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COMMITTEE REPORT

An Analysis of the U.S.-U.K. Supplementary Extradition Treaty

On December 23, 1986, a Supplementary Extradition Treaty entered into force that narrowly restricts the application of the political offense exception as between the United States and the United Kingdom.¹ This aspect of the Supplementary Treaty has been hailed as a major improvement in the efforts of democratic nations to fight international terrorism.² As a result of amendments by the U.S. Senate, however, the treaty also makes a substantial change in the well-established "rule of non-inquiry,"

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1. Supplementary Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, with Annex, signed at Washington on June 25, 1985 [hereinafter Supplementary Treaty]. It supplements and amends the Extradition Treaty, June 8, 1972, United States-United Kingdom of Great Britain and Northern Ireland, 28 U.S.T. 227, T.I.A.S. No. 8468 [hereinafter 1972 U.S.-U.K. Treaty]. It was transmitted by President Reagan to the U.S. Senate under cover of letter dated July 17, 1985. TREATY DOC. No. 8, 99th Cong., 1st Sess. (1985). The Senate Foreign Relations Committee held several hearings and eventually reported out a resolution of ratification containing several amendments. S. EXEC. REP. No. 17, 99th Cong., 2nd Sess. (1986) [hereinafter S. REP. 99-17]. The resolution is reprinted in 132 CONG. REC. S9120 (daily ed. July 16, 1986). On July 17, 1986, the Senate consented to ratification of the Supplementary Treaty, subject to the Committee amendments. See 132 CONG. REC. S9273 (daily ed. July 17, 1986). On November 26, 1986, the British House of Commons also approved the Supplementary Treaty (as amended by the U.S. Senate). The instruments of ratification were exchanged in London on December 23, 1986, and, pursuant to its terms, the Supplementary Treaty entered into force.

2. See Editorial, N.Y. Times, July 11, 1985, at A22, col. 1 ("An important first step has been taken . . . to seal a legal foxhole that shelters terrorists."); Letter of Submittal from Secretary of State Schultz to President Reagan, (July 3, 1985), TREATY DOC. No. 8, *supra* note 1, at V ("It . . . represents a significant step to improve law enforcement cooperation and counter the threat of international terrorism and other crimes of violence."); accord Sofaer, *Terrorism and the Law*, 64 FOREIGN AFFAIRS 901 (1986); Address by Sir Michael Havers to the ABA Section of Int'l Law and Practice (June 30, 1986), reprinted in 21 INT'L LAW. 185 (1987) [hereinafter Havers].

a change whose significance is a matter of some doubt. This article describes how the Supplementary Extradition Treaty is to be applied.

I. Background

Virtually every extradition treaty contains a provision barring extradition for a "political offense" or, in the words of the 1972 U.S.-U.K. Extradition Treaty, an "offense . . . regarded by the requested Party as one of a political character."³ Many treaties also preclude extradition if the requesting state is motivated by politics rather than law enforcement considerations in seeking the return of a fugitive.⁴ Under present case law in the United States, it is within the jurisdiction of the courts to decide whether the crime for which extradition has been requested is a "political offense."⁵ By contrast, the Secretary of State has sole discretion to determine whether an extradition request should be denied because it is a subterfuge, and accordingly, courts traditionally have declined to consider whether the requesting country's motives in seeking extradition are "political."⁶ In addition, pursuant to this "rule of non-inquiry," courts will not inquire into the fairness of a requesting state's procedures, and it is left to the Secretary of State's discretion to determine whether to deny extradition on humanitarian grounds, such as a fugitive's claim that he would not be afforded a fair trial in the country seeking extradition or that he would face assassination or torture if he were returned to the requesting country.⁷

Recently, a deep concern arose over the potentially crippling effect of several U.S. judicial decisions on efforts by the United States and other countries to combat international terrorism. In four cases, U.S. magistrates or district judges denied extradition of IRA terrorists on the ground that their crimes were "political offenses": *In re McMullen*, *In re Mackin*,

3. Extradition Treaty, *supra* note 1, art. V(1) (c) (i).

4. *E.g.*, *id.* art. V(1) (c) (ii) (extradition shall not be granted if: "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").

5. *See* *Quinn v. Robinson*, 783 F.2d 776, 787 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986); *In re Mackin*, 668 F.2d 122, 135-37 (2d Cir. 1981); *Eain v. Wilkes*, 641 F.2d 504, 512-18 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981); *In re Ezeta*, 62 F. 972, 996-97 (N.D. Cal. 1894).

