Joseph Doherty and the INS: A Long Way to International Justice

Wendy L. Fink

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol41/iss3/9

This Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
JOSEPH DOHERTY AND THE INS: A LONG WAY TO INTERNATIONAL JUSTICE

INTRODUCTION

The concepts of political asylum and extradition both date back to ancient civilizations.\(^1\) Political offenders have fled their countries of origin in search of safe havens, and their countries of origin have demanded their return. This cycle of flight and return is played out on the background of nonrefoulement. Nonrefoulement is the right of refugees not to be returned to a country where they may face persecution. This principle is a customary international norm that protects both the interests of the requesting country and the interests of the political refugee.

Nonrefoulement safeguards the interest of the country requesting extradition in combating international terrorism since it is not available to fugitives who have committed terrorist acts. On the other hand, nonrefoulement protects the political offender by ensuring that he will not be sent to a country where he may face persecution. Nonrefoulement is based on human rights and humanitarian law, and is embodied in many extradition treaties and asylum statutes.

This Note analyzes the principle of nonrefoulement in relation to the case of Joseph Doherty.\(^2\) Doherty fled to the United States in 1981, escaping a life sentence imposed upon him in Northern Ireland for his participation in the fatal ambush of a British Security Forces captain. From 1983, when Doherty was arrested by Immigration and Naturalization Service ("INS") officials, until February 1992, when he was deported to the United Kingdom, Doherty fought both his extradition and deportation to the United Kingdom.\(^3\)

This Note begins by examining the history of nonrefoulement and its incorporation into extradition and asylum law. The Note then describes the Do-

---

1. See AESCHYLUS, THE SUPPLIANT MAIDENS (an ancient Greek play about both the asylum and the extradition of Egyptian princesses).
herty cases and provides an illustration of how nonrefoulement applies to both extradition—under the political offense exception—and deportation and asylum—under the mandatory withholding of deportation and the discretionary asylum statutes. The final section argues that nonrefoulement protects the rights and interests of Doherty, and should have prohibited his return to the United Kingdom.

I. BACKGROUND

Nonrefoulement is embedded in international law, which has developed over the last several hundred years. International law develops from the practice of states, or customary law, and “by purposeful agreement by states,” or “conventional law.” International law is derived from three different sources: (a) “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states”; (b) “international custom, as evidence of a general practice accepted as law”; and (c) “the general principles of law recognized by civilized nations.” As nonrefoulement is an international custom, this Note will focus on the second source of international law.

The second source of international law, customary norms, is binding on all nations. International customary law consists of two components: (a) “a general and consistent practice of states,” and (b) a belief by the states that the practice is mandatory. Evidence of state practice is reflected in governmental acts, official statements of policy, diplomatic acts and instructions, public measures, and a state’s inaction.

4. A state is defined under international law as “an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.” See Restatement (Third) of Foreign Relations Law of the United States § 201 (1986).

5. See id. § 101 intro. (1986).

6. Statute of the International Court of Justice, art. 38(1) (comprising an integral part of the United Nations Charter). This article is generally accepted as a concise statement of the sources of international law. See P. Hyndman, An Appraisal of the Development of the Protection Afforded to Refugees Under International Law, 1 LawAsia 229, 265 (1980).

7. Statute of the International Court of Justice, art. 38(1).

8. Id.; see also Restatement (Third) of Foreign Relations Law of the United States § 102(1) (1986) (listing the three sources of international law as “(a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world”).

9. Hyndman, supra note 6, at 265.

10. See Restatement (Third) of Foreign Relations Law of the United States § 102(2) (1986). This second component often is called opinio juris, meaning the state believes that it is under a legal obligation to adhere to a practice. Id. cmt. c.

For cases outlining the two components of customary international law, see North Sea Continental Shelf (F.R.G. v. Den. and F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20) (using customary international law principles to resolve a boundary dispute between West Germany, Denmark, and the Netherlands over the North Sea Continental Shelf); Asylum (Colombia v. Peru), 1950 I.C.J. 266, 276-78 (Nov. 20) (using customary international law to rule that Colombia had violated Article 2 of the 1928 Havana Convention Regarding Asylum).

11. See Restatement (Third) of Foreign Relations Law of the United States § 102
In the United States, courts have enforced international law for over two centuries. Both conventional and customary international law are considered federal law. Customary law is similar to federal common law. Numerous examples exist that demonstrate that international customary law is an integral part of United States domestic law. The Supreme Court has stated that "international law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . ." When United States statutes conflict with international law, courts should strive to construe the statutes consistently with international law.

12. See id. § 111 cmt. d.
13. Id.
14. E.g., First Nat'l Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611 (1983) (ruling that Cuba could not escape liability for acts in violation of international law simply by retransferring assets to separate juridical entities); The Paquete Habana, 175 U.S. 677 (1900) (determining that it is an established rule of international law that coastal fishing vessels are exempt from capture as a prize of war); The Nereide, 13 U.S. 388 (1815) (using the law of nations to determine that a neutral ship lawfully may employ an armed belligerent vessel to transport goods); Republica v. De Longchamps, 1 U.S. 111 (1784) (finding that the defendant had violated the law of nations by assaulting a French national); Filartiga v. Pena-Irula, 630 F.2d 876 (2d Cir. 1980) ("Deliberate torture perpetrated under the color of official authority violates universally accepted norms of international law of human rights."); Fernandez v. Wilkinson, 505 F. Supp. 787, 800 (D. Kan. 1980) ("[U]ndeterminate detention of petitioner in a maximum security federal prison . . . constitutes arbitrary detention and is a violation of customary international law."); aff'd on other grounds sub nom. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981); United States v. La Jeune Eugenie, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551) (deciding that a French ship engaged in slave trade was subject to condemnation both by the law of nations and the municipal law of France); Hanfield's Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360) (holding that the federal judiciary has jurisdiction over an offender who violated the law of nations); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. j (1986) ("[C]ustomary law and law made by international agreement have equal authority as international law."); Louis Henkin, International Law in the United States, 82 MICH. L. REV. 1555, 1558 (1983) (discussing the transition from the law of nations under Swift v. Tyson to the interdependence of the law of nations as well as international law under Erie R.R. v. Tompkins).
15. Paquete Habana, 175 U.S. at 700. The Court further stated that "for this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators." Id.; see also United States v. Smith, 18 U.S. 153, 160-61 (1820) (Story, J.) (determining that United States courts had jurisdiction under the law of nations to prosecute the defendants' act of "piracy"); Filartiga, 630 F.2d at 880-81 (holding that the United States courts had jurisdiction over an alien defendant whose deliberate torture violated norms of international human rights law); ANTHONY A. D'AMATO, CONCEPT OF CUSTOM IN INTERNATIONAL LAW 34 (1971) (explaining that international law is based on the way representatives of states perceive it); Michael Akehurst, Custom as a Source of International Law, 47 BRIT. Y.B. INT'L L. 1, 11 (1974) (discussing the development of international law through custom); Theodor Meron, Geneva Convention as Customary Law, 81 AM. J. INT'L L. 348, 367 (1987) (discussing the relationship between the Geneva Conventions and customary law).
16. See Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (noting that it is a maxim of statutory construction that statutes be construed consistently with international law); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[United States statutes] ought never to be
The principle of nonrefoulement prohibits a state from returning refugees to a territory where the refugees are likely to face persecution or danger to their life or freedom. This principle is found in many international covenants, as well as in state practice. An examination of the history of nonrefoulement as it appears in conventions and in state practice reveals that this principle has developed into a customary international norm, which some scholars have deemed to be a peremptory right.

A. History of Nonrefoulement in International Conventions

The term "nonrefoulement" is rooted in the French word *refouler*, which means "to drive back or repel, as of an enemy who fails to breach one's defenses." In the immigration context of continental Europe, refoulement was a term used to cover "summary reconduction to the frontier of those discovered to have entered illegally and summary refusal of admission of those without valid papers."

The principle of nonrefoulement was conceived in the mid-1800s. An early documented example of nonrefoulement was the United Kingdom's Aliens Act of 1905. This Act allowed persons fleeing political or religious persecution to enter the United Kingdom. Other countries were slow to follow the United Kingdom's lead, and it was not until after the First World War that nonrefoulement emerged as a principle in many international agreements.


18. See infra note 104 and accompanying text (listing scholars who maintain that nonrefoulement is a peremptory right).


20. Id.

21. During the mid-1800s, Europe and South America experienced political unrest, which resulted in the migration of citizens to other countries. The Russian and Ottoman pogroms against Jewish and Christian minorities also led to mass migration. The principle of asylum and non extradition of political offenders began to form and provide refugees some protection. Id. at 70.

22. Id. (citing Aliens Act, 1905, 5 Edw. 7, ch. 13).

23. Id. (citing Aliens Act, 1905, 5 Edw. 7, ch. 13, § 1(3)). Article 1(3) applies to those "seeking to avoid prosecution or punishment on religious or political grounds or for an offence of a political character, or persecution involving danger of imprisonment or danger to life or limb on account of religious belief." Id.

24. Goodwin-Gill, supra note 17, at 70. Prior to the development of the principle of nonrefoulement, neighboring states would contract among themselves for international criminal
The League of Nations (1922-1946)

After World War I, several organizations and international agreements were created to ameliorate the immense refugee problem left in the wake of the war. The most prolific of these organizations was the League of Nations. Its charter went into effect on January 10, 1920.

The League was created to secure international peace by "the firm establishment of international law as the actual rule of conduct among governments." One of the League's many functions was to ensure fair treatment to the large number of refugees following World War I. During the League's 1933 Convention Relating to the Status of Refugees, the principle of nonrefoulement was seen for the first time in an international setting. Although the term "nonrefoulement" was not expressly used, Article III of the 1933 Convention embodies the concept. It requires the parties not to "remove or keep from [their] territor[ies] by application of police measures, such as expulsions or non-admittance at the frontier [refoulement], refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order." However, Article III lacked force, as only eight states ratified the Convention, and three of those states expressed official reservations to the nonrefoulement provision.

cooperation by establishing mutual obligations to surrender subversives, dissidents, and traitors to the countries that sought them. Id.

26. LEAGUE OF NATIONS COVENANT pmbl., reprinted in 1 INTERNATIONAL LEGISLATION 1, 2 (Manley O. Hudson ed., 1970). The Preamble further states:

In order to promote international cooperation and to achieve international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and honorable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another, the powers signatory to this covenant adopt this constitution of the League of Nations.

Id.

President Woodrow Wilson is credited with the inspiration for the League in his famous Fourteen Point Plan. Unfortunately, the United States Congress refused to approve United States membership into the League, and the League remained largely ineffectual. See JULIA E. JOHNSON, LEAGUE OF NATIONS 3 (1924).

28. GOODWIN-GILL, supra note 17, at 70.
29. 1933 Convention, supra note 27, art. III. The two exceptions for public order and national security are typical in the early nonrefoulement provisions. See id.; see also infra text accompanying notes 67-68 (discussing other exceptions to the principle of nonrefoulement).
30. The eight participating states include Czechoslovakia, Egypt, Italy, Belgium, Bulgaria, Norway, France, and Denmark. 1933 Convention, supra note 27, at state signatories. Czechoslovakia reserved the right to expel aliens who posed a danger to the safety of the state and public order as well as those subject to expulsion under existing extradition treaties. Id. Egypt reserved the right "to expel such refugees at any moment for reasons of public security." Id. Italy reserved the authority to expel refugees "for reasons of national security and public order." Id.
Two agreements submitted to the League by Germany in 1936\(^\text{31}\) and 1938\(^\text{32}\) also reflect the principle of nonrefoulement. Similar to the 1933 Convention, however, these agreements were limited and several signatories expressed reservations to the principle.\(^\text{33}\) In addition to the limited international agreements, there were five different groups that handled refugee problems.\(^\text{34}\) Unfortunately, these groups did not work together and succeeded mainly in creating administrative confusion.\(^\text{35}\) As a result, the obligation of a country not to expel a refugee was hardly developed during World War I or World War II.\(^\text{36}\) Treaty law on refugee problems was minimal,\(^\text{37}\) and one scholar notes that the rule of nonrefoulement really did not exist at this time in international law.\(^\text{38}\)

Despite its slow acceptance and the qualifications placed on the international agreements that contained the principle of nonrefoulement, very few refugees were returned to their countries of origin during the inter-war period.\(^\text{39}\) Although under no legal obligation to do so, the Allied nations protected the large number of people fleeing political and religious persecution. This protection laid the foundation for the significant incorporation of nonrefoulement into international conventions by the United Nations after World War II.\(^\text{40}\)

