistently and that they not be dependent upon the tergiversations of political interests. Such a view derives from the concept of extradition as a tripartite international process involving the requesting state, the requested state and the relator, whose interests must be taken into account.

While relations between the interested states may be predicated on their perceived national interests, which legitimately include the preservation of public order and the duty to cooperate in the prevention and control of crime, there are nonetheless other interests that reflect certain national and international values, which must also be secured. These interests include protecting the integrity of governmental and judicial processes, observing and strengthening of the rule of law, and adhering to internationally recognized norms of human rights.[21] The preservation of these values requires that the relator's nationally and internationally defined rights, whether substantive or procedural, may not be overridden by state interests.

Furthermore, these values and interests must be defined with sufficient specificity and applied with a high level of consistency that would provide needed predictability in order to contribute to the preservation of world public order.[22] The consistent application of uniform standards of practice between states and the relator is self-evidently a sound policy. Such an application avoids competing claims and differing expectations by states that are not treated similarly, which might otherwise produce negative outcomes. Uniform and consistent practice is one of those common sense actions which is a wise policy in law and diplomatic relations.

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18. *See* S. EXEC. REP. 17, 99th Cong., 2d Sess. (1986); 132 CONG. REC. S9119 (daily ed. July 16, 1986).

19. *See supra* note 17. *Compare* Bassiouni, *supra* note 16.

20. *See* BASSIOUNI, EXTRADITION, *supra* note 10, C. VAN DEN WIJNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION 48-50 (1980).

21 Bassiouni, *Ideologically Motivated Offenses and the Political Offense exception in Extradition: A proposed Juridical Standard for an Unruly Problem* 19 DE PAUL L. REV. 217(1969).

22. *See generally* M. MCDOUGAL, H.D. LASWELL & L.C. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980); TOWARD WORLD ORDER AND HUMAN DIGNITY (W. Reisman & B. Weston eds. 1976); M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961).

II. THE BASES AND RATIONALE OF THE SUPPLEMENTARY TREATY

In its relations with the United Kingdom, the United States has concluded a number of treaties, the first of which was the Jay Treaty of 1794.[23] The Supplementary Treaty, is, however, the first time in the history of the U.S.-U.K. relations that the "political offense exception" has been removed from a treaty.[24]

The version of the Supplementary Treaty that was signed by the U.S. and the U.K. in 1985 bears only a slight resemblance to the essentially rewritten text as ratified by the Senate in 1986. The analysis that follows is based on the Senate's ratified text, with occasional references to the original 1985 text that was signed by the two governments. The Supplementary Treaty is in the nature of an amendment to the 1972 Extradition Treaty and is meant to "form an integral part of the Extradition Treaty."[25]

A. Scope of the Supplementary Treaty

Article I of the Supplementary Treaty amends and limits the scope of Article V, Paragraph (1)(c)(i) of the 1972 Extradition Treaty. It removes certain crimes from the purview of the "political offense exception." The new text of Article 1 states:

> For the purposes of the Extradition Treaty, none of the following shall be regarded as an offense of political character:
>
> (a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;
>
> (b) murder, voluntary manslaughter, and assault causing grievous bodily harm;
>
> (c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;
>
> (d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person;
>
> (e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense.

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23. For a discussion of the historical background of the treaties, *see* BASSIOUNI, EXTRADITION, *supra* note 10, at 1-107.

24. The Treaty of Amity, Commerce and Navigation with Great Britain (Jay's Treaty), November 19, 1794, [1795] 8 Stat. 116, T.S. No. 105, *reprinted in* 1 W. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICAN AND OTHER POWERS 590 (1910). *See also* S. BEMIS, JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY (2d ed. 1965). For a discussion of the treaty and its effect of American extradition, see MOORE, *supra* note 11, at 90.

25. *See supra* note 1.

As revised, the committee's amendment to Article I has five subparts.[26] Subpart (a) excludes offenses listed in certain multilateral conventions from consideration as a political offense. These are conventions in which two governments have agreed either to extradite or try an individual sought for such an offense. The four conventions to which this at present would apply are:

The Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at the Hague on 16 December 1970; The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature at Montreal on 23 September 1971; The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature at New York on 14 December 1973; and The International Convention against the Taking of Hostages, opened for signature at New York on 18 December 1979.

Subpart (b) covers serious violent crimes against the person. The term "voluntary manslaughter" is intended to cover crimes which have been held by the U.K. courts to be manslaughter and which in many U.S. states would amount to second degree murder.

Manslaughter under the law of many states of the United States is an offense punishable by up to 10 years imprisonment and under the law of the United Kingdom is punishable by a maximum of life imprisonment. In most states of the United States it applies primarily to such involuntary offenses as the grossly negligent and reckless driving of an automobile where a life is lost or such voluntary offenses as killing in the heat of passion.

The remaining subparts of Article I are for the most part self-explanatory. Subpart (c) excludes any offense involving kidnapping, abduction, or serious unlawful detention, including taking a hostage. Subpart (d) excludes any offense involving the use of a bomb, grenade, rocket, firearm, letter bomb, parcel bomb or any type of incendiary device from the political offense exception if that use endangers even a single person. Subpart (e) carries the exclusion forward to attempts and to those who are accomplices. For example, an individual accused of helping to construct a bomb, the use of which endangered a person, would not be able to assert the political offense exception.[27]

In Article III, an exception is made that allows a showing that the extradition request is made on a discriminatory basis or for purposes of persecuting the relator. That showing, if proven, would constitute a bar to extradition.

The Senate's new text of Article III states:

(a) Notwithstanding any other provisions of this Supplementary

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26. S. EXEC. REP. 17, *supra* note 18, at 6-9.
27. *Id.* at 6,7.

> Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions.
> (b) In the United States, the competent judicial authority shall only consider the defense to extradition set forth in paragraph (a) for defenses listed in Article I of the Supplementary Treaty. A finding under paragraph (a) shall be immediately appealable by either party to the United States district court, or court of appeals, as appropriate. The appeal shall receive expedited consideration at every stage. The time for filing a notice of appeal shall be 30 days from the date of the filing of the decision. In all other respects the applicable provisions of the Federal Rules of Appellate Procedure or Civil Procedure, as appropriate, shall govern the appeals process.[28]

In its "Section by Section Analysis," the Senate Report states:

> Article III(a) provides that, notwithstanding Article I, "extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by the preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions or that he would, if surrendered, be prejudiced at his trial or punished, detained, or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions."[29]
>
> A number of committee members expressed unease at permitting U.S. courts to entertain an inquiry as sensitive as that contemplated by Article III(a). This is particularly the case given the nature of discovery under U.S. law which has no counterpart in British or European practice. The committee wishes to caution that sensitive foreign policy issues may be involved even at the discovery stage and that use of protective orders may be appropriate.
>
> Article III(b) applies only to the United States. It does two things: First it limits the scope of Article III(a) in the U.S. extradition proceedings to offenses listed in Article I of the Supplementary Treaty. In other words, if an individual is wanted for extradition to the United Kingdom for Fraud, drug smuggling or some other offense not listed in Article I, that individual may not invoke Article III(a) before a Federal magistrate or judge.
>
> Article III(b) gives either party to the extradition proceeding the right to appeal a finding under Article III(a). Because an initial finding may either be made by a Federal magistrate or Federal Rules of Civil Procedure or Federal Rules of Appellate Procedure, "as appropriate", controlling on appeal. If the appeal is from a Federal magis-

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28. *Id.* at 16. *See also* 132 CONG. REC. S9119 (daily ed. July 16, 1986).
29. S. EXEC. REP. 17, *supra* note 18.