6. *See In re Lincoln*, 228 F. 70, 73-74 (E.D.N.Y. 1915), *aff'd per curiam*, 241 U.S. 651 (1916); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971); *In re Gonzalez*, 217 F. Supp. 717, 722 (S.D.N.Y. 1963).

7. *See Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983); *Escobedo v. United States*, 623 F.2d 1098, 1105 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980); *Sindona v. Grant*, 619 F.2d 167, 176 (2d Cir. 1980); *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1976); *In re Mackin*, No. 80 Cr. Misc. 1, slip op. at 68 (S.D.N.Y. Aug. 13, 1981), *appeal dismissed*, 668 F.2d 122 (2d Cir. 1981).

In re Doherty, and *Quinn v. Robinson*.⁸ In each of the IRA cases the test set forth in the nineteenth century English case of *In re Castioni*⁹ was accepted as the operative definition of a political offense. The court in *Castioni* had defined a political offense as a crime which was “incidental to and formed a part of political disturbances.”¹⁰ Mechanically applying the *Castioni* test, U.S. courts in the four IRA cases concluded that extradition was prohibited since “political disturbances” were taking place in Northern Ireland and the bombings and shootings at issue in those cases were natural “incidents” of those disturbances.

Reacting to these decisions, the governments of the United States and the United Kingdom entered into negotiations and on June 25, 1985, signed a Supplementary Extradition Treaty that, as between the two countries, essentially eliminates the political offense exception for acts of violence and, with it, the traditional role of U.S. courts in that connection.

On July 17, 1985, the Supplementary Extradition Treaty was submitted to the U.S. Senate for advice and consent to ratification. The Senate Foreign Relations Committee held extensive hearings on the Treaty between August and October of 1985.¹¹ Substantial opposition was raised by Irish-American groups and human rights organizations as well as by several members of the Senate who questioned the fairness of the British court system used to try IRA members or who feared that the Supplementary Treaty would establish a precedent that would endanger “freedom fighters” in other countries.¹²

In the Spring of 1986, efforts were made within the Senate Foreign Relations Committee to reach a compromise that balanced antiterrorism concerns and the right of due process for individuals. A compromise resolution of ratification was adopted in June of 1986 by the Committee and passed by the Senate by a vote of 87-to-10 on July 17, 1986.¹³ The principal effect of the compromise was to condition the Senate’s consent to ratification on the acceptance by the Government of the United Kingdom and the executive branch of the United States of an amendment to the Treaty altering the rule of non-inquiry into the fairness of the requesting state’s judicial system. The central feature of the Supplementary

8. *In re McMullen*, Mag. No. 3-78-1099 MG (N.D. Cal. 1979); *In re Mackin*, 80 Cr. Misc. 1 (S.D.N.Y. 1981), *appeal dismissed*, 668 F.2d 122 (2d Cir. 1981); *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984) (Sprizzo, J.); *Quinn v. Robinson*, No. C-82-6688 (RPA) (N.D. Cal. 1983), *rev’d*, 783 F.2d. 776 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986).

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

10. *Id.* at 165.

11. *United States and United Kingdom Supplementary Extradition Treaty: Hearings Before the Senate Comm. on Foreign Relations*, 99th Cong., 1st Sess. 703 (Aug. 1, Sept. 18, and Oct. 22, 1985) [hereinafter *S. Hearing 99-703*].

12. See *infra* note 31 and accompanying text.

13. 132 CONG. REP. S9273 (daily ed. July 17, 1986).

Extradition Treaty—its restriction of the political offense exception—remained essentially unchanged.

II. Limitation of the Political Offense Exception

As amended by the Senate, article 1 of the Supplementary Treaty provides as follows:

For the purposes of the Extradition Treaty, none of the following shall be regarded as an offense of a 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;¹⁴
- (b) murder, voluntary manslaughter, and assault causing grievous bodily harm;¹⁵
- (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.¹⁶

In addition, article 1(e) provides that an attempt to commit any of the above offenses or participation as an “accomplice” is likewise excluded from the political offense exception.¹⁷

In its revisions, the Senate deleted references in the Supplementary Treaty as originally submitted that also excluded crimes involving serious property damage, possession of weapons with intent to use, and conspiracy. From a policy standpoint, this change is minor.¹⁸

14. As noted in the Senate Report, S. REP. 99-17, *supra* note 1, at 6-7, the four conventions to which article 1(a) at present would apply are: (1) Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* at the Hague Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192; (2) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *opened for signature* at Montreal Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570; (3) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532; and (4) International Convention against the Taking of Hostages, *opened for signature* Dec. 18, 1979, U.N. Doc. A/RES/34/146.

