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Just Say No! United States Options to Extradition to the North of Ireland's Diplock Court System

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NOTES AND COMMENTS

Just Say No! United States Options to Extradition to the North of Ireland's Diplock Court System

It is not those who can inflict the most but those who can suffer the most who will conquer. Terrance McSwiney¹

I. INTRODUCTION

In 1972, the United States entered into a formal extradition treaty with the United Kingdom.² This treaty originally allowed for a "political offense" exception to extradition which was determined on a case by case basis by the judiciary.³ Although varying interpretations of this exception have been promulgated,⁴ the political offense exception is not the focus of this Comment. Rather, this Comment seeks to answer two questions: First, does the United States have a

1. Terrance McSwiney was the mayor of Cork who died in 1920 in a British prison after seventy-four days on a hunger strike. Hunger striking has a long history in Irish culture as a way of shaming an adversary into yielding to a striker's position. D. BERESFORD, *TEN MEN DEAD: THE STORY OF THE 1981 IRISH HUNGER STRIKE* iii (1987).

2. Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468 [hereinafter U.S.-U.K. Extradition Treaty].

3. *Id.* art. V(1)(c)(i)-(ii). These provisions state:

(1) Extradition shall not be granted if:

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

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

There has been some controversy regarding whether the judicial, legislative or executive branch is authorized to make this "political character" determination. Historically, the judiciary has rejected any executive infringement upon its right to decide the issue. See *Quinn v. Robinson*, 783 F.2d 776, 787 (9th Cir. 1986). However, the question of who decides whether or not the offense was political is now moot since Congress has legislated the exception out of the treaty.

4. There are essentially three political offense exception tests. (1) The French "objective" test, (2) the Swiss "proportionality" test, and (3) the Anglo-American "incidence" test. For a review of these as well as the history of the political offense exception see *Quinn*, 783 F.2d 776, 794-95 (9th Cir. 1986). The analysis that has been most widely used in the American courts is the "incidence" test.

moral obligation not to extradite those accused of "scheduled offenses,"⁵ political offense exception or not, due to the extent of derogation⁶ that exists in the Diplock⁷ court system of "Northern"⁸ Ireland? Second, if there is a moral obligation not to extradite, what alternatives are available to the United States?

To understand the implications of these questions one must first look at the historical developments that led to the current situation. Then, the Diplock courts themselves will be analyzed, along with the consequences of extradition. Finally, options to extradition will be proposed which consider the legal and moral obligations of the United States.

A. Historical Perspective

The history of the Anglo-Irish conflict is a long and sordid story, far beyond the scope of this Comment. There is a large body of work dealing with the subject,⁹ and the following is only a cursory overview to lay a foundation for the ensuing discussion.

5. Northern Ireland (Emergency Provisions) Act of 1978, ch. 5, sched. 4, pts. I-III. "Scheduled" offenses are specific crimes, the commission of which subjects the perpetrator to trial in the special Diplock courts as opposed to an ordinary court of law. The list of offenses is extensive, including murder, manslaughter, rioting, kidnapping, and possession of firearms or explosives. *Id.* pt. I(1-11).

6. Derogation in this context means any emergency provision that departs from the minimum standards established by the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5 [hereinafter European Convention].

7. Diplock courts derive their name from Lord Diplock, author of the REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, CMND. NO. 5185 (1972) [hereinafter DIPLOCK REPORT]. His committee's recommendations were subsequently adopted as the Northern Ireland (Emergency Provisions) Act of 1973 which was reaffirmed as the Northern Ireland (Emergency Provisions) Act of 1978. (These measures will be discussed *infra* at Part II of this Comment.) For an excellent critique of Diplock's report see Twining, *Emergency Powers and the Criminal Process: The Diplock Report*, 1973 CRIM. L. REV. 406.

8. "There is no neutrality in Northern Ireland, at least not in the terminological sense: the use of the term 'Northern Ireland' places a writer on one side of the conflict, because to an Irish Nationalist there is no such entity." D. BERESFORD, *supra* note 1, at 1. Loyalists refer to the six counties as Northern Ireland or Ulster interchangeably. Nationalists refer to the six counties as the "north" of Ireland. See also *Playboy Interview: The I.R.A.*, PLAYBOY MAG., April 1989, at 55 (interview with Danny Morrison and Gerry Adams of Sinn Fein).

9. See, e.g., D. BERESFORD, *supra* note 1; K. BOYLE, T. HADDEN & P. HILLYARD, TEN YEARS ON IN NORTHERN IRELAND: THE LEGAL CONTROL OF POLITICAL VIOLENCE 8 (1980); T. COOGAN, ON THE BLANKET: THE H BLOCK STORY (1980); K. KELLEY, THE LONGEST WAR: NORTHERN IRELAND AND THE I.R.A. (1982); M. MACDONALD, CHILDREN OF WRATH (1986); E. O'BALLANCE, TERROR IN IRELAND (1981).

1. That Was Then . . .

The Anglo invasion of Ireland dates back to the 1100s. However, England did not solidify its hold on Ireland until 1690 when the Protestant William of Orange defeated the Catholic King James at the Battle of the Boyne. During the 1600s, the English implemented a very successful "plantation of Ulster" policy whereby Scottish Presbyterians were given confiscated land to encourage them to settle in the north of Ireland.¹⁰ This policy helped facilitate England's control of the native Irish at that time and directly resulted in the Protestant majority there today. Periodically, the Irish rebelled against English rule,¹¹ but a serious challenge to England's control was not mounted until the early 1900s.

In 1916, the Irish Republican Army ("I.R.A.") started a war of independence which lasted until 1921.¹² The ensuing political settlement created the Free State of Ireland from twenty-six counties, leaving six counties from the north as part of the United Kingdom.¹³ A civil war followed in the Free State of Ireland over this political settlement¹⁴ and lasted throughout the 1920s. The six counties in the north of Ireland initially remained autonomous and a Northern Ireland Parliament was created at Stormont. The north of Ireland remained relatively stable until the 1960s.¹⁵ In 1968, however, a new era in the life of the north "erupted" rather peacefully.

2. This Is Now . . .

The "troubles," as they are commonly referred to,¹⁶ started with the civil rights marches of the late 1960s. Members of the minority populace (the Catholics) in the north of Ireland demanded equal

10. M. MACDONALD, *supra* note 9, at 22.

11. D. BERESFORD, *supra* note 1, at xi. The rebellions against English rule have been perpetual, but notable uprisings occurred in 1798 (led by Wolfe Tone), 1803, 1823, 1848, 1867, and finally in 1916.

12. The Easter uprising in Dublin in 1916 was led by James Connally and Peadrig Pearce. Although initially unsuccessful, ten members of the uprising were executed. Ironically, this actually increased popular support for the revolution and eventually helped it to succeed. *See generally supra* note 9.

13. Ireland consists of thirty-two counties comprising the four provinces of Munster, Leinster, Ulster, and Connaught. The six counties in the north are referred to as the six counties, the "north" of Ireland, Northern Ireland, or Ulster. D. BERESFORD, *supra* note 1, at xi.

14. *Id.*

15. I.R.A. activity in the north erupted in virtually every decade but was not sustained until 1970. M. MACDONALD, *supra* note 9, at 85-86.

16. *See generally supra* note 9.

rights from members of the majority (the Protestants).¹⁷ The Official/Protestant response to these demands became increasingly more violent¹⁸ and led to the resurgence of the I.R.A. as the protectorate of the Catholic ghettos.¹⁹ Concerned with the increase in violence, England sent British troops to the north on August 15, 1969, to restore peace.²⁰ By 1972, England had disbanded the Stormont Parliament and instituted its own direct rule from London.²¹ The British troops and government are still present today.

Over the years, British legislation concerning the I.R.A. has been substantial,²² and in 1972 the United States signed an extradition treaty with the government of Prime Minister Edward Heath to extradite suspected "terrorists"²³ to the United Kingdom.²⁴ A handful of Irish fugitives²⁵ have tested the enforceability of this treaty with some success. This very same success,²⁶ coupled with international political considerations,²⁷ led to the 1986 Supplement,²⁸ which virtually elimi-

17. Presently, there is approximately a 2:1 Protestant to Catholic ratio in the north of Ireland. M. MACDONALD, *supra* note 9, at 28. For the most part, Catholics are assumed to be nationalists and Protestants are regarded as loyalists. K. BOYLE, T. HADDEN & P. HILL-YARD, *supra* note 9, at 8.

18. See K. KELLEY, *supra* note 9, at 97-119.

19. *Id.* at 124-31. The I.R.A. split in 1970 into the Official ("O.I.R.A.") and Provisional ("P.I.R.A." or "Provos") wings. The O.I.R.A. renounced violence. Although both are proscribed organizations under the Northern Ireland (Emergency Provisions) Act of 1978, ch. 5, sched. 2, the P.I.R.A. is the focus of the 1972 extradition treaty.

20. K. KELLEY, *supra* note 9, at 120-21. The British troops initially were welcomed by the Catholic communities as protection against the Loyalist mobs.

21. *Id.* at 166.