---

31. Provisional Agreement Concerning the Status of Refugees Coming from Germany, July 4, 1936, 171 L.N.T.S. 77.
33. Only one agreement was ratified, and this was signed by only one state (Belgium). 2 PETER H. ROHN, WORLD TREATY INDEX 302, 327 (2d ed. 1983).
34. These groups included: (1) The League of Nations High Commissioner for Russian and Armenian Refugees (1921-30), subsequently incorporated in the Nansen International Office for Refugees (1930-38); (2) The Office of the High Commissioner for Refugees Coming from Germany (1933-35), subsequently incorporated in the League of Nations (1936-46); (3) The League of Nations High Commissioner for all Refugees (1938-46); (4) The Inter-Governmental Advisory Commission for Refugees (1929-35); and (5) The Inter-Governmental Committee for Refugees (1938-47). GRUNNEL STENBERG, NON-EXPULSION AND NONREFOULEMENT 30 (1989).
35. Id. at 35.
36. Id. at 45.
37. Between 1918 and 1939, only one treaty existed that protected refugees: the Montevideo Treaty on International Penal Law in Latin America. See id. at 45 n.89 (citing OAS; Treaty Series No. 34, OEA/Ser.K/XVI/1.1). Article 16 of the Montevideo Treaty provides that “political refugees shall be offered an inviolable asylum” when facing extradition. Id.
38. GOODWIN-GILL, supra note 17, at 72.
39. Between 1918 and 1939, a large number of refugees fled the Russian Revolution, the Ottoman Empire, the fascist regime in Germany, and the civil war in Spain. These refugees were given safe haven. For example, France admitted 400,000 refugees from Spain in just ten days in 1939. Id. at 73.
40. Id. at 71.
2. Nonrefoulement in the United Nations International Conventions

a. 1946 to 1951

Since its inception, the United Nations has provided the impetus for the development of customary rules through its resolutions, its recommendations, and the activities of its different agencies.\(^{41}\) The Charter of the United Nations was signed in San Francisco on June 26, 1945.\(^{42}\) One of the many purposes of the United Nations was “to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”\(^{43}\) The United Nations targeted the growing problem of refugees as one area in need of international cooperation.\(^{44}\)

On February 12, 1946, the United Nations General Assembly decided to create a special committee, the International Refugee Organization (“IRO”) to solve the refugee problem.\(^{45}\) The IRO incorporated the four previous organizations that handled refugee problems,\(^{46}\) and facilitated the resettlement and integration of over 1,620,000 refugees.\(^{47}\) This organization had some impact on most of the Western states, and nonrefoulement was seen as a regional custom during the period immediately after World War II.\(^{48}\)

42. U.N. CHARTER pmbl. Most scholars give credit to Franklin Roosevelt for the creative spirit behind the formation of the United Nations. His famous 1941 Four Freedoms speech envisioned many precepts that the United Nations sought to achieve. The four freedoms include: (1) freedom of speech and expression; (2) freedom of every person to worship God in his own way; (3) freedom from fear; and (4) freedom from want. THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS 17-18 (1988); ARTHUR N. HOLCOMBE, HUMAN RIGHTS IN THE MODERN WORLD 4-5 (1948).
44. Id.
46. Prior to the creation of IRO, there were four major organizations that dealt with the massive number of refugees and displaced persons after World War II. These organizations included: (1) The League of Nations High Commissioner for Refugees, which protected persons belonging to the refugee categories of the inter-war period; (2) Intergovernmental Committee for Refugees (“IGCR”), which gave legal protection and re-emigration assistance to other categories of refugees; (3) the Allied Military Authorities under the supervision of the Supreme Allied Expeditionary Force (“SHAEF”), which until August 1945 had primary responsibility for the liberation, care, maintenance, repatriation, and resettlement of United Nations displaced persons; and (4) the United Nations Relief and Rehabilitation Administration (“UNRRA”), which handled questions relating to the relief and repatriation of displaced persons, including refugees. STENBERG, supra note 34, at 52.
47. Id. at 54; GOODWIN-GILL, supra note 17, at 72.
48. One commentator writes that immediately after World War II, “expulsion and deportation were very rare.” LOUISE W. HOLBORN, THE INTERNATIONAL REFUGEE ORGANIZATION 325...
In 1946, the United Nations for the first time officially advocated the principle of nonrefoulement in two documents. The principle is incorporated into the constitution of the IRO.\(^4\) In addition, the U.N. General Assembly passed a resolution on February 12, 1946, stating that "no refugees or displaced persons . . . shall be compelled to return to their country of origin."\(^5\) The United Nations again recognized the principle, although indirectly, in the Universal Declaration of Human Rights in 1948.\(^6\) In 1950, the United Nations also established the Office of the High Commissioner for Refugees ("UNHCR"), which was designed to provide international protection for refugees.\(^6\)


The most comprehensive and binding document for refugee problems was drafted in 1951.\(^6\) The 1951 United Nations Convention on the Status of Refugees ("1951 Convention") provides protection to refugees by "matching specific state rights with corresponding state obligations."\(^6\)4 The General Assembly apparently thought it wise to "revise and consolidate previous international
agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement.\textsuperscript{55} The drafters of the 1951 Convention sought to guarantee the refugees "fundamental rights and freedoms."\textsuperscript{56} The General Assembly accomplished this goal by expressly incorporating the right to nonrefoulement in the 1951 Convention.\textsuperscript{57}

The 1951 Convention's definition of refugee is a vital threshold question concerning its applicability. Only those people falling under its scope are entitled to nonrefoulement. The 1951 Convention defines a refugee as anyone who 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 . . . is unable or, owing to such fear, is unwilling to return to it.\textsuperscript{58}

The 1951 Convention further limits its scope to individuals who became refugees due to events occurring in Europe prior to January 1, 1951.\textsuperscript{59} While the 1951 Convention was well suited to handle World War II refugees, it did nothing to assist Asian, African, or Latin American refugees.\textsuperscript{60} Despite its limited scope, the 1951 Convention was an improvement over the prewar conventions, and afforded more protection to refugees through its nonrefoulement provisions.

The two main provisions within the 1951 Convention that guarantee the principle of nonrefoulement are Articles 32 and 33.\textsuperscript{61} These two articles concern the power of the member states to expel refugees. Article 32 provides that "the Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."\textsuperscript{62} Expulsion based on grounds of public order or national security may only result from a decision

\textsuperscript{55} 1951 Convention, supra note 53, pmlb.
\textsuperscript{56} Id.
\textsuperscript{57} Id. art. 33(1) ("[N]o contracting state shall expel or return certain refoulers to a territory where his life or freedom may be threatened.").
\textsuperscript{58} Id. arts. 1(A)(2), 33(1). Note that this definition does not include victims of general violence (the refugees must be under individual attack), nor does it include economic refugees (individuals seeking better lifestyles) or displaced persons (individuals who are homeless but who have not left their countries' borders).
\textsuperscript{59} Id. The 1951 Convention allowed states to define "events occurring before January 1, 1951" in two ways; one limited "events" only to those occurring in Europe, while the other did not contain geographical limitations. Id. The Convention requested each contracting party to specify which way it would define "events" at the time of ratification. See id. art. 1(B); see also Martin, supra note 54, at 654 (noting this limitation).
\textsuperscript{60} This was due to the geographical and time limitations of the 1951 Convention. See Martin, supra note 54, at 654.
\textsuperscript{61} 1951 Convention, supra note 53, arts. 32, 33.
\textsuperscript{62} Id. art. 32(1).
reached in accordance with due process of law.\(^6\)

Article 33 provides that "no Contracting States 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 in a particular social group or political opinion."\(^6\) A crucial aspect of Article 33 is that each state may not make reservations of any kind, but rather must agree to the terms as written.\(^6\) Thus, Article 33 obligates all contracting states to "unconditionally" observe its nonrefoulement clause.\(^6\)

However, Article 33 does not protect those refugees whom the state reasonably regards 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."\(^6\) Nor does this article protect refugees who (a) have committed crimes against peace, crimes against humanity, or war crimes; (b) have committed serious nonpolitical crimes; or (c) have acted in a manner contrary to the principles and policies of the United Nations.\(^6\) Nevertheless, these limits do not detract from the obligatory nature of nonrefoulement.

The 1951 Convention greatly expanded the concept of nonrefoulement well beyond the qualifications and reservations imposed in earlier times. Contracting states could neither directly nor indirectly force refugees to return to countries where the refugees reasonably could face persecution, unless the refugees constituted a threat to "national security" or to "the community."\(^6\) To date, ninety-five countries are signatories to the 1951 Convention.\(^7\) Other nations, like the United States, became signatories to the 1951 Convention indirectly by signing the 1967 Protocol Relating to the Status of Refugees.\(^6\) The 1951 Convention continues to provide substantial protection for refugees and is the basis upon which current refugee law has developed.\(^7\)

\(^{63}\) Id. art. 32(2).

\(^{64}\) Id. art. 33(1).

\(^{65}\) Article 42(1) provides that "at the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive." Id. art. 42(1) (emphasis added). Article 1 contains the definition of the term "refugee"; article 3 is a non-discrimination clause; article 16(1) provides for free access to the courts of all contracting countries; and articles 36-46 are administrative clauses. Id. arts. 1, 3, 4, 16(1), 36-46. Thus, Article 33 is the only substantive provision that allows no exceptions by contracting states.

\(^{66}\) See Martin, supra note 54, at 654.

\(^{67}\) 1951 Convention, supra note 53, art. 33(2).

\(^{68}\) Id. art. 1(F)(a)-(c).

\(^{69}\) See supra notes 67-68 and accompanying text (discussing the three exceptions to nonrefoulement in the 1951 Convention).

\(^{70}\) See 3 ROHN, supra note 33, at 635-36.


\(^{72}\) GOODWIN-GILL, supra note 17, at 13.

Several years after the ratification of the 1951 Convention, the United Nations General Assembly recognized that there were problems with the limitations the Convention had placed on refugees. While the number of refugees around the world increased with each new political upheaval, the number of refugees protected by the 1951 Convention decreased. This decrease was due to the requirement that the individuals seeking refuge be refugees due to events occurring in Europe prior to January 1, 1951.

In an effort to widen the scope of protection under nonrefoulement, the General Assembly eliminated the time and geographical limitations placed on refugees under the 1951 Convention. It broadened the scope of the 1951 Convention to include all the individuals who had become refugees due to incidents that occurred after January 1, 1951, and abandoned the European location requirement. Therefore, the 1967 Protocol now applies to almost every refugee.

Like the 1951 Convention, the 1967 Protocol also obliges Contracting States to adhere to the principle of nonrefoulement. Article 7(1) of the 1967 Protocol does not allow states to reserve any rights under Article 33 of the 1951 Convention. "The presence of this limitation indicates that, sixteen years after the drafting of the Convention, the principle of non-refoulement remained of such importance as to allow no conditional or alternative provisions." Thus, the right of nonrefoulement was permanently entrenched in international law.

d. Other international conventions

In addition to the 1951 Convention and the 1967 Protocol, there are a number of other international documents that reflect the principle of nonrefoulement. These documents are both regional and international, and contain varying definitions of "refugee." The first is the 1967 Declaration on Territorial Asylum. The United Nations General Assembly adopted the resolution that "[n]o person . . . shall be subjected to measures such as rejection at the fron-

73. 1967 Protocol, supra note 71, art. I(2), (3).
74. Id.
75. Note that while the time and geographical limitations are gone, the 1967 Protocol did not expand the 1951 Convention's definition of refugee. Thus, refugees of general violence, economic refugees, and displaced persons still do not fall within the scope of the term "refugee." See supra text accompanying notes 58-59 (discussing the definition of refugee under the 1951 Convention).
76. 1967 Protocol, supra note 71, art. VII(1). Article I(3) does provide that any reservations made by a State under the 1951 Convention shall apply to the 1967 Protocol. Id. art. I(3).
77. Id. art. VII(1).
78. Martin, supra note 54, at 655.
79. As of 1990, ninety-five states have become signatories to the 1967 Protocol, including the United States. 4 ROHN, supra note 33, at 1394-95.
tier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution. 81 In the same year, the Committee of Ministers of the Council of Europe ratified a document providing that states should “ensure that no one shall be subjected to refusal of admission at the frontier which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution . . . .” 82 The Committee used the same definition of refugee as the 1951 Convention.

In 1969, the Organization of African Unity (“OAU”) created a document that espouses one of the most comprehensive applications of the principle of nonrefoulement. 83 The OAU Convention on Refugee Problems in Africa, a regional convention open to African states only, protects refugees through Article II(3), which states that “no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened . . . .” 84 The phrase “physical integrity” expands the nonrefoulement provision of the 1967 Protocol as applied by the OAU. 85

Another regional document that broadened nonrefoulement is the 1969 American Convention on Human Rights. 86 This convention includes all North, Central, and South American states. Article 22(8) of the 1969 American Convention states:

In no case may an alien be deported or returned to a country, regardless

81. Id. art. 3(1). This Declaration used the same definition of refugee as the 1951 and 1967 United Nations conventions concerning refugees. See supra text accompanying notes 58-59 (discussing the 1951 Convention definition of a refugee).
82. See Goodwin-Gill, supra note 17, at 76 (citing G.A. Res. (67) 14 on Asylum to Persons in Danger of Persecution, adopted June 29, 1967).
84. Id. art. I(2).
85. In addition to the usual definition of the term “refugee,” Article I(2) of the 1969 OAU Convention also includes:

Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinion.  

In contrast to Article 33 of the 1951 Convention, which allowed states to return people who constitute risks to national security or danger to the community, Article 22 recognizes absolutely no reservations or exceptions to its provision. Under Article 22, nonrefoulement applies to all persons legally or illegally within the borders of a party state.

Finally, the 1966 International Covenant on Civil and Political Rights also reflects the principle of nonrefoulement. Although this United Nations document does not expressly prohibit refoulement, it does recognize the international rights of a refugee facing expulsion. These international and regional documents demonstrate the extensive growth of the principle of nonrefoulement since World War II.

