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A STUDY OF THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW

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## Abstract

The aim of this work is to study the position of the individual in international law. The traditional viewpoint is that only states have rights and duties at the international level. However, the modern exception is found in the doctrine of the law of human rights. After a theoretical, jurisprudential analysis of the position of the individual in the international arena, the work concentrates on the interaction of a traditional area of the law with a direct impact on individuals, namely extradition and the role human rights plays in this domain. Extradition is a key area where an examination of the individual's position in the international arena can be tested.

Within the law of extradition, the political offence to extradition forms an important (at least in theory) limitation to extradition. However, with the increase in international violence which the perpetrators claim is justified by political motives, democratic states have enacted measures designed to limit the exception. Limitations which have been sought at both the national and international level, are analysed in detail.

It has been put forward that these limitations augur ill for the protection of individual rights and liberty. Asylum for the political offender is a sensitive issue; the study of the concept of asylum and its relation to the law of human rights will form the concluding section of the work.

## CHAPTER ONE

### INTRODUCTION

The aim of this work is to study the relationship between the individual and international law. The traditional view of international law is that it regulates conduct between states only. Thus states were and, some authors still forcefully maintain, are the only subjects of international law. This essay will attempt to prove that the individual has been granted significant status in the domain of international law for the status of any particular legal person depends upon the rules of the legal system, which 'grants' or 'confers' personality.

Attempts to limit the cruelty of war brought the individual into contact with international law. In the Hague Conventions of 1907 regarding warfare, many rules were in operation whose aim was to protect soldiers and civilians against unnecessary cruelty during war. The League of Nations and later the United Nations had as their primary purpose the prevention of war. But it was clear that to do so, other aspects of human society had to be taken care of. These include the respect for human life and dignity, economic and social conditions. With the creation of special organs and organisations to deal with these issues, individuals were brought into a limited amount of contact with international law.

Chapter Two of the essay will analyse the various theories of the position of the individual in international law. Jurists of the Positivist School in international law insist that individuals are the objects of international law, whilst states alone are the subjects. But Naturalists think otherwise. The views of leading Natural lawyers such as Judge Sir Hersch Lauterpacht provide



powerful counter-arguments to positivist thought.

Chapter Three of the essay will consist of a study of some of the practice of traditional international law with a direct impact upon the interests of the individual, to see how these interests are protected. The area of study will be extradition. Extradition is one of the two areas which most concerns the individual and his claim to recognition as a subject in international law. The important safeguard which is invoked as proof of state recognition of the rights of individuals is the political offence exception to extradition incorporated in all extradition legislation. This trend commenced in the middle to late nineteenth century with France. France initiated the most important substantive treaty provision commonly contained in modern extradition treaties, namely, the exception of political offenders, the concept of speciality. These substantive provisions will be discussed in detail. One other important aspect to look at concerns the international minimum standard of state treatment of individuals and the development of human rights law. In traditional international law, protection of individual interests was extended only to the treatment of aliens. If a state committed a wrong against an individual who was an alien, the wrong was considered a wrong against the alien's state of nationality. In other words, the duty not to deviate from the international minimum standard was owed to the state of nationality. As such there was no protection for stateless persons or for nationals against mistreatment by their own state. The events of World War Two showed the need for such protection. Protection which is not dependent on the nationality or official status of the individual is afforded by the human rights principles. This 'new law' of human rights will be studied and analysed in detail. It is worth noting that in order to emphasise the importance of the issue it was decided that the measures to protect respect for human life and dignity were not left to the discretion of the individual states. The work for the promotion of human rights has been allotted to various organs of

the international institutions such as the United Nations (U.N.) and the International Labour Organisation (I.L.O.) These efforts to protect human life and welfare have the effect of bringing the individual into direct contact with international law. This is inevitable since the creation of international organs which deal with individuals must logically conceive of individuals as entities with a status, however limited, on the international plane. Mrs. Erica-Irene A. Daes, appointed as Special Rapporteur by the Sub-Commission on Prevention of Discrimination and Protection of Minorities was given a mandate to undertake a study on the subject entitled "The status of the individual and contemporary international law".(1) She is of the opinion that international societies are collectivities composed of individuals; that international law is a legal order of the community of peoples of the "World Association of Men".(2) She correctly asserts that international law has changed qualitatively, especially after the Second World War; the most important change having taken place after the birth of international human rights law. She asserts that international law at the present time should be considered as a transitory period towards a new legal order in which the individual will be "called to play a more important role as a subject of international rights, responsibilities and duties".(3) "In particular, it is around the respect for the human person that new developments and tendencies join in order that the individual, regardless of his own nationality may be recognised as a person with rights, responsibilities and duties in international human rights law".(4)

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1. E/CN.4/Sub.2/1984/29 26 June 1984 - The Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities XXVII Session. Item 15(a) of the provisional agenda.
  2. Ibid., p. 4, para. 13.
  3. Ibid., p. 4, para. 18.
  4. Ibid., p. 4, para. 19

The fact that such a study is taking place at the international level and with widespread co-operation from the various specialised agencies (such as the I.L.O., U.N.E.S.C.O., the Food and Agricultural Organisation of the U.N. - the F.A.O., the World Health Organisation - W.H.O.) only emphasises the importance of the topic. The essay will conclude with a discussion of what actual state practice perceives the position of the individual to be. Some suggestions will be put forward with regard to areas where improvements can be made.

## CHAPTER TWO

### AN ANALYSIS OF THE THEORETICAL POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW

Jurisprudential writing on the position of the individual in international law concerns itself with the question, "is the individual a subject of international law?" Two schools of thought dominate the discussion: the first school, the positivist school (1) can be divided into two classes. The traditional positivist view insists that only states and never individuals are subjects of international law. More modern positivists adopt the view that individuals could in principle be subjects of international law, but no existing rule of international law renders him the subject of rights and duties. The second school of thought can also be divided into two categories. Traditional natural lawyers (2) believe that only physical persons are the subjects of law and therefore only individuals and never states are and can be the subjects of international law. But the more middle of the road naturalist adopts the view that although states have been regarded as the traditional subject of international law, individuals have, in an increasing number of cases achieved recognition as subjects of international law.

As a starting point to the discussion reference must be made to the works of

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1. G. Schwarzenberger, *International Law Vol. I* (3rd ed.) (1957) London; A Manual of International Law (5th ed.) (1967) London; D. Anzilotti, *Cours de Droit International* (1929) Paris; T. Gihl, *Folkkratt under Fred* (1956) Stockholm; M. Siotto-Pintor, *Recueil des Cours* 41 (1932 III); G. Sperduti, *L'individu et le Droit International* 90 (1956 II)
  2. Hans Kelsen, *Principles of International Law* (2nd ed.) (1966) New York; Alfred Verdross, *Volkerrecht* (1959) Vienna; Lauterpacht, *International Law and Human Rights* (1950) London; "The Subjects of the Law of Nations" (1947) 63 *L.Q.R.*, pp. 443-460; P. Guggenheim, *Traite de Droit International Public* T I-II (1953-54) Geneva; C.A. Norgaard, *The Position of the Individual in International Law* (1962) Copenhagen.

Grotius and in particular his work entitled *De Jure Belli ac Pacis*.<sup>(3)</sup> Grotius believed that relations between states were governed by law; and the law of nature was a source for supplementing the voluntary law of nations and in judging its adequacy in the light of ethics and reason. He conceived that the will of states could not be the exclusive or decisive source of the law of nations. A persistent theme of Grotius's treatise is that of morality and rationality as the foundation of law and this is extended to the conduct of nations and rulers acting on behalf of individuals. Grotius maintained that there was a close analogy between the legal and moral rules governing the conduct of states and individuals alike. He saw states as composed of individual human beings; "Behind the mystical, impersonal metaphysical state there are actual subjects of rights and duties, namely individual human being".<sup>(4)</sup> Therefore the individual is conceived as the limit of all law, international and municipal, in the sense that the obligations of international law are ultimately addressed to him. The development, the well-being and the dignity of the individual are a matter of direct concern to international law.

From this starting point, members of the monist school of jurisprudence have continued the tradition. Natural lawyers insist that individuals and states are subjects of international law. Among the supporters of this philosophy are to be found Professor Hans Kelsen <sup>(5)</sup>, Professor Alfred Verdross <sup>(6)</sup>, Professor Paul

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3. Books I-III (1625). An excellent analysis of the works of Hugo Grotius is found in a study by Judge Sir Hersch Lauterpacht in (1946) XXIII B.Y.I.L., p. 1.
  4. *De Jure Belli ac Pacis* Book II, Ch.XV and XII 1. See also (1946) XXIII B.Y.I.L., p. 27.
  5. Op.cit., supra. N.2.
  6. Op.cit., supra. N.2.

Guggenheim (7) and Judge Sir Hersch Lauterpacht.(8) In describing the position of the individual Lauterpacht employs the concepts "subjects of rights" (9), "subjects of duties" (10) and "procedural capacity." (11) The individual is a subject of duties under international law when international law directly (without recourse to state legislation) imposes duties upon the individual not acting as an organ or on behalf of his state, and the duties can be enforced on him before a court, either international or - in cases where national courts according to the monist conception of the author directly apply international law - a national court. Where he refers to "subject of rights" under international law Lauterpacht means the beneficiary of an international rule, the person whose interests are directly fixed and protected by international law. He believes that international law may confer rights directly upon individuals and illustrates this assertion by reference to the Advisory Opinion concerning the Jurisdiction of the Court of Danzig.(12) Here he held that although in principle a treaty cannot, as such, create direct rights and obligations for private

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7. Op.cit., supra. N.2.
  8. Op.cit., supra. N.2.
  9. Lauterpacht, International Law and Human Rights (1958), p. 38.
  10. Ibid., p. 38.
  11. Ibid., p. 38. Also Lauterpacht, International Law Collected Papers Vol. I, pp. 141-143.
  12. P.C.I.J. (1928) Series B No. 15, pp. 17-18.

individuals, "the very object of an international agreement, according to the intentions of the contracting parties, may be adoption by the parties of some definite rules creating individual rights and obligations and enforceable by national courts".(13) The Court rejected the view that as the provisions of a treaty adopted in favour of Danzig railway officials had not been incorporated in Polish law, those officials had no enforceable rights of action.

Norgaard (14), although an ardent supporter of the view that the individual is a subject in international law, does not accept that the quotation from the case proves anything. He does not accept that the Opinion can be construed so as to mean that the individual is a subject of international law. He accepts that the view expressed by the court marks an important step in the evolution of the position of the individual in international law, because the court for the first time explicitly states that the individual can have rights and duties under international law. But, he maintains, the Opinion does not prove that a person possessing rights under international law, but not endowed with procedural capacity in any form on the international plane, is nevertheless to be considered a subject of international law. But there are instances where individuals have been provided with procedural capacity to invoke an international tribunal. This power has been furnished by certain treaties. In 1907 five Central American states signed a convention for the establishment of the Central American Court of Justice. Article 2 of the Convention provided that the Court should take notice of the questions which any individual of one of the Central American countries raised against any of the other contracting governments, due to the violation of treaties or conventions, and any other cases of an international character, even

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13. Ibid., p. 17.

14. C. Norgaard, *The Position of the Individual in International Law* (1962) Copenhagen, p. 49.

if their own government supported the claim or not. Another example of rights of individuals under international law is provided by the Germano-Polish Convention regarding Upper Silesia, signed at Geneva on May 15 1922. Article 5 permitted private persons to bring a suit before an international court against the state which had violated certain interests of these individuals protected by the Convention. Because the interested parties were, in this case, private persons, the Convention attributed rights to individuals as private persons by conferring on them the power to appeal to an international tribunal even against their own state. In Steiner v. Gross (15) a Polish and a Czechoslovak citizen brought action against the Polish state before the Upper Silesian Arbitral Tribunal on the basis of the German-Polish Convention of May 15 1922. The Polish government argued that the Convention did not give the Polish national a right of action against the Polish state; that it was a general principle of international law that an individual could not invoke an international authority against his own state. The tribunal rejected this contention stating that the Convention conferred in unequivocal terms jurisdiction upon the tribunal irrespective of the nationality of the claimants. The guiding principle of Article 5 was the respect of private rights and the preservation of the economic unity of Upper Silesia, and thus no one of these considerations was compatible with the exclusion of any category of claims for the sole reason of the nationality of the claimant. Steiner v. Gross goes further than the Jurisdiction of the Courts of Danzig Advisory Opinion for the individual in the former case, could point to a specific authority entitling him with the power to invoke an international tribunal. Lauterpacht maintains that there is nothing in the structure of international law that prevents the individual from becoming a subject of proceedings. In this connection he suggests as a natural consequence of the development of

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international law a change of Article 34 (16) Statute of the International Court of Justice to read as follows: "The Court shall have jurisdiction; 1. In disputes between states; 2. In disputes between states and private and public bodies or private individuals in cases in which states have consented in advance or by special agreement, to appear as defendants before the Court". Lauterpacht's train of thought is powerfully influenced by his monist point of view. Monist thinking asserts that national and international law are both part of the same legal order and international law can, without any specific transformation, be directly applied by a national court. The individual may therefore be considered a subject of international law if he is a party to a case decided by a national court by applying international law.

"Now the principle that international law is, without an express act of transformation part of municipal law means in effect that rights and duties created by international law are directly applicable through the instrumentality of municipal courts and that, to that extent, individuals are subjects of the law of nations".(17)

In Trendex v. Nigerian Central Bank (18) Lord Denning and his colleagues in the Court of Appeal found that, the Central Bank having acted commercially and not for a state purpose, it could not as an arm of the government claim immunity in personam in respect of a failure to meet commercial letters of credit. This shows that if the courts are now prepared to look at the nature of the transaction engaged in and not at the status of the foreign state trading company,

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16. Article 34 Statute of I.C.J. reads: "(1) Only States may be parties in cases before the Court".

17. H. Lauterpacht, *The Subjects of the Law of Nations* (1947) Vol. 63 L.Q.R., p. 443.

18. (1977) 2 W.L.R., p. 356.

the individual will be greatly protected in that his international commercial transactions will be subject to the process of law.

Dualism or the dualist school of thought maintains that national and international law are two separate legal orders. International law is never applied directly by national courts, but must be transformed in one way or another to national law before it can be applied by national organs. If a national court relies on the transformation of the international rule by a domestic rule, it is this latter which gives the individual his rights and it is not necessary to regard him as having any rights in international law in order to give him his remedy. The monist position has in recent times been associated with Kelsen.<sup>(19)</sup> Kelsen's view is that the rules of international law laying down duties, responsibilities and rights, can have only human conduct in view. The individuals are the final subjects of international law, but in most cases they are subjects in a specific way because international law frequently leaves to national law to decide who are the subjects of international law.<sup>(20)</sup> In rare cases, however, international law directly states who are the individual subjects, and the individuals in these cases are direct subjects of international law.<sup>(21)</sup> Kelsen breaks down the concept "subjects of law" into the three groups, "subjects of duties", "subject of responsibility" and "subject of rights". According to him, a person is a subject of law when he possesses one or more of these qualities. According to Kelsen, a subject of duties is a person whose conduct is regulated by a legal norm in such a way that the person is obliged to refrain from acting contrary to it. A subject of responsibility is the person against whom the court directs a sanction in case of a behaviour contrary

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19. H. Kelsen, *Principles of International Law* (2nd ed.) (1966) New York.

20. H. Kelsen, *Principles of International Law* (2nd ed.) (1966), p. 195.

21. *Ibid.*, pp. 212 and 221.

to the norm stipulating the duty. The subject of duties and the subject of responsibility is often the same person, but not necessarily so, and the two concepts must be distinguished. A subject of rights is a person who has the legal possibility of instituting a lawsuit in order to enforce the legal duty of another person. So for Kelsen, a person is a subject of duties under international law if his conduct is regulated by international law; a subject of responsibility under international law if the rules of international law establish individual responsibility "by directing sanctions exclusively against the immediate delinquent or against another physical person individually and directly determined by international law"(22); and a subject of rights under international law if he can appear before an international court as plaintiff.

As far as Alfred Verdross is concerned, in order to consider the individual a subject of rights within the international law arena, he or she must have capacity to assert his right before an international court; the capacity to make petitions to an international organ is not sufficient.(23) But as regards being a subject of duties Verdross states that the individual has this position only if he directly, on the basis of international law, can be held responsible for his conduct.(24) Professor Guggenheim states that in order to recognise the individual as a direct subject in international law, the individual either can be held responsible before an international court or can enforce his rights internationally - either as plaintiff before an international court or by petition directly to an international organ.(25) All four leading natural rights

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22. H. Kelsen, op.cit., supra. N. 20, p. 195.

23. A. Verdross, op.cit., supra. N. 2, pp. 159-160. For reference to the works of A. Verdross, see C. Norgaard, op.cit., supra. N. 2, pp. 44-46.

24. Ibid., pp. 157-158.

25. P. Guggenheim, *Traite de droit internationale public* (1953-54) (Geneva), pp. 171-210. For reference to the works of P. Guggenheim, see C. Norgaard, op.cit., supra. N. 2, pp. 53-57.

proponents claim that the individual must either be a subject of rights or a subject of duties under international law in order to be characterised as subject of international law. But there is a divergence of opinion when the question of responsibility and the capacity to enforce the rights is debated. Lauterpacht does not claim any procedural capacity vested in the individual in order to recognise him as a subject of international law. It is sufficient that a rule of international law confers a right on the individual even if the individual is not furnished with any capacity to enforce his right before a court by his own action. Kelsen and Verdross set higher, more rigorous standards. They both require that the individual must be a subject of proceedings before an international court in order to be considered a subject of international law where "rights" are concerned. Thus the question must inevitably be asked, if the prospect of judicial enforcement before an international tribunal is the matrix of international personality and since all international judicial proceedings are established by treaty, perhaps Kelsen and Verdross lean towards the positivism. The most one can say is that Lauterpacht belongs to the "traditional" natural law school whereas Kelsen and Verdross can be viewed as merely natural lawyers who wish to see the jurisprudential debate of law as it is and law as it ought to be kept close to the legal ought rather than the moral ought.

Before considering the alternative view as stated by the positivist school of thought, reference must be made to the work of Norgaard.(26) He believes that the disagreement in the doctrine of international law as to the position of the individual results from the fact that many authors do not make clear what they understand by a subject of law. "It is a decisive prerequisite for development and lucidity in the theory of international law that several concepts of international law are distinguished into their constituent elements and thereupon in

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26. C. Norgaard, op.cit., supra. N. 14.

an empirical investigation, are confronted with the legal reality".(27)

Norgaard considers that in describing the position of the individual in international law, the most appropriate point of departure is to be found in the basic conceptual analysis undertaken by Alf Ross.(28) Ross was of the opinion that the concept of subject of law ought to be disintegrated into constituent elements, subject of rights and subject of duties because a subject of law is not necessarily both a subject of rights and of duties. The concept of subject of rights, in its turn, is reduced into subject of interests and subject of proceedings. Correspondingly, the concept of subject of duties is disintegrated into subject of conduct and subject of responsibility. A subject of interests under a legal rule is a person for whose benefit the rule exists, i.e., a person who has a substantive right under the legal rule notwithstanding the problem whether the person himself has any legal capacity to take action by which to enforce his substantive right or whether such action can only be taken by another, in international law, normally his state. A subject of proceeding is a person who can bring a claim as a case before a tribunal. A subject of rights is a person who is both a subject of interests and of proceedings. A subject of conduct is a person of whom a legal rule requires a certain conduct, i.e., a person who has a material duty under the legal rule irrespective of the problem whether he personally can be held responsible for violating it or whether only another, in international law normally his state, can be held responsible. A subject of responsibility is a person who can be sued and held responsible before a tribunal. Norgaard stresses that in order to describe the position of the individual in international law, a division of the concept of subject of law as outlined above is necessary. Norgaard is convinced of the natural law

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27. C. Norgaard, op.cit., supra. N. 14, p. 27.

28. Alf Ross, A Textbook on International Law (1947) (London).

proposition that the individuals along with states, are subjects in international law. And he believes that the main weakness of the positivist view regarding the position of the individual is that it does not distinguish between the possession of rights and duties and the procedural capacity to be sued or be sued on them. Norgaard invokes the dictum of the permanent Court of International Justice in 1933. "It is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights one-self" (29) and asserts that access to the International Court, as to the Permanent Court before it, is barred to the individual. But he may assert his claim through his national government. Professor R. Higgins (30) disagrees with Norgaard's assumption that there is something "fixed and immutable" in the non-access of individuals to the International Court. "Power, to be sure, still rests to a substantial degree with sovereign states; and it is within their power to block the access of the individual to certain international tribunals and to continue to assert the old rule of nationality of claims, but the very notion of international law is not predicated on this assumption and the international legal system survives conceptually even were this to change".(31)

The positivist school of thought is led by such eminent jurists as Dionisio Anzilotti, G. Schwarzenberger and Torsten Gihl; Schwarzenberger does not object in principle to the individual being a direct bearer of rights and procedural capacity and of duties and responsibility under international law; but he maintains that no existing rule of international law provides as such. The individual is thus merely an object of the law.(32) Anzilotti for his part

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29. Series A/B No. 61, p. 231.

30. R. Higgins, (1978) 4 B.J.I.S. p. 1.

31. R. Higgins, op.cit., supra. N. 30, p. 4.

32. G. Schwarzenberger, A Manual of International Law (5th ed.) (1967) London, p. 52.

maintains that the rules of international law which seem to impose duties and responsibilities on individuals, in reality only means that the state will suppress and/or punish certain acts of individuals. Where no national rule forbids the act of the individual, he is under no duty and responsibility and cannot be punished for committing the act in question.(33) Gihl is a rigid exponent of the positivist view point. He asserts that though states may permit an individual to bring a claim based upon international law before an international tribunal, it is not the individual's own claim but rather the claim of the state to which the individual belongs. Individuals do not have this capacity on the basis of international law (i.e., not in the capacity of being subjects of international law) but only based upon the agreement between the states.(34) Sperduti maintains that the rules of international law which deal with the interests of the individuals do not address themselves to the individuals but to states having jurisdiction over the individuals in question.(35) But he proceeds to disagree with the view that the individual is the object of international law. The individual's status is intermediary, he contends and, using the concept "material subject", (the concept "material subject" covers the individual as one designated subject of rights and/or subject of duties) he alleges that the individuals in most cases are material subjects of international law. Importantly however, Sperduti disagrees with the fundamental dualist proposition that the individual cannot be a subject of international law and, therefore, cannot have access to international courts. He correctly points to the Central

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33. D. Anzilotti, *Cours de Droit International* (1929) (Paris), p. 134. For references to the works of D. Anzilotti, see C. Norgaard, op.cit., supra. N. 2, pp. 35-36.
34. For references to the works of T. Gihl and Sperduti, see C. Norgaard, op.cit., supra. N. 2, pp. 37-38 and 38-39. T. Gihl, *Folkkratt Under Fred* (1956) (Stockholm), p. 31 et seq.
35. G. Sperduti, *L'individuo nel diritto internazionale and L'individu et le Droit International Ret.* t. 90 (1956 II), p. 788.

American Court which existed from 1907-1917 where the individual had a direct access to an international court. But, he continues, since this is the only time when the individual has had the said capacity, "the individual cannot today be recognised as a subject of international law in the strict sense".(36)

Having canvassed both sides of the argument, the arguments of one important author who is strictly speaking a natural lawyer, needs to be mentioned. R. Higgins (37) suggests that it is not useful to "rely on the subject-object dichotomy". She maintains that it is "closer to perceived reality" to return to the view of international law as a particular decision-making process". Within that process there are a variety of participants making claims across state lines, with the object of maximising various values. These values will relate, among other things, to power, wealth, prestige and nations of vindication and justice. The participants will promote their claims by a variety of techniques ranging from force to diplomacy and public persuasion and a variety of decision-makers, international arbitration tribunals, or courts, will pronounce authoritatively upon these claims. In this model there are no "subjects" and "objects" but only participants. "Individuals are participants along with governments, international institutions and private groups". She asserts that the interests of individuals lie in the direction of protection from the physical excesses of others, in their personal treatment abroad, in the protection abroad of their property interests; and such topics as the minimum standard of treatment of aliens, the growth of the human rights movement "are not simply exceptions conceded by historical chance within a system of rules that operates as between states. Rather they are simply part and parcel of the fabric of international law, representing the claims that are naturally made by individual participants

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36. G. Sperduti, op.cit., supra. N. 1, p. 789. See C. Norgaard, p. 39.

37. R. Higgins, op.cit., supra. N. 30, p. 5.

in contradistinction to state-participants".(38) She goes on to argue that individuals are now able to pursue claims if they have grievances about an identified set of human rights, in the Council of Europe countries, initially in the European Commission of Human Rights (39) and perhaps ultimately in the Strasbourg Court of Human Rights. Thus access of individuals to international forums is becoming a reality, although access to the International Court by individuals is still blocked. Professor Higgins refers to the notion of nationality of claims and the fact that particular tribunals are not available to the individual. She argues that although Articles 35 and 65 of the Statute of the International Court allow only states and international organs to obtain judgments and advisory opinions respectively, this does not mean that the court has no interest in "for example, the expropriation of property or human rights". She maintains that the assumption is that the state will bring the action on behalf of its national. However she realistically points out that governments will not disturb good relations with other states and in such a situation the individual has no means of compelling his government to take up his claim. "The nationality of claims rule can thus militate unjustly so far as the individual is concerned and there are powerful arguments for giving him access - through a revision of its Statute - to the International Court or perhaps to a special chamber of that Court".(40) An important study on the question of nationality of claims and human rights has been carried out by certain authors.(41) The aim of the study was to observe the concept of "nationality" and all the ancillary rules about the conferrment and withdrawal of nationality and "to see how these are

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38. R. Higgins, op.cit., supra. N. 30, p. 6.

39. The individual has no right of access to the European Court of Human Rights, Article 31.

40. R. Higgins, op.cit., supra. N. 30, p. 7.

41. Myres S. McDougal, H. Lasswell, L. Chen, "Nationality and Human Rights: The Protection of the Individual in External Arenas" (1973-74) 83 Y.L.J. 900.

managed in the allocation of competence among territorial communities to protect human beings against deprivations by other territorial communities and in determinations of what states are authorised to impose what burdens upon individuals in different value processes". The study was focused upon the allocation of competence to protect individuals and the decisions which most directly affected the allocation. "Given a decentralised world arena in which nation-states are still the principal official participants, if the individual human being does not have some state as a protector, the larger community aspiration for human rights is meaningless. The possible value deprivations to which such a person may be subjected are severe and all-encompassing; he has little or no access to authoritative decision, on either national or international levels".(42)

McDougal et al assert that despite movement toward human rights standards in the laws concerning conferrment and withdrawal of nationality, the individual ought to be vested with the authority of self-protection. They argue that the substantive human rights prescriptions can never be made effective if the individual has no competence to invoke them in appropriate conditions. As such therefore, the individual should be made a full subject of international law, with access to all arenas, both international and national. They also recommend that much greater effect be given, in the laws permitted by international law for the conferrment & withdrawal of nationality, to the free choice of the individual in associating himself himself with a state. And to accord the individual freedom of choice among potential state protectors would be an important move in this direction. They conclude with the words, "the time has come to make the law of nationality defend and fulfil the human rights of the individual".(43)

Essentially McDougal is a natural lawyer. His views reflect the domain of law as it ought to be. D.P. O'Connell (44) asserts that the individual being the end of a

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42. Ibid.

43. McDougal et al, op.cit., supra. N. 41, p. 998.

44. D.P. O'Connell, International Law (2nd ed.) (1960), p. 108.

community, is a member of the community, and a member is furnished with status. Therefore he cannot be an object. He argues that theory and practice establish that the individual has legally protected interests, can enjoy rights and be the subject of duties under municipal law deriving from international law; and if personality is no more than a sum of capacities, then he is a person in international law, though his capacities may be different from and less in number and substance than the capacities of states".(45) O'Connell argues that much of the difficulty that international lawyers have experienced on this topic has arisen from the assumption that if the rights are vested directly in the individual there must be duplication of them in the national state. "There seems to be nothing juristically contradictory in the idea that the national state is empowered to act for protection of its nationals' rights; failure or refusal to act merely means that the available machinery for protection has not operated, and lack of machinery has never been taken to be lack of substantive law".(46)

Professor Brownlie (47) suggests, like R.. Higgins, that to say the individual is, or is not, a "subject" of international law is "in either case, to say too much and to beg a great many questions".(48) He suggests that it would be more helpful if writers were to "advert to the precise difficulties involved in giving procedural capacity to individuals before international tribunals". He asserts that political factors are the major inhibiting factor. But he does share the views of writers on the subject on the need to reinforce the protection of human rights.

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45. D.P. O'Connell, op.cit., supra. N. 43, p. 108.

46. D.P. O'Connell, op.cit., supra. N. 43, p. 109.

47. I. Brownlie, Principles of Public International Law (3rd ed.) (1979), p. 577.

48. Ibid., p. 577.

In conclusion, one has to admit that there are powerful arguments on both sides to justify the conclusions the various scholars promote. But one major flaw in the argument of the positivist is their refusal to accept, with the advent of international recognition of human rights, that the individual has been vested with rights which he can point to as being embodied within the international legal framework and from which he can seek protection by approaching certain international tribunals.(49) Although the framework of human rights is still being strengthened and various qualifications and reservations present obstacles to the individual, they are nevertheless a set of rights which the individual possesses in international law. As such therefore the strict delimitation of states alone being subjects of international law is challenged, since these human/individual rights demand of the states specific consideration and care in their treatment of nationals. Any breach may result in international determination of the breach. However, there are areas where the individual still has a long way to go in order to achieve the status of being an unchallenged subject of international law. The nationality of claims rule means that the individual is dependent on his state to pursue an action on his behalf. And it is in this area that Professor Higgins and McDougal insist that the most fundamental changes be made on behalf of the individual.

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49. The European Commission on Human Rights and at the world level, The Human Rights Commission.

## CHAPTER THREE

### THE LAW OF EXTRADITION

#### Brief Introduction

The previous chapter concerned the theoretical analysis of the individual in international law. In this chapter we will look at the inter-relation of a long-established area of the law which has a direct impact on the individual. The actual practice is the yardstick to measure the theoretical explanations. Extradition is a state right and the exercise of this act by a state provides an opportunity to analyse state perceptions of the power of the individual, when exercising his right, to challenge any breach which is detrimental to the individual. Extradition has been defined as "the surrender by a state of a fugitive alleged or convicted criminal from another state, following a request by the latter for his surrender".(1) In addition to this definition, one must add that the surrender is for the purpose of trying the fugitive or returning him to custody.

Extradition has also been described as "the formal surrender based upon reciprocating arrangements by one nation to another of an individual accused or convicted of an offence outside its own territory and within the jurisdiction of the other which, being competent to try and punish him, demands the surrender".(2)

Extradition will not be looked at in its entirety. The study will concentrate on the Anglo-Irish side of the issue, but where necessary references will

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1. V.E. Hartley-Booth, *British Extradition Law and Procedure* (1981), p. L1.
  2. Terlinden v. Ames 184 U.S. 270, 289 (1902).

be made to the United States of America and European practice. Any arguments put forward or conclusions reached, are tentative, but due to the material studied one can reach certain conclusions with some confidence.

Both definitions assume that the requested state has the power under its own law to deal with a person found within its jurisdiction by "surrendering" him to another state for a crime he committed or is alleged to have committed outside its jurisdiction; and that there exists reciprocal arrangements which have been formally secured.(3) There are different views as to the basis for the surrender by a requested state of a fugitive criminal to a requesting state. Some authors take the view that it is an international duty; others perceive it as an act of international comity or goodwill. The United Kingdom view appears to be that extradition is a matter of international comity. In support of this contention, authors cite the case of The Creole in 1842 (4) where the slave cargo of a United States vessel rose against the master, murdered a passenger and sought refuge in the Bahamas. The law officers stated, "It is the practice of some states to deliver up persons charged with crimes who have taken refuge, or been found within their domains, on demand of the government of which the alleged criminals are subjects but such practice does not prevail universally, nor is there any rule of the law of nations rendering it imperative on an independent state to give up persons residing or taking refuge within its territory".(5) The founders of international law, among them Grotius, took the view that a legal duty to surrender criminals existed. Grotius believed that the state of refuge should punish the criminal or hand him back to the state seeking his return.(6) Vattel

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3. See article by Rezek in B.Y.I.L. (1982) LIII, p. 171.

4. 6 B.D.I.L. Vol. 6, Ch. 17, p. 456.

5. Ibid., p. 456.

6. Grotius, *De Jure Belli ac Pacis*, Bk. II, c. 21, paras. 3-4.

also considered extradition to be a clear legal duty " at least in the case of serious crimes and between states on terms of amity".(7) The opponents consider extradition, as already stated, simply as a matter of imperfect obligation only, which was required to be confirmed and regulated by special compact in order to secure the force of international law. Common law countries do not extradite in the absence of a treaty. The United States law requires the existence of a "treaty or convention for extradition"(8), while in Great Britain, the extradition legislation only applies "where an arrangement has been made with any foreign state".(9) However the intra-Commonwealth scheme does not depend on treaties nor does rendition between the United Kingdom and Ireland. Most of the states of the Commonwealth are similarly inhibited by their laws from extraditing in the absence of a treaty. Canadian extradition legislation contains a provision permitting extradition without treaty but the provision has never been brought into force.(10) It is suggested that the effective beginnings of modern international co-operation in the suppression of crime lie in the eighteenth century. In traditional international law, there is no duty to extradite. A state can enter into treaty relationship with another state which creates an obligation to extradite. The treaty invariably contains provisions which protect the individual's interests, for example, the non-extradition of political offenders, or those that protect the state rights, such as the refusal to return nationals of the requested state. But the individual cannot rely on these protections at the international level. The protections are only relevant in so far as they can be invoked at domestic level. "A state may limit its freedom

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7. Vattel, *Le Droit des Gens*, Bk. II, c. 6, paras. 76-77.

8. 18 U.S.C. 3184 (1964 ed.) and Valentine v. United States ex. rel. Neidecker 299 U.S. 5, 9 (1936).

9. 33 and 34 Vict. C. 52 S. 2 (1870).

10. R.S.C. 1952 C. 322, Part II.

under its own national law to extradite certain persons, [but] rules of national law should not be confused with rules of international law".(11) Thus, even if the individual is permitted to enjoy a right under the municipal law of a state not to be extradited for a political offence, this provision in an extradition treaty is not generally construed as conferring rights on the individual under international law. Certain measures have become prevalent in attempts to by-pass lawful extradition.

Part I will consist of an analysis of irregular extradition with its specific impact on the individual. Part II will consist of a review of domestic, i.e., United Kingdom extradition law with reference to the political offence exception, the most important principle which an individual may invoke in proceedings concerning his extradition.

In Part III we will look at the Political Offence exception in the international legal arena.

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11. A.M. Connelly, "Non-extradition for Political Offenders; A Matter of Legal Obligation or Simply a Policy Choice?" (1982) I.J., p. 59 at p. 66.

Part I - Irregular Extradition

In addition to extradition according to treaties and the municipal laws of the two states, an individual may be returned to the state where he is alleged to or has committed a crime in other ways. There may be violations of the municipal law of either state in which case his remedy, if any, would be in the domestic law. But the return may be achieved in violation of the extradition treaty (where there is one) or in violation of some other rule of international law. The question then arises whether the individual may rely on such a violation as a bar to the jurisdiction of the courts of the requested state. While this proposition can often be tested only to the extent that the courts can rely on international law, an examination of the practice shows that domestic courts are extremely reluctant to concede that an individual has any rights as a result of the violation of international law.

As far as English law is concerned it has been established since the nineteenth century that the court has no power to inquire into the circumstances in which a person is found in the jurisdiction for the purpose of refusing to try him.<sup>(12)</sup> The earliest case to lay down this precedent was ex p. Susannah Scott (1829).<sup>(13)</sup> Scott was arrested in Brussels by an English officer, to whom the warrant for arrest on a charge of perjury was specially directed. Scott applied to the British ambassador who refused to interfere and she was brought into custody against her will to England where she was tried. On her behalf it was argued that the courts of England had no jurisdiction to try her because of the improper manner in which she had been brought into the jurisdiction. Lord

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12. Dr. O'Higgins, "Unlawful Seizure and Irregular Extradition" (1960) 36 B.Y.I.L. 279.

13. 9 B and C 446; 109 E.R. 166.

Tenterden C.J. stated: "I thought and still continue to think that we cannot inquire into the manner in which she was brought within the jurisdiction. If the acts complained of were done against the law of a foreign country, that country might have vindicated its own law. If it gave her a right of action, she may sue upon it". It was not clear if the Belgian authorities agreed to the arrest. The judge only concerned himself with the question of illegality under municipal law. There was no consideration of breach of international law on the jurisdiction of the court. The case was not concerned with breach of international law because there was none. Even if there had been it is doubtful whether this would have barred the jurisdiction of the court.

In R v. Officer Commanding Depot Battalion, R.A.S.C. Colchester ex parte Elliot(14) a deserter from the British army was arrested in Belgium by British military police accompanied by two Belgian policemen. At his trial he argued that his arrest was illegal because the British authorities had no authority to arrest him in Belgium and because he was arrested contrary to Belgian law. His contention was rejected by the court; Lord Goddard C.J.: "The point with regard to the arrest in Belgium is entirely false. It is no answer to state I was arrested contrary to the laws of state A or state B. He is in custody before the court which has jurisdiction to try him. We have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may have been brought here". Professor O'Higgins doubts the absoluteness of this rule, but in commenting on ex parte Susannah Scott and ex parte Elliot, he concludes that the cases are authority for the principle that an arrest made in breach of English municipal law or in breach of the law of the state where the arrest took place is no bar to the jurisdiction of an English court. One question which should be addressed is the effect of the mistaken

surrender of a fugitive criminal by one state to another. Mistaken surrender is an example of collusive avoidance of the extradition process.

In R v. Savarkar (1911) (15) Savarkar was an Indian revolutionary being sent back for trial in India under the provisions of the Fugitive Offenders Act, 1881. He travelled in the custody of Indian police officers on a ship which called at Marseilles. Savarkar jumped overboard in an attempt to escape and swam ashore. He then handed himself over to a French constable (or equivalent in France). The policeman did not know who he was and led Savarkar back to the ship. The international tribunal had to decide whether "Savarkar, in conformity with the rules of international law, should be restored to the French government from the United Kingdom". The United Kingdom argued that the case was one of erroneous surrender because the mistake, if any, was made by the French policeman, as to French law or his powers thereunder and was not a matter for international concern. The tribunal held that a mistake committed by an official in circumstances such as those in which Savarkar was surrendered could not in international law give rise to an obligation to restore the prisoner to France. Shearer suggests that because great significance was attached by the tribunal to the fact that French police had assisted in Savarkar's arrest and return to the vessel, "it cannot safely be concluded that the tribunal would have come to the same conclusion had the arrest been effected without the co-operation of the local authorities".(16) Dr. O'Higgins for his part suggests that the English court is not precluded from considering the international illegality as a bar to jurisdiction.(17) Since Elliot, two recent cases have been judged upon concerning the same area of the law of extradition. Before discussing these

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15. Hague Court Reports 276 (1911).

16. I.A. Shearer, *Extradition in International Law* (1972), p. 73.

17. Dr. O'Higgins, *op.cit.*, *supra*. N. 12 at p.

cases reference must be made to R v. Brixton Prison Governor ex parte Soblen(18). The case concerned the deportation of an alien from the United Kingdom. Extradition and deportation are different powers vested in a state. Extradition has the object of restoring a fugitive criminal to the jurisdiction of a state which has a lawful claim to try or punish him for an offence, whereas deportation is the power by which a state removes undesirable aliens from its territory. Deportation is a domestic power. Municipal law powers do not provide international law remedies for the individual. International law imposes virtually no restrictions on whether a state can expel an alien nor in the destination to which it can send him. However the destination to which the alien is deported raises certain questions. By the municipal law of most states, the deporting authorities are empowered to specify a particular destination in a deportation order (19); and a common practice of national immigration authorities is to look first to the place where the alien embarked for the territory of the deporting state. Where the country of embarkation indicates in advance that it is unwilling to receive the alien, other destinations must be sought. Usually the choice will revolve next to the state of which the deportee is a national. But the bone of contention, as far as the individual fugitive criminal is concerned is that where the destination selected is one at which the authorities are anxious to prosecute or punish the deportee for a criminal offence, the deportation may result in a de facto extradition. This is usually referred to as disguised extradition, and is considered to be the process by which deportation is used with the prime motive of extradition.

Soblen was a naturalised citizen of the United States and was convicted in the United States of espionage and sentenced to a lengthy period of imprisonment.

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18. (1963) 2 Q.B. 242; (1962) 3 All E.R. 641.

19. Immigration Act, 1971, Sch. 3, para. 1.

While on bail pending the hearing of his appeal he fled to Israel. Israel rejected Dr. Soblen's invocation of the Israeli law of return and put him on a plane bound for New York via London. He inflicted knife wounds upon himself just before arriving in London and this necessitated his hospitalisation. When he recovered a deportation order was made against him specifying removal by a direct flight to New York. The question raised on habeas corpus was whether the deportation order which was prima facie lawfully made on the grounds of Dr. Soblen's illegal entry into the United Kingdom, could be set aside on the ground that the ulterior motive of the order was to secure his return to the United States to serve his sentence of imprisonment. Czechoslovakia announced its willingness to accept the deportee and this possibility of an alternative destination added weight to Dr. Soblen's challenge. All the members of the court considered that it was open to the court to look behind a deportation order and consider any evidence that the order had been made mala fide, on grounds other than those appropriate solely for deportation. But on the facts of the case the court held that the fact that Czechoslovakia had announced its willingness to accept Dr. Soblen did not of itself provide conclusive evidence of mala fides on the part of the Home Secretary.(20) Discovery of Home Office papers was refused on the basis of Crown privilege. Soblen could not have been extradited because under the provisions of the Treaty of Extradition of 1931 between the United States and the United Kingdom, espionage was not an extraditable crime. And on the question of any breach of international law, there was no such breach because Soblen had no right to go to Czechoslovakia. Lord Denning M.R. (21) stated on the question of the order having been made mala fides: "The court cannot compel the Home Secretary to disclose the materials on which he acted but if there is

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20. (1962) 3 All E.R. 641, p. 660, 662.

21. Ibid., p. 661.

evidence on which it could reasonably be supposed that the Home Secretary was using the power of deportation for an ulterior purpose, then the court can call on the Home Secretary for an answer; and if he fails to give it, it can upset his order. But on the facts of this case I can find no such evidence". Soblen was relied on in the case of R v. Bow Street Magistrates ex parte Mackeson.<sup>(22)</sup> The applicant, a United Kingdom citizen, was in Zimbabwe, formerly Rhodesia, in 1979 when allegations of fraud were made against him in the United Kingdom. The Metropolitan Police could not then ask the Zimbabwe-Rhodesian<sup>(23)</sup> authorities to extradite him because at the time the de facto government of Rhodesia was in rebellion against the Crown and considered illegal. Subsequently, the Metropolitan Police informed the Zimbabwe-Rhodesian authorities that the applicant was wanted in England in connection with fraud charges. He was arrested in Zimbabwe-Rhodesia and a deportation order made against him. His passport was returned to the Metropolitan Police and sent back to the United Kingdom. He brought proceedings in Zimbabwe-Rhodesia for the deportation order to be set aside. The court of first instance accepted the claim that his deportation was unlawful because it served the purpose of extraditing him to England.<sup>(24)</sup> The judge at first instance referred to ex parte Soblen, citing a passage from the judgment of Lord Denning M.R. where the learned judge stated that the courts can always go behind the face of the deportation order in order to see whether the powers entrusted by Parliament have been exercised lawfully or not. There was evidence that extradition was the purpose of Mackeson's deportation. The judge at first instance in Mackeson proceeded to adopt this proposition. The finding was overturned on appeal on the basis that the courts

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22. (1982) 75 Cr. App. R. 24.

23. The name Zimbabwe-Rhodesia will be used for convenience.

24. Mackeson v. Minister of Information, Immigration and Tourism (1980) 1 S.A. 7, 747.

had no power to look behind the deportation order.(25) No attempt was made to extradite the applicant after Zimbabwe-Rhodesia had returned to direct rule under the Crown in December 1979 when extradition proceedings could have been relied on. The applicant was escorted back to the United Kingdom under the deportation order and handed over to the Metropolitan Police. In the proceedings in England, Mackeson sought judicial review by way of an order of prohibition to prevent the hearing of committal proceedings against him in the magistrates court because of the manner in which he had been brought to England. The divisional court reviewed the evidence presented in Rhodesia. The evidence showed that the British police had taken some initiative in the process which had eventually led to Mackeson's return, that there had been co-operation between authorities in Salisbury and London to facilitate the return of Mackeson and the important fact that the British police had not taken the opportunity to commence proper extradition proceedings with the resumption of British authority in Rhodesia. Mackeson had been properly arrested at Gatwick Airport and was therefore properly before the courts. However Lord Lane C.J. agreed with the decision at first instance in Rhodesia stating "It seems clear to me that the object of this exercise was simply to achieve extradition by the back door. It seems equally plain to me that the English police authorities were, to say the least, concurring in that exercise". The court approved the New Zealand case of R v. Hartley (26), and held that although it could hear the charges against the applicant since by whatever means he had arrived in the United Kingdom he was subject to arrest by the police force in the United Kingdom and the mere fact that his arrival might have been procured by illegality did not in any way oust the jurisdiction of the court, nevertheless, since the applicant had been removed from Zimbabwe-Rhodesia by unlawful means, i.e., by a deportation order in the

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25. (1980) 2 S.A., 747.