22. The Civil Authorities (Special Powers) Act of 1922, 12 & 13 Geo. 5, ch. 5, was reactivated in 1971 to allow, among other things, internment without trial. Since then, legislation includes: (1) the Northern Ireland (Emergency Provisions) Act of 1973, (2) the Northern Ireland (Emergency Provisions) Act of 1978, (3) THE DETENTION OF TERRORISTS ORDER 1972, STATUTORY INSTRUMENTS NO. 1632 (N.I. 15) (repealed in 1975), (4) SPECIAL CATEGORY STATUS OF 1972 (repealed in 1976), (5) Prevention of Terrorism (Temporary Provisions) Act of 1984, and (6) the Anglo-Irish Accord of 1985.

23. Terrorism is an inherently subjective term but has been defined by the British as, "the use of violence for the purpose of putting the public or any section of the public in fear." DETENTION OF TERRORISTS ORDER 1972, STATUTORY INSTRUMENTS NO. 1632 (N.I. 15), at § 2.

24. U.S.-U.K. Extradition Treaty, *supra* note 2.

25. See *infra* notes 33-36 and accompanying text.

26. 132 CONG. REC. S9149 (daily ed. July 16, 1986) (statement of Sen. Pell).

27. An interesting anecdote appeared in "The Irishman,"

President Ronald Reagan, who claims Irish ancestry, strongly endorsed the treaty as gratitude to Thatcher's support for allowing American planes based in Britain to attack Libya. France denied the planes permission to fly over French territory. Margaret Thatcher remains one of Reagan's strongest international allies and many U.S. diplomats and Senators felt the favor should be returned.

nated the political offense exception from the 1972 treaty.²⁹

B. Extradition Treaty of 1972 and Supplement of 1986

The extradition treaty between the United States and the United Kingdom was signed on June 8, 1972 and entered into force on January 21, 1977.³⁰ The United States has nearly one hundred extradition treaties,³¹ each with a political offense exception similar to Article V of the 1972 United States-United Kingdom extradition treaty.³² Four cases have arisen since the treaty came into effect where the English government has requested American extradition of an individual for I.R.A. activity. They are the cases of Peter McMullen,³³ Desmond Mackin,³⁴ Joseph Doherty,³⁵ and William Quinn.³⁶

The courts in *McMullen*³⁷ and *Mackin* held that the offenses committed were governed by the political offense exception and therefore refused to extradite. In contrast, the court in *Quinn* found that the political offense exception did not apply because the following three part Anglo-American incidence test was not satisfied: (a) an uprising must exist, (b) the charged offense must be in furtherance of the uprising, and (c) the accused must be a member of the uprising group.³⁸ The court held that Quinn's offenses, which took place in England rather than the north of Ireland, were not covered by the political offense exception because there was no "uprising" in England.³⁹ As the dissent noted, this reasoning is specious at best,⁴⁰ con-

Extradition Treaty Passes Senate, The Irishman, Aug-Sept. 1986, at 1. Bill Quinn was extradited shortly thereafter.

28. Supplemental Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, S. EXEC. REP. NO. 17, 99th Cong., 2d Sess. 1 (1986) [hereinafter 1986 Supplement].

29. See Blakesley, *Evisceration of the Political Offense Exception to Extradition*, 15 DEN. J. INT'L LAW & POL'Y 109 (1986).

30. U.S.-U.K. Extradition Treaty, *supra* note 2.

31. 132 CONG. REC. S9153 (daily ed. July 16, 1986) (statement of Sen. D'Amato).

32. See *supra* note 3.

33. *In re McMullen*, Magistrate No. 3-70-1099 MG (memorandum decision) (N.D. Cal. 1979) reprinted in 132 CONG. REC. S9146 (daily ed. July 16, 1986).

34. *In re Mackin*, 668 F.2d 122 (2d Cir. 1981).

35. *United States v. Doherty*, 786 F.2d 491 (2d Cir. 1986).

36. *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986).

37. Even though McMullen prevailed at the hearing concerning his extradition to the United Kingdom, he subsequently failed in his bid to withhold deportation to Ireland. *McMullen v. I.N.S.*, 788 F.2d 591 (9th Cir. 1986). The analysis under deportation is substantially different than extradition and will be discussed *infra* at note 184.

38. *Quinn*, 783 F.2d at 810.

39. *Id.*

sidering the constitutional unity of England and the north of Ireland. Bill Quinn, an American citizen by birth, was subsequently extradited to England, where he was convicted of murder and conspiracy to bomb, and sentenced to life in prison.⁴¹

The case of Joseph Doherty is an egregious illustration of how hard the Executive branch of the United States government will work to extradite an accused I.R.A. member. Joe Doherty was arrested in the United States on June 18, 1983.⁴² He prevailed at his original extradition hearing⁴³ but Attorney General Edwin Meese appealed the ruling. Judge Sprizzo's decision was upheld⁴⁴ so Meese appealed again. Joe Doherty prevailed once more,⁴⁵ and this time the Second Circuit Court described the Executive branch's position as "startling."⁴⁶ The U.S. government refused to quit and appealed once again.⁴⁷ While this appeal is processed, Joe Doherty will have spent

40. Circuit Judge Fletcher, dissenting, stated:

I find persuasive . . . the district court's findings that a severe political uprising existed in the United Kingdom, including England, at the time of the acts of which Quinn is accused took place. The magistrate recognized the constitutional unity of Northern Ireland and Great Britain . . . I cannot agree that when PIRA [Provisional Irish Republican Army] members revolt against their British rulers in Northern Ireland, such acts are protected under the political offense exception, whereas identical violent acts carried out against the same British rulers in London lose their protected status.

Id. at 820.

41. Quinn's San Francisco attorney, Patrick Halinan, said that based upon the evidence, Quinn never would have been convicted in an American court of law. (Quinn was tried in an English court in London rather than in the Diplock courts because his alleged offenses took place in England.) Telephone interview with Patrick Halinan, San Francisco, (Oct. 20, 1989).

42. Joseph Doherty,

was a member of the Provisional Irish Republican Army ("PIRA"). On May 2, 1980, at the direction of the I.R.A., he and three other members of PIRA took over a private house in Belfast, holding a family hostage in the process, as part of an operation to ambush a convoy of British soldiers. A few hours later a car stopped in front of the house. Five members of the Special Air Service of the British Army emerged carrying machine guns. The two groups fired at each other; in the exchange of gunfire, Captain Westmacott of the British group was killed.

United States v. Doherty, 786 F.2d 491, 493 (2d Cir. 1986). Doherty escaped from prison while awaiting trial and was convicted in absentia and sentenced to life imprisonment. McCaffrey, *Justice Denied: The Joseph Doherty Story*, 1 NAT'L BAR EXCHANGE, March 1989, at 4.

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

44. *United States v. Doherty*, 615 F. Supp. 755 (S.D.N.Y. 1985).

45. *Doherty*, 786 F.2d at 503.

46. *Id.* at 495.

47. This action by the Executive branch has been widely criticized by senators, congressmen, federal judges, Cardinal John O'Connor and the A.C.L.U. Representative Thomas Downey of New York expressed his outrage:

In several instances the U.S. courts have ruled in favor of Mr. Doherty, but that apparently makes no difference to Mr. Meese who holds English wishes above U.S. rights If he were an Afghan, Majaheedeen, Cuban or a Contra, Mr. Doherty

six years in the Metropolitan Correction Center in New York.

With the exception of *Doherty*, the particular facts and holdings in these cases are interesting from an historical perspective but are not altogether relevant today. This is because under the 1986 Supplement, which eliminated the political offense exception for specific, enumerated crimes,⁴⁸ there is little doubt that all four individuals would have been summarily extradited upon a showing of probable cause.⁴⁹ During debates on the Supplement, Senator D'Amato expressed concern that people of Irish descent were being singled out for unfair treatment.

would be granted asylum at the drop of a hat. But Mr. Meese does not want that so he is moving heaven and earth to have Mr. Doherty sent back to England.

McCaffrey, *supra* note 42, at 4.

48. Article 1 of the 1986 Supplement eliminates consideration of the political offense exception for the following:

- (a) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at The Hague on 16 December 1970;
- (b) an offense within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature at Montreal on 23 September 1971;
- (c) an offense within the scope of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature at New York on 14 December 1973;
- (d) an offense within the scope of the International Convention against the Taking of Hostages, opened for signature at New York on 18 December 1979;
- (e) murder;
- (f) manslaughter;
- (g) maliciously wounding or inflicting grievous bodily harm;
- (h) kidnapping, abduction, false imprisonment or unlawful detention, including the taking of a hostage;
- (i) the following offenses relating to explosives:
 - (1) the causing of an explosion likely to endanger life or cause serious damage to property; or
 - (2) conspiracy to cause such an explosion; or
 - (3) the making or possession of an explosive substance by a person who intends either himself or through another person to endanger life or cause serious damage to property;
- (j) the following offenses relating to firearms or ammunition:
 - (1) the possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life; or
 - (2) the use of a firearm by a person with intent to resist or prevent the arrest or detention of himself or another person;
- (k) damaging property with intent to endanger life or with reckless disregard as to whether the life of another would thereby be endangered;
- (l) an attempt to commit any of the foregoing offenses.

1986 Supplement, *supra* note 28.

49. U.S.-U.K. Extradition Treaty, *supra* note 2, art. IX(1) states, "[e]xtradition shall be granted only if the evidence be found sufficient according to the law of the requested Party either to justify the committal for trial of the person sought if the offense of which he is accused had been committed in the territory of the requested Party" This evidence is defined as probable cause under United States law. See 18 U.S.C. § 3060 (1986).