B. The History of Nonrefoulement as State Practice

In addition to the many international conventions that promulgate nonrefoulement, state practice over the twentieth century lends support to the notion that this principle is an established custom of international law. While the term "nonrefoulement" is usually not expressly stated, the municipal laws of most states contain language that parallels that found in Article 33 of the 1951 Convention. Cases of nonrefoulement usually are reflected in individual

87. 1969 American Convention, supra note 86, art. 22(8).
88. See supra text accompanying notes 67-68 (discussing the two exceptions to nonrefoulement in the 1951 Convention).
89. 1969 American Convention, supra note 86, art. 22.
90. Id. art. 22(1).
92. The 1966 Covenant protects the refugee's due process rights under Article 13, which states: [A]n 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 . . . be allowed to submit the reasons against his expulsion and to have his case reviewed by . . . the competent authority. 1966 Covenant, supra note 91, art. 13.
93. For other examples of regional documents that reflect nonrefoulement, see the 1954 Caracas Convention on Territorial Asylum, Mar. 28, 1954, 18 Pan-Am. T.S. No. 34, OAS Off. Rec., OEA/ser. X/1 (text in English). Article 3 provides that "no State is under the obligation . . . to expel from its own territory, persons persecuted for political reasons or offenses." Id. art. 3; The European Convention on Human Rights, Nov. 4, 1950, Sept. 3, 1953, reprinted in COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS § 1, Doc. 1 (7th ed. Strasbourg 1971). Article 2(2) provides that "no one shall be deprived of the right to enter the territory of the States." Id. art. 2(2).
94. See, e.g., 8 U.S.C. § 1253(h)(1) (1988); GOODWIN-GILL, supra note 17, at 162-204 (analyzing the domestic law enactment of nonrefoulement in over twenty countries); Kay Hailbronner, Non-refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal
adjudications in immigration courts around the world. Refugees may be protected indirectly ("for example, where deportation tribunals are empowered to take all relevant factors into account")94), or directly, by an express limitation on the permissible grounds for expulsion and choice of destination.95

The United States, for example, incorporates the principle of nonrefoulement in 8 U.S.C. § 1253(h).96 This statute provides:

The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.97

This provision includes the same five bases of persecution as Article 33 of the 1951 Convention.98 Several United States Supreme Court decisions have interpreted section 243(h) of the 1980 Immigration and Nationality Act as incorporating the principle of nonrefoulement. In INS v. Stevic,99 the Court noted that "section 203(e) of the Refugee Act of 1980 amended the language of § 243(h) [of the Immigration and Nationality Act], basically conforming it to the language of Article 33 . . . ."100 In INS v. Cardozo-Fonseca, the Court stated that § 243(h) "fulfills the nonrefoulement requirements of article 33."101

Customary international law requires both consistency of state practice and a belief by the observing state that the practice is obligatory, or opinio juris.102 While it is more difficult to establish that states practice nonrefoulement out of a sense of legal obligation, opinio juris is reflected (a) in express official statements, (b) in the consistency of state practice, and (c) from protests by other states against breaches of the norm.103 The above-mentioned international and regional conventions, as well as domestic law, all embody the principle of nonrefoulement. Further, the overwhelming majority of states consistently have embraced this concept. Finally, many scholars regard
nonrefoulement as a customary norm. Thus, both elements needed to establish nonrefoulement as an customary international norm have been satisfied.

Some scholars contend that a new international norm has grown out of nonrefoulement. This norm, the right to temporary refuge, prohibits the deportation of refugees to their country of origin. The right to temporary refuge is similar to nonrefoulement, as it prohibits a state from returning refugees to a country where the refugees may face persecution. The main difference is its scope—the norm protects refugees who do not fall under the individualized protection of the 1951 and the 1967 United Nations refugee documents. In other words, the right to temporary refuge covers those refugees who are the victims of general violence and persecution.

Temporary refuge embodies the concept that aliens should not be returned to a country that is engaged in internal strife until the violence ceases and normal conditions resume. This norm "prohibits a state from forcibly repatriating foreign nationals who find themselves in its territory after having fled generalized violence . . . caused by internal armed conflict within their own state." A refuge state must provide safe haven until the "state can assure the security and protection of its nationals.”

The right to temporary refuge enjoys growing legal and judicial support. Recently, a United States court extended the principle of nonrefoulement by refusing to return three Salvadoran refugees back to El Salvador until the civil war had ceased. The fact that another norm has grown out of the principle

104. The following is a list of scholars who agree with this principle: Goodwin-Gill, supra note 17; Hyndman, supra note 6; Martin, supra note 54; Karen Parker, Human Rights and Humanitarian Law, 7 WHITTIER L. REV. 675, 679 (1985); Perluss & Hartman, supra note 95; Peter Weis, United Nations Declaration on Territorial Asylum, 1969 CAN. Y.B. INT’L L. 92, 148 (1969); Riga, supra note 51. For the opposing view, see 2 ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 94-98 (1974); S. PRakash Sinha, Asylum and International Law 159, 280 (1969).

105. See Guy Goodwin-Gill, Non-Refoulement and the New Asylum Seekers, 26 VA. J. INT’L L. 897, 914 (1986); Parker, supra note 104, at 679; Perluss & Hartman, supra note 95, at 600. But see Hailbronner, supra note 93, at 858 (arguing that nonrefoulement is not an international norm, because states fear losing control of their borders).

106. Deportation is a method by which a country returns an individual to his country of origin if that individual does not meet the criteria for legal entry into the country. See, e.g., 8 U.S.C. § 1252 (1988).


108. See Perluss & Hartman, supra note 95, at 558-71 (listing countries that have provided the right of temporary refuge to refugees).

109. Id. at 554.

110. Id.

111. In re Santos, No. A29-564-781 (Aug. 24, 1990) (Nejelski, l.J.), summarized in 67 INTERPRETOR RELEASES 982 (1990). The Santos case represents a breakthrough for immigration defense attorneys who have advocated the right of temporary refuge without great success. Judge Nejelski is the first immigration judge to acknowledge the right of temporary refuge. “This court finds a right to non-return to a country engaged in civil war, which is recognized in international state practice and opinio juris . . . .” Id., slip op. at 10. Other immigration judges mask this concept under the guise of extended voluntary departure. See Parker, supra note 104, at 680 (“The concept of nonrefoulement is articulated in United States Law as extended voluntary de-
of nonrefoulement bolsters the argument that it is a well-established customary international norm. Some scholars contend that the customary international norm of nonrefoulement is now a peremptory right.\footnote{112}

In addition, the United Nations High Commissioner for Refugees ("UNHCR") recently stated that there exists "a universally recognized principle of non-refoulement, which requires that no person shall be subjected to such measures as rejection at the frontier . . . expulsion or compulsory return to any country where he may have reason to fear persecution or serious danger from unsettled conditions or civil strife."\footnote{113}

While nonrefoulement protects most refugees, there are express limits on the scope of its protection. Even if the refugee may face persecution in a country, the refugee may be returned to that country if the refugee falls under one of the express exceptions to nonrefoulement.\footnote{114}

C. Exceptions to the Principle of Nonrefoulement

Like so many other concepts of international law, nonrefoulement is not an absolute principle.\footnote{115} States have long justified the derogation of the principle with the excuse of "public order" or "national security."\footnote{116} The more deeply embedded the principle becomes in international law, however, the more difficult it is for states to invoke exceptions.\footnote{117}

The 1951 Convention expressly excludes refugees from the protection of nonrefoulement whom the state reasonably regards as "a danger to the security of the country" or "a danger to the community of that country."\footnote{118} State departure. In my view, extended voluntary departure is just another way of saying non-refoulement.

\footnote{112. See Perluss & Hartman, supra note 95, at 600 ("[T]he prohibition on compulsory return as a principal should be observed as a rule of jus cogens.").}


\footnote{114. See supra text accompanying notes 67-68 (describing the limits on the protection of nonrefoulement in the 1951 Convention).}

\footnote{115. Goodwin-Gill, supra note 17, at 95.}

\footnote{116. Id.; see, e.g., the exceptions in the 1933 Convention relating to the International Status of Refugees (noted supra text accompanying note 29).}

\footnote{117. Goodwin-Gill, supra note 17, at 95.}

\footnote{118. 1951 Convention, supra note 53, art. 33(2).}
authorities determine who constitutes a danger by reviewing the individual’s activities to assess potential security risks. In addition, the 1951 Convention does not give protection to any refugee who has committed a crime against peace or humanity, a war crime, or a serious nonpolitical crime, or has acted in a manner inconsistent with general United Nations principles and policies.

Other international conventions also create exceptions to nonrefoulement. A stronger exception appears in the 1967 U.N. Declaration on Territorial Asylum. In addition to a national security exception, Article 3 of this declaration authorizes further exceptions “in order to safeguard the population, as in the case of a mass influx of persons.” As mass influxes of people usually occur with temporary refuge and not nonrefoulement, most commentators criticize this strong exception as vague and urge states not to invoke the provision.

Unlike the conventions cited above, the 1969 OAU Convention states that the principle of nonrefoulement is without exception. Similarly, the 1969 American Convention does not permit a contracting state to diminish the scope of protection under its nonrefoulement provisions.

While the 1951 Convention includes four limitations to the concept of nonrefoulement, various states have developed municipal laws that expand the exceptions to nonrefoulement. For example, the United States places six limitations on this principle in the 1980 Refugee Act. These include when:

[a] the refugee is not a refugee within the meaning of the refugee Act of 1980;

119. One representative to the 1951 Convention stated that state authorities should interpret “reasonable grounds” on the basis of whether the danger likely to be encountered by the refugee upon refoulement was greater than the threat to the community. See Goodwin-Gill, supra note 17, at 96 n.118 (citing U.N. Doc. A/CONF.2/SR.16, at 8).
120. 1951 Convention, supra note 53, art. 1(F)(a)-(c); see also supra text accompanying note 68 (discussing these limitations).
121. 1967 U.N. Territorial Declaration, supra note 80, art. 3.
122. Id.
123. Goodwin-Gill, supra note 17, at 97. Goodwin-Gill maintains that states should examine the likelihood of international response in terms of financial and medical assistance as a factor to be set against any potential threat to security. Id.
124. 1969 OAU Convention, supra note 83, art. II.
125. See supra text accompanying notes 86-90 (describing the 1969 American Convention).
127. The 1980 Refugee Act, 8 U.S.C. § 1101(a) (1980), defined “refugee” as:

[A]ny person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . . The term ‘refugee’ does not include any person who ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, nationality, religion, membership in a particular social group, or political opinion.

Id. [author’s note]
[b] the refugee has been firmly resettled in a foreign country;
[c] the refugee ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular group, or political opinion;\[\text{128}\]
[d] the refugee was convicted by a final judgment of a particularly serious crime, and constitutes a danger to the community of the United States;
[e] the United States has serious reasons for considering that the alien has committed a serious non-political crime outside the United States; and
[f] the United States has reasonable grounds for regarding the alien as a danger to its national security.\[\text{129}\]

The United States limitations on the availability of nonrefoulement are stricter than the 1951 Convention and the 1967 Declaration on Territorial Asylum.

Another means by which states try to avoid the application of nonrefoulement is through extradition treaties. While a state may grant asylum to protect a refugee, it also may have a duty to return a refugee to a requesting country. These two principles create tension among nations and confusion over which obligation, extradition or nonrefoulement, carries greater weight.\[\text{130}\]

D. Extradition Procedures

Extradition is the converse of asylum. Current extradition practice is "a formal process by which a person is surrendered by one state to another based on a treaty . . . ."\[\text{131}\] Like asylum, extradition is an old concept, originating in early non-Western civilizations.\[\text{132}\] As the Doherty case concerns the extradition treaties between the United States and the United Kingdom, this analysis will be confined to the treaties between these two countries.

\[\text{128}\] At least one court has held that attacks by guerrillas on police and military are not acts of persecution. See \textit{In re} Fuentes-Sánchez, 19 I. & N. Dec. 658 (1988); see also \textit{In re} Rodriguez-Majano, 19 I. & N. Dec. 811, 816 (1988) ("We do not believe Congress intended to restrict asylum and withholding of deportation only to those who have taken no part in armed conflict."). [author's note]

\[\text{129}\] 8 C.F.R. § 208.8 (1988).


\[\text{131}\] 1 M. CHERIF BASSIOUNI, \textit{INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE} 8 (1987). Both the United States and the United Kingdom require that a treaty be in force before extradition will be granted. \textit{Id.} at 10.

In general, most extradition treaties require that three procedural elements are met prior to extradition: (a) the offender must be within the jurisdiction of the requesting state; (b) the state intending to prosecute or punish a fugitive must make a formal request; and (c) the offense must have been committed in the jurisdiction of the requesting state. \textit{Satya D. Bedi, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE} 19 (1968). The extradition process in the United States is the exclusive prerogative of the federal government. See \textit{1 BASSIOUNI, supra}, at 711.

\[\text{132}\] 1 BASSIOUNI, \textit{supra} note 131, at 5. The first extradition treaty dates back to ancient Egypt, 1280 B.C. \textit{Id.} at 6; IVAN A. SHEARER, \textit{EXTRADITION IN INTERNATIONAL LAW} 5 (1971).
1. General Extradition Process

The United States requires that an extradition treaty be in force between the requesting and asylum states before extradition will be granted. The authority to enter into extradition treaties rests solely with the executive branch pursuant to the United States Constitution. However, such treaties must be submitted to the Senate for ratification.

In general, the United States extradition process works as follows. The requesting state petitions the Attorney General to file a complaint in a federal district court. The Attorney General seeks a warrant for the fugitive's arrest, which is usually granted. The fugitive is arrested and detained until his extradition hearing before a United States district court judge.