15. The term “voluntary manslaughter” is intended to cover crimes that have been held by the U.K. courts to be manslaughter and that in many U.S. states would amount to second degree murder. S. REP. 99-17, *supra* note 1, at 7.

16. Supplementary Treaty, *supra* note 1, art. 1.

17. *Id.* art. 1(e).

18. As Senator Pell, the senior Democratic member of the Foreign Relations Committee, stated, “[t]he list is not as extensive as the one the administration had proposed, but it nevertheless covers all typically terrorist acts.” 132 CONG. REC. S9149 (daily ed. July 16, 1986). Similarly, Sir Michael Havers, the United Kingdom’s Attorney General, recently stated, as follows: “[t]he list of offenses to which the political exception no longer applies has emerged [from the Senate] as somewhat shortened. However, the essential ones remain. The treaty still covers a wide range of terrorist offenses.” Havers, *supra* note 2, at 187.

It should be noted that the deletion of these possessory and other offenses from the Supplementary Treaty does not preclude the extradition of persons charged with such offenses. If, for example, a fugitive were sought by the United Kingdom for the crime of possession of firearms with intent—as opposed to an offense involving their use—the individual could still be extradited under certain conditions. As the Senate Report makes clear, the accomplice provision of the Supplementary Treaty would apply if the firearm were ultimately used.¹⁹ Alternatively, even if there were no actual use that endangered a person, the possessor of a weapon could be extradited under the terms of the original 1972 treaty, so long as a court determines that such possession is not a “political offense” under traditional principles.²⁰

Two principle reasons were advanced for excluding serious violent crimes from the political offense exception. These were summarized on the Senate floor by Senator Lugar, Chairman of the Foreign Relations Committee, as follows:

First, in a democracy such as the United Kingdom violence should never be deemed an acceptable part of the political process. To even permit courts in the United States to consider political motives as justifying murder or other violent crimes showed a lack of respect for the democratic process. . . .

Second, to refuse to extradite even a few terrorists undermines U.S. anti-terrorism policy. That policy is bottomed on the proposition that cooperation with our democratic allies is an essential element in the war against international terrorism. For the United States to refuse to extradite suspected terrorists makes it that much more difficult to enlist the allies in antiterrorism efforts.²¹

During the hearings and in the Senate deliberations, some opponents argued that the Supplementary Treaty ran counter to the United States' 200-year-old tradition of providing a haven for political refugees and freedom fighters. Opponents of the treaty sought to draw a distinction between a “terrorist” and a genuine “rebel”. According to these critics, while a

19. The Senate Report states that “an individual accused of helping to construct a bomb, the use of which endangered a person, would not be able to assert the political offense exception.” S. REP. 99-17, *supra* note 1. Article 1(e) covers “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.” *Id.*

20. For example, possession of firearms and ammunition with intent is a violation of § 14 of the Firearms Act (Northern Ireland) 1969 and is an extraditable offense by virtue of the U.K. Extradition Act, 1870, 33 & 34 Vict., ch. 52 (as amended by the Suppression of Terrorism Act, 1978, ch. 26). It is one of the crimes within the Schedule of Offenses referred to in art. III of the original 1972 U.S.-U.K. Treaty, *supra* note 1; see *In re Mackin*, 80 Cr. Misc. 1, *slip op.* at 3 fn. (S.D.N.Y. 1981) (Buchwald, Magis.); it is also an offense in the United States, see response from Mr. Hannay to questions from Sen. Kerry, S. Hearing 99-703, *supra* note 11, at 682-83.

For the most recent analysis by a U.S. court of traditional political offense principles, see *Quinn v. Robinson*, 783 F.2d 776, 803-10 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986).