> trate's decision, it is to be lodged in Federal district court and the Federal Rules of Civil Procedure shall apply. If it is from a Federal district court, the appeal, of course, is to be lodged with the appropriate U.S. court of appeals and the Federal Rules of Appellate Procedure are to control. This article is not intended to make the Federal Rules generally applicable to the extradition hearing itself, but only to the appeal of a decision under Article III(a).
>
> In either case, a notice of appeal must be filed within 30 days from the date the decision containing the initial finding is filed. The appeal is to be expedited at every stage. Nothing in Article III(b) is to be interpreted as permitting interlocutory appeals or otherwise upsetting established rules of appellate procedure.[30]

B. The Purposes of the Supplementary Treaty: An Overstatement

The purposes of the Supplementary Treaty are stated in the President's Transmittal Letter to the Senate of July 17, 1985, in that "it represents a significant step in improving law enforcement cooperation and combating terrorism, by excluding from the scope of the political offense exception serious offenses typically committed by terrorists." The Department of State Transmittal Letter of July 3, 1985, signed by Secretary of State George Schultz, reiterates this theme and states that "it therefore represents a significant step to improve law enforcement cooperation and counter the threat of international terrorism and other crimes of violence." To a large extent these lofty purposes are overstated, and their factual basis is questionable. The actual purpose of the Supplementary Treaty is to assist Great Britain in quelling Irish resistance in both its lawful and unlawful forms, the latter constituting the resort to wanton violence or violence directed against impermissible targets.[31]

The stated purpose and unarticulated premise of the Treaty are somewhat misleading. The United States has not had the occasion to seek the extradition of a "terrorist" from the U.K. under the current 1972 treaty.[32] Thus, there is no reason to believe that the U.S. needed the Supplementary Treaty. Furthermore, there is no basis to believe that the Supplementary Treaty will benefit the U.S. in the future, because the U.K. law and jurisprudence as to the "political offense exception" are adequate to protect the interests of the U.S., particularly with respect to any eventual extradition case involving "international terrorists"[33] in

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30. *Id.* at 7-8.

31. *Hearings*, *supra* note 9, at 97 (statement of Christopher Pyle). *See also*, *Nation Mourns its Loss*, Time, Sept. 10, 1979, at 30-33.

32. The issue was raised by the relator and rejected by the court in *Matter of Budlong and Kember*, 1 ALL ENG. REP. 714 (1980). The same applies to the Dawes-Simon Treaty of 1932, 47 Stat. 2122, and the Webster-Ashburton Treaty of 1842, 8 Stat. 572.

33. "International Terrorism" consists of those acts of violence prohibited by multilateral conventions, irrespective of whether or not the acts occur exclusively within a national jurisdictional context. *See, e.g.*, Friedlander, *supra* note 2; Bassiouni, *International Terrorism*, *supra* note 2.

which the U.S. would be the requesting state and the U.K. the requested state.[34] The real purpose of the Supplementary Treaty is to avoid the U.S. application of the "political offense exception" with respect to requests by the U.K. for Irish resisters who engage in acts of violence. There have been three cases decided in the U.S. involving persons who committed acts of violence in the U.K. and Northern Ireland, who were sought for extradition by the U.K., and whose extradition was denied by U.S. courts on the grounds that the "political offense exception" applied to them: *In re McMullen*,[35] *In re Mackin*,[36] and *Matter of Doherty*.[37] In addition to these three cases, the District Court in *Quinn v. Robinson* recognized the applicability of the "political offense exception,"[38] but the U.S. Court of Appeals for the Ninth Circuit reversed it.[39] The Supplementary Treaty came about because of these cases. It was due in part to secure the return of these four individuals to the U.K. that the original text of the 1985 Supplementary Treaty contained a retroactive application provision and a provision removing the application of the requested state's statute of limitation.[40] The Senate's ratified version precludes that result.

The three cases that denied the U.K.'s extradition requests were decided under the 1972 Extradition Treaty[41] in accordance with the long-standing jurisprudence of the U.S. on the "political offense exception"[42]. None of these cases constitutes a departure from the jurisprudence in ex-

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34. *See infra* note 45.

35. Magistrate's Decision No. 3-78-1099 M.G. at 3 (N.D. Cal. May 11, 1979).

36. 8 Cr. Misc. 1 (S.D.N.Y. Aug. 13, 1981), *aff'd*, United States v. Mackin, 668 F.2d 122 (2d Cir. 1981).

37. Matter of Doherty, 599 F.Supp. 270 (S.D.N.Y. 1984). *See also* 85 Civ. 935-C.F.H. (S.D.N.Y. June 25, 1985) (Government's declaratory judgment petition denied).

38. C-82-6688 R.P.A. (N.D. Cal. Oct. 8, 1983).

39. Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1983).

40. *See* Article V of the Supplementary Treaty as ratified by the Senate, 132 CONG. REC. S9119 (daily ed. July 16, 1986).

41. *See supra* notes 35-38.

42. *See* Ornalez v. Ruiz, 161 U.S. 502 (1896); Artukovic v. Rison, 784 F.2d 1354 (9th Cir. 1986) (extradition granted); Eain v. Wilkes, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981); Escobedo v. United States, 623 F.2d 1098 (5th Cir. 1980); Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir. 1976), *cert. denied*, 429 U.S. 833 (1976); Shapiro v. Ferrandina, 478 F.2d 894 (2d Cir. 1973); Garcia-Guillern v. United States, 450 F.2d 1189 (5th Cir. 1971), *cert. denied sub nom.* Jimenez v. Hixon, 373 U.S. 914 (1962); Matter of Sindona, 450 F.Supp. 672 (S.D.N.Y. 1978) *aff'd sub nom* Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980); In re Gonzalez, 217 F.Supp. 717 (S.D.N.Y. 1963); Ramos v. Diaz, 179 F.Supp. 459 (S.D. Fla. 1959); Artukovic v. Boyle, 107 F.Supp. 11 (S.D. Cal. 1952) (no extradition treaty between U.S. and Yugoslavia), *rev'd sub nom* Ivancevic v. Artukovic, *on remand sub nom* Artukovic v. Boyle, 140 F.Supp. 245 (S.D. Cal. 1956) (political offense exception precluded extradition), *aff'd sub nom* Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *rev'd*, 355 U.S. 898 (1958) (full hearing on political offense exception required), *on remand sub nom* U.S. v. Artukovic, 170 F.Supp. 383 (S.D. Cal. 1959) (political offense exception precluded extradition); In re Lincoln, 228 F. 70 (S.D.N.Y. 1915); In re Ezeta, 62 F. 972 (N.D. Cal. 1894); *See also* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 477 comment (g), reporters' notes 4 and 5 (Tent. Draft No. 7, 1986).

istence in the U.S.[43] Furthermore, there has historically been no significant difference between the decisions of the U.S. and those of the U.K. on the interpretation and application of the "political offense exception."[44] The U.S. position is predicated on the same English cases upon which the U.K. relies.[45] Furthermore, the jurisprudence of the U.S. courts does not suggest that "wanton violence" would benefit from the "political offense exception."[46] The conclusion is thus inescapable that the Supplementary Treaty is intended to benefit the U.K. in its ongoing civil strife in Northern Ireland, regardless of the merits of the issue, the nature of the act, the potential legitimacy of the act under existing U.S. and international legal standards, and the fact that such preferential treatment is reserved for the U.K. and is denied, at least at present, to all other states with which the U.S. has extradition relations.