At the hearing, a United States district court judge examines whether the necessary procedural and substantive elements of extradition have been met. The purpose of the extradition hearing is not to assess the guilt or innocence of the fugitive. Rather, it is an "inquiry into whether there is competent evidence to justify holding the accused." The judge must determine "whether there is probable cause to believe that an offense has been committed and that the accused committed it."

At the extradition hearing, the fugitive may introduce evidence that demonstrates that his case falls within a prohibition to extradition under the extradition treaty (such as the political offense exception), but he may not introduce evidence on the merits of his case. The judge then determines whether or not to extradite the fugitive.

Federal courts should interpret extradition treaties in "accordance with applicable Constitutional provisions." Extradition treaties are incorporated into federal law, and are of equal weight as federal legislation. Courts should interpret the two to avoid conflicts and inconsistencies.

If a court finds that extradition would violate a fugitive's constitutional rights, the executive branch may not extradite him. Extradition decisions

---

133. See 1 Bassioumi, supra note 131, at 10.
134. See U.S. Const. art. II, cl. 2; 1 Bassioumi, supra note 131, at 39.
135. 1 Bassioumi, supra note 131, at 39.
136. See 2 id. at 512-13.
137. 2 id.
138. 2 id.
139. 2 id. at 562.
141. Id. at 1292.
142. See 2 Bassioumi, supra note 131, at 577.
143. McMullen, 769 F. Supp. at 1293 (citing Eain v. Wilkes, 641 F.2d 504, 514 (7th Cir.), cert. denied, 454 U.S. 894 (1981)).
144. Id. (citing Terlinden v. Ames, 184 U.S. 270, 288 (1902)).
145. Id. (citing 1 Bassioumi, International Extradition United States Law and Practice ch. II, § 4-7); see supra note 16 and accompanying text (discussing the relationship between United States statutory construction and international law).
146. McMullen, 769 F. Supp. at 1294 (citing Grin v. Shine, 187 U.S. 181, 184 (1902)); see
are not appealable, as they are not final decisions. Thus, the recourse of an unsatisfied fugitive is to bring a habeas corpus proceeding in a United States district court. The recourse of an unsatisfied requesting state is to refile the request.

2. History of Extradition Between the United States and the United Kingdom

A brief history of the extradition treaties between the United States and the United Kingdom reveals that the early treaties primarily concerned trade, navigation, and boundaries, and contained very few limitations to extradition. Later treaties between the United States and the United Kingdom include the Webster-Ashburton Treaty of 1842, the Dawes-Simon Extradition Treaty of 1931, and the 1972 Extradition Treaty. The 1972 Extradition Treaty was.

also In re Burt, 737 F.2d 1477, 1485 (7th Cir. 1984) ("[W]hen the conduct of the United States government is challenged, such conduct must be assessed in light of the Constitution."); Plaster v. United States, 720 F.2d 340, 348 (4th Cir. 1983) (same); In re Extradition of Atta, 1988 WL 66866 (E.D.N.Y. June 17, 1988) (unreported slip op.) (holding that constitutional rights in extradition take precedence over treaty terms).

147. **McMullen**, 769 F. Supp. at 1288 n.12 (citing Jhirad v. Ferrandina, 536 F.2d 478, 482 (2d Cir.), cert. denied, 429 U.S. 988 (1976)).

148. Id. (citing In re Mackin, 668 F.2d 122, 128 (2d Cir. 1981)). United States courts have held that refileing an extradition request is not a Fifth Amendment double-jeopardy violation. See Collins v. Loisel, 262 U.S. 426, 430 (1923).

149. **See Shearer**, supra note 132, at 13 (citing 1 William M. Malloy, Treatises, Conventions, International Acts, Protocols and Agreements Between the United States of America and Other Powers 590 (1910)).

150. One provision regarding the extradition of fugitives is located in Article 27 of Jays Treaty of 1794, which provides:

> It is further agreed that His Majesty and the United States on mutual requisitions, by them respectively, or by their respective Ministers or officers authorized 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 for trial, if the offense had been there committed.

Shearer, supra note 132, at 13 (citing Jays Treaty of 1794, art. 27).

While many of the modern elements of extradition are reflected in Article 27, many others are absent; namely, the exception for political offense, the principle of specialty, the rule against double jeopardy and the wide range of offenses applicable to the extradition. See id. Note that the only two crimes listed are murder and forgery.

151. **See Webster-Ashburton Treaty of 1842**, in Shearer, supra note 132, at 14 (citing 1 William M. Malloy, Treatises, Conventions, International Acts, Protocols and Agreements Between the United States of America and Other Powers 650 (1910)).


in force at the time of Doherty's trial. Most of its provisions remain in force today. 184

3. The Political Offense Exception

The political offense exception is one of the many restrictive principles in the extradition process. These restrictions serve as substantive limits on the extradition of fugitives. 185 Along with the political offense exception, other grounds which justify a refusal of extradition include: "the legality of the offense charged, double jeopardy, statute of limitations, speedy trial, amnesty, and trial in absentia." 186 The political offense exception is one of the most traditional restrictions on extradition. The political offense exception bars the extradition of a fugitive if his "crime" was politically motivated. 187 As Doherty enlisted the political offense exception, this Note will focus on this exception alone.

The political offense exception is based upon three different rationales. The first rationale is rooted in altruistic humanitarian concerns relating to the treatment to which the fugitive would be subjected upon his return. 188 The second justification stems from the commitment and desire of the asylum state to protect bona fide values of individual freedom. 189 The final justification is


155. When a fugitive is not returned to the requesting country, it is termed "nonextradition." STENBERG, supra note 34, at 179.

156. See 1 BASSIOUNI, supra note 131, at 381.

157. See id. at 371; Edward M. Wise, Terrorism and the Problems of an International Criminal Law, 19 CONN. L. REV. 799, 824-25 (1987); see also Lora L. Deere, Political Offenses in the Law and Practice of Extradition, 27 AM. J. INT'L. L. 247 (1933) (analyzing the political offense exception in European and U.S. extradition treaties).

Bassiouni advocates that fugitives should not be sheltered by the political offense exception if they committed international crimes. 1 BASSIOUNI, supra note 131, at 436-45. International offenses include: (i) aggression as defined by the United Nations Charter; (ii) crimes against humanity; (iii) war crimes; (iv) piracy; (v) hijacking; (vi) slavery, white slavery and other forms of traffic of women and children; (vii) counterfeiting; (viii) the kidnapping of internationally protected persons; (ix) international traffic in narcotics; and (x) racial discrimination. 1 Id. at 443-44.

158. See M. Cherif Bassiouni, Ideologically Motivated Offenses and the Political Offenses Exception in Extradition—A Proposed Juridical Standard for an Unruly Problem, 19 DePAUL L. REV. 217, 232 (1970); Cantrell, supra note 130, at 782; Deere, supra note 157, at 249.

the assumption that political offenses do not violate international world order.\textsuperscript{160} Thus, states do not share a mutual interest in suppressing political crimes. Political offenses usually are local in character and are directed at the domestic state, and therefore do not warrant international suppression.\textsuperscript{161} All three justifications provide humanitarian protection for the fugitive, and seek to ensure that the rights of a refugee or fugitive receive adequate protection.\textsuperscript{162}

Many scholars agree that the principle of nonrefoulement is incorporated into the political offense exception.\textsuperscript{163} Both serve to prohibit the return of a person to a country where the person may face political persecution. Most perpetrators of political crimes would be persecuted on account of their political opinion. Most scholars maintain that where no extradition treaty exists between the asylum country and the requesting country, the asylum country must abide by the principle of nonrefoulement,\textsuperscript{164} due to the fact that a treaty must exist between the two states prior to extradition. Opinion is split, however, where an extradition treaty exists. A minority of scholars contends that where an extradition treaty exists, the obligation to extradite takes precedence over the obligation of nonrefoulement.\textsuperscript{165} By contrast, a majority of scholars supports the view that a state's duty to practice nonrefoulement takes precedence over a state's duty to extradite a fugitive under an extradition treaty.\textsuperscript{166} These scholars maintain that abiding by the extradition obligation may be contrary to the principle of nonrefoulement, and that the creation and ratification of the treaty itself may constitute a violation of Article 33, and thus vio-


The notion that political offenses do not violate international world order stems from the "glorification of revolutionary heroes" of the nineteenth century. Wijngaert, supra, at 29. "It was assumed that political offenders were morally superior to common offenders because they fought for a better legal order and because they did not act from personal motives but in the interests of society as a whole." Id.

\textsuperscript{161} See Shelton, supra note 160, at 151.

\textsuperscript{162} In fact, the effect of the political offense exception is comparable to asylum. See Arthur C. Helton, Harmonizing Political Asylum and International Extradition: Avoiding Analytical Cacophony, 1 Geo. Immigr. L.J. 457, 458 (1986) ("The political offense exception . . . has a humanitarian function, and its effect is comparable to a right of asylum.").

\textsuperscript{163} See Goodwin-Gill, supra note 17, at 120; Wijngaert, supra note 160, at 65; Nayar, supra note 159, at 32.

\textsuperscript{164} Stenberg, supra note 34, at 179.

\textsuperscript{165} Id.

\textsuperscript{166} See Alona E. Evans & John F. Murphy, Legal Aspects of International Terrorism 497 (1979); Stenberg, supra note 34, at 179; Wijngaert, supra note 160, at 77; A.M. Connelly, Non-Extradition for Political Offenses: A Matter of Legal Obligation or Simply a Policy Choice?, 1982 Irish Jurist 59, 67; Nayar, supra note 159, at 65; Shelton, supra note 160, at 157; Weis, supra note 104, at 143.

Wijngaert states, "The fact that the person . . . committed crimes, however serious, should not result in the denial of the protection of nonrefoulement . . . . The humanitarian character of the norm is too absolute and should . . . not warrant any exception whatsoever." Wijngaert, supra note 160, at 77.
Therefore, the majority approach would apply nonrefoulement over the duty to extradite. As one scholar notes, "No general municipal provision exists which would prohibit the nonextradition of a refugee to a country of persecution." Further, proponents of this approach argue that the general wording of Article 33 supports the stronger obligation of nonrefoulement.

The majority approach enjoys the additional support of the United Nations High Commissioner of Refugees. The UNCHR "has for a long time . . . taken the view that Article 33 of the 1951 Convention may be interpreted to include a prohibition against extradition of a refugee to a country of persecution." This support, along with state practice of including the political offense exception into extradition treaties, demonstrates that Article 33 "includes a prohibition against extraditing a refugee to a country of persecution." Thus, the political offense exception embodies the duty of nonrefoulement.

a. 1972 Extradition Treaty's political offense exception

Doherty thwarted the United Kingdom's attempt to extradite him under the 1972 Extradition Treaty by using the political offense exception. This clause provides:

Extradition shall not be granted if . . . the offense for which extradition is requested is regarded by the requested Party as one of a political character . . . or the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character . . .

This definition is similar to the political offense exceptions in the majority of current extradition treaties between the United States and other countries.

b. 1985 Supplementary Treaty political offense exception

In stark contrast, the 1985 Supplementary Extradition Treaty currently in force between the United States and the United Kingdom completely eviscer-
ates the political offense exception. While it retains the political offense exception in principle, the treaty bars so many offenses from its scope that the exception is rendered meaningless. A person committing any of the following offenses are subject to extradition:

[a] an offense for which both Contracting parties have the obligation to a multinational international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;
[b] murder, manslaughter, and assault causing grievous bodily harm;
[c] kidnapping, abduction, false imprisonment or serious unlawful detention, including the taking of a hostage;
[d] an offense involving the use of a bomb, grenade rocket, firearm, letter or parcel bomb, or an incendiary device which is likely to endanger life or cause serious damage to property; and
[e] an attempt to commit any of the foregoing offenses or participate as an accomplice of a person who commits or attempts to commit such an offense.

Very few crimes fall outside the scope of this list. Thus, scholars have criticized the Supplementary Treaty, stating that Article I "curtails the availability of the political offense exception to an unprecedented degree in international law." Many critics and opponents fought hard to keep the exclusion list out of the treaty. Congress held lengthy debates that mainly centered on the severe curtailment of the political offense exception and the alleged purpose behind the treaty. The executive branch stated that the new treaty represented "a significant step in im-


178. Supplementary Treaty, supra note 154, art. I. See Helton, supra note 162, at 472.

proving law enforcement cooperation and combating terrorism, by excluding from the scope of the political offense exception serious offenses typically committed by terrorists."181 It argued that the new treaty would close the loopholes created by the political offense exception.