26. (1978) 2 N.Z.L.R. 199.

guise of extradition he had in fact been returned to the United Kingdom by irregular means. The court would therefore in its discretion, grant the application for prohibition and discharge the applicant. The court was relying on its inherent jurisdiction to prevent the abuse of its process.(27) There had been no breach of international law in Mackeson. But despite this fact, the court felt it necessary to signal its disapproval of any excess on the part of the executive or public officials acting on behalf of the executive.

Hartley's case concerned a murder committed by a motorcycle gang. The gang dispersed and one member called Bennett went to Australia. Hartley was charged with the murder and Bennett was charged with being a party to the offence. Bennett appealed on the grounds that the court had no jurisdiction to try him because he was illegally brought back to New Zealand. The police had not obtained a warrant for Bennett's extradition and had merely asked the Melbourne police by telephone to put Bennett on the next plane to New Zealand. The New Zealand Court of Appeal stated that on the issue of jurisdiction ex parte Elliot governed the law and was applicable to New Zealand. Although Bennett had been brought back unsuccessfully, he was eventually lawfully arrested within New Zealand and then by due process of law, brought before the court. Thus the court was able to exercise jurisdiction in respect of him. But as far as the issue of discretion was concerned, "There are explicit statutory directions which surround the extradition procedure for the protection of the public. The statute rightly demands the sanction of recognised court processes before any person who is thought to be a fugitive offender can be properly surrendered from one country to another. And in our opinion there can be no possible question here of of the court turning a blind eye to the action of the New Zealand police which has deliberately ignored those imperative requirements of the statute".(28) This

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27. Connelly v. D.P.P. (1964) A.C. 1254.

28. (1978) 2 N.Z.L.R. 199, 216-217.

simply illustrates judicial control of public officials and it does not raise any issues of international law. The New Zealand court then referred to the Australian case Brown v. Lizars (29) which reinforced their argument. The court in Mackeson therefore relied on Hartley in stating that it had an inherent power to prevent the abuse of its jurisdiction. The fact that it has such a power is not in dispute, but the uncertainty is why the court chose to invoke it in the present case. It is at odds with ex parte Elliot and previous case law, on facts which do not seem to sanction any derogation from the principles of ex parte Elliot. However, as far as the individual is concerned, it would seem to be a welcome decision because it seems to suggest that priority should be placed on compliance by the English authorities with available extradition proceedings to obtain the return of fugitive criminals because of the importance of the safeguards in such procedures for the protection of individual liberty. But hardly had the dust settled from Mackeson than another case came<sup>30</sup> before the courts, R v. Guildford Magistrates Court ex parte Healy. (30) The applicant, who was wanted for various offences in the United Kingdom fled to the United States on a false passport. Policemen from the United Kingdom went to the United States where Healy was eventually arrested in Los Angeles. At the hearing at the Los Angeles Immigration Tribunal the officers gave evidence of the gravity of the charges against Healy. The officers then returned to England and took no further part in the deportation proceedings. The judge at the immigration tribunal, having decided that Healy was an illegal immigrant and subject to deportation, gave the defendant a choice of deportation destinations: United Kingdom or Spain. Spain refused to take him so he was deported to the United Kingdom. He was arrested on his return to the United Kingdom and argued that instead of using extradition procedures, the police had improperly co-operated

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29. (1905) 2 C.L.R. 837, 852.

30. (1983) 1 W.L.R. 108.

with the American authorities to obtain his deportation to England. The applicant referred to ex parte Mackeson. However his argument was rejected; the judgment of the court was that it was only proper for the English police to pursue the applicant after he had allegedly fled from England and inform the United States authorities that he may have (and indeed did) enter their country on a false passport. It was also right that the United Kingdom police should furnish the Los Angeles tribunal with evidence so as to enable the tribunal to establish the status of the applicant. The police were not in America when most of the hearing took place. The decision to deport the man was therefore not prompted by the British police.

"It is in the interest of the law abiding community that there should be international co-operation to bring wanted criminals to justice; this does not suggest a collusive agreement between two countries to use the deportation process as a short cut to extradition".(31) Thus the law prior to Mackeson was in great measure restored. C. Warbrick (32) discusses the effect of the two cases Mackeson and Healy and their significance as regards irregular extradition. He argues that the two cases can be distinguished on the basis that deportation in the one case was to avoid extradition and in the other was properly for immigration purposes. But he goes on to state that it is harder to distinguish Mackeson and Elliot "at least in a way which justifies a departure from the rule in Elliot's case". Mr. Warbrick points out that the return of the fugitive was achieved with the co-operation of the "foreign" authorities in both cases. In Elliot there were no arrangements by which Elliot's return could have been otherwise achieved; in Mackeson such a possibility arose only at a late stage in events with the restoration of British authority in Rhodesia.

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31. (1983) 1 W.L.R. 112.

32. C. Warbrick, "Irregular Extradition", (1983) P.L.J., p. 269.

Mr. Warbrick continues by pointing out that any "wrongdoing" by the British officials was both limited, in that they co-operated in what was admittedly a procedure initiated by the Rhodesian authorities and omitted to act when extradition became a feasible process after the establishment of the government in Rhodesia, and not unlawful either by Rhodesian law since no British official had done anything in Rhodesia, or by British law, since it is not unlawful for a British official to ask for or to acquiesce in the return of a fugitive from another state by a means other than extradition. "To suggest otherwise is to give a domestic status to extradition that they do not possess and an interpretation they cannot bear, viz. that where an extradition treaty exists, the states have argued that it is by extradition alone that they shall obtain from each other fugitive criminals".(33) Mr. Warbrick suggests that the error of Mackeson is caused by the reliance upon Soblen. An individual in this country possesses legal rights under the extradition legislation not to be removed to face criminal charges abroad other than within the terms of the statutes. However a person brought back to this country has no such legal rule to rely upon. Mr. Warbrick concludes his analysis by stating that "Mackeson does little more than confirm that there are some limits to the rule in Elliot without providing much guidance as to what they are".(34) Mackeson would have left the law in an uncertain condition, with the courts in the difficult position of not knowing which line of precedent to follow; but a decision in the Divisional Court this year has clarified the position of the fugitive criminal returned to the United Kingdom by way of irregular extradition. In R v. Plymouth Justices ex parte Driver (35) the applicant had been on holiday in Plymouth when a murder had been committed. The following day the applicant had

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33. Ibid., p. 273.

34. Ibid., p. 274.

35. The Times Law Report, April 19 1985, p. 21 and (1985) 2 All E.R., pp. 681-699.

left the country and the police suspecting him of murder had inquired through Interpol as to his whereabouts. About four weeks later he was arrested in Turkey, and the co-operation of the Turkish authorities was sought in order to confirm his identity and assist in establishing his connection with the crime. The English police had told the Turkish authorities that they had no authority to seek his extradition or deportation but if it was within their power to deport him to the United Kingdom it would assist the police to interview him. The Turkish authorities told the police that they would expel the applicant "to the United Kingdom" and asked the United Kingdom authorities to pay his air fare which they had done. The applicant had then been deported from Turkey in a way which was illegal in Turkey and flown to Heathrow airport where he had been lawfully arrested. After being charged with murder the applicant argued that his deportation had amounted to a disguised extradition and that since the deportation had been unlawful in Turkey and against his will, and since he could not have been extradited from Turkey, the case was on all fours with the decision in Mackeson, the applicant's presence in England having been procured by irregular co-operation between the English and Turkish police. But the court rejected this allegation, stating that it had not been established that the English police had been guilty of any improper dealing, i.e., the United Kingdom authorities had not exceeded their powers as public officials. Stephen Brown L.J. pointed out that the English police had never sought the applicant's detention or continued detention in Turkey and had never encouraged the Turkish authorities to act illegally in any way. His Lordship referred to ex parte Susannah Scott and to Sinclair v. H.M. Advocate (1890).(36) Here, the Lord Justice Clerk said that even if proceedings in Scotland were irregular where a court of competent jurisdiction had a prisoner before it upon a competent complaint they were bound to try him, no matter what had happened before, even though he might have been

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36. (1890) 17 R. (Crt. Sess.) 38.

harshly treated by a foreign government and irregularly dealt with by a subordinate officer. Concerning Hartley's case their Lordships stated that the court in Hartley were wrong to have thought that Elliot was only concerned with questions of jurisdiction. Elliot was authority for the proposition that the courts had no discretion such as the court in Hartley held that they had. Their Lordships also stated that Soblen was not relevant to the issue in Mackeson since it was concerned with the exercise of a discretionary power by a minister of the Crown. Thus there was no power to inquire into the circumstances in which a person was found within the jurisdiction for the purpose of refusing to try him. Thus their Lordships felt they must differ from the decision in Mackeson "which had been decided per incuriam, since the court had not there been referred to Scott or Sinclair, and might have considered Elliot in the light of the reference to it in Hartley". Elliot's case ought to be followed on the basis that the court had no title or interest to inquire as to the regularity of proceedings under which a fugitive was apprehended and given over into custody. This case has the effect of isolating Mackeson and reinforcing the line of authority prior to Mackeson. There is no doubt that the certainty on this area of the law which ex parte Driver reintroduces, is more desirable than the attempt in Mackeson to introduce a principle which, although laudable from the point of view of the individual and his protection, cannot strictly be accommodated in the evolution of irregular extradition. The restoration of the orthodoxy shows that the individual has apparently no rights of his own to be extradited properly - or at least no right which goes so far as precluding jurisdiction.

In the United States the case law parallels the English line of evolution, that the court has no authority to inquire into the manner in which a defendant has come into its jurisdiction. The leading authority is Ker v. Illinois.<sup>(37)</sup>

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37. Ker v. Illinois 119 U.S. 436 (1886).

Whilst resident in Peru, Ker was indicted by an Illinois grand jury for embezzlement and larceny. The President invoking the current treaty of extradition between the United States and Peru, issued a warrant for Ker. The warrant was never served; Ker was forcibly abducted by an American agent, put on a vessel and taken to the United States where he was tried and convicted. Counsel for Ker attempted to rely primarily on a treaty between Peru and the United States to argue that he could not be tried in the United States. The court found that the case was not covered by a treaty right of asylum and that since no treaty between the United States and Peru had been invoked, the United States had no such obligation to Peru with regard to Ker. Therefore he was entitled to no protection under the treaty. The abduction of Ker did not violate the due process clause of the Fourteenth Amendment. The method by which Ker had been acquired was irrelevant. The holding thus established that Ker could not rely on the treaty because the treaty had not been relied on. Nor could Ker rely on any violation of Peru's sovereignty because this was a right that belonged to Peru. Ker in fact had no constitutional rights because the Fourteenth Amendment extended only to the trial process in the United States and not to pre-trial proceedings.(38)

What the so-called "Ker-Frisbie" rule established was that the due process rule was limited to the guarantee of a constitutionally fair trial, regardless of the method by which jurisdiction was obtained over the defendant. However "Ker-Frisbie" was the subject of qualification in United States v. Toscanino.(39) The applicant was wanted for various narcotics offences in the United States. In proceedings before the courts in the United States, the applicant alleged that he had been lured by a telephone call to his home in Montevideo, Uruguay, the call

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38. Note also Frisbie v. Collins 342 U.S. 519 (1952) which reiterates the same point.

39. United States v. Toscanino 500 F. 2d 267 (1974).

having been made by or under the direction of the police force. In answer to the call Toscanino went to the arranged spot and was tied up and abducted and driven to the Brazilian border. At no time had there been any formal or informal request on the part of the United States government or of the government of Uruguay. The Uruguayan government claimed it had no prior knowledge of the kidnapping nor did it consent to it. In Brasilia Toscanino was subjected to torture and interrogation for seventeen days. More importantly he alleged that throughout the entire period the United States government was aware of the interrogation and did receive reports of its progress; that members of the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs were present during the torture and interrogation. He was electrocuted, then drugged and flown to the United States where he was brought to trial. The District Court refused to entertain Toscanino's challenge, citing the "Ker-Frisbie" line of precedent. On appeal Circuit Judge Mansfield said of the "Ker-Frisbie" rule that in the two cases due process was limited to guarantee of a constitutionally fair trial, regardless of the method by which jurisdiction was obtained over the defendant. However various attempts had been made since then to deter police misconduct and Mapp v. Ohio (40) was referred to, a case which interpreted the due process clause of the Fourteenth Amendment to require that the exclusionary rule be applied to unconstitutionally obtained evidence. Judge Mansfield continued by stating that having seized the defendant in violation of the Fourth Amendment which guarantees "the right of the people to be secure in their persons against unreasonable seizures" the government ought as a matter of fundamental fairness be obliged to return him to his status quo. "We view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it had been acquired as the result of the government's deliberate unnecessary and unreasonable invasion of the accused's constitutional rights.

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40. Mapp v. Ohio 367 U.S. 643 (1961).

This conclusion represents the well-recognized power of federal courts in the civil context to decline to exercise jurisdiction over a defendant whose presence has been secured by force or fraud".(41) The important part of the judgment to note is the reference to "unreasonable invasion of the accused's constitutional rights". The actions of the American agents, Toscanino's torture and drugging, went beyond the acceptable standards of police authority and were such as to severely infringe Toscanino's constitutional rights and this required compensation not only for violations of his rights (note Elliot), but also the denial of jurisdiction to try him. This case was followed in quick succession by United States ex parte Rel. Lujan v. Gengler.(42) Lujan was a pilot hired by one Duran to fly him to Bolivia. Duran was hired by American agents to lure Lujan to Bolivia although he said he had business there to transact. Lujan was promptly arrested in Bolivia and taken into custody by police acting as paid agents of the United States, not at the direction of their own superiors or government. He was flown to New York and was arrested there. No charge had been made against him by the Bolivian police nor had a request for extradition been made by the United States. However the court stated that in comparison with Toscanino the government conduct of which Lujan complained paled in comparison. "There is no allegation of that complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process".(43) There were no allegations of having been subjected to drug intoxication by the United States officials; nor were there any acts of torture, terror or custodial interrogation. Thus Lujan suffered no deprivation greater than that which he would have endured through lawful extradition. Thus the "Ker-Frisbie" rule was re-affirmed in much the same way that

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41. United States v. Toscanino 500 F. 2d. 267 (1974), p. 275.

42. Lujan v. Gengler 510 F. 2d. 62 (1975).

43. Lujan v. Gengler, p. 66.

ex parte Driver has re-affirmed Elliot. In the United Kingdom there are no similar constitutional arguments which can be invoked. As Mr. Warbrick points out, "there is little enough indication that the courts are prepared to protect individual rights by the sanction of exclusion".(44) M. Feinrider (45) in his review of Toscanino and Lujan suggests that the authority for the remedy of divestiture of jurisdiction was found either in an unprecedented extension of the constitutionally based "exclusionary rule" or in the court's discretionary supervisory power over the administration of criminal justice in the district courts. But he concludes by saying that Toscanino's vitality for support of divestiture of jurisdiction does not go beyond cases involving extra territorial abduction and torture.

Before considering in detail the rights of the individual in cases of irregular extradition and the cases of abduction which breach international law, one area must be canvassed. It has clearly been established by American courts that seizure by United States officials of fugitive criminals on the territory of a state with whom the United States has an extradition treaty is not ipso facto a breach of that extradition treaty. As stated above in Ker v. Illinois, counsel for the plaintiff attempted to argue that by virtue of the Treaty of Extradition with Peru, the defendant acquired by his residence in Peru a right of asylum; a positive right that he should only be forcibly removed from Peru to the State of Illinois in accordance with the provisions of the treaty. And that this right is one that he could assert in the courts of the United States in all cases, whether the removal took place under proceedings sanctioned by the treaty, or under proceedings which were in total disregard of that treaty amounting to an

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44. C. Warbrick, "Irregular Extradition", (1983) P.L.J. 275.

45. M. Feinrider, "Extraterritorial Abductions; A Newly Developing International Standard", (1980) 14 Akron L. Rev. p. 27 at pp. 34-35.

unlawful and unauthorised kidnapping.(46) But the court refuted this contention stating that such a proposition could not be sustained in that there was nothing in the treaty with Peru that expressly gave the fugitive such a right. This doctrine was confirmed in United States v. Sobell.(47) Sobell alleged he was illegally kidnapped from Mexico, by the Mexican security police acting as agents of the United States. He argued that his kidnapping violated the extradition treaty with Mexico and that since that treaty was the law of the land its violation deprived the United States courts of jurisdiction over the offence he was charged with. The court rejected this argument. On appeal Sobell sought to rely on Cook v. United States (48) which holds that the United States courts may not acquire jurisdiction by means of treaty violation. But the Appellate Court refused to accept Sobell's contention and ruled that Ker v. Illinois applied and that there had been no treaty violation. "[The] appellant seeks to avoid the impact of the Ker case by insisting that, although there was no treaty violation in that case, there was such a violation in the case at bar". "Unlike the facts in Ker", appellant says, "the petition here charges action by the U.S. government". The appellant relies on "the actions of the U.S. agents in initiating, planning and participating in the seizure. But it can hardly be maintained still assuming the truth of appellant's charges that the unlawful and unauthorised acts of the Mexican police acting on behalf of subordinate agents of the executive of the U.S. government were any more acts of the U.S. than the unlawful and unauthorised acts of the emissary of the chief executive. We think the question presented is indistinguishable from that before the Supreme Court in Ker, and our decision is controlled by that case".(49)

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46. Ker v. Illinois 119 U.S. 436 (1886).

47. United States v. Sobell (1956) 142 F. Supp. 515.

48. Cook v. United States 288 U.S. 102.

49. United States v. Sobell (1957) 244 F. 2d. 520 at p. 525.

Questions of international responsibility for the irregular seizure were raised by Toscanino and Lujan v. Gengler. The Uruguayan government had no prior knowledge of the kidnapping nor did it consent to it. In fact it condemned the abduction as alien to her laws. Thus there was a violation of her sovereignty. But the rights following a breach of state sovereignty belong exclusively to the state and not the individual. The solution reached following such a breach is a matter for the government and executive of the states involved. And if Toscanino had sought to rely on this breach of sovereignty alone he would have been met by the "Ker-Frisbie" line of precedent. In Lujan v. Gengler the court pointed to the fact that neither Argentina nor Bolivia had protested or even objected to his abduction and therefore he could not rely on the United Nations Charter or the Charter of the Organisation of American States. In Toscanino the court referred to the United Nations Charter Article 2, para. 4 which obliges "all members to refrain from the threat or use of force against the territorial integrity of political independence of any state" and to the Charter of the Organisation of American States Article 17 "The territory of a state is inviolable. It may not be the object even temporarily of measures of force taken by another state, directly or indirectly, on any grounds whatever". In Lujan the court stated that the lack of protest by Bolivia or Argentina was fatal to his reliance upon treaty provisions. In Patrick Lawler (1860) the law officers advised the surrender of the fugitive, a convict, who having escaped from Gibraltar, was seized on Spanish territory by a British prison officer; the law officers stated that "we regard removal, if effected, as alleged by means of drugging or intoxication as being removal clearly without consent and involving the same international consequences as if it had been accomplished by force. A plain breach of international law having occurred we deem it to be the duty of the state into whose territory the individual, thus wrongfully deported was conveyed to restore the aggrieved state, upon its request to that effect as far

as is possible to its original position".(50) It may be significant that in none of the cases concerning forcible abduction has the Patrick Lawler case been mentioned. As far as the individual is concerned it would provide solid weight to the argument that where state sovereignty has been breached it is not just the state which has been wronged. The leading case concerning international responsibility for abduction is Attorney-General of the Government of Israel v. Eichmann.(51) The accused, a German national, was head of the Jewish office of the German Gestapo and responsible for the extermination of countless number of Jews in Europe during the Second World War. He was found in Argentina in 1960 by persons who may or may not have been agents of the Israeli government and abducted to Israel without the knowledge of the Argentinian government. When put on trial the Israeli court concluded that the defendant could not claim immunity from prosecution on the basis of his abduction from Argentina. Argentina lodged a complaint with the Security Council of the United Nations requesting reparation, Eichmann's return and punishment of his abductors, for the violation of its sovereignty.(52) The Security Council resolved on June 23 1960 (53) that Israel's action in abducting Eichmann in the way they did from Argentina was a breach of sovereignty and caused the kind of international friction which, if repeated, could endanger international peace and security. It advised Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law. The two governments reached an agreement and issued a joint communique, resolving "to regard as closed the incident which arose out of the action taken by citizens of Israel, which infringed the

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50. Lord McNair, *International Law Opinions* Vol. 1, pp. 78-79.

51. (1961) 36 I.J.R. 5.

52. 15 U.N. SCOR. Supp. April-June 1960 at 26, U.N. Doc. S/4334.

53. U.N. Doc. S/4349.

fundamental rights of the State of Argentina".(54) The Israeli court relied on the settlement of the dispute between Argentina and Israel in dismissing Eichmann's contention that he was immune from prosecution. The case against Eichmann began after Argentina had exonerated Israel for violating her sovereignty and the breach of international law was thereby cured. The court decided that "the accused cannot presume to speak, as it were, on behalf of Argentina and claim rights which that sovereign state had waived".(55) L.C. Green (56) discusses Eichmann and states that the assertion that a state is not competent by international law to try an alien for an offence committed abroad is irrelevant as far as Eichmann is concerned, because international law in the absence of a treaty expressly creating individual rights only recognises the rights of states. "The theory of international law in such cases is that the wrong suffered by the alien is in fact an injury to his home state". Eichmann was German and thus only Germany ought to have protested against the exercise by Israel of jurisdiction over him. But the West German authorities, whom Israel recognises as a state, made known their willingness to tolerate the trial and cooperate in any way possible. The court in Eichmann referred to ex parte Scott, and Elliot stating that the illegality of his arrest or of the means whereby he was brought within the jurisdiction were not sufficient to bar his trial. One important point that Green makes is that if the kidnappers were private individuals indulging in private enterprise, no international responsibility arises. Prime Minister Ben Gurion claimed personal credit for the abduction at first; later on he disclaimed all personal knowledge and described the affair as one of purely private initiative. Eichmann is a sad reflection of the assertion that

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54. Joint Communique quoted in Eichmann 36(5) I.L.R., p. 59.

55. Ibid., p. 63.

56. L.C. Green, "The Eichmann Case" (1960) M.L.R. Vol. 23, p. 507.

the individual has no rights to rely on at the international level. The eventual agreement Argentina accepted was an agreement which had nothing to do with the securing of just reparation to Eichmann himself (despite the odious character of Eichmann). Israel has again been the subject of discussion concerning forcible abduction. In Faik Bulut (57), a Turkish citizen was convicted by an Israeli military court of belonging to Al-Fatah in Lebanon and Syria and sentenced to seven years in prison. He had been captured in February 1972 during an Israeli raid one hundred miles into Lebanon. He was tried under a 1972 amendment to the Israeli penal law (Offences Committed Abroad) which states "The courts of Israel are competent to try under Israeli law a person who has committed abroad an act which would be an offence if it had been committed in Israel and which harmed or was intended to harm the State of Israel, its security, property or economy or its transport or communication links with other countries". The article suggests that the trial raises two important issues in international law; firstly, is there a substantive basis under international law for the exercise of jurisdiction by the State of Israel despite the fact that the offences were committed by non-nationals outside Israel?; and secondly, is the exercise of jurisdiction consistent with international law despite the fact that the defendants were brought to Israel in a manner not condoned by international law? Both questions are important because they involve the relative freedom of an individual from the control of a foreign legal system. The protective principle was considered to be the source applicable to the issue of substantive jurisdiction. Bulut had not been charged with acts of aiding a wartime enemy or crimes against humanity as Eichmann had been; he was simply a member of an organisation which is considered by some to have terrorist links. In analysing the protective principle, the article points out that Lebanon guarantees the right to be a member of a

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57. "Extraterritorial Jurisdiction and Jurisdiction following Forcible Abduction; A New Israeli Precedent in International Law" (1973-74), Vol. 72 Mich. L. Rev., p. 1087.

Palestinian organisation and such membership is not a crime under the international law of states. The offence with which Bulut was charged and convicted is likely to endanger the security of Israel only in an indirect and insubstantial way, the article claims. Concerning the second point raised by the case, the court relied on the principle male captus bene detentus. Ker v. Illinois, ex parte Scott and ex parte Elliot were relied on. The article accepts this line of judicial development but argues that kidnapping encourages the undermining of the international and domestic law of extradition, which provides safeguards for the individual. The article suggests that a total repudiation of the Ker doctrine is not necessary to support the conclusion that jurisdiction should be precluded in the current Israeli case(s). The reason put forward is that Ker, Frisbie, Scott and Eichmann all involved offences such as larceny, murder, perjury or war crimes which were presumably crimes in the state of refuge and which were not political crimes. Thus they were extraditable. But the offence of belonging to Al-Fatah is not a crime in Lebanon and it is also arguably a political offence. Thus, the article suggests as a distinction to Eichmann, Bulut had not committed a crime of an international character, nor had he committed crimes within the territory of Israel prior to his abduction. On this basis, preclusion of jurisdiction on account of forcible abduction would not require an overruling of Eichmann. A further distinction is that whilst the issue of the impairment of Argentina's sovereignty had been settled by both countries, there has been no such diplomatic closing of Israeli incursions into Lebanon. The article emphasises in conclusion that it is the individual human rights that are ultimately affected; "forcible abduction [is a precedent] harmful to ... the international system and to individual human rights".(58) Professor A. Evans (59) in her article in which she discusses the

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58. Ibid., p. 1113.

59. Professor A. Evans, "Acquisition of Custody over the International Fugitive Offender - Alternatives to Extradition. A Survey of United States Practice" (1964) 40 B.Y.I.L. 77-104.

shortcomings of the extradition process argues that despite the expense and the lack of speed by which extradition is characterised, use of other methods of rendition other than extradition severely inhibit the protection afforded to the accused such as the mandatory hearing in the courts of the state of refuge and the general unavailability of extradition for political offences. She argues for a balance to be struck between the public interest in acquiring the fugitive and the need to safeguard his interests.

As regards irregular extradition reference should be made to the Argoud Case.<sup>(60)</sup> In France, Article 23 of the 1927 Extradition Act provides that extradition is null when it is obtained in cases not provided by the law. Argoud was a member of the Secret Army Organisation. His capture and kidnap in Munich was made by unknown persons and the French police had no knowledge of Argoud until an anonymous telephone call led them to find him gagged in an abandoned car, inside French territory. It was argued on Argoud's behalf that Article 23 negated the jurisdiction of the court because of the irregular manner by which he was returned. Also, that since he had been granted asylum by the Federal Republic of Germany his abduction without extradition proceedings violated international law and rendered his subsequent prosecution a nullity. But the court rejected this assertion. The court distinguished between a "disguised extradition" carried out by officials in disregard of the extradition treaties or laws to which the provisions related, and an abduction carried out by private persons which was unprotected by the provision. Or put another way, the Supreme Court stated that Article 23 only contemplates violations of the extradition treaty and does not relate to non-observance of treaty provisions. The court also found that, if a violation of the sovereignty of the Federal Republic had occurred, only the injured state could complain and demand reparation. Thus,

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60. Cours de Cassation decision of 4 June 1964. Re Argoud 45 I.L.R. 90.

Argoud was not entitled to plead a violation of the rules of international law as a personal basis for immunity from judicial proceedings. In Croissant (61), the German Federal Republic requested the extradition of Klaus Croissant, an attorney, whom the German authorities suspected of forming a network of communications for the benefit of a criminal organisation and carrying on an intense propaganda campaign for a group called the Baader-Meinhoff gang, an alleged terrorist group. The relevance of this case as far as irregular extradition is concerned lies in its illustration of extradition as an institution of international public law which renders possible an international administration of justice; and the judicial control on decisions with respect to extradition has, in this context, a purely domestic character and as such is not regulated by international law. In the majority of countries, judicial control takes the form of an advisory opinion which has to be requested of the court by the government before extradition can be granted. Advisory opinions are usually ~~only~~ derogated from if they are positive (i.e., if they favour extradition). The legal remedies against an extradition decree differ from country to country. Some offer no remedy at all, whilst some limit it to either the judicial or the administrative stage of the decision-making. The effectiveness of this legal recourse is often strongly undermined by the fact that it does not have the effect of suspending proceedings and extradition can be granted before the competent court has been able to rule upon the appeal. In Croissant the extradition decree against him, issued after the mixed positive advisory opinion of the Chambre d'Accusation of the Court of Appeal of Paris, was immediately executed although the government had been expressly notified of the fact that Croissant had challenged the decree before the Conseil d'Etat. Thus there is no real guarantee for the requested person as long as there exists no legal provision to the effect that execution of the extradition decree should be suspended until the decision on appeal

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61. Court of Appeal of Paris, November 16 1977. See C. Wijngaert, *The Political Offence Exception to Extradition*, 1980, p. 124.

against the extradition decree has been rendered. Extradition lato sensu ought to be the only legitimate process to surrender a person to the authorities of the state seeking him for the purposes of prosecution or punishment. Before considering what protection the individual can be provided with through the invocation of human rights law, two cases must be mentioned which give priority to individual interests above state rights. Unconcerned as they are with irregular extradition, they are nevertheless important.

In Plaster v. United States (62) an army serviceman named Plaster and another called Burt fled from West Germany to the United States to avoid prosecution for the murder of a West German national. Intending to prosecute both men for the West German murder, the United States military authorities obtained a waiver of prosecutorial jurisdiction from the West German authorities. But Miranda v. Arizona (1966) barred the use of incriminating confessions such as those obtained from the appellee and Burt. The United States and West Germany entered into an extradition treaty providing for extradition by either government for offences committed either before or after the treaty entered into force. Under Article 7 of the treaty, a government asked to extradite one of its own nationals "shall have the power to do so provided the law of the requested state does not so preclude". The United States attorney sought a certificate of extraditability for the appellee, supported by a West German request under the 1978 Treaty. But the United States District Court issued a writ of habeas corpus prohibiting extradition, finding that Article 7 of the 1978 Treaty precluded the appellee since it would violate his constitutional rights. Also, allowing the United States government to renege on its promise of transactional immunity would be fundamentally unfair and violate the appellee's due process rights. Apart from the treaty the court also found that the United States government could not,

as a matter of constitutional law, extradite a United States citizen if to do so would violate his constitutional rights. The United States Court of Appeals for the Fourth Circuit disagreed with the District Court's interpretation of Article 7 but upheld the judgment, observing that United States treaty obligations cannot justify otherwise unconstitutional governmental conduct. The Appeal Court rejected the government's contention that the extradition power of the United States commits the consideration of alleged constitutional violations solely to the Secretary of State and the President, stating that the Secretary of State and the President may not extradite an individual where extradition would in the opinion of the judiciary violate the individual's constitutional rights. The case clearly illustrates that (as far as United States citizens are concerned) foreign policy considerations and treaty obligations, although important, do not necessarily override the notion implicit in the constitution that the government must deal fairly with its citizens in conducting criminal prosecutions. Such a decision is a favourable precedent for the individual to draw upon in the wider context of individual interest being just as important as state interests, and it will be interesting to see how often the judgment is invoked as persuasive argument on behalf of the individual during an appropriate case in a different jurisdiction.

In Jaffe (63) a Canadian businessman, Sidney Jaffe, was abducted from Canadian territory by two United States bounty hunters. The bounty hunters brought Jaffe to Florida where he was tried and convicted for unlawful land sales practices and failure to appear at trial. The Canadian government is protesting the abduction and requesting Jaffe's return. It has filed an application in the Federal District Court for a writ of habeas corpus, challenging Jaffe's detention in the United States. If Canada succeeds in proving that the abduction

constituted a violation of international law, the court may order Jaffe's release to redress the violation. In her article (64) K. Selleck suggests that the traditional Ker rule would mandate the court's exercise of jurisdiction over Jaffe given his presence before the Florida court. She suggests that like Ker, Jaffe cannot claim any right of asylum in the country from which he was forcibly taken. She also asserts that Jaffe cannot invoke the Cook exception, since the express terms of the extradition treaty between Canada and the United States were not abrogated by Jaffe's kidnapping. There was no evidence of the sort of "shocking" brutality apparent in Toscanino. Therefore on the basis of precedent Jaffe will have difficulty in his attempts to bar the court's exercise of jurisdiction over him. However Selleck asserts that based on strong policy of "respect for the law of nations, and the integrity and independence of other nations" (65), the court may consider Jaffe's release appropriate redress for the violation of international law.(66)

As regards possible human rights protection certain safeguards may lie within the European Convention on Human Rights 1950 as far as European states are concerned. There are two lines of argument which may be put forward. Under Article 5 it can be argued that irregular return of a fugitive is not "lawful". Secondly, that the manner of return has been achieved in a way not compatible with Article 3. Article 5(2) states "everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) The lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person effected for the purpose of bringing him

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64. K. Selleck, "Jurisdiction After International Kidnapping; A Comparative Study" (1985) Vol. VIII No 1 B. Col. I & C.L.R. p. 237 at p. 248.

65. Lira 515 F. 2d. at pp. 72-73.

66. K. Selleck, op.cit., supra. N. 64 at p. 249.

before the competent legal authority". Professor O'Higgins was of the opinion that the unlawful seizure of a person abroad might not be in accordance with a procedure prescribed by law and that a competent court could not be determined solely by reference to the municipal law of a state but must mean competent in the light of international law.(67) However Mr. Warbrick (68) states that it is not certain that a violation of international law in obtaining a fugitive necessarily involves the consequences, as a matter of international law, that a domestic court has no authority to try him. He points to Eichmann and the effect of the agreement between Argentina and Israel. Also Mr. Warbrick alludes to Mackeson illustrating that difficult cases can arise where there is no breach of international law.

Article 3 prohibits "torture or inhuman or degrading treatment or punishment". In Toscanino the court found the actions of the police such as to amount to a violation of his constitutional rights. (Note; Patrick Lawler (1860) where the court stated as much). Mr. Warbrick suggests that if the abduction is the work of the agents of the state seeking the fugitive criminal, Article 3 can be said to carry an obligation not to go on with the trial of the abducted individual.(69) "The state has a positive obligation to guard against violations of Article 3 and the collateral consequences of the denial of jurisdiction as a contribution to this end could be argued to be inherent in Article 3".(70) For those countries outside the ambit of the European Convention on Human Rights, Article 13 of the International Covenant on Civil and Political Rights may be useful. Regarding Article 13, the suggestion is that it imports

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67. Professor O'Higgins, loc.cit., p. 319.

68. C. Warbrick, loc.cit., pp. 275-276.

69. Note Eichmann where it was uncertain whether the kidnappers were agents of the Israeli government.

70. C. Warbrick, loc.cit., p. 277.

an obligation not to try a person brought to one state's jurisdiction without complying with another state's law. Article 13 states, "An alien lawfully in the territory of a state party to the present covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before the competent authority or a person or persons especially designated by the competent authority". This Article is particularly apposite when Hartley is considered. Bennet was returned to the jurisdiction by a mere telephone call from the New Zealand police who had not obtained a warrant for Bennet's extradition to Australia without a chance to submit reasons against his removal to a proper tribunal. Thus any expression of his rights were completely violated by public official excess. Thus human rights protection are effective for an individual only where the national court can take them into account, for example, where the treaty has been made part of municipal law or where there is the possibility of an appeal by the individual to some international human rights body such as the European Commission on Human Rights or where as in the United States, the national constitutional protections reflect the international human rights standards; note Toscanino. At present, extradition is still viewed as an inter-state mechanism for the suppression of crime and this has paramountcy over any interests the fugitive criminal may have. Cases like Plaster seem to be the odd beacon in the dark world of state supremacy; until a consistent line of precedent is built up, individual protection against irregular extradition will remain a question of hit and miss. Ex parte Driver has isolated the deviation of Mackeson, but it has not provided positive evidence that anything but state interest is the central matrix around which irregular extradition revolves. A fuller study of human rights and individual protection will be carried out in Chapter Four.

Part II - Extradition  
and the Political Offence

A. Brief Historical Outline

The majority of writers on the history of international law express the view that international co-operation in the matter of ordinary crime was not extensive before the eighteenth century. Not many treaties existed and if extradition did take place, it occurred in the absence of treaty obligations and concerned largely the delivery of political enemies, not ordinary criminals.(1)

In confirmation of this statement, the earliest major work on British extradition law listed only five treaties concluded by England between 1174 and 1794 and stated that cases of extradition in almost every instance concerned the delivery of political offenders.(2) One eminent international law expert suggests that the above conclusion, as far as is applicable to the United Kingdom, may have to be qualified. Professor O'Higgins (3) adduces evidence that there were a considerable number of treaties in existence, that extradition seldom took place in the absence of a treaty obligation and that extradition was not limited to political offenders. The oldest document in diplomatic history, the peace treaty between Rameses II of Egypt and the Hittite prince Hattusili III (c. 1280 B.C.) made provision for the return of the criminals of one party who fled and were found in the territory of the other. I.A. Shearer (4) points out that this treaty was not just a mere crude machinery for surrender of fugitive

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1. De Visscher, *Theory and Reality in Public International Law* (1957), 243; Nussbaum, *A Concise History of the Laws of Nations*, 214 (254); Oppenheim, *International Law Vol I* (8th ed.) (1955), 696, 704.
  2. Clark, *Extradition* (4th ed.) (1903), 18-22.
  3. O'Higgins, "The History of Extradition in British Practice" (1964) 13 Ind. Y.I.A., 78.
  4. I.A. Shearer, *Extradition in International Law* (1972), p. 6.

criminals, that it contained some institutional concepts. The treaty stipulated that any one surrendered pursuant to the treaty was not to be subjected to such severe punishments as mutilation and the destruction of his house and family. Can these provisions be adduced as forerunners to the present rights to be found in human rights law? Professor O'Higgins (5) in his study showed that the treaties he looked at appeared to be concerned with objects other than the surrender of criminals, such as the protection of trade and industry in addition to the reciprocal surrender of criminals.

British extradition history goes back a number of centuries. Early examples of treaties entered into by the sovereign to expel fugitive criminals include the treaty of 1174 when Henry II and William of Scotland agreed to deliver up fugitive felons. In 1303 Edward I and Philip of France each agreed to expel enemies of the other, whilst in 1496 Henry VII and the Duke of Burgundy each agreed to order rebels and other fugitives from the dominions of the other to leave the realm.(6) However, the first extradition agreement of the modern era entered into by Great Britain was concluded with the United States in 1794. This was the Jay Treaty of 1794.(7) Article 27 of the treaty provided: "It is further agreed that His Majesty and the United States on mutual requisitions, by them respectively, or by their respective ministers or officers authorised to make the same, will deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found would justify his apprehension and commitment

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5. O'Higgins, supra.

6. V.E. Hartley-Booth, *British Extradition Law and Procedure* (1981), LVII.

7. Malloy, *Treaties, Conventions, International Act, Protocols, and Agreement between the U.S.A. and Other Powers*.

for trial, if the offence had there been committed. The expense of such apprehension and delivery shall be borne and defrayed by those who make the requisition and receive the fugitive". I.A. Shearer (8) suggests that the treaty can be recognised as setting the framework of later American and British treaties of extradition. But he notes, and an important note it is as far as the individual is concerned, that certain common present-day features were lacking in the treaty; the exception of political offenders, the principle of speciality and the rule against double jeopardy. The start of modern extradition history, however, commenced in 1842 with the signing of the Webster-Ashburton Treaty of 1842 (9) between the United States and the United Kingdom which dealt specifically with the surrender of fugitive offenders. The Jay Treaty expired in 1806. Before its expiration only a few criminals had been surrendered pursuant to its provisions.(10)

#### B. British Extradition Law

United Kingdom law regarding extradition is dependent entirely on statute.(11) Any fugitive criminal found in the Kingdom may be extradited to a foreign country only in accordance with the provisions of the Extradition Acts 1870 to 1935.(12) It seems that the prerogative power to accede to a request for the surrender of a fugitive offender to a foreign state has not survived the passing of these Acts; Barton v. Commonwealth of Australia.(13) However,

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8. Shearer, supra, p. 13.

9. Malloy, 650, 655 (Art. 10).

10. Clark, Extradition (4th ed.) (1903), pp. 39-41; Moore, Extradition (1891) Vol. 1, p. 90; (1965) 6 B.D.I.L., p. 445.

11. R v. Governor of Brixton Prison, ex parte Soblen (1963) 2 Q.B. 243 at 299, 300.

12. Brown v. Lizars (1905) 2 C.L.R. 837; Diamond v. Minter (1941) 1 K.B. 656.

13. (1974) 131 C.L.R. 477 at 485; 3 A.L.R. 70 at 74.

while in the absence of an extradition treaty it is the normal practice of the United Kingdom not to request extradition, the prerogative power to make such a request has probably not been extinguished by the passing of the Acts (14), Barton v. Commonwealth of Australia.(15) In proceedings concerning Ronald Biggs who committed what is popularly known as "The Great Train Robbery", Biggs entered Brazil in 1970. No extradition was in force between Great Britain and Brazil. When he was arrested by order of the Minister of Justice in 1974, Biggs applied for a writ of habeas corpus before the Federal Court of Appeal, arguing that, in spite of his unlawful immigration he could not be expelled from the country since the Brazilian law precludes both expulsion and deportation whenever these measures can in practice imply an extradition which would not be legally permitted. The court held that Biggs' extradition to Great Britain was effectively impossible, although it recognised that the minister was in principle allowed to deport him. The final decision denied the writ of habeas corpus stating that the arrest was lawful, but that the fugitive could not be deported to Great Britain or to any other country from which Great Britain could obtain his rendition. Thus the government was divested of power to expel Biggs from Brazil.(16)

In the particular area of extradition treaties, where the identity of the contracting state is important, the continued validity of such treaties depends upon the existence of the original contracting states; thus if one of them ceases to exist (i.e., through annexation) then its obligations under the treaty cannot,

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14. The Extradition Act, 1870; The Extradition Act, 1873; The Extradition Act, 1895; The Extradition Act, 1932; The Counterfeit and Currency (Convention) Act, 1935, s. 4 and s. 6(4).

15. Op.cit., supra., 13 at 485 and 74.

16. Rezek, "Reciprocity as a basis of Extradition" (1982) L.II B.Y.I.L. 171 at 202. Also R.A. Biggs v. Minister of Justice habeas corpus No. 3.345. Tribunal Federal de Recursos, 20 July 1974.

without further arrangement be fulfilled by the new state and the treaty becomes extinguished.(17)

The Act stipulates the conditions which should be met before a person is extradited. Before any formal request is made to the United Kingdom, there are usually informal communications of an informative nature between various authorities. Interpol may inform the British foreign office of the presence of wanted foreign criminals in the United Kingdom before any requisition is made to the United Kingdom. The government of the foreign state would then instruct its embassy to forward the requisition for the arrest of the fugitive to the foreign office.(18) As far as the actual formal request is concerned, section 7 of the 1870 Act governs the procedure; section 7 of the 1870 Act states "A requisition for the surrender of a fugitive criminal of any foreign state, who is in or suspected of being in the United Kingdom, shall be made to a secretary of state by some person recognised by the secretary of state as a diplomatic representative of that foreign state. A secretary of state may, by order under his hand and seal signify to a police magistrate that such a requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal. If the secretary of state is of the opinion that the offence is one of a political character, he may, if he thinks fit, refuse to send any such order, and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody".

By section 8(1) a police magistrate once in receipt of the order from the secretary of state and if there exists such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal

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17. Also new treaty with Spain signed 22 July 1985 prior to which no extradition between the United Kingdom and Spain was possible, after the lapse of the previous treaty in 1979.

18. V.E. Hartley-Booth, op.cit., supra. N. 6 at p. 20.

convicted in England, must issue a warrant for the apprehension of the fugitive criminal, who is in or suspected of being in the United Kingdom.

Section 8(2) governs the issue of a provisional warrant. Where a warrant has been issued without an order from the secretary of state, the police magistrate or justice of the peace must send a report of the fact of such issue, together with the evidence and information or complaint, to the secretary of state who then has the power to cancel the warrant and discharge the person who has been apprehended.

Where the fugitive criminal is apprehended on a warrant issued without the order of a secretary of state, the individual has to be discharged by the police magistrate, unless the police magistrate within such a reasonable time as he fixes, receives an order from the secretary of state signifying that a requisition has been made for the surrender of the individual.

#### Committal Proceedings

A fugitive criminal arrested under the provisions of the Extradition Acts has the right to have the evidence presented in court as if he or she were subject to committal proceedings for trial on indictment. The burden which is normally on the prosecution in such cases is transferred to the requesting state; it has to satisfy the magistrate that a prima facie case exists on the evidence produced, as well as having to comply with the formalities of extradition procedure and show that the request is in respect of an extradition offence or offences. Sections 9, 10 and 14 of the 1870 Act govern the procedure and evidence at committal. Section 9 requires that the manner of hearing and jurisdiction of the court closely follows committal on indictment; section 9 states: "When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner and have the same jurisdiction and powers, as near as may be as if the prisoner were brought before him charged

with an indictable offence committed in England". In a recent government report (19) on extradition, the requirement of a prima facie case was widely debated. In European countries the absence of committal procedures means that when faced with the English requirement that they establish a prima facie case against the accused, the state finds itself with an unduly burdensome and serious obstacle to the efficient extradition of a fugitive. The existence of this requirement is regarded as one of the reasons why Spain after twenty-five years lack of success denounced its extradition treaty with the United Kingdom in 1978. As a result suggestions were made that the prima facie rule be retained only where the person whose rendition is sought is a British national; and to discard the rule where the requesting state is a party to the European Convention on Extradition.(20) This would enable the United Kingdom to benefit from easier extradition arrangements with those European countries with which the United Kingdom has particularly close commercial and legal ties.