The United States is a party to nearly 100 bilateral extradition treaties. Each one has a provision which exempts political offenders from extradition. No other treaty, even those that have been recently concluded, contains the narrow political offense exception found in the proposed United States-United Kingdom Supplemental Extradition Treaty.⁵⁰

The inequality recognized by Senator D'Amato led to serious reservations regarding the Supplement, so, in true legislative compromise, Article 3(a) was added. Article 3(a) abrogates the traditional non-inquiry restriction on extradition cases and allows a judicial inquiry into the court system in the north of Ireland.⁵¹ Article 3(a) mandates that the judicial branch shall refuse extradition if the person sought can establish by a preponderance of the evidence that he or she would be either punished or prejudiced, "on account of his race, religion, nationality, or political opinions"⁵² This permits the accused to present evidence concerning his plight in the Diplock courts regardless of whether he meets any political exception or not.⁵³

The decision of whether or not to extradite now hinges on the *legitimacy of the court system* rather than the *motivations of the accused*. This inquiry still could and should be made in the case of Joe Doherty. The next section of this Comment will attempt to do just that by exploring the question: To what kind of justice system is the United States being asked to extradite?

II. THE DIPLOCK COURT SYSTEM: WHAT IS IT?

The trial, true to form, was a farce etc!! Bobby Sands⁵⁴

50. 132 CONG. REC. S9153 (daily ed. July 16, 1986) (statement of Sen. D'Amato).

51. 1986 Supplement, *supra* note 28, Article 3(a) states:

(a) Notwithstanding any other provision of this Supplemental Treaty, extradition shall not occur if the person 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.

52. *Id.*

53. See 132 CONG. REC. S9253 (daily ed. July 17, 1986) (statement of Sen. Biden).

54. D. BERESFORD, *supra* note 1, at 39. This quote from Bobby Sands was taken from the communications, smuggled out of prison on cigarette papers, between the hunger strikers of 1981 and the I.R.A. Army Council. Bobby Sands was the first of the ten I.R.A. and Irish National Liberation Army hunger strikers to die, trying to achieve a return to political prisoner status, on May 5, 1981. For a review of the "special status" given to the I.R.A. in 1972 and its subsequent withdrawal, see Note, *Terrorists and Special Status: The British Experience in Northern Ireland*, 9 HASTINGS INT'L & COMP. L. REV. 481 (1986).

Lord Diplock was commissioned by the Secretary of State for Northern Ireland in 1972 to consider,

what arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organizations by bringing to book, otherwise than by internment by the Executive, individuals involved in terrorist activities, particularly those who plan and direct, but do not necessarily take part in, terrorist acts; and make recommendations.⁵⁵

Diplock's commission detailed three specific areas where ordinary criminal procedures were insufficient.⁵⁶ First, too many confessions were found inadmissible due to the way in which they were gathered. Second, there was the possibility of witness intimidation. Third, there was concern about the impartiality of juries in Northern Ireland's highly polarized society. The authors of "Ten Years On"⁵⁷ summarized the situation as follows:

The package of measures recommended by the Diplock Commission was specifically designed to overcome these [three] problems. The extension of the powers of the police to arrest and question suspects . . . was intended to facilitate the police in obtaining confessions from guilty suspects, and so to avoid any difficulty in securing convictions based on evidence from independent witnesses. Some change in the rules on admissibility was then thought to be necessary to avoid the risk that such confessions would be excluded by the judges: hence the provision that statements might be admitted provided that they had not been obtained by torture or inhuman or degrading treatment. . . . Finally, to avoid the risk of partisan or perverse verdicts, trial by jury was suspended for a list of offenses likely to be committed by terrorist offenders. These offenses are known as 'scheduled' offenses and the courts in which such cases are heard are generally referred to as 'Diplock Courts.'⁵⁸

The recommendations of Diplock's Commission⁵⁹ were incorporated wholesale into the Emergency Provisions Act of 1973.⁶⁰ These provisions were subsequently readopted in the Emergency Provisions Act of 1978 and reaffirmed in Lord Baker's 1984 review of the 1978 legis-

55. DIPLOCK REPORT, *supra* note 7, at 1.

56. K. BOYLE, T. HADDEN & P. HILLYARD, *supra* note 9, at 57.

57. *Id.*

58. *Id.*

59. See generally DIPLOCK REPORT, *supra* note 7.

60. Twining, *supra* note 7, at 406-07.

lation.⁶¹ They still exist today. Since the Baker Report is the most thorough and recent governmental adoption of these emergency measures, it will be the focus of the next section of this Comment.

The emergency provisions presently in place are extensive.⁶² Consequently, this discussion will be limited to those specific provisions which would be the subject of an Article 3(a) judicial inquiry allowed under the 1986 Supplement to the 1972 extradition treaty. These include: (1) interrogation techniques leading to the introduction of confessions and their impact on the right to remain silent,⁶³ (2) elimination of the right to trial by jury,⁶⁴ (3) shifting the burden of proof to the accused for certain offenses,⁶⁵ and (4) arrest, seizure and detention powers.⁶⁶ In addition, recently proposed measures include the elimination of the right to remain silent, i.e. silence as an admission of guilt,⁶⁷ and the reintroduction of internment without trial.⁶⁸ To understand the significance of these measures we must examine how the Diplock courts evolved, their justification, and their relation to internationally accepted minimum standards of due process.

A. *Comparison of the Diplock Courts to the Minimum Standards of Human Rights Established in the European Convention on Human Rights*

There certainly is no dispute that the measures in place in the north of Ireland to deal with "terrorist" offenses are unusual in a civilized state. Since their inception these measures were acknowledged derogations from the minimum standards established under the European Convention on Human Rights.⁶⁹ Article 15 of the European

61. REVIEW OF THE OPERATION OF THE NORTHERN IRELAND (EMERGENCY PROVISIONS) ACT OF 1978, 1984, CMND. NO. 9222 (Lord Baker, Chairman) [hereinafter BAKER REPORT]. Baker recommended retaining essentially all of the existing emergency provisions first introduced in the Diplock Report.

62. See Northern Ireland (Emergency Provisions) Act of 1978, ch. 5, pts. I-IV.

63. *Id.* pt. I, § 8.

64. *Id.* pt. I, § 7.

65. *Id.* pt. I, § 9.

66. *Id.* pt. II, §§ 11-20.

67. This was actually proposed in the BAKER REPORT, *supra* note 61, ¶ 189.

68. Internment was stopped in practice in 1975, but the power to intern was never repealed. See Northern Ireland (Emergency Provisions) Act of 1978, ch. 5, pt. II, § 12, sched. 1. See also K. BOYLE, T. HADDEN & P. HILLYARD, *supra* note 9, at 5.

69. European Convention, *supra* note 6, art. 15 states:

(1) In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situa-

Convention allows a country to derogate from the minimum standards prescribed for the preservation of human rights, "[i]n a time of war or other public emergency threatening the life of the nation" ⁷⁰ Before implementing measures in derogation from these standards, a country must inform the Secretary-General of the Council of Europe (which the United Kingdom did). ⁷¹

In analyzing the appropriateness of a country's derogation, two questions must be considered. First, does an emergency exist justifying derogation and secondly, if so, are the measures taken appropriate to the exigencies of the situation. ⁷² Assuming there was a legitimate need (i.e. an emergency existed) in 1973 for derogation from the minimum standards of the European Convention in the north of Ireland, the question of whether an emergency situation can still exist seventeen years later persists. Also, and more importantly, are the measures taken appropriate for the exigencies of the situation?

1. Interrogation and Confessions

The techniques used during interrogation to obtain confessions and the subsequent admissibility of such confessions at trial have created an ongoing controversy over the last twenty years. In fact, this one emergency provision has been an endless source of written material. ⁷³ The root of the controversy is the Diplock report recommendation ⁷⁴ which equates Article 3 of the European Convention on Human Rights with the common law traditions against self-incrimination and

tion, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

70. *Id.* art. 15(1).

71. *Id.* art. 15(3).

72. See Donahue, *Human Rights in Northern Ireland: Ireland v. United Kingdom*, (1978) Y.B. European Convention on Human Rights 602 (Eur. Ct. of Human Rights) (judgment) 3 B.C. INT'L & COMP. L. REV. 377, 387.

73. See Eisenhower, *Interrogation and the Admissibility of Confessions in Northern Ireland*, 1 TEMPLE INT'L & COMP. L.J. 7 (1985). See also K. BOYLE, T. HADDEN & P. HILL-YARD, *supra* note 9, at app., where the authors propose a "Draft Code of Interrogation Practice" to alleviate part of the problem.