These purposes were met with skepticism, and several congresspersons criticized the Administration for "neatly wrap[ping] [the Supplementary Treaty] in the jargon of antiterrorism."182 Other congresspersons thought that the treaty would provide "uneven and politically motivated justice," by making "it easier [for Britain] to extradite terrorists and members of the outlawed Irish Republican Army accused of violent crimes."183

While the treaty purportedly was needed to combat international terrorism, some scholars184 and many congresspersons agree that the real purpose behind the Supplementary Treaty was to eliminate the application of the political offense exception to Northern Irish fugitives in United States courts.185 Senator D'Amato summed up the debates by stating that the treaty "singles out Irish people, and subjects them to much narrower rules than any of our other treaties provide."186

As a backlash to the almost complete debilitation of the political offense defense, Congress inserted a compromise provision into the Supplementary Extradition Treaty. This provision is Article 3(a).

c. Article 3(a) of the Supplementary Extradition Treaty

Article 3(a) of the new treaty directly incorporates the principle of nonrefoulement into the extradition process between the United States and the United Kingdom.187 Article 3(a) states:

> Notwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of

---

182. 132 CONG. REC. 16,797 (1986) (statement of Senator Dodd); see also 132 CONG. REC. 16,797-819 (1986) (reflecting speeches in favor of Article 3(a) by Senators Dodd, Kerry, Matthias, Hatch, Biden, and Levin).
185. Bassiouni argues that, given the fact that the United States has never tried to extradite a terrorist from the United Kingdom, and the fact that both United Kingdom and United States law and jurisprudence adequately protect United States interests with respect to international terrorism, it is difficult not to view the actual purpose of the Supplementary Extradition Treaty as an effort to assist the United Kingdom in quelling Irish resistance. Bassiouni, supra note 180, at 264-65.
186. See supra text accompanying notes 182-83; infra text accompanying note 186 (describing the public statements of several senators).
187. Supplementary Treaty, supra note 154, art. 3(a), as amended, in 132 CONG. REC. 16558 (1986).
the competent judicial authority by a preponderance of the evidence that the
request for extradition has in fact been made with a view to try or punish
him on account of his race, religion, nationality, or political opinions, or that
he would, if surrendered, be prejudiced at his trial or punished, detained or
restricted in his personal liberty by reason of his race, religion, nationality,
or political opinions.\footnote{188}

This provision embodies the principle of nonrefoulement.

The legislative intent behind Article 3(a) clearly reflects congressional con-
cern over the fate of Irish fugitives. Senator Kerry stated that “[t]he problem
in finding the proper balance between the need to deal with the threat of inter-
national terrorism and the necessity for maintaining basic democratic tradi-
tions and individual safeguards poses a dilemma for both our nations.” He
continued, “This balance . . . can only be achieved through the broad inter-
pretation of article 3(a).”\footnote{189} Kerry concluded that “article 3(a) is about
human rights liberties and our distrust of systems of justice that don't respect
these fundamental safeguards.”\footnote{190} This concern overrode the traditional
United States policy of not judging the fairness of a foreign justice system.
With this provision, the Senate abandoned the rule of noninquiry,\footnote{191} and pro-
vided some humanitarian relief for the political fugitives of Northern Ireland.

d. Rule of noninquiry

By ratifying this amendment to the treaty, Congress abandoned its adher-
ence to the rule of noninquiry. The rule of noninquiry concerns the traditional
practice of United States courts of not examining the fate that awaits a fugi-
tive upon his return to the requesting state.\footnote{192} Historically, the judicial branch
has been reluctant to probe into the requesting state's judicial or prison sys-
tem, and/or into whether the fugitive would receive a fair trial and treatment
in that state. However, Article 3(a) expressly requires a United States court to
examine the circumstances surrounding the extradition request and the fugi-
tive's return to the requesting state. If the court thinks that the fugitive would
not receive fair treatment or trial, the court can refuse the extradition request.
Thus, Congress granted the judicial branch the authority to apply nonrefoule-
ment, as reflected in Article 3(a), over the duty to extradite.

e. Application of the Supplementary Extradition Treaty

The Supplementary Extradition Treaty has been applied once since it be-

\footnote{188. Id.}
\footnote{189. 132 Cong. Rec. 16,798 (1986) (statement of Senator Kerry).}
\footnote{190. Id.}
\footnote{191. The rule of noninquiry traditionally prohibits a judicial body from examining the con-
tions awaiting a fugitive upon his return to the requesting country. See Scharf, supra note 184, at
258.}
\footnote{192. For example, District Court Judge Sprizzo adhered to this principle at Doherty's extradi-
tion hearing. See infra note 302 (describing the application of the noninquiry rule).}
came effective on December 23, 1986. In *In re Extradition of McMullen*, the district court faced an issue of first impression concerning the Supplementary Treaty—whether this treaty, as applied to McMullen, constituted an unlawful bill of attainder.

McMullen participated in several political acts as a member of the Provisional Irish Republican Army ("PIRA") before leaving the organization in 1977. He fled to California to escape a "death sentence levied upon him" by PIRA. Upon his arrival in the United States, McMullen contacted Department of Justice officials, hoping to exchange information on PIRA activities for asylum status. However, the deal fell through, and McMullen was arrested upon the United Kingdom's extradition request.

The extradition magistrate found McMullen's acts to be political in nature and denied the United Kingdom's extradition request under the political offense exception to the 1972 Extradition Treaty. McMullen then fought to receive asylum status or the less protective withholding of deportation for several years. However, McMullen lost the battle, and in 1986 the judge entered an order that he be deported to Ireland. He was transferred to New York to catch the airplane on December 23, 1986, the same day the Supplementary Treaty went into effect. Minutes before boarding the plane for Ireland, McMullen was arrested pursuant to the United Kingdom's new extradition request.

Among other arguments, McMullen asserted that the application of the Supplementary Treaty to him amounted to an unconstitutional bill of attainder. The court first noted that in order for a legislative enactment to operate as a bill of attainder, it must satisfy three requirements: (a) specification of the affected persons, (b) punishment, and (c) lack of a judicial trial.

McMullen first maintained that the Supplementary Treaty was unlawful, as the Executive and Senate "specifically targeted him and two other suspected

---

194. *Id.* at 1283.
195. *Id.* at 1282.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* McMullen's battle with INS officials is chronicled in the following cases: McMullen v. INS, 788 F.2d 591 (9th Cir. 1986); *In re McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981); *In re McMullen*, Interim Decision 2831 (BIA 1980).
201. McMullen also argued that: (a) the application of the Supplementary Treaty to him violated the Ex Post Facto Clause of the United States Constitution; (b) the Supplemental Treaty violated the separation of powers doctrine; and (c) the totality of the government's actions in his case violated the Due Process Clause of the Fifth Amendment. *Id.*
202. *Id.; see* U.S. Const. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder . . . .").
Irish Republican Army members, explicitly attempting to override judicial determinations favorable to them regarding the political offense exception contained in the 1972 Treaty." Second, McMullen argued that the retroactive nature of the treaty and its significant limitations on the political offense exception amounted to a "punitive goal." Finally, this legislative punishment had been imposed upon McMullen without the benefit of a judicial proceeding.

The court agreed with him. It noted numerous references to the cases of IRA members McMullen, Doherty, and Mackin in the congressional record in support of limiting the political offense exception. In addition, several senators stated that the goal of the new treaty was "to reverse the three cases where extradition was denied and put an end to this development in the law [successful use of the political offense exception]." The court determined that the purpose of the new treaty was clearly punitive, as its goal was to punish "a small group of three persons whom the Government finds blameworthy because of their participation in IRA activities against the United Kingdom." Finally, the court found that the burdens of the new treaty (reversal of a prior finding in his favor, the removal of the defense, and the near certain extradition to the United Kingdom) were forced upon McMullen without a trial. As all three elements were satisfied, the court ruled that the Supplementary Treaty was an unconstitutional bill of attainder as applied to McMullen. The court concluded by criticizing the new treaty. It stated:

[I]n effect, the Supplementary Treaty turns more than 100 years of extradition law on its head, reversing the traditional roles of the political and judicial branches and placing the political offense determination in the hands of the political branches of government (which have expressed an intention to eliminate the exception on a country-by-country basis), while forcing the judiciary to probe the internal political workings of requesting countries.

The Second Circuit Court of Appeals affirmed this decision on January 7, 1992.

As in McMullen, when courts deny an extradition request, the executive branch often attempts to deport the fugitive to the requesting country. This is

204. Id. The two other IRA members were Doherty and Mackin. For a comprehensive discussion of the Doherty cases, see infra text accompanying notes 281-352. For a discussion of Mackin's situation, see In re Mackin, 668 F.2d 122 (2d Cir. 1981).

205. McMullen, 769 F. Supp. at 1284.

206. Id.

207. Id. at 1285.

208. Id. (quoting statement of Senator Lugar, 132 CONG. REC. 16,586 (1986)).

209. Id. at 1289. The court stated that the retroactive nature of the treaty and the fact that no other United States treaty contained such a restrictive political offense exception supported its punitive nature. Id.

210. Id. at 1290.

211. Id.

212. Id. at 1289 n.14.

termed "disguised extradition,"\textsuperscript{214} or "de facto extradition."\textsuperscript{215}

4. Disguised Extradition

Use of the political offense exception is one way an asylum state can refuse to extradite a person to the requesting state.\textsuperscript{216} Reasons for circumventing the extradition process include the expense involved, the delay involved, or simply that the requesting state has a weak case and the outcome is uncertain.\textsuperscript{217} Many asylum states have avoided this situation by circumventing the formal extradition process through the use of immigration laws or extralegal methods.

Disguised extradition occurs when a state accomplishes with immigration laws what it could not do under an extradition treaty, namely, returning the fugitive to the requesting country. Methods of rendition employed by states include (a) using immigration laws, such as deportation,\textsuperscript{218} expulsion, or exclusion, and (b) using extralegal methods, such as unlawful seizure or illegal abduction.\textsuperscript{219} As the United States recently deported Doherty to the United Kingdom, this Note focuses on the use of immigration laws as disguised extradition.

There are several ways in which state officials may utilize immigration laws as "disguised extradition" to send an individual to a specific country. In the United States, for example, disguised extradition occurs when the Attorney General exercises his discretion to block an individual's country designation.\textsuperscript{220} Under 8 U.S.C. § 1253(a), the Attorney General may prohibit an individual's travel to the country of his choice if it "would be prejudicial to the interests of the United States."\textsuperscript{221} Another tactic employed by the INS is when INS officials block the deportation of an individual not only to the country of his choice, but to any country other than the one which the individual originally had requested.\textsuperscript{222} The INS also may label an individual as a national security risk, and expel him to a specific country before he has the chance to make travel arrangements of his choice.\textsuperscript{223} By engaging in these tactics, the INS uses immigration procedures to accomplish what could not be accomplished.

\textsuperscript{214} See 1 Bassiouni, supra note 131, at 147.
\textsuperscript{215} See Wijngaert, supra note 160, at 57.
\textsuperscript{216} However, use of this exception usually strains relations between the two nations. Id. at 58.
\textsuperscript{217} See Evans & Murphy, supra note 166, at 496.
\textsuperscript{218} See 8 U.S.C. § 1252 (1988). Deportation is a method by which a country returns an individual to his country of origin if that individual does not meet the criteria for legal entry into the country.
\textsuperscript{219} 1 Bassiouni, supra note 131, at 191, 196.
\textsuperscript{220} See infra notes 313-24 and accompanying text (discussing the INS's decision to block Doherty's country designation, and the district court's affirmation of this decision).
\textsuperscript{221} See 8 U.S.C. § 1253(a) (1988); see also infra note 319 and accompanying text for a full description of the statute.
\textsuperscript{222} See In re Badalamenti, 19 I. & N. Dec. 623 (1988) (where the Immigration Board of Appeals chastised INS officials for attempting to block the deportation of Badalamenti to any country other than Italy).
\textsuperscript{223} Id. at 626.
through legal extradition procedures—the return of an individual to a specific country.

Some scholars have questioned the legality of disguised extradition. This is due to the fact that extradition procedures are full of specific procedural safeguards that protect the fugitive. In contrast, deportation procedures require few procedural elements, and the fugitive does not have the same rights as he does with extradition. Even United States courts have criticized the use of disguised extradition. Over a century ago, the Supreme Court stated that "the immigration laws of this country were not enacted to facilitate the punishment of one convicted of an offense against another country's laws."

One way to avoid using disguised extradition procedures is through the principle of aut dedere aut judicare. This doctrine allows the asylum state to choose between extraditing the fugitive or exercising jurisdiction over the fugitive itself. The asylum state would use the laws of the requesting nation in its adjudication of the fugitive, and the fugitive would serve his sentence (if any) in the asylum state's prison. This allows the asylum state to maintain political harmony with the requesting state. Although at least one scholar fears that prosecuting the fugitive will violate jurisdictional principles, the doctrine has been utilized more frequently in the last decade.

The political offense exception embodies the principle of nonrefoulement. It bars the return of a fugitive to a country in which he might face persecution based on his nationality, race, religion, membership in a social group, or political views. While the current Supplementary Extradition Treaty narrows the crimes that fall within its political offense exception, Article 3(a) broadly authorizes the reviewing court to examine the conditions that await the fugitive in the requesting country if returned. The court may examine the judicial system of the requesting country to ensure that the fugitive will receive a fair trial and punishment. If the United Kingdom had filed a second extradition request for Doherty, the reviewing court would have had to examine the his-

---


225. Fong Yue Ting v. United States, 149 U.S. 698, 709 (1892); see also Brief of Respondent, INS v. Doherty, 60 U.S.L.W. 4085 (U.S. Jan. 15, 1992) (No. 90-925) (available on 1991 LEXIS, Genfed library, Brief file, at *16) ("The extradition statute is wrongfully circumvented and the immigration laws abused when the latter are employed to return a fugitive to a country denied his extradition in order that he serve his sentence in that country.").