21. 132 CONG. REC. S9147 (daily ed. July 16, 1986).

few IRA members may have engaged in terrorist acts, the bulk of the IRA—such as McMullen, Mackin, or Doherty—are merely “rebels,” performing warlike acts in the course of a rebellion or uprising. Drawing an analogy to the American Revolution, these critics argued for the existence of a “right to rebel” that must be respected in all circumstances.²² Based on this theoretical “right,” Helms attempted to amend the treaty so as to continue the applicability of the political offense exception to “acts in furtherance of an armed uprising, insurrection, or rebellion against the military authorities of the state in which the accused person is a national.”²³

This effort to legitimize political violence directed at military or police personnel was strongly criticized during the hearings and Senate deliberations.²⁴ A strong voice in this aspect of the debate was the American

22. Comparing the troubles in Northern Ireland to the American Revolution, for example, Senator Helms stated that:

If this treaty had been in effect in 1776, . . . [its] language would have labeled the boys who fought at Lexington and Concord as terrorists. There is no question that the British authorities in 1776 would have considered the guerrilla operations of the Americans to be murder and assault. Their offenses included the use of bombs, grenades, rockets, firearms, and incendiary devices, endangering persons, as may be demonstrated by reference to our National Anthem. 132 *Cong. Rec.* S9161 (daily ed. July 16, 1986); *accord* S. REP. 99-17, *supra* note 1, at 12.

Similarly, Senator Dodd drew attention to a June 16, 1986, editorial in the *National Law Journal*, which opposed the treaty on the ground that it was inconsistent with this Country's revolutionary past, S. *Hearing* 99-703, *supra* note 11, at 884, and went on to state that: “The underlying proposition in this agreement is that all acts of political violence are wanton crimes and acts of terrorism. It equates all political violence with terrorism, and that is a bogus proposition. It's as bogus as equating political opposition to sedition or treason.” 132 *CONG. REC.* S9252 (daily ed. July 17, 1986).

23. *See* Amendment No. 2207, introduced by Senator Helms, 132 *CONG. REC.* S9161 (daily ed. July 16, 1986). A similar amendment had been offered and rejected during business meetings of the Senate Foreign Relations Committee in April and June of 1986. *See* S. REP. 99-17, *supra* note 1, at 3.

24. The inappropriateness of a rule that immunized military attacks by “freedom fighters” or “rebels” in all situations was highlighted in the remarks of Senator Lugar on the Senate floor. He stated that: “In Great Britain, we are not talking about a society in revolution or a society experiencing substantial political violence. We are talking about a remarkable democracy, a peaceful democracy, a democracy operating under law.” 132 *CONG. REC.* S9162 (daily ed. July 16, 1986). He further quoted remarks of Prime Minister Thatcher of Great Britain who said:

There is no justification for the IRA. Everyone in Northern Ireland has the same right to vote for a Member of Parliament as we have in the rest of the United Kingdom. Everyone in Northern Ireland has the same civil rights. What they are trying to do is trying to get something by virtue of fear when the result of the ballot has denied it to them.

Id. at S9163.

Similarly, Senator Eagleton, a principal draftsman of the Senate's amendments to the Treaty, emphasized that: “[T]errorism is terrorism. If the killing of 241 U.S. marines in their barracks, arguably an act of war, is internationally condemned as an act of terrorism, then IRA bombs that explode throughout Great Britain, killing civilians and military alike, are acts of terrorism.” *Id.* at S9165.

Bar Association, which endorsed the Supplementary Treaty as written.²⁵ In urging ratification, the ABA stated:

Traditionally, a distinction has been drawn between armed conflict and disorders falling short of armed conflict in order to prevent making the Government's security personnel and property fair game for terrorist attacks in situations falling short of armed conflict. While ABA policy established with respect to legislation has called for such a distinction to be made, governments are reluctant to draft treaties dealing with normal law enforcement relationships in a manner that expressly contemplates such events.

It is the understanding of the ABA Section of International Law and Practice that, in negotiating and concluding this treaty, the United States and British governments do not contemplate either country being involved in a non-international armed conflict, civil war, or insurrection, or governing dependent territories the population of which no longer desire that relationship. In the light of this understanding, the Section concludes that ratification of the Treaty is consistent with ABA policy.²⁶

By a vote of 87-to-9, the Senate decisively rejected the Helms amendment and its ill-advised distinction between civilian victims and military victims of terrorist attacks.²⁷ The Senate thus made clear that there is no open season on soldiers or policemen in countries where the institutions of democratic governance exist.²⁸

III. Modification of the Rule of Non-Inquiry

During the ratification process, the Senate added a new provision, article 3(a), which provides as follows:

Notwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions.²⁹

25. Letter from Robert D. Evans, Director, Governmental Affairs Group, American Bar Association, to Senator Richard G. Lugar (April 16, 1986), *reprinted in S. Hearing 99-703*, *supra* note 11, at 873.