III. EXCLUSIONS FROM THE "POLITICAL OFFENSE EXCEPTION" IN THE SUPPLEMENTARY TREATY

A. International Crimes and Crimes Under National Law

The purpose and policies of the "political offense exception" and the values embodied therein should be first identified before appraising their significance. They include *inter alia*: 1) political neutrality in foreign internal conflicts; 2) the individual and collective right of resistance, including armed resistance under certain conditions and subject to certain rules; 3) the application of internationally recognized norms of human rights with respect to the rendition of a requested person; and 4) an international duty to cooperate in the prevention and suppression of international criminality as a means of preserving world order.[47] It is in light of these purposes, policies and values of the "political offense exception" that the following analysis is made with respect to the relevant provisions of the Supplementary Treaty.

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43. *Id.*

44. *See* Cantrell, *The Political Offense Exception in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 MARQ. L. REV. 777 (1977).

45. *See Re* Castioni, [1891] 7 Q.B. 149, subsequently expanded in *Re* Meunier [1894] 2 Q.B. 415, and in Regina v. Governor Brixton Prison *ex parte* Kolcynski, [1955] 1 Q.B. 540. *See also* Schtracks v. Government of Israel, (1964) A.C. 556; Cheng v. Governor of Pentonville Prison, (1973) A.C. 931; Regina v. Governor of Pentonville Prison *ex parte* Tzu-Tsai, (1975) 7 W.L.R. 893. *See generally* V. E. HARTLEY BOOTH, BRITISH EXTRADITION LAW AND PROCEDURE (1980); 2 J. STEPHEN, HISTORY OF CRIMINAL LAW IN ENGLAND (1883). Stephen states, "fugitive criminals are not to be surrendered for extradition crimes if those crimes were *incidental to and form part of political disturbance. . . .*" *Id.* at 71 (emphasis added). *See also* Gilbert, *Terrorism and the Political Offense Exemption Reappraised*, 34 INT'L & COMP. L.Q. 695 (1985).

46. Eain v. Wilkes, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981). *See* Banoff & Pyle, *To Surrender Political Offenders: The Political Offense Exception to Extradition in United States Law*, 16 N.Y U. J. INT'L L. & POL'Y 169 (1984).

47. *See* Bassiouni, *supra* note 21.

The exclusions contained in Article I of the Supplementary Treaty can be divided into two categories:"international crimes" and "ordinary crimes of violence." Paragraphs (a), (b), (c), and (d) cover "international crimes," with respect to which a number of applicable international criminal law conventions provide for the alternative duty to prosecute or extradite, *aut dedere aut iudicare*.[48] Thus, these provisions of the Supplementary Treaty are in conformity with the international legal obligations of the United States and the United Kingdom, to the extent that the two countries have ratified the relevant international criminal law conventions,[49] and to the extent that these obligations are part of customary international law.[50] However, the exclusions in the Supplementary Treaty are more restrictive than their counterparts in the relevant international criminal conventions.[51] The Supplementary Treaty unconditionally obligates the parties to extradite, whereas the relevant international criminal law conventions provide for the alternative right to prosecute.[52] The Supplementary Treaty allows for the alternative of prosecution. However, there is no such jurisdictional basis for prosecution under existing U.S. law unless the act charged has an impact in the U.S.;[53] thus the alternative does not exist.

Paragraphs (b) through (e) of the Supplementary Treaty apply to "ordinary crimes of violence". These exclusions are not supported by any international duty to extradite, except for the portion of paragraph (d) that concerns the mailing of explosive devices. All the other enumerated offenses are ordinary crimes of violence, which, when linked to an actor's political motives, have usually been regarded as non-extraditable under the "political offense exception" as applied in the U.S. the U.K., and most Western European states.[54] Thus, these exclusions constitute a de-

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48. *See, e.g.*, Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT'L L. 27, 35 n.31 (1983).

49. *See* M.C. BASSIOUNI, INTERNATIONAL CRIMES: DIGEST/INDEX OF INTERNATIONAL INSTRUMENTS 1815 TO 1985 (2 vols. 1985) [hereinafter BASSIOUNI, DIGEST]. The author identifies twenty-two categories of international crimes that are the subject of 312 international instruments, a number of which contain provisions on extradition, which are listed at the end of each of the twenty-two categories of crimes.

50. Statute of the International Court of Justice, art. 38. *See generally* A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1968); 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW (1968).

51. *See* BASSIOUNI, DIGEST, *supra* note 49. Under each category of crime, references are made in the relevant conventions to the specific treaty provisions on extradition and prosecution. Also at the end of each category of crime, a summary of these provisions is contained.

52. *Id.*

53. *See infra* note 69. *See also* H.R. 4151, 99th Cong., 2d Sess., 132 CONG. REC. H5944 (daily ed. Aug. 12, 1986); Blakesley, *Extraterritorial Jurisdiction*, in 2 M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: PROCEDURE 3 (1986).

54. For a listing of cases from over twenty countries, see C. VAN DEN WIJNGAERT, *supra* note 20. *See also* 2 BASSIOUNI, EXTRADITION, *supra* note 10, at 1-108; S. BEDI, EXTRADITION IN INTERNATIONAL LAW (1968); HARTLEY-BOOTH, *supra* note 45; I. SHEARER, EXTRADITION IN INTERNATIONAL LAW (1977). For earlier seminal works, see A. BILLOT, *supra* note 11; E.

parture from existing precedent in the United States and the United Kingdom[55] because they remove from the judicial and executive branches consideration of the applicability of the "political offense exception" for any of the acts enumerated, regardless of their insignificance, purpose, justification, or excusability.[56]

Because of the differences in applicable sources of law, the two categories of Article I, paragraph (a) and that portion of paragraph (d) concerning the mailing of explosive devices, are consistent with the relevant international criminal law conventions ratified by both the U.S. and U.K., and embodied in U.S. law. These are the 1970 Hague Convention,[57] the 1971 Montreal Convention on Aircraft Sabotage,[58] the 1974 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons,[59] and the Convention on Taking of Hostages.[60]

A number of international conventions prohibit the use of the mails to send dangerous explosives.[61] Because this is a technique used in terror-violence, whether committed by individuals, small groups or governmental secret services, it must be included among those international crimes that are "exceptions to the exception."[62] That type of conduct should have been included in Article I, paragraph (a) rather than paragraph (h), but the error appears to have been a technical oversight by the drafter.

It must be noted that the 1977 European Convention on the Suppression of Terrorism[63] excludes from the "political offense exception" those same "international crimes" excludable under Article I, paragraph

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CLARKE, A TREATISE ON THE LAW OF EXTRADITION (4th ed. 1903); J.B. MOORE, *supra* note 11. For a critical review of the political offense exception and some of its applications, see Carbonneau, *The Political Offense Exception To Extradition and Transnational Terrorists: Old Doctrine Reformulated And New Norms Created*, 1 ASILS INT'L L.J. 1 (1977); Gilbert, *supra* note 45; Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 COLUM. J. TRANSNAT'L L. 381 (1980); Lubet & Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & CRIMINOLOGY 193 (1980).

55. *See supra* notes 42, 45.

56. *See generally* P. ROBINSON, CRIMINAL LAW DEFENSES (1984).

57. Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Hijacking Convention), 26 January 1973, 974 U.N.T.S. 177, 25 U.S.T. 564, T.I.A.S. No. 7570.

58. Convention for the suppression of Unlawful Acts against the Safety on Civil Aviation (Montreal Hijacking Convention), 26 January 1973, 974 U.N.T.S. 177, 25 U.S.T. 564, T.I.A.S. No. 7570.

59. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York Convention), 20 February 1977, U.N. G.A. Res. 3166 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 146, U.N. Doc. a/9030 (1974), 28 U.S.T. 1975, T.I.A.S. No. 8532.