74. See DIPLOCK REPORT, *supra* note 7, ¶¶ 73-92.

involuntary confessions.⁷⁵ Diplock, in his 1973 report concluded, "that the detailed technical rules and practice as to the 'admissibility' of inculpatory statements by the accused as they are currently applied in Northern Ireland are hampering the course of justice in the case of terrorist crimes"⁷⁶

In trying to "effectuate" justice, Diplock was confronted with the common law standards for the admissibility of confessions as well as Article 15, section 2 of the European Convention.⁷⁷ Article 15, section 2 prohibits any derogation from the mandate of Article 3 of the Convention that, "[n]o one shall be subjected to torture or inhuman or degrading treatment or punishment."⁷⁸ This prohibition applies in times of war and regardless of whether the detainee has advocated violence or not.⁷⁹

To overcome this problem, Diplock recommended ignoring the common law standard by which admissions were judged. Instead, he proposed that the admissibility of a confession be governed by the language of Article 3 so that only statements made after the person had been tortured or subjected to inhuman or degrading treatment would be excluded. As a consequence, section 6 of the 1973 Emergency Provisions Act, reaffirmed as section 8 of the 1978 Emergency Provisions Act, was drafted.⁸⁰ It allowed for the introduction into evidence of any statement made by the accused unless, "prima facie evidence is adduced that the accused was subjected to torture or to inhuman or degrading treatment in order to induce him to make a

75. At common law, a defendant had a right, "at any stage of an investigation . . . to communicate and consult privately with a solicitor. This is so even if he is in custody and provided that in such a case no unreasonable delay or hinderance is caused to the process of investigation or the administration of justice by his doing so." *Eisenhower*, *supra* note 73, at 15. For the seminal case in this country dealing with the right to remain silent and involuntary confessions, see *Miranda v. Arizona*, 384 U.S. 436 (1966). The progeny of *Miranda* have made interesting distinctions between the right to remain silent and the right to counsel during "interrogation." See *Brewer v. Williams*, 430 U.S. 387 (1977) and *Rhode Island v. Innis*, 446 U.S. 291 (1980). However, since Baker's 1984 review of the Northern Ireland (Emergency Provisions) Act of 1978 still allows a person to be detained for up to 48 hours in the north of Ireland, without notification, charging, or attorney contact, this interesting distinction is unfortunately inapplicable.

76. DIPLOCK REPORT, *supra* note 7, ¶ 87.

77. European Convention, *supra* note 6, art. 15(2). See *supra* note 69 for text.

78. *Id.* art. 3.

79. REPORT OF AN AMNESTY INTERNATIONAL MISSION TO NORTHERN IRELAND, June 13, 1978, EUR 45/01/78 [hereinafter 1978 AMNESTY INTERNATIONAL REPORT].

80. Northern Ireland (Emergency Provisions) Act of 1978, ch. 5, pt. I, § 8, ¶ 1. The precursor to § 8, ¶ 1 can be found at § 6, ¶ i, pt. 1 of the Northern Ireland (Emergency Provisions) Act of 1973, adopted from the Diplock Report.

statement”⁸¹

This exclusionary language, taken directly from the non-derogable provisions of Article 3 of the European Convention, was interpreted in *Regina v. McCormick*⁸² by McGonigal, L.J., to allow “a moderate degree of physical maltreatment for the purpose of inducing a person to make a statement”⁸³ McGonigal also stated that only conduct which amounted to, “torture or inhuman or degrading treatment” and was done “for the purpose of inducing a person to make a statement” would allow a court to exclude a statement thus made by the accused.⁸⁴

The causation requirement⁸⁵ for exclusion, imposed in *Regina v. McCormick*, allowed for the admissibility of statements made after physical or mental degradation as long as the mistreatment was not committed “for the purpose of” inducing the statement. This allowable “degree of physical maltreatment” certainly placed in question the voluntariness of any confession obtained through interrogation and led to concern over the danger of false confessions.⁸⁶ Apprehension surrounding the validity of these confessions is amplified by the fact that close to 90% of all convictions in the Diplock courts are based in whole or in part on these “confessions.” In only a third of these cases was other additional evidence introduced which may or may not have been enough, on its own, to convict.⁸⁷

This concern led the Republic of Ireland to institute a suit against the United Kingdom in the European Court of Human Rights in 1976.⁸⁸ In February of 1977, the Attorney General of the United Kingdom, Samuel Silkin announced that his country would discontinue use of its five admitted torture techniques.⁸⁹ The United Kingdom was subsequently found guilty in 1978, by the European Court at Strasbourg, of violating Article 3 of the European Convention which

81. *Id.* § 8, ¶ 2.

82. *Regina v. McCormick et. al.*, 1 N. Ir. 105 (1977). See also 1978 AMNESTY INTERNATIONAL REPORT, *supra* note 79, at 62, for a critical analysis of this decision.

83. *McCormick*, 1 N. Ir. at 111.

84. *Id.*

85. See Eisenhower, *supra* note 73, at 29.

86. K. BOYLE, T. HADDEN & P. HILLYARD, *supra* note 9, at 46.

87. *Id.* at 44-85 (providing a thorough statistical analysis of the percentages of various outcomes for different groups in the Diplock courts).

88. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978).

89. *United Kingdom Renounces Northern Ireland Torture Techniques*, Amnesty International Newsletter, Mar. 1977. The five admitted techniques are, “hooding, prolonged periods of standing with the fingers pressed against the wall, loud electronic noise, deprivation of sleep and a limited diet of bread and water.”

prohibits torture.⁹⁰

Fortunately, Baker, in his 1984 review of the 1978 Emergency Provisions Act, recommended that section 8 be amended, redefining the interpretation of "torture or inhuman or degrading treatment." Baker stated that the definition of "torture or inhuman or degrading treatment" was "to include and always have included the use or threat of physical violence."⁹¹ However, a pervasive bias can still be seen in Baker's report with such statements as, "I am convinced that no physical violence of any degree would now be tolerated and I cannot believe that violence could occur, unless the accused was the aggressor."⁹² Questions have persisted regarding the methods used by the British in the north of Ireland. On November 29, 1988, Britain was once again found guilty by the European Court at Strasbourg of violating the human rights of four men held under its anti-terrorism laws.⁹³

2. Non-Jury Trials

Another Diplock measure reaffirmed in the 1978 Emergency Provisions Act was the elimination of the right to trial by jury for scheduled offenses.⁹⁴ This procedure was also upheld in Baker's 1984 review of the 1978 legislation.⁹⁵ Baker's obvious bias is seen once again in paragraph 108 of his report where he whimsically questions, "[w]ould there be juries in any trials if Sinn Fein came to power?" The official reasons set forth as the basis for this decision originally were twofold. First, there was fear that the jurors would be intimidated.⁹⁶ Second, there was a fear of unwarranted acquittals of Loyalists by largely Protestant juries.⁹⁷ The concerns of the nationalist community with respect to this practice can be characterized as: (1) the loss of the right to be judged by one's peers, (2) judges becoming case-hardened to the plight of the defendant, (3) no possibility of jury nullification or "lawlessness", and (4) no "trial within a trial" regarding admissibility of confessions or if admitted, their reliability.

90. *Ireland, supra* note 88.

91. BAKER REPORT, *supra* note 61, at app. J.

92. *Id.* at 55.

93. L.A. Times, Nov. 30, 1988, pt. I, at 2, col. 1.

94. Northern Ireland (Emergency Provisions) Act of 1978, ch. 5, pt. I, § 7(1) provides that, "[a] trial on indictment of a scheduled offense shall be conducted by the court without a jury."

95. BAKER REPORT, *supra* note 61, ¶¶ 96-108.

96. K. BOYLE, T. HADDEN & P. HILLYARD, *supra* note 9, at 80.

97. *Id.*

The right to trial by jury has a long standing tradition in English common law, dating back to the Magna Carta in 1215 a.d.⁹⁸ This right was considered so important as to be incorporated in the Constitution of the United States.⁹⁹ One justification for this time consuming and inefficient process is that a person has the right to be judged by a group of his peers who reflect a cross section of the community. Unquestionably, a valuable safeguard of liberty exists in having twelve ordinary members of the community, rather than one professional judge sitting alone, be convinced of the individual's guilt. Under the Diplock system, a judge sits alone and makes all the factual, as well as legal determinations.

Quite conceivably, judges will, with time, become hardened to the plight of the criminal defendant. The statistical tables compiled by the authors of *Ten Years On*¹⁰⁰ regarding the outcome of jury versus non-jury trials in the north,

provide strong support for the view that the declining acquittal rate in Diplock trials is the result of judges becoming case-hardened. This conclusion, when combined with the fact that a very high proportion of cases in Diplock trials are wholly dependent upon confessions obtained during interrogation, can only increase the general concern that the risk of innocent persons being convicted in Diplock courts is substantially greater than in jury trials.¹⁰¹

An additional consideration justifying jury trials in all judicial systems is the concept of jury nullification or jury "lawlessness."¹⁰² Jury nullification occurs in those cases where the defendant, though technically guilty, is acquitted because either the law itself or the actions of the police or prosecution make a conviction inappropriate.¹⁰³ This can only happen when the collective beliefs of the community, as exemplified by the beliefs of the members of the jury, are such that the

98. "No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed—nor will we go upon or send upon him—save by the lawful judgment of his peers or by the law of the land." Magna Carta, 1215 a.d., at ¶ 39. See also BAKER REPORT, *supra* note 61, at ¶ 104, quoting Lord Devlin who wrote, "[o]f all the institutions that have been created by English law, there is none other that has a better claim to be called . . . the privilege of the Common People of the United Kingdom . . . it is one which no other European people enjoys."

99. U.S. CONST. amend. VII.

100. K. BOYLE, T. HADDEN & P. HILLYARD, *supra* note 9, at 62.

101. *Id.*

102. W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 830 (1986).

103. K. BOYLE, T. HADDEN & P. HILLYARD, *supra* note 9, at 80.

individual circumstances of the case justify a non-legal conclusion. It is futile to believe that this will happen with any regularity, if at all, with a case-hardened jurist sitting alone.