The rights of a fugitive criminal during committal proceedings in the magistrates court are important. These rights take the form of submissions as to the validity of the proceedings. The fugitive criminal can be represented (21) and may receive legal aid as well as be permitted to give evidence on oath himself. Although he may call witnesses and produce exhibits, the committal proceedings must not amount to a trial of fact. The three main submissions which shall be referred to are the political offence exception; the principle of speciality and, the principle of double criminality.

#### I. The Principle of Speciality

This principle is embodied in the 1870 Act section 3(2) which states that

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19. Government Report of February 1985, R/85 Cmnd. 9421.

20. December 13 1957, E.T.S. No. 24.

21. The Legal Aid Act s. 28(2), Archbold, p. 321C.

fugitives may not be tried or convicted for offences which occurred prior to their surrender other than those for which they are returned. The importance of this principle is somewhat negated by the fact that speciality is not a right of the individual. This factor is clearly borne out when one realises that although the principle requires a requesting state to give the fugitive an opportunity to return to the asylum state before prosecution for other offences, the rule is almost certainly to be ineffective in cases where the requesting state is anxious to retain the individual for political reasons. Speciality is a principle which can be waived by the state in whose interest it is to do so. The tendency has been to assume that the requesting state will act in accordance with its treaty commitment and that the request is made with the bona fide intention to put the accused on trial solely for the offence recited in the extradition warrant; Re Arton (22) where the court refused to allow counsel to question the good faith of the requesting state. Some authors suggest that though the principle is widely known, it is of little importance without clear evidence, and since such clear evidence depends upon information which is difficult to obtain, namely the intentions of the public prosecution departments of foreign states, it is not likely to be argued frequently. Thus, although the principle imposes restrictions on the requesting state, the "good faith" rule means that it provides little protection in proceedings in the requested state. And importantly, the possibility of speciality providing protection in the law of the requested state depends on whether the extradition takes domestic effect; and if it does so, whether it is interpreted as providing rights for the individual and not just the state.

The European Convention on Extradition (23)

Article 14(1) makes reference to the rules of speciality. It states that

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22. (1896) 1 Q.B.

23. December 13 1957, E.T.S. No. 24.

a person extradited should not be proceeded against, sentenced or detained with a view to carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom, except where (a) the requested state surrendering him consents; (b) or when the person, having had an opportunity to leave the territory of the state to which he has been surrendered, has not done so within forty-five days of his final discharge, or has returned to that territory after leaving it.

## II. The Principle of Double Criminality

In Government of Denmark v. Nielsen (24) the House held that on a proper construction of section 10 of the 1870 Act, a magistrate considering an application for extradition of a fugitive under a treaty which incorporated the whole of the list of extradition crimes set out in Schedule 1 to the 1870 Act was only required to determine whether the conduct or acts of the accused constituted under English law a crime so that he would be committed for trial if he had committed such acts or conduct in England, provided that the crime was one of the crimes listed in Schedule 1 to the 1870 Act and in the relevant extradition treaty. In considering whether the fugitive's acts or conduct would amount to a crime in England the magistrate was not required to consider any question of foreign law, because any comparison was only necessary if the extradition treaty contained limitations on surrender or if extradition was being sought on the basis of a conviction already obtained in the foreign state.(25) The question of double criminality is linked to the concept "extradition crime". This term is defined in section 26 of the 1870 Act as "a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first

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24. (1984) 2 All E.R. 81 H.L.

25. Note also, United States Government v. McCaffery (1984) 2 All E.R. 570.

schedule to this Act". In addition to the requirement that the offence should be listed in the 1870 Act, the extradition crime must also be one of those offences listed in the contractual document entered into by the United Kingdom and the foreign state.(26) Usually the requesting state checks that the offence is on the list of extradition offences at the time of the requisition. When the evidence is presented, difficulty sometimes arises over whether the facts establish a prima facie case for the actual offence charged. There must be evidence showing that all the elements of the offence were committed (27) and that this was within the jurisdiction of the requesting country.(28) However, within the context of Nielsen if the British court were asked to delve into "minutiae" of foreign law, "the court would be engaging itself in an impossible task".(29) It has been stated that the court cannot become a tribunal of foreign law.(30) From this point of view, the double criminality rule is severely restricted. The rule or principle as expressed in Nielsen does not look like a rule for the protection of individual interests as opposed to state interests. Nielsen attempted to rely on section 9(2), "The police magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime". But the court cited the safeguard of speciality in section 3(2) in reply.(31) The court was more concerned with ensuring that the magistrate understood his function and powers under section 10

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26. R v. Wilson (1877) 3 Q.B.D. 42; Re Arton (No.2) (1896) 1 Q.B. 509 per Lord Russell of Killowen C.J. at 513.

27. R v. Portugal 16 Q.B.D. 487.

28. R v. Governor of Brixton Prison ex parte Rush (1969) 1 All E.R. 316.

29. V.E. Hartley-Booth, op.cit., supra., N. 6 p. 50.

30. R v. Governor of Pentonville Prison ex parte Elliot (1975) 119 S.J. 709.

31. (1984) 2 All E.R. 91.

of the 1870 Act in relation to the list of extradition crimes set out in Schedule 1 of the 1870 Act, than whether Nielsen was likely to ultimately suffer any injustice.

C. The Political Offence Exception to Extradition in England

Extradition is an international legal act between two states; the requesting and the requested state. In this process, the requested person plays a merely passive role; he is the object of a legal process in which only the states concerned are considered interested parties.(32) The recognition of the individual as an interested party would, as a matter of fact, be incompatible with one of the fundamental principles of international law, which only considers states as perfect juridical subjects.(33) However there has been a move towards greater recognition of the individual as a juridical subject, with the development and strength of the human rights principle since the Second World War. The political offence exception was one of the first legal principles which clearly and unequivocally contemplated the protection of the individual.(34) The French Revolution is seen as the point at which the exception began to gather momentum against the idea of extradition. The emergence of the philosophical concept of freedom and its penetration into French society ultimately culminated in the right to revolt as proclaimed by the French Revolution, which established the moral and legal basis for the exercise of the right to revolutionary political

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32. M. Ch. Bassiouni, *International Extradition and World Public Order* (1974), p. 49.

33. Th. E. Lawrence, *The Principles of International Law* (6th ed.) (1915), p. 72; Oppenheim, Vol 1, p. 19 (8th ed.) (1955). Also see Chapter 2 of present study.

34. Dr. C. Van den Wijngaert, "The Political Offence Exception to Extradition; The delicate problem of balancing the rights of the individual and the international public order" Kluwer (1980), p. 37.

action.(35) The abhorrence of absolutism and despotism which was gaining ground in Europe at the time, resulted in the Jacobin Constitution of 1793 which for the first time proclaimed the individual right to asylum. It declared in Article 120 that the French people "grants asylum to foreigners banished from their countries for the cause of freedom. It will be denied to tyrants". This connection between the political offence exception and the concept of asylum is of fundamental importance to the individual. Briefly stated, asylum is defined by the Institut de Droit International at its 1951 Bath session as: "The protection accorded by a state on its territory or in another place under its jurisdiction to an individual who has come to seek it". Article 2(1). This definition is in keeping with the classic law of nations because it indicates the state, and not the individual as the holder of the right of asylum. This right follows the normal exercise of territorial sovereignty and each state is, in principle, completely free to act at its own discretion.(36) In recent times, new trends have developed which tentatively suggest that the individual may be the holder of a right of asylum (37) as well as various attempts to restrict the content and scope of the right of asylum. Asylum will be discussed in detail in Chapter 4.

In 1833 political asylum was, for the first time, officially codified in statute law. The Belgian Extradition Act of October 1 1833 was the first recorded extradition Act in history and at the same time the first official

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35. L. Bolesta-Kodziebrodsk, *Le Droit d'Asile* (1962), p. 29; Th. E. Carbonneau, "The Political Offence Exception to Extradition and Transnational Terrorists; old doctrine reformulated and new norms created" (1977) 1 *A.S.I.L.S. Int. L.J.*, p. 45.
36. L. Oppenheim, *International Vol 1*, pp. 676-678 (8th ed.) (Lauterpacht 1955); F. Morgenstern, "The Right of Asylum" (1949) 26 *B.Y.I.L.*, p. 327; M. Garcia-Mora, *International Law and Asylum as a Human Right* (1956), p. 120.
37. However, note the U.N. Declaration on Territorial Asylum December 14 1967 A/Res. 2312 (XXII). Article 1 refers to "Asylum granted by a state in the exercise of its sovereignty" which clearly negates the individual right to asylum.

codification of the political offence exception. Article 6 contained the relevant provision, "It shall be expressly stipulated in these treaties that the foreigner shall not be prosecuted nor punished for any political offence committed before extradition, nor for any fact connected to such crime". However even at this time, the drafters were conscious of the practical difficulties arising from the vagueness of the concept "political crime". The first formal limitation to the political offence exception in statute law was introduced by Belgium as a result of Jacquin, a famous case. In September 1854 the French Emperor Napoleon III made a trip by train to Tournai Belgium. Celestin and Jules Jacquin, two Frenchmen residing in Belgium had placed a bomb on the railway where the French emperor's train was about to pass. The bomb exploded, but the attempt was unsuccessful. Napoleon survived and Celestin and Jules Jacquin fled to Belgium. France then requested Celestin's extradition from the Belgian government. Since France was a mighty military power, Belgium was in a difficult position. The Brussels Court of Appeal had rendered a negative advisory opinion regarding Jacquin's extradition, holding that the crimes charged were political offences. The Belgian government though not bound by the court realised the political delicacy of granting extradition in derogation of the court ruling. France withdrew her extradition request eventually, but the government of Belgium introduced a bill, now known as the "Belgian Clause" or the "Attentat Clause" which provided that "It shall not be considered as a political offence nor as a fact 'connected' to such offence, the attempt against the person of a foreign head of state or against the person of his family members, whether the attempt be by means of murder, assassination or poisoning". Many countries have now enacted a similar clause in their extradition laws and treaties.(38) Great Britain is

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38. Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters, Article 3(2)(a) 1962; European Convention on Extradition, Article 3(3) (1957); Arab League Extradition Agreement, Article IV(1) and (2) (1952); Central American Extradition Convention, Article 3 (1934).

seen as the forerunner in the modern establishment of the political offence exception. In 1815 the Governor of Gibraltar surrendered political fugitives to Spain. This led to a public outcry in England which led Sir James Mackintosh to say that no nation ought to refuse asylum to political fugitives. In 1816 Lord Castlereagh stated that there could be no greater abuse of law than to allow it to be the instrument of inflicting punishment on foreigners who had committed political crimes.(39) In 1868 various debates took place in the Select Committee of Parliament. These debates were due to the fact that it was Parliament's doubts about the compatibility of extradition with the right of asylum which delayed the enactment of an extradition law in the United Kingdom. The Secretary of State for Foreign Affairs stated (40) : "Under our present treaties we should not give up a person charged with a political crime"; and the chief Metropolitan Police magistrate when appearing before the same Committee stated (41) : "The law of extradition expressly excludes political offences. In our treaty there is no clause to that effect; but it is a well understood law and it is laid down by all French authors; all their treaties contain a clause that political crimes are not to come within the treaty".

The desire to prevent the legal processes from being used by another state as instruments against its domestic opponents, and the feeling that the political offender had suffered enough by exile meant that despite the example of the Belgian "attentat" clause in 1856, Parliament's strong protection of the right to grant political asylum would not admit any limitation or derogation.

After the 1868 Parliamentary debates legislation was introduced which eventually resulted in the enactment of the 1870 Extradition Act. Section 3(1)

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39. Oppenheim, pp. 704-705; Wheaton, International Law (6th ed.) (1929), Vol. 1, p. 217.

40. 6 B.D.I.L., p. 654.

41. H.C. Papers 1867-1868 No. 393; 6 B.D.I.L., pp. 659-804.

of the 1870 Extradition Act (42) contains the relevant exception clause "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he proves to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus or to the secretary of state that the requisition of his surrender has, in fact, been made with a view to try and punish him for an offence of a political character". No definition of the term "offence of a political character" exists and case law subsequent to the 1870 Act has interpreted the term. At the outset, as the debates before Parliament illustrated in 1868, the primary concern was the respect for the right of asylum given to political offenders. The clear line of priority resolved itself in favour of the individual interests rather than state interests. With the passage of time, however, this advantage to the individual has been gradually eroded as a direct result of the changing methods by which individuals have challenged the political structure of the state. The conflict between state interests in the repression of crime and the individual's right not to be oppressed is being resolved more and more in favour of the state. The justification for this move is the fear that the predominant form the political challenge now assumes is one which endangers the whole social fabric of democratic societies and not just the particular government in power. The "terrorists" whose early form was the anarchist has found that his right to rebel or to rebel in the way that they choose is not deemed superior to the common interest in the suppression of their activities. In fact the invocation of the political offence exception has succeeded only twice before the English courts. The first case that will be considered illustrates "acceptable" violence permitted in the commission of a political offence, whilst the third case shows violence which is permitted where the purpose is deemed

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42. 33 and 34 Vict. C. 52 (1870). Note, "true" or "pure" political offences such as high treason, sedition and lese-majeste are not extraditable offences, as they are not included in the first schedule to the 1870 Act.

acceptable. In these two cases the section 3(1) exception was successfully invoked. The analysis of the case law shows this move towards the consolidating of state interests above individual interests.

Re Castioni (43)

This concerned an application by Switzerland for the extradition of Castioni for the murder of one Luigi Rossi, who was a member of the state council of the Canton of Ticino. The murder occurred during an uprising which grew out of the dissatisfaction with the administration of the government of the Canton. The citizens rose up against the government by use of force, with weapons, and attacked the municipal palace, where they then set up a provisional government. The prisoner took an active part and shot Rossi during the struggle for the municipal palace. Counsel for the applicant sought to invoke the protection of section 3(1) by using the definition of political offence suggested by John Stuart Mill in the debate in the House of Commons upon the Extradition Bill, namely, "any offence committed in the course of a furthering of civil war, insurrection or other political commotion". A more obvious case of a political offence could hardly be imagined.(44) Counsel for the applicant also referred to the definition given by Stephen J. in his History of the Criminal Law of England (45) that political offences were those crimes which were "incidental to and formed part of political disturbances".(46) Hawkins J. came nearest to a definition when he stated he "adopted absolutely" Mr. Justice Stephen's interpretation advanced in his book. Denman J. rejected Mill's definition on the ground that it appeared to give immunity to any act merely because it occurs concurrently with the existence of political commotion. Thus it was considered

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43. (1891) 1 Q.B., p. 149.

44. I.A. Shearer, Extradition in International Law, p. 170.

45. Vol. II 70, 71 (1883).

46. (1891) 1 Q.B. 165-166.

too broad. Hawkins J. felt that the first requirement was that there had to be some political disturbance. Some commentators on the case suggest that this does not necessarily import a contention for control of the government.(47) Denman J. though it necessary that there be "a political matter, a political rising, or a dispute between two parties in the state as to which is to have the government in its hands".(48) On this view something less than a disturbance would apparently be sufficient. A mere disagreement or a dispute between two political parties would be covered.(49) This view is broader than that of Hawkins J. Much effort is made by both Denman J. and Hawkins J. to emphasise that Castioni's act was not motivated by private revenge.(50) "He did not shoot to take the man's life or pay off an old grudge or revenge himself for anything which Rossi had ever personally done to him". Thus the court felt there were at least three constituent elements in a political offence; first, the actor must be politically motivated, any conduct for such private purposes as revenge being excluded; secondly, the act must be at least some overt act aimed directly, not indirectly at the existing government, if not in active support of the attempted overthrow of the state; thirdly, the act in question must take place in a political context (51) i.e., within the specific physical context of the political struggle. Following closely on Castioni was Re Meunier.(52)

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47. J. Woodcock, "Political Offences and Extradition; A Conceptual Deviation in the English Courts" April 1980 T.L., p. 29.

48. (1891) 1 Q.B. 156.

49. Dr. Amerasinghe, "The Schtraks Case, Defining Political Offences in Extradition" (1965) 28 M.L.R., p. 32.

50. (1891) 1 Q.B. 159, 165, 167.

51. J.G. Castel and M. Edward, "Political Offences; Extradition and Deportation - Recent Canadian Developments" (1975) O.S. H.L.J., 89.

52. (1894) 2 Q.B. 415.

Re Meunier

The prisoner had caused two explosions; one at a cafe killing two persons and the other at military barracks. He argued that the offences charged were of a political character because they were outrages against government property committed by an anarchist. In rejecting this proposition, Cave J. stated: "It appears to me that, in order to constitute an offence of a political character, there must be two or more parties in the state, each seeking to impose the government of their choice on the other, and that, if the offence is committed by one side or other in pursuance of that object, it is a political offence, otherwise not".(53) Thus the elements necessary to constitute an offence of a political character, as regards Cave J.'s interpretation are, firstly, the existence of two or more parties, and secondly, that these parties are seeking to impose the government of their choice and thirdly, the act must be done in pursuance of the second point above. Cave J. emphasised that anarchists are enemies of all governments and that their acts are directed against the general body of citizens; "they may secondarily and incidentally commit offences against some particular government; but anarchist offences are mainly directed against private citizens".(54) The court emphatically stated that there were not two political parties in the case, thus denying that anarchists were a political party. This stresses the important part that political parties play in the definition. It is not a question of political motives as such. But it is essential that political parties be at variance before the notion of a political offence can come into operation.(55) Anarchist activities throughout Western Europe, most particularly in France, had reached their zenith at this time. The philosophical precepts held by this group were anathema to the bourgeois liberal

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53. Ibid., p. 419.

54. Ibid., p. 419.

55. Dr. Amerasinghe, op.cit., supra. N. 49 at p. 34.

democrats, who held sacrosanct the existing forms of parliamentary democracy. Meunier's activities in France were only a part of a much larger offensive organised by the anarchists beginning some time in March 1892. This offensive was prompted by the Conservative republicans' continued resistance to social reform and then the Massacre of Fourmies in 1891, where government troops fired on a group of demonstrating workers and killed women and children. From this historical context, either no evidence of the political situation in France was placed before the court or the notion of giving asylum to a person of Meunier's political persuasion was completely offensive to the judges.(56) The first provisions concerning the political offence exception were drafted in an atmosphere of romanticism and glorification of political offenders, starting from an almost naive identification of the political offender with the liberal revolutionary, without, however taking into account the possibility that other political offenders would in turn oppose the new liberal legal order itself.(57) Shearer notes that the judgment of Cave J. at page 419 served to narrow the concept by introducing the qualification that there should be some kind of organised party contending for power with the established government.(58) The court preferred the definition of Denman J. in Castioni to that of Hawkins J. in that it did not require the existence of a physical political disturbance. The next important case concerning section 3(1) of the 1870 Act was R v. Governor of Brixton Prison ex parte Kolczynski.(59)

R v. Governor of Brixton Prison ex parte Kolczynski

The case concerned seven Polish nationals serving as crew members on a trawler in the North Sea, as part of a Polish fishing fleet. On board each of

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56. J.G. Castel and M. Edward, op.cit., supra. N. 51 at p. 98.

57. Dr. C. Van den Wijngaert, op.cit., supra. N. 34 at p. 14.

58. Shearer, op.cit., supra. N. 44 at p. 171.

59. (1955) 1 Q.B. 540.

the trawlers was a person known as a party secretary. The political commissar and party secretaries exercised supervision over the crew's political leanings and they noted the conversations of the men. The applicants decided to escape so they overwhelmed the captain and the party secretary and brought the vessel into an English port. Poland demanded their extradition for assault and revolt or conspiracy to revolt on board a vessel on the high seas. The applicants raised the defence that their offences were political, arguing that a broad meaning should be assigned to the words "offence of a political character".

Alternatively, if Castioni and Meunier were still good law, as they were, and that as the offence had to be done "in furtherance of a conflict between different parties contending for power in a state", then the crew could be considered to be a "political unit" which had rebelled against the "political head" of that political unit. The political head was the party secretary on board the vessel, who, it was alleged, listened to the conversations of the crew and generally supervised the crews political leaning. The court accepted the suggestion that the views expressed in Castioni and Meunier were to be read in the political context of the nineteenth century. Lord Goddard C.J. considered that "the evidence about the law prevalent in the Republic of Poland today shows that it is necessary, if only for reasons of humanity, to give a wider and more generous meaning to the words we are now construing".(60) It was admitted that there was no organised internal opposition to the government of Poland in 1955. Section 3(1) contains two limbs. The first limb forbids the surrender of a fugitive if the evidence shows the crime to have been committed in circumstances clothing it with a political character; the second prevents his surrender, although the offence is not of a political character if the fugitive can establish to the court that the requisitioning state really requires his surrender so that it may try him for another offence which is of a political

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60. Ibid., p. 549, 551.

character, or at least punish him on his conviction of the non-political offence as though he had been tried for the political offence, Cassels J. adopted this construction holding that the offences here were of a political character within the first limb of the subsection; further that even if the seven men were tried in Poland for the extradition offences alone, they would be punished for an offence of a political character, i.e., treason in going over to the enemy, thus bringing the case within the second limb of section 3(1). As such the sailors would be punished for an offence of a purely political character.(61)

Lord Goddard C.J. construed the subsection in an entirely different manner in extending the definition of an offence of a political character. He stated: "The revolt of the crew was to prevent themselves being prosecuted for a political offence and in my opinion therefore the offence had a political character".(62) The party secretary was keeping observation on the accused, monitoring their political opinions. If they were returned to Poland and prosecuted, any such prosecution would have been a political one, or a prosecution for a political offence in the pure sense of the term. Since the common crimes for which extradition was sought were committed with the purpose of avoiding such a prosecution they acquired the character of political crimes. As such therefore Lord Goddard felt the case fell squarely within the second limb of section 3(1). W. Denny (63) points out that in reaching his decision upon the relationship between the facts of the case and the construction of section 3(1), Lord Goddard relied upon the provisions of section 3(2) the principle of speciality. A treaty containing the provision for the principle of speciality was made with Poland in 1932. Relying upon a case called Re Arton No.1 (64)

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61. W. Denny, "An Offence of a Political Character" (1955) 18 M.L.R. 380.

62. (1955) 1 Q.B. 550.

63. W. Denny, op.cit., supra. N. 61 at pp. 381-382.

64. (1896) 1 Q.B. 108.

Lord Goddard declared that "the court must not assume that the foreign state will not observe the terms of the treaty" and that therefore "the second limb of the section cannot mean that the court can say that if extradition is sought for crime A we believe that if surrendered he will be tried or punished for crime B". In Re Arton it was alleged by the applicant fugitive from France that his extradition on charges of monetary crimes was a mere device in order to subject him to police interrogation with regard to certain political matters. The court considered that an offence of a political character had to be an offence already committed, and not a purely speculative one which might be the outcome of interrogation. Lord Russell C.J. stopped counsel for the applicant from arguing that the French government ("a friendly state") was not acting in good faith in making its application. Certain authors, notably Denny (65), do not agree with Lord Goddard's interpretation of Arton in Kolczynski. They view this manner of interpretation as depriving a fugitive criminal of an important additional protection against political persecution. They argue that in section 3(2) the legislature obviously intended that some safeguard should operate against abuse of surrender; "although the courts will not assume that the foreign state will not observe the treaty (as the Lord Chief Justice said). Re Arton does not, it is submitted, preclude the reception of evidence and a finding by the court to that effect (as the argument of the Lord Chief Justice inferred and required)".(66) In deciding the meaning of the phrase "an offence of a political character", Lord Goddard C.J. and Cassels J. considered the previous case law. Of Castioni they found the definition suggested by Stephen J. to be too narrow for the facts before them; flexibility was needed due to twentieth century circumstances. W. Denny considers that the definition of Stephen J. was adequate

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65. W.E. Denny, "An Offence of a Political Character" (1955) 18 M.L.R. p. 380 at p. 382.

66. W.E. Denny, Ibid., p. 382; I.A. Shearer, op.cit., supra. N. 44 at pp. 173-175.

for Kolczynski, provided "the phrase political disturbance was given a common-sense interpretation in the light of existing political circumstances and not limited to forcible attempts to overthrow a government by an opposing party".(67) Neither judge referred to Meunier in their judgments. The case is regarded as "the high water mark of liberality in the determination of the limits of a political offence by British courts".(68) Denny concludes by stating that it is regrettable that the law on the interpretation of section 3(1) should have been left in a state not only uncertain but also capable of dangerous restrictions in the protection afforded by the Act to political fugitives.(69) The prophetic nature of these words have in the course of time become apparent. One can only conclude that the case was or should have been decided on the second limb of section 3(1) whilst Castioni and Meunier were confined to the first limb.

In 1962 the House of Lords for the first time considered the words "offence of a political character".

Schtraks v. Government of Israel (70)

The parents of a boy named Joseph Schuchmacher left the boy in custody of his mother's parents, the Schtraks. When the parents asked for the return of the boy the grandparents refused to return the boy on the grounds that if the boy were returned he would not be given the education proper to an orthodox Jew. In habeas corpus proceedings the Supreme Court ordered the grandparents to hand over the boy by a set date; when the date came and the boy had still not been returned, the grandfather was sent to prison. The appellant was an uncle of the

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67. W.E. Denny, Ibid. at p. 384.

68. I.A. Shearer, op.cit., supra. N. 44 at p. 173.

69. W.E. Denny, op.cit., supra. N. 61 at p. 385; J. Woodcock, op.cit., supra. N. 47 at p. 32.

70. (1962) 3 All E.R. H.L.; (1962) A.C. 573; (1962) 3 W.L.R. 1013.

boy, being a son of the grandparents. It was alleged against him that he took the boy to a settlement at Kommemiyut and arranged with a family that they should keep the boy for some time, giving false names for himself and the boy. The application was against both the grandparents and the appellant who was alleged to be making common cause with the grandparents and in assisting them in their determination not to return the boy. The appellant's action was supported by the Rabbi of Jerusalem. The case provoked debates in the Knesset and public meetings were held. The appellant fled to England to seek refuge and proceedings were commenced to return him to Israel on charges of child stealing and perjury. The accused sought to argue that because no precise definition of "political" could be given, if a crime is committed within the context of an acute political struggle within the state then it is a crime of a political character (the Castioni criteria). In Israel the argument proceeded, religious leaders also have political duties and this particular religious issue had become a political issue in the Knesset. But the House of Lords unanimously held that it was not enough to make out a case under the section that the offences were capable of political significance if in fact they had not been committed for a political purpose. The fugitive had to be at odds with the state which applied for his extradition, on some issue connected with the political control or government of the country. The present offence was not of a political character because they were ascribable either to "filial piety" or to a wish to take his (the appellant) father's side rather than to demonstrating against the policy of the state. The House thus made it plain that an offence could not be regarded as political where it was committed without a political motive notwithstanding that a political significance might be attached to the act in the minds of other people. The evidence strongly showed that the actions of the accused in this case were privately motivated rather than in any real sense directed towards demonstrating against the policy of the state. On this view of the facts it became unnecessary to decide what in fact was meant by a "political offence".

The views on this question which followed were obiter dicta. The decision of the court was based on a principle to be found in all the definitions that had emerged from the previous cases of Castioni and Meunier, namely, that it was necessary that the offence be committed in furtherance of the political struggle. The illustrations given in this case do not insist on the presence of a political disturbance of the kind envisaged by Hawkins J. in Castioni. The existence of a political movement or struggle is deemed sufficient. In this respect it comes closer to the definition adopted by Denman J. in Castioni and that of Cave J. in Meunier. The other factor to emerge is that it is necessary for the struggle to be between the governing party and another political party in the state. It is insufficient that the struggle be between any two political parties in the state. In this aspect it is different from the definition offered in the Meunier case; it approximates to the narrower interpretation of Denman J.'s definition in Castioni.

Lord Reid's judgment is considered by one author to be "one of the most sensitive and penetrating that has yet been given".(71) He looks to the intention of the legislature which he stated was to give effect to the principle that there should be in this country asylum for political refugees. He widens the circumstances which may be said to be indicative of an offence of a political character. He emphasised the preparatory stages of an open insurrection, something which Castioni did not take account of. He stated that there need not be an open insurrection; "an underground resistance may be attempting to overthrow a government and it can hardly be that an offence committed the day before open disturbances broke out would be treated as non-political while a precisely similar offence committed two days later would be of a political character".(72)

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71. J.G. Cassel and M. Edwards, op.cit., supra N. 51 at p. 102.

72. (1962) 3 W.L.R. 1025-1026.

Nor was it necessary that there should be an attempt to overthrow the government; attempts to compel a government to change its advisers or its policy could give rise to political offences. Dr. Amerasinghe also points out that Lord Reid established that the motive and purpose of the offender is relevant. "Thus the commission of a crime in order to satisfy a grudge would prevent the offence from being political. The purpose must be to promote a political cause".(73)

Lord Radcliffe (74) felt an attempt at a definition would be inappropriate but that it was necessary to give the words a "description". He sees the whole question of "political offence" as one concerning itself with "political refugees", "political asylum" and "political prisoner". "The fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of the country. It does indicate that the requesting state is after him for reasons other than the enforcement of the criminal law in its ordinary, what I may call its common or international aspect; if the central government stands apart and is concerned only to enforce the criminal law that has been violated by these contestants, I see no reason why fugitives should be protected by this country on the grounds that they are political offenders". This statement has been the source of considerable controversy and confusion as various interpretations of its meaning have been put forward.(75) Lord Radcliffe's discussion impels one to the conclusion that the formulation of a workable rule is impossible.(76) On what evidence could a court come to the conclusion that a requesting government was intent only to enforce the ordinary criminal law? From Lord Radcliffe's judgment two points of

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73. Dr. Amerasinghe, op.cit., supra. N. 49 at p. 37.

74. (1962) 3 W.L.R. 1032-1033.

75. J.G. Castel and M. Edwards, op.cit., supra. N. 51 at p. 104.

76. I.A. Shearer, Extradition in International Law, p. 178.

importance emerged on the question of a political offence.<sup>(77)</sup> Firstly, the idea that the connection between the offence and an uprising, disturbance, insurrection and war or struggle for power envisaged in Castioni and Meunier had to be maintained, even though a liberal meaning was given to these words. Secondly, the mere fact that the offence was committed for a political purpose or with a political motive or for the furtherance of some political cause or campaign did not make it political. Arguably the judgments have had the result of widening the Castioni decision. However Amerasinghe cautioned against a wide interpretation of its conclusions on political offences. C. Warbrick (78) suggests that this was "percipient counsel, because since that time, the English cases have narrowed down the concept of political offence in response to the nature and extent of political violence perceived by the courts". J.G. Castel and M. Edwards (79) consider that the judgment in laying less emphasis on the requirement of a turbulent political context as an element in a political offence is eminently praiseworthy "as it reflects a more realistic understanding of modern conditions and the changing modes of political resistance". For his part, J. Woodcock (80) argues that by approaching the concept from the "worthiness of asylum" angle the court widens the Castioni model which is a good thing. But by "deliberately keeping their options open by enabling themselves to alter the definition according to present circumstances (which can only be taken to mean political considerations) they are in effect establishing and retaining for themselves a political veto".<sup>(81)</sup>

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77. Dr. Amerasinghe, op.cit., supra. N. 49 at p. 38.

78. C. Warbrick, (1980) Summer P.L., p. 114.

79. Op.cit., supra. N. 51 at p. 104.

80. J. Woodcock, op.cit., supra. N. 47 at p. 33.

81. Ibid., p. 33.

For her part Dr. C. Van den Wijngaert (82) says of Kolczynski and Schtraks that they illustrate how within the boundaries of the political incidence theory (as the English case law development of the political offence is known) British courts managed to reduce the political offence exception to its most essential *raison d'etre*, i.e., the protection of the individual against retaliatory trial by his political adversaries. "Whereas in the Kolczynski case, the risk of a retaliatory trial led the court to characterise the crimes alleged as political, the absence of the same risk in the Schtraks case resulted in the crimes being considered as extraditable, non-political offences".

Re Gross, ex parte Treasury Solicitor (83)

In this case the trial of an S.S. officer for murder of concentration camp inmates was held not to be an offence of a political character. The offender was not "at odds" with the government when the offence was committed, but was rather serving its end. Chapman J. noted that Lord Radcliffe had stressed the relationship between political offenders and political asylum in Schtraks and there was little prospect that the offender here would have been granted political asylum when the crime was committed. He, however, did consider that there might be cases where persons working for the government might claim that their actions were of a political character, for example, if a usurper government set about liquidating its opponents and later that government was overturned, those who had assisted the usurping government in this endeavour might well be looked upon as political offenders.(84)

In 1973 a new case came before the House of Lords which added another

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82. Op.cit., supra. N. 34 at pp. 113-114.

83. (1968) 3 All E.R. 804.

84. G.V. La Forest Q.C., Extradition to and from Canada (2nd ed.) (1977), p. 72.

dimension to the interpretation of the term "political offence".

R v. Governor of Pentonville Prison ex parte Cheng (85)

The applicant was a member of a formosan organisation opposed to the Taiwan regime and convicted in New York of the attempted murder of its vice-premier. He was allowed bail and he fled to London via Sweden. The attack, according to the World Union of Formosans for Independence, of which Cheng was a member, was equally directed against the United States because of their economic and military support of Taiwan. As such the offence was claimed to be a political one. In essence the question is do the words "in the state" necessarily import the words "requesting" so that the concept is limited to an offence directed against the requesting state; and is the exception of section 3(1) to be applied to those who carry on political opposition in exile?

The House of Lords dismissed the appeal stating that the "political character" in its context connoted opposition to the requesting state on some issue connected with the political control or government of that state; and since the applicant had not, on the facts been taking political action vis-a-vis the United States government and the United States government was not concerned with the relations between the United States and Taiwan in asking for extradition but was concerned only with the enforcing of its criminal law, the applicant's offence was not one of a political character within section 3(1).

The defence attempted to argue that the place where the offence occurred was irrelevant to the question of whether the offence is political or not. And because the evidence established that the applicant was the secretary of the established political movement seeking to remove the Taiwan regime, the offence was within the meaning of the previous case law authorities whether it be the

test of Lord Reid or that of Viscount Radcliffe in Schtraks. The House of Lords rejected the appellant's arguments by a three to two majority. One crucial argument operating against the appellant in the case was again put by Lord Radcliffe in Schtraks, namely, that one must look to the requesting state to determine whether in its eyes the context is political or not.(86) Lord Diplock based his judgment upon an analytical interpretation of the words "offence" and "political". His interpretation of the first is used to limit the territorial applicability of section 3 and of the second to limit the "interest sought". "The relevant state of mind is not restricted to the intent necessary to constitute the offence with which he is charged, for in the case of none of the extradition crimes can this properly be described as being political. The relevant mental element must involve some less immediate object which the accused sought to achieve by doing the physical act".(87) In attempting to accommodate Kolczynski in his judgment, Lord Diplock confuses the issues. In Kolczynski the court did not state that the attribution of "political" to the Polish seamens' action was conditional upon them having the requisite mental element of intending to carry on a fight against the Polish government. Lord Salmon's judgment shows clearly the political atmosphere and the implications for the United Kingdom if the appellant should succeed: "It seems to me that the benevolence with which it is said that the Act of 1870 should be construed in favour of a fugitive offender must have some rational limits. Otherwise persons could, for example, bomb buildings or destroy civilian aircraft or murder visiting politicians in the United States of America or any other country with which we have an extradition treaty knowing that they could escape trial and punishment by escaping to England".(88) The dissenting opinion of Lord Simon, it

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86. J. Woodcock, op.cit., supra. N, 47 at p. 37.

87. (1973) 1 W.L.R. 755.

88. Ibid., p. 771.

is submitted, is the better view. He refers to the canons of construction; strict statutory interpretation. He refers first to the "first" or golden rule which requires that words and phrases should be given their natural and ordinary meanings. It is wrong to read into an Act of Parliament words which are not there. Secondly, from the approach of historical background, he concludes that Parliament could not have intended section 3(1) to be construed other than benevolently in favour of the fugitive offender. Thirdly, he cites the presumption in favour of compatibility with international law. He refers to Re Pavelic and Kwaternik (89) which he considers as indistinguishable from the present case. Here, two Croatians were alleged to have murdered in Marseilles the King of Yugoslavia and also the French foreign minister. They then fled to Italy. Subsequently, the request for their extradition was refused unconditionally by the Italian court. So just as international law precludes Pavelic's extradition for the alleged murder of King Alexander in France (though the Italian court did not rely on international law), it precludes the appellant's extradition for the attempted murder of the Taiwan vice-president in the United States and the Act of 1870 should be construed accordingly in the absence of contrary indication.(90) Lord Simon emphasised at the end of his judgment that despite the increase in political violence, the solution to the kind of political violence represented in the case was for "governments in international conclave; there is no advantage in marginal and anomalous judicial erosion of traditional immunities". The problem as Shearer (91) points out, is that the treaty stipulations relating to political offences are commonly silent as to the organs of the requested state competent to determine whether a fugitive is protected as a political offender. The executive exercises the final act in the extradition

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89. (1933-34) 158 Ann. Dig.

90. (1973) 1 W.L.R. p. 766.

91. Shearer, loc.cit., p. 191.

process of ordering the conveyance of the fugitive to the requesting state. In Zacharia and Arestidou v. Republic of Cyprus (92) a case brought under the Fugitive Offenders Act 1881, a statute which deals with rendition between the Commonwealth, the applicant argued on two grounds. Firstly, that the murders they were alleged to have committed were offences of a political character. The killings, which they denied they had committed, were done in the course of the fight for independence of Cyprus made by a group called the E.O.K.A. to which the appellant belonged. Secondly, the application for their return was not made in good faith in the interests of justice. The appeal was rejected by the House of Lords. The executive, however, then refused to allow the surrender of the two individuals.

Atkinson v. United States Government (93)

This is authority for the proposition that the executive but not the courts have the power to refuse the surrender of a fugitive to a foreign country if it would be wrong, unjust or oppressive to do so. Various arguments have been put forward in support of the exercise of executive discretion in this area. The executive undoubtedly has access to confidential avenues of information closed to the courts which may significantly alter the appreciation of the nature or circumstances of an offence to the fugitive's advantage. It can also act upon information supplied by the fugitive which could not be received as admissible evidence by the courts because of evidentiary rules or procedures. But the main objection to the exercise of an executive discretion in favour of the fugitive is based on diplomatic expediency. An executive discretion in favour of the fugitive implies an unfavourable comment on the bona fides of the requesting government or the standards of justice prevailing in its territory. To assign

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92. (1963) A.C. 634; (1962) 2 All E.R. 433.

93. (1969) 3 All E.R.

the problem to the judiciary spares the requested government much embarrassment. This is the nub of Lord Simon's (94) judgment in Cheng. C. Warbrick (95) points out that what the court was concerned with in Cheng was the acceptable levels of violence used for the purposes of achieving political ends. Cheng limits the range of violence permitted for the promotion of a political struggle. This judicial trend has had a detrimental effect on the principle of asylum, the basis on which the political offence exception was introduced into legislation concerning extradition.(96)

The judicial trend of Cheng is well illustrated by reference to cases brought before the British courts during the seventies relating to the Irish conflict. In these cases the crimes for which extraditions were requested were linked (so the argument proceeded) to this conflict situation and thus, according to the strict application of political offence theory developed since Castioni, they could have been considered as political crimes. "But the courts have further de-emphasised the strict application of the political incidence test in order to focus on the 'at odds' test developed in Schtraks and increased attention to the subjective elements, i.e., the motives for the act".(97)

Keane v. Governor of Brixton Prison (98)

The procedures governing extradition between the Republic of Ireland and the United Kingdom are known as the Backing of Warrants (Republic of Ireland) Act

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94. Shearer, loc.cit., p. 192.

95. C. Warbrick, (1980) Summer, P.L., pp. 118-119.

96. M.R. Garcia-Mora, "The Present Status of Political Offence in the Law of Extradition and Asylum" (1953) 14 U. Pitt. L. Rev. p. 371; C. Van den Wijngaert, op.cit., supra., pp. 114-116; C. Warbrick, op.cit., pp. 118-120; Thornberry, "Is the Non-Surrender of Political Offenders Outdated?" (1963) 26 M.L.R. 555.

97. C. Van den Wijngaert, op.cit., supra. N. 34 at p. 115.

98. (1972) A.C.

1965 in the United Kingdom and Part III Extradition Act 1965 in the Republic of Ireland. Keane, a former member of the I.R.A. had been involved in political activities all his life. He helped in the formation of a new political organisation called Free Ireland. Though not itself illegal, it could be made so at any moment. The applicant arrived in England and was arrested on two Republic of Ireland warrants endorsed in accordance with the Backing of Warrants (Republic of Ireland) Act 1965. The first warrant was for the murder of a policeman in connection with a bank robbery; the second was a charge of armed robbery of a bank on another occasion. Section 2(2) of the above statute states that no order (for the applicant's return to the Republic of Ireland) shall be made if it is shown (a) that the offence specified in the warrant is an offence of a political character; (b) that there are substantial grounds for believing that the person named or described in the warrant will, if taken to the Republic, be prosecuted or detained for another offence, being an offence of a political character. The magistrate ordered his return to the Republic of Ireland. The appellant argued that though the newly formed Free Ireland was not illegal, it could be made illegal at any moment by the introduction of the Offences Against the State Act 1939. If it were in the future made illegal, then as a leading member of it, if he persisted in his political activities he might be detained and prosecuted under the Act and the offences would undoubtedly then be of a political character. The appellant secondly argued that he had served prison terms for attempted arson and common assault in October 1967 which arose out of an attack on the headquarters of the Fianna Fail, the government party office, presumably a political offence, showing that he is a political animal. It was argued that this was enough to satisfy the court that there were substantial grounds for believing that if returned he would be prosecuted or detained for another offence, being an offence of a political character. But the court held that even if the widest construction were to be given to section 2(2)(b) (i.e., that if there were substantial grounds for believing that after the applicant had been

prosecuted for the offences of murder and armed robbery as charged, he would at some time in the future undefined be prosecuted for a political offence, no order could be made for his return) the applicant could only succeed if he could point to some offence with which he was going to be detained or charged (note Re Arton). Secondly, since the applicant had not satisfied the requirements of the above statement, his application was not successful. Lord Parker C.J. in the Court of Appeal (whose judgment was affirmed by the House of Lords) stated that an example of something that had already occurred in which it is alleged that he is concerned, could be the making illegal of the Free Ireland organisation, under the Offences Against the State Act 1939 and that before he came to England he had taken some active steps as a leading member of the organisation. However, as this had not been the fact in the case, there were no substantial grounds for believing that he will be prosecuted or detained, if returned for a political offence.(99)

R v. Governor of Winson Green Prison ex parte Littlejohn (100)

In October 1972 an armed robbery took place in the Republic of Ireland. The robbery was organised by a gang for the purpose of obtaining money for the I.R.A. On October 19 the applicant and his brother were arrested in England on an Irish warrant charging them with the commission of the robbery. During habeas corpus proceedings, the applicant and his brother argued that their connection with the I.R.A. made the offence one of a political character within section 2(2)(a) of the 1965 Act. The court held that there was not a sufficient political association between the offence and the applicant's motive and refused the application. On return to Ireland, the applicant was tried in a "special court" which had been established under the Offences Against the State Act (Ireland) 1939. The special court which sat without a jury had been set up because the Irish

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99. (1972) A.C., pp. 209-210.

100. (1975) 1 All E.R. 208.

government was satisfied that the ordinary courts were inadequate to secure the effective administration of justice and the preservation of public peace and order within sections 35(2) and 36(1) of the 1939 Act. The applicant was sentenced to twenty years' imprisonment. In March 1974 the applicant escaped to England. A warrant for his arrest was issued in Dublin for the offence of gaol breaking. When brought before a magistrate he concluded that the request should be refused under section 2(2) of the 1965 Act, to make an order for his delivery to the Irish police since there were substantial grounds for believing that he would be "detained for another offence, i.e., the armed robbery, being an offence of a political character within section 2(2)(b)". He relied on the fact that he had been tried in a special court as evidence that the robbery had been a political offence. The court held that an offence might be "of a political character" either where the wrongdoer had some direct ulterior motive of a political kind or where the state requesting his return was anxious to punish him for his politics rather than for the offence referred to in the extradition proceedings. Lord Widgery C.J. stated that in refusing to accept the submission two years previously when the matter was before the court, the court was saying in substance that although Littlejohn had been concerned with the I.R.A. and although their interest in robbing the bank was not simply to obtain money on their own account, there was not a direct political association to make the offence one of a political character. Also, the fact that the applicant had been tried in a special court did not indicate the contrary since neither section 35(2) nor section 36(1) of the 1939 Act necessarily struck at offences of a political character or disclosed that the special courts were political courts. Thus the application by Littlejohn was refused. The Cheng case along with Littlejohn and Keane illustrate the way the courts refuse to permit allegiance to a political party to be justification for the commission of a criminal offence. In Keane and Littlejohn, the offences were considered too remote for their political objective to be regarded as having a political

character. The remoteness test was used by Lord Diplock in Cheng. However, J. Woodcock (101) argues that Lord Widgery used the test in a different way in Littlejohn. From Lord Widgery's judgment it is clear he is stating that the two most important factors to be taken into account in deciding whether an offence is of a political character are (a) the attitude of the requesting state and (b) the attitude and motive of the wrongdoer himself.(102)

C. Warbrick suggests that perhaps an attack by an I.R.A. member on an Irish politician or on a barracks in Ireland would be regarded as sufficiently proximate to its political objective to be an offence of a political character.(103)

R v. Budlong (104)

Members of the Church of Scientology entered various government offices in the District of Columbia in the United States and stole confidential material relating to the church. The applicants were charged with burglary in respect of which the United States government made a requisition for their surrender. The applicants argued that the offences were of a political character because the applicants were engaged in an attempt to change the policy of the United States government towards the Church of Scientology and that the burglaries were committed to further this end. They relied upon passages in the opinion Schtraks and Cheng where Lord Reid and Lord Diplock refer to an offence of a political character being one aimed at changing the policy of the foreign government. However Griffiths J. stated that these words of their Lordships should be read in the full context of their speeches which makes it clear that they were

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101. J. Woodcock, op.cit., supra. N. 47 at p. 40.