60. International Convention Against the Taking of Hostages, G.A. Res. 34/146 (XXXIV), 34 U.N. GAOR Supp. (No. 46) at 245, U.N. Doc. a/34/46 (1979), *entered into force*, 3 June 1983.

61. For a list of the postal conventions from 1891 to 1984, see BASSIOUNI, DIGEST, *supra* note 49, at 331-401.

62. *See* BASSIOUNI, EXTRADITION, *supra* note 10, at 74-78.

63. E.T.S. No. 90 (1977).

(a) and portions of paragraph (d) of the Supplementary Treaty.[64] The U.K. is a signatory to the European Convention,[65] but the U.S. is not. In order to implement the relevant treaty obligations, the U.K. passed the Suppression of Terrorism Act of 1978. The Terrorism Act does not define "terrorism," but it amends Section III of the Extradition Act of 1870 as amended by the Acts of 1965 and 1967, the basic statute of the United Kingdom applicable to extradition with non-Commonwealth countries.[66]

The second category, "ordinary crimes of violence." contains exclusions that are a departure from existing U.S. and U.K. law and practice concerning the denial of extradition on "political offense exception" grounds. Nothing precludes the U.K. from entering into a treaty with a foreign government to change that position, but the U.K. will have to embody the provisions of such a treaty in an act of Parliament in accordance with that country's statutory enactment requirements. Since such legislation has not yet been passed it is difficult to assess the impact of the Supplementary Treaty or the interpretation and application of the current U.K. extradition law and practice.

The Supplementary Treaty's provisions excluding ordinary crimes of violence are also a departure from existing U.S. law and practice, but since extradition treaties are deemed self-executing in the U.S., there is no need for additional implementing legislation.[67] While nothing precludes the U.S. from entering into a treaty that limits the rights of individuals in extradition proceedings, such limitations cannot however, be contrary to the Constitution.[68] Thus, it is necessary to examine whether the Supplementary Treaty contains any provisions that may be deemed contrary to the United States Constitution.

B. Constitutional Questions

The first question is whether the Article I exclusions can be viewed as violating the United States Constitution. In this context, the Article I exclusions should be examined under the two categories: "international crimes" and "ordinary crimes of violence."

The first category of exclusions, "international crimes," is not a violation of any constitutional provision. It adds nothing to the existing inter-

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64. *But see* HEARINGS, *supra* note 9, at 311-12 (statement of Charles E. Rice) (Supplementary Treaty limits political offense exception to greater extent than does European Convention on Terrorism).

65. As of June, 1986, seventeen States had ratified the Convention: Austria, Belgium, Cyprus, Denmark, F.R. Germany, Iceland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. Some States have ratified it with reservations. Several States have not yet ratified the Convention: France, Greece, Ireland, and Malta. Israel, Canada and the United States, which can accede to European Conventions, have neither signed nor acceded.

66. *See* HARTLEY-BOOTH, *supra* note 45 at 265-335.

67. *See*, RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 131 (Tent. Draft No. 6, 1985).

68. *See, e.g.*, Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980).

national legal obligations of the United States under the relevant international conventions, which the United States has ratified, on aircraft hijacking and sabotage, the kidnaping of diplomats and internationally protected persons, the taking of civilian hostages, and the unlawful use of the mails for violence. These treaty obligations are also embodied in both Title 18 of the United States Code and in the Comprehensive Crime Control Act of 1984.[69] Thus, such crimes are extraditable if charged in an extradition request by any state with which the U.S. has an extradition treaty. Alternatively, a requesting state may in the absence of a bilateral extradition treaty, rely upon the provisions of the applicable multilateral conventions as the legal basis for extradition.[70] Thus, U.S. courts could, as they have, reject the defense of the "political offense exception" on the grounds that the offense for which the relator is sought constitutes an international crime.[71]

The 1984 Extradition Act, still pending before the House, contains exclusions from the "political offense exception" similar to those in Article I of the Supplementary Treaty but allows the courts to consider "exceptional circumstances,"[72] under which the exception could still apply. Proponents of the Administrations's view oppose even that limited judicial inquiry.[73]

The second category of exclusions, "ordinary crimes of violence," raises constitutional questions on two grounds, although this writer believes that neither one the these grounds are sufficient to invalidate the Supplementary Treaty. They are: equal protection under the due process clause of the Fifth Amendment; and the supremacy of international law under the Constitution.

1. The Equal Protection Argument

The exclusions in question are aimed solely at persons charged with committing such "ordinary crimes of violence" under U.K. law. The same

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69. 18 U.S.C. §§ 31, 32, 34-35 (destruction of aircraft); 18 U.S.C. § 12, 1116 (violence against foreign officials); 18 U.S.C. §§ 231, 371, 1117 (conspiracy); 18 U.S.C. §§ 231-33, 921-22 (illegal possession of firearms); 18 U.S.C. §§ 351, 1751 (kidnaping public officials); 18 U.S.C. §§ 552, 871, 877-879 (threats); 18 U.S.C. §§ 841-842 (possession of explosives); 18 U.S.C. §§ 1111-1114, 1751, 2031 (killing or assaulting federal officials); 18 U.S.C. § 1716 (mailed explosives); 18 U.S.C. §§ 2151-52 (sabotage); Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, 100 Stat. 853, *reprinted in* 1986 U.S. CODE CONG. & AD. NEWS 1865; Comprehensive Crime Control Act of 1984, P.L. 98-473, 98 Stat. 1976 (1984). *See also* B.J. GEORGE, THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 147-216 (1986).

70. *See* Derby, *Duties and Powers Respecting Foreign Crimes*, 30 AM. J. COMP. L. 523, 531 (Supp. 1982).

71. *See* Demjanjuk v. Meese, 784 F.2d 114 (D.C. Cir. 1986); Artukovic v. Rison, 784 F.2d 1354 (9th Cir. 1986).

72. Extradition Reform Act of 1984, 18 U.S.C. § 3194 (e)(2) 1984. *See* H.R. 3347, 98th Cong., 18 U.S.C. 2d Sess. 27-31 (1984).

73. *See, e.g., The Extradition Act of 1981: Hearings on S. 1639 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 3,4 (statement of Daniel McGovern).

exclusions do not apply to persons who commit the same offenses in other states with which the U.S. also has extradition treaties. Thus, persons committing the same acts could benefit from the "political offense exception" depending on the country where the act is committed. In other words, the acts of violence that are no longer part of the "political offense exception" where the requesting state is the U.K., would still be part of the exception where the requesting state is any of the other states with which the U.S. has extradition relations.[74] This "double standard"[75] may be a violation of equal protection under the due process clause of the Fifth Amendment. There is no valid legal basis for discriminating against persons in the U.S., including U.S. citizens, who commit an offense in the U.K. for which they could be extradited, but who would not be extraditable if the same offense were committed in another State. A political value judgment on the importance of relations between the United States and the United Kingdom should not be a sufficient basis for such a distinction.[76] Since that distinction, however, is made by treaty, the question remains whether a bilateral treaty can override the Constitution. Since the issue of unwarranted class discriminations does not seem, to this writer's knowledge of constitutional law, to be supported by existing jurisprudence, the ultimate issue of an eventual conflict between the Supplementary Treaty and the Constitution cannot be reached. The most obvious contrary argument is that the various U.S. extradition treaties with different countries have historically contained different extraditable offenses and differing provisions on certain defenses, and the issue of inequality of legal standards has never been ruled upon as being unconstitutional.