A final consideration is the elimination of the "trial within a trial" concerning the admissibility of confessions.¹⁰⁴ In a normal criminal proceeding the judge decides admissibility and the jury decides guilt or innocence. Even if the judge admitted the statement, under the rules of common law, the accused could still argue its reliability to the jury. However, in the Diplock courts, the person who determines admissibility is the same person who ultimately decides reliability and as such, guilt or innocence. It is contrary to human nature to assume that the ultimate fact finder can ignore evidence that he has excluded previously or to discount the reliability of a statement he has just admitted. This takes on great significance considering the incredibly high percentage of convictions obtained as a result of confessions after interrogation.¹⁰⁵ In many Diplock trials the only issue in dispute is the admissibility and/or reliability of the confession.¹⁰⁶

3. Burden Shifting

Under the 1978 Emergency legislation, the burden of proof shifts to the defendant to prove lack of knowledge or control for certain possessory offenses¹⁰⁷ including possession of any explosive, firearm or petrol bomb. Section 9(1) of the 1978 Emergency Provisions Act states that where a person is accused of a scheduled offense involving possession and it is proven that,

at the time of the alleged offence—

- (a) he and that article were both present in any premises; or
- (b) the article was in premises of which he was the occupier or which he habitually used otherwise than as a member of the public, the court may accept the fact proved as sufficient evidence of his possessing (and, if relevant, knowingly possessing) that article at that time unless it is further proved that he did not at that time know of its presence in the premises . . . or, if he did know, that he had no control over it.¹⁰⁸

Diplock reasoned that while everyone was entitled to a presump-

104. 1978 AMNESTY INTERNATIONAL REPORT, *supra* note 79, at 60. (quoting CROSS, ON EVIDENCE 64-65 (4th ed.)).

105. K. BOYLE, T. HADDEN & P. HILLYARD, *supra* note 9, at 44-85.

106. *Id.* at 58-59.

107. Northern Ireland (Emergency Provisions) Act of 1978, ch. 5, pt. I, § 9.

108. *Id.*

tion of innocence under Article 6(2) of the European Convention,¹⁰⁹ the situation in the north of Ireland with respect to explosives and firearms made it, "[intolerable] that the scales should be weighted so heavily in favour of guilty men."¹¹⁰ Relying on this reasoning, Baker recommended that burden shifting remain in place. In fact, he felt its removal would be "an affront to justice."¹¹¹

What is an affront to justice is Baker's summary dismissal of any and all valid arguments against burden shifting. Baker places great emphasis on the case of *Regina v. Whalen*,¹¹² where three brothers were convicted of possession of a gun found in the dresser drawer of a bedroom where they all slept. Since none of the three testified, none of the three were cross-examined.¹¹³ Their convictions were reversed by the appeals court because the evidence was insufficient to sustain the conviction.¹¹⁴ Baker's expressed concern is that if no one is forced to explain the presence of a gun found in an apartment or car, then no one could be convicted of its possession.¹¹⁵ This reasoning is absurd. Inferences of intent can be drawn from all types of circumstantial evidence discovered through further investigation and diligent police work. The right to remain silent and the right to be free from compulsory self-incrimination should not be so lightly dismissed.

Baker simultaneously denigrated the presumption of innocence, the right to remain silent, the right to be free from compulsory self-incrimination and the government's burden of proof when he said:

It must be borne in mind that the statutory shifting of the onus of proof is really a procedural device for ascertaining the truth by forcing, in some but not by any means all cases, the accused to say on oath that he had no knowledge. He can of course be cross-examined but he and often he alone or with the other defendants knows what is the truth.¹¹⁶

Obviously, it is the defendant who normally knows what actually happened. However, the reasons for protecting a person's right to remain silent are numerous and deeply rooted in the judicial systems of both

109. European Convention, *supra* note 6, art. 6(2) provides that, "[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

110. BAKER REPORT, *supra* note 61, ¶ 203.

111. *Id.* ¶ 213.

112. *Id.* ¶ 202.

113. *Id.*

114. *Id.*

115. *Id.* ¶ 206.

116. *Id.* ¶ 207.

the United Kingdom and the United States.¹¹⁷ So too are the reasons for making the government, with all its resources, bear the burden of proof.¹¹⁸ These rights were developed in civilized countries for the protection of all citizens, not just those who are ultimately convicted.

4. Arrest, Seizure, and Detention

The authority of the police or the military to arrest, detain, or search and seize an individual in the north of Ireland is extensive.¹¹⁹ Although this authority has been curtailed somewhat since Baker's report, it is still beyond what most people would comprehend as possible in a "democratic" state. Although Baker recommended the elimination of internment without trial,¹²⁰ he also recommended keeping the bulk of the Diplock provisions governing arrest and detention powers. His recommendations included reducing detention time from seventy-two to forty-eight hours¹²¹ and requiring an objective "reasonable suspicion" rather than the subjective "suspicion" standard for arrest in sections 11, 13, and 14 of the 1978 legislation.¹²² However, reasonable suspicion can be based entirely on hearsay.¹²³ Baker also recommended retaining the power of the Secretary of State, or "one of his junior ministers," to extend the detention period for an additional five days.¹²⁴

The injustice inherent in this type of power can be seen in the figures supplied by the Royal Ulster Constabulary¹²⁵ ("R.U.C.") showing that 76% of those detained are released without charge.¹²⁶ The extent to which Baker went to eliminate this obvious intelligence gathering device of the police was merely to "suggest" that the R.U.C. be instructed to double check their reasonable suspicion regarding persons arrested.¹²⁷ When one combines the capability to detain a person for up to seven days, with the lowered standards for the

117. See E. CLEARY, *MCCORMICK ON EVIDENCE* 278-86 (3d ed. 1984).

118. See W. LAFAVE & A. SCOTT, *CRIMINAL LAW*, at 44-56 (1972). See also *In re Winship*, 397 U.S. 358 (1970).

119. See Northern Ireland (Emergency Provisions) Act of 1978, ch. 5, pt. II, §§ 11-20.

120. BAKER REPORT, *supra* note 61, ¶ 236.

121. *Id.* ¶ 279.

122. *Id.* ¶¶ 283, 346.

123. *Id.* ¶ 280.

124. *Id.* ¶ 273.

125. The Royal Ulster Constabulary (R.U.C.) is the equivalent of the civilian police force. See K. KELLEY, *supra* note 9, at 104. The British Army and the local Ulster Defense Regiments (U.D.R.) also have law enforcement powers in the north of Ireland.

126. BAKER REPORT, *supra* note 61, ¶ 276.

127. *Id.* ¶ 292.

admissibility of statements by that person, it is obvious why the Diplock courts rely so predominately on confessions.

Since the above discussed measures are purportedly temporary responses to an emergency situation, section (3) of Article 15 of the European Convention requires the derogating country to inform the Secretary when these measures "have ceased to operate."¹²⁸ The United Kingdom gave this notice in 1984¹²⁹ under the guise that the situation was normal. This was of course the same year that Baker recommended retaining virtually all of the Diplock "emergency" measures, in place since 1973.¹³⁰

The government of Margaret Thatcher has maintained a hard and fast line that the measures in place in the north of Ireland are strictly an "internal" matter.¹³¹ Nevertheless, the United States must concern itself with whether or not these measures are "normal," and, if so, whether it should promote their legitimacy by extraditing to the north of Ireland. Since the United States is being asked to extradite to the Diplock court system, with its incredible due process deficiencies, Margaret Thatcher must realize these courts are no longer an internal matter.

In addition to the measures already discussed, several draconian restrictions have been proposed recently to combat the I.R.A. The next section of this Comment will discuss their relevancy to an Article 3(a) inquiry.

B. Proposed Measures Affecting the Diplock Courts

Recent concern over increased I.R.A. activity has led the government of Prime Minister Thatcher to propose several harsh measures designed to eliminate the I.R.A. Some measures are aimed at the publicity and financing of the I.R.A. and its political wing, Sinn Fein.¹³² These include limiting banking secrecy and allowing forfeiture of assets to make it harder for the I.R.A. to finance its activities along with requiring an oath of non-violence for candidates in north-

128. European Convention, *supra* note 6, art. 15(3). See *supra* note 69 for text.

129. See Note, *supra* note 54, at 514. This Note points out the irony that Lord Baker admitted that Sections 11, 12, 13, and 14 of the Northern Ireland (Emergency Provisions) Act of 1978, as well as Section 12 of the 1984 Prevention of Terrorism Act violated Article 5 of the European Convention.

130. See BAKER REPORT, *supra* note 61.

131. Flynn, N.Y. Times, Aug. 16, 1984, A23, col. 2.

132. Sinn Fein (Gaelic for "Ourselves Alone") is the legal political wing of the Irish Republican Army. The I.R.A. itself is a proscribed organization under the Northern Ireland (Emergency Provisions) Act of 1978, ch. 5, sched. 2.

ern elections.¹³³ Television and radio broadcasts of direct statements from the I.R.A. or Sinn Fein are now prohibited.¹³⁴ In addition, a "shoot to kill" policy has been rumored for years.¹³⁵ Measures affecting the Diplock courts include the elimination of the right to remain silent,¹³⁶ the reintroduction of internment without trial¹³⁷ and stiffer prison sentences.¹³⁸

Undoubtedly, the measures regarding the right to remain silent and the reintroduction of internment without trial are the two measures with the greatest significance to a United States jurist performing an Article 3(a) inquiry under the 1986 Supplement. The right to remain silent existed at common law and has become the cornerstone of a defendant's protection from the abuses of state power. In the debates over this measure, Roy Hattersley, deputy Labor party leader in Parliament said, "[t]he right to silence is an essential element of a free society. . . . To abolish [it] is to place a terrible risk [on defendants]." ¹³⁹ Under the proposed rule, "virtually assure[d of] passage," ¹⁴⁰ an inference of guilt may be drawn when a criminal defendant refuses to rebut the charges against him.¹⁴¹ In addition, a suspect would have no right to refuse to answer police questions during interrogation; if he or she did, this refusal could also be used at trial.