26. ABA Sec. Int'l L. & Prac., Report to the House of Delegates 4 (1986), *reprinted in* 21 INT'L LAW. 271 (1987). The report was principally drafted by Prof. Waldemar Solf, then-chairman of the Section's International Criminal Law Committee.

27. 132 CONG. REC. at S9163.

28. *Cf.* Prepared Statement of Prof. Steven Lubet, *S. Hearing 99-703*, *supra* note 11, at 394; Hannay, *Legislative Reform of U.S. Extradition Statutes: Plugging the Terrorist's Loophole*, 13 DEN. J. INT'L L. & POL. 53, 75 (1983).

29. Supplementary Treaty, *supra* note 1, art. 3(a) adapts language found in art. 5 of the European Convention on the Suppression of Terrorism, *done* Nov. 10, 1976, Europ. T.S. No. 90, 15 I.L.M. 1272 (1976), *reprinted in S. Hearing 99-703*, *supra* note 11, at 570-75, 764-77. *See S. REP. 99-17 supra* note 1, at 4.

As explained in the Senate Foreign Relations Committee report, a compromise was reached between the supporters and opponents of the treaty, and a modification of the rule of non-inquiry was the quid pro quo for ratification.³⁰ Article 3 (a) is the heart of that compromise, responding to the concern expressed by several witnesses at the hearings and by several Senators over the fairness of the so-called Diplock court system in Northern Ireland.³¹ Supporters of the Supplementary Treaty urged that such concerns were overstated, pointing inter alia to the following statement of the U.S. District Judge in the *Doherty* case:

The Court . . . specifically rejects respondent's claim that the Diplock Courts and the procedures there employed are unfair, and that respondent did not get a fair trial and cannot get a fair trial in the courts of Northern Ireland. The Court finds the testimony of the government witnesses as to this issue both credible and persuasive. The Court concludes that both Unionists and Republicans who commit offenses of a political character can and do receive fair and impartial justice and that the courts of Northern Ireland will continue to scrupulously and courageously discharge their responsibilities in that regard.³²

Article 3(a) contains two distinct concepts: first, the courts may inquire into whether the requesting state has "trumped up" charges against the fugitive (referred to as the Ninoy Aquino clause), and, second, the courts may inquire into whether the fugitive would be unfairly treated at his trial because of his race, religion, nationality, or political opinions. The purpose of this article is to avoid unfair discrimination and not to open up a backdoor for terrorists to escape extradition.³³

30. See S. REP. 99-17, *supra* note 1, at 3-4.

31. See Remarks of Sen. Biden, S. HEARING 99-703, *supra* note 11, at 29-30; Statement of David Carlner, *id.* at 455-56; Remarks of Sen. D'Amato, 132 CONG. REC. S9154 (daily ed. July 16, 1986) ("[a]nother major reservation I have about this supplementary treaty is based on my lack of faith in the court system used in Northern Ireland, particularly the infamous Diplock courts . . . Some say that these are nothing but kangaroo courts"); Remarks of Sen. DeConcini, *id.* at S9164 ("The judicial system is riddled with juryless trials, warrantless raids of private homes, and torture-filled prisons. This is the infamous Diplock system."); Statement of Frank Durkan (Brehon Law Society of New York), S. HEARING 99-703, *supra* note 11, at 469-77; Remarks of Sen. Kerry, *id.* at 241-42; Statement of Christopher Pyle, *id.* at 98, 121-25; Statement of Charles E. Rice, *id.* at 306, 328; Statement of Joseph Roche (National President, Ancient Order of Hibernians), *id.* at 343-50.

32. *In re Doherty*, 599 F. Supp. 270, 276 (S.D.N.Y. 1972). An analysis of the Diplock court, prepared for the Senate Committee on Foreign Relations by the Department of State and used during the Committee's deliberations was reprinted at 132 CONG. REC. S9168-71 (daily ed. July 16, 1986), and S. HEARING 99-703, *supra* note 11, at 549-61. The Department of State also prepared a comparative analysis of the U.K.'s Emergency Provisions Act for Northern Ireland, the U.K. Prevention of Terrorism Act, and various martial law provisions in the Philippines, South Africa, and South Korea. See *id.* at 692-98.