In practice, the exclusions in question are likely to involve only U.K. or Irish citizens engaged in armed rebellion against the U.K. Thus, they are essentially "IRA exclusions."[77] This raises another issue of unconstitutional discrimination on the basis of race and political conviction.[78] An Irish resister engaging in armed rebellion against the U.K., who is part of an organized resistance group and whose target is legally permissible under both existing U.S. and U.K. interpretations of the "political offense exception" and the international regulation of armed conflicts,[79] would be

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74. *See generally*, I KAVASS & A. SPRUDZS, EXTRADITION LAWS AND TREATIES: UNITED STATES (1980).

75. HEARINGS, *supra* note 9, at 73 (statement of William J. Hughes). *See also* Pyle, *Defining Terrorism*, 62 FOREIGN POLICY 63 (1986).

76. Under traditional equal protection analysis, a classification must be at least rationally related to a legitimate governmental interest. *See, e.g.* Mathews v. Lucas, 427 U.S. 495 (1976). *See also* HEARINGS, *supra* note 9 at 73 (statement of William J. Hughes).

77. *See* HEARINGS, *supra* note 9, at 281 (statement of this author).

78. The term "race" is used here in its non-technical meaning and refers to an identifiable ethnic group in violation of the 1967 Protocol to the 1951 Refugee Convention, 820 U.N.T.S. 454. *See* The 1980 Refugee Act, 8 U.S.C. § 242(h). *See also* Symposium, *Transnational Legal Problems of Refugees*, 1982 MICH Y.B. INT'L LEG. STUD. 1.

79. *See infra* notes 85, 86.

extradited to the U.K. A member of another national group who committed a similar act against any other country would be protected by the "political offense exception." Admittedly, these are novel arguments with respect to the application of equal protection to extradition, and there is no precedent or authority to support it.

2. The Supremacy of International Law Argument

The Constitution implies a supremacy of international law over national legislation, and presumably over bilateral treaties. Such a ranking arises from the provisions conferring upon Congress the power "to define and punish offenses against the Law of Nations" (Article I, § 9), and those concerning ambassadors, treaties, war and other international acts and relations.[80] The implication is that a bilateral treaty cannot derogate from an established rule of international law, because of its higher ranking. To the best of this writer's knowledge (who admittedly is not a constitutional law expert), treaties, whether bilateral or multilateral, are "the supreme law of the land,"[81] and no case known to this writer holds that a treaty, once ratified, can be judicially tested on the basis of its lack of conformity to other sources of international law. That does not mean, however, that the question cannot be raised. The arguments in this instance would be that the Supplementary Treaty derogates from customary international law.

At present, every legal system similar to that of the U.S., or with equivalent concepts and practices of fairness and due process, allows the "political offense exception" to include the offenses unconditionally excluded under the provisions of Article I, paragraphs (b) through (e).[82] An argument can thus be made that there exists a customary international law regarding the political offense exception and that, the U.S. is subject to it.[83] It is this writer's belief, however, that such an argument is of questionable constitutional merit.

Another related constitutional argument, is however, meritorious. The U.S. has certain treaty obligations under the four Geneva Conventions of August 12, 1949,[84] and other sources of the customary rules of

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80. *See e.g.*, HENKIN, *supra* note 13; H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 562-652 (1986).

81. U.S. CONST. art. VI, § 6.

82. *See supra* note 54.

83. *See supra* note 50.

84. The Geneva Conventions of August 12, 1949: No. I For the Amelioration of the Wounded and Sick in the Armed Forces of the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; No. II. For the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3115, T.I.A.S. No. 3363, 75 U.N.T.S. 85.; No. III. Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; No. IV. Relative to the Protection of Civilian Persons in War, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287; The Protocols Additional to the Geneva Conventions of August 12, 1949, June 10, 1977, U.N.Doc. A/32/144 (1977); Hague Convention of October 18, 1907: Convention (I) for the Pacific Settlement of International Disputes, 3

war, which exclude lawful combatants in a conflict of a "non-international character," acting according to the regulations of armed conflicts, from being considered common criminals.[85]

The Supplementary Treaty does not include provisions consistent with these treaty obligations and with the customary rules of war as they apply to this question. Thus, under the Supplementary Treaty the U.S. could be in violation of these treaty obligations, as well as customary rules of war.[86]

The exclusions unconditionally remove the enumerated acts of violence from the "political offense exception," irrespective of their nature, intensity, the harm they produce, the motives and goals of the actor, and the circumstances that may have compelled the actor to commit them. The exclusions are, contrary to customary international law and certain aspects of conventional international law that permit their inclusion, subject to certain conditions. Acts that are regulated by these sources of international law are also protected by the Constitution, which makes international law part of the supreme law of the land. To permit a bilateral treaty to derogate from a customary or conventional rule of international law may be found to be constitutional, but is it wise? The question of wisdom leads one to ask why the Supplementary Treaty did not include any of the provisions of the regulation of armed conflicts. The answer is the inclusion of these provisions would appear to give some legitimacy to the Northern Irish resistance movement, which the U.K. has always re-

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Martens Nouveau Recueil (3d) 360, 36 Stat. 2199, T.S. No. 536; Convention (II) respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, 3 Martens Nouveau Recueil (3d) 414, 36 Stat. 2241, T.S. No. 537; Convention (III) relative to the Opening of Hostilities, 3 Martens Nouveau Recueil (3d) 437, 36 Stat. 2259, T.S. No. 539; Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of war on Land, 3 Martens Nouveau Recueil (3d) 504, 36 Stat. 2310, T.S. No. 540; Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, 3 Martens Nouveau Recueil (3d) 533; Convention (VII) relating to the Conversion of Merchant Ships into War-Ships, 3 Martens Nouveau (3d) 557; Conventions (VIII) relative to the Laying of Automatic Submarine Contact Mines, 3 Martens Nouveau Recueil (3d) 580, 36 Stat. 2332, T.S. No. 541; convention (IX) concerning Bombardment by Naval forces in Time of War, 3 Martens Nouveau Recueil (3d) 604, 35 Stat. 2351, T.S. No. 542; Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of July 6, 1907, 3 Martens Nouveau Recueil (3d) 630, 36 Stat 2371, T.S. No. 543; Convention (XI) relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, 3 Martens Nouveau Recueil (3d) 663, 36 Stat. 2396, T.S. No. 544; Convention (XIII) relative to the Creation of an International Prize Court, 3 Martens Nouveau Recueil (3d) 688; Convention (XIII) concerning the Rights and duties of Neutral Powers in Naval War, 3 Martens Nouveau Recueil (3d) 713, 36 Stat. 2415, T.S. No. 545; Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosive from Balloons, 3 Martens Nouveau Recueil (3d) 745, 36 Stat. 2439, T.S. No. 546.

85. *See generally* H. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICTS, (1986).

86. *See e.g.*, SCHINDLER & TOMAN, THE LAWS OF ARMED CONFLICT (2d ed. 1982); Levie, *Documents on Prisoners of War*, in 60 INTERNATIONAL LAW STUDIES: U.S. NAVAL WAR COLLEGE (1979); Levie, *Prisoners of War in International Armed Conflict*, in 59 INTERNATIONAL LAW STUDIES: U.S. NAVAL WAR COLLEGE (1977).

jected, and which is now also rejected by the U.S. The political implication for the U.S. is that it aligns itself with the U.K., abandoning its historical neutrality in the Northern Ireland conflict, and that may not be a wise policy, especially if it means that the U.S. will take similar positions, or refuse to do so, with respect to other countries involved.