102. V.E. Hartley-Booth, British Extradition Law and Procedure, p. 228.

103. C. Warbrick, op.cit., supra. N. 95 at p. 121.

104. (1980) 1 W.L.R. 1110.

considering offences committed in the course of a struggle against a foreign government from which the accused had sought asylum in this country. "In respect of any government policy there will probably be a substantial number of people who disagree with it and wish to change it, but it should not be thought that if they commit a crime to achieve their ends it necessarily becomes an offence of a political character".(105)

The applicants stated that the burglaries were planned in order to gain access to the information that had been collected by the Internal Revenue Services Department and the Department of Justice, so that they could identify persons in the Department hostile to scientology and also in order to refute false allegations. However the court rejected this argument as coming within the ambit of section 3(1) of the 1870 Act. The court held that the applicants did not order the burglaries to take place in order to challenge the political control or government of the United States. They did so to further the interests of the Church of Scientology and in particular the interests of their founder. Thus the court rejected the plea of the applicants that their offence was of a political character and that they were political refugees with a good case for asylum being granted.

In the case Griffiths J. stated that as society becomes more sophisticated, so the scope of government increases with the inevitable result that certain governmental policies will affect individuals over a widening range. One important area of increasing public concern is that of the various governmental stances around the world to the question of the build up of nuclear armament. Would offences committed in furtherance of the attempt to alter governmental policy on the issue come within the ambit of section 3(1) of the 1870 Act? According to Lord Reid in Schtraks, non-violent demonstrations against the

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105. Ibid., p. 1123, paras. E-F.

authorities can come within section 3(1) and an assault for example on a policeman during such a demonstration ought, arguably, to come within the section.

In conclusion to this survey of the political offence exception and its development in English case law, certain factors emerge. It is clear that one must not exaggerate the importance of the political offence exception in practice.<sup>(106)</sup> Only two cases have successfully invoked section 3(1), Castioni and Kolczynski. The former was decided on the first limb of section 3(1), whilst the latter was decided on the second limb, the asylum principle. Meunier (anarchist), Cheng (terrorist) and Littlejohn (I.R.A. a terrorist also - see later discussion) illustrate the narrowing down of the concept. They show the type of violent activity which is outlawed; Lord Simon's judgment in Cheng is an attempt to keep in existence the nineteenth century idea of political asylum. However national and international practice suggests that the emphasis is shifting from the circumstances of the offence and the motive of the fugitive to the likely attitude of the requesting state and the political compulsion of the requesting government. (Concerning Cheng, the maintenance of good relations with the United States is obviously a more important factor than the claims of a fugitive criminal). To prove that the motive of the requesting state is not made in good faith imposes a heavy burden on the fugitive (Littlejohn and his argument that his trial at the special courts was evidence of the political nature of his offence and the true intentions of the Irish request for his extradition). Various authors<sup>(107)</sup> see this trend of making the dominant factor in the decision to grant asylum, conditional upon the goodwill between the requesting and requested state, and "reducing the compassion for the individual"

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106. D.N. Schiff, "Astrid Proll's Case" (1979) P.J., pp. 353-371.

107. C. Warbrick, op.cit. at pp. 121-122; C. Thornberry, op.cit. at p. 559; J. Woodcock, op.cit. at pp. 42-43; C. Wijngaert, op.cit. at p. 116; R. Young, "The Political Offence Exception in the Extradition of the United Kingdom - A Redundant Concept?" (1984) Vol. 4 J. Leg. S. p. 211.

as a great blow to the concept of the political offence exception. A very pertinent conclusion to this part of the essay is provided by M. Garcia-Mora when he states "To restrict unduly the scope and meaning of the concept of political offences would almost certainly amount to striking a mortal blow to the protection of human rights in one of its most vital aspects".(108)

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108. M. Garcia-Mora, "The Present Status of Political Offences in the Law of Extradition and Asylum" (1953) 14 U. Pitt. L. Rev., p. 371.

D. The Political Offence - with regard to Extradition and the Commonwealth

Extradition between Great Britain and the Commonwealth was governed by the Fugitive Offenders Act 1881.(1) In contrast to the Extradition Act 1870, the application of the Fugitive Offenders Act is not dependent upon there being a treaty in existence. This is due to the fact that despite their different social systems and political attitudes, the members of the Commonwealth have a common political heritage and share in the use of English as the official language of the country. Also "the constitutional relationship between the legislative executive and judicial branches of government, the adversary system of criminal procedure, the rules of evidence, the writ of habeas corpus are all common traditions which considerably simplify the finding of common ground".(2) However, the 1881 Act did not impose the traditional safeguards that are normally recognised by international law for the protection of the individual.(3) There was no actual listing of extradition offences. Instead the Act asks for the surrender of the fugitive if the offence with which he is charged carries a penalty under the law of the state where it was committed of at least twelve months' imprisonment with hard labour.(4) The Act did not mention the principle

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1. 44 and 45 Vict C. 69, now repealed and replaced by the Fugitive Offenders Act 1967 C. 68.  
See generally, V.E. Hartley-Booth, *British Extradition Law and Procedure*; Halsbury's *Laws of England* Vol 18 (4th ed.); I.A. Shearer, *Extradition in International Law* (1971) Manchester; A. Bedi, "Grounds for Denial of Extradition to and from Commonwealth Countries" (1978) 10 *Z.L.J.*, pp. 1-33; S.D. Bedi, "Law and Practice of Extradition with the Commonwealth Countries" (1977) 14 *J. Ind. L. Inst.*, pp. 437-419; P. O'Higgins, "Reform of Intra-Commonwealth Extradition" (1966) *C.L.R.*, p. 361; "Extradition of Fugitive Offenders" (1968) 42 *A.L.J.*, p. 87; J.G. Castel and M. Edwards, "Political Offences; Extradition and Deportation - Recent Canadian Developments" (1975) *Os. H.L.J.* Vol. 13 No. 1, pp. 89-148; G.V. La Forest Q.C., *Extradition to and from Canada* (1977), Toronto.
  2. I.A. Shearer, *Extradition in International Law* (1971), p. 55.
  3. J.G. Castel and M. Edwards, "Political Offences; Extradition and Deportation - Recent Canadian Developments" (1975) *Os. H.L.J.* Vol. 13 No. 1, p. 89 at p. 120.
  4. Section 3.

of double criminality which requires that the offence in question must be an offence under the general law of both the requesting state and the requested state. Neither was the important principle, that of speciality, which does not permit the trial of a fugitive for an offence that may allegedly have taken place prior to his rendition but is different from the one upon which his surrender was granted unless he is given the opportunity of first returning to the jurisdiction from which he was extradited, included.(5) But essentially, the most important omission was the lack of any reference to the exempting of political offenders from extradition.

These omissions express the basis of the 1881 Act. All parts of the Empire owed allegiance to the British Crown and were subject to the supremacy of the imperial Parliament at Westminster.(6) Therefore the Act did not require reciprocity and extended by the mere force of its enactment to all parts of the Empire. In Re Harrison (7) the court commented on the difference between surrender to a foreign state and surrender to another member of the Commonwealth. "It is quite obvious that some additional care ought to be taken in the case of extraditing persons to foreign countries than in facilitating criminal proceedings in the various parts of the Empire, to which alone the Fugitive Offenders Act applies". In the New Zealand Supreme Court Stout J. stated in ex parte Lillywhite (8) "At common law there was thought to be an asylum for foreign offenders; and it is only by virtue of treaties that foreign offenders are given up. The rendition of an offender against the Crown from one portion of the

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5. R. Clute, "Law and Practice in Commonwealth Extradition" (1959) 8 Am. J. C.I. p. 15 at p.23.

6. P. O'Higgins, "Extradition within the Commonwealth" (1960) 9 I.C.I.Q. 486.

7. (1918) 25 B.C.R. 433 at 437.

8. (1901) 19 N.Z.L.R. 502 at 505.

possessions of the Crown to another portion should, it seems to me, be differently viewed".

As time has progressed, and with numerous members of the Commonwealth gaining political independence from the United Kingdom, so the political and social objectives shared by the members has declined. "In particular political systems with widely diverging views on the sanctity of civil liberties have led to questions about the propriety of surrendering political offenders".(9)

Professor O'Higgins states: "The very close relationship between different parts of the Commonwealth and the simplified procedure for extradition provided by the Fugitive Offenders Act require for their maintenance the utmost good faith and mutual confidence. Whatever was the original *raison d'etre* for the non-exclusion of political offences, be it unity of sovereignty or common political deals, the Fugitive Offenders Act is not likely to survive any attempt to interpret its provisions as a licence to secure the surrender of political offenders".(10)

Re Government of India and Mubarak Ali Ahmed (11)

Ahmed was a Pakistani national who had been on trial in India on charges of forgery when he jumped bail and fled to England. Ahmed's extradition was sought by the Indian government. He attempted to argue that the proceedings were based on political considerations and that since 1948 his family had suffered political persecution. He asserted that in India he was publicly known as a political spy for Pakistan and would thus be unable to get a fair trial. The court affirmed the order for his surrender and refused to embark on any consideration of whether he would be given a fair trial on his return to India. However, Lord Goddard did state that he was "quite sure that in a proper case the court would apply the

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9. J.G. Castel and M. Edwards, op.cit., supra. N. 3 at p. 122.

10. P. O'Higgins, op.cit., supra. N. 6 at p. 488.

11. (1952) 1 All E.R. 1060.

same rules with regard to applications under the Fugitive Offenders Act 1881 as it does under section 3(1) of the Extradition Act 1870. If it appears that the offence with which the prisoner was charged was in effect a political offence, no doubt this court would refuse to return him".(12) But in point of fact the House of Lords came to a different conclusion in Zacharia v. Republic of Cyprus.(13) The facts have already been dealt with (14); Zacharia, in his application for a writ of habeas corpus and relief under section 10 of the Fugitive Offenders Act 1881, argued that the Divisional Court had erred in the exercise of its discretion under section 10 by not considering the political aspects and character of the alleged offence. Section 10 had been interpreted too narrowly by the court and it ought to be read as embracing provisions similar to those of the Extradition Act exempting political offenders. Viscount Simond stated "[the 1881 Act] unlike the Extradition Act 1870 makes no exception of political offences. It would be strange if it did, since in the forefront of the offences for which a fugitive offender may be apprehended and returned to his own country is placed the offence of treason. [It is] irrelevant to consider whether the offences could in another context be called political offences".(15) Lord Devlin stated: "I think it is assumed [that] countries within the Commonwealth will have the same standards of freedom and justice and good order and will secure them by substantially the same safeguards".(16) He noted that the 1870 Act contemplated that there might be fugitives from oppression as well as fugitives from justice and the Act excludes the former. The unwillingness of the courts to give effect to the political exception in intra-Commonwealth

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12. Ibid., at p. 1063.

13. (1962) 2 All E.R. 438.

14. See Section A.

15. Ibid., at p. 444.

16. Ibid., at p. 460.

extradition and the unwillingness of the government to intervene had certain political repercussions. After Zacharia there were other occasions on which member states of the Commonwealth had attempted to secure the return of fugitives charged with political crimes or offences allegedly having political overtones.(17) It was clear that Commonwealth extradition needed a complete review and in 1966 a meeting of Commonwealth law ministers was held in London.(18) The communique issued at the end of the discussions stated, "The meeting considered that Commonwealth extradition arrangements should be based on reciprocity and substantially uniform legislation incorporating certain features commonly found in extradition treaties, e.g. a list of returnable offences, the establishment of a prima facie case before return and restriction on the return of political offenders". The conference then formulated a scheme setting out principles controlling extradition within the Commonwealth countries.(19) It was recommended that effect should be given to the scheme in each Commonwealth country. Thus certain Commonwealth countries have brought new Fugitive Offenders Acts replacing the old ones which used to control the law relating to the return of fugitive offenders within the Commonwealth countries.(20)

The scheme makes three important changes; the principles of speciality (section 4(3)) and double criminality (section 10) are introduced for the first time into Commonwealth extradition.(21) Most vital of all, by section 4(1),

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17. R v. Governor of Brixton Prison ex parte Enahoro (1963) 2 Q.B. 455; Armah v. Government of Ghana (1968) A.C. 192.

18. Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth, Cmnd. 3008 (1966).

19. S.D. Bedi, "Law and Practice of Extradition within the Commonwealth Countries" (1977) 19 J. Ind. L. Inst., pp. 419-437.

20. (Australia) the Extradition (Commonwealth Countries) Act 1966 (Act No. 75 of 1966); (Great Britain) Fugitive Offenders Act 1967 C. 68; (Malaysia) the Commonwealth Fugitive Criminals Act 1967.

21. (Australia) the Extradition Act 1966 section 11(3); (Great Britain) the Fugitive Offenders Act 1967 section 4(3); (India) the Extradition Act 1962 sections 21 and 31; (New Zealand) the Extradition Act 1966 section 5(2).

"A person shall not be returned under this Act to a designated Commonwealth country, or committed to or kept in custody for the purposes of such return, if it appears to the Secretary of State, or to the court of committal (a) that the offence of which that person is accused or was convicted is an offence of a political character; (b) that the request for his return (though purporting to be made on account of a relevant offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or, (c) that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinion".

Many commentators, including the present author, consider that this provision goes further than the 1870 Extradition Act in its protection and safeguards for the individual fugitive offender. In effect the legislators have taken into account "the interests of the human rights principle".(22) In section 4(1) of the Fugitive Offenders Act 1967, the principle of non-intervention in a foreign state's affairs and of insulating the judiciary from diplomatic controversy is abandoned.(23) The concept of political asylum has been considered of paramount importance and worthy of priority. "Diplomatic embarrassment" or "judicial unease" have been set aside. This section 4 provision is echoed in the Suppression of Terrorism Act 1978. The essence of section 4 is that it protects individuals whose claim to political refugee status does not rest on the circumstances in which, nor the purpose for which, the alleged offence was committed. The fear that the individual fugitive offender has need not emanate from the government requesting his extradition and by inserting the clause "for the

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22. R. Young, "The Political Offence Exception in Extradition Law of the United Kingdom; A Redundant Concept?" (1984) Vol. 4 No. 2 J. Leg. S. pp. 211-223.

23. R. Young, ibid., p. 217.

purpose of punishing him for his race, religion, nationality or political opinions", a narrow interpretation of "political" is avoided. Thus the courts can investigate the state of affairs in a foreign state and evaluate the likelihood of fair treatment in the country and courts of the requesting state. Thus where previously British extradition law made no provision for challenging the good faith of a requesting state, section 4(1)(b) and (c) now permits it. The Extradition Act 1870 however does not do so.(24)

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24. Note, the government report of February 1985, R/85 Cm,nd. 9421, on extradition where it was recommended that the 1870 Act should incorporate a provision similar to section 4(1) Fugitive Offenders Act 1967. But no change was recommended as regards the provisions of the Commonwealth arrangements for extradition.

F. The Political Offence and United States Law

In the United States the judicial development of the concept of a political offence in the context of extradition has not proceeded with the same flexible development as English case law. This is due to the fact that the United States Supreme Court has not had the occasion to consider the problem directly. The nineteenth century criteria of Castioni and Meunier is still the basis of judicial pronouncements. In Re Ezeta the court quoted Castioni at length and defined a political crime as "any offence committed in the course of or furthering of civil war, insurrection or political commotion".(1) The criterion used in the case has been applied without alteration, with unusual results in certain cases. For example, in 1972 a case arose concerning an extradition request by Venezuela for ex-president Jimenez.(2) Jimenez was accused of a number of crimes allegedly committed while holding office as President of Venezuela. The main charges concerned the unauthorised receipt of commissions on Venezuelan government contracts for his own personal gain. Jimenez was deposed by a coup and fled to the United States, to which an extradition request was subsequently presented by the new government of Venezuela. Therefore forces hostile to Jimenez had overthrown him by violence "on an issue related to the political control of the country", and now these forces, as the requesting government, stood "at odds" with Jimenez on that issue. Jimenez had also been accused of murder and attempted murder. The alleged murder and attempted murder were deemed to be unextraditable because the facts were not sufficiently proven and thus there was a lack of probable cause. But the financial crimes were considered extraditable. The court held that they did not qualify as political offences because "There is no evidence that the financial crimes charged were

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1. 62 F. 972, (N.D. Cal. 1844). See also, G.H. Hackworth, *A Digest of International Law* Vol. 4 (1942), pp. 49-50; M.Ch. Bassiouni, *International Extradition and World Public Order* (1974), p. 390.

2. Jimenez v. Aristeguieta et al U.S. Court of Appeals December 12 1962 (1967) 33 I.L.R. p. 353.

committed in the course of and incidentally to a revolutionary uprising or other violent political disturbance".(3) I.A. Shearer (4) in discussing the case, considers that an English court would have had to consider the implications of Lord Radcliffe's dictum in Schtraks that the essence of a political offence was that the requesting government was intent to enforce its criminal law in some way other than in its ordinary aspect. (In fact, diplomatic assurances were given by the Venezuela to the United States government before extradition was finally granted). It would have been difficult to rebut altogether the argument that in the case of a former head of state, a trial for common offences could not be conducted in an atmosphere divorced from political considerations. Or, on the other hand, and still within the bounds of Schtraks, it could have been strongly argued that a political motive was vital to the invocation of the defence; and that Jimenez was not motivated by any considerations other than personal profit in soliciting the commission. But in strictly applying Castioni and Ezeta the court did not even consider these possibilities. The court was, in effect, saying that a premium is placed on violent political disturbance.(5) In contrast to Jimenez, one notes the case of Mylonas (6), a Greek request was made for the extradition of Mylonas on account of similar financial charges. Mylonas was an anti-Communist from 1950 until 1953 when he had been a member and subsequently the president of the community council of a small Greek town. In 1954, he was the only member of his party to be re-elected, the others being defeated by the Communists. He thus emigrated to the United States and shortly afterwards, his

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3. Ibid., p. 357.

4. I.A. Shearer, op.cit., pp. 180-181.

5. Ch.L. Cantrell, "The Political Offence Exception in International Extradition; A Comparison of the United States, Great Britain and the Republic of Ireland" (1977) 60 Marquette L.Rev. pp. 777-824; C. Van den Wijngaert, op.cit., p. 117; C. Warbrick, op.cit., p. 115.

6. United States District Court, September 1 1960 (1966) 31 I.J.P. p. 369.

extradition was requested on charges of embezzlement. Acting on a writ of habeas corpus, the United States District Court considered the crimes alleged as political offences. The court found that "the offence for which extradition was sought was incidental to, formed a part of, and was the aftermath of political disturbances".(7) The unanswered question arising here, however, is whether the same conclusion would have been reached had Mylonas been a Communist instead of an anti-Communist.(8) In one case, however, the hint of Kolczynski is apparent in the court's deliberation.

Gonzales (9) concerned the request by the Dominican Republic of the extradition of one of its nationals charged with murder and torture of political prisoners under the former regime of Rafael Trujillo. The crimes alleged had been committed by Gonzales in a military or quasi-military capacity. Gonzales argued that his crimes were political because they were part of political disturbances. But the district court refused to accept this argument and held that the facts alleged did not qualify as political offences, because, at the moment of their commission, there was no political uprising to which they were incidental. However, the court accepted that this interpretation could possibly have been different if the requesting state had been a totalitarian regime.(10) Some authors (11) consider that this case illustrates the weakness of the political incidence theory. They argue that with respect to extremely serious crimes such as the alleged torturing and killing of political prisoners, as in

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7. Ibid., p. 369.

8. C. Van den Wijngaert, op.cit., p. 117.

9. United States District Court May 23 1963, (1967) 34 I.L.R. p. 139;  
Ramos v. Diaz United States District Court December 18 1959, (1963) 28  
I.L.R. p. 351.

10. Ibid., p. 141.

11. In particular, C. Wijngaert, op.cit., p. 117; C. Warbrick, op.cit., p.118.

this case, the pure political incidence test is too formalistic and incomplete. Wijngaert in particular argues that due attention should be paid to the seriousness of the acts, rather than to the question of whether they were incidental to and part of a political conflict situation.

Artucovic (12) is considered to be an example of the deficiency highlighted above. This case concerned a request by the Federal People's Republic of Yugoslavia. Artucovic had been the Minister of the Interior of the pro-Hitler Pavelic government in Croatia during the war. In this capacity, he was held responsible for the killings of thousands of Jews, Serbs and gypsies. Before the district court, Artucovic invoked the political offence exception. He argued that his acts were incidental to the political conflict of the Second World War. The district court and the Court of Appeals accepted this argument and considered the crimes alleged as non-extraditable political offences. As a result, the serious international character of the war crimes and the genocide which he was party to were not given any prominent consideration.

In Sindona (13), a request for extradition was made by Italy. The charges concerned fraudulent bankruptcy. Sindona argued that his crime was political. The Court of Appeals did not accept this argument; without any reference to the nature of the act or to Sindona's motivation, the non-political character of the crimes charged to Sindona was deduced from the fact that there were no severe political disturbances such as war, revolution or rebellion in Italy at the moment the crimes were committed. This is, again, a strict application of the Castioni precedent.

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12. Karadzdeole v. Artucovic Court of Appeal June 24 1957, (1957) 24 I.L.R. p. 511.

13. Sindona v. Grant United States Court of Appeals 2nd Circ. March 21 1980, 619 F. 2d., p. 167 at 173.

The United States have not looked to the subsequent developments of the "political offence exception" in England since Castioni. Kolczynski, Schtraks, Cheng and Littlejohn have all had an effect on judicial development of the principle. The trend in the United States is to over-emphasise the requirement of a political uprising.<sup>(14)</sup> Not much attention is paid to the seriousness or international character of the crime (Artucovic); and on the motivation of the perpetrator. Thus a crime may, notwithstanding its seriousness, qualify for the political offence exception as soon as it can be considered as related to a political conflict (Artucovic). But in cases where no political conflict situation can be proven, extradition can be granted even if it is requested by the direct political adversaries of the person claimed (Jimenez).

Reference will be made to the United States practice in reference to Irish extradition and the particular difficulties posed by the activities of the I.R.A. and the more recent I.N.L.A. in the next section.

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14. Ch.L. Cantrell, op.cit., supra N. 5 at p. 797.

F. The Irish Angle

In continuing the survey of judicial interpretation of the political offence exception, in this section we will concentrate on extradition from the Irish angle. One will look at the way in which the Irish courts have interpreted the concept; then reference will be made to limitations placed on the power to invoke the exception, due to the enactment of the Council of Europe's Convention on the Suppression of Terrorism 1977 (1) and the United Kingdom Suppression of Terrorism Act 1978 which incorporates the Convention into domestic law. Then a survey will be made of the limitations placed on the power to invoke the section at international level, as a result of the passing of the European Convention on the Suppression of Terrorism.

Next, one will return to consider the attempts made by a law enforcement commission in 1973 to resolve the difficulties presented by the "terrorist" activity of the I.R.A. and the more recent I.N.L.A. and their claim that their activities are within the ambit of the political offence exception to extradition, an assertion that has caused untold friction between the authorities on the mainland and those across the Irish Sea.

I. A Brief Historical Outline (2)

The procedures which govern extradition between the Republic of Ireland and the United Kingdom do not depend upon the existence of an extradition treaty between the two countries. The Extradition Act 1870 and the 1967 Fugitive Offenders Act do not form the basis of extradition between the two countries.

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1. E.T.S. No.90, Cmnd. 7031 (1977).
2. See generally, V.E. Hartley-Booth, *British Extradition Law and Procedure* (1982) London, p. 209; Dr. P. O'Higgins, "Irish Extradition Law and Practice" (1958) 34 B.Y.I.L. 274; M. McGrath, "Extradition; Another Irish Problem" Winter (1983) 34 N.I.L.Q.; Ch.L. Cantrell, "The Political Offence Exception in International Extradition; A Comparison of the United States, Great Britain and the Republic of Ireland" (1977) 60 Marquette L.Rev pp. 777-824; A. McCall-Smith and Ph. Magee, "The Anglo-Irish Law Enforcement Report in Historical and Political Context" (1975) C.L.R. p. 200.

Instead extradition is based upon an administrative process whereby warrants of arrest are issued in one country and sent to the other country for endorsement and execution in that country. These procedures are governed by the Backing of Warrants (Republic of Ireland) Act 1965 (3), hereinafter referred to as ("the 1965 Act") in the United Kingdom and Part III of the Extradition Act 1965 (4) ("the Irish Act") in the Republic of Ireland.

In 1921 the Anglo-Irish Treaty established the Irish Free State. The Irish Free State became a self-governing dominion comprising twenty-six of the counties of Ireland. But the remaining six north-easterly counties remained within the United Kingdom. In December 1957 the Council of Europe's Convention on Extradition was opened for signature and it entered into force in April 1960. The Irish Extradition Act of 1965 is based on this instrument. By basing the 1965 Act on the European Convention on Extradition, this meant that Ireland adopted the approach to extradition which civil law countries use. Very importantly, one difference between common law countries (the United Kingdom, United States) and civil law countries in the matter of extradition, is the rule that a prima facie case should be established when the fugitive offender is extradited. In Britain this is considered of paramount importance in order to ensure a broad alignment of extradition proceedings with domestic criminal proceedings and to guard against unnecessary surrender. The 1870 Extradition Act and the Fugitive Offenders Act 1967 both enact this requirement. Thus there is no objection made in the common law countries to the extradition of nationals. In civil law states however there is no rule that prima facie evidence be adduced before an extradition order is made, but these states normally reserve the right to exempt their nationals from extradition. Thus, in accordance with the provisions of the

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3. Came into force on 15 November 1965; Backing of Warrants (Republic of Ireland) Act 1965 (Commencement) Order 1965 S.I. 1965 No. 1850.

4. No. 17 of 1965, an Act passed by the Oireachtas of the Republic of Ireland.

European Convention on Extradition, Ireland did not include the prima facie case requirement in the 1965 Act at all.

The United Kingdom did not ratify the European Convention on Extradition and the failure to provide for the prima facie evidence requirement is one of the major reasons why not. This requirement has been omitted in Part III of the Irish Act. As O'Higgins states, the Republic had to omit the requirement for evidence of a prima facie case if not it would have been in the absurd position of having to admit this requirement in surrenders to the United Kingdom while not requiring it for surrenders to any other country apart from the United Kingdom.<sup>(5)</sup> The 1965 scheme for surrendering offenders between the Republic of Ireland and the United Kingdom removed many of the technical difficulties that were present in cases arising in both countries prior to the legislation. But, one of the most sensitive problems in relation to extradition, that of the political offender, was not resolved by the legislation.<sup>(6)</sup> Before engaging in a detailed discussion of this topic, the procedural aspects of extradition between the United Kingdom and the Republic of Ireland will be set out.

## II Procedure (7)

### Provisional Warrants

Under the Extradition Act 1870 and the Fugitive Offenders Act 1967, there are, on average, two cases of extradition per year involving extradition. This compares with some thirty to forty cases every year between the United Kingdom and the Republic. The geographic proximity and the lack of emigration and travel restrictions are said to encourage movement between the two countries. Therefore

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5. O'Higgins, (1966) 15 I.C.L.Q. 369, p. 391. Note also R/85 Cmd. 9421 February 1985 Government paper on new recommendations concerning extradition.
  6. M. McGrath, op.cit., p. 298.
  7. See V.E. Hartley-Booth, op.cit., p. 209. Halsbury's Laws of England Vol. 18 (4th ed.) (1977).

some method was needed to facilitate the speedy apprehension of fugitive offenders faster than it took to invoke the full administrative process under the 1965 Act. Thus section 4 of the 1965 Act authorises a Justice of the Peace to issue a "warrant in the prescribed form" known as a "provisional warrant" for the arrest of a fugitive offender on the application of a constable.

### Evidence

The 1965 Act does not require that at the time the application is lodged with a Justice of the Peace for the endorsement of the Irish warrant, there should be adduced sufficient, or any evidence to show that there is a prima facie case against the requested person. Re Arkins.<sup>(8)</sup> The House of Lords affirmed this in Keane v. Governor of Brixton Prison.<sup>(9)</sup> Their Lordships, in dismissing Keane's application for a writ of habeas corpus, held that the 1965 Act makes no provision for a magistrate to inquire whether a prima facie case has been made out. The 1965 Act simply requires proof that the warrant was duly issued in the Republic and proof of the particular law of the Republic in question.

### Dual Criminality

The 1965 Act in listing these offences which it specifically excludes from its operation, states that the return of a fugitive offender to the Republic will not be ordered by the court where it appears to the court that the offence against the laws of the Republic specified in the warrant does not correspond with any offence which is indictable or punishable on summary conviction with six months' imprisonment<sup>o</sup> (10) under the law of that part of the United Kingdom in

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8. (1966) 3 All E.R. 651.

9. (1972) A.C. 204.

10. Section 2(2).

which the court acts.(11) In the first instance the justices are not required to consider in detail whether there is a corresponding offence or not by a full consideration of the corresponding offences.(12) The magistrates' court must be satisfied that the offence specified in the warrant was one against the laws of the Republic and where this is not clear on the face of the warrant itself, the magistrates must have a fuller investigation to enable them to determine the question.

There is no application of the speciality principle. But it has become the practice of the Attorney-General in the Republic of Ireland to apply the rule for the purpose of habeas corpus applications, in that the offence must be specified in the accompanying affidavits although the same practice does not exist in the United Kingdom.(13)

### III The Political Offence Exception - section 2(2) 1965 Act and section 50(2) Irish Act

These apply the principle of the political offence exception, but there is a difference in the terminology used. The Irish Act states that a person may not be surrendered if the offence with which he is charged "is a political offence or an offence connected with a political offence" (section 50(2)). By section 2(2) of the 1965 Act (the United Kingdom Act), no order is to be made under section 2(1) of the Act for the removal of requested persons to the Republic if it is shown to the satisfaction of the court "that the offence specified in the warrant is an offence of a political character". This difference between the two statutes is worth emphasising because it lends to the uncertainty at

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11. Ibid.

12. Re Marks (1973) 12 December (unreported) Div. Ct. See Hartley-Booth, op.cit., p. 224.

13. I. Stanbrook, The Law and Practice of Extradition (1980), p. 72. However, note O'Rourke v. Magee, see supra.

international level. And this uncertainty favours states rather than individuals. When interpreting section 50 the Irish courts have given the term "a political offence or an offence connected with a political offence" a wide interpretation, which thus permits the encompassing of a wider range of offences.

Bourke v. Attorney-General (14)

The case concerned a British request for the extradition of an Irish national who had assisted a detained prisoner in his flight abroad. Bourke had, while he was himself serving a sentence in prison in England, become acquainted with one Blake, a Soviet spy who had been condemned to a very long term of imprisonment on account of espionage. As soon as he had served his sentence, Bourke assisted his friend Blake to escape from prison and helped him to flee to the Soviet Union. The applicant was arrested in Ireland. The District Court ordered that the accused be delivered to England. Bourke argued that he had committed the act out of friendship for Blake, whose penalty he had found unreasonably long. The court held that it considered Bourke's act a political crime since it was "connected with" a purely political crime, namely the espionage committed by Blake.(15)

The application of the political offence doctrine in Ireland has been complicated by the continuing dispute with the United Kingdom about the status of Northern Ireland and in particular by the activities of para-military groups like the I.R.A. and the I.N.L.A., a more recent group, which carry out their activities in both the Republic and Northern Ireland. The point of contention is whether or not these organisations can or should be classified as political organisations.(16) The Irish Act is sufficiently wide enough to encompass the

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14. (1973) 107 I.L.T.R. 33; (1972) I.R. 36.

15. (1973) 107 I.L.T.R., p. 296.

16. A. McCall-Smith and P. Magee, "The Anglo-Irish Law Enforcement Report in Historical and Political Context" (1975) C.L.R. 200-214.

activities of these groups and the refusal by the Irish Republic to extradite to the United Kingdom persons accused or convicted of offences in the United Kingdom, in the context of the disturbances in Northern Ireland, has soured Anglo-Irish relations.

The State (Magee) v. O'Rourke (17)

Magee was a garage proprietor and in the course of his business he did work for members of the British army in their private capacity. In connection with this work he had access to British military barracks situated at Hollywood, County Down. An armed raid was carried out on these barracks and a quantity of arms and explosives were stolen. Magee was arrested and questioned about the raid. He stated when questioned that although not a member of the I.R.A., he sympathised with them and was on friendly terms with a number of them. To connect him with the raid, Magee thought that the police had evidence in the form of photographs and witnesses. The inference was that the raid was carried out to secure explosives and ammunitions for violent and political purposes. And because Magee was questioned about his connections to the I.R.A. it showed that Magee was suspected of subversive activities prior to the raid. The person who took the photographs was with him and they were taken, as Magee put, "hiddenly" with a view to a raid on the barracks. Thus he was concerned with the preparations for the raid which was, the court believed, clearly a raid of a political nature. Implication in the raid would normally lead to a prosecution. Magee left Northern Ireland in September 1964 and went South. He feared that if he was removed from the state he would also be charged with conspiracy in connection with the armed raid. The court believed that no valid reason existed why the evidence given should have been rejected. They thus held that the evidence and the inferences properly drawn from it lead to the conclusion that

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that there were substantial grounds for believing that Magee, if removed from the state under the 1965 Act would be prosecuted or detained for a political offence or an offence connected with a political offence. Budd J. (18) stated "The obvious inference in the absence of any other explanation is that the raid was to secure explosives and ammunition for violent political purposes. Previous to this raid Magee had been questioned many times about I.R.A. activities which showed that prior to the raid he was a person suspected of subversive activities".

This decision can be contrasted with Arton (19), where the court refused to allow the fugitive offender to question the good faith or bona fides of the French ("a friendly nation") state's request for his extradition. An important factor worth noting is the dissenting opinions of Fitzgerald J. In both Bourke and Magee v. O'Rourke. In the latter he stated: "I am not prepared to hold that the requesting country is likely to be guilty of a breach of faith by prosecuting or detaining the alleged offender for a political offence".(20) This view would appear to be more in line with the position adopted by the British courts which, as we have seen, refuse to impute bad faith to a requesting state with which a treaty has been concluded.(21) But here no treaty existed and no explicit speciality duty. Despite this fact, the majority view in these cases illustrate that the Irish courts do not approve of the "political incidence theory" at present, and take a more liberal view of "political motivation" and thus lean more towards the continental approach.(22) However there have been

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18. (1971) I.R. 215.

19. (1894) 2 Q.B. 415. See Ante p.

20. (1971) I.R. 50 at p. 216.

21. M. McGrath, op.cit., p. 302. Note Royal Government of Greece v. Governor of Brixton Prison (1971) A.C. 250.

22. C. Van den Wijngaert, op.cit., p. 120.

relatively few reported cases to judge whether a distinctive trend has emerged since the 1965 Act.

The main case upon which the Irish government bases its argument in relation to the question of extradition for political offences is The State (Duggan) v. Tapley.<sup>(23)</sup> The case concerned obtaining money by false pretences and had nothing to do with a political offence; but the accused contended that section 29 of the Petty Sessions (Ireland) Act 1851, by virtue of which his delivery to England was sought, had ceased to apply in Ireland on the coming into operation of the Constitution because the section would, if still effective, allow a person to be delivered even if the offence for which his delivery was sought was a political one. He argued that the non-extradition of political offenders was a generally recognised principle of international law and then relied on Article 23.3 of the Irish Constitution which states, "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other states". The High Court and the Supreme Court unequivocally rejected this contention. Maguire C.J. stating: "The farthest that the matter can be put is that international law permits and favours the refusal of extradition of persons accused or convicted of offences of a political character but allows it to each state to exercise its own judgment as to whether it will grant or refuse extradition in such cases and also as to the limitations which it will impose upon such provisions as exempt from extradition".<sup>(24)</sup>

One has to acknowledge that the legal aspect of Anglo-Irish extradition is inseparable from the political background of Ireland. The I.R.A. have conducted a campaign of "terrorist" violence to publicise their anti-British message during the 1970's when the political institutions in Northern Ireland were dismantled

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23. (1952) I.R. 62.

24. Ibid., p. 84.

and the province became administered by means of direct rule from Westminster. This violence which commenced in Northern Ireland, spread to the Republic and into Great Britain. The problem was most strongly felt in Northern Ireland where most terrorist violence was centred. The perpetrators of the violence would then usually flee to the security of the South.

In Ireland no legislation has been passed dealing with the definition of a political offence and the interpretation of the relevant legislative provisions have been left to the courts. The Irish courts have accepted that where there is sufficient evidence of a political motive on the plaintiff's part in committing the alleged offence he should not be extradited. (Note, however, Fitzgerald's dissenting judgment in Bourke and O'Rourke). However the trend is moving away from the above statement of practice.

Hanlon v. Fleming (25)

Here the plaintiff, who was wanted in the United Kingdom for the offence of handling stolen goods, namely, a number of electronic detonators and a small amount of high explosives, sought to argue that this was "a political offence or an offence connected with a political offence". Hanlon brought forward evidence of his involvement with the I.R.A. and it was contended that the proceeds of several robberies and cheque card frauds which he perpetrated in England over many years had been transferred to the I.R.A. Without any corroborative evidence the court was not prepared to accept that any of the proceedings of his criminal activities were used for the purposes of the I.R.A. in such a way as to lend "political colours to the offence".(26) The Supreme Court confirmed the decision of the High Court. What is considered to be the most significant development in recent years is the case of McGlinchey v. Wren.

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25. 6 October 1980 unreported. See A. Connelly, "Non-Extradition for Political Offences; A Matter of Legal Obligation or Simply a Policy Choice?" (1982) I.J., p. 59 at p. 77.

26. Per Doyle J., p. 7.

McGlinchey v. Wren (27)

The accused was wanted by the authorities in Northern Ireland for the murder of an elderly woman who had been shot and killed when her home was attacked by a gang firing Armalite rifles. The attack was made by the I.R.A. of whom McGlinchey was an active member. Before the High Court McGlinchey relied on section 50(2)(a) of the 1965 Act claiming that at the time of the killing he had been an active member of the I.R.A. and that this organisation had claimed responsibility for the murder. On appeal to the Supreme Court he no longer sought to rely on this provision but O'Higgins C.J. while finding it unnecessary to delineate the boundary between an ordinary criminal offence and a political offence in the instant case, pointed out that "It should not be deduced that if the victim were someone other than a civilian who was killed or injured as a result of violent criminal conduct chosen in lieu of what would come directly or indirectly within the ordinary scope of political activity, the offence would necessarily be classified as a political offence or an offence connected with a political offence. The judicial authorities on the scope of such offence have in many respects been rendered obsolete by the fact that modern terrorist violence whether undertaken by military or para-military organisations or by individuals or groups of individuals, is often the antithesis of what could reasonably be regarded as political either in itself or in its connections".(28) McGlinchey did rely, however, on section 50(2)(b) contending that there were substantial grounds for believing that, if removed from the state, he would be prosecuted for a political offence or an offence connected therewith. In holding that the onus of proof which the plaintiff bore had not been discharged the court stated: "The excusing per se of murder and of offences involving violence and the infliction of human suffering, done by, or at the behest of, self-ordained arbiters, is the

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27. (1982) I.R., pp. 154-160.

28. Ibid., p. 159.

very antithesis of the ordinances of Christianity and civilisation and of the basic requirement of political activity".(29)

The Supreme Court seem to have accepted that there is a distinction to be made between firstly barbarous or terrorist acts which are to be classified as ordinary crimes irrespective of motivation and secondly, political activity which even if formally criminal, should not entitle a person to be exempted from extradition.(30)

The release of John Quinn (31) by a London magistrate after a three year battle for his extradition from Ireland led to political embarrassment in Dublin and London. Although Quinn was charged with obtaining £600 from a London bank in 1980, he was said to be a fund raiser for the I.N.L.A., which admitted responsibility for the murder of the Conservative M.P. Mr. Airey Neave at the House of Commons. Quinn's counsel argued successfully that there had been an unjustified delay by the prosecution. Although senior Treasury counsel asked a High Court judge to order Quinn's release at the instigation of the Director of Public Prosecutions, Quinn managed to leave the country from Heathrow and subsequently went into hiding in Dublin. Apart from this procedural aspect, it is difficult to see how Quinn would have avoided the test laid down in Littlejohn and Keane.

The political sensitivity in the matter of extradition between the Irish government and London is well illustrated in the case of Miss Evelyn Glenholmes.(32) The Irish government were upset after leaks emanating from

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29. Ibid., p. 160.

30. Note, in The Times 10 October 1985, McGlinchey was successful in his appeal to the High Court in Ulster against his sentence for the murder. The Crown proposes an appeal to the House of Lords.

31. The Guardian July 26 1985, p. 3. (Magistrates Court decision).

32. The Guardian November 12 1984, p. 1 and 28.

London claimed that politicians and police in the Republic were reluctant to hand over for extradition, Evelyn Glenholmes, who is identified by Scotland Yard as an alleged terrorist bomber. Dublin's reaction induced the Attorney-General, Sir Michael Havers, to issue a statement clearing the Irish government of either negligence or bureaucratic feet dragging. A. Connelly (33) suggests that the judiciary have, through such case(s) as McGlinchey v. Wren, embarked upon a road which the government have been reluctant to tread. She suggests that the test which the Supreme Court would now apply if faced with a political offence plea is whether "the person charged was at the relevant time engaged, either directly or indirectly in what reasonable civilised people would regard as political activity".(34) However what specific offences the court will accept as coming within the ambit must remain a question for the future. She vigorously asserts that nothing generally in international law nor, as far as Ireland is concerned, in its Constitution, exists to fetter the state's freedom from granting or refusing the extradition of political offenders. "The decision whether or not to do so is purely political".(35) Clearly much would be gained in this arena if Ireland were to become a party to the European Convention on the Suppression of Terrorism 1977. The advantage would arise due to the fact that the Convention specifically outlaws certain activities. These acts of violence are "depoliticised" (an important word where the Irish situation is concerned) and would remove the politico-legal burden which the courts face when called upon to determine extradition cases concerning the I.R.A. and I.N.L.A.

1 The Suppression of Terrorism Act 1978

This Act gives effect to the European Convention. Section 1 implements

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33. A. Connelly, op.cit., pp. 80-83.

34. McGlinchey v. Wren per O'Higgins C.J., p. 7.

35. A. Connelly, op.cit., p. 82. See also A. Connelly, "Ireland and the Political Offence Exception to Extradition" (1985) Vol. 12 J.L.S. pp. 153-183.

Articles 1 and 2 of the Convention by providing that for the purposes of the Fugitive Offenders Act 1967, the Backing of Warrants (Republic of Ireland) Act 1965 and the Extradition Act 1870 no offence specified in Schedule 1 of the Act shall be regarded as an offence of a political character, when a request is made on behalf of a "convention country" (i.e., a party to the Convention). The Act makes of both Article 1 and Article 2 offences from the political exception mandatory on courts and executive alike. Nor is there any strict requirement of reciprocity between the convention country and the United Kingdom so that the United Kingdom will not invoke a requesting state's reservation as a ground for not applying the Convention.

A. Jurisdiction and Trial

The Convention is said to be based on the principle *aut dedere aut judicare*. The precise obligation is laid down in Article 7.(36) There is no question of an obligation on a state to try any suspected terrorist held by it until that state has received and refused a request for his extradition. Moreover, any such request must accord with Article 6.(37) The effect of Article 6 would seem to be that where a state requests extradition on a basis of jurisdiction which existly equally in the requested state, for example, on the basis that the offence was committed within its territory (that offence being punishable on the territorial principle in both states), Article 6 is satisfied and the requested state must either extradite the suspect or establish its jurisdiction over the alleged offence and submit the case to its competent authorities. The establishment of its jurisdiction over him will involve a departure from the territorial principle since the offence will have been committed in the territory of the requesting state. Where the request is based on a ground of jurisdiction not recognised by the requested state, no such obligations arise under Article 6. For example,

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36. Article 7, supra.

37. Article 6, supra.

were Britain requested by West Germany to extradite a person on the basis that he he is suspected of having committed an offence against a West German national outside West Germany, the obligation would not arise because the extra-territorial commission of an offence against a British national is not, under British law, a basis for the exercise of jurisdiction by British courts.