33. As the Senate Report states: "Nothing in Article 3(a) should be interpreted as to giving aid or comfort to those who commit terrorist acts of violence in the United Kingdom. . . . It would be a perversion of the Committee's intent were Article 3(a) used to impede the extradition of those sought for acts of terrorism." S. REP. 99-17, *supra* note 1, at 4.

Article 3(a) appears to be a substantial change from prior practice. As explained above, the decision to deny extradition on the ground of political motivation by the requesting state or humanitarian considerations has uniformly been recognized as within the exclusive discretion of the executive branch.³⁴ Recognizing the diplomatic problems that this new form of judicial inquiry might create, the Foreign Relations Committee urged caution by the courts stating:

A number of committee members expressed unease at permitting U.S. courts to entertain an inquiry as sensitive as that contemplated by Article 3(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.³⁵

In this regard, it should be noted that, except for an appeal under article 3(b), the Federal Rules of Civil Procedure are not generally applicable to the extradition hearing itself.³⁶

In order to avoid frivolous claims being raised under article 3(a) and to fulfill the salutary purpose of the Supplementary Treaty, article 3(a) places a substantial burden of proof on the fugitive. The treaty language makes clear that the court may not speculate as to the likelihood of the prohibited events occurring, but rather the person sought must prove "by a preponderance of the evidence" that the requested state "in fact" trumped-up charges or that he "would" be prejudiced or punished by reason of his race, religion, nationality, or politics.³⁷

The treaty language also makes clear that the court's inquiry into the prejudice that the fugitive might encounter is a narrow, focused one. As

34. See *supra* text accompanying notes 6-7.

35. S. REP. 99-17, *supra* note 1, at 8.

36. *Id.*

37. See Remarks of Sen. Eagleton, 132 CONG. REC. S9167 (daily ed. July 16, 1986). The "in fact" language of article 3(a) places an even greater burden of proof on fugitives than that required of an alien who seeks to avoid deportation under section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h) (1982). The latter statute prohibits deportation or return of an alien to a country "if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, . . . or political opinion." *Id.* § 1253(h)(1). In *INS v. Stevic*, 467 U.S. 407 (1984), the Supreme Court held that an alien must demonstrate that "it is more likely than not that [he] would be subject to persecution" in order to qualify for relief under section 243(h). *Id.* 429-30. Section 243(h) "does not require withholding [deportation] if the alien 'might' or 'could' be subject to persecution." *Id.* at 422.

The language of article 3(a) of the treaty differs even more markedly from that of section 208(a) of the Refugee Act of 1980, 8 U.S.C. § 1158(a) (1982), under which an alien may be granted asylum if he has "a well-founded fear of persecution on account of race, religion, nationality, . . . or political opinion." *Id.* § 1101(a)(42). The Supreme Court recently held that section 208(a) "makes the eligibility determination turn to some extent on the subjective mental state of the alien" and is therefore more liberal than the objective showing required under section 243(h). *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1212-13 (1987).

Senator Eagleton, who was a principal draftsman of article 3(a), explained during the Senate debates:

Finally, Mr. President, I would emphasize that Article 3(a) is not intended to give courts authority generally to critique the abstract fairness of foreign judicial systems. It is directed at the treatment to which this particular person will be subjected. And it is directed at the likelihood of prejudice by reason of race, religion, nationality, or political opinions. A court may not deny extradition because it concludes that a foreign tribunal does not provide every procedural safeguard provided by U.S. courts. Rather, the test should be whether the procedures that would be applied to the requested person, on account of his race, religion, nationality, or political opinions, would be so unfair as to violate fundamental notions of due process.³⁸

It is plain that a fugitive could not carry his burden under article 3(a) merely by enumerating the differences between the Diplock court system and the United States Constitution or our own criminal justice system.

The United States has entered into bilateral extradition treaties with some one hundred countries³⁹ and has never required our extradition partners to adhere to every feature of our system. For example, the United States Supreme Court has held with respect to constitutional prohibitions against bills of attainder, ex post facto laws, and the due process clause of the fourteenth amendment, that:

[T]hese provisions have no relation to the crimes committed without the jurisdiction of the United States against the laws of a foreign country.