226. The term aut dedere aut judicarre was coined by Hugo Grotius in the sixteenth century. It means "to extradite or prosecute." Wiingaert, supra note 160, at 7-8. This language is contained in several extradition and international terrorism conventions, and obligates a state either to extradite a fugitive to the requesting state, or to prosecute the fugitive itself. Id. See generally Declan Costello, International Terrorism and the Development of the Principle Aut Dedere Aut Judicarre, 10 J. INT'L L. & Econ. 483 (1975) (analyzing the concept of aut dedere aut judicarre in international conventions).

227. See Shearer, supra note 132, at 89.

tory of the political strife in Northern Ireland in order to determine whether its current judicial system doles out fair and equitable justice to both Catholics and Protestants.

E. Northern Ireland

Northern Ireland is a territory rife with political turmoil and violence.\(^229\) This turmoil has created many areas in which the Northern Irish face persecution based on political opinion. An examination of both the general strife and the effects of the current state-of-emergency legislation is crucial to understanding the impact that Article 3(a) of the Supplementary Extradition Treaty\(^230\) will have on the extradition process between the United States, the United Kingdom, and Northern Ireland.

While the conflict in Northern Ireland dates back to the thirteenth century,\(^231\) historians agree that the "genesis of the modern Irish 'troubles'" began during the civil rights movement in the 1960s.\(^232\) Although Catholic activ-

---


230. See supra notes 187-91 and accompanying text (describing the contents of Article 3(a)). One scholarly source specifically mentions Northern Ireland in the context of whether a fugitive will receive "fair treatment at all stages of the proceeding . . . or due process of law [as embodied in the United States Constitution] when submitted to a given country's criminal justice system . . . . [S]ome countries [such as Northern Ireland], may single out the terrorist for more rigorous treatment in detention or in the judicial process." Evans & Murphy, supra note 166, at 505.


Since the sixteenth century, English kings and parliaments have asserted strategic and economic interests over the inhabitants of Northern Ireland by sending large groups of settlers to take over Irish lands. States of Emergency, supra note 231, at 219. While the earlier inhabitants of Northern Ireland were Roman Catholics, most of the new settlers were Protestants. Varying religious and financial factors kept these two groups from commingling, and the current political and religious factions were well formed by the eighteenth century. *Id.*

In 1920, the British Parliament passed the Government of Ireland Act, which formally partitioned northern and southern Ireland by creating separate parliaments of limited powers for each section. Foley, supra, at 285 [citing Government of Ireland Act, 1920, 10 & 11 Geo. 5, chs. 6, 7]. Great Britain allegedly partitioned Ireland to safeguard political power for the Northern Protestants in their own state despite the overall majority of Catholics. *Id.*

The northern section, comprised of six counties within the province of Ulster, became Northern Ireland, and continuously has remained under British control. *Id.* The southern section, comprised of twenty-six counties, became the Irish Free State in 1922, and is independent of Great Britain.
ists pushed for equal rights and opportunities for both Catholics and Protestants. Protestant mobs repeatedly attacked them during the 1960s. As the violence escalated, the British Government entered and established direct rule over Northern Ireland in 1972.

The struggle over political power has left Northern Ireland deeply divided. The political lines are split between the Unionists or Loyalists, who wish to maintain the state of union with Great Britain, and the Republicans or Nationalists, who wish to reinstate a unified Ireland. Each faction has its own parties, both nonviolent and paramilitary. In order to keep peace among the


233. States of Emergency, supra note 231, at 220. Contrary to popular belief, the struggle in Northern Ireland is not over religion. According to the London Times:

There are two communities in Northern Ireland, different in their origins, nursing different historical myths, possessing distinguishable cultures, having different songs and heroes, and wearing different denominations of the same religion. Religion is the clearest badge of these differences. But the conflict is not about religion. It is about the self-assertion of two distinct communities, one of which is dominant in the public affairs of the province.


234. States of Emergency, supra note 231, at 221. Unfortunately, the Catholic community perceived the British army as being directed against them—a notion that was anchored during a series of official misconduct and "improper interrogation procedures"; for example, the Falls Road Belfast operation of July 1970; the Londonderry shootings in early July 1971; the internment operation of August 1971; and "Bloody Sunday" of January 1972. Id.

235. Id. at 223; see also Kelly D. Talcott, Note, Questions of Justice: U.S. Courts' Powers of Inquiry Under Article 3(a) of the United States-United Kingdom Supplementary Extradition Treaty, 62 Notre Dame L. Rev. 474, 478 (1987) (describing the strife in Northern Ireland and how a United States court can use Article 3(a) to examine the judicial process in that country).

236. Foley, supra note 232, at 286.

237. The following are parties under the Unionist flag:

First, the Unionist party governed Northern Ireland without interruption until 1972. Foley, supra note 232, at 287 (citing Thomas Moody, The Ulster Question: 1603-1973, at 32, 48 (1974)). During this period, discrimination against the Catholic community was widespread in housing, employment and the administration of justice. Id. at 288.

Second, the Ulster Volunteer Force ("UVF") was born in the early twentieth century yet largely disappeared after the 1922 partition. It then re-emerged in the 1960s as a terrorist group. Foley, supra note 232, at 290-91 (citing Martin Dillon & Denis Lehane, Political Murder in Northern Ireland 28 (1973)).

Third, the Ulster Defense Association ("UDA") was founded by the working class in 1971. It is the largest Loyalist group, and its goal is to demonstrate against the idea of a united Ireland. Id. at 291 (citing William D. Flackes, A Political Directory 1968-1979 147 (1980)).

Fourth, the Royal Ulster Constabulary ("RUC") is a Northern Irish patrol comprised of volunteer Protestants in the community. Id. (citing Kevin Boyle et al., Ten Years On in Northern Ireland 25 (1980)).

Fifth, the Ulster Special Constabulary ("B Specials") was a paramilitary auxiliary police force of volunteer Protestants initially used to supplement the British forces in Northern Ireland. States of Emergency, supra note 231, at 220.
two factions, England has kept Northern Ireland in a state of emergency since 1972.288


The United Kingdom established direct rule through the passage of the Northern Ireland (Temporary Provisions) Act of 1972.289 This Act authorized the Secretary of State for Northern Ireland to be Chief Executive Officer,240 and it dismissed the Northern Ireland Parliament at Stormont.241 The Act also authorized the British parliament to make laws for Northern Ireland.242 Although direct rule was intended to last for only one year, it remains in force today.243

In 1973, a commission chaired by Lord Diplock of Great Britain recommended the modification of many criminal procedures to help cope with the growing violence in Northern Ireland.244 This commission examined measures that could be used to deal with terrorist activity other than the measure of "internment by the Executive."245 Many of the Diplock Commission recommendations found their way into a new law passed in 1973—the Northern

The following parties fall under the Republican flag:

First, the Irish Republican Army ("IRA") was created in the early twentieth century to push for a united Ireland. This group became a proscribed organization in the mid-1970s. Foley, supra note 232, at 289 (citing TIM P. COOGAN, THE IRA 21 (1980)).

Second, the Provisional Irish Republican Army ("PIRA") is a paramilitary offshoot of the IRA. This group has directed an assassination campaign against representatives of the British Army and all Loyalist groups. Id. at 289-90 (citing TIM P. COOGAN, THE IRA 61 (1980)).

Third, the Sinn Fein is the legal political arm of the IRA. See CHI. TRIB., Feb. 1, 1992, § 1, at 15.


238. STATES OF EMERGENCY, supra note 231, at 220. Northern Ireland's first emergency legislation in response to the political turmoil that erupted shortly after Ireland was partitioned was the Civil Authorities (Special Powers) Act of 1922. See Foley, supra note 232, at 288. This Act authorized the Minister of Home Affairs to take all steps and issue all orders as might be necessary for preserving peace and maintaining order. Id.

239. STATES OF EMERGENCY, supra note 231, at 223 (citing Northern Ireland (Temporary Provisions) Act, 1972). This Act replaced the Civil Authorities (Special Powers) Act (Northern Ireland) of 1922. Many of the emergency provisions contained in the Special Powers Act have been retained in the Temporary Provisions Act. Id.

240. Id.

241. Id.

242. Id.

243. The Act is renewable on an annual basis by a percentage vote in the British Parliament. Id.

244. See Foley, supra note 232, at 291 (citing REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, CMD 5, No. 5185 (1972) (Lord Diplock, Chairman) [hereinafter DIPLOCK REPORT]. The criminal justice system in place in Northern Ireland is referred to as the "Diplock court system."

245. STATES OF EMERGENCY, supra note 231, at 223.
Ireland (Emergency Provision) Act.\textsuperscript{246} This Act constitutes the bulk of the current Northern Irish criminal code.

The Emergency Provisions Act ("EPA") controls much of the personal rights and freedoms that the citizens of Northern Ireland possess today.\textsuperscript{247} EPA severely curtails the pretrial rights of a suspect. Police in Northern Ireland have the authority to arrest a suspect without a warrant when they have reasonable cause to believe that the suspect has committed a crime or will commit a crime.\textsuperscript{248} The police also may arrest anyone whom they suspect is a terrorist,\textsuperscript{249} and may determine reasonable cause based on their own subjective beliefs.\textsuperscript{250}

Once a suspect is detained, he is not allowed, for all practical purposes, to consult with an attorney.\textsuperscript{251} British officials maintain that communication is allowed between suspects and their attorneys; but since the police are allowed to be present during any consultation session, both the suspects and their attorneys find consultation ineffective.\textsuperscript{252}

Human rights organizations have linked this denial of access to an attorney with the high number of complaints of ill treatment by suspects.\textsuperscript{253} British officials investigated the high number of complaints after Ireland filed its case before the European Human Rights Court.\textsuperscript{254} Ireland alleged that British Security Forces were engaging in administrative activity in violation of Article 3 of the Geneva Protocol and Article 5 of the European Declaration of Human Rights. Ireland alleged that five of the practices the Security Forces had used to secure confessions from Irish resisters "constituted inhumane and degrading treatment." Id. at 130. These five techniques included wall-standing, hooding, subjection to high pitched continuous noise, deprivation of sleep, and deprivation of food and drink. Kerry S. Sullivan, \textit{Pretrial Detention of Suspects in Northern Ireland: A Violation of Fundamental Human Rights}, 11 N.Y.L. SCH. J. INT'L & COMP. L. 297, 303-04 (1990). The United Kingdom eventually suspended the use of the techniques.


\textsuperscript{247} EPA recently was supplemented by the Prevention of Terrorism (Temporary Provisions) Act, 1984, ch. 8 [hereinafter PTA]. Talcott, \textit{supra} note 235, at 478 n.22. PTA applies to the entire British Commonwealth and gives police the power to arrest people whom the police have "reasonable grounds" to suspect are involved with terrorism. The police can detain a suspect for up to forty-eight hours without charging him with a crime, and the Secretary of State may increase the detainment period for up to five additional days. Id. at 479 (citing PTA § 12(4), (5)). Police do not need a warrant to arrest, and they need not file charges until the internee's seventh day in detainment. Sources indicate that over ten percent of Northern Irish citizens have been arrested under PTA. Id.

\textsuperscript{248} Id. (citing Criminal Law Act § 2 (1967)).

\textsuperscript{249} \textit{States of Emergency}, \textit{supra} note 231, at 227. It is not uncommon for the police to arrest a suspect as soon as the suspect is released. Id. at 226.

\textsuperscript{250} Id.

\textsuperscript{251} Id. at 227.

\textsuperscript{252} Id.

\textsuperscript{253} Id.

JOSEPH DOHERTY AND THE INS

curity Forces were torturing IRA prisoners in violation of international law. Subsequent investigations revealed that the Security Forces had engaged in "sensory deprivation techniques," had assaulted the internees, and had forced the internees to do tiring calisthenics. British officials have abandoned most of these techniques and have tried to improve the conditions at the infamous Long Kesh and Maze Prisons. However, despite the efforts of the United Kingdom, reports of prisoner maltreatment surface on a continuing basis. Many critics contend that police interrogation will continue as long as EPA exists because its provisions leave suspects in highly vulnerable positions.

In addition to pretrial provisions, EPA also alters the traditional criminal trial system in Northern Ireland in two ways: (a) it abolishes trial by jury "in order to avoid acquittals due to bias or intimidation," and (b) it modifies "common law rules on the admissibility of confessions, whether oral or written . . . so as to make it easier for the prosecution to obtain a conviction based upon an alleged confession." The traditional right to trial by jury and the standard of inadmissibility of an involuntary confession have been jettisoned in favor of maintaining public order.

One consequence of these two unique developments has been the increased

of these five techniques and replaced them with the Detention of Terrorist Order. States of Emergency, supra note 231, at 223; see also David Lowry, Ill-Treatment, Brutality, and Torture: Some Thoughts upon the "Treatment" of Irish Political Prisoners, 22 DePaul L. Rev. 553 (1973) (analyzing the treatment of IRA prisoners in Northern Irish prisons).

255. States of Emergency, supra note 231, at 227.

256. The United Kingdom installed the following safeguards to ameliorate conditions: mandatory medical examinations of all internees; comprehensive record keeping; the immediate report of complaints of ill-treatment; and instructions that forbade the use of violence, threats, or insults to obtain confessions. Id. at 228.

257. In 1978, after reports that seventy-eight internees had been maltreated, the United Kingdom conducted yet another investigation led by Sir Bennett. Id. at 229-30. This report revealed that the United Kingdom had not eradicated police misconduct during interrogations. Id. In fact, between 1972 and 1978, over 119 suspects filed personal injury suits against the British Security Forces. Id. at 230. Further, forensic medical officials condemned the large number of bruises, contusions, abrasions, ruptured eardrums, hair pulling, increased mental agitation, states of excessive anxiety, hypertension, and hyperflexion of joints. Id.