B. Section 4 Suppression of Terrorism Act 1978

This is concerned with the interpretation of the *judicare* obligations of the Convention. Section 4(1) and (2) deal with those acts which if committed in a convention country would have been offences if committed in the United Kingdom. Because English courts mostly exercise jurisdiction only in respect of offences committed within the United Kingdom, drastic changes were needed to establish jurisdiction over offences committed abroad by non-nationals in the circumstances required by Article 6, i.e., where a suspected offender present in this country is not extradited after an extradition request has been received from a contracting state whose jurisdiction is based on a rule of jurisdiction existing equally in English law. Section 4 extends jurisdiction over acts committed in a convention country which, if done in a part of the United Kingdom would have constituted one of a specified selection of Schedule 1 offences in that part of the United Kingdom. The effect of this sub-section is to give the English courts extra-territorial jurisdiction over a number of the scheduled offences - those which correspond roughly to those in Article 1 of the Convention (with the exception of offences against protected persons) where jurisdiction is exercised in another convention country on the basis of the territorial principle. Section 4(2) establishes extra-territorial jurisdiction regardless of the nationality of the offender, in a similar manner over certain additional offences where these are committed against a "protected person". Jurisdiction is extended only to cases where the relevant act took place in a convention country, where that state would have jurisdiction over the offence on the territorial principle.

The creation of extra-territorial offences by section 4 is necessary not only so that fugitives be punished in the United Kingdom if they cannot be extradited, but also that they can be extradited at all if the offence for which their extradition is requested is extra-territorial by the law of the requesting state. Unless the circumstances were such that the offence was among the exceptional ones which are also extra-territorial by English law, there could be no extradition, regardless of any political character of the offence for want of double criminality.(38) The safeguard against the surrender of genuine political refugees contained in Article 5 has been enacted in section 2. Section 4(1) (b) and (c) of the Fugitive Offenders Act 1967 already contains such a provision. Thus only the Extradition Act 1870 and the Backing of Warrants Act 1965 have to be brought into line. Article 5 was included in order to ensure respect for the provisions of the European Convention on Human Rights (39) and confers a right under treaty to question the motive of the requesting state. As far as the Extradition Act is concerned, despite the fact that provision was made for the fugitive to prove that "the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character", the courts have so interpreted this as to exclude bringing forward evidence to challenge the good faith of the requesting state. Also, all attempts to argue more generally that the surrender of the fugitive might be unjust, and that he might suffer as a result of his political activities have been in vain.(40) The Suppression of Terrorism Act follows Article 5 by providing that where a request for extradition is made by a convention country in respect of a

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38. R v. Governor of Brixton Prison ex parte Rush (1969) 1 All E.R. 316; and now Nielsen v. Government of Denmark (1984) 2 All E.R., p. 81.
39. I. Brownlie, Basic Documents on Human Rights (1971), p. 338; European Convention on Human Rights, 4 November 1950, Council of Europe E.T.S. No. 5.
40. Atkinson v. United States Government (1971) A.C. 197; Royal Government of Greece v. Governor of Brixton Prison (1971) A.C. 250. But note, Magee v. O'Rourke (1971) I.R. 205.

Convention offence, "the Extradition Act 1870 shall have effect as if at the end of paragraph (1) of section 3 there were added the words "or with a view to try to punish him on account of his race, religion, nationality or political opinions, or that he might, 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".(41) Despite some fears that Article 5 effectively negates any effect that the abolition of the political offence exception might have, Lowe and Young suggest that it differs from the political offence exception in two vital respects; first, it assumes that unless the fugitive can show that there is an actual risk of political prejudice, then the fact that his offence may be tied up with political matters is irrelevant. Thus the good faith of the requesting government and the integrity of the legal system are assumed unless evidence is shown to the contrary. Secondly, the offence for which extradition is requested does not need to be one of a political character for extradition to be refused. The two exceptions overlap but do not coincide.(42) An excellent analysis of the application of the Suppression of Terrorism Act to the development of the political offence exception in English case law is made by J. Barrett.(43) She notes that Schtraks is an important case in analysing the position of the terrorist as regards the political offence exception. The essential element of the offence was said to be that the fugitive is at odds with the requesting state on some connected with the political control or government of the country and that the requesting state is pursuing him for

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41. Lowe and Young, (1979) Neth. Jt.L.Rev p305 at p. 327 believe that it is unfortunate that the Act cannot be amended to bring it into line with the Fugitive Offenders Act, but they acknowledge that this would involve a renegotiation of many bilateral treaties.

42. Lowe and Young, op.cit., p. 327.

43. J. Barrett, "The European Convention on the Suppression of Terrorism and the Suppression of Terrorism Act 1978" (1980) T.L. p. 1 at pp. 2-17.

reasons other than the ordinary enforcement of the criminal law.(44) This reasoning was developed in Cheng (45) where the court held that for an offence to be political in character it must have been directed against the government of the state requesting extradition and since criminal jurisdiction is territorial the offence will usually have to be directed against the government of the state where the offence was committed. This limitation would prove fatal to any terrorist whose political campaign is not restricted to one country. Therefore if a terrorist offence committed in furtherance of the Palestinian Arab Cause outside Israel it would not qualify as a political offence, nor would any of the Baader-Meinhoff attacks against centres of United States imperialism in Europe be regarded as political.(46) Cheng is considered to be the one British reported case which deals directly with what the members of the Council of Europe see as the dangerously prevalent violence against which the European Convention is aimed, and as such gives some guidance on how the British courts might approach the problem of international terrorism, quite apart from the Convention.(47) One question Cheng does not answer is the case where the offence is intended to effect a change in the requesting state's foreign policy in order to weaken the government of another state. This was not at issue in Cheng but some groups have professed this as their aim when committing acts of violence in Western Europe.(48)

Another requirement which terrorists are not likely to be able to meet is that the offence committed must have a close link with the political goal sought to be achieved. The wrongdoer must have had some direct ulterior motive of a

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44. (1962) 3 All E.R. 529.

45. (1973) 2 All E.R. 204.

46. J. Barrett, op.cit., p. 5.

47. Lowe and Young, op.cit., p. 322.

48. Ibid.

political kind when he committed the offence (49) (ex parte Littlejohn). Activities such as robbing banks in order to raise funds for a political organisation are not sufficiently linked to the political purpose (50) (Keane). Most terrorist acts such as random bombings and kidnappings carried out with the intention of attracting publicity to the political cause would not be considered to further the political aim in a direct enough manner. J. Barrett concludes with the assertion that terrorists are not going to be easily assimilated within the traditional notion of the "political offender" as developed in English case law. There is a vast difference between the romantic Castioni and the indiscriminately violent Meunier or Baader-Meinhoff group. International terrorists often do not possess the necessary connection with the requesting state, since their campaigns are frequently directed against a government other than one of the state in which they are operating, or against no government in particular.

From the analysis of British practice one can safely say that the occasions prior to the 1978 Act, where terrorists could avail themselves of the political offence exception, are few and far between (Cheng). The fluidity of the concept has left enormous judicial discretion. The particular prevailing international political conditions are always likely to play a part in the final decision by the judiciary. Also, at the national level it is possible to imagine incidents arising out of a campaign of separatist violence directed against public installations or where offences are committed in the course of demonstrations against a particular item of a government's programme, such as against nuclear power, where what would be characterised as terrorist violence by the government against which it is directed, might yet be regarded as a political

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49. (1975) 3 All E.R. 208.

50. (1971) 3 All E.R. 1163.

offence according to Castioni and Schtraks).<sup>(51)</sup> D.N. Schiff <sup>(52)</sup> suggests that a new low point in the protection of the individual was achieved with the passing of the Suppression of Terrorism Act 1978. Proll was arrested on September 9 1978 in the United Kingdom. She was alleged to have committed the offences of attempted murder and robbery whilst a member of the Baader-Meinhoff terrorist group. West Germany requested her extradition but certain complications arose due to her attempts to argue that she was a British citizen, as a result of her marriage to a British national. Importantly for the purposes of this work Schiff notes the unwillingness of the Home Secretary to register her as a British citizen and the timing of the Suppression of Terrorism Act 1978 along with "the implications of the more restrictive safeguard of section 2(1) of the Act, in relation to the safeguard of the political exemption to extradition".<sup>(53)</sup> He concludes by saying that "Judicial review of extradition proceedings appears no longer to be an adequate counter to greater political co-operation".<sup>(54)</sup>

One important angle to the Irish problem is the interpretation which a foreign court would put on the plea from a member of the I.R.A. or I.N.L.A. that his offence was political. An excellent survey was made by C. Warbrick <sup>(55)</sup> of McMullen <sup>(56)</sup>, a case which was decided in the United States of America. The case was decided by Judge Woeflen in the United States District Court in the Northern District of California. The facts were that McMullen was a deserter

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51. J. Barrett, op.cit., p. 6.

52. Astrid Proll's case (1979) P.J. p. 353 at p. 369.

53. Ibid., p. 370.

54. Ibid., p. 371.

55. C. Warbrick (1980) Summer P.L. pp. 113-122.

56. In the matter of the extradition of Peter Gabriel John McMullen May 11 1979.

from the British army who was wanted by the British authorities for his alleged part in bomb explosions at army barracks in England in 1974. McMullen was arrested as an illegal immigrant to the United States in May 1978 and detained in custody until the disposal, a year later, of the request for his extradition made by the British government. Among other objections to his being returned, McMullen pleaded that his offences were of a political character and fell outside the terms of the United Kingdom-United States Extradition Treaty.(57) McMullen also claimed that he was protected by Article V(2) of the Treaty on the grounds that he would face physical or mental ill treatment if he were handed over to the United Kingdom authorities. Judge Woelflen upheld McMullen's claim that his offences were political by applying the rule in Castioni. The judge accepted that there had been a disturbance of sufficient intensity in Ulster in 1974 to allow McMullen's defence to succeed. The British government has tried to deny that there has been a civil war in Ulster. It has attempted to challenge the I.R.A. by different methods which have included the use of troops in assisting the local police force, the Royal Ulster Constabulary. The court procedures for the trial of terrorist offences also differ from those for the trial of ordinary offences in Ulster. The trials are before a single judge in the absence of a jury, there are restrictions on access to bail, and evidential rules, especially those on confessions, have been altered in favour of the prosecution. Judge Woelflen did not accept the British government's contention that the disturbances in Northern Ireland were not sufficiently intense to form the context for a political offence. He relied on the emergency declaration made by Her Majesty's Government when ratifying the International Covenant on Civil and Political Rights (58); "The record shows that highly placed officials in the British

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57. U.K.T.S. (1972) No. 2 Cmnd. 5040 in force January 1 1977.

58. U.K.T.S. (1977) No. 6 Cmnd. 6702. See C. Warbrick (1980) Summer P.L. p. 116.

government made direct admissions than an insurrection was occurring in 1970 and 1974".(59) Castioni requires that there be a political disturbance and that the alleged offences have been committed in furtherance of it. The court accepted that McMullen had no private motivation for his act. The judge pointed out that McMullen was a member of the Provisional I.R.A. in 1974 and the I.R.A. was a distinct "organisation existing in an era of political upheaval, which was engaged in and conducted political violence of the most extreme nature with a solely political objective".(60)

More recently, another case has been decided in the United States by Judge John Aprizzio in New York. Joseph Patrick Thomas Doherty (61) was convicted of murdering a British soldier in Belfast. He escaped from gaol in June 1981, two days before a judge found him guilty of murder, attempted murder, possession of illegal weapons and membership of the I.R.A. The judge in New York refused to extradite him, accepting the argument that his crime was a political act. He is currently being held in New York prison without bail, as an illegal alien. Meanwhile, he has applied for political asylum. If turned down he will be deported.

William Quinn (62) was accused of murdering an off-duty policeman in London in 1975. He fled to the United States where he was held in custody pending an extradition hearing. In 1983 Quinn was freed in California on the grounds that the alleged crime was "incidental to a political uprising". The Doherty decision caused alarm in the United States and Britain. Mr. Stephen Trott, head of the criminal division of the United States Justice Department,

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59. Judgment p. 3. See C. Warbrick, ibid.

60. Judgment p. 5. See C. Warbrick, ibid., p. 117.

61. The Times December 19 1984, p. 1.

62. The Observer September 15 1985, p. 4.

acknowledged that moves had to be made to renegotiate the extradition treaty the United States had with the United Kingdom. His concern was that the United States may become a "sanctuary for violent criminals" which was the same argument of Lord Salmon in Cheng. "We have got to get rid of this political nonsense among free, friendly nations" he states. Although his last words may cause great alarm to those who hold as paramount the granting of asylum for political offenders, the Home Office in July 1985 acknowledged the need for a renegotiation of the treaty with the United States. This was a direct result of the Beirut hijacking of American hostages in June/July 1985 and the plea by the United States that all nations should join forces to find solutions to the problem of international terrorism. The latest developments on the issue of a new extradition treaty between the United States and the United Kingdom, at the time of writing this work, has been the realisation by the British officials that the treaty will be opposed by a powerful Irish Republican lobby, despite the present anti-terrorist feeling following the Beirut hijack of this summer. The Senate Foreign Relations Committee has decided to hold an extended series of hearings. Numerous people have spoken against the treaty and such persons include academics, lawyers, congressmen and inevitably special interest groups. The treaty when presented eventually to Senate will need a two-thirds majority. The director of the Irish National caucus is Father Sean McManus. He bases his argument on three grounds. Firstly, that the treaty legitimises British rule in Northern Ireland, that the Ulster courts are oppressive and unfair and that the treaty sets a dangerous precedent.<sup>(63)</sup> It is believed to be this last point which is causing the senators most concern, because of the United States' long tradition of receiving political refugees. However Sir Oliver Wright, the British Ambassador to the United States, has been busy lobbying on Capitol Hill and meeting important senators to urge the view of Her Majesty's Government as

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63. The Observer September 15 1985, p. 4.

strongly as possible.

In Parliament in the United Kingdom, the then Home Secretary, Leon Brittan, gave a written answer on the question of the supplementary treaty to the present United Kingdom-United States Extradition Treaty.(64) He stated that the effect of the supplementary treaty would be to deny fugitives accused or convicted of certain serious offences of violence the ability to avoid extradition on the grounds that their offences were political. He stated that both governments believe that the present political offence to extradition, as it applies to violent offences, is not suitable to extradition arrangements between two democratic countries sharing the same high regard for the fundamental principles of justice and operating similar independent judicial systems.

The supplementary treaty, he suggested, would represent a most significant contribution to the efforts being made by western democracies to counter the threat posed by international terrorism.

In his letter to the Senate, on July 17 1985, President Reagan asked that the Supplementary Treaty be given early and favourable consideration.(65) The Supplementary Treaty Supplements and amends the Extradition Treaty between the United States and the United Kingdom signed at London on June 8 1972.(66) The Supplementary Treaty would exclude specific crimes of violence typically committed by terrorists, from the scope of the political offence exception to extradition.

Article 1 of the Supplementary Treaty effectively limits the scope of Article V, paragraph (1)(c)(i) of the current Extradition Treaty - the political

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64. Weekly Hansard Issue No. 1353 24 to 28 June 1985, 81 H.C. Deb. Col. 287. See also (1985) I.L.M. p. 1104 for President Reagan's letter to Senate, of July 17 1985 and the Supplementary Treaty.

65. (1985) I.L.M. p. 1104.

66. 28 U.T.S.; TIAS 8468.

offence exception - by listing the crimes which shall not be regarded as offences of a political character, namely: aircraft hijacking; aircraft sabotage; crimes against internationally protected persons, including diplomats; hostage taking; as well as murder; manslaughter; malicious assault; kidnapping and specified firearms, explosives, and serious property damage offences.

Article 2 of the Supplementary Treaty amends Article V, paragraph (1)(b) of the current Extradition Treaty by providing that extradition shall be denied if prosecution would be barred by the statute of limitations of the requesting state. The current treaty provision permits the statute of limitations of either the requesting or requested state to apply.

Article 3 of the Supplementary Treaty amends Article VIII, paragraph (2) of the current Extradition Treaty by providing that the requesting state shall have as much as 60 days following provisional arrest to submit evidence in support of an extradition request, and that if by that time such evidence has not been submitted the person arrested shall be set at liberty. The current treaty allows only 45 days.

Article 4 of the Supplementary Treaty provides that its provisions shall apply to any offence committed before or after the entry into force of the Supplementary Treaty, but shall not apply to an offence committed before the Supplementary Treaty enters into force if the offence in question was not an offence under the laws of both contracting parties at the time of its commission.

Article 5 of the Supplementary Treaty provides that it shall form an integral part of the current Extradition Treaty and sets forth its territorial application for the United States and the United Kingdom, respectively.

SUPPLEMENTARY TREATY CONCERNING THE EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, SIGNED AT LONDON ON JUNE 8 1972

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland;

Desiring to make more effective the Extradition Treaty between the Contracting Parties, signed at London on June 8 1972 (hereinafter referred to as "the Extradition Treaty");

Have resolved to conclude a Supplementary Treaty and have agreed as follows:

ARTICLE 1

For the purposes of the Extradition Treaty, none of the following offences shall be regarded as an offence of a political character:

- (a) an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at The Hague on December 16 1970;
- (b) an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature at Montreal on September 23 1971;
- (c) an offence 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 offence within the scope of the International Convention against the Taking of Hostages, opened for signature at New York on December 18 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 offences 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 offences 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 offences.

#### ARTICLE 2

Article V, paragraph (1) (b) of the Extradition Treaty is amended to read as follows:

"(b) the prosecution for the offence for which extradition is requested has become barred by lapse of time according to the law of the requesting Party; or"

#### ARTICLE 3

Article VIII, paragraph (2) of the Extradition Treaty is amended to read

as follows:

"(2) A person arrested upon such an application shall be set at liberty upon the expiration of sixty days from the date of his arrest if a request for his extradition shall not have been received. This provision shall not prevent the institution of further proceedings for the extradition of the person sought if a request for extradition is subsequently received."

#### ARTICLE 4

This Supplementary Treaty shall apply to any offence committed before or after this Supplementary Treaty enters into force, provided that this Supplementary Treaty shall not apply to an offence committed before this Supplementary Treaty enters into force which was not an offence under the laws of both Contracting Parties at the time of its commission.

#### ARTICLE 5

This Supplementary Treaty shall form an integral part of the Extradition Treaty and shall apply:

(a) in relation to the United Kingdom: to Great Britain and Northern Ireland, the Channel Islands, the Isle of Man and the territories for whose international relations the United Kingdom is responsible which are listed in the Annexe to this Supplementary Treaty;

(b) to the United States of America;

and references to the territory of a Contracting Party shall be construed accordingly.

#### ARTICLE 6

This Supplementary Treaty shall be subject to ratification and the

instruments of ratification shall be exchanged at London as soon as possible. It shall enter into force upon the exchange of instruments of ratification. It shall be subject to termination in the same manner as the Extradition Treaty.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed this Supplementary Treaty.

Part IIIThe 'Exception' to the Political Offence Exception in the International Legal ArenaI. International Terrorism

The substantial increase in the acts of violence committed for political ends, and the increasing international nature of these acts have caused a great deal of alarm and concern in the international community. One specific reaction of states has been to introduce practical restrictions on the claim by individuals that their actions came within the principle of the "political offence exception." Another reaction has been the creation of new offences like hijacking and yet another has been the elaboration of special duties of protection. These restrictions are known as the "depoliticising formula" or the exception to the political offence exception. The first example of the politicising formula is the Belgium attentat clause of 1856.<sup>(67)</sup> This international trend towards the outlawing of certain forms of violent activity commenced with a response to specific activities which threatened the international order as well as national order, such as hijacking and the kidnapping and killing of diplomatic personnel and has developed to encompass a wide range of socially disruptive behaviour, especially violent behaviour which, even if politically motivated, involved death, or injury of persons or serious injury to private property. Such activities have been

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67. Moniteur Belge March 27 1856.

labelled "acts of terrorism" and have been variously described as "acts of violence which endanger or take innocent human lives or jeopardise fundamental freedoms" (68), or which are "directed against the life, physical integrity or liberty of persons or against property where they create a collective danger for persons, including attempts of or threats of or participation as accomplice in these acts." (69) As regards definitions, J. Dugard (70) states that the correct definition of "terrorism" is of paramount importance to the starting point of any debates about "terrorism." At the international level, the trend is associated with the development of the notion of an international crime, particularly a crime against humanity, that is, behaviour which is regarded as so barbarous as to be repulsive to a sense of humanity and as deserving the condemnation of all civilised people. The United Kingdom is a party to a number of international conventions which deal with various types of

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68. Preamble to the United Nations General Assembly Resolution on measures to prevent international terrorism, 18 December 1972 (1973) 12 I.L.M., 218.
69. Recommendation No. R. (82) 1 of the Committee of Ministers of the Council of Europe concerning International Co-operation in the Prosecution and Punishment of Acts of Terrorism, 15 January 1982 (1982) 21 I.L.M., 199.
70. J. Dugard, "Towards the Definition of International Terrorism" (1973) 67 Am. Soc. Int. L. Proc., pp. 94-100.

acts which are considered to be "terrorist" activity.(72) The Hijacking Act 1971 implements the Hague Convention; the Protection of Aircraft Act 1973 (72) implements the Montreal Convention; the Internationally Protected Persons Act 1978 implements the New York Convention; the Genocide Act 1969 implements the Genocide Convention; the Hostages Act 1981 has also been enacted by the legislature in the United Kingdom.

The relevant Article in the Genocide Convention is Article 7 which provides that genocide and other crimes enumerated in Article 3, will not be considered as political crimes for the purposes of extradition. However this particular provision of the Genocide Convention caused vehement opposition in several states. The United Kingdom waited until 1969 before ratifying the Convention because it could not agree with the depoliticising formula of Article 7. The British government had made it clear that it preferred to avoid a formal extradition arrangement for war criminals and to employ instead

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71. (a) Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, December 16 1970, I..A.O. Doc. 8920, the "Hague Convention";  
(b) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal, September 23 1971, I.C.A.O. Doc. 8966, the "Montreal Convention";  
(c) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, New York, December 14 1973, U.N. Doc. A/3166 (XXVIII), the "New York Convention";  
(d) International Convention Against the Taking of Hostages, New York, December 17 1979, U.N. Doc. A/Res. 34/146 (January 24, 1980) the "Hostages Convention";  
(e) Convention on the Prevention and Punishment of the Crime of Genocide, December 9 1948, 78 U.N.T.S., p. 277.  
Note also, J. Murphy, "United Nations Proposals on the Control and Suppression of Terrorism" in M.Ch. Bassiouni, International Terrorism and Political Crimes (1975), pp. 493 et seq.; B. De Schutter, "Prospective Study of the Mechanisms to Repress Terrorism" in Reflexions sur la Definition et la Repression du Terrorisme (1974), p. 253; Y. Alexander and S.M. Fingers, Terrorism; Interdisciplinary Perspectives (1977).

72. The Aviation Security Act 1982 (C. 36 S.I. F. 9) Sch. 3 replaces earlier Statutes.

its statutory powers to deport undesirable aliens.(73) The main reason for British hesitancy was due to the attempted restriction on the concept of political offences and the British tradition of granting asylum.(74) In the United States there were strong objections raised against its ratification and Article 7 is one of the reasons why, to date, the Convention has not yet been ratified. Article 7 of the Genocide Convention has never been explicitly applied. There have been a number of cases in which extradition was granted for genocide, but the refusal to apply the political offence exception in these cases was not based on Article 7 but on other criteria such as the barbarity of the act.(75)

In the United States the position has now altered with regard to ratification of the Genocide Convention.(76) On September 5th 1984 President Reagan asked the Senate to give its advice and consent to ratification of the Genocide Convention. On October 11 Senate voted eighty-seven in favour, two against and eleven abstentions. Resolution 478 (77) was adopted; it expressed its support for the principles embodied in the Convention. On September 24 1984 the Senate Committee on Foreign Relations reported favourably. Of Article 7 the Committee noted that the main concern was that American citizens might be extradited for trial in foreign courts without the protection of United States constitutional guarantees. But the Committee stated that ratification of the Genocide Convention would only open the way for one more crime - genocide - to be added to the list of crimes

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73. Green, "Political Offences, War Crimes and Extradition" (1962) I.C.L.Q. p. 329. See also Garcia-Mora, "Crimes against Humanity and the Principle of Non-extradition of Political Offenders" (1964) 62 Mich. L. Rev. p. 927; M. Whiteman, Digest of International Law Vol. 6 (1968), pp. 846-847.

74. I.A. Shearer, op.cit., p. 186.

75. Bohne, "Supreme Court of Argentina" (1968) 62 Am. J.I.L., p. 784.

76. M.N. Leich, "Contemporary Practice of the United States relating to International Law" (1985) Am. J.I.L., p. 116 at p. 124.

77. For text see 130 Congress Rec. S. 14, 076 (daily edition, October 10 1984).

for which Americans may be extradited under ratified extradition treaties. They noted that extradition treaties are carefully worded to be as explicit as possible about the definition of the crimes covered and the procedure under which a citizen will be surrendered to another nation for trial.(78)

Since October 1975 there is a second international instrument which excludes genocide from the political offence exception; Article 1(a) Additional Protocol to the European Convention on Extradition.(79) This article provides that crimes against humanity, as provided by the Genocide Convention, will not be considered as political crimes for the purposes of extradition. With respect to the Genocide Convention, however, this article does not add anything now because the Convention already provided for the duty to extradite. During the drafting of the Protocol, several states were reluctant to accept the proposed "depoliticisation" of genocide and the other crimes provided in Article 1. Thus, the question to be asked is whether the new Protocol will have the success hoped for. The most important international convention however is the Council of Europe's Convention on the Suppression of Terrorism.(80) This Convention has been enacted in United Kingdom law as the Suppression of Terrorism Act 1978. The Convention and the Act have arguably made the most important change in extradition law since 1870.(81) Before considering the national and international impact of the Act and the Convention, a survey of previous attempts to come to grips with the problem of terrorism is necessary. J. Dugard (82) considers that the most relevant precedent of an anti-terrorist nature is the 1937 Convention for the

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78. The Genocide Convention of 9 December 1948 now has 95 ratifications including the United States.

79. October 15 1975 E.T.S. No. 5.

80. Signed at Strasbourg on January 27 1977 E.T.S. No. 90, Cmnd. 7031 (1977).

81. V.E. Hartley-Booth, op.cit., p. 83.

82. J. Dugard, op.cit., p. 94.

Prevention and Punishment of Terrorism.(83) This Convention was signed by twenty-four states but never came into force; it was a direct response to the assassination of King Alexander I of Yugoslavia in Marseilles in 1934 by persons who today would probably have been described as terrorists. The Convention was intended to suppress acts of terrorism having an international character only and most of its definitions were devoted to a definition of the international element. "Acts of terrorism" were characterised in Article 1 as acts directed against a state which were intended or calculated to create a state of terror in the minds of a section of the public. Dugard argued that an ideal treaty which aimed at combatting international terrorism should, firstly, reaffirm that all states have the duty in all circumstances to refrain from encouraging guerilla activities in another state; secondly, prohibition should be made of acts of terrorism which disturb the international order and clearly identify the international element which brings the act within the jurisdiction of international law; thirdly, oblige states to extradite or to punish the offender under the Convention; and fourthly, the Convention should reaffirm the international community's abhorrence of state controlled terrorism as expressed in the Nuremberg Trials, the Genocide Convention and the human rights provisions of the Charter. But he suggests that there are two obstacles to such a Convention; firstly, the dubious status of wars of national liberation; secondly, the right of states to grant asylum to political offenders. The United Nations Charter clearly permits use of force in the exercise of the right of self-defence and under the authority of the Security Council, Dugard points out, in referring to wars of national liberation. He adds that political toleration of wars of national liberation is a fact of international life which cannot be ignored by the drafters of a convention on terrorism. Thus a compromise convention is necessary which omits all reference to support for armed bands in the concept of

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83. League of Nations Doc. C. 546 M. 383 1937 V. and U.N. Doc. A/C. 6/418.

international terrorism. He states that self-determination is a prime value to many states. As regards the granting of asylum to political offenders, he argues that from a doctrinal point of view, the international terrorist does not fall within the category of a political offender. He rightly points out that political offenders were given asylum for the precise reason that their acts did not, like those of the common criminal, present a threat to the life or property of citizens of other states, but modern terrorist activity is geared to have such results and as such the terrorist becomes a criminal under international law. He concludes by stating that "a full appreciation of the *raison d'etre* of the non-extradition of political offenders might persuade states to adopt a less intransigent attitude to the extradition of international terrorists and lead them to accept the principle of *aut dedere aut punire*". Dugard considers that the Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism (84), the "U.S. Draft" which was submitted to the General Assembly of the United Nations, faces most of the difficulties to which he refers. Under Article 1 an act of terrorism assumes "International significance" if it meets four requirements. Firstly, it is committed or takes effect outside the territory of which the terrorist is a national; secondly, if it is committed or takes effect either outside the territory of the target state or within its territory but is directed at non-nationals of the target state; thirdly, if it is not committed in the course of military hostilities; fourthly, if it is intended to damage the interests of or obtain concessions from a state or international organisation.

This definition of terrorism does not permit a war of self-determination to come within its ambit because in such cases the act either takes place inside the territory of the target state or is committed by a national of the target state.

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84. September 25 1972, U.N. Doc. A/C 6/L 850.

But acts such as the Palestinian taking of Israeli hostages during the Munich Olympics in 1972 would be covered. Dugard suggests that two principles need to be stated more clearly. Firstly, that the motive of the terrorists is irrelevant in determining whether an act of terrorism has been committed; secondly, that the act should be intended to or calculated to inspire terror in a section of the public. Article 3 of the U.S. Draft obliges a state either to extradite an offender or to try him "without exception whatsoever" before the local courts. One important achievement of the U.S. Draft is that it succeeds in localising internal conflict situations by providing international measures for the punishment of those zealous revolutionaries who seek to dramatise their cause by acts of terrorism in foreign countries.

On the particular issue of wars of national liberation, Lowe and Young (85) note that Third World states emerging from colonialism resort to use of arms when the possibility of self-determination achieved through constitutional channels is unavailable because of the repressive nature of the government. These groups argue that since attacks on the ruling regime are unlikely to result in any change, attacks on other targets may be necessary. And these acts ought not to be considered as terrorist activity. One should look not at the means employed but at ends which the violence serves. Both authors note that these arguments are used by those individuals involved in national liberation movements in Europe. Acts of violence have been used by groups seeking regional autonomy within Europe; these groups which include the Bretons and Basque separatists, have openly argued that their actions were motivated by their quest for self-determination. The authors point out that if this argument were accepted, these secessionist movements within Europe would have to be treated differently from terrorists, and the approach among the Western states is not to accept this

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85. A.V. Lowe and J.Y. Young, (1979) Neth. Int. L. Rev. p. 305 at p. 306.

argument.(86)

## II The Council of Europe's Convention on the Suppression of Terrorism

One of the fundamental problems is that there is no international agreement as to whether and to what extent, political asylum should be restricted with respect to acts of terrorism. There is not even agreement among states as to the necessity to suppress terrorism at all.(87) The treaties which have been drafted so far in the framework of the United Nations do not deal with terrorism in general but have confined themselves to a number of specific terrorist offences; hijacking, unlawful acts against the safety of international aviation, unlawful acts against internationally protected persons and the taking of hostages. None of these treaties, however, contains a provision declaring that the political offence exception will be excluded for the crimes in question. Instead extradition is left as a matter of the domestic law of each contracting party, thus leaving the application of the exception to their own discretion. Nor have proposals to restrict asylum been accepted. For example, a proposal to establish a duty to extradite for hijacking, regardless of the motivation of the perpetrator, was rejected.(88)

Europe has led the way in meeting or attempting to meet the issue of terrorism head on. Unlike the United Nations, with the 1977 Convention on the

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86. Note, however, the refusal of the Federal German courts to authorise the return of Croatian separatists wanted for offences committed in Yugoslavia. The Times, September 15 1978. (See C. Warbrick (1980) P.L., p. 121; N. Ronzitti, "Wars of National Liberation - a Legal Definition" (1975) I.Y.I.L., p. 192.

87. Witness the lukewarm response that has occurred despite United States and United Kingdom pleas for urgent international discussions to consider ways and means to effectively combat terrorism, following upon the hijacking by Amal, an extreme Lebanese political-religious group, of American passengers aboard an aeroplane at Beirut airport in June/July 1985.

88. A. Abramovsky, "Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft" (1974) 13 Col. J. Trans. L., p. 401; P. Van Kreken, "Hijacking and Asylum" (1975) 32 Neth. Int. L.Rev. p. 17.

Suppression of Terrorism, the Council of Europe has agreed upon a considerable restriction of political asylum with respect to terrorist offences. Certain offences have been depoliticised interse between those members of the Council of Europe which are parties to the Convention and extradition procedures have been strengthened in order to ensure that perpetrators of terrorist acts do not escape prosecution and punishment. The intention is to ensure that it should be impossible for terrorists to find a safe refuge in Europe.(89) Thus its impact is limited territorially and states outside Europe can still grant political asylum to terrorists. Since extradition for political offences is usually excluded in extradition treaties, the Convention provides that certain offences are not to be regarded as political offences. Thus Article 1 provides "for the purposes of extradition between contracting states, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives; (a) an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, the "Hague Convention"; (b) an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the "Montreal Convention"; (c) a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents; (d) an offence involving kidnapping, the taking of a hostage or serious unlawful detention; (e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons; (f) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence". Article 2 adds, (1)"for the purposes of extradition between contracting states, a contracting state may decide not to regard as a political offence or as an offence connected with a political offence or as an offence inspired by political motives a serious

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89. J. Barrett, "The European Convention on the Suppression of Terrorism and the Suppression of Terrorism Act 1978" (1980) T.I., p. 1.

offence involving an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person; (2) The same shall apply to a serious offence involving an act against property, other than one covered by Article 1, if the act created a collective danger for persons; (3) The same shall apply to an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence".

Article 5 provides, however, "Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested state has substantial grounds for believing that the request for extradition for an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that the person's position may be prejudiced for any of these reasons". It is reported that this provision was incorporated at the request of the Irish Republic; it is therefore called the "Irish Clause".(90)

In the case where the requested offender is found in the territory of the contracting state and that state does not extradite him Articles 6 and 7 provide that the contracting state "shall take such measures as may be necessary to establish its jurisdiction over an offence mentioned in Article 1" and "shall submit the case without exception whatsoever and without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that state". This is the principle of *aut dedere aut judicare*. Article 13 provides, "Any state may at the time of signature or when depositing its instruments of ratification, acceptance or approval, declare that

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90. P. Weiss, "Asylum and Extradition" (1977) Rev. Int. Comm. Jur. pp. 37-43.

it reserves the right to refuse extradition in respect of any offence mentioned in Article 1 which it considers to be a political offence, an offence connected with a political offence or an offence inspired by political motives, provided that it undertakes to take into due consideration, when evaluating the character of the offence, any particularly serious aspects of the offence, including "(a) That it created a collective danger to the life, physical integrity or liberty of persons; or (b) that it affected persons foreign to the motives behind it; or (c) that cruel or vicious means have been used in the commission of the offence." As at January 1 1982 Austria, Cyprus, Denmark, the Federal Republic of Germany, Iceland, Liechtenstein, Luxembourg, Norway, Portugal, Spain, Sweden, Turkey and the United Kingdom were party to the Convention. The Convention entered into force in December 1978.(91) It is M. Wood's(92) opinion that a major weakness of the Strasbourg Convention is that Article 13 permits this "major and somewhat obscure reservation." (93) Article 13(3) provides that a reserving state may not claim the application of Article 1 by any other state; but it may, if its reservation is partial or conditional, claim the application of that Article in so far as it has itself accepted it.

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91. At the time of signing the Convention, France, Italy, Norway and Portugal made a number of reservations and declarations; (1976) 16 I.L.M., p. 1329.

92. (1981) 1 Y.E.L., p. 307 at p. 324.

93. Ibid., p. 324.

17. Wood notes that even though no mention is made of other reservations, this does not mean that they are prohibited since Article 13 does not provide that only the specified reservation may be made. "Other reservations may be made unless they are incompatible with the object and purpose of the Convention and the rules of general international law".(94) Lowe and Young note that the inclusion of Article 13 reinforces the impression that the Convention will not necessarily have any significant effect upon state practice in this matter. "Such states as might have stretched the political exception to include terrorist acts are likely to enter reservations in order to avoid the necessity for a change in their practice".(95) The distinction between Articles 1 and 2 is that the former is mandatory whereas the depoliticisation of the offences contained in Article 2 is left to the discretion of the contracting parties. However the distinction is off-set by Article 13 which, as noted above, creates the possibility of formulating a reservation with respect to Article 1. J. Barrett (96) points out that it is clear from the travaux préparatoires that the Convention was only intended to be a partial solution to the terrorist problem.

The Consultative Assembly acknowledged that such regional action was a temporary measure whilst waiting for a long-term universal solution - with particular attention being paid to the Arab governments which provide havens for terrorists.(97)

Before considering the various debates and controversies which the Convention has caused, a consideration of its application will be carried out.

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94. Ibid., p. 324.

95. Lowe and Young, p. 319.

96. J. Barrett, op.cit., p. 1.

97. Council of Europe AS/POL/T1 (24) Assemblée Consultative. Commission des Question S. Politiques, Sous - Commission sur le terrorisme internationale, 25 April 1973.

Article 3(1) of the European Convention on Extradition states, "Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested party as a political offence or as an offence connected with a political offence". Terrorist acts might be considered as political offences for this purpose as a result of the lack of a generally accepted definition of "political offence". There existed therefore as the Council of Europe pointed out "serious lacuna in existing international agreements with regard to the possibility of extraditing persons accused or convicted of terrorism".(98) The importance of this lacuna depends upon the likelihood of states regarding acts of terrorists as coming within the ambit of the political offence exception. The dictum in Re Ockert (99) suggests the likely response of European courts to terrorist activity, "acts which are not related to a general movement directed to the realisation of a particular political object in such a way that they themselves appear as an essential part of incident thereof, but which serve merely terrorist ends so as to facilitate a future political struggle, can raise no claim to asylum". Generally the exception is limited to acts which form an integral part of a general political uprising or outbreak of political violence, or which are intended to make an effective contribution to an immediate struggle concerning the political organisation of the state. Also the courts tend to weigh the means employed against the objective in order to determine whether the act is excusable, because of its predominantly political purpose and the perpetrator, worthy of asylum.(100) Only separatist movements, in attempts to

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98. Council of Europe, Explanatory Report on the European Convention on the Suppression of Terrorism (1977), p. 12.

99. Ann. Dig. (1933-34), p. 369.

100. J.H.W. Verzijl, International Law in Historical Perspective Part V Ch. VII, pp. 303-310 and 339-351 (1972) on European Practice; B.A. Wortley, "Political Crimes in English Law and International Law" (1971) XLV B.Y.I.L., p. 219; Garcia-Mora, "The Nature of Political Offences" (1962) 48 Va. L.Rev. p. 1226; L.C. Green, "The Nature of Political Offences" (1976) 7 J. Ind. L. Inst., pp. 1-26.

overthrow the government of a region, may meet these requirements. However, because they are concerned with essentially regional issues, they are less likely to operate on an international level than some other groups, particularly when they have a measure of local sympathy.(101)

The continued support for this approach is illustrated in the request by the United States for the extradition from France of William Holder Kerkow on charges arising from the hijack of an airliner in 1972. The United States memorandum of law addressed to the French Foreign Ministry and Ministry of Justice stated that, "It is well established that political motive alone does not give a common crime the character of a political offence, violent crimes committed by terrorist and other political activists do not constitute political offences unless the crimes form part of an action aimed at the immediate overthrow of the state".(102) But extradition was not granted by France on the grounds that the offence was political. In 1981, following a decision by the United States Court of Appeals, seventh circuit (103), Ziyad Abu Eain, a member of the Al Fatah branch of the Palestinian Liberation Organisation, was surrendered to Israel, notwithstanding that the applicable extradition treaty between Israel and the United States provides that extradition shall not be granted when "the offence is regarded by the requested party as one of a political character"(104) and that the accused pleaded that his offence was of this character. He was accused of placing a bomb in a rubbish bin in a crowded market in the Israeli city of Tiberias. The bomb exploded, killing two young boys and injuring more than thirty other people.

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101. Lowe and Young, op.cit., p. 315.

102. Digest of United States Practice in International Law (1975), pp. 170-17 ; also U.S. Digest (1976), pp. 124-125. See C. Wijngaert, Court of Appeal of Paris November 15 1976.

103. 641 Fed. Reporter (1981) 2nd series 504; (1982) 21 I.L.M., p. 342.

104. Article 6(4).

According to evidence at the extradition proceedings, he had carefully avoided any contact with military personnel, and it was clear that the intended victims of the bombing were not soldiers but members of the civilian population. The United States Court of Appeals placed great emphasis on the indiscriminate nature of the form of violence used and drew a distinction between acts which are destructive of the social as opposed to the political structure of a state. "Terrorist activity seeks to promote social chaos" (105), the court stated. "We recognise the validity and usefulness of the political offence exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere".(106) Such a distinction between what might be termed "social" as opposed to "political" offences might be criticised as somewhat artificial, imprecise and at times difficult to draw, but it has also found favour in recent years with courts in France.(107) Under an extradition treaty between France and the Federal Republic of Germany, "L'extradition ne sera pas accordee si l'infraction pour laquelle elle est demandee est consideree par la partie requise, d'apres les circonstances dans lesquelles elle a ete commise, comme une infraction politique ou comme un fait commis pour preparer une telle infraction, l'executer, en assurer le profit (ou) en procurer l'impunite".(108) Acting under this treaty, Germany requested the extradition from France of Klaus Croissant, a lawyer for the Baader-Meinhoff group (109). In 1977 Croissant had

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105. (1982) 21 I.L.M., p. 352.

106. Ibid., p. 353.

107. A. Connelly, "Non-extradition for Political Offence; A Matter of Legal Obligation or Simply a Policy Choice (1982) I.J. p. 59.

108. Article 4 quoted in Julien-Laferrriere, "L'evolution recente du droit francais de l'extradition" (1970) Rev. D. Pub., p. 793 at 859. See A. Connelly, op.cit., p. 76.

109. Th.E. Carbonneau, "Extradition and Transnational Terrorism; A Comment on the Recent Extradition of Klaus Croissant from France to West Germany" (1978) 12 Int. Lawyer, pp. 813-823.

been the attorney of a number of Baader-Meinhoff members and the German authorities suspected him of (a) forming a net of communications for the benefit of a criminal organisation and (b) granting indirect assistance to a criminal association, consisting of the organisation of hunger strikes and the carrying on of an intense propaganda campaign for the Baader-Meinhoff group. Croissant invoked the political offence exception contending that these acts were related to the political crimes of the Baader-Meinhoff group. The Court of Appeals of Paris, however, did not accept this argument. It found that the crimes of this group were not inherently political and added that political motivation in itself is not sufficient to consider a given offence as a political offence.(110)

"Maitre Bore, for the state, said that the right of asylum did not apply to common law crimes. Neither the activities of the Baader-Meinhoff gang, nor those of Herr Croissant, had been political in character. Both were guilty of social crimes, not of political ones, because they attacked the nation, not the structure of the state".(111) This position was confirmed in Piperno (112) a case which arose out of an Italian extradition request introduced in 1979. Piperno was suspected of inter alia, participation in the kidnapping and murder of Aldo Moro in the Spring of 1978. Rejecting Piperno's plea that his offence was of a political character, the Court of Appeal of Paris held, "the court reveals the extreme seriousness of the facts alleged since in addition to the physical and mental torture implied by a sequestration of many weeks, they have consisted of the killing of the innocent hostages. Whatever be the purpose pursued or the context in which such acts are located, they cannot, taking into

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110. Croissant, Court of Appeal of Paris, November 16 1977 2nd decision, (1978) 93 J. Trib., p. 52. See C. Wijngaert, p. 124 for reference.

111. The Times July 8 1978. See Lowe and Young, op.cit., p. 316.

112. Piperno, Court of Appeal of Paris, October 17 1979, arret no. 1343-79, p. 14 (not published); Le Monde October 19 1979, p. 4. See C. Wijngaert, p. 124 for reference.

account their seriousness, be considered as being of a political character".(113) The Netherlands has adopted the same criterion in dealing with terrorist offences. Wackernagel, Schneider and Folkerts, three members of the Baader-Meinhoff group were requested by the German Federal Republic for the kidnapping and murder of the industrialist Herr Schleyer. Extradition was granted by the Dutch courts.(114) Pohle was extradited from Greece to Germany the Athens Supreme Court having reversed a finding of an Athens appeal court that his offences, connected with the kidnapping of Herr Lorenz as a hostage for the release of other Baader-Meinhoff members, were political.(115) But there have been decisions which have not followed the general European trend; witness the refusal of France to extradite Abu Daoud on charges connected with the attack on Israeli athletes at the Munich Olympics. But it seems quite clear that the basis of the decision not to accede to extradition requests from Germany and Israel were wholly unconnected with the question of whether or not the offences in question were "political" for the purposes of French law.(116)

However, one aspect of the terrorist question has to be noted. In Great Britain and the United States, the required relationship between the struggle for power and the political crime is given a more liberal application when the requesting state is a "totalitarian regime" in which the normal struggle for power is not possible.(117) Thus, a hijacking committed by three Yugoslavs, Kavic, Bjelanovic and Arsenijevic was considered a predominantly political crime

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113. Ibid., p. 14.