IV. THE WISDOM OF ARTICLE I EXCLUSIONS: THE DEMISE OF JUDICIAL DETERMINATION AND THE RISE OF AD HOC POLITICAL JUDGMENT

The category of "international crimes" exclusions does not need to be embodied in a bilateral extradition treaty with a given country, because these crimes are already subject to U.S. international legal obligations under the relevant multilateral conventions and are also part of federal criminal law. These crimes would be excludable from the "political offense exception" as "exceptions to the exception," unless the U.S. chooses to prosecute a person accused of such a violation as an alternative to extradition. The federal judiciary, however, does not have such jurisdiction under present law, and the U.S. is not a party to a convention, such as the European Convention on Transfer of Proceedings in Criminal Matters,[87] that would permit it to accept a transfer of proceedings and prosecute in the U.S. Interestingly, however, the Senate's ratified version of the Supplementary Treaty provides in Article I(a) that the U.S. may choose ". . . to extradite the person sought or to submit his case to the competent authorities for decision as to prosecution . . ." This provision may be moot or it may provide for prosecution of international crimes committed outside the U.S.[88]

Under present U.S. jurisprudence, extradition can be granted for international crimes,[89] yet these crimes are specifically included in the Supplementary Treaty. There are several reasons for their inclusion: 1) In *Quinn*,[90] the U.S. District Court did not consider the mailing of letters containing explosives as an "exception to the exception," although it is an international crime.[91] The government, however, failed to raise this issue. It is this writer's suspicion that the Government's attorneys in this case were unaware of that fact. Considering, however, that the Senate drafters of the ratified version of the Supplementary Treaty did not place this exclusion in the category of international crimes, it must be assumed that the Government's experts on the subject failed to note the applicable multilateral conventions prohibiting the unlawful use of the mails, including the unlawful mailing of explosives.[92] 2) Arguments concerning the sta-

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87. Europ. T.S. No. 73 (1972). *See* Schutte, *The European System*, in 2 M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: PROCEDURE 319 (1986).

88. *See* Blakesley, *supra* note 53.

89. *See* Demjanjuk v. Meese, 784 F.2d 1114 (D.C. Cir. 1986); Artukovic v. Rison, 784 F.2d 1254 (9th cir. 1986).

90. No. C-82-6688 R.P.A. (N.D.Cal. 1983) 783 F.2d 776 (9th Cir. 1983).

91. *See* BASSIOUNI, EXTRADITION, *supra* note 10, at 78-93.

92. *See supra* note 61.

tus of accused IRA members as lawful combatants in a "conflict of non-international character" under the international regulation of armed conflict could be accepted by U.S. courts,[93] thus accepting that certain acts of violence by irregular combatants against regular combatants, and against permissible military targets, are non-extraditable as common criminals. Both the U.K. and the U.S. would want to avoid such an exception and such a legitimizing label being affixed to IRA members who engage in acts of violence, irrespective of whether or not they are in conformity with the international regulation of armed conflicts.[94] 3) The litigation of such issues before U.S. courts would be lengthy and costly. 4) The U.S. might give an impression of being a haven for persons who engage in violence in internal political conflicts, particularly the conflict in Northern Ireland.

While there is some legitimate U.S. concern with respect to all these considerations, a sounder approach would have been to pursue legislative reform of U.S. extradition laws. Legislation was proposed at the time of the Supplementary Treaty, and is still pending before Congress.[95] Since 1981, however, when the first Extradition Reform Act was before the House, the question of whether to exclude entirely the "political offense exception" has been hotly debated.[96] Congress appears to have accepted a qualified approach, which recognizes that under "exceptional circumstances" the acts of violence excluded from consideration under the "political offense exception" could still be recognized.[97] Since the Administration opposed this qualification, it probably decided instead to pursue the bilateral treaty approach exemplified by the Supplementary Treaty.[98] The exclusion of any judicial consideration of exceptional or extraordinary circumstances is, in the opinion of this writer, an unwise policy; there are bound to be cases where judicial discretion would be warranted and welcomed.

Many of the arguments raised with respect to the wisdom of the exclusion of international crimes also apply to the second category of exclusions, "ordinary crimes of violence." These crimes should not have been singled out for exclusion from the "political offense exception" in a single extradition treaty with a single state, contrary to customary international law and to the law and practice of the United States since 1848.

It is ironic in this respect that the first extradition statute passed in

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93. *See supra* notes 84-86. *See also* HEARINGS, *supra* note 9, at 170-73 (statement of William Hannay); *Id.* at 873 (resolution of American Bar Association).

94. *See supra* notes 84-86.

95. H.R. 3347, 98th Cong., 2d Sess., 129 CONG. REC. H4102 (1983).

96. *See, e.g., The Extradition Act of 1984: Hearings on H.R. 2643 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) [hereinafter *Hearings on H.R. 2643*]; *The Extradition Reform Act of 1981: Hearings on H.R. 5227 of the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) [hereinafter *Hearings on H.R. 5227*]; *The Extradition Act of 1981: Hearings on S. 1639 Before the Comm. on the Judiciary*, 97th Cong. 1st Sess. (1981).

97. H.R. 3347, *supra* note 95, § 3194.

98. *See, e.g., Hearings, supra* note 9, at 11 (testimony of Abraham D. Sofaer).

the U.S. in 1848[99] was in response to the *Robbins* case, in which the President had improvidently supported the Secretary of State's request that a court order the surrender of an accused person to England.[100] The 1848 statute was intended to curb executive power and to make extradition a judicial rather than a political determination.[101] In this respect, the Supplementary Treaty reveals the Administration's attempt to return extradition practice in the U.S. to its position before 1848. In fact, the Administration sponsored the 1981 Senate Bill (the "Extradition Reform Act"), which sought to give the power to determine the applicability of the "political offense exception" to the Secretary of State.[102] Opposition in Congress led to a removal of that provision in favor of the traditional judicial determination.[103]

As stated by this writer before Committees of the Senate and House in hearings on the 1981 Extradition Reform Act, the concern that the U.S. may become a "haven for terrorists," as advanced by Administration proponents of the Act, is simply preposterous.[104] In the last thirty years, the "political offense exception" has been raised no more than two dozen times.[105] It has been granted in only three cases.[106] To attempt, by means of a treaty with a particular state, to preclude U.S. courts from the valid exercise of their judicial prerogatives, which have been so well exercised over a period of 140 years, is not only unwise, but is also an unconscionable statement of lack of confidence in the judiciary. For obvious reasons, judicial determination is always preferable to *ad hoc* political judgments.

V. THE NON-DISCRIMINATION AND NON-PERSECUTION PROVISION OF ARTICLE III: THE NEW "POLITICAL EXCEPTION"

Having provided in Article I for exclusion of international crimes and certain common crimes of violence from the meaning of the "political offense exception," the Supplementary Treaty nonetheless provides in Article III for new grounds to bar extradition. That provision allows a relator who is accused of having committed any of the crimes enumerated in Article I to argue that, regardless of the commission of such crimes, he or

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99. Act of August 12, 1848, ch. 167, 9 Stat. 302.

100. *In re* Pobbins, 27 F. Cas. 825 (No. 16,175) (D.S.C. 1799).

101. For a scholarly discussion of the impact of *In re* Robbins, *see In re* Mackin, 668 F.2d 122 (2d Cir. 1981).

102. *See supra* note 73.

103. *See* Bassiouni, *Extradition Reform Legislation in the United States: 1981-1983*, 17 AKRON L. REV. 495, 547-53 (1984).

104. *The Extradition Act of 1981: Hearings on S. 1639 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 20 (1981); *The Extradition Reform Act of 1981: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 98 (1982).