258. Suspects remain alone with interrogators for up to seven days without counsel. Id. at 231.

259. Id. at 232. A person indicted on a scheduled offense does not receive the right to trial by jury. Instead, the case is heard by one judge, who acts as finder of both fact and law. Scheduled offenses include murder, manslaughter, kidnapping, false imprisonment, assault causing bodily harm, riot, theft, and terrorist types of crimes such as explosive violations and hijacking. Foley, supra note 232, at 292-93 (citing EPA § 30, sched. 4 & n.2).

260. States of Emergency, supra note 231, at 232. Under this reduced standard, any statement made by the indictee is admissible unless the indictee makes a prima facie showing that the Security Forces engaged in torture, or inhumane or degrading treatment to induce the sentence. Talcott, supra note 235, at 483. One study reflects that in 56% of the cases tried in the Diplock System, the only evidence was the indictee's statement. Over 70% of the convictions obtained were based primarily on statements made to the police. See Foley, supra note 232, at 299 n.113 (citing Kevin Boyle et al., Ten Years On in Northern Ireland 44 (1980)).
use of police informants, otherwise known as "supergrasses."\textsuperscript{261} Prosecutors have enjoyed a high rate of convictions at a single proceeding under the informant system.\textsuperscript{262} Although the use of "supergrass" witnesses has recently declined, the detention and conviction of suspects based on the testimony of one person still occurs in Northern Ireland.\textsuperscript{263} The above-mentioned practices reflect EPA's trampling on the long-held tradition in Anglo jurisprudence that a suspect is entitled to certain rights under due process of law.

Many scholars contend that EPA has served only to exacerbate the very conditions it was supposed to calm. One critic charges that EPA creates "resentment, drives people into terrorists groups, and undermines basic respect for the rule of law in Northern Ireland."\textsuperscript{264} EPA has played a large part in the increased violence in Northern Ireland and has contributed to the increase in terrorist acts by Irish resisters.

2. **Terrorism in Northern Ireland**

One of the daily features of life in Northern Ireland is acts of terrorism. Terrorism is not easily defined. The most commonly used definition of terrorism is "the intentional or extremely reckless application of violence against innocent individuals or property for the purpose of obtaining a military, political or religious end."\textsuperscript{265} Another definition includes "any conduct by which the perpetrators exert violence upon innocents . . . in order to reap some political or military advantage or benefit . . . ."\textsuperscript{266} These two definitions focus on danger or injury to innocent civilians.

While innocent civilians are not permissible targets for terrorist attacks, some groups are. Permissible targets include members of military forces or groups opposed to one's own military group.\textsuperscript{267} Terrorism is not "killing or other violence directed against the opposition in military, civil or international strife, for political or military purposes."\textsuperscript{268} Political acts directed against "the opposition" are not considered terrorism. This is one reason why most extradition treaties include an exception for political offenses, as most political offenses do not constitute terrorism.

The Geneva Conventions and Protocols outline international law concerning the conduct to which parties to any type of strife must adhere.\textsuperscript{269} Geneva law

\begin{itemize}
  \item \textsuperscript{261} Steven C. Green, Supergrasses and the Legal System in Britain and Northern Ireland, 102 LAW Q. REV. 198, 198 (1986). "Grass" is slang for informer, while "supergrass" refers to those who tell authorities about a large number of suspects and who appear at their trials as the principle witnesses for the state. \textit{Id}.
  \item \textsuperscript{262} Talcott, \textit{supra} note 235, at 484.
  \item \textsuperscript{263} \textit{Id}.
  \item \textsuperscript{264} See Foley, \textit{supra} note 232, at 296.
  \item \textsuperscript{265} See Blakesley, \textit{supra} note 176, at 902-03.
  \item \textsuperscript{266} \textit{Id}. at 903.
  \item \textsuperscript{267} See infra text accompanying notes 273-76 (describing the theory of permissible targets).
  \item \textsuperscript{268} See infra text accompanying notes 273-76.
  \item \textsuperscript{269} See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Conven-
sets up the parameters in which targets are acceptable according to the type of conflict. The fundamental principle behind Geneva Law is the 1868 Declaration of St. Petersburg ("Declaration"). This Declaration states:

The only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy . . . . [F]or this purpose it is sufficient to disable the greatest possible number of men . . . . [T]his object would be exceeded by the [useless aggravation] of the sufferings of disabled men, or render[ing] their death inevitable.

In modern terms, this principle generally prohibits indiscriminate attacks that place civilian populations at risk.

Thus, innocent civilians are protected under the theory of protected targets. This theory provides that certain targets be protected from all forms of terrorism. Protected targets include "innocent civilians, duly accredited diplomatic and international personnel acting within their legitimate functions, international civil aviation and the mails, and other means of international communications . . . ." A civilian is defined as "any person who is not a member of the belligerent armed forces . . . or of associated militia, incorporated paramilitary police or voluntary corps . . . ."

Several types of armed conflict exist. The Geneva Conventions outline rules for conflicts between two countries (international strife) or conflicts between the government and a rebel group within the same country (noninternational strife). The strife in Northern Ireland can be characterized as the latter —noninternational strife. Thus, the Northern Irish conflict falls under Article III of Protocol II to the Geneva Conventions.

Article III regulates the conduct of noninternational armed conflicts, and


271. Id.

272. Id.


274. Id.

275. Id.

276. Protocol II, supra note 269, art. III; see also MCCOUBREY, supra note 270, at 113 (defining a civilian under international law).

prohibits mutilation, cruel treatment, torture, outrages upon personal dignity and humanity, and degrading treatment of persons taking no active part in the hostilities.\footnote{278} The application of Article III generally holds that persons taking an active part in hostilities are fair targets.\footnote{279} Thus, under Article III the participants of the conflict in Northern Ireland are the British Security Forces, the Northern Irish Security Forces, the Irish Republican Army, and the Provisional Irish Republican Army. Any member of these groups is a permissible target for the opposition groups.\footnote{280} Nonmembers are not permissible targets, as Article III absolutely bars indiscriminate attacks on innocent civilians.

The pivotal question in the Doherty case is whether Doherty’s participation in the ambush of the British Security Forces captain was a terrorist act or a legitimate political crime. If the captain was a permissible target under Article III, Doherty’s participation would be political in nature, and he would be entitled to the protection of nonrefoulement as embodied in the political offense exception. On the other hand, if the captain was an innocent civilian, Doherty’s participation would be terrorism, and his extradition would be much more difficult to prohibit.

II. THE DOHERTY CASES

A. Factual Background

Joseph Doherty was a member of the Provisional Irish Republican Army ("PIRA"), a paramilitary offshoot of the Irish Republican Army ("IRA").\footnote{281} On May 2, 1980, the PIRA directed Doherty and three other PIRA members to ambush a convoy of British soldiers.\footnote{282} The four PIRA members entered a house at 371 Antrim Road in Belfast, where they awaited the British convoy.\footnote{283} Several hours later, a group of five British soldiers drove by the house at 371 Antrim and stopped in front.\footnote{284} The soldiers were members of the Special Air Service of the British Army.\footnote{285} The two groups exchanged gunfire,

\begin{footnotes}
\item[278] Protocol II, supra note 269, art. III.
\item[279] McCoubrey, supra note 270, at 148.
\item[280] See Shelton, supra note 160, at 151 ("Doherty attacked military targets during an ongoing internal armed conflict and should be considered [a] political [offender].").
\item[281] In re Doherty (Doherty I), 599 F. Supp. 270, 272 (S.D.N.Y. 1984).
\item[282] The United States considers both the IRA and the PIRA to be "official terrorist groups." See Brief for Respondent at *21 n.21, INS v. Doherty, 60 U.S.L.W. (No. 90-925) (available on 1991 Genfed library, Brief file) (citing United States State Department, Patterns of Global Terrorism: 1988 82 (1989)). The same report also lists the African National Congress ("ANC") as an official terrorist group—yet President Bush recently received Nelson Mandela, the leader of the ANC, at the White House, and Mandela addressed a joint session of Congress after his release from jail. See id. (citing Maureen Dowd, The Mandela Visit; Mandela Declines to Rule Out Force, N.Y. TIMES, June 26, 1990, at A1).
\item[283] Doherty I, 599 F. Supp. at 272.
\item[284] Id.
\item[285] Id.
\end{footnotes}
which resulted in the death of British Captain Herbert Richard Westacott. British officials arrested Doherty on murder charges and held him in Crumlin Road Prison pending trial. On June 10, 1981, after the trial was completed, but prior to formal sentencing, Doherty escaped from prison. The court sentenced Doherty in absentia of four crimes: murder, attempted murder, illegal possession of firearms and ammunition, and belonging to a proscribed organization (the PIRA). After his escape, Doherty made his way to New York, where he illegally entered the United States. Doherty worked in a bar in Manhattan until June 18, 1983, when INS officials arrested him.


B. The Doherty Decisions

In In re Doherty (Doherty I), district court Judge Sprizzo determined that Doherty's actions fell under the political offense exception of the 1972 Extradition Treaty then in force between the United States and the United Kingdom. Unless Doherty fell within the ambit of the political offense exception in this treaty, he would be extradited to Northern Ireland to serve his life sentence. Thus, the court examined the parameters of the political offense exception in the 1972 Treaty.

286. Id.
287. Id.
288. Id.
289. Doherty v. United States Dep't of Justice (Doherty V), 908 F.2d 1108, 1111 (2d Cir. 1990).
290. Id.
292. Id.
293. This hearing was pursuant to 18 U.S.C. § 3184, which states:
   Whenever there is a treaty... for extradition between the United States and any foreign government, any justice or judge of the United States... may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty... issue his warrant for the apprehension of the person so charged, that he may be brought before such justice [or] judge... to the end that the evidence of criminality may be heard and considered.

295. Id. The treaty in force in 1983 was the 1972 Extradition Treaty between the United States and the United Kingdom. Doherty's actions would not be considered political under the current Supplementary Treaty between these countries. See supra notes 176-86 and accompanying text (discussing the evisceration of the political offense exception under the Supplementary Treaty).
In order to determine whether the ambush was a political act, the court first examined the smoldering situation in Northern Ireland. It next determined the scope of the political offense exception. The court stated that "no act [should] be regarded as political where the nature of the act is such as to be violative of international law, and inconsistent with international standards of civilized conduct." It reasoned that five factors controlled the question, and paid special attention to the fact that the ambush did not cause "indiscriminate personal injury, death, and property damage." The court also noted that PIRA was a highly structured and organized group, unlike many of the "amorphous" political groups. Focusing on the above circumstances and characterizations, the court concluded that Doherty's actions fell within "the political offense exception in its most classic form." It ruled that both the killing of Captain Westacott and Doherty's escape from prison were political in character, and denied the United Kingdom's request for the extradition of Doherty.

*United States v. Doherty (Doherty II)* involved the United States' unsuccessful appeal of Judge Sprizzo's decision denying the United Kingdom's extradition request. Unsatisfied with this decision, the United States argued to the district court that it should be granted collateral review of the decision by means of declaratory judgment. The court rejected this argument, noting that to protect the fugitive's rights, Congress had provided the requesting party with only one means of redress—to refile the extradition request with another extradition magistrate. No other remedy, such as declaratory judg-

---

296. *Doherty I*, 599 F. Supp. at 273; see also notes 229-64 and accompanying text (discussing background information on the conflict in Northern Ireland).
298. The court examined (a) the nature of the act, (b) the context in which it was committed, (c) the status of the party committing the act, (d) the nature of the organization on whose behalf the act was committed, and (e) the particularized circumstances of the place where the act takes place. *Id.* at 275.
299. *Id.*
300. *Id.* at 276.
301. *Id.*
302. *Id.* at 277. The court expressly stated that the Diplock court system did not prohibit Doherty from receiving a fair trial. The court concluded that "both Unionists and Republicans who commit offenses of a political character can and do receive fair and impartial justice and that the courts of Northern Ireland will continue to scrupulously and courageously discharge their responsibilities in that regard." *Id.* at 276. Although the district court adhered to the doctrine of noninquiry, Article 3(a) of the Supplementary Treaty was designed to eliminate this possibility. See *supra* text accompanying note 192 (discussing the rule of noninquiry under Article 3(a) of the Supplementary Treaty).
304. *Id.* at 761.
305. *Id.* at 757-58. The United States argued that declaratory judgment "seeks literally nothing more than the same right to obtain judicial review of an adverse extradition decision that Doherty would have had if the matter had gone the other way." *Id.* at 758.
306. *Id.* at 760.
ment, was available to the United States. The court denied the United States Government’s motion and granted Doherty’s motion to dismiss the complaint for failure to state a claim.

United States v. Doherty (Doherty III) concerned another unsuccessful appeal by the United States Government. Before the Second Circuit Court of Appeals, the government challenged the district court’s denial of its motion for judicial review of the extradition decision. The Second Circuit characterized this appeal as “an attempt by the Government to escape from the long held principle that when an extradition magistrate acting under 18 U.S.C. § 3184 refuses to certify a person sought to be extradited . . . the Government’s sole recourse is to submit a request to another extradition magistrate.” The court concluded that it would not upset the “remedial balance” with respect to extradition, which had been achieved for over seventy-five years, and affirmed the district court’s ruling against the United States Government.