114. Keesing's Contemporary Archives, p. 28919 (1978); The Times October 16 1978. See Lowe and Young, p. 316 for reference.

115. Ibid., p. 23923 (1978).

116. Lowe and Young, op.cit., p. 317; R. Greenfield, "The Abu Daoud Affair" (1977) II J. I. L. E., pp. 539-582. As quoted in Lowe and Young, p. 317.

117 C. Van den Wijngaert, op.cit., p.. 128. Note, Kolczynski and Gonzales.

by the Swiss Federal Tribunal, although there was no political struggle in Yugoslavia to which the acts could possibly have been related.(118)

An important point to make when considering such cases as Croissant is that extradition to a state with a high interest in punishing the offender is necessary because some states (the majority) do not want to risk potential terrorist activities designed to secure the release of the terrorist, and the potential cost of innocent lives which may result from such retaliatory violence. An example, not connected with extradition, is supplied by the Swedish government's expulsion of four members of the R.A.F. from Sweden following the raid on a Stockholm embassy in 1975, intended to secure the release of Andreas Baader and others from prison. Baader was one of the leaders of the Red Brigade (the R.A.F.) and in 1975 his trial began in Frankfurt on charges of murder, attempted murder, bombings and other offences.(119)

### Part ~~IX~~ Conclusions

From the outset the Convention provoked controversy. One of the main problems was that it constitutes the end of political asylum in Europe because practically all political offences are excluded from the scope of political asylum. However this must not be exaggerated since asylum may be granted to people who are not criminals. The terms of the Convention, especially in Article 2 are said to be very vague and thus nearly any offence could qualify for the application of the Convention. Some authors have centred the debate on the question whether political asylum ought to be restricted or abolished within certain regional frameworks. Those who subscribe to the restriction of asylum state (quite correctly) that it is illogical for states with similar political

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118. (1952) 19 I.L.R. p. 374. Also C. Warbrick (1980) P.L., p. 120 footnote 39.

119. Keesing's Contemporary Archives, p. 27261 (1976). See Lowe and Young p. 317 for reference.

institutions to protect persons who jeopardise these institutions because an attack against one state would affect the others. Thus states with a great identity of interests are correct to seek restrictions on the scope of the applicability of the political offence exception.(120) Those against this idea posit the view that political asylum is one of the fundamental democratic principles from which no departure whatsoever should be allowed; they refer to Nazi Germany and fascist Italy, where the political offence exception was one of the first rules to be abolished. They argue that when a choice is to be made between either punishing the crime and its underlying political motivation, or not punishing it at all, the latter alternative must be chosen. This choice, they argue, is the only possible option for a liberal democracy. Wijngaert (121) does not accept this view. She asks the question, "do we want to keep this implication of the rule, i.e., immunity from prosecutions, at any price even vis-a-vis a form of political criminality which has a pronounced tendency towards internationalisation and which at the same time is often accompanied by very serious common crimes".(122) She accepts that the criminal law is the only (though not totally adequate) means available to combat political terrorism; and as such the criminal laws ought not to halt at the frontiers of states. Inter-state co-operation and the combatting of terrorism by the criminal law should not be rendered impotent because of the political motivation of the acts in question. But she rightly points out that whatever means are used to combat terrorism, the rights of the individual should be respected. The justification which protagonists of the Convention claim for the restriction of political asylum is that it

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120. M. Travers, *Le Droit Penal International* (1921) Vol. II No. 2060-61; C.H. Thornberry, "Is the Non-surrender of Political Offenders Outdated?" (1963) 26 *M.I.R.* p. 555; W.D. Greig, *International Law* (2nd ed.) (1976), p. 340.

121. *Op.cit.*, p. 151.

122. *Ibid.*

contains a number of essential individual safeguards which warrant the exclusion of certain crimes from the scope of the political offence exception. Firstly, they argue, the Convention is open to accession only to member states of the Council of Europe, which are pledged to support democracy and the rule of law and which, in addition have all signed the European Convention for the Protection of Fundamental Rights and Freedoms. Secondly, Article 5 of the Convention creates the possibility to refuse extradition if there are substantial grounds to believe that the request has been made "for purposes of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that the person's position may be prejudiced for any of these reasons".(123) One problem worth emphasising is that to accept that all Member States of the Council of Europe are democratic states is subject to debate. States, under the external appearance of democracy may in fact be undemocratic in material respects; and precisely because of the closed regional framework such as the Council of Europe, the states concerned may not have the political courage to use the safeguards provided by the Convention against each other by refusing extradition notwithstanding the quasi-automatic extradition system created by the treaty.

P. Weiss, it is submitted, correctly states that it is going too far to say that the Convention jeopardises the right of asylum.(124) But he does point out that it could become a dangerous precedent if its principles were followed in other areas of the world where political conditions are different and democratic regimes are not present, and thus not bound by the rule of law. However, in concluding this analysis one must note the wise observation of one author who states that when individuals claim the application of Article 5 of the Convention, they are likely to run across the formal assumption that Member

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123. P. Weiss, op.cit., p. 41; C. Wijngaert, op.cit., p. 153.

124. P. Weiss, op.cit., p. 42.

States of the Council of Europe respect human rights. Here lies the paradox. "The general confidence in the respect given to human rights by European states is for the individual the greatest barrier to find support in proving effective violations thereof".(125)

### Conclusion to the Irish Angle

In December 1973 representatives of the British and Irish governments, together with representatives of the prominent political parties in Northern Ireland met at Sunningdale in Surrey to seek political solutions to the problems in Northern Ireland. A joint communique was issued in which the group stated that they were concerned at the ease with which persons who had committed crimes of violence in Ireland successfully evaded being held to account for their crimes through the normal judicial process by simply crossing the border from one jurisdiction in Ireland to the other.

In considering ways of tackling the situation, it was realised that there were "problems of considerable legal complexity involved".(126) The result was that a Law Enforcement Commission was set up jointly by the two governments to consider the matter. The members completed their report and submitted it to the Secretary of State for Northern Ireland and the Minister for Justice in the Republic of Ireland in May 1979.(127) The Commission considered four proposals for dealing with the problem. These were, (1) the all-Ireland court method, a common law enforcement area in which jurisdiction would be exercised by an all-Ireland court; (2) the extradition method, by which the existing law would be

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125. B. Swart, "Terrorisme en Uithevering" (1978) *Recht en Kritiek*, p. 345; G. Fraysse-Druesne, "La Convention Europeenne pour la Repression du Terrorisme" (1978) 82 *Rev. Gen. D. Int. Pub.* p. 969.

126. Para. 10, Joint Communique, December 1973.

127. Report of the Law Enforcement Commission, Cmnd. 5627, 1974.

amended; (3) the extra-territorial method, which involved the conferring of additional extra-territorial jurisdiction upon the court of each jurisdiction; (4) the mixed court method, which amounted to the exercise in each jurisdiction of extra-territorial jurisdiction by special courts consisting of three judges, at least one of whom would be a judge of the other jurisdiction. The first method was not accepted because it was thought to be too cumbersome. The fourth method, seen as a less satisfactory form of the third proposal was not analysed in detail by the Commission. Thus the Commission concentrated their arguments around the extradition method. Article 29.3 of the Irish Constitution is the relevant constitutional provision which is said to protect political offenders. It has been advanced by Ireland as a reason for declining to become a party to the European Convention on the Suppression of Terrorism 1977. In her article A. Connelly (128) examines the soundness of the interpretation of the effect of the constitutional provision at the present time. Part of the issue (a most important part) is the justification for the interpretation with the increase of indiscriminate and international acts of violence of which the I.R.A. are sometimes guilty parties. The four Irish members of the Commission rejected the proposal to adopt the method of extradition in dealing with offences which were claimed to be of a political character. They based their arguments on the following reasons, firstly, on the grounds of public international law it was argued that it was a well recognised principle of international law that the extradition of a person accused of a political offence should not take place and that the Irish government did not feel that a departure from a principle of international law so firmly established, could be justified. The case of Tapley was doubted as authoritative. They argued that the case was not in any way concerned with a political offence and that the statutory provision in question,

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128. A. Connelly, "Non-extradition for Political Offences; A Matter of Legal Obligation or Simply a Policy Choice?" (1982) I.J., p. 59.

section 29 of the Petty Sessions Act 1851, never purported to be a provision for international extradition. They were of the belief that nothing in the decision in Tapley indicated that the state could have passed a law on the question of extradition which would run counter to the general principles of international law. But is this principle correct? Connelly asks whether there does in fact exist a generally recognised rule of international law that political offenders ought not to be extradited.(129) She thinks not and she makes an extensive survey of the leading authorities to justify her conclusions. Brownlie (130) states that "no general rule forbids surrender"; and Whiteman (131) is of the same belief. To quote B.A. Wortley, "International law, in the absence of a specified treaty obligation, a sovereign state has a right to hand over to another civilised state any criminal, political or otherwise".(132) The Irish members of the Commission argued, secondly, that notice had to be taken of the European Convention on Extradition 1957. Ireland is a contracting party to this Convention and it would be a breach of Ireland's obligations if they acceded to extradition.(133) Thirdly, allusions were made to the procedural complexity of international extradition.

It was argued that this complexity could be considerably increased as a consequence of the strong public feelings and emotions which are generated by efforts to extradite for offences which are in law or in the public mind political offences or offences connected with political offences.(134)

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129. A. Connelly, op.cit., p. 65.

130. Principles of Public International Law (3rd ed.) (Oxford 1979), p. 19.

131. Whiteman, Digest of International Law Vol. 6, p. 853.

132. Wortley, "Political Crime in English Law and in International Law" (1971) 45 B.Y.I.L. 219 at 253.

133. Cmnd. 5627 1974, p. 24.

134. Cmnd. 5627 1974, p. 25.

The United Kingdom members of the Commission challenged these arguments. They argued that the extradition method would not involve a breach of the Constitution of Ireland, nor would it infringe any generally recognised principle of international law and it would not constitute a breach of the Irish government's international obligations. The United Kingdom members argued that international law recognises the right, without imposing the duty, to refuse extradition of such offenders and that whatever be the true extent of the principle, or practice of international law, the practice of exceptions with regard to the enormity or barbarism of the crime justifies an exception (135); terrorists operating in Northern Ireland, whatever their motivation, come within this exception, they alleged. In commenting on Tapley the United Kingdom members stated the case was authority for two propositions, (a) that no rule or principle of international law compels a state to surrender a fugitive offender; and (b) no rule or principle of international law compels a state to withhold surrender of a fugitive political offender. They noted Maguire C.J.'s (136) statement, "If a recognised principle exists forbidding the extradition of political refugees it should be possible to state it in terms sufficiently definite to be applied by a court of law". The United Kingdom members then analysed Article 29.3 which they saw as containing two phrases, "as a guide" and "its relation with other states". They argued that the latter phrase puts on inquiry whether Article 29.3 applies at all to a situation such as the present one under discussion. The words "as a guide" were seen as illuminating the functions of Article 29.3. In conclusion, the United Kingdom members pointed to the Resolution on International Terrorism 24 January 1974 of the Committee of Ministers of the Council of Europe as proof of a changing international attitude in relation to crimes of terrorism. This Resolution stated "that the political motive alleged by the authors of

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135. Ibid., pp. 29-34.

136. (1952) I.R. 77.

certain acts of terrorism should not have as a result that they are neither extradited or punished". In their final submission they emphasised that "The right to refuse extradition is that of the requested state; it may be waived and confers no right on the alleged offender; by waiving the right a state commits no breach of international law since there is no rule or principle which compels a state to grant asylum".(137) The statement emphasises the concept of state supremacy. The individual is in effect possessed of no rights which are worthy of recognition (so the quotation suggests) and the final determination as to whether a person is to be extradited is a matter between states and their respective interests. No consideration is given to the interests of the individual. It is submitted that this position ought to be modified. McGrath suggests that the inability of the two groups of lawyers to reach a satisfactory conclusion indicates not only the complexity of the issues, but more especially the political dimensions of the debate.(138) McCall-Smith and Magee state, "The Irish representative on the Commission framed their objections to extradition in legal terminology, but they were probably disguising a much more fundamental political objective".(139) In essence, the Irish representatives were seeking at the international level to show that a state does not have to send offenders or alleged offenders back to the requesting state. The British authorities held the correct view. Because the Commission was equally divided it was unable to recommend extradition as a means of dealing with the problem. The third proposal was subsequently adopted by the governments of the United Kingdom and the Republic of Ireland.(140) The Commission members were aware of

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137. Cmnd. 5627 1974, p. 40.

138. M. McGrath, op.cit., p. 306.

139. (1975) C.I.R. 200 at p. 219.

140. In Ireland, the Criminal Law (Jurisdiction) Act 1976 and in the United Kingdom, the Criminal Jurisdiction Act 1975.

the inherent difficulties of this method; they emphasised that its effectiveness would depend upon the securing of the requisite evidence from one jurisdiction for a trial in the other.(141) This method was accepted and implemented by the respective governments and is still in effect. The two Acts confer on the courts of Northern Ireland and the Republic of Ireland, respectively, jurisdiction to try fugitive offenders accused of committing serious crimes of violence outside the jurisdiction in which they are apprehended, but within the island of Ireland. The Acts further provide for the taking of evidence on commission in either jurisdiction in connection with a trial conducted in the other.

Both statutes came into force simultaneously on June 1 1976. Very few lawyers and politicians felt it would deal effectively with the problem; this has been proved correct. There have been few prosecutions under this legislation. "The Acts are not in fact practical instruments suitable for routine use. It is simply not feasible for the authorities in one jurisdiction to collate evidence in relation to an offence committed in another".(142)

Connelly concludes by stating that though there is no legal obstacle to Ireland becoming a party to the European Convention on the Suppression of Terrorism, or to her passing restrictive legislation, "there are reasons, many of them not unrelated to Ireland's history, for denying the extradition of politically motivated offenders to the United Kingdom. But the constitution should be removed from this essentially political debate".(143)

## II General Conclusion

Asylum is the basis upon which the concept of non-extradition of political

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141. Commission Report, Ch. IV, pp. 17-22.

142. M. McGrath, op.cit., p. 308.

143. A. Connelly, op.cit., p. 83.

offenders is founded. From its naive, raw expression in the nineteenth century to the present time, one has seen how the concept of the political offence exception has been narrowed down first in English law by the decisions of Schtraks and Cheng most notably and in relation to the Irish conflict, by Littlejohn and Keane. Terrorism has always been objected to by the judiciary (Meunier - anarchists) and at the international level, objection to terrorism has expressed itself in the various hijacking conventions, the Genocide Convention, and most recently and importantly, the European Convention on the Suppression of Terrorism. With these limitations to the undefined concept of an offence of a political character and to the equally elusive understanding of what "terrorism" actually means within a legal framework, the fear is that the rights of the individual are being subordinated to the interests of "free, friendly nations" in their attempts to contain indiscriminate violence. But does the individual have a right to be granted asylum? "The right to refuse extradition is that of the requested state; it may be waived and confers no right on the alleged offender; by waiving the right a state commits no breach of international law since there is no rule or principle which compels a state to grant asylum".(144) There is a connection between the political offence and asylum but they are not necessarily the opposite sides of the same coin. The Irish members of the Law Enforcement Commission of December 21 1973 made this mistake, by seeking at the international level to show that a state does not have to send alleged fugitive offenders back to the requesting state. The right not to be returned can be distinguished from the concept of asylum. Asylum is a state right, not a right which the individual can invoke in self-protection during proceedings for his extradition.

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144. Cmnd. 5627 1974, p. 40.

## CHAPTER FOUR

### THE REFUGEE, ASYLUM and HUMAN RIGHTS

#### Part One - Asylum

In the preceding Chapter we noticed how the narrowing of the political offence exception has led some authors (1) to consider whether the exception has not effectively been removed in all but reality. With this fear comes the worry about the political violation of individual rights, where such traditional protections as the political offence exception have existed (at least in theory at any rate). In this Chapter one will attempt to identify areas which may hold out individual protections. Asylum and the human rights concept will be studied. The importance of the principle of asylum is to be found in the law relating to the status of refugees. At the outset it is best to explain the concepts of asylum; non-refoulement and the definition of a refugee, as these all form the matrix of our study in this Chapter.

#### I Asylum

The Institut de Droit International at its 1951 Bath Session defined asylum as "The protection accorded by a state on its territory or in another place under

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1. On asylum and refugees, see (1) G. Goodwill-Gill, *The Refugee in International Law* (1983) New York; (2) A. Grahl-Madsen, *The Status of Refugees in International Law* (1972) Vol. II, pp. 6, 22, 79 et seq.; (3) M.R. Garcia-Mora, *International Law and Asylum as a Human Right* (1956) Washington; (4) F. Morgenstern, "The Right of Asylum" (1949) 26 *B.Y.I.L.* 327; (5) P. Weiss, "Territorial Asylum" (1966) 6 *Ind. J. Int. L.*, p. 174 and p. 178; (6) S.P. Sinha, *Asylum in International Law* (1971), pp. 73, 156, 279; (7) G. Gilbert, "Asylum; A Change of Direction?: (1983) 32 *I.C.L.Q.*, p. 633; (8) D. Johnson, "Refugees, Departees and Illegal Immigrants" (1980) 9 *Sy. L.Rev.* p. 11; (9) D. Martin, "Large-Scale Migration of Asylum Seekers" (1982) *Am. J.I.L.*, p. 598; (10) C. Van den Wijngaert, *The Political Offence Exception to Extradition* (1980) Kluwer, Netherlands; (11) E.W. Vierdag, "Asylum and Refugees in International Law" (1971) 24 *Neth. Int. L. Rev.* pp. 287-303.

its jurisdiction to an individual who has come to seek it".(2) The debate about asylum is centred around the question of whether the right of asylum is vested in the state absolutely, or whether recent trends in international law have shifted this right, so that it is now a right which the individual can invoke. Hugo Grotius (3) considered the right of asylum as a natural right of the individual and felt it to be the corresponding duty of states to grant asylum on behalf of the international community. In contrast, traditional international law sees the right as one of states to grant at their own discretion. The basis of this, some authors suggest, is the state exercise of territorial sovereignty.

## II The Refugee

The first major statute which deals with the issue of the refugee is the 1951 Convention relating to the Status of Refugees.(4) Article (1) defines the term "refugee" and this definition is still in use, with a slight amendment attached. A refugee is defined "As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it". The 1951 Convention was primarily concerned with the refugee problems consequent upon the ending of the Second World War and the resultant Cold War, east-west difficulty prior to 1951. But this difficulty in

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2. Article 2(1) Resolution, concerning L'asile en droit international public, adopted on September 11 1950. See C. Wijngaert, op.cit., p. 66.
  3. De Jure Belli ac Pacis, Book II Ch. XXI V(1) 1625. See C. Wijngaert, op.cit., p. 66.
  4. Resolution 429(V) General Assembly, December 14 1950 and Geneva July 28 1951, 189 U.N.T.S., p. 137.

terms of date in the 1951 Refugee Convention was remedied by the conclusion of the Protocol Relating to the Status of Refugees at New York on January 3 1967.(5) This Protocol omits the definition found in the 1951 Convention "As a result of events occurring before January 1 1951" and adds the words "As a result of such events". This provision recognises that there have been events since 1951 that have created situations where individuals are persecuted or become stateless. The definition or description of refugee is to facilitate and to justify aid and protection. Thus the definition of a refugee contained in Article 1 is vital in determining who is entitled to the protection and assistance of the United Nations, because it is the lack of protection by their own government which distinguishes refugees from ordinary aliens. Goodwin-Gill points out that the United Nations High Commissioner for Refugees (6) (U.N.H.C.R.) (the main U.N. agency concerned with refugee problems) Statute contains an apparent contradiction. It affirms that the work of the office ought to relate to groups and categories of refugees; yet it proposes a definition of the refugee which is essentially individualistic, requiring a case by case examination of subjective and objective elements. No state has objected to U.N.H.C.R. taking up individual cases as such.(7) Thus Goodwin-Gill states that one can conclude that

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5. G. A. Resolution 2198 (CCI) December 16 1966 entered into force October 4 1967. 97 ratifications (1984) H.R.L.J., :- Algeria, Angola, Argentina, Australia, Austria, Belgium, Benin, Bolivia, Botswana, Brazil, Burkina Faso, Burundi, Cameroon, Canada, Central African Republic, Chad, Chile, China, Columbia, Congo, Costa Rica, Cyprus, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Germany/Federal Republic, Ghana, Greece, Guatemala, Guinea, Guinea-Bissau, Haiti, Holy See, Iceland, Iran, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kenya, Lesotto, Liberia, Liechtenstein, Luxembourg, Mali, Malta, Morocco, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Phillipines, Portugal, Rwanda, Sao Tome and Principe Senegal, Seychelles, Sierra Leone, Samalia, Spain, Sudan, Suriname, Swaziland, Sweden, Switzerland, Tanzania, Togo, Tunisia, Turkey, Uganda, United Kingdom, United States, Uruguay, Yemen, Yugoslavia, Zaire, Zambia, Zimbabwe.

6. Goodwin-Gill, op.cit., supra. N. 1, pp. 129-131.

7. Sadruddin Aga Khan "Legal Problems Relating to Refugees and Displaced Persons" Hague Recueil (1976-I), 331-2.

the class of persons within the mandate of or concern to the U.N.H.C.R. includes (1) those who, having left their country can, on a case by case basis be determined to have a well-founded fear of persecution on certain specified grounds; and (2) those, often large groups or categories or persons, who likewise having crossed an international frontier, can be determined or presumed to be without, or unable to avail themselves of, the protection of the government of their state of origin. This is said to be the broad meaning of the term "refugee" for the purposes of the United Nations. There are thus four elements which Convention refugees are said to possess. (1) They are outside their country of origin; (2) they are unable or unwilling to avail themselves of the protection of that country or to return there; (3) such inability or unwillingness is attributable to a well-founded fear of being persecuted and (4) The persecution feared is based on reasons of race, religion, nationality of a particular social group or political opinion.

Within the 1951 Refugee Convention, certain important safeguards for the individual exist. The most important is contained in Article 33(1) which states that "(1) No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion; (2) The benefit of the present provision may not, however, be claimed by a refugee when there are reasonable grounds for regarding as a danger to the security of the country in which he is or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country". This principle is known as the non-refoulement principle. This is a principle of recent origin. The first reference to the principle is found in an international agreement, contained in Article 3 of the Convention relating to the International Status of Refugees 1933, where the contracting parties undertook not to remove resident

refugees or keep them from their territory, unless dictated by national security or public order.

So much for the preliminary outline. The refugee issue has gained in prominence with the two world wars. Although the concept of asylum pre-dates World War Two, the vast numbers of persons displaced as a result of the war focused attention on the refugee problem. But this focus concerned itself with the problem from an inter-state angle rather than primarily from the point of view of the individual refugee. It was (is) based on the idea that states claimed the right to give sanctuary to persons threatened with unconscionable treatment. In contrast to political offenders, refugees had not usually actively challenged the ruling regime in their countries. They were passive victims of the changing political structure within their countries. The principle grew up that those aliens liable to "persecution" in their home states ought not to be returned there. This new concept has developed into the law of asylum and the law relating to refugees.

### III The Refugee and Asylum

The United Nations High Commissioner for Refugees is the main United Nations agency concerned with refugees. At its 1950 session, the General Assembly formally adopted the statute of the U.N.H.C.R. as an annexe to Resolution 428(V) on December 14 1950. The functions of the U.N.H.C.R. extend to "providing international protection" and "seeking permanent solutions" to the problems of refugees by way of voluntary repatriation or assimilation in new national communities".(8) The Statute also provides that "the work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of

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8. Statute, para. 1; Goodwin-Gill, *The Refugee in International Law* (1983) (New York), p. 130.

refugees".(9) The function considered to be the most important is the provision of international protection because without protection by the U.N.H.C.R. to intervene to secure the admission of refugees, there can be no possibility of finding lasting solutions. The U.N.H.C.R. statute prescribes the relationship of the High Commissioner with the General Assembly and the Economic and Social Council (E.C.O.S.O.C.) identifies ways in which the High Commissioner is to provide for protection and financing of any constructive schemes.(10) The specific type of protection envisaged includes promoting the conclusion of international conventions for the protection of refugees, supervising their application and proposing amendments to them; promoting through special agreements with governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection, as well as promoting the admission of refugees.

In relation to the General Assembly and to general international organs, the U.N.H.C.R. was set up by the General Assembly as a subsidiary organ under Article 22 of the U.N. Charter. The relationship of the two organisations is clarified in the statute which states that the U.N.H.C.R. acts "under the authority of the General Assembly" (11) and that it shall "follow policy directives given by the General Assembly or the Economic and Social Council". (12). The Statute also states that the U.N.H.C.R. "shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine".(13) The High Commissioner has to report to the

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9. Ibid., para. 2. But para. 3 obliges the High Commissioner to follow policy directives of the General Assembly and the Economic and Social Council.

10. Statute, para. 8.

11. Ibid., para. 3.

12. Ibid., para. 4.

13. Ibid., para. 9.

General Assembly annually, through the Economic and Social Council and such report has to be considered as a separate item on the agenda of the General Assembly.(14) The High Commissioner is also called upon by the Statute, in cases of difficulty, to seek the opinion of the Advisory Committee on Refugees.(15) This kind of committee was first established in 1951 and replaced four years later by the U.N. Refugee Fund Executive Committee. This organisation was then replaced by the Executive Committee of the High Commissioner's Programme, at the instigation of the General Assembly. This was set up by the Economic and Social Council in 1958. Its present membership is forty-one, after the initial number of twenty-four states. The Committee's terms of reference include advising the High Commissioner, on request, in the exercise of the Office's statutory functions and advising on the appropriateness of providing international assistance through the Office in order to solve any specific refugee problems. In 1975, the Executive Committee set up a Sub-committee of the whole on International Protection.(16) This Sub-committee is said to make a continuing contribution to the development and strengthening of refugee law.(17)

The specific value of these organisations is that it involves the participation of states at varying levels in the international institutions protecting refugees. "The practice of such organisations is relevant in assessing the standing of both the U.N.H.C.R. and of the rules benefitting refugees in general international law".(18)

Although the 1951 Convention defines refugees and provides for certain

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14. Ibid., para. 11.
15. Statute, para. 1.
16. Report of the Executive Committee 26th Session 1975. U.N. Doc. A/AC 96/521, para. 69(h).
17. Goodwin-Gill, op.cit., p. 132.
18. Ibid.

standards of treatment to be accorded to refugees, it says nothing about procedures for determining refugee status and leaves to states the choice of means as to implementation at national level. Unless an alien can prove a well-founded fear of persecution, he is not a refugee and cannot qualify for asylum. Goodwin-Gill suggests that a decision on the well-foundedness or not of a fear of persecution is essentially an essay in hypothesis, an attempt to prophesy what might happen to the applicant in the future if returned to his or her country of origin.<sup>(19)</sup> The refugee need not have fled by reason of fear of persecution, nor that persecution should have actually occurred. The persecution could have arisen whilst the individual or group were abroad. Subjective and objective factors have to be taken into account. If the applicant's statements in regard to the fear are consistent and credible, then little more can be required in way of formal proof. The next stage is to determine whether the subjective fear is well-founded; whether there are sufficient facts to permit the finding that the applicant would face a serious possibility of persecution. The Convention provides five relevant grounds of persecution; race, religion, nationality, membership of a particular social group, political opinion. ~~Fear~~ of persecution and lack of protection are considered to be interrelated elements. Those who are persecuted do not enjoy the protection of their country of origin and conversely, any evidence of lack of protection on either the internal or external level may create a presumption of persecution and the well-foundedness of any fear. Though persecution includes the threat of deprivation of life and physical freedom, measures such as the imposition of serious economic disadvantage, denial of access to employment or restrictions on freedoms normally guaranteed in a democratic society, such as freedom of speech may suffice. In his article <sup>(20)</sup>

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19. Goodwin-Gill, op.cit., p. 22.

20. G.S. Gilbert, "Asylum; A Change of Direction" (1983) 32 I.C.L.Q. pp. 633-650.

G. Gilbert considers the elements which constitute or can amount to persecution.(21) He correctly points out that evidentiary difficulties will arise when the refugee tries to prove the fear is well-founded because it is only his testimony that will be provided. The state of origin is not likely to provide records to back up his claims. (Note, Canada has recently announced changes in the regulations that will give a presumption that the refugee is telling the truth unless there is clear evidence to the contrary - Toronto Star February 21 1982, p. A2 col. 1).(22) He suggests that refugees basing their claims on social or political persecution are going to have to show some personal connections such as leadership of a political party or previous arrests. In Re Inzunza and the Minister of Employment and Immigration (1979) (23), a Canadian case, it was held that the Immigration Board ought to look at whether the controlling government considers his activity to be political, not whether the Board thinks it is. Also, previous treatment as a political activist, even if completely unfounded, should be enough to establish a prima facie case of fear of persecution.

The Universal Declaration of Human Rights (24) originally intended to provide for an individual right to asylum. According to the original text, everyone would have "the right to seek and to be granted asylum in other countries from persecution".(25) But the United Kingdom delegation vigorously opposed this provision and thus it was reduced to "the right to seek and to enjoy asylum."<sup>7</sup> Article 14 of the U.N. Universal Declaration of Human Rights thus

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21. Ibid., pp. 644-646.

22. Ibid., p. 645.

23. (1979) 103 D.L.R. (3d) 105 at p. 109 (F.C.A.) See G. Gilbert, op.cit., p. 646.

24. December 10 1948 U.N. Doc. A/Res. 217 (III).

25. U.N. Doc. E/CN. 4/713 p. 8 for activities of the various organs of the U.N. in connection with the right of territorial asylum.

reads, "(1) Everyone has a right to seek asylum and enjoy in other countries asylum from persecution; (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations" Thus the traditional view that the right of asylum belonged to states was reinforced. Sir H. Lauterpacht characterised the formulation of Article 14 as "artificial to the point of flippancy".(26) Another author considers the Universal Declaration as "a mere statement of pious hope as to the standards of conduct that might one day be achieved".(27) The problem with the so-called right of asylum lies in the refusal of states to accept an obligation to grant asylum in the sense of residence and lasting protection against the jurisdiction of another and the element of protection, particularly by residence, granted to a foreign national against the exercise of jurisdiction by another state, is the whole basis of the concept of asylum.

As far as international treaties are concerned, only the 1948 American Declaration of Human Rights and the 1969 American Convention on Human Rights provide for an individual right to asylum.(28) But Gilbert suggests that the 1967 Protocol is the document which has "given vent to the wind of change blowing through the domestic policy in this area".(29) Before returning to Gilbert's useful discussion on the effect the 1967 Protocol has had on domestic

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26. H. Lauterpacht, "The Universal Declaration of Human Rights (1948) 25 B.Y.I.L. 374 L.
27. Green, "The Right of Asylum in International Law (Inaugural lecture at the University of Malaya, 1961).
28. The American Declaration of the Rights and Duties of Man Art. XXVII (1948) 43 Am. J. Int. L., p. 133 (supp. 1949). The American Convention on Human Rights Art. 22(7) (1969) 9 I.L.M., p. 673. "Everyone has the right to seek and be granted asylum in the event he is being pursued for political offences or related common crimes".
29. Gilbert, op.cit., p. 634.

immigration legislation, there are important qualifications at the international level which must be referred to, because these have the effect of limiting the right of states to refuse asylum. These can also be seen as important safeguards for the individual. Articles 31-34 of the Refugee Convention contain the safeguards. Article 31 states that contracting states ought not to impose penalties on account of the illegal entry or presence of refugees who have come directly from a territory where their life or freedom has been threatened in the manner prescribed by Article 1, as long as they go straight to the relevant authorities and show good cause for their illegal entry. Article 32 provides that contracting states will not expel a refugee lawfully in their territory save on grounds of national security or public order. Article 34 states that the contracting state in which the refugee seeks asylum must make such provisions as far as is possible, to help with the assimilation and potential naturalisation of refugees. However Article 33(1) is the most important provision; the non-refoulement principle. As far as Goodwin-Gill is concerned, "There is substantial, if not conclusive authority that the principle is binding on all states, independently of specific assent. State practice before 1951 is, at least, equivocal as to whether in that year, Article 33 of the Convention reflected or crystallised a rule of customary international law. State practice since then, however, is persuasive evidence of the concretisation of a customary rule, even in the absence of any formal judicial pronouncement".(30)

This belief that Article 33 of the Convention is a rule of customary international law has been extensively debated by international law authors. Historically, Article 33(1) is the result of an international compromise as the final text is a substantially weakened version of the originally intended formulation. Whereas the principle of non-refoulement as it was formulated in the

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30. Goodwin-Gill, op.cit., p. 103.

draft also applied to the admission of refugees at the border (31) and to extradition, these two words were removed from the text during the discussions. Thus the rule of non-refoulement in principle only applies to expulsion, not to admission and extradition.(32) But some writers suggest that the rule also applies to admission and extradition since it is formulated broadly enough so as to encompass also admission and extradition.(33) Wijngaert shares this opinion because, she states, "the humanitarian purpose of this rule could be totally circumvented if a person who cannot be expelled, according to the principle of non-refoulement, would still be liable to extradition. In such cases, extradition would amount to a 'disguised expulsion'".(34)

As alluded to above, Goodwin-Gill's belief is that the non-refoulement principle has become a customary rule of international law and is thus binding upon states which have not ratified the Convention Relating to the Status of Refugees. He is supported in this contention by some other eminent authors.(35) But other authorities in the international law arena do not consider the principle has achieved the status of a customary rule of international law.(36) Wijngaert for her part suggests that the discussions with regard to this question are partly irrelevant because of the lack of enforcement machineries.(37) She

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31. S. Sinha, op.cit., supra. N. 1, p. 110; Grahl-Madsen, op.cit., Vol II, p. 94, et seq. (1972).
  32. S. Sinha, Ibid.; Grahl-Madsen, op.cit., supra. N. 1.
  33. P. Weiss, "The U.N. Declaration on Territorial Asylum" (1969) 7 Can. Y.I.L., p. 143; M.Ch. Bassiouni, International Extradition and World Public Order (1974), p. 102.
  34. C. Van den Wijngaert, op.cit., p. 75.
  35. M.Ch. Bassiouni, op.cit.; Th. Vogler, Auslieferung und Grundgesetz (1970), pp. 215-223.
  36. Grahl-Madsen, op.cit., p. 98; S. Sinha, op.cit., p. 110.
  37. Op.cit., p. 76.

considers it to be of more importance to emphasise the humanitarian principle which underlies the rule of non-refoulement by pointing out that it would be inhuman to return a person to a country where his life or liberty would be seriously jeopardised for purely subjective reasons such as race, religion, nationality or membership of a particular social group.<sup>(38)</sup> She assumes that this was the opinion of the drafters of the Refugee Convention. But she admits that from a legal point of view, the least that one can say is that "states which have ratified the Convention are legally bound to comply with the principle of non-refoulement". Non-refoulement is limited in two ways by the Refugee Convention. Article 1(F) provides that the provisions of the Convention "shall not apply to any person with respect to whom there are serious reasons for considering that (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes; (b) He has committed a serious non-political crime outside of the country of refuge prior to his admission to that country as a refugee; (c) He has been guilty of acts contrary to the purposes and principles of the U.N."

Article 33(2) is the other provision. The difference between the two provisions is that Article 1(F) stipulates the conditions for the granting of the status of political refugees, whereas Article 33(2) refers to the withdrawal of the same status with respect to persons who have already been recognised as political refugees. But in applying the two Articles, the same practical consequences will occur; the alien can be returned to the state where his life or liberty is jeopardised on account of race, religion, nationality or membership of a particular social group. A point worthy of notice is that the two provisions do not require proof; derogation from the principle of non-refoulement is justified as soon as there are "reasonable grounds" to believe that the person

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38. Ibid., p. 76.

concerned has committed one of the facts enumerated, the proof need not be furnished. The dangers to the individual or group is obvious here, and as Wijngaert states, the fact that a person is alleged to have committed serious crimes ought not to result in the denial of the protection of non-refoulement, especially if there is no proof that he has committed the crimes. Even though no states today claim any general right to return refugees or bona fide asylum seekers to a territory in which they may face persecution or danger to life or limb, the attitude of states to the principle is sometimes uncertain. The main basis by which states will claim not to be bound by the obligation will normally rest on the grounds of threats to national security. As an example of state practice in this area one can point to the United States treatment of Cuban refugees. In 1980, following the arrival of some 125,000 Cuban asylum seekers in the United States, the U.N.H.C.R. was requested by the authorities, inter alia, to advise on asylum applications which were likely to be refused on account of the applicant's criminal background.(39) The size of the flux made individual case by case assessment difficult and it was later decided to accord the majority interim status in anticipation of their situation being regularised by special legislation.(40) Suspected criminals, however, were examined in a joint U.N.H.C.R./State Department exercise. In order to promote consistent decisions, the U.N.H.C.R. proposed that, in the absence of any political factors, a presumption of the serious crime might be considered as raised by evidence of commission of any of the following offences; homicide, rape, child molesting, wounding, arson, drugs traffic and armed robbery. (The evidence in question was provided by the asylum seekers themselves in interviews with United States officials). However, that presumption should be capable of rebuttal by evidence

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39. Evans, "Observations on the Practice of Territorial Asylum in the United States" (1962) 56 Am. J.I. L. p. 148; 19 I.L.M. 1296.

40. "Cuban-Haitian Arrivals in United States Current Policy" in No. 193, June 20 1980.

of mitigating factors. The elements were; minority of the offender; parole; a lapse of five years since conviction or completion of sentence; general good character; offender was merely accomplice; other circumstances surrounding commission of the offence, such as provocation and self-defence.(41) But convicted felons are usually excluded (Fernandez v. Williamson).(42) These criteria are potentially of general value in the interpretation of the Convention and the Statute, "bearing in mind that the objective of such provisions is to obtain a humanitarian balance between a potential threat to the community of refuge and the interest of the individual who has a well-founded fear of persecution".(43)

The area where non-refoulement and asylum meet without much dispute is usually found when the state is called upon to determine the position of a single refugee. Naturally the burden of the state (or more accurately the pressure) to grant asylum is not likely to be magnified by media attention, unless the individual is a famous person, for example a Russian dissident from the world of music, literature or science. However specific problems arise when the refugees are large in numbers and continuous over a number of years. The reasons for recent large-scale population movements are mainly of two types; wars and economic hardship. (Asia and Ugandan Asians of East Africa in particular). The difficulties attendant to such cases of mass influx are based not just on the sheer size of

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41. See Goodwin-Gill, op.cit., pp. 62-63. "There was plenty of evidence in statements by convicts from different gaols that an incentive to leave Cuba had been the threat by officials of a further term of imprisonment. Others, particularly former convicts, were threatened with up to four years' imprisonment under Cuba's Ley de Peligrosidad, while some were issued with passports on simple production of their release certificates at local police stations. The greater part of the case load provided few problems, in that the commission of serious crimes were clearly indicated". Goodwin-Gill, op.cit., p. 63.

42. Slip Opinion, December 31 1980 (D.C. Kansas).

43. Goodwin-Gill, op.cit., p. 63.

the numbers involved, but the cross-cultural and potentially serious political problems that can arise. Neighbouring states of Africa can often bear no similarity in politics or social culture to one another and the problem is further complicated where race is in question. (Witness the Ugandan Asians and their attempts to enter the United Kingdom in the early 1970's). The question of large-scale refugee problems highlights the essentially individualistic-orientated approach of the 1951 Convention. The dilemma for states is that, while they might be prepared to admit the non-refoulement principle in the individual case, where very large numbers of persons are involved, to accept an obligation not to send them back to their state of nationality, can impose undesirable financial (Pakistan and the Afghans), security (Thailand and the Cambodians), social (Malaysia and the Chinese Vietnamese) problems; non-refoulement becomes tantamount to a right of asylum, which states will not accept. The fact of mass influx is the wedge which has driven states away from accepting the concept of a right of asylum. The Indo-China exodus of the mid-1970's is illustrative of the issues involved. This episode caused new efforts to be made to deal with the issue. Some commentators are sceptical of the amount of commitment which the various participants have brought to this arena in terms of attempting a positive solution to the problem. In his article (44) Johnson concentrates on the effect the Vietnamese boat people had on the Australian state. Australian commentators of which Johnson is one, suggest that the world has not really distanced itself from the European centred approach where the individual was the main concern. Australia, in 1979 and 1980, urged the Executive Committee of the High Commissioner's programme, to recognise and elaborate a concept of "temporary refuge", an intermediate level of protection appropriate to large-scale influxes. Australia believed that states were

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44. D. Johnson, "Refugees, Departees and Illegal Immigrants" (1980) 9 Sy.L. Rev. See also, Martin, "Large-Scale Migration of Asylum Seekers" (1982) Am. J.I.L., p. 598.

reluctant to allow large-scale influxes because they felt admission was tantamount to a grant of asylum in the strongest sense of the word. Thus Australia sought clarification of the receiving states immediate obligations and burden sharing at the international level in order to reduce the tensions attendant on mass flux.

However, other states felt that temporary refuge would erode present practices on asylum and would undermine the principle of non-refoulement; it was a "new concept" and states had no need of it. In fact, temporary refuge is not a new practice according to various commentators on the subject. Only the terminology is different. It is an advantage in that the fact of the presence of the refugees permits the possibility of local integration of some or all of them, and allows for protection for them, whilst a durable solution is sought. This way minimum rights and standards of treatment can be secured. Non-refoulement however, is the principle which allows admission and awakens the international community to a sense of awareness and attempts to find solutions. Solutions in cases of mass exodus will vary but they include repatriation and resettlement which require fundamentally different provisions.

In order to see the effect that the Refugee Convention, the Protocol of 1967 and the principle of non-refoulement have had on states, one has to turn to domestic legislation. A treaty generally creates no enforceable rights for an individual. It merely places on the party state the burden of securing domestic legislation, compliance of which may involve the enactment of giving rights to individuals. To see the change of direction, if any, that has occurred one has to turn to national approaches.<sup>(45)</sup> As far as the United Kingdom is concerned, entry and residence within the United Kingdom is governed by the Immigration Act 1971 and the rules laid down in this legislation. The revised rules which

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45. Gilbert, "Asylum; A Change of Direction?" (1983) 32 I.C.L.Q., 633.

entered into force on March 1 1980 widened the ambit of the refugee entrance requirements to bring them into line with the Convention and Protocol. Article 16 is said to be all-pervasive. "Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the status of refugees" (Cmnd. 9171 and Cmnd. 3906). Nothing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments". The provision of the rules which are of most importance to the refugee are said to be Articles 73, 153 and 165. They deal with the right to enter the United Kingdom and deportation if he is already residing therein.

#### Article 73

"Special considerations arise where the only country to which a person could be removed is one to which he is unwilling to go owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Any case in which it appears to the immigration officer as a result of a claim or information given by the person seeking entry at a port that he might fall within the terms of this provision is to be referred to the Home Office for decision regardless of any grounds set out in any provision of these rules which may appear to justify refusal of leave to enter. Leave to enter will not be refused if removal would be contrary to the provisions of the Convention and the Protocol relating to the status of refugees".

Though this provision might on the surface seem very comforting to a refugee, the reality of it may (and usually is) otherwise. What constitutes a "social group" is of particular interest where United Kingdom law is concerned. Gilbert (46) gives the example of a situation where the concept might apply; he

refers to a successful left-wing coup subsequent to which the propertied classes flee. If they did not express political views in their state of origin they would not come within the "political opinion" qualification".(47) But Gilbert suggests that they could be persecuted because of their membership of a particular social group. They would be economic refugees.

#### Article 165

This concerns the refugee who is already in the United Kingdom and these rules relate to deportation. Article 165 states that a deportation order will not be made against any person if the only country to which one could send such a person would persecute him. This is expressed to be in order to keep the United Kingdom in line with the Convention and Protocol. It is this provision that the Iranian groups facing deportation from the United Kingdom seek to use. They supported by and large the propertied or at any rate, pro-Shah, regime in Iran. But with the revolutionary takeover by the religious fundamentalists, they fear persecution if returned to Iran. The Home Office argument is that if they have not been back to Iran since the revolution, how can their fear of persecution be well-founded?

In essence this is an area where the strength of the non-refoulement principle can be tested. Even if there is no specific proof that they will be persecuted, humanitarian considerations ought to be taken into account (the basis of non-refoulement) and the benefit of the doubt given to these people. This is particularly so where the Iranians and other such groups have integrated themselves into the community successfully.

#### IV The United States

Regarding the United States, the Protocol entered into force on November 1

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47. R v. Governor of Pentonville Prison ex parte Teja (1971) 2 All E.R. 11 at p. 22.

1968.(48) Thus in 1968 the Protocol became part of the domestic law of the United States. The existing domestic legislation on the question of deportation was discretionary and only applied to "deportable aliens"; these are understood to be those aliens already in the United States either legally or illegally. "Excludable aliens" were those aliens already in the United States but who had been refused entry, i.e., those refugees from persecution who were permitted to stay whilst their cases were considered. These aliens were not allowed the protection of the domestic legislation, even though they were within the ambit of the Protocol. This conflict needed resolution.