In connection with the above proposition, we are reminded of the fact that the appellant is a citizen of the United States. But such citi-

38. 132 CONG. REC. S9167 (daily ed. July 16, 1986). During the floor debate, Senators Kerry and Biden appeared to have some disagreement with Senator Eagleton as to the breadth of the inquiry authorized under art. 3(a). Compare *id.* at S9164-67 (Sen. Eagleton) with *id.* at S9253-58 (daily ed. July 17, 1986) (Sen. Kerry) and *id.* at S9259-62 (Sen. Biden).

Both Senators Kerry and Biden drew attention to a colloquy that took place at a business meeting of the Foreign Relations Committee and that is set forth in S. REP. 99-17, *supra* note 1, at 4-5. During that colloquy, Senator Kerry asked and received assurance from Senator Lugar, the committee chairman and a principal sponsor of the amendment, that a fugitive "would . . . be able to challenge the fairness of the judicial system to which he would be returned and thereby raise a right of inquiry into the fairness of that system" under the second clause of art. 3(a). *Id.* at 5. During the colloquy, Senator Biden followed up with a further question about "the nature of the rule of inquiry into the justice system in Northern Ireland that we are establishing here." He asked and was assured by Senator Lugar that "the defendant will have an opportunity in the Federal court to introduce evidence that he or she would personally, because of their race, religion, nationality or political opinion, not be able to get a fair trial because of the court system or any other aspect of the judicial system in the requesting country." *Id.*

The Kerry-Biden-Lugar colloquy is in fact consistent with the remarks of Senator Eagleton that are quoted in the text. Article 3(a) does not authorize a generalized inquiry into the "fairness" of the Diplock system, but does permit a fugitive to show that he would be personally prejudiced or punished because of his race, religion, nationality, or political opinion.

39. See 18 U.S.C. § 3181 (1982 & Supp. II 1984 & Supp. III 1985) (Treaties of Extradition).

zenship does not . . . entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled.⁴⁰

Further, the United States has entered into Status of Forces Agreements with numerous foreign countries providing for trial of U.S. military personnel in the foreign countries for violation of foreign laws; yet these agreements do not contain all of our constitutional requirements.⁴¹

Efforts at defining a minimum international standard of criminal procedure have proved elusive. Fundamental differences exist between common law and civil law criminal procedure. Further, there are important differences among countries within each tradition—for example, between the United States and the United Kingdom, on the one hand, and between individual civil law countries on the other. As one jurist noted in a case that raised a question of whether an American citizen had been denied justice in a Mexican trial, “[i]nternational law insures that a defendant be judged openly and that he be permitted to defend himself, but in no manner does it oblige these things to be done in any fixed way, as they are matters of internal regulation and belong to the sovereignty of States.”⁴²

Even where a multilateral agreement defining trial safeguards has been drafted, such as the European Convention on Human Rights, a certain margin or latitude in determining how to accommodate those rights must be given.⁴³ It should be noted in this regard that, with the exception of certain specific incidents of prisoner mistreatment, the European Court of Human Rights has not found the United Kingdom’s criminal justice

40. *Neely v. Henkel*, 180 U.S. 109, 122-23 (1901). Similarly, U.S. courts have held that the absence of a right of confrontation and cross-examination such as that guaranteed by the sixth amendment did not constitute a defense to extradition. See *Gallina v. Fraser*, 177 F. Supp. 856 (D. Conn. 1959), *aff’d*, 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960) (extradition of a person convicted *in absentia* is not contrary to due process of law); *Ex parte La Mantia*, 206 F. 330, 332 (S.D.N.Y. 1913) (sixth amendment “did not apply to persons extradited for trial under treaties with foreign countries whose laws may be entirely different”); M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 446 (1974) (“[A] trial *in absentia* is not considered by the United States Supreme Court as sufficiently extreme a denial of fundamental fairness under universal principles to warrant denial of extradition”).

41. See, e.g., NATO Status of Forces Agreement, June 19, 1951, art. VII(9), 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 (a U.S. serviceman is not expressly entitled to a jury trial, for example). Thousands of U.S. personnel have been tried before the courts of more than 40 foreign countries pursuant to such agreements. See Williams, *An American’s Trial in a Foreign Court: The Role of the Military Trial Observer*, 34 MIL. L. REV. 1 (1966).