105. *Id.*

106. *In re* Mackin, 668 F.2d 122 (2d Cir. 1981); Matter of Doherty, 559 F. Supp. 270 (S.D.N.Y. 1984); *In re* McMullen, No. 3-78-1099 M.G. (N.D.Cal. May 11, 1979). *See also* Quinn v. Robinson, 783 F. 2d 776 (9th Cir. 1986).

she is really sought in order to be tried or punished on account of race, religion, nationality or political opinion, or, if surrendered, that he or she may be prejudiced in his or her trial or punishment for the same reasons.[107]

The language of Article III parallels the political asylum provisions of the 1980 Refugee Act,[108] which embodies the terms of the 1967 Protocol Amending the 1951 Refugee Convention.[109] Laudable as this provision may seem, in effect it shifts the judicial inquiry from the "political offense exception" to the more difficult inquiry into either the motives of the U.K. as a requesting state, or the internal legal and administrative processes of trial and detention in the U.K. There is no precedent in U.S. legal history for such determination in the extradition context. It is hard to conceive of the legal standards that the U.S. courts will use and the evidence that will be admissible. This approach is certainly a departure from the traditional "rule of non-inquiry" in extradition proceedings.[110]

U.K. law enforcement practices and proceedings concerning Irish resisters have been fraught with questions of discrimination and persecution. These questions can now be raised at U.S. extradition proceedings with the U.K. Article III may potentially overwhelm the intended effect of the Article I exclusions.

Article III(b) also introduces a novelty in U.S. extradition. It allows the Government to appeal decisions on Article III rulings.[111] There is no general right of Government appeal on adverse rulings. Curiously, Article III provides for such a right, but limits it to that issue.

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107. For a proposal to supplement the political offense exception with the individual's absolute right to freedom from discrimination in extradition, see C. VAN DEN WIJNGAERT, *supra* note 20, at 207-18. *See also* Van den Wijngaert, *The Political Offense Exception to Extradition: Defining the Issues and Searching a Feasible Alternative*, 1983 REVUE BELGE DE DROIT INTERNATIONAL 741-54.

108. *See* The 1980 Refugee Act *supra* note 78.

109. *See* the 1967 Protocol to the 1951 Refugee Convention, 820 U.N.T.S. 454.

110. BASSIOUNI, EXTRADITION, *supra* note 10, at 1-17. *See, e.g.*, U.S. v. Rauscher, 199 U.S. 407 (1886); U.S. v. Rossi, 545 F.2d 814 (2d Cir. 1976); Shapiro v. Ferrandina, 478 F.2d 894 (2d Cir.), *cert. denied*, 414 U.S. 884 (1973); Fiocconi v. Attorney General of United States, 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972); U.S. *ex rel.* Donnelley v. Mulligan, 76 F.2d 511 (2d Cir. 1935); Berenguer v. Vance, 473 F. Supp. 1195 (D.D.C. 1979). *See also* Note, *Toward a More Principles Approach to the Principle of Specialty*, 12 CORNELL INT'L L.J. 309 (1979); Peroff v. Hylton, 563 F. 2d 1099 (4th Cir. 1977); Gallina v. Fraser, 278 F.2d 77 (2d Cir. 1960) (indicating in *dicta* that rule of non-inquiry may be abandoned). Amendments to the 1981-83 Extradition Acts contained a partial consideration of inquiry into a request for extradition if based on discrimination or persecution grounds and a limited right to raise issues about the future treatment of a relator. *See* Bassiouni, *supra* note 103; H.R. Rep. No. 998, 98th Cong., 2d Sess. (1984).

111. *See supra* note 1.

VI. THE WISDOM OF ARTICLE III - BARRING EXTRADITION ON DISCRIMINATION AND PERSECUTION GROUNDS: SUBSTITUTING THE UNMANAGEABLE FOR THE MANAGEABLE

Under Article III, a relator has the opportunity to raise questions about the motives of the extradition request and the treatment he may expect upon his return to the U.K.[112] The U.K.'s treatment of Irish prisoners and detainees has been the subject of unfavorable decisions by the European Commission on Human Rights[113] and the European Court of Human Rights.[114] The so-called "Diplock Courts" use special procedures for accused Irish resisters that deprive them of the traditional right to trial by jury.[115] These and similar questions may now be raised before U.S. courts under Article III. But what standards will the U.S. courts adopt? Nothing in extradition law and jurisprudence exists upon which the courts can rely as precedent, and the Senate provides no guidance. Among the questions likely to arise are the following:

1. Will such hearings turn into a trial of U.K. policies and practices in Northern Ireland or against Irish resisters? Will it be a trial of the Irish resistance history and movement?
2. Will the U.K.'s legal and administrative proceedings, and law enforcement practices, be on trial?
3. How, and to what extent, will the U.S. government, on behalf of the U.K., defend it?
4. To what extent will the U.S. government, on behalf of the U.K., be compelled to present what would be tantamount to exculpatory evidence?
5. What type of evidence can the relator introduce?
6. What evidence is the relator entitled to ask for in discovery?
7. How does a relator satisfy the burden of a preponderance of the evidence to show that he or she falls within the confines of Article III?
8. On what precedents or analogy is the court to rely? Are the precedents concerning the similar provisions on political asylum in the 1980 Refugee Act applicable in these proceedings?
9. What standards shall the Court of Appeals follow?
10. How will an appellate court objectively review the factual, politi-

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112. *Id.*

113. *See* Ireland v. United Kingdom, 1976 Y.B. EUR. CONV. ON HUMAN RIGHTS 512 (Eur. Comm'n on Human Rights).

114. *See* Ireland v. United Kingdom, 1976 Y.B. EUR. CONV. ON HUM. RTS. 602 (Eur. Ct. of Hum. Rts.)(inhuman treatment); Lawless v. United Kingdom, 1961 Y.B. EUR. CONV. ON HUM. RTS.. 430 (Eur. Ct. of Hum. Rts.) (detention in violation of Art.5 of European Convention). *See also* O'Boyle, *Torture and Emergency Powers under the European Convention on Human Rights: Ireland v. the United Kingdom*, 71 AM. J. INT'L L. 674 (1977); Moseley, *Amnesty International Denied Ulster Inquiry*, Chicago Tribune, Sept. 30, 1986, §1, at 6, col. 1. *See generally* Bassiouni & Derby, *An Appraisal of Torture in International Law*, 48 REVUE INTERNATIONAL DE DROIT PENAL 17 (1977).

115. *See* Ireland v. United Kingdom, 1976 Y.B. EUR. CONV. ON HUM. RTS. 512, 532-542 (Eur. Comm'n on Hum. Rts.); *Hearings*, *supra* note 9, at 327-35 (statement of Charles E. Rice).

cal, and judgmental appraisals of the magistrate or trial court?

These and other issues promise to make Article III hearings the most exciting, if not entertaining, judicial proceedings ever heard in the U.S. A foreign government and a resistance movement will be on trial. Gone will be the wisdom of political neutrality and judicial limitation of adjudicating foreign political conflicts. Farewell also to the "rule of non-inquiry," even though it merits introduction into the extradition system. In that respect, the debates in the House and Senate on the 1981-84 Extradition Reform Act should have been more carefully considered.[116]

Is it conceivable that the U.K. will accept being subjected to such proceedings by pressing for the extradition of such Irish resisters as McMullen, Doherty, Mackin, and Quinn? Did the Senate, in its political wisdom, intend Article III to deter the U.K. from pursuing extradition in certain thorny cases? If that is the case, it is surely an ingenious political expedient to ratify the Supplementary Treaty, thus appearing to make all parties concerned happy with it, while having a provision that might deter the U.K. from using the Supplementary Treaty in certain cases. Furthermore, it allows Irish resisters their day in court. It would indeed be quite a day for Irish resisters to vilify the U.K. and glorify their cause in an Article III hearing. The Senate and the Administration should have been wise enough to leave the "political offense exception" as it stood, rather than to create this new situation.