The Refugee Act 1980 (49) made amendments with the aim of resolving the conflict. The Immigration and Naturalisation Act 1952 is considered to be one of America's worst laws and the Refugee Act 1980 had the effect of amending its provisions as regards refugees. Gilbert suggests that because the 1980 Act was passed at approximately the same time as the United Kingdom was issuing its new immigration rules, "this almost simultaneous change of approach may well pave the way for universal recognition of the right to asylum".(50) Under section 203(e) of the Refugee Act 1980, 8 U.S.C., section 1253(h) of the Immigration and Naturalisation Act 1952 is reformed so as to comply with the Protocol. It now applies to all refugees who are de facto in the United States. The discretion to deport refugees who qualify for admission under the prescribed tests is also removed. In the Matter of McMullen (51) the Board of Immigration Appeals held that relief under section 1253(h) is mandatory for an eligible alien, unlike asylum; (1) The Attorney-General shall not deport or return any to a country if

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48. 19 U.S.T. 6223; T.I.A.S. No. 6577.

49. P.L. 96-212; 94 Stat. 107.

50. Gilbert, op.cit., p. 642.

51. 1980 Bd. Imm. App. I. & N. Interim Dec. No. 2831; 658 F.2d. 1312 (9th Cir. 1981).

the Attorney-General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership of a particular social group or political opinion.(52)

In the United States an individual can qualify as a refugee but as regards asylum, this may still be refused on two principle grounds; firstly, that the alien has been involved in the persecution of others on grounds of race, religion, etc.(53) The individual has acted contrary to the principles of the United Nations and cannot avail himself of humanitarian measures. Secondly, as stated previously, if the Attorney-General considers them to be a danger to the security of the United States.(54) However, in a recent case (55), a high burden was put on the individual to prove the possibility of persecution, if returned. The facts were that the respondent alien in 1977 was ordered to surrender to deportation. In 1977 he sought relief under section 243(h) of the Immigration and Naturalisation Act 1952 which then authorised the Attorney-General to withhold deportation of an alien upon finding that the alien "would be subject to persecution" in the country to which he would be deported. The case went to several appeals. Meanwhile the United States had acceded to Article 33 of the 1968 United Nations Protocol Relating to the Status of Refugees, and enacted the Refugee Act 1980. The respondent thus argued that he no longer had the burden of showing "a clear probability that he would suffer persecution", but simply a "well-founded fear of persecution", thus bringing domestic law into line with the international standard. But the Supreme Court rejected this assertion and stated that the applicant still has to show that he is more likely than not to

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52. 8 U.S.C. section 1253(h)(1).

53. 8 U.S.C. section 1253(h)(2)(a).

54. 8 U.S.C. section 1253(h)(2)(d).

55. The Immigration and Naturalisation Service v. Stevic 104 S. Crt. 2489; 81 L. Ed. 2d. 321; 52 U.S.L.W. 4724.

suffer persecution on one of the specified grounds. The Refugee Act 1980 did not alter this position. The interpretation adopted by the immigration authorities prior to 1980 was still to be maintained.

As a conclusion to this chapter on asylum one notes that Goodwin-Gill concludes with the assertion that "the individual has no right to be granted asylum". "The state has discretion whether to exercise its right, as to whom it will favour, as to the form and content of the asylum to be granted. To pursue an ideal of asylum in the sense of an obligation imposed on states to accord lasting solutions, with or without a correlative right of the individual, is currently a vain task. Asylum remains an institution which operates between subjects of international law. In an era of mass exodus, of actual or perceived threats to national security, states are not prepared to accept an obligation without determinable content or dimension".(56) Gilbert reaches a different conclusion. He admits that granting asylum is a "delicate balancing operation". Who is a refugee and what amounts to persecution will always involve a complex of objective and subjective factors. However he continues, "What is true is that the interest is vested in the individual as a subject of international law. Further, the Protocol and domestic legislation based on it ought to lead to a situation where if an individual qualifies as a refugee he will be given asylum. This is a great advance. Typically, in the closely weighted case, a lot will depend on what the refugee has to offer and the state of refuge's opinion on the state of origin".(57) Perhaps Goodwin-Gill was referring to mass exoduses in his conclusions; Gilbert's arguments were expressed in the context of individual refugees. It is submitted that the real solution lies in the concluding words of Johnson (58), where he argues that countries where refugees

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56. Goodwin-Gill, op.cit., p. 121.

57. Gilbert, op.cit., p.. 650.

58. Johnson, op.cit.

first arrive can only be expected to adhere to the 1951 Refugee Convention and to the 1967 Protocol and to carry out the provisions of these instruments if they can be assured that they will not bear the burden alone. Burden sharing, i.e., re-settling of refugees in various countries, may be the answer albeit an idealistic one.

Asylum is a state right in international law and states show no inclination to depart from this position. Non-refoulement is an important protection for individuals, short of asylum. The only way such a protection can be made effective is by national proceedings and sympathetic interpretation of the international standard by domestic decision makers. However making non-refoulement more effective makes it tantamount to a right of asylum in many cases which states are not prepared to accept; especially where mass refugees are concerned. Therefore there is a movement to burden sharing with states other than the state of first refuge accepting some responsibility for refugees. But this is an inter-state process.

## Part Two - Human Rights

In the domain of human rights, one finds the most powerful rebuttal to the positivist argument that individuals are merely objects of international law and not subjects; that they do not have any rights at the international level. The focus on human rights as a principle inherent within international law was rapidly developed as a direct consequence of the Second World War. "A new legal consciousness has emerged in which the human being has occupied a more central position".(1) Although there has always been a recognition of certain standards by which human beings ought to be treated, certain acts and forms of activity, sparked off the international recognition that there ought to be a universal system by which states could be monitored within the international arena as regards treatment of individuals.

### I Historical Review

Two factors are said to have completely changed the status of individuals under international law after the Second World War.(2) These two factors are related to the actions of the Nazis and the attendant cruelty which they

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1. C. Van den Wijngaert, op.cit., p. 64.  
See generally, (1) A.H. Robertson, *Human Rights in the World* (1982); A.H. Robertson, *Human Rights in Europe* (1977); (2) P. Siegart, *The International Law of Human Rights* (1982); (3) C. Van den Wijngaert, op.cit., pp. 64-66 and p. 89 et seq; (4) I. Brownlie, *Principles of Public International Law*, pp. 552-599; (5) L.B. Sohn "The New International Law; Protection of the Rights of Individuals rather than State" (1982) 32 Am. U.L.Rev. pp. 1-65; (6) R. Higgins, "Conceptual Thinking about the Individual in International Law" (1978) 4 B.J.I.S. pp. 1-19 at p. 11 et seq.; (7) A. Lester, "Fundamental Rights; the United Kingdom Isolated?" (1984) P.L., pp. 46-72; (8) A. Drzemczewski, "The Sui Generis Nature of the European Convention on Human Rights" (1980) 29 I.C.L.O.; (9) P.T. Muchlinski, "The Status of the Individual under the European Convention on Human Rights and Contemporary International Law" (1985) 34 I.C.L.O., p. 376; (10) P. Duffy, "Procedural Innovations at the European Court of Human Rights" (1983) P.L., p. 32.
  2. L.B. Sohn, "The New International Law; Protection of the Rights of Individuals rather than States" (1982) 32 Am. U.L.Rev. pp. 1-65.

initiated. The Nuremberg Trials as well as the Tokyo Trials were the first factor whilst the second was the determination at international level never to let loose again any such mephistophelean evil and the consequential crimes against humanity. The attempt by those indicted at the International Military Tribunal at Nuremberg, on November 14 1946 and the International Military Tribunal for the Far East, Tokyo, on February 15 1946 to November 12 1948, to argue that they acted on behalf of the state or that they were merely following orders of the superiors, were rejected. But the Tribunals pointed out that international law was not concerned only with the actions of sovereign states, but "imposed duties and liabilities upon individuals as well as upon states".(3)

Article 1 of the United Nations Charter states that one of the purposes of the United Nations is "To co-operate in promoting respect for human rights and fundamental freedoms for all". These provisions considered to be the most important where human rights are concerned are contained in Articles 55 and 56. Article 55(C) provides that the United Nations shall promote "Universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". Article 56 states "All members pledge themselves to take joint and separate action in co-operation with the organisation of the achievement of purpose set forth in Article 55". The Charter was signed in June 1945 and entered into force on October 24 of the same year.

The Economic and Social Council was entrusted with the task of establishing a Commission on Human Rights which would prepare an International Bill of Rights. The Commission was established in 1946.(4) Two years later the first document

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3. The Nurnberg Trial 6 F.R.D. 69, 110 (1946).

4. E.S.C. Res. (5) 1 U.N. E.S.C.O.R. Supp. (No. 1) at p. 163, U.N. Doc. E/1 (1946).

was ready; this was the Universal Declaration of Human Rights.(5) This was approved by the General Assembly on December 10 1948 after some amendments with 48 votes in favour, none against and 8 abstentions (the Soviet Bloc, South Africa and Saudi Arabia).

When the Commission on Human Rights finished the Universal Declaration, it began preparing for the other part of the International Bill of Rights, a Convention containing precise obligations that would be binding on the state parties. The initial work of the Commission concentrated on civil and political rights, but in 1950 after consultation with the General Assembly, it was decided that economic, social and cultural rights should be included.(6) However two separate covenants were then decided upon, but with as many similar provisions as possible and also with both covenants including an article on "the right of all people and nations to self-determination".(7) What caused the most difficulty to the Commission were the articles on measures of implementation, rather than the narrative provisions. This was because the views of its members were greatly divided on the basic question of how far governments could be expected to accept a system of international control with respect to their treatment of their own nationals. The Commission eventually decided in favour of the establishment of a permanent Court of Human Rights to consider complaints of violations of human rights on an inter-state basis. But it rejected the possibility of considering complaints by non-governmental organisations and petitions by individuals.(8)

In essence, until 1945 international law considered that the way in which a

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5. Approved December 1 1948 G.A. Res. 217A, U.N. Doc. A/810 at p. 56 (1948).
  6. Res. 421(V) December 4 1950.
  7. Res. 543(VI) and 545(VI) February 5 1952.
  8. L.B. Sohn, "A Short History of U.N. Documents on Human Rights", in The United Nations and Human Rights 18th Report of the Commission to study the Organisation of Peace, New York 1968, pp. 39-186 at pp. 51-52.

state treated its own nationals was a question within its own jurisdiction and competence. But this belief has been altering with the passage of time and it is now argued that where states have accepted obligations in international law, the unfettered rule of national sovereignty no longer applies.(9) This view is substantiated by the Tunis-Morocco Nationality Decrees Case (10). The Advisory Opinion given by the Permanent Court was that "whether a matter is or is not within the domestic jurisdiction of a state is essentially a relative question; it depends on the development of international relations. "In a matter which, like that of nationality, is not, in principle regulated by international law, the right of a state to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other states. In such cases, jurisdiction which, in principle, belongs solely to the state is limited by rules of international law".

In 1966, the Third Committee of the General Assembly agreed to the establishment of a Human Rights Committee with its members elected by the states parties instead of by the International Court of Justice, as had been proposed by the Commission. Concerning the Covenant on Economic, Social and Cultural Rights, the Committee retained the system of reports by contracting parties to the Economic and Social Council, on the basis of which the Council may adopt recommendations "of a good nature", i.e., not referring to particular situations or even particular states".(11) Where the Covenant on Civil and Political Rights was concerned, the Committee decided in favour of a double system of implementation, i.e., a compulsory system of reporting to the new Human Rights Committee and an optional system of fact-finding and conciliation which would

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9. A. Robertson, *Human Rights in the World* (1982), p. 31.

10. (1923) P.C.I.J. Rep. Series B, No. 4.

11. L.B. Sohn, op.cit., pp. 163-164. Article 21.

apply only in relation to states which had expressly agreed to this procedure. The Covenants were finally approved unanimously by the General Assembly on December 16 1966. They required thirty-five ratifications.(12) The reporting procedure is the principal measure of implementation as regards the Covenant on Civil and Political Rights. States party to the Covenant submit reports which are then examined by the Human Rights Committee. These reports are meant to show the extent to which states have complied with their international obligations.

Importantly, the form and contents of the reports are divided into two parts; the first part has to describe the general legal framework within which the civil and political rights are protected, including information as to whether they are protected in the constitution or by a separate Bill of Rights, whether the provisions of the Covenant are directly enforceable in internal law, and what remedies are available to an individual who thinks his rights have been violated. The second part should deal with the legislative, administrative or other measures in force in regard to each right and include information about restrictions or limitations on their exercise.(13) Paragraph 4 of Article 40 deals with the powers and procedure of the Committee when it has received the report of states parties. The Committee firstly studies the reports; secondly draws up its own report "and such general comments as it may consider appropriate". These are then transmitted to the states parties. The Committee, thirdly, may also transmit these comments to the Economic and Social Council together with the reports of the states parties. In the next stage, parties may

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12. January 3 1976 G.A. Res. 2200A 21 U.N. G.A. OR. Supp. (No. 16) at 49 U.N. U.N. Doc. A/6316 (1966). As regards the Covenant on Civil and Political Rights, entered into force March 23 1976 G.A. Res. 2200A 21 U.N. G.A. OR. Supp. (No. 16) at 52 U.N. Doc. A/6316 (1966). At the time of writing, E.C.O.S.O.C. has 83 ratifications, I.C.C.P.R. has 80 ratifications.

13. A.Robertson, Human Rights in the World, p. 24 et seq.

submit to the Committee their observations on the latter's comments on their reports. By Article 45, the Committee is then required to submit an annual report on its activities through E.C.O.S.O.C. to the General Assembly.

As has been put forward, the main deficiency of these procedures is the fact that the Committee can only make general comments. Nor are the states concerned required to take any action on the comments made by the Committee on their reports. They may submit their observations on any comments that may be made but they may ignore them completely. Thus the "compulsory" process under the Covenant is an inter-state one with no standing for an aggrieved individual.

In her article (14) D. Fischer assesses the effectiveness of the reporting system as it has evolved in the Committee's first five years. She notes that the disparate conceptions of the Committee's role have divided the members on the meaning of "its report" and "general comments" right from the start. Some members felt that Article 40(4) required the Committee to prepare a report on each report submitted by a state party; thus the reporting function was seen simply as a means to an end, since the parties' reports are intended to enable the Committee to determine whether states are in fact giving effect to the rights recognised in the Covenant. The other view was that the reports referred to do not differ from the annual report required under Article 45. Most importantly, according to this argument, the Committee is not called upon to make an appraisal or to determine whether a given state has fulfilled its obligations. The adherents of the first view felt that the Committee could make comments on a particular state provided they were general in character, i.e., that they did not relate to named individuals. The second opposing view was that the "general comments" provision precluded recommendation to particular states. The

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14. D. Fischer, "Reporting under the Covenant on Civil and Political Rights; the First Five Years of the Human Rights Committee" (1982) 76 Am. J. I. L., p. 142.

arguments put forward in the first view were those of the Western European members of the Committee whilst the arguments of the Eastern Europeans were encompassed in the second view. By the 11th Session (October 1980) a major compromise was reached. There was agreement to proceed with the adoption of non-country-specific comments in exchange for the possibility of further consideration of issuing separate Committee reports on each state report.

Fisher (15) correctly notes that the compromise reached "amounts to one step backward and two steps forward. The Committee is no closer than it was when the issue first arose to making specific recommendations on the law and practice of the states parties". However Fischer notes that the first efforts of the Committee "are not without merit" (16), despite the doubt about the efficacy of non-country-specific general comments. She hopes that future general comments will be addressed increasingly to the application and content of specific articles of the Covenant. The substantive provisions of the Covenant are designed to set a minimum standard. Although the Committee is divided on the interpretation of substantial portions of that standard, on issues not implicating distinctly political freedoms, the division slackens. "Here there appears to be, if not agreement, then the faint promise of agreement on the interpretation of some parts of the standard".(17) Ultimately the real test of the Committee's reporting system is whether it has effected change in the law and practice of the states parties. She concludes by suggesting that the Committee should give maximum publicity to undertakings by governments to alter their domestic law or practice in response to their obligations under the Covenant. "By publicising the positive aspects of compliance with international human

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15. D. Fischer, op.cit., p. 149.

16. Ibid., p. 150.

17. Ibid., p. 150.

rights norms, the Committee can play an important role in removing the stigma that many states continue to feel is attached to any international oversight of domestic human rights practices".(18)

Before considering the substantive law in relation to the Covenant and its relation to this essay, one needs to look at the regional arrangements concerning human rights and their procedural mechanism.

#### 1. The European Convention on Human Rights and Fundamental Freedoms

The history of the United Nations Covenants illustrates the difficulties of negotiating detailed human rights provisions that will be acceptable to the governments of states of widely differing cultures, traditions, ideologies and stages of economic and social development. Agreement on such matters is easier to achieve amongst governments within the same geographical region and sharing a common history and cultural tradition. The European case illustrates this fact clearly.(19) Less than two years after the adoption of the Universal Declaration of Human Rights and in fact, inspired by it, the West European Member States of the Council of Europe drafted the European Human Rights Convention which they signed on November 4 1950 and which entered into force on September 3 1953.(20)

The growth towards the concept of a European Convention on Human Rights was due to the Nazi and Facist regimes (as stated earlier) and their vigorous denial of the basic principle of human dignity. The organs of control are (1) a Commission (21) and (2) a Court of Human Rights.(22) But the right of

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18. Ibid., p. 153.

19. Siegart, op.cit., p. 26.

20. E.T.S. No. 5; U.K. T.S. 70 (1950) Cmnd. 8969. Twenty-one ratifications at the time of writing.

21. The European Convention on Human Rights, Article 19(1).

22. Ibid., Article 19(2).

individuals to lodge complaints with the Commission was made conditional on the express acceptance of this procedure by the state concerned.(23) The possibility of bringing a case before the court was also made conditional on the agreement of the state concerned to accept the court's jurisdiction.(24) The Committee of Ministers of the Council of Europe is the final arbiter in cases which are not referred to the Court of Human Rights. Under Article 24 any party may refer to the Commission an alleged breach of the Convention by any other party. The first thing the Commission must do when it considers an application is to decide whether it is admissible. Article 26 lays down two rules which apply both to inter-state cases and to individual applications. (1) The Commission may deal with a case only after domestic remedies have been exhausted; (2) and within a period of six months from the date of the final decision at the national level. Article 27 which only applies to individual applications, the Commission must reject as inadmissible applications which are (1) anonymous; (2) manifestly ill-founded; (3) those which constitute an abuse of the right of petition and (4) those which are incompatible with the provisions of the Convention. The Commission is not competent to make a final determination on the merits of an application. This is a decision for the Committee of Ministers or the Court but the Commission must reject the application as inadmissible if it is "manifestly" ill-founded. If the case is admissible under Article 28 the Commission must examine the application with a view to ascertaining the facts. This means in practice a judicial hearing at which the individual applicant and the respondent government are represented by counsel on a completely equal footing. Once the Commission has completed its investigation, Article 28(b) of the Convention requires it to try to secure a friendly settlement of the matter. If a friendly settlement is not achieved, the Commission draws up a detailed report, setting

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23. E.C.H.R., Article 25(1).

24. E.C.H.R., Article 48.

out the facts and stating its opinion as to whether the facts as found disclose a violation of the Convention. The Report is transmitted to the Committee of Ministers of the Council of Europe; the Commission can make in its report such proposals as it thinks fit.(25)

As regards the European Court of Human Rights, a case may be referred to it only by the Commission or a state party concerned and not by an individual applicant (Article 44) and if the defendant state has accepted its jurisdiction. This can be done ad hoc for a particular case (Article 48) or by a general declaration accepting the jurisdiction of the Court as compulsory, in accordance with Article 46. After being set up in January 1959 after eight contracting states had made declarations recognising its compulsory jurisdiction, the Court adopted its own Rules of Court in September 1959. These rules have been revised recently (1983) and will be discussed later on.

Perhaps at this stage it would be constructive to detail present-day procedural practice of the United Nations with regard to human rights. As mentioned (26), there exists a Sub-commission on Prevention of Discrimination and Protection of Minorities. The twenty-six members of the Sub-commission are elected by the Commission on Human Rights every three years taking into account geographic representation.(27) The Sub-commission considers instances of human rights violations in specific countries in three ways. Firstly, by use of the procedure established by Economic and Social Council (E.C.O.S.O.C.) Resolution 1503.(28) Secondly, under the specific agenda item authorised by E.C.O.S.O.C.

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25. E.C.H.R., Article 31.

26. See Introduction.

27. The 1984 U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities (1985) Am. J. I. J. pp. 168-180.

28. E.S.C. Res. 1503 (XLVIII) 48 U.N. E.S.C. OR. Supp. No. 1A at 8 U.N. Doc. E/4832/ Add 1 (1970).

Resolution 1235.(29) Thirdly, under a general agenda item where violations in a specific country are used to illustrate or highlight a problem covered by the agenda item. The Working Group on Communications, established pursuant to E.C.O.S.O.C. Resolution 1503 considered hundreds of petitions submitted to the United Nations alleging human rights violations in specific countries in the August 1984 session. The Working Group, Sub-Commission and Commission consider 1503 related matters in closed sessions and the only public source of information is the statement made by the head of the Commission prior to its public debate.

By E.C.O.S.O.C. Resolution 1235, the Sub-Commission annually devotes an agenda item to violations of human rights and fundamental freedoms. This agenda item has evolved to the point where it provides a flexible and public forum for publicising human rights violations in specific countries. Though the Soviet expert at the 1984 session attempted to halt the procedure of mentioning specific countries by Sub-Commission members (30), both Sub-Commission members and non-governmental organisations (N.G.O.'s) detailed instances of violations of human rights in specific countries under the agenda item. (N.G.O.'s are considered very useful in this field. They provide Sub-Commission members with information relating to the human rights in specific countries through oral interventions, written statements and informal discussions. They also lobby for the adoption of specific resolutions). This practice is clearly a positive step by the experts. To conceal abuses of human rights behind nebulous or unidentified entities defeats the whole purpose of the Sub-Commission. An illustration of the plus factor of the practice of mentioning specific countries can be seen by reference to the situation in Japanese mental hospitals. The human rights abuse of the mentally ill in Japan was expressed by N.G.O.'s. The newspaper notoriety that

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29. E.S.C. Res. 1235 (XLII) 42 U.N. E.S.C. OR. Supp. No. 1 at 17 U.N. Doc. E/4393 (1967).

30. U.N. Press Release H.R./1583.

resulted caused the Japanese to effect legislation to regulate the admission and treatment of mental hospital patients within weeks of the exposure. Japan has consistently responded swiftly to complaints about domestic human rights violations when raised by Western N.G.O.'s. For example, in 1980 the International Human Rights Law Group submitted a 1503 communication concerning the Korean minority in Japan. Following the intervention, the Law Group was assured that steps would be taken to remedy the situation legislatively. It is clear that Japan's way in responding to public exposure is not typical of the trend as regards the major offenders. But their approach is symbolic of the ideal which all responsible, intelligent and concerned groups would like to see expressed universally. But for every forward step there is invariably one backward. In 1979 the Working Group on Universal Acceptance of Human Rights Instruments was established to encourage acceptance of international human rights instruments.(31) It had power to call upon governments that had not ratified the various human rights instruments to explain their inaction.(32) The sad fact is that few governments have bothered to partake in the Working Group's sessions. Thus the Sub-Commission asked the Secretary-General to review the possibility of offering technical assistance and designating regional advisers to facilitate the adoption of human rights instruments by more countries.(33) And by appointing a member of the Sub-Commission to prepare a Status Report (34), by suspending the Working Group, the Sub-Commission has reacted positively to governmental/state lethargy in this area.

At the August 1984 session the Sub-Commission considered various

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31. E.S.C. Res. 1979/1B (XXXII) U.N. Doc. E/CN 4/Sub. 2/1979/L. 716.
  32. Weissbrodt, "A New U.N. Mechanism for Encouraging the Ratification of Human Rights Treaties" (1982) 76 Am.J. I. L., p. 418.
  33. E.S.C. Res. 1984/36 U.N. Doc. E/CN 4/Sub. 2/1984 CRP 2/Add 2 at 11.
  34. Ibid., at 12.

resolutions. The experts from the United States and the Soviet Union each introduced three resolutions that the Sub-Commission found too controversial to consider. These concerned the plights of Andrei Sakharov (35), Raoul Wallenberg (36), Jews in the Soviet Union (37), Leonard Peltier (38) and the citizens of Northern Ireland (39) and President Reagan's remarks on the launching of a nuclear attack.(40) However the Sub-Commission did not debate the resolutions on the grounds that they were "political". By so characterising the resolutions as "political" because of the countries named in them makes sure that the powerful countries cannot be made the subject of resolutions.

## 2. Procedures with Specific Relevance to the Individual

At the universal level, during the formative stages of the Covenant on Civil and Political Rights, the Netherlands proposed a further optional clause intended to provide for individual petitions. But this was not successful. The Third Committee by a narrow majority of 41 votes for to 39 against, with 16 abstentions decided that a text permitting individual petitions or communications to the Human Rights Committee be incorporated in a separate "Optional Protocol" to the Covenant, and thus apply to states which, by a separate act, ratify the Protocol.(41) The Optional Protocol to the Covenant provides that "Any State Party to the Covenant which ratifies the Protocol thereby recognises the competence of the Committee to receive and consider communications from

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35. U.N. Doc. E/CN 4/Sub. 2/1984/L. 13.

36. U.N. Doc. E/CN 4/Sub. 2/1984 L. 12.

37. U.N. Doc. E/CN 4/Sub. 2/1984/L. 42.

38. U.N. Doc. E/CN 4/Sub. 2/1984/L. 28.

39. U.N. Doc. E/CN 4/Sub. 2/1984/L. 31.

40. U.N. Doc. E/CN 4/Sub. 2/1984/L. 29.

41. L.B. Sohn, op.cit., pp. 164-169.

individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant". As Robertson (42) rightly points out the real test of the effectiveness of a system of international control for the protection of human rights is to be found in the answer to the question whether or not it permits the individual whose rights are violated to seek a remedy from the international organ. Articles 2 and 3 make it a rule that all domestic remedies have to be exhausted. Article 4 and the final paragraph of Article 5 deal with the procedure of the Committee when dealing with individual communications. They must be communicated to the state party concerned, which must within six months, submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may be taken by that state.

Article 5, paragraph 1 states that the proceedings must be based on all written information made available by the individual and the state party concerned. Article 5, paragraph 4 states that the Committee shall forward its view to the state party concerned and to individuals. The procedure is not contentious nor is it a judicial procedure in the sense of leading to a decision on the question of violation by the Human Rights Committee. "Nevertheless, even with these limitations, it marks a big advance on any measures of implementation previously established by the United Nations. Much will depend on how the Human Rights Committee interprets its powers under the Protocol particularly in forwarding "its view" to state parties under Article 5(4) and in reporting to the General Assembly under Article 6".(43)

As regards the protection of human rights in Europe, under Article 24 any party may refer to the European Commission of Human Rights an alleged breach of

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42. A. Robertson, ibid., p. 54.

43. Ibid., p. 58.

the Convention by any other party. The competence of the Commission to consider individual applications entered into force on July 5 1955 when six states had recognised the "right of individual petition", i.e., the right of redress accorded by Article 25 to "any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention". Thus the right of individual petition was made optional and applies only in relation to states which have expressly declared that they accept it, in accordance with the provisions of Article 25.(44) Robertson notes (45) "It is the great merit of the European Convention on Human Rights that it institutes a procedure which permits an individual to complain to the European Commission even against his government. This was a remarkable innovation in international law; so much so that governments refused to accept it". In his article A. Lester (46) refers to the United Kingdom position in this area. He states when speaking of the United Kingdom participation in the early stages of the drafting of the Convention, "The matters to which they took the greatest objections were the proposed right of individuals and others to petition the European Commission of Human Rights in respect of alleged violations of the Convention by the United Kingdom and the jurisdiction of the European Court of Human Rights in such cases. At [that] stage, the draft Convention made acceptance of the proposed right of individual petition mandatory rather than optional".(47) The initial argument by the United Kingdom was founded on the belief that such a system of appeal to an international authority would be politically unsettling in many colonial territories where the people

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44. There have been seventeen Declarations regarding Article 25 at the time of writing.

45. Op.cit., p. 87.

46. A. Lester, "Fundamental Rights; The United Kingdom Isolated?" (1984) P.L., pp. 46-72.

47. Ibid., p. 50.

were considered "politically immature". These people needed to look up to "[a] single undivided authority as responsible for their affairs". This right of petition to an international body might have the effect suggesting to the colonial people that the Crown was not their ultimate authority or that they have a choice as to which authority to pay allegiance to. The fear was that political extremists might try to undermine the Crown in the colonies.(48)

The issue is that as far as human rights is concerned the Convention has the objective of attempting to protect the rights of individual citizens. If his rights are violated this will in most cases be done by the authorities of his own state. Classic international law states that the individual has no locus standi on the theory that his rights will be championed by his government. But the essence is, how can the individual's government be his champion when it is in all truth the offender? The argument that another state will take up the violation on his behalf against his government is not realistic (though possible). There are not many foreign offices that will jeopardise good relations with a useful (military or economic) ally for the sake of rectifying mistreatment of the latter's citizen. To be able to collate sufficient information might also cause difficulties. The danger of another state interfering raises the risk of an inter-state dispute, something few states would willingly risk.

The individual applicant has no locus standi before the European Court of Human Rights. A case may be referred to it only by the Commission or a state party concerned and not by an individual applicant.(49) The Rules of Court adopted in September 1959 have been revised and the most recent full-scale revision entered into force on January 1 1983 in relation to cases referred to it

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48. Memorandum circulated by the Colonial Secretary Jim Griffiths C.P. (50) 179 CAB 129/41 34611. See A. Lester, "Fundamental Rights; The United Kingdom Isolated?" (1984) P.L., p. 50.

49. E.C.H.R., Article 44.

after that date.(50) These Rules are said to have considerably improved the position of the individual in getting a case to the Court.(51) The case law prior to the Revised Rules provided some hope however for the individual. In the first case to come before the Court, Lawless v. Ireland (52), the Court recognised that the interests of justice required that the Commission, as the defender of the public interest, be able to inform the Court of the applicant's views on the issues being argued. Maloney notes that Article 6(1) of the Convention guarantees the individual a "fair hearing" and hence "equality of arms" before the domestic courts in civil and criminal matters; this was lacking in proceedings at the European Court. The Court, for want of a genuine hearing of both sides in contention, sometimes had difficulty in gaining a full picture of the issues at stake. Therefore the unequal treatment given to the individual who has allegedly suffered a breach was not easily reconcilable with the principles of fair procedure to be found in the substantive provisions of the Convention and some authors (53) say that it was not very useful in the practice of proper administration of justice. With this in mind, the 1983 reforms were introduced. The revised Rules of Court provide for the establishment of direct relations between the Court and the applicant and for separate representation of the applicant once a case has been referred to the Court by a contracting state or the Commission in accordance with Article 48 of the Convention. However, in view of the wording of Articles 44 and 48 of the Convention, the denial to the applicant of any entitlement to decide whether or not his case is to be brought before the Court remains unaffected. As regards direct relations, paragraphs 1 and 2 of New Rule 33 provide that on receipt of an application (from a

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50. Rule 67 (final clause).

51. P. Maloney, "Developments in the Procedure of the European Court of Human Rights; The Revised Rules of Court" 3 Y.E.L., p. 127.

52. April 7 1961 Series A No. 2, 24.

53. P. Maloney, op.cit., p. 131.

contracting state) or request (from the Commission) originating proceedings, the Registrar is obliged to transmit a copy of the originating document and of the Commission's report not only to the judges and, as the case may be, the Commission and "any contracting party mentioned in Article 48 Convention", but also to "the person, non-governmental organisation or group of individuals who lodged the complaint with the Commission under Article 25 Convention".

But importantly, as regards the representation of the applicant, New Rule 30 requires legal representation whilst making provision for exceptions. Rule 30 provides, (1) The applicant shall be represented by an advocate authorised to practise in any of the contracting states and resident in the territory of one of them, or any other person approved by the President. The President may, however, give leave to the applicant to present his own case, subject if need be, to his being assisted by an advocate or other person aforesaid. Gradually over the years the role of the applicant's lawyer has become increasingly independent of the Commission's control. (54) The position has much progressed since Lawless.(55) In the important case of The Sunday Times (56), the applicants were allowed to lodge a lengthy independent memorial and their lawyer, Anthony Lester Q.C., addressed the Court fully on the issues before it. Previously, before the New Rules, the applicant's lawyer has technically only been before the Court as assisting the Commission's delegates. Duffy (57) notes that "the recognition of an independent role for the applicant puts an end to this sub-terfuge and clarifies the situation". The other major innovation is contained in Rule 37(2), "The President may in the interests of the proper administration of

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54. P. Duffy, "Procedural Innovations at the European Court of Human Rights" (1983) P.L., p. 32.

55. Op.cit.

56. April 26 1979 Series A No. 30 App. No. 6538/74.

57. P.Duffy, op.cit., p. 33.

justice, invite or grant leave to any contracting state which is not a party to the proceedings to submit written comments within a time limit and on issues which he shall specify. He may also extend such an invitation to grant such leave to any person other than the applicant". Prior to this New Rule there had been only two occasions on which the Court had accepted representations from parties other than the Commission and the states actually involved in the particular case before it. In Winterwerp v. Netherlands (58), the United Kingdom government asked to be heard at the oral hearings under the former Article 38 paragraph 1 on a point of construction regarding Article 5 paragraph 4 of the Convention. Pending before the Commission were a number of applications from the United Kingdom in which this particular point of construction described as being "of major importance for the government" was in issue. The President of the Chamber did not accede to the United Kingdom's request but at the hearing the delegates of the Commission were given leave to submit a written statement from the United Kingdom government on the interpretation of Article 5 paragraph 4.

The second occasion was in the case of Young, James and Webster v. United Kingdom (59), the so-called "closed shop" case. The Court decided following a request by the Trades Union Congress, to hear a representative of the Congress, Lord Wedderburn of Charlton, under Old Rule 38 paragraph 1 "on certain questions of fact (including English law and practice) and for the purpose of information. In addition, during the hearings the delegates of the Commission filed a document entitled "Memorial (submissions of fact and law) of the Trades Union Congress". One of the applicant's lawyers, who was "assisting" the delegates, protested vigorously at the developments, speaking of "an attempt to abuse the process of this Court, because in truth what is being sought is that the Trades Union

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58. October 24 1979 (Merits) Series A No. 33 and November 27 1981 (Art. 50) Series A No. 47.

59. Judgment of August 13 1981, Series A No. 44, para. 8.

Congress is seeking to intervene in these proceedings as a party". The Court subsequently decided that it would take into account the "Memorial" as regards any factual information but not any arguments of law, which it contained.(60)

The position was completely clarified in the revised Rule 37(2). Thus overall there have been improvements of the individual's position vis-a-vis the European Court of Human Rights. He is still denied full locus standi, but nonetheless these gentle inroads are to be welcomed. In the conclusion to this work, discussion will be made of the comments by other authors on this topic.

### 3. Other Regional Arrangements for Human Rights

#### I The American Convention on Human Rights

The March 1945 Inter-American Conference on Problems of War and Peace held in Mexico considered the possibility of setting up an Inter-American system in the post-war world. At the Inter-American Conference in Rio de Janeiro in 1947, the Inter-American Treaty of Reciprocal Assistance was signed in September 1947 and this still forms the basic instrument of collective security of the Inter-American system. At Bogota in 1948 a whole review of the Inter-American system was made and reorganised. The Charter of Bogota adopted on this occasion furnished the new constitutional instrument that was required and thereby established the Organisation of American States (O.A.S.) The Charter proclaimed expressly in its first article that the O.A.S. is a regional agency within the United Nations and highlighted that the basic aim was to strengthen peace and security, to ensure the peaceful settlement of disputes, to provide for common action in the event of aggression and to promote economic, social and cultural development. At Bogota in 1948 the American Declaration on the Rights and Duties of Man was adopted on May 2 1948. It contained ten articles setting out duties

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60. Judgment 13 August 1981, para. 10.

of individuals and twenty-eight articles proclaiming his rights. In Santiago in 1959 a meeting of the Ministers for Foreign Affairs adopted a "Conclusion" which charged the Inter-American Council of Jurists to prepare a draft Convention on Human Rights and a draft Convention on the creation of an Inter-American Court for the Protection of Human Rights. It also resolved to create an Inter-American Commission on Human Rights of seven members elected as individuals by the Council of the O.A.S. from panels of three candidates presented by governments. At a specialised conference on Human Rights held on San Jose, Costa Rica from November 7 to 22 1969, the American Convention on Human Rights, also known as "The Pact of San Jose", was drafted and signed on November 22 1969. It entered into force on July 18 1978 when eleven ratifications had been achieved.

Article 1 states that the aim of the Convention "is to ensure to all persons subject to their jurisdiction the free and full exercise" of their rights and freedoms recognised therein. Article 2 provides that contracting parties will adopt such legislative measures as may be necessary in cases where the rights and freedoms are not already ensured in their domestic law. Twenty-six rights and freedoms are protected by the Convention and twenty-one are found also in the United Nations Covenant on Civil and Political Rights. Of significance to this thesis, Article 2 relates to freedom from torture and inhuman treatment; Article 5, the right to a fair trial; Article 12, freedom of movement; Article 4 relates to the right to liberty and security and three rights and freedoms not found in the United Nations Covenant, namely Article 23, freedom from exile; Article 24, prohibition of the collective expulsion of aliens and Article 26, the right of asylum.

Robertson (61) considers that two of the most important rights guaranteed in the United Nations Covenant and in the two regional Conventions (American and

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61. Robertson, *Human Rights in the World* (1982), p. 138.

European) are the right to liberty and security, including freedom from arbitrary arrest, and the right to a fair trial.

### Control Mechanism

The American Convention on Human Rights provides for two organs of control; a Commission and a Court.

#### (a) The Inter-American Commission

The number of members is seven and it represents all the member countries of the O.A.S. ( Article 35). The members sit in a personal capacity which is important as this protects their independence (and in this day and age South America needs politically independent representatives in such organisations). Articles 44 to 47 give the Commission competence to consider petitions from individuals, groups of individuals or non-governmental organisations alleging violation of the Convention by states parties (Article 44). This is in common with Article 25 of the European Convention. But in contrast to Article 25, acceptance of this competence is not optional but obligatory. "This difference represents probably the most important advance enshrined in the American Convention".(62) Article 45 concerns inter-state complaints. The procedure is optional, not obligatory. A declaration accepting this competence of the Commission may be made at any time and can be made for a limited or unlimited period of time.

This contrasts with the European Convention. Acceptance of the right of individual petition is automatic after ratification, whereas the procedure for inter-state complaints is optional. This is considered to be a "major advance" in establishing an effective system of international control, once it is recognised that a compulsory system of inter-state complaints would be politically dangerous in the Latin-American context.

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62. Robertson, op.cit., p. 146.

The first task of the Commission is to establish the facts, once it has declared a case admissible. It may make an investigation and in order to do this, the states concerned must furnish all the necessary facilities (Article 48 (1)(d)). The Commission then has to try and bring about a friendly settlement. This procedure is governed by Article 48(1)(f) and Article 49. If no friendly settlement is achieved, the Commission is required to draw up a report setting out the facts and stating its conclusions.

### II The Permanent Arab Commission on Human Rights

The League of Arab States was created on March 22 1945 with the signature of seven Arab states. These states were Egypt, Iraq, Jordan, Lebanon, Saudi Arabia, Syria and Yemen. In December 1968, the Council of the League initiated an Arab regional conference on Human Rights in Beirut. A Permanent Arab Commission on Human Rights was set up. Despite the fact that not much information is available on the actual results of the Permanent Commission on Human Rights of the Arab League, in 1979 a Union of Arab Lawyers attempted to conclude an Arab Convention on Human Rights intended to guarantee fundamental rights within an Islamic context. The establishment of a non-governmental Permanent Committee for the Defence of Human Rights and Fundamental Freedoms in the Arab homeland with power to accept complaints from individuals was also proposed. This proposal merits attention. Coming from a part of the world which has laws fundamentally opposed to human rights, such a proposal for individual complaints would constitute a significant politico-religious reappraisal.

### III The African Charter on Human and Peoples' Rights

This is the most recent of the regional human rights treaties. It was adopted at a meeting of heads of state and government of the Organisation of African Unity in Nairobi, Kenya on June 26 1981. It has not yet entered into force. The treaty will come into force three months after a simple majority

(currently twenty-six) of the Organisation of African Unity member states has ratified it.(63).

#### IV What Value Regionalism in Human Rights?

The essential point to note is that regional systems may not only allow states to have more confidence in the standards, but in the supervision processes, even so far as allowing some individual participation; whereas at the universal level, doctrinal differences prevent this even though there has been progress on the applicable standards.

By Resolution 6 (XXIII) the United Nations Commission decided to set up an ad hoc study group to consider the setting of regional Commissions on Human Rights in the parts of the world where they did not already exist. Those against the idea included the East Europeans who felt that these entities would interfere with issues which came within the domestic jurisdiction of states; and this would be contrary to the principle of national sovereignty and would violate Article 2(7) of the Charter.

In opposition to this is the claim that the states have assumed international obligations to promote and respect human rights by ratifying the Charter of the United Nations and becoming party to her Covenants, and so the question of human rights is no longer simply a matter of national sovereignty.

The most powerful argument for establishing a regional system on human rights is that which recognises the great divergence between peoples and their political, economic and social way of life, in different parts of the globe. It would be an oddity that human rights should claim to be about individual rights, yet impose a central Human Rights Commission in one part of the world, ignoring

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63. Article 63(3).

the particular divergences of different individual cultures around the world. Recognition of individual rights is both microcosmic (the individual person) and macrocosmic (the individual state). As long as these regional systems protect the rights established in the Universal Declaration, they need not be expected to conform to one central system.

In arguing for the establishment of regional Commissions, one has to accept that states will be more willing to identify with a system which comprises neighbouring friendly states; a system which is run by states composed of people with similar cultures will obviously be more prepared to become energetically involved in the question of human rights, more so than if they were part of a large multinational system. Secondly, from the practical point of view of distance and expense, a regional system makes more sense. It would help matters if states or individuals from remote corners of the globe did not have long distances to travel at great expense to present a case before a central court such as Strasbourg. Therefore, in taking into consideration the above points, regional Commissions are a positive way of ensuring complete international support for the promotion and respect for human rights.

Part Four

1. The Substantive Law under the International Covenant on Civil and Political Rights and the European Convention on Human Rights

In this section of the essay, one will look at the case law in so far as it touches upon this thesis and attempt to analyse those provisions which provide some protection to the individual against the three principal areas of interest in this study. First, what, if any, protection there is (1) against irregular extradition in terms of (a) preventing it or (b) remedying it; (2) the possible protection against extradition/deportation for some political offences; (3) The protection provided against extradition/deportation in other circumstances.

The rights enshrined in the Covenant on Civil and Political Rights which are important to this study are found in Part II and include Articles 7, 12 and 13. Article 7 provides that, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

Article 12 provides that, "(1) Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence; (2) Everyone shall be free to leave any country including his own; (3) The above rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant; (4) No one shall be arbitrarily deprived from the right to enter his own country.

Article 13 provides that, "An alien lawfully in the territory of a state party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling

reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority".

A. The International Covenant on Civil and Political Rights

The cases under the International Covenant on Civil and Political Rights and the Optional Protocol provide useful guidelines as to the level of abuse necessary before an individual can successfully invoke the protection of the Human Rights Committee. In Maroufidou v. Sweden (1) the case concerned the expulsion of a presumed terrorist who sought to invoke the article concerning freedom of aliens from arbitrary expulsion.(2) The author was a Greek citizen who came to Sweden in 1975 to seek asylum. In 1976 she was granted a residence permit. On April 4 1977 she was arrested in Stockholm on suspicion of having supported a terrorist plan to abduct a former member of the Swedish government. On May 5 the Swedish government decided to expel her, concluding that there was "reason" to assume that she belonged to or worked for a terrorist organisation or group, as provided for in Articles 20 to 29 of the Aliens Act. The applicant's claim was that the Swedish authorities wrongfully considered her to come within the scope of Articles 20 to 29 of the Aliens Act. Thus the decision to expel her was not taken in accordance with Swedish law and was therefore in violation of Article 13 of the Covenant.

The Committee considered that the essential question was whether the expulsion was "in accordance with the law". Article 13 requires compliance with both the substantive and the procedural requirements of the domestic law of the

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1. (6189/73) C.D. 46, 214 Decision April 9 1981, H.R.J., 1981, p. 143.

2. Article 13.

state party concerned. Maroufidou claimed that the decision to expel her was based on an incorrect interpretation of the Swedish Aliens Act. But the Committee took the view that the interpretation of domestic law is essentially a matter for the authorities of the state party concerned. It is not within the powers or functions of the Committee to evaluate whether the competent authorities of the state party in question have interpreted the domestic law correctly in the present case before it under the Optional Protocol, unless it is established that they have not interpreted and applied it in good faith or that it is evident that there has been an abuse of power. The adoption of this position by the Human Rights Committee, though procedurally correct, would seem to highlight a deficiency which augurs ill for the individual applicant. In effect it suggests that it is for the individual to establish that the state has not interpreted and applied the domestic law in good faith. And this imposes a severe burden upon the individual applicant, for the state will inevitably have at its disposal machinery with which to counteract any potentially damaging assertions by the individual. The procedural inability of the Committee to evaluate whether the competent authorities of the state party have interpreted the domestic law correctly is a throw back to the old views that the manner in which a nation interprets its domestic laws are not the concern of the international legal order, even where such interpretation constitutes a violation of an individual's rights.