42. B.E. Chattin (U.S. v. Mex.), 4 R. Int’l Arb. Awards 282 (United States-Mexican Claims Commission 1927).

43. European Convention for the Protection of Human Rights and Fundamental Freedoms, *done*, Nov. 4, 1950; entered into force September 3, 1953. Europ. T.S. No. 5. For a discussion of the need for extending flexibility to states to apply individual rights, see Note, *The Doctrine of Margin of Appreciation and the European Convention on Human Rights*, 53 NOTRE DAME LAW. 90 (1977).

system in Northern Ireland to violate its obligations under that convention.⁴⁴

In any event, as the remarks of Senator Eagleton make clear, the focus of article 3(a) is on whether the *individual* fugitive would be discriminated against because of his race, religion, nationality, or political opinion in the requesting country. It should therefore be unnecessary for a U.S. court to attempt to formulate or identify a minimum international standard of criminal procedure, because that issue is outside the scope of article 3(a).

IV. Other Procedural Issues

The Supplementary Treaty contains several interesting procedural provisions that raise a question as to whether they constitute a change in existing law. For example, article 2 sets forth a number of rules to guide the court in making the extradition determination, including a definition of "probable cause." The Senate Report states that article 2 is a "distillation of settled law" and is "designed to lay to rest any assumption that extradition under this Supplementary Treaty will be 'automatic' or that Federal magistrates and judges will not carefully evaluate the evidence presented in support of extradition."⁴⁵ Article 2 thus would appear to make no changes in basic procedure.

Article 3(b), which applies only to the United States, limits the scope of article 3(a) and gives to the government the right to appeal a finding under article 3(a). Carrying through the specific compromise reflected in the legislative history, the rule of non-inquiry is abrogated only to the extent that extradition is sought for the types of terrorist crimes listed in article 1. Thus, if a fugitive is wanted for extradition to the United Kingdom for fraud, drug smuggling, or some other offense not listed in article 1, that individual may not invoke article 3(a) before a U.S. judge. Further, to avoid any negative impact on the extradition process from the creation of the article 3(a) judicial inquiry, the treaty permits the government to appeal from an adverse decision in that regard. The traditional rule is that the United States may not appeal an adverse ruling in an extradition proceeding.⁴⁶

Finally, the Supplementary Treaty is expressly made retroactive. Article 5 specifies that it "shall apply to any offense committed before or after this Supplementary Treaty enters into force. . . ." This article of

44. See *Ireland v. United Kingdom*, 25-A Eur. Ct. H.R. (1978).

45. S. REP. 99-17, *supra* note 1, at 5-7.

46. See *in re Mackin*, 668 F.2d 122 (2d Cir. 1981).

the Treaty survived an attempt on the Senate floor to delete it.⁴⁷ In accord with this provision, Peter McMullen, one of the IRA terrorists whose extradition had previously been denied, was recently rearrested at the time the Supplementary Treaty entered into force.⁴⁸

V. Conclusion

The Supplementary Treaty's restriction of the political offense exception represents a substantial improvement in the ability of the United States and the United Kingdom to fight the rising tide of international political violence and is a good model for similar treaties with other democracies.⁴⁹ On the other hand, the treaty's "rule of non-inquiry" is more a reflection of political compromise in the Senate than a useful contribution to international human rights. Nevertheless, article 3(a) should, if interpreted properly, present no serious impediments to the extradition process.

47. See Amendment No. 2206, 132 CONG. REC. S9153 (daily ed. July 16, 1986) (Sen. D'Amato). The proponents of the amendment—which would have deleted the retroactivity provision—were apparently under the misapprehension that the Supplementary Treaty would constitute some form of an *ex post facto* law. In fact, as explained by Senator Lugar in opposing the amendment, the Supreme Court directly ruled on this issue long ago and made clear that an extradition raised no such constitutional issue. 132 CONG. REC. S9156 (daily ed. July 16, 1986) (citing *Collins v. Loisel*, 259 U.S. 309 (1922)). As further explained in correspondence from the Department of State, numerous United States treaties contain such retroactivity provisions. See Letter of Mary V. Mochary, Deputy Legal Advisor (June 23, 1986), reprinted in 132 CONG. REC. S9158 (daily ed. July 16, 1986).

48. United Press International news story (Dec. 24, 1986).

49. While the Senate's resolution of ratification declares that "nothing in the Supplementary Treaty . . . shall be considered a precedent by the executive branch or the Senate for other treaties," S. REP. 99-17, *supra* note 1, at 10, the U.S. Government has already negotiated two other similar supplementary treaties. On October 21, 1986, the United States and West Germany signed such a treaty, and on March 17, 1987, a similar one was concluded with Belgium.