The right to remain silent, long considered absolute in the United States,¹⁴² was considered expendable by Baker in his 1984 report when he referred to it as "[t]he so-called right to silence, which some witnesses still regard as a luxury that any civilized society faced with increasing violent crime can ill afford" ¹⁴³ To extradite a person from the United States to a system that is devoid of such fundamental

133. L.A. Times, Nov. 25, 1988, pt. I, at 13, col. 1.

134. L.A. Times, Oct. 20, 1988, pt. I, at 17, col. 5.

135. See Flynn, *supra* note 131. See also, Spuitt, "The Official Use of Deadly Force by the Security Forces Against Suspected Terrorists: Some Lessons From Northern Ireland", PUB. L. 38, 39 (1986); Spuitt, "Deadly Force and Riot Control in Northern Ireland", PUB. L. 35, 35 (1987). For a detailed story of one man's investigative attempt to discern this policy with respect to the deaths of six unarmed civilians in 1982, see J. STALKER, THE STALKER AFFAIR (1988).

136. USA Today, Oct. 21, 1988, at A4, col. 3.

137. See Washington Post, Sept. 6, 1988, A1.

138. L.A. Times, Nov. 25, 1988, pt. I, at 13, col. 2.

139. USA Today, Oct. 21, 1988, at A4, col. 3.

140. *Id.*

141. L.A. Times, Sept. 8, 1988, pt. I, at 16, col. 1.

142. U.S. CONST. amend. V.

143. BAKER REPORT, *supra* note 61, ¶ 189.

guarantees is a difficult decision at best. At worst, it is an affirmative participation in a miscarriage of justice.

No emergency measure ever introduced in the north inspired the overwhelming resentment and hostility that internment without trial did. The authors of *Ten Years On* explained that, "[n]umerous opinion surveys have established beyond a reasonable doubt that most Catholics have a deep seated objection to detention without trial and a corresponding commitment to the ideals of procedural and substantive criminal justice."¹⁴⁴ There is also a general belief that the policy was not only ineffective but was actually detrimental to the ends sought by its implementation.¹⁴⁵ The re-implementation of this policy undoubtedly will lead to the same type of reactionary violence that occurred in 1971. To most Americans, the concept of interning a person without trial, or even formal charges, is beyond comprehension. For a United States judge to allow extradition of an individual to this type of system would be an abandonment of the very tenets on which this country and our system of justice were founded.

III. SHOULD THE UNITED STATES EXTRADITE TO THE DIPLOCK COURT SYSTEM?

Whether the United States should extradite can only be answered after consideration of the following: what are its legal obligations to the United Kingdom and what are its moral obligations to the person who is being extradited?

A. *What Are the United States' Legal Obligations to the United Kingdom?*

Under the current form of the treaty, the United States shall grant extradition if (1) the United Kingdom can show probable cause that the suspect committed one of the twenty-nine offenses listed in the schedule annexed to the treaty or any of the crimes listed in the Supplement to the treaty,¹⁴⁶ and (2) the judge is satisfied, after an Article 3(a) inquiry, that the person will not be punished or

144. K. BOYLE, T. HADDEN & P. HILLYARD, *supra* note 9, at 102 (quoting from T. Hadden and S. Wright, *A Terrorist Trial in Crumlin Road*, NEW SOCIETY, June 28, 1979).

145. See Twining, *supra* note 7, at 414-15 for a detailed criticism of the effects of internment. See also Rauch, *The Compatibility Of The Detention Of Terrorists Order (Northern Ireland) With The European Convention For The Protection Of Human Rights*, 6 N.Y.U. J. INT'L LAW & POLITICS 1 (Spr. 1973).

146. U.S.-U.K. EXTRADITION TREATY, *supra* note 2, at 234, and 1986 Supplement, *supra* note 28, art. 1. See *supra* note 48 for text.

prejudiced at his trial due to "race, religion, nationality, or political opinions."¹⁴⁷ This is the sum of the United States' legal obligation owed under the treaty. However, the doctrine of universal jurisdiction,¹⁴⁸ as applicable through the four international Conventions which are specifically incorporated in the 1986 Supplement,¹⁴⁹ allows the United States to assume jurisdiction under certain circumstances. These Conventions, and the ramifications of assuming jurisdiction, will be discussed in the next section. Specifically considered is how they affect the United States' moral obligations to ensure fair treatment to the person being extradited.

B. What Are the United States' Moral Obligations to the Person Being Extradited?

When a person commits a criminal offense against the state and is captured and tried in the same jurisdiction where the offense occurred, that person is "subject to" the procedural and substantive due process of the offended state.¹⁵⁰ However, when the accused flees the jurisdiction of the offended state and is captured elsewhere, different considerations come into play. Under certain circumstances, the United States can refuse to extradite altogether,¹⁵¹ or it can assume jurisdiction and try the person in federal court. Hence a situation of concurrent¹⁵² jurisdiction arises for certain offenses. Therefore, when

147. 1986 Supplement, *supra* note 28, art. 3(a). See *supra* note 51 for text.

148. There are five recognized bases for criminal jurisdiction. They are the principles of Territoriality, Nationality, Protective, Passive Personality, and Universality. Universal jurisdiction allows each and every state to try defendants for particular crimes that are regarded as criminal universally throughout the world. It is an extremely narrow jurisdictional grant. See M. SHAW, *INTERNATIONAL LAW* 349-61 (2d ed. 1986).

149. 1986 Supplement, *supra* note 28, art. 1. See *supra* note 48 for text.

These four Conventions all include universal jurisdiction provisions:

(1) Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), Dec. 16, 1970, 22 U.S.T. 1641, art. 7 [hereinafter Hague Convention].

(2) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, 24 U.S.T. 564, art. 7 [hereinafter Montreal Convention].

(3) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, U.S.T., art. 7 [hereinafter New York Convention].

(4) International Convention Against the Taking of Hostages, Dec. 18, 1979, G.A. Res. 34/146, U.N. GAOR Supp. (No. 46) at 245, art. 8 [hereinafter Hostages Convention].

150. This is the principle of objective territoriality, *supra* note 148.

151. 1986 Supplement, *supra* note 28, art. 3(a). See *supra* note 51 for text.

152. Bowett, *Jurisdiction: Changing Patterns of Authority Over Activities and Resources*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY* 555, 565 (R. MacDonald & D. Johnston, eds. 1983). See also L.

the United Kingdom asks the United States to exercise its sovereign power to return for trial a person who allegedly committed an act of "terrorism," it is in essence asking the United States to waive its jurisdiction and "participate" in the United Kingdom's criminal justice system.¹⁵³

This participation requires that we either approve of, or turn a blind eye to, the emergency measures existing in the north of Ireland. Since turning a blind eye to the Diplock courts would be irresponsible, as well as violative of Article 3(a) of the 1986 Supplement, this request from the United Kingdom should be analyzed in terms of whether or not the United States can approve of the system in place in the north. If it cannot approve of the Diplock courts, then the United States should not extradite to them.

1. The Four Conventions and the Guarantee of Fair Treatment

The New York and Hostages Conventions¹⁵⁴ make specific reference to the guarantees of fair treatment for the alleged offender. The New York Convention at Article 9 states that "[a]ny person regarding whom proceedings are being carried out in connexion with any of the crimes set forth in article 2 shall be guaranteed fair treatment at all stages of the proceedings."¹⁵⁵ The Hostages Convention goes even further by ensuring the rights and guarantees of the law of the State where the offender is found. Article 8(2) reads,

Any person regarding whom proceedings are being carried out in connexion with any of the offenses set forth in article 1 shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of *all the rights and guarantees provided by the law of the State* in the territory of which he is present.¹⁵⁶

BLOOMFIELD & G. FITZGERALD, *CRIMES AGAINST INTERNATIONALLY PROTECTED PERSONS: PREVENTION AND PUNISHMENT, AN ANALYSIS OF THE UN CONVENTION* at 80-82 (1975).

153. When the United Kingdom asks the United States to extradite, it is asserting that:

(a) it has jurisdiction over the subject matter of the conduct allegedly performed by the actor; (b) it is a competent forum to try the offender, and (c) when the actor is surrendered, he or she will be properly submitted to its judicial authorities for the exercise of their competent jurisdictional authority. . . . These representations . . . presuppose that the requesting state: 1) is competent to exercise "in personam" jurisdiction over the relator; 2) had its legislative authority to regulate the type of conduct allegedly committed . . . and deemed in violation of that state's laws is not violative of international law, and 3) that it is the competent forum to prosecute the offender.

M. BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 270 (1974).

154. New York Convention and Hostages Convention, *supra* note 149.

155. New York Convention, *supra* note 149, art. 9.

156. Hostages Convention, *supra* note 149, art. 8(2) (emphasis added).

Authors Bloomfield and Fitzgerald in their analysis of the New York Convention¹⁵⁷ explain "fair treatment" in the context of Article 14 of the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations.¹⁵⁸ In addition to requiring a "fair and public hearing by a competent, independent and impartial tribunal,"¹⁵⁹ this International Covenant specifically preserves the right (1) to the presumption of innocence¹⁶⁰ and (2) to be free from compelled testimony or compelled confessions of guilt.¹⁶¹ As noted above, any extradition for an offense covered by the Hostages Convention would require "enjoyment of all the rights and guarantees provided by the law of" the United States.

Clearly, no one could be extradited from the United States to the Diplock courts for an offense covered by the Hostages Convention¹⁶² because the "rights and guarantees" provided under United States law do not exist. Nor could anyone be extradited for any of the New York Convention offenses,¹⁶³ because the Diplock courts do not ensure "fair treatment" according to the International Covenant on Civil and Political Rights. In the interest of consistency then, does it make sense to allow extradition to the Diplock courts for the offenses listed in Article 1 of the 1986 Supplement¹⁶⁴ when extradition for

157. L. BLOOMFIELD & G. FITZGERALD, *supra* note 152, at 111.

158. International Convention on Civil and Political Rights, Dec. 16, 1966, U.N. GAOR Supp. (No.16).

159. *Id.* art. 14(1).

160. *Id.* art. 14(2).

161. *Id.* art. 14(3)(g).

162. Hostages Convention, *supra* note 149, art. 1. Article 1 provides:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hostage) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person . . . to do or abstain from doing any acts as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage taking") within the meaning of this convention.

163. New York Convention, *supra* note 149, art. 2. Article 2 lists the following extraditable offenses:

The intentional commission of:

- (a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person;
- (b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;
- (c) a threat to commit any such attack;
- (d) an attempt to commit any such attack; and
- (e) an act constituting participation as an accomplice in any such attack

164. 1986 Supplement, *supra* note 28, art. 1. See *supra* note 48 for text.

those offenses listed in the New York and Hostages Conventions is prohibited?

The Hague and Montreal Conventions use more ambiguous language. Article 11 of the Montreal Convention states that, "[c]ontracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect to the offenses. The law of the state requested shall apply in all cases."¹⁶⁵ Similarly, the Hague Convention at Article 7 states:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of an ordinary offense of a serious nature under the law of that State.¹⁶⁶

The Montreal Convention is similar to the Hostages Convention by requiring that the law of the requested state should apply to all criminal proceedings. This would certainly eliminate the possibility of a Diplock trial for these offenses.¹⁶⁷ Under the Hague Convention, if the holding state refuses to extradite, then it must "submit the case to its competent authorities for the purpose of prosecution."¹⁶⁸ The history of this phrase was interpreted by Nicholas M. Poulantzas in his analysis of the Hague Convention.¹⁶⁹ According to Poulantzas,

the sentence "for the purpose of prosecution" does not mean mandatory prosecution of the offender by the said State. The authorities of this State will decide on the question of the prosecution of the offender and on other related problems—as, for example, the discontinuance of the proceedings in exceptional circumstances—according to the law of the State in question and taking into con-

165. Montreal Convention, *supra* note 149, art. 11.

166. Hague Convention, *supra* note 149, art. 7.

167. Montreal Convention, *supra* note 149, art. 1. Article 1 defines unlawful acts as,

(a) . . . violence against person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or

(b) destroys an aircraft . . .

(c) places or causes to be placed on an aircraft . . . a device or substance which is likely to destroy that aircraft . . .

(d) destroys or damages air navigation facilities . . .

(e) communicates information that he knows to be false, thereby endangering the safety of an aircraft in flight.

168. Hague Convention, *supra* note 149, art. 7.

169. 18 N. POULANTZAS, CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT, World Peace Through Law Center (1971).

sideration all relevant circumstances of every concrete case.¹⁷⁰

The four Conventions mentioned above require "fair treatment", the "rights and guarantees" of United States law, or prosecution "in the same manner" as United States law, respectively. These guarantees apply to any person accused of taking hostages, harming diplomats or hijacking airplanes. Since it is clear that our legal and moral obligations to the person being extradited cannot be met in the Diplock courts, the United States must refuse extradition for these offenses. It is morally inconsistent then, to allow extradition to these same Diplock courts for the other offenses listed in Article 1 of the 1986 Supplement, when extradition for these Convention offenses is prohibited.

Fair treatment according to the laws of the United States should apply to all persons the United States extradites, not just those accused of taking hostages, harming diplomats or hijacking. If the country requesting extradition cannot afford to guarantee these fundamental rights, then how can the United States afford to extradite? This question becomes even more compelling when one considers the other international treaty obligations the United States must meet.

2. Additional Treaty Considerations

The New York Convention also includes two additional considerations. First, nothing in Article 7 is construed to "impair the principle of *non refoulement*."¹⁷¹ Thus, if the requested state feels the offender would not be afforded a fair trial or would be subjected to any abusive treatment, the state should refuse to extradite.¹⁷² This is essentially the type of inquiry that should be made under Article 3(a) of the 1986 Supplement.¹⁷³ Secondly, the preamble to the New York Convention specifically states:

170. *Id.* at 27.

171. L. BLOOMFIELD & G. FITZGERALD, *supra* note 152, at 96.

172. *Id.*

173. 1986 Supplement, *supra* note 28, art. 3(a). See *supra* note 51 for text. This inquiry is also required under the European Convention on the Suppression of Terrorism, Jan. 27, 1977, E.T.S. 90, art. 8(2), providing that:

Nothing in this Convention shall be interpreted as imposing an obligation . . . for mutual assistance in respect to an offence . . . made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that person's position may be prejudiced for any of these reasons.

Although this Convention is applicable only to the States of the Council of Europe (which includes the United Kingdom), it provides powerful support for the seriousness with which a United States jurist should perform an Article 3(a) inquiry.

[T]he provisions of the annexed Convention could not in any way prejudice the exercise of the legitimate right to self-determination and independence in accordance with the purposes and principles of the Charter of the United Nations and the Declarations on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations by peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination and apartheid.¹⁷⁴

Additionally, the United Nations Resolution on Terrorism, *[f]urther urges* all States, unilaterally and in co-operation with other States, as well as relevant United Nations organs, to contribute to the progressive elimination of the causes underlying international terrorism and to pay special attention to all situations, including, *inter alia*, colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien occupation, that may give rise to international terrorism and may endanger international peace and security.¹⁷⁵

The New York Convention preamble when combined with the United Nations Resolution on Terrorism forcefully implies a unilateral obligation, both moral and legal, on the part of the United States to "contribute to the progressive elimination" of the Diplock courts. These courts, with their emergency measures, in and of themselves, are an underlying cause of the current "troubles" in the north of Ireland, due to the resentment they breed.

This unilateral push should come in the form of refusing to extradite anyone under any situation unless and until the Diplock courts are reformed to guarantee the fundamental rights of the accused. Paragraph 9 becomes even more relevant when one considers that the north is essentially a "colonial"¹⁷⁶ situation involving "flagrant violations of human rights and fundamental freedoms."¹⁷⁷ To extradite would be to approve of, and affirmatively participate in promulgating,

174. New York Convention, *supra* note 149, at preamble, ¶ 4. According to Bloomfield and Fitzgerald, this language was a compromise from the proposal of a large group of African and Middle East delegations who wanted the preamble to state: "No provision of the present articles shall be applicable to peoples struggling against colonialism, etc." L. BLOOMFIELD & G. FITZGERALD, *supra* note 152, at 133-34.

175. United Nations Resolution on Terrorism, Dec. 9, 1985, G.A.R. 40/61, U.N. Gen. Ass. Off. Rec. 40th Sess., Supp. No. 53 (A/40/53), at 301, ¶ 9.

176. M. MACDONALD, *supra* note 9, at 6-11.

177. See *supra* notes 88-93 and accompanying text.

a system that is "terroristic" in and of itself. The United States has a moral obligation not to do this.

Arguably, the United States has the highest standards of due process afforded a criminal defendant anywhere in the world. The United States also does not have the same type of problems that confront everyday life in the north of Ireland. As such, any system of justice implemented in the north should not be expected to function under the same type of scrutiny and controls that are in place in this country.

However, a criminal defendant in that type of system should still be guaranteed certain fundamental rights consistent with a civilized state. Guarantees such as the right to remain silent without an inference of guilt, the right to be tried by a jury of your peers, the right to force the state to bear the burden of proving its charges, and the right not to be interned arbitrarily without charge or trial are not radical concepts.¹⁷⁸ They are accepted as fundamental in the international community¹⁷⁹ and expected by every citizen of the United States. It is the undeniable moral obligation of the United States, when acting in its sovereign capacity, to ensure that anyone who is, or was, under its control, is guaranteed these rights.

IV. IF THE UNITED STATES REFUSES TO EXTRADITE, WHAT ARE THE OPTIONS?

The foregoing discussion leads one to the inescapable conclusion that the United States should not extradite to the north of Ireland under any circumstances. However, the question of what the United States should do with the person remains open. The following discussion details some of the options available and their possible consequences.