In the Celiberti case (3), Celiberti was a Uruguayan citizen by birth but had Italian nationality. She had been an active member of a resistance movement in Uruguay and in this connection she had been arrested for "security" reasons, and subsequently released several times. In 1978 when travelling to Porto Allegro in Brazil, she was arrested in Brazil by Uruguyan agents with the

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3. Communication No. R. 13/56 H.R.L.J. Vol 2 No. 1-2, p. 145.

connivance of Brazilian officers and kept in detention. The authorities announced that Celiberti and her companions had tried to cross the border security with subversive material from November 1978 to March 1979. Celiberti was held incommunicado and detained in a military camp. She was permitted no visits by relatives. In March 1979 she was charged with "subversive association, violation of the constitution by conspiracy and preparatory acts thereto". She was ordered to be tried by a military court and kept in preventive custody. She claimed breach of Articles 9, 10 and 14. Article 9(1), right to liberty and security, because the act of abduction into Uruguyan territory constituted an arbitrary arrest and detention. Article 10(1), right of detained persons to be treated with humanity; she alleged she was kept incommunicado for four months. Article 14, right to a fair trial; she had no counsel of her own. Also Article 14(3)(e) because she was not tried without undue delay.

The Human Rights Committee observed that although arrest and initial detention allegedly took place on foreign territory, the Committee was not barred either by virtue of the Optional Protocol Article 1, "individuals subject to its jurisdiction" or by virtue of Article 2(1) Covenant, "individuals within its territory and subject to its jurisdiction", from considering these allegations, together with the subsequent abduction into Uruguyan territory, in as much as these acts were perpetrated by Uruguyan agents acting on foreign soil. The Committee stated that the reference to Article 1 Optional Protocol does not affect the above conclusion because the reference in that Article is not to the place where the violation occurred, but to the relationship between the individual and the state in relation to a violation of any rights set forth in the Covenant, wherever they occur. Article 2(1) does not imply that the state party concerned cannot be held accountable for violations of rights under the Covenant committed by its agents in the territory of another state, whether with the acquiescence of the government of that state or in opposition to it. Article

5(1) Covenant states "Nothing in the present Covenant may be interpreted as implying for any state group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised therein or at their limitation to a greater extent than is provided for in the present Covenant". Thus, it would be unconscionable to interpret the responsibility under Article 2 of the Covenant so as to permit a state party to perpetrate actions on the territory of another state, which if committed in its own territories would amount to violations of the Covenant. The Committee acting under Article 5(4) Optional Protocol to the Covenant took the view that the facts as found by the Committee disclosed violations of the Covenant and in particular Articles 9, 10 and 14.

In the Lopes Burgos case (4), the author was a political refugee of Uruguayan nationality. Her communication was submitted on behalf of her husband a worker and trade union leader in Uruguay, who had been subject to various forms of harassment because of his trade union activities. On July 13 1976 her husband had been kidnapped in Buenos Aires by members of the Uruguayan security and intelligence forces. On July 26 1976 Burgos was illegally and clandestinely transported to Uruguay where he was detained incommunicado by special security forces at a secret prison for three months. During this detention he was continually subjected to physical and mental torture and other cruel and degrading treatment. Allegations of breach of Articles 7, 9, 12 and 14 were submitted. The Uruguyan government attempted to argue that they acted under provisions in Uruguyan law which dictate prompt security measures in certain instances. But without submission of fact or law to back up this assertion and because of the brutal acts committed against Burgos, the Committee did not accept that there were any circumstances present which permitted such a deviation from the provisions of the Covenant. Violations of the Articles were found by the

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4. (1981) H.R.L.J., p. 150. Communication R 12/52 H.R.C. 36, 176.

Committee. The Committee recommended that Uruguay release Burgos immediately and compensation be made for the violations he had suffered.

In the Quinteros case (5), the facts centred around an abduction from the Venezuelan Embassy of a Uruguayan subject. The daughter of the communicate was arrested at her home in Montevideo on June 24 1976 and taken to a spot near the Venezuelan Embassy. The girl, Elena Quinteros, succeeded in getting into the Embassy grounds. The Uruguayan military personnel accompanying her then entered the diplomatic mission and assaulted the secretary of the Embassy before dragging Quinteros off the premises. Venezuela suspended diplomatic relations with Uruguay. Her detention was never officially admitted. Her mother stated that there were no domestic remedies that could be invoked and/or exhausted because her arrest has always been denied by the Uruguayan authorities and the remedy of habeas corpus is only applicable in the case of detained persons. Violations of Articles 7, 9, 10 and 14 were claimed. The Committee decided that in cases where the author has submitted to the Committee allegations supported by substantial witness testimony, as in this case, and where further clarification of the case depends on information exclusively in the hands of the state party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the state party. On this basis the Committee accepted the testimony, amongst others, of the matter of the abducted girl and the Venezuelan Embassy staff, noting the break of diplomatic relations between the states. Thus violations of Articles 7, 9, 10 and 14 were found and Uruguay was asked to rectify the position.

What the Committee is attempting to do in these cases is to set forth minimum human rights standards in the way a state deals with its individuals, in

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5. Decision of July 21 1983. Communicastion No. R. 24/107 (1983)  
H.R.L.J., p. 196.

this instance, where abduction is concerned (see Chapter 3 Part I); however where an alien is expelled by correct procedures as laid down in the state's domestic law, the Committee will not regard itself competent to intervene, unless there is a clear abuse of power or the government has acted in bad faith.(6) The difference is important because it differentiates between the kind of treatment involved. Where the proper procedure has been followed prior to expulsion, the individual will have exercised his individual rights to the full, in judicial proceedings where he may have successfully invoked certain safeguards. But where arbitrary expulsion or abduction is concerned, the individual has no rights to invoke, since judicial proceedings will not have preceded his removal from the state. The standard of treatment accorded the individual will of necessity be that much lower.

B. The Substantive Law under the European Convention on Human Rights

Even though no human rights rule has been formulated which explicitly and directly relates to extradition, the influence of human rights rules on extradition is strongly felt. In the European arena, the Council of Europe illustrates this point. Even though the European Convention on Human Rights does not contain special provision regarding the right of asylum or the right not to be extradited, the Commission has often applied general human rights provisions to extradition.(7) The relevant provision in this respect is Article 3 which prohibits torture and inhuman or degrading treatment or punishment.(8) The claim by the applicant in this respect is that his or her extradition (or other removal) would expose them to treatment in the destination state which would violate Article 3 if carried out by a state party to the Convention.

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6. Siegart, op.cit., p. 185.

7. C. Van den Wijngaert, op.cit., p. 90.

8. Note the U.N. General Assembly Resolution 39/46 Convention against Torture of December 10 1984 (not in force).

The interpretation of Article 3 will form the basis of study in this section of the work, and the case law will be analysed with this factor in mind. Some reference will be made to Article 2(1) which states that, "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided". The Committee has been extended by several Protocol some of which are relevant to the theme of the study. The Fourth Protocol entered into force on May 2 1968. Article 2 of the Fourth Protocol states, "(1) Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence; (2) Everyone shall be free to leave any country, including his own; (3) No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, prevention of crime, health or morals or for the protection of the rights and freedoms of others; (4) The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society".

Article 3 of Protocol No. 4 states that, "(1) No one shall be expelled by means of either an individual or of a collective measure from the territory of the state of which he is a national; (2) No one shall be deprived of the right to enter the territory of the state of which he is a national".

Article 4 states that, "The collective expulsion of aliens is prohibited".

Protocol No. 7 (9)

Article 1 states that, "(1) An alien lawfully resident in the territory of

a state shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed (a) to submit reasons against his expulsion; (b) to have his case reviewed and (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority; (2) An alien may be expelled before the exercise of his rights under paragraph 1(a) (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is granted on reasons of national security".

Before discussing the case law on Article 3, some discussion of the terms contained in the Article are necessary. As regards the jurisprudence of Article 3, there have been attempts to define what the words contained in the article mean.(10) Torture is considered as containing two main elements, (a) severe inhuman treatment; (b) and a particular purpose, such as the obtaining of information or confessions (11), (Ireland v. United Kingdom).(12) It is considered both physical and non-physical, thus mental suffering is included, but the suffering must be of such a serious nature before torture can be established (the Greek Case).(13) Inhuman treatment is said to concern treatment which in certain situations is unjustifiable and has to be distinguished from roughness of detainees by both police and military authorities. Inhuman treatment is not suffered where a person is detained for a few days in uncomfortable circumstances. Degrading treatment is considered to be "any treatment whose severity tended to lower the victim in rank, position, reputation or character whether in his own eyes or in the eyes of other people"

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10. P. Duffy, "Article 3 of The European Convention on Human Rights" (1983) I.C.L.Q., pp. 316-345.

11. Ibid., pp. 316-318.

12. (5310/71) Report January 25 1976; 19 M.E.C.H.R.,

13. (3321-3/67; 3344/67) Report, 12 Y.E.C.H.R.

(East African Asians v. United Kingdom (14) and Tyrer v. United Kingdom (15)).

The Commission has stated that the right of asylum and the freedom from expulsion are not included amongst the rights and freedoms mentioned in the Convention. However the Commission recognises that it can amount to inhuman or degrading treatment to send an individual to a country where he will be killed or enslaved. This is so, despite the fact that the early cases suggest an answer in the negative. In X v. Austria and Yugoslavia (16), the applicant was a Yugoslav citizen in custody in Austria at the time of his application. In 1962, a Yugoslav court sentenced him to nine years imprisonment for embezzling several million dinars from the company of which he was the regional manager in Yugoslavia. X escaped to Austria in November 1962. He claimed asylum, but the Austrian Ministry of the Interior never took any final decision in the matter. The Yugoslav government then demanded his extradition.

The applicant's complaint was directed against his conviction in Yugoslavia, which he alleged was preceded by "acts of brutality and violence" and repeated violation of the rights of defence. He maintained that his case was in fact a political one; those who had really committed the acts of embezzlement were members of the Communist Party but they had been protected at the expense of an innocent person, i.e., the applicant who was a practising Catholic opposed to the Tito regime.

The applicant also complained that the Austrian authorities despite all his efforts had ignored the political motives behind the request they had received

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14. Application No. 4403/70 3 E.H.R.R., p. 76.

15. Communication 5856/72 Judgment of April 25 1978 Series 26 2 E.H.R.R., p. 1.

16. Application No. 2143/64 7 Y.F.C.H.R., p. 314.

from Yugoslavia. He claimed that if extradited he would be subjected to "very severe and inhuman reprisals" and urged the Commission to intervene without delay to prevent his extradition. But after a review of the evidence the Commission took the view that the disputed extradition did not constitute "inhuman or degrading treatment" within the meaning of Article 3 of the Convention. There was evidence presented which suggested that the applicant was really attempting to evade serving his criminal sentence. In X v. Federal Republic of Germany (17), the applicant was an Algerian citizen having served in the French army until 1958; then he became a member of the Front de Liberation Nationale. Having moved to the Federal Republic of Germany in 1963, he was expelled to France in 1964. Back in Algeria he took part in an attempted Putsch against the regime. He was there, he alleges, detained and sentenced to death, but he finally succeeded in escaping. Back in the Federal Republic of Germany he was refused political asylum. In October 1973 he was put in detention pending his expulsion to France. He then lodged his application with the Commission. After negotiations between the German and the French authorities, the latter stated in August 1974 that they were prepared to admit the applicant into France. The German authorities indicated that, at the time of the applicant's deportation, they would send a note to the French authorities, asserting that they assume the applicant will not be extradited to the Algerian government. The applicant's fear was of being handed over to the Algerian authorities. The object of his application was to prevent his expulsion to a country where, according to him, he risked subjection to treatment contrary to Article 3 of the Convention. The applicant equally objected to his transfer to France, and asserted that the French authorities would immediately proceed to expel him to Algeria. However, the Commission took the view that a direct expulsion to Algeria was out of the question. The French Home Secretary in 1974 had expressed

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17. Application No. 6315/73 1 D. & R., p. 74.

his agreement to the re-admission to France of the applicant. Also, no request for the extradition of the applicant had been made by the Algerian authorities. The Commission then dealt with the allegation that the French might expel the applicant to Algeria after his deportation to France and that this would amount to a breach of Article 3 of the Convention for which the Federal Republic of Germany might be held responsible. The Commission concluded that in the particular circumstances of the present case, the government of the Federal Republic of Germany could not be held responsible within the frame of their obligations under the Convention, of a possible decision affecting the applicant taken at a later stage by the French government.

The immediate effect of this judgment is to deny the individual applicant any possible safeguard against a change in policy on the part of the French government. If such an event did occur, the individual could look nowhere for protection. By absolving the Federal Republic of Germany from any blame in such an event, the individual would find himself unable to seek protection from any state.(18) More recently, in Becker v. Denmark (19), the applicant was a West German journalist and director of a body called Project Children's Protect and Security International. His application concerned an alleged violation of the Convention by the Danish government in the envisaged repatriation of one hundred Vietnamese children who had been billeted on Livo in Denmark. The applicant alleged that if the children were sent back to Vietnam, there was a serious danger that they would be killed or physically persecuted because of their race, language and ethnic characteristics, since they belonged to an ethnic group called the Montagnard in Vietnam. Their repatriation would therefore be contrary to Article 3. He also alleged that repatriation contravened the

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18. Note also, Application No. 6357/73 X v. Federal Republic of Germany 1 D. & R., p. 77.

19. 4 D. & R., p. 215; 19 Y.F.C.H.R., p. 416.

prohibition of collective expulsion of aliens laid down in Article 4 Protocol 4 of the Convention. The government of Denmark countered that the present case differed essentially from the cases of expulsion and extradition which had previously been brought before the Commission in that here, the repatriation was being planned in co-operation with the United Nations High Commissioner for Refugees and the relevant Red Cross societies. The U.N.H.C.R. would not be party to anything that would jeopardise the safety of the refugees. Also, the applicant had to submit proof of the existence of "exceptional circumstances" and "social reasons" to believe that an alien will be subjected to treatment prohibited under Article 3. And the applicant was unable to do this. In essence, the test is for the applicant to show that there is a likelihood of these refugees being ill-treated. The Commission were satisfied that the Danish government had taken all precautions. It had issued instructions that individual cases ought to be looked at in determining who should be granted residence permits and those to be repatriated. In other words, there was no question of mass expulsion. This is in keeping with the 1951 Convention relating to the status of refugees which is framed in a manner that requires an essentially individualistic approach in deciding refugee problems. The Danish government had also accepted a special responsibility for them after their return to South Vietnam and the Danish Red Cross would continue their representation once the children were in Vietnam. The application was therefore considered manifestly ill-founded within the meaning of Article 27(2) of the Convention. The actions and efforts of the Danish government were certainly exemplary in this connection and the Commission were justified in the decision they reached.

In Lynas v. Switzerland (20) Lynas was arrested in Geneva on suspicion of forgery committed in 1963. A request was made by the United States for his extradition. He was accused of having attempted to introduce cocaine into the

United States. He denied the charges and was extradited to the United States in December 1975. The applicant explained that he had engaged in activities which were successful to enable the Republic of Chile to obtain foreign currency. This so frustrated the efforts of the United States to deprive Chile of monetary resources that the C.I.A. took steps to get rid of him; thus there was an unsuccessful attempt to murder him in September 1971. The narcotics charge was therefore a fabrication to get him to the United States where he was convinced he would be killed by the C.I.A. As proof he produced an individual who admitted being in on an abortive murder attempt in 1971. The Swiss authorities nevertheless extradited Lynas to the United States. In his application to the Commission, after being returned to the United States, the applicant relied on the right to life.(21) In fact no attempt had been made on his life since his arrival in America, and the Swiss government put forward the view that Lynas had not been able to bring certain proof of the existence of a real threat to his life. This test of certainty may be too high for the individual to satisfy and especially on the facts of this particular case. The Commission accepted this argument put forward by the Swiss government. They took the view that by extraditing him to the United States, the Swiss authorities had not exposed him to the dangers he alleged. Thus Articles 2 and 3 had not been violated.

One analysis that can be made of this case is the fact that the Swiss authorities were willing to accept the assurances from the United States authorities that Lynas would suffer no ill-treatment once returned to the United States. Thus once the two states accept guarantees given the individual has no further say in the matter. States rights and interests clearly override individual rights at this point. Lynas' real fear was that the C.I.A. would eliminate him once returned to the United States. Therefore any protections

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21. E.C.H.R., Article 2.

accorded him would have to be prior to his removal. There were none, once the Swiss authorities decided to extradite him.

The Commission has decided allegations that the deportation or extradition order in itself can amount to treatment contrary to Article 3.(22) In the case of Agee v. United Kingdom (23) the applicant was an American citizen resident in the United Kingdom. He was employed for twelve years as an agent for the C.I.A. but he resigned in 1969 due to growing disillusionment. He stated that he was never engaged in activities involving United States or United Kingdom intelligence collaboration and that he had no knowledge of United Kingdom intelligence services. He published a book describing the work of the C.I.A. in South America, but insisted he had never divulged information bearing upon the United Kingdom or other Western European democracies. In 1976 a deportation order was made against him "in the interests of national security". Agee submitted that the act of deportation might amount to degrading treatment contrary to Article 3 as being arbitrary, unjustified or disproportionate punishment. He also alleged potential violation of his right to liberty and security or person under Article 5.(24)

The Commission however did not agree that the applicant would suffer Article 3 violation. Deportation of an alien on grounds of state security cannot be looked at as a penalty in normal circumstances, and the applicant could not show that the authorities were intent on punishing him rather than trying to protect national security. Thus Article 3 was not violated. As regards Article 5, the

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22. N.D.I. & C.L.Q. Vol. 2;99, pp. 112-120.
23. Application No. 7729/76 7 D. & R., p. 164.
24. Article 5(1), "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with the procedure described by law;  
Article 5(1)(f), "The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Commission stated that the protection of "security" of person guaranteed by Article 5 is concerned with arbitrary interference by a public authority with an individual's personal "liberty". Accordingly any decision taken with the sphere of Article 5 must, in order to safeguard the individual's right to "security of person" conform to the procedural and substantive requirements laid down by an already existing law. They noted that the decision to deport Agee was taken under the provisions of the Immigration Act 1971. And there was no indication that the requirements of the Act had not been complied with. Also, Agee had been allowed to decide which country he wished to be deported to.

Overall the Commission noted that Article 5(1)(f) and Articles 3 and 4 of Protocol 4 "clearly implied" that the states parties intended to reserve for themselves the power to deport aliens from their territory".(25) This case can be contrasted with *Lynas*. *Lynas* feared specific reprisals by the C.I.A. on return to the United States. Whereas Agee merely considered the deportation disproportionate punishment for the facts of the case. There was no specific fear that the C.I.A. would attempt to get at him or ill-treat him in any way (although such fear would probably have been a motivating factor in his decision to challenge the deportation order). Also Agee was considered a national security risk and this presumably put him in a different category. For him to prove that he did not pose a security threat to the nation would have been practically impossible. It is essentially for the state to decide who does and who does not pose a security risk.

Although liability to criminal prosecution will not usually bring Article 3 into play, it may do so if political factors are present or if the punishment is likely to be extreme. The most notorious case in this context is *Amekrane v. United Kingdom* (1973).(26) The case concerned a Lieutenant-Colonel Amekrane,

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25. 7 D. & R., p. 172.

an officer in the Moroccan airforce. He had been involved in an attempt to assassinate the King of Morocco. The attempt was unsuccessful and he had flown to Gibraltar in search of political asylum. This was refused by the British authorities in Gibraltar. Before his expulsion to Morocco, the authorities obtained a promise from the Moroccans that Amekrane would be treated correctly and tried before a military tribunal in accordance with the constitution. In the event he was condemned to death and executed. In addition to alleging that the expulsion foreseeably led to Amekrane's execution for a political offence his widow complained of the conditions of detention prior to expulsion, the failure of the authorities to inform Amekrane of the administrative proceedings and that Amekrane's expulsion as an undesirable alien in fact constituted disguised extradition. The breach of Article 3 was the inhuman treatment constituted by the fact that a political refugee applying for asylum in a democratic state, was handed over without having been heard by a court and in deliberate disregard of his individual rights to a country in which he was condemned to death. The case resulted in a friendly settlement whereby the United Kingdom without admitting any violation of Article 3, agreed to pay £37,000 to Amekrane's widow. A friendly settlement, as noted already, is not a conclusive finding on the merits of the allegations of the applicant. Mrs. Amekrane's application was declared admissible and points the way to arguments which might involve a breach of the Convention.

The British authorities needed to keep on good terms with the Moroccan government in order to safeguard its interests in Gibraltar. Whatever knowledge they had of the likelihood of inhuman treatment towards Amekrane, was subordinated to the extent that Amekrane's individual rights were ignored completely. It is here that the individual is most vulnerable because the rights

under Article 3 which he is said to possess seem to be ineffectual at a time when they need to be most effective. Siegart (27) comments of the case, that by operating Article 3 extra-territorially, the Commission could create a right of asylum or at least a right to non-refoulement. In Altun v. Federal Republic of Germany (28) the applicant, a Turk, had founded a political organisation at school. This organisation was banned in 1979; whilst at university he joined various political organisations. In 1980 proceedings were begun against him because of his being a founder member of the Association of Revolutionary Secondary School Pupils. He left Turkey and went to West Berlin. In 1982 his extradition was requested. He was wanted for inciting the assassination of the Customs Minister in May 1980. A second extradition request was based exclusively on hiding criminals and interference with evidence. The Turkish authorities stated that none of the offences carried the death penalty. The applicant contended that the extradition was merely a pretext to ensure his return to Turkey for political reasons. The Commission accepted this as a legitimate consideration and its deliberations reflected this view. They noted evidence that showed he had engaged in political activity in Turkey inspired by a political ideology which was not that of the government; and that the applicant was being sought for an offence which occurred in a political context. The Commission noted a disparity between the first arrest warrant in which the applicant was accused of inciting an assassination attempt and the latter warrant which only mentioned crimes of harbouring offenders and of hiding evidence, on which the extradition was based. The Commission therefore concluded that it was not possible to dismiss with sufficient certainty the danger of some manipulation of the criminal proceedings in Turkey. The applicant's allegation that torture was widely used was not disputed by the Turkish authorities. Thus because the

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27. Siegart, op.cit., p. 190.

28. 5 E.H.R.R. 611.

Turkish government could not indicate satisfactorily what safeguards it had taken or would take to ensure a just trial, given the applicant's militant political past, it was not a manifestly ill-founded application under Article 27(2).

The Commission had special knowledge of the situation in Turkey because of the Denmark v. Turkey case.(29) The case took a twist however.(30) On June 16 1983 the applicant submitted a note informing the Commission that West Germany Federal Office for the Recognition of Foreign Refugees had granted the applicant political asylum. Thus the applicant proposed a friendly settlement if inter alia, the West German government cancelled its decision granting extradition. On August 30 1983, the applicant committed suicide, although proceedings relating to his request for asylum were still pending and further discussions between the Federal Ministry of Justice and the applicant's lawyer concerning extradition were still in progress. The request by Altun's brother to continue the proceedings on his brother's behalf were not permitted by the Commission. The Commission found however that the decision to extradite had lapsed and that the grounds relied on by the applicant's brother to pursue the application in his own name had no direct relation to the subject of the application. In fact, because the Commission was able to examine the same questions raised by Altun in the other case Denmark v. Turkey above, there was no reason to proceed with Altun's case. On December 6 1983 the Commission declared admissible France, Norway, Denmark, Sweden, the Netherlands v. Turkey (31), relating to the allegation that during the period September 12 1980 to July 1 1982, there was an administrative practice of torture or ill-treatment of prisoners in Turkey.

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29. 6 E.H.R.R. 241 Application No. 9940-9944/82.

30. 7 E.H.R.R. 154.

31. 6 E.H.R.R. 241.

In Kirkwood v. United Kingdom (32), Kirkwood was alleged to have committed multiple murder and attempted murder in California. He was arrested on arrival at Heathrow airport, London and charged the next day on a warrant issued by a magistrate at Bow Street Magistrates' Court for his extradition to the United States. On December 30 1982 the United States government made a formal request for the applicant's return to the United States. On July 12 1983 the applicant submitted a petition to the Secretary of State that he should not be ordered to be surrendered to the United States. On February 6 1984 the Secretary of State signed the warrant for the applicant's surrender to the United States authorities and removal from the United Kingdom. An application by the applicant for a stay on his surrender and for leave to challenge the Secretary of State's decision by way of judicial review as one which no reasonable authority would make was ultimately refused.(33) The law relating to extradition between the United Kingdom and the United States is governed by the Extradition Acts 1870 to 1935 and the Treaty signed between the two states on June 8 1972. Article IV of the Treaty provides that, "If the offence for which extradition is requested is punishable by death under the relevant law of the requesting party, but the relevant law of the requested party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting party gives assurances satisfactory to the requested party that the death penalty will not be carried out". This discretion is vested in the Secretary of State by section 11 of the Extradition Act 1870 and comes into play after the fugitive has exhausted his legal remedies at committal or by way of habeas corpus. On July 1 1983, the Secretary of State informed the applicant that he had received from the United States government assurances that in the event of a conviction and the imposition of the death penalty, the Deputy Attorney-General

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32. Application No. 10479/83.

33. (1984) 2 All E.R., pp. 390-395.

of California would ensure that a representation be made on behalf of the United Kingdom expressing the United Kingdom wish that the death penalty not be carried out. The applicant's submission was that, bearing in mind the probability of the imposition of the death penalty in the event of his return to the United States, after trial and conviction, and taking into account the automatic appeal procedure operated in California and the consequent delay in the implementation of any such death penalty, his extradition would constitute inhuman and degrading treatment contrary to Article 3 of the Convention. The applicant's complaint centres upon the inevitable psychological tension and uncertainty which will be generated during the appeal procedure from a decision imposing the death penalty on him. He contended that the length of such proceedings and the vital nature of their outcome will create circumstances which amount to inhuman and degrading treatment. The United Kingdom respondent government claimed before the Commission that the applicant could not claim to be a victim of a violation of the Convention firstly because the allegations which the applicant sought to rely on were expectations of certain events occurring in the future. Therefore, because the allegations were derived from assumptions rather than fact, they were too remote and uncertain. Secondly, where the alleged violation is ultimately based upon anticipated events taking place in a non-contracting state, the Commission lacks competence *ratione loci* to determine the application. The government argued that the "contributory act" in returning an offender is of no significance in Convention terms, unless it is related to the conditions which obtain in the receiving non-contracting state. And it was not possible that either the applicant, the contracting state involved or the Commission or Court would independently have comprehensive access to all relevant information such as would enable a reliable and objective measure to be made (Altun v. Federal Republic of Germany where the Commission had specific knowledge of the practice of torture in Turkey). The Commission noted the existence of complex and detailed measures to accelerate the appeal system in capital cases in

California. These were reflected in the priority assigned to capital cases in the District Attorney's office, where counsel responsible for a capital case on appeal are relieved of all other responsibilities to be able to concentrate exclusively on the preparation of that appeal. The Commission also noted the backlog of cases which were making the death row phenomenon worse. However the Commission stated that its task was not to assess "as a mathematical probability" the likelihood of the applicant being exposed to the treatment about which he complains, but to examine the machinery of justice to which he will be subjected and to establish whether there are any aggravating factors which might suggest arbitrariness or unreasonableness in its operation. On this basis the Commission found, due to the material submitted before it, that capital cases were dealt with with particular vigilance to ensure their compliance with the standards of protection afforded by the Californian and United States constitutions in order to prevent arbitrariness. Thus the essential purpose of the California appeal system was seen as ensuring protection for the right to life and to prevent arbitrariness. Despite the delays, these delays were subjected to the controlling jurisdiction of the courts. And, because the applicant had not been tried or convicted, his risk of exposure to the death row phenomenon was uncertain. Thus there was no violation of Article 3 of their Convention, and the application was manifestly ill-founded.

Various points arise from the cases of Amekrane, Altun and Kirkwood. The distinction between the first two cases and Kirkwood is that the former cases were coloured by the political background of their offences and their subsequent request for extradition. Kirkwood committed purely criminal offences (although he alleged he had been engaged in "violent political activity" in California). In Kirkwood, Article IV Treaty highlights once again that extradition is very often not concerned with the rights of the individual. Once the Secretary of State had obtained assurances from the United States (a "friendly

ally?") the subjective complaints of the applicant based on facts, were not powerful enough to challenge the government assurances. The Treaty requirements had been complied with and this was sufficient. Regarding removal, one notes the reluctance of the United Kingdom to accept international responsibility for treatment which may be meted by another state. This raises the question of suspensory remedies. It is not sufficient to give an individual a remedy against being removed to a state where he might be ill-treated if he has already been removed there. (Note, same argument in Lynas v. Switzerland). The requested state is unlikely to give him back. This applied in Amekrane also, where the British authorities sought assurances from the Moroccan authorities that he would be treated and tried according to their legal rules. In the event he was executed. The United Kingdom were unable to (and would not have wanted to) interfere once Amekrane had been handed over.

One important fact borne out by Kirkwood is the question of the relationship between Article 3 and the principle of non-refoulement. Article 3 is wider in that no "discrimination" need be involved in the mistreatment but it is narrower (probably) because firstly the standard of mistreatment is higher and secondly, the burden on the applicant is stricter. Another point is that Kirkwood shows that for refugees non-refoulement is valuable as a right for individuals only if there is some forum for its exercise. Under the Refugee Convention that can only be in domestic law (though it need not be a judicial remedy - merely an effective one) and that there are circumstances where effective guarantees must include suspensory remedies.

Article 1(F)(b) of the Refugee Convention limits non-refoulement where the individual has committed serious non-political crimes outside the country of refuge. Kirkwood was allegedly guilty of multiple murder and attempted murder. Thus even from the point of view of looking at the non-refoulement principle from a humanitarian aspect, Kirkwood is not likely to benefit. By contrast,

Amekranc and Altun may have had strong claims to invocation of the humanitarian principle which underlies the non-refoulement principle because their crimes and the subsequent request for extradition had a definite political colouring; such that it was clearly inhuman to return them to Morocco and Turkey where their lives would be seriously jeopardised, due to their political opinions. Thus they are both within the requirements of the Refugee Convention section 33(1) and they may also avail themselves of Article 3 of the European Convention on Human Rights. They do not fall within Article 1(F) which limits the non-refoulement principle; nor do they come within Article 33(2) where non-refoulement cannot be invoked if the individual is a danger to the security of the country in which refuge is sought. It is difficult to establish the real extent of the non-refoulement rule. In the final analysis, because the Refugee Convention does not prohibit the extradition of political refugees, their protection is left totally to domestic law. In most states, judicial authorities cannot apply the principle of non-refoulement when deciding about the extraditability of political refugees, since extradition laws usually do not provide for an explicit exception in this respect and since the application of the Refugee Convention usually falls beyond the scope of their competition.

## 2. The Protection of the Individual in other Articles of the European Convention on Human Rights

However, in other areas of the Convention, the law has developed for the benefit of the individual. After the passing of the 1968 Immigration Act certain East African Asians sought entry to the United Kingdom. They were British passport holders who were fleeing the anti-Asian policies of the Ugandan government. Some had family members who were resident in Britain. They were not allowed admission on the basis that their passports did not afford them an automatic right of entry and they would thus have to take their place in the immigration queue. This process would take years to sort out.

Article 3 of the Fourth Protocol states that, "No one shall be deprived of the right to enter the territory of the state of which he is a national". But the United Kingdom has not ratified this Protocol.(34). The Asians took their case to the Commission and nevertheless argued that their treatment under the Immigration Act 1968 amounted to a breach of the Fourth Protocol Article 3 and also amounted to degrading treatment under Article 3. Some applicants argued breach of Article 8 which concerns the right to respect for one's private and family life, and one's home. The United Kingdom claimed, successfully, that the Convention did not guarantee to everyone, including passport holders, a right of entry or residence. But the Commission went on to say that discrimination based on race could by itself amount to degrading treatment of the person, which is prohibited under Article 3.(35) "Thus a government, operating in an area which it believes substantively to be beyond the reach of the Convention, can find itself caught up via the more generalised provisions relating to the standard of treatment of individuals that the Convention requires".(36)

In conclusion, one notes that there are very strict requirements which need to be satisfied before the individual can avail himself of the protection of Article 3. Thus the individual cannot look to Article 3 for ready protection. Only treatment of a high degree of severity will suffice before the applicant can successfully invoke the Article. Because of the seriousness of finding a violation of Article 3, the Court has insisted on proof "beyond reasonable doubt". Thus any theoretical protections the individual has under the

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34. Not at the time of writing anyway.

35. East African Case 4403/70; 36 Collected Decision 92; 13  
Y.F.C.H.R., p. 928.

36. R. Higgins, "Conceptual Thinking about the Individual in International Law" (1978) B.J.I.S. p. 1 at p. 13. Note however, The Indian Residents Case No. 5301/71; X and Y v. United Kingdom 44 Collected Decision 29 where the applicant East Asians were not successful.

Convention do not in practice amount to very much.

At at both the universal and regional (European) level, it is difficult to say that an individual actually has a right to rely on the Articles in the European Convention or the International Covenant of Civil and Political Rights and the Optional Protocol, to the extent that he could be said to possess rights international law for the protection of his individual life and liberty.

It is therefore clear that positive attempts at international level to keep the human rights issue at the forefront of state activity which directly affects the individual, is the only way to make sure that continuing abuse or disregard of these rights are exposed.

## CONCLUSION

The examination of extradition leads one to conclude that many international legal rules remain inter-state rules, and even if the individual is disadvantaged by their breach, he has no rights at the international level. Any rights he has are purely matters of domestic law. Not only is the individual dependent on domestic remedies but the state may change the rules to his disadvantage as arguably the courts have done with the interpretation of the political offence as illustrated in the case law referred to in Chapter Three, and Parliament has done with its abolition for certain offences by the enactment of the Suppression of Terrorism Act 1978. Therefore one can say that the individual finds protection only if his rights are interfered with. And the inevitable question to ask is does he have any at international level? It is argued that refugees have a right of non-refoulement which would impose a limit on the state's power to limit the political offence exception.

But this right is limited. Firstly, it is not a right of asylum, which remains, and for good reasons - mass exoduses - a state right. Secondly, the remedies for the individual at international law for breach of non-refoulement are essentially a matter of domestic law. It is clear that improvement in the provision of remedies for individuals at the international level is necessary. Human rights offer some hope in this respect. With respect to Europe, Articles 2, 3 and 5 (1) enshrine important principles, as do the Fourth Protocol and Article 1 of the Seventh Protocol. At the universal level, Article 13 of the

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1. Article 2, the right to life; Article 3, freedom from torture and from inhuman or degrading treatment or punishment; Article 5, the right to liberty and security of the person.

international Covenant on Civil and Political Rights is the key Article for the purposes of this study. Whilst the Human Rights Committee has allowed individuals success at invoking Article 13 where proven violations have occurred, within the European context, our case study illustrates how difficult it is for the individual to succeed in invoking Article 3. And from this point of view importance has to be attached to the inter-action between international standards and the domestic legal system.

Whether the courts concerned are in fact able to take account of their state's obligations under international human rights treaties will depend on whether these obligations are incorporated in the state's domestic law, either by national enactment or through self-execution, i.e., without need for specific legislation. Some states provide by their constitutions that certain provisions of international law shall be self-executing. The Constitution of the United States, for example, includes international treaties which bind the United States among the sources of law.<sup>(2)</sup> Other countries go further by not only making international law self-executing, but assigning to it a rank in the domestic hierarchy superior to all prior and subsequent legislation. Examples of this include France <sup>(3)</sup> and the Federal Republic of Germany.<sup>(4)</sup> But the United Kingdom does not accept any international law as self-executing where the obligations under international human rights treaties are not incorporated into the state's domestic law, the courts will be confined to the interpretation, application and enforcement of the provisions about human rights to be found in the state's own domestic legal system, either in its constitution or in its ordinary laws. These provisions sometimes follow the language of one or more of the international instruments.

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2. Article VI, section 2.

3. 1958 Constitution, Article 55.

4. Basic Law of May 8 1949 as amended on January 1 1966, Article 25.

As such therefore, whether any violation by a particular state a human right protected by one of the international instruments is capable of redress by domestic legal proceedings will therefore depend on whether, firstly, that right is protected by the domestic law of the state, independently or through incorporation of an appropriate provision of international law. Secondly, whether the domestic legal system affords a procedure for such redress and thirdly, whether the preconditions for that procedure are satisfied.

If there is no domestic remedy available, redress through an international procedure will depend on whether firstly, the state is a party to a treaty which protects that right. Secondly, that the treaty provides an appropriate procedure before an international institution. Thirdly, that the state has accepted the competence of that institution for that purpose, where the treaty requires this and fourthly, that the preconditions for that procedure are otherwise satisfied.

Thus, the fundamental point with regard to the inter-action between international standards and the domestic legal system can be summed up in two ways. Firstly, it is of paramount importance that the state arranges its domestic laws in line with the international standards when their inconsistency is exposed. Secondly, the state ought to comply with its international obligations and standards and put its domestic law in order. By so doing, the need for the individual to seek international determination of any violations would be eliminated.

This leads on to the important question of how to improve the power of the individual to make a claim against (his own) state at an international court - in the European context, at the European Court of Human Rights. Sir Hersch Lauterpacht hoped that the individual would ultimately be able to seek legal remedies before an international court of law and he suggests an amendment to Article 34 of the Statute of the International Court of Justice which would

confer upon the individual the capacity to initiate proceedings. The New Revised Rules of Court referring to the European Court of Human Rights, which came into force on January 1 1983 are an illustration of the sort of progress needed to bring the individual up to the standard whereby he can claim to be a full subject in international law. Although there is still a long way to go, Rule 30(1) has the effect of improving the applicant's independent status before the court.(5) Muchlinski in his article (6) states that this shows that the traditional rules of international law will be modified where it is necessary to accommodate change. But he goes on to say that as far as Western Europe is concerned, regional developments cannot support a fundamental change in the rules of international law without evidence of their acceptance as general custom. "It is clear that the granting of procedural capacity is not such a custom".(7) Brownlie (8) for his part argues that there are many political and practical factors that inhibit the granting of full international personality to the individual. He suggests that on the political level there are not many governments who will admit that the individual has any international legal standing. And on a more practical basis, the problem of representation and costs would raise difficult problems.

In his book, Drzemczewski (9) considers the whole human rights issue as one concerned with effectiveness. After a survey of twenty-one legal systems, the author concludes that the Convention's reception and application in national law

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5. P.T. Muchlinski, "The Status of the Individual under the European Convention on Human Rights and Contemporary Law" (April 1985) 34 I.C.L.Q. Part 2, p. 376.
  6. Ibid.
  7. P.T. Muchlinski, Ibid., p. 379.
  8. I. Brownlie, Principles of Public International Law (3rd ed.), p. 592.
  9. Improving the Protection of Human Rights; A Comparative Study" (1983) Oxford University Press.

could profit from a "harmonious" and "uniform" interpretation of its substantive provisions in cases of doubt, by the institution of a preliminary ruling procedure to the European Court of Human Rights. He suggests that this would remove the delay currently experienced by applicants to Strasbourg. It would also have another effect; the domestic court would become the primary agent for the enforcement of the Convention applying not its version of "Convention law" but an "official" version provided on request by the European Court of Human Rights thus avoiding conflicts of interpretation between national courts.

L.B. Sohn (10), whose article has already been mentioned and discussed, believed that the statement by some international law commentators that human rights law is "soft law" or "normes sauvages" rather than "hard law" is not correct. He refers to the various declarations and conventions on human rights and believes that the United Nations Charter forms the apex to the pyramid of documents referring to human rights. He believes that the Declaration is an authoritative listing of human rights which has become a basic component of international customary law building on all states, not only on members of the United Nations. He recognises the difficulty of persuading governments which are in group, the international law-makers, to agree upon the enforcement against themselves where they have violated international law. "It is not the law that is soft, but the governments".(11) He studies the guarantees in the Covenant on Civil and Political Rights and he rightly points out that the Covenant was designed to help states improve their domestic laws and institutions so that human rights would be protected throughout the world. Even if the Covenant relies on domestic remedies, it "also recognises the new international status of individuals" and gives them access to an international committee, against those

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10. L.B. Sohn, "The New International Law; Protection of the Rights of Individuals rather than States" (1982) 32 Am. U.L.Rev. pp. 1-64.

11. L.B. Sohn, Ibid., p. 13.

states that have accepted the Optional Protocol. His assertion is that since almost half the members of the world community have, by becoming parties to the Covenant, accepted the new international rule that individuals are not mere objects of the provisions of the Covenant. They have safeguards enshrined in the Covenant which they can invoke when they suffer violation by the state. His assertions are in many respects revolutionary when viewed from present day state policy and international practice. But there has to be acknowledgement of the fact that the individual ought to possess enforceable rights in international law, in the positive sense. As John Stuart Mill stated, "The worth of a state, in the long run is the worth of the individuals composing it".

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## List of Abbreviations

- A.C. Appeal Cases
- Akron, L. Rev. Akron Law Review
- All E.R. All England Reports
- A.L.J. Australian Law Journal
- A.L.R. Australian Law Reports
- Am. J.I.L. American Journal of International Law
- Am. J.C.L. American Journal of Comparative Law
- Am. Soc. Int. L. Proc. Proceedings of the American Society of International Law
- Am. U.L. Rev. American University Law Review
- Ann. Dig. Annual Digest and Reports of Public International Law Cases
- A.S.I.L.S. Int. L.J. American Society of International Law Students' International Law Journal
- B. Col. I. & C.L.R. Boston College International & Comparative Law Review
- B.D.I.L. British Digest of International Law
- B.J.I.S. British Journal of International Studies
- B.Y.I.L. British Yearbook of International Law
- Can. Y.I.L. Canadian Yearbook of International Law
- Col. J. Transn. L. Columbia Journal of Transnational Law
- Cr. App. Rep. Criminal Appeal Reports
- C.L.R. Criminal Law Review
- Crt. Sess. Court of Sessions
- Current Leg. Probl. Current Legal Problems
- D & R Decisions and Reports of the European Commission of Human Rights

E.C.H.R. European Commission of Human Rights  
E.C.O.S.O.C. Economic and Social Council  
E.H.R.R. European Human Rights Reports  
E.R. English Reports  
E.T.S. European Treaty Series  
F.R. Federal Reporter  
Hag. C.R. Hague Court Reports  
Hag. Rec. Hague Recueil  
Harv. Int. L.J. Harvard International Law Journal  
H.R.J. Human Rights Journal  
H.R.L.J. Human Rights Law Journal  
H.R.Q.J. Human Rights Quarterly Journal  
Ind. J. Int. L. Indian Journal of International Law  
I.Y.I.A. Indian Yearbook of International Affairs  
I.C.L.Q. International & Comparative Law Quarterly  
Int. Lawyer International Lawyer  
I.L.M. International Legal Materials  
I.L.R. International Law Reports  
I.J. Irish Jurist  
I.L.T. Irish Law Times  
I.L.T.R. Irish Law Times Reports  
I.R. Irish Reports  
I.Y.I.L. Italian Yearbook of International Law  
J.D. Int. Journal du Droit International  
J.Ind. L. Inst. Journal of the Indian Law Institute  
J.I.L.E. Journal of International Law & Economics

J. Leg. S. Journal of Legal Studies  
J.L.S. Journal of Law and Society  
K.B. King's Bench Division Reports  
L.Q.R. Law Quarterly Review  
Marquette L. Rev. Marquette Law Review  
Mich. L. Rev. Michigan Law Review  
M.L.R. Modern Law Review  
Nett. Int. L. Rev. Netherlands International Law Review  
N.Z.L.R. New Zealand Law Review  
N.I.L.Q. Northern Ireland Legal Quarterly  
N.D.I.C.L.J. Notre Dame Int. & Comparative Law Journal  
Os. H.L.J. Osgoode Hall Law Journal  
P.L. Public Law  
Q.B. Queen's Bench Division Reports  
Rec. Recueil de Decisions de la Commission Europeenne des Droits  
de l'Homme  
Rec. Cours. Acad. D. Int. Recueil des Cours de l'Academie de  
Droit International  
Rev. D. Homme Revue des Droits de l'Homme  
Rev. D. Int. Leg. Comp. Revue de droit international et de  
legislation comparee  
Rev. D. Pub. Revue du Droit Public  
Rev. Gen. D. Int. Pub. Revue General de Droit International Public  
Rev. Int. Comm. Jur. Review of the International Commission of  
Jurists  
Rev. Int. D. Pen. Revue internationale de droit penal  
S.A. South African Reports  
Sy. L. Rev. Sydney Law Review

T.I.A.S. Treaties and Other International Acts Series  
T.L. Topical Law  
T.L.R. Texas Law Review  
S.L.R. Sydney Law Review  
Y.I.L. Comm. Yearbook of the International Law Commission  
U.K.T.S. United Kingdom Treaty Series  
U.N.G.A.O.R. United Nations General Assembly, Official Records  
U.N.T.S. United Nations Treaty Series  
U. Pitt. L. Rev. University of Pittsburgh Law Review  
U.S.C. United States Supreme Court Reports  
Va. L. Rev. Virginia Law Review  
Wayne L. Rev. Wayne Law Review  
W.L.R. Weekly Law Reports  
Y.E.L. Yearbook of European Law  
Y.L.J. Yale Law Journal  
Z.L.J. Zambia Law Journal  
Y.E.C.H.R. Yearbook of the European Convention on Human Rights