Paragraph (b) of Article III provides for a right of appeal for both the government and the relator on Article III issues. Is it conceivable, regardless of which party prevails, that the other side will not appeal? Article III(b) is the first time in the history of U.S. extradition that the government has a right to appeal, even though only on that narrow issue. Such an approach is difficult to understand. The Extradition Reform Act, in all its versions from 1981 to 1984, contained a provision on the government's right to appeal irrespective of the issue.[117] Would that not have been the better approach? Once again, an *ad hoc* solution of dubious wisdom has been used.

Based on all the arguments raised above, this author cannot help but wonder whether the Senate may have ratified the Supplementary Treaty with such revisions in order to generate momentum for the passage of the Extradition Reform Act of 1984.[118] If so, the Administration, which has been reluctant to endorse the Act, may now find it best to support it. The half-measures that crept into Article III and other provisions of the Supplementary Treaty could then be restored to fuller legislative consideration.

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116. *See* H.R. 3347, § 3194(d); *Hearings on H.R. 2643*, 96 at 274-77 (statement of this author); *Hearings on H.R. 5227*, *supra* note 96 at 104,105 (statement of this author).

117. H.R. 3347, § 3195. *See* H.R. 3347, 129 CONG. REC. H4102 (1983).

118. *See* H.R. 3347, 129 CONG. REC. H4102 (1983).

VII. APPRAISAL

The decision of the Administration to tamper with the "political offense exception," can only be explained by the presumed pressures of the U.K. government in light of its experiences and policies with Irish resisters. The attempt on Prime Minister Thatcher's life at Brighton was most likely an important factor.[119] Additionally, the three cases discussed above were an embarrassment to the U.K.[120] That government would certainly like to put an end to the possibility that Irish resisters who commit acts of terror-violence can find sanctuary in the U.S. Thus, the original text of the Supplementary Treaty contained a provision on the applicability of the statute of limitation of the requesting state (Article II(h)). The combination of this Article with Articles I and IV (retroactivity) would have enabled the U.K. to make new requests for the extradition of Messrs. McMullen,[121] Doherty[122] and Mackin.[123] Their extradition would have been a significant blow to the IRA and PIRA. However, the Senate's ratified version, and in particular Article III, makes the prompt return of these three persons improbable. If the Administration wanted to alter the judicial application of the "political offense exception," it should have done so through legislation rather than through an *ad hoc* treaty, which implies a special relationship with our country, but not with others. Such a precedent opens the floodgates for the amendment or supplementation of existing U.S. extradition treaties, which the U.S. has with more than one hundred countries,[124] yet does not provide any consistent policy and application for a legal process that requires both.

The Supplementary Treaty reverses a historical trend in the U.S., which, since the 1860's Irish rebellion against British rule in Ireland, has never surrendered an Irish political resister to Great Britain. Such a reversal, under the terms established in the Supplementary Treaty, means only that the U.S. has taken sides in an internal political conflict, which it had carefully avoided doing in the past. A policy of neutrality toward foreign internal civil strife is wisest in light of the many ongoing civil conflicts occurring all over the world. The U.S. has thus placed itself in a difficult position with respect to other countries seeking similar favored treatment. In order to avoid embroiling itself in all sorts of difficult situations with a large number of countries, and becoming, indirectly, a party to foreign internal civil strife, the U.S. should have continued its historical neutrality.

The Administration has thus opened a Pandora's box. Other coun-

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119. *See, The Target: Thatcher*, Time, Oct. 22, 1984, at 50. *See also infra* note 127.

120. *In re* Mackin, 668 F.2d 122 (2d Cir. 1981); Matter of Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984); *In re* McMullen, No. 3-78-1099 M.G. (N.D. Cal. May 11, 1979).

121. *In re* McMullen, No. 3-78-1899 M.F. (N.D. Cal. May 11, 1979).

122. Matter of Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984).

123. *In re* Mackin, 688 F.2d 122 (2d Cir. 1981).

124. *See* I. KAVASS & A. SPRUDZS, *supra* note 74.

tries are now likely to seek the favored treatment afforded the U.K. The Administration will have to make hard judgments in granting or denying requests by other states that desire similar extradition provisions. Denial of the requests of some states will surely have a negative effect on U.S. relations with those countries. Acceptance of such requests may require the U.S. to review periodically the internal conditions in particular countries in order to determine whether such favored treatment should continue, thus altering its extradition treaties with the changing internal political circumstances of these countries as they are perceived in the U.S. Considering the change in U.S. perceptions of foreign regimes (*e.g. apartheid* in South Africa, the former Marcos regime in the Philippines, Pinochet's regime in Chile, and others), this would require a constant process of evaluation.[125] The Senate would be faced with ratification of many new supplementary extradition treaties and the abrogation of older ones, which would unnecessarily occupy its time and energy. Moreover, the U.S. would signal internal insurgents in countries given such favored treatment that it is opposed to them. The U.S. could then become a target of their acts of terror-violence. In addition, if one of these groups should become the new ruling regime in any of these countries, the U.S. would have unnecessarily created enmity with that new regime. The Senate has already stumbled into this pitfall by stating in its ratification "Declaration:"

> The Senate of the United States declares it will not give its advice and consent to any treaty that would narrow the political offense exception with a totalitarian or other non-democratic regime and that nothing in the Supplementary Treaty with the United Kingdom shall be considered a precedent by the executive branch or the Senate for other treaties.[126]

Mutatis mutandi, a non-totalitarian or democratic regime, however these terms are to be defined or perceived, may rely on the Supplementary Treaty as a valid precedent.

The U.K. exerted much effort to obtain the ratification of the Sup-

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125. The Administration and the Senate should be reminded of the draft United States - Philippines Treaty on Extradition, which was concluded with the government of Ferdinand Marcos. Under that Treaty, the Marcos regime could have sought the extradition of the late Benigno Aquino. At the hearings before the Senate on that Treaty, the Administration and members of the Senate supporting it raised similar arguments to those raised regarding the political offense exception in the context of the Supplementary Treaty. Fortunately, the Senate did not ratify the draft United States - Philippines treaty. Subsequent events in the Philippines proved the wisdom of not rushing into *ad hoc* bilateral treaties. *See Hearings*, *supra* note 9, at 119-21 (statement of Christopher Pyle).

126. 132 CONG. REC. S9120 (daily ed. July 16, 1986); S. EXEC. REP. 17, *supra* note 18, at 10.

plementary Treaty[127] which may benefit that country. The U.S., however, needs both comprehensive reform of legislation and a consistent policy.[128]

127. *See* Kennedy, *Why were F-111s 'Misused' in the Raid on Libya?* Chicago Tribune, Aug. 19, 1986, §1, at 15, col. 2. The author, who was an Air Force intelligence officer and a strategic analyst with the U.S. Army War College, is of the opinion that the issue was the political agenda of both President Reagan and Prime Minister Margaret Thatcher that made dramatic British support for some aspect of American policy highly desirable. That matter was an extradition treaty aimed at members of the Irish Republican Army seeking sanctuary in the United States. The treaty had been blocked in the Senate Foreign Affairs Committee for nearly a year, despite Reagan's endorsement. (Committee members who opposed it thought the United States was being pressured to violate a long tradition of support for opponents of tyranny and oppression.) "Thatcher, of course, has a particular enmity toward the IRA; it has tried to kill her once and has vowed to try again."

128. *See Hearings*, *supra* note 9, at 73 (statement of William J. Hughes); *Id.* at 136,37 (statement of this author). *See also* Bassiouni, *supra* note 103.