A. Release

Release is obviously the most controversial option since the 1986 Supplement was aimed at eliminating this possibility. However, under Article 3(a), extradition shall not occur if the judicial authority

178. All of these guarantees are specifically incorporated in the Constitution of the United States. The right to remain silent is guaranteed in the 5th amendment, the right to a jury trial is guaranteed by the 7th amendment and the presumption of innocence, the prosecutorial burden, and the prohibition against arbitrary internment are guaranteed by the 14th amendment due process clause.

179. See *supra* note 158.

is convinced that the person would be punished or prejudiced on account of his "race, religion, nationality, or political opinions."¹⁸⁰ Unfortunately, the treaty does not specify what is to happen if the extradition is denied for one of these reasons.

Should it make a difference if the person would be "punished" versus "prejudiced" if tried in the north of Ireland? Certainly, if extradition is refused because the individual is being punished on account of race, religion, nationality, or political opinion it would be ludicrous to assume jurisdiction and try them here. There is simply no argument against release of someone who proves this motivation for prosecution. If the offender would be prejudiced in a Diplock court hearing, then a stronger argument could be made to assume jurisdiction and try the person in the United States court system.

This argument, discussed fully below, should be rejected. As a compromise of competing interests, persons who prove prejudice should be afforded an evidentiary hearing to determine if they are a security risk to the United States. If they are not a threat to the citizens of the United States, they should be allowed to stay.¹⁸¹ If, however, they are thought to pose a danger in this country, they could be deported to an agreeable country. This procedure already exists in the Immigration and Nationality Act, section 243(h).¹⁸² Section 243(h) has its own "political exception" clause which states that the Attorney General shall not deport if the alien's "life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular group, or political opinion."¹⁸³ Although this exception to deportation is different than the political offense exception to extradition,¹⁸⁴ it adds additional support for a magistrate to consider the "political" nature of these type of crimes. This option

180. 1986 Supplement, *supra* note 28, art. 3(a). See *supra* note 51 for text.

181. Irish nationalists will rarely, if ever, pose a threat to the United States. In fact, the original Immigration Judge in the case of Peter McMullen held that McMullen was not a security risk to the United States. *McMullen v. I.N.S.*, 788 F.2d 591, 593 (9th Cir. 1986).

182. Immigration and Nationality Act, section 243(h), codified at 8 U.S.C. § 1253(h).

183. 8 U.S.C. § 1253(h), ¶ (1).

184. The court in *McMullen* distinguished between the political offense exception under the pre-1986 United States-United Kingdom extradition treaty, where McMullen was successful, and the political exception to deportation, where McMullen was unsuccessful, 788 F.2d at 595-96. The Ninth Circuit found no *res judicata* effect in the magistrate's earlier determination that McMullen's offenses were "political", thus avoiding extradition, when it analyzed whether or not he could be deported. The Ninth Circuit held that the political offense exception is tied to the language of the particular extradition treaty, while the analysis in deportation is dependent upon the Convention and Protocols relating to the Status of Refugees, Nov. 1, 1968, 19 U.S.T. 6223, T.I.A.S. No. 6577. McMullen was deported because he was found to

would also satisfy those who argue that the United States would become a haven for "terrorists," as well as create an impetus for reform of the Diplock courts.

B. Assume Jurisdiction

It is difficult to imagine a scenario where someone accused of a "scheduled" offense would not be able to prove a minimum of "prejudice" under an Article 3(a) inquiry if tried in the Diplock courts. However, if such a case arose, the United States should still refuse to extradite because extraditing would be an explicit acceptance of the entire Diplock process. We should refuse to participate in any way in a system that so wholly lacks the fundamental guarantees of fairness. Instead, the United States could assume jurisdiction and try the person in an American court with all of the procedural safeguards guaranteed under the United States Constitution.

Even though this assumption of jurisdiction is specifically allowed under all four of the Conventions incorporated in the 1986 Supplement,¹⁸⁵ it has a number of inherent problems. First, there is no rational distinction why the offenses listed in these Conventions should be treated any differently than the offenses listed in the 1986 Supplement. The United States has a moral obligation to ensure fair treatment for all persons under its control, not just those accused of taking hostages, harming diplomats or hijacking airplanes. Consequently, the option of assuming jurisdiction should apply to all extraditable offenses, not just offenses under the four Conventions.

However, the doctrine of universal jurisdiction is one that by its very nature is limited in application.¹⁸⁶ True universal jurisdiction exists only when the crime itself is "regarded as offensive to the international community as a whole."¹⁸⁷ Piracy is truly the only universally recognized crime, although arguments have been made for both genocide and war crimes.¹⁸⁸ A second premise for universal jurisdiction has been advanced when a specific treaty clause grants jurisdic-

have committed a "serious non-political crime" prior to admission into the United States and consequently was excluded from the protection of the Refugee Convention.

185. See *supra* note 149.

186. Murphy, *Protected Persons and Diplomatic Facilities*, LEGAL ASPECTS OF INTERNATIONAL TERRORISM 277, 303 (1978).

187. M. SHAW, *supra* note 148, at 359.

188. *Id.* at 361. See also R. WALLACE, INTERNATIONAL LAW: A STUDENT INTRODUCTION 104 (1986).

tion to try the person in the custody state.¹⁸⁹ This has been termed quasi-universal jurisdiction¹⁹⁰ because it expands jurisdiction, by agreement between the parties, beyond what is considered a true universal crime. This is what the current extradition treaty (the 1986 Supplement) calls for with respect to the four Convention offenses. A third proposed basis for universal jurisdiction includes those crimes "under municipal law (not international law) for which all municipal legal systems make provision."¹⁹¹ Generally, this third basis has been rejected¹⁹² and should be rejected here as well.

Secondly, although the four Conventions listed in the 1986 Supplement allow quasi-universal jurisdiction for the crimes of taking hostages, harming diplomats or hijacking airplanes, the other crimes listed in the 1986 Supplement¹⁹³ are not of the type that are recognized universally. Murder is a prime example. Although all municipal legal systems outlaw the act of murder, not all would consider the killing of a soldier from an occupying country by a nationalist paramilitary group to be murder.¹⁹⁴ Certainly, they would not be considered "protected persons" under the Geneva Convention for the Protection of War Victims.¹⁹⁵ This is true regardless of whether or not the state agrees with the politics of the para-military group.

Allowing universal jurisdiction to encompass non-universal crimes would be a dangerous precedent. This expansion would create an opportunity for abuse on the part of the prosecuting authorities in any state seeking to expand its jurisdiction. The "political" atmosphere surrounding these trials would undoubtedly influence the actions of the custody state.¹⁹⁶ Therefore, it would be an invalid extension of the doctrine of universal jurisdiction for the United States to try a person accused of a "scheduled" offense in the courts of the United States.

Finally, assuming jurisdiction would provide no impetus for reform of the Diplock courts. It would not meet the United States' unilateral obligation to "contribute to the progressive elimination of

189. R. WALLACE, *supra* note 188, at 105.

190. M. SHAW, *supra* note 148, at 362.

191. Bowett, *supra* note 152, at 564.

192. *Id.*

193. 1986 Supplement, *supra* note 28, art. 3(a). See *supra* note 51 for text.

194. M. GREENSPAN, SOLDIER'S GUIDE TO THE LAWS OF WAR 3 (1969).

195. Geneva Convention for the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

196. Bowett, *supra* note 152, at 563.

the causes underlying international terrorism"¹⁹⁷ because it does not provide an incentive to the United Kingdom to reform the Diplock courts. If the British thought that I.R.A. fugitives would spend significant time in United States prisons, they would no doubt be satisfied with the status quo in the Diplock courts. Therefore, assuming jurisdiction should be rejected.

CONCLUSION

The extent of derogation that exists in the Diplock courts in the north of Ireland is beyond comprehension to most Americans. Any legitimate judicial inquiry under Article 3(a) could come to no other conclusion. Because of this, the United States should not implicitly or explicitly approve of these courts by extraditing to them. The United States' options are to release, deport, or assume jurisdiction and try the case in an American court. Assuming jurisdiction is inconsistent with the United States' other international obligations. Release is the option more in conformity with the values of the founders of the United States who over 200 years ago fought a war for independence from the same country that presently runs the Diplock courts. Therefore, unless and until the United Kingdom can afford to reform the Diplock courts to allow the full panoply of human rights and minimum guarantees of due process to everyone in the north of Ireland, the United States cannot afford to extradite. The moral price is simply too high.¹⁹⁸

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197. See United Nations Resolution on Terrorism, *supra* note 175.

198. On October 20, 1989, the convictions of the "Guildford Four," Gerard Conlon, Paul Hill, Patrick Armstrong, and Carole Richardson, all imprisoned since 1974, were reversed by a British appeals court after the attorney representing the government admitted the convictions were based on evidence "concocted" by the police. "Although all four confessed to the bombings, they later maintained that the confessions were obtained after beatings and intense intimidation at the hands of the police. There was no forensic evidence to back the prosecutor's case, which rested entirely on the retracted confessions and statements from the police." The reversal of the "Guildford Four" convictions has led to increased speculation about the innocence of the "Birmingham Six" and Annie Maquire, a woman imprisoned due to Gerard Conlon's retracted confession. Conlon's father, Giuseppe, jailed in connection with the Annie Maquire case, died in prison. He was pardoned posthumously. The British Home Secretary, Mr. Hurd, has promised an "investigation". Boston Globe, Oct. 20, 1989, National/Foreign section, at 2.