Doherty v. Meese (Doherty IV) involved Doherty’s unsuccessful attempt to circumvent the Attorney General’s review of his situation. Five months after the Doherty III decision, Doherty withdrew his application for political asylum and conceded deportability. Doherty requested immediate deportation to the Republic of Ireland. The motivation behind this move was the pending ratification of the 1985 Supplementary Extradition Treaty between

307. Id.
308. Id. at 761.
309. 786 F.2d 491 (2d Cir. 1986).
310. Id. at 503.
311. Id. at 492-93.
312. Id. at 497.
313. 808 F.2d 938 (2d Cir. 1986).
314. Id. at 944.
315. Id. at 940. The procedural aspects of immigration law require a refugee seeking asylum to file a petition before the district director of the local INS office. Stephen H. Smith, Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process, 71 IOWA L. REV. 1297, 1303-10 (1986). When a petitioner files a petition for asylum status, he automatically is considered for withholding of deportation under 8 U.S.C. § 1251 (1988). Id. at 1304. He receives a hearing before an immigration judge—the lowest level of immigration adjudications. Id. at 1309. Immigration adjudications follow agency law. If the petitioner or the United States Government is dissatisfied with the outcome of the initial hearing, either party or both may appeal the decision to the Board of Immigration Appeals (“BIA”). The BIA will review the case and make a decision. This decision may be appealed to a federal district court under an abuse of discretion standard. See infra note 335 (reviewing decisions that have applied the abuse of discretion standard). At any time, INS officials may request that the matter be certified for review by the Attorney General. 8 C.F.R. § 3.1(h) (1988). “The Board shall refer to the Attorney General for review of its decision all cases which . . . [t]he Attorney General directs the Board to refer to him . . . [or] a majority of the Board believes should be referred to the Attorney General . . . [or] the Commissioner requests be referred to the Attorney General . . . .” Id.

During the extradition hearing, Doherty had applied for asylum, and thus automatically for withholding of deportation. He then requested and received a stay on his asylum petition pending the outcome of the extradition hearing and its two subsequent appeals. Doherty later withdrew his asylum petition in order to return to the Republic of Ireland. Doherty IV, 808 F.2d at 940.

316. Doherty IV, 808 F.2d at 940.
the United States and the United Kingdom. Under the new treaty, Doherty's actions would not fall under the political offense exception, and there was a strong possibility that he would be extradited back to the United Kingdom. As Doherty wanted to return to Ireland, where he faced a ten-year prison sentence rather than the life sentence in the United Kingdom, Doherty designated Ireland as his country of deportation.

INS officials denied Doherty's country designation of Ireland on the grounds that deportation to Ireland "would be prejudicial to the interests of the United States in its relations with other nations concerning the fight against international terrorism." Instead, INS officials designated the United Kingdom as the country of deportation. At a hearing before the immigration judge on September 19, 1986, the judge reversed the INS decision and ordered Doherty to return immediately to Ireland. However, the INS appealed this decision to the Board of Immigration Review ("BIA"). During this time, Doherty petitioned the district court for a writ of habeas corpus releasing him from prison and allowing immediate deportation to Ireland. The district court denied this petition, and Doherty appealed to the Second Circuit Court of Appeals.

Doherty argued that the United States Government was delaying his deportation to Ireland solely to ensure that the new Supplementary Extradition Treaty would be ratified before Doherty was allowed to leave the United States. The Second Circuit rejected Doherty's argument. The court stated that much of the delay in Doherty's case was his own doing, and that INS

317. Id.
318. Id. As the Supplementary Treaty can be applied retroactively, if the United Kingdom had filed a second extradition request Doherty might have faced a possible extradition to Northern Ireland instead of his deportation to the United Kingdom.
319. Id. A refugee can designate a country of deportation under 8 U.S.C. § 1253(a), which provides:

The deportation of an alien in the United States provided for in this chapter . . . shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States.

320. Doherty IV, 808 F.2d at 940-41.
321. Id. at 941.
322. Id. The BIA eventually ruled on March 11, 1987, that Doherty be deported to Ireland, as no clear evidence showed that granting the deportation request would be prejudicial to United States' interests. Doherty v. INS (Doherty V), 908 F.2d 1108, 1112 (2d Cir. 1990). During October, 1987, the INS requested that the matter be reviewed by Attorney General Meese under 8 C.F.R. § 3.1(h) (1988). Id. Attorney General Meese rejected Ireland as the designated country in a decision dated June 9, 1988. Id.
323. Doherty IV, 808 F.2d at 941.
324. Id.
325. Id.
326. Id. The court reminded Doherty that he had stayed the asylum hearings himself pending the outcome of the extradition decision and its two appeals. Id. Doherty requested that the asylum proceedings be stayed on March 18, 1985. He filed a motion to continue the proceedings on September 3, 1986. Id.
had reasonably exercised its discretion under the Immigration and Nationality Act to reject Doherty's country designation.\textsuperscript{327}

Having lost the battle to return to Ireland, on December 3, 1987, Doherty moved to reopen his asylum proceedings so that he could (a) withdraw Ireland as the country of designation for deportation, and (b) submit an application for asylum status and for withholding of deportation.\textsuperscript{328} Doherty withdrew Ireland as his designated country because of a new treaty pending ratification between Northern Ireland and Ireland.\textsuperscript{329} Like the Supplementary Extradition Treaty, this treaty narrowed the political offense exception and required Ireland to extradite fugitives who had committed crimes in Northern Ireland back to that country.\textsuperscript{330} The INS denied this motion.

However, the BIA decided on appeal that Doherty had established a prima facie case for relief based on a well-founded fear of persecution in Northern Ireland.\textsuperscript{331} Thus, it set a date for an asylum hearing. Once again, INS officials requested the matter for certification to the new Attorney General Richard Thornburgh.\textsuperscript{332}

Attorney General Thornburgh reviewed this decision. On June 30, 1989, Thornburgh rendered a decision that Doherty's motion to reopen, and ordered Doherty to be immediately deported to the United Kingdom.\textsuperscript{333} Thornburgh determined that Doherty was ineligible for asylum status and withholding of deportation. On January 19, 1990, Doherty appealed the decisions of both Attorneys General Meese and Thornburgh in \textit{Doherty v. Department of Justice (Doherty V)}.\textsuperscript{334}

In the fifth Doherty decision, the Second Circuit Court of Appeals reviewed the decisions of the Attorneys General under an abuse of discretion standard.\textsuperscript{335} It first found that Attorney General Edwin Meese had not abused his

\textsuperscript{327} Id. at 944. Although Doherty argued that the appeal was frivolous, as the INS had never rejected a country designation before, the Second Circuit disagreed with him, stating that the lack of precedent did not render a claim frivolous. \textit{Id.} at 941 n.3.

\textsuperscript{328} Doherty v. INS (\textit{Doherty V}), 908 F.2d 1108, 1112 (2d Cir. 1990). To be eligible for asylum status, an applicant must fit within the parameters established by 8 U.S.C. § 1101(a)(42) (1988). \textit{See supra} note 127 (describing the statute's definition of a refugee).

\textsuperscript{329} \textit{Doherty V}, 908 F.2d at 1112.

\textsuperscript{330} \textit{Id.}

\textsuperscript{331} \textit{Id.} The BIA followed established case law that allowed a motion to reopen asylum hearings based on a well-founded fear of persecution. \textit{See Cardoza-Fonseca v. INS}, 480 U.S. 421, 428 (1987) (relying on the international standard of the term "well-founded fear of persecution" to deny petitioners' deportation).

\textsuperscript{332} \textit{Doherty V}, 908 F.2d at 1113.

\textsuperscript{333} \textit{Id.} at 1114.

\textsuperscript{334} \textit{Id.}

\textsuperscript{335} \textit{Id.} at 1115. An abuse of discretion occurs if the Attorney General acts arbitrarily, departs inexplicably from established policies, discriminates invidiously against a particular group, or gives effect to considerations that Congress could not have intended to make relevant. \textit{See INS v. Abudu}, 485 U.S. 94 (1988) (applying an abuse of discretion standard of review in determining whether the BIA had incorrectly denied petitioner's motion to reopen deportation proceedings); \textit{Aviles-Torres v. INS}, 790 F.2d 1433, 1437 (9th Cir. 1986) (reversing the lower court's decision and ruling that the BIA had abused its discretion by basing its denial of petitioner's motion to
discretion when he denied Ireland as the country of designation for deportation. The court stated that the Attorney General had the requisite authority to deny a country designation based on reasonable grounds.

The court next turned to Attorney General Richard Thornburgh's decision. It held that Thornburgh had abused his discretion in three different ways. First, Thornburgh had erred by using an improper legal standard to review Doherty’s evidence. Second, the court found that Thornburgh had improperly determined the ultimate relief Doherty should receive under a motion to reopen the asylum hearings. The court noted that it was obvious that an evidentiary hearing was needed, and chastised Thornburgh for prejudging the merits of Doherty’s claim. Third, Thornburgh erred by rejecting Doherty's claim that his return to Ireland would harm relations between the United States and the United Kingdom. The court stated that a “decade of practice confirms that the board’s discretionary denials of asylum ... have been primarily for reasons of administrative fairness and efficiency, not to pre-

reopen on factors deemed to be arbitrary, capricious, or contrary to the law); Wong Wing Hang v. INS, 360 F.2d 715, 718 (2d Cir. 1966) (“[T]he reviewing court shall set aside agency action ... found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accord with the law.”); Kaloudis v. Schaugnessy, 180 F.2d 489, 491 (2d Cir. 1950) (ruling that the BIA did not abuse its discretion by denying petitioner’s motions on grounds that Congress could not have intended to make relevant).

336. Doherty V, 908 F.2d at 1113.

337. Id. Meese had denied the designation on two grounds: (a) “it is the policy of the United States that those who commit acts of violence against a democratic state should receive swift and lawful punishment, and it is thus in the interest of the United States that respondent serve his sentence in the United Kingdom”; and (b) “a decision to deport respondent to Ireland rather than the United Kingdom would be injurious to our relations with the United Kingdom.” Id.

338. Id. at 1114.

339. Id. at 1116. Thornburgh had decided that Doherty had not established new unforeseeable evidence to support his motion to reopen. The court rejected this argument, stating that “[n]either the regulations nor the applicable decisional law require expressly or by implication that the new evidence be 'unforeseeable'; indeed, such a rule would lead to absurd consequences.” Id. at 1115. The court noted that Doherty could not have foreseen that his country designation would be denied, as the Attorney General had never before rejected a country designation. Id. at 1116.

340. Id. at 1117.

341. Id.

342. Id.

343. Id. at 1121. After an in-depth analysis of the legislative history of asylum law, the court concluded that with the passage of the 1980 Immigration Act, Congress had intended to eliminate the geographical and ideological considerations that had plagued the asylum process during much of the twentieth century. Id.

serve our political relationship with the allegedly persecuting nation.\textsuperscript{344}

With one dissenting opinion,\textsuperscript{345} a majority of the Second Circuit panel found that Attorney General Thornburgh had abused his discretion, and remanded the case to the immigration judge for asylum hearings.\textsuperscript{346} However, the hearings will not be held, as the United States Supreme Court reversed the Second Circuit's decision to reopen Doherty's asylum hearing.\textsuperscript{347}

The Court found that neither Attorney General Meese nor Thornburgh had abused their discretion in denying Doherty's motion to reopen his asylum hearing.\textsuperscript{348} It decided that the denial of Doherty's country designation and the change in Irish extradition law due to the new Ireland-Northern Ireland Treaty did not qualify as new material evidence to support reopening.\textsuperscript{349} Further, the Court found that "withdrawing a claim for a tactical advantage is not a reasonable explanation for failing to pursue the claim at an earlier hearing."\textsuperscript{350} Thus, it denied Doherty's motion to reopen his asylum hearings.\textsuperscript{351} One month after the Supreme Court's decision, INS officials deported Doherty to the United Kingdom, and the United Kingdom promptly sent him to a prison in Northern Ireland.\textsuperscript{352}

\textsuperscript{344} Doherty \textit{V}, 908 F.2d at 1120. The court also rejected Thornburgh's contention that Doherty had "waived" his right to apply for asylum when Doherty conceded deportability. \textit{Id.} at 1122. Thornburgh argued that Doherty had "assumed the risk" that (a) Ireland might change its extradition laws, and (b) Meese might deny his country designation. \textit{Id.} The court found that this reasoning "was incompatible with any motion to reopen." \textit{Id.}

345. The dissenting judge found that the record supported Attorney General Thornburgh's decision. He contended that the Attorney General's word was final, and that Congress did not intend to eliminate political factors from the asylum process. \textit{Id.} at 1125 (Lombard, J., dissenting). He further stated that Doherty had taken a calculated risk to admit deportability, and that Doherty could not have a "second bite at the apple" just because Doherty had miscalculated. \textit{Id.} at 1127 (Lombard, J., dissenting). The judge found that both Attorneys General had acted properly, within the scope of their discretion. \textit{Id.} at 1127, 1130 (Lombard, J., dissenting).


349. \textit{Id.} at 4088-89.

350. \textit{Id.} at 4089.

351. \textit{Id.} Meanwhile, Doherty petitioned the BIA, and then the district court, to release him from jail. Doherty \textit{v.} Thornburgh, 750 F. Supp. 131 (S.D.N.Y. 1990), \textit{aff'd}, 943 F.2d 204 (2d Cir. 1991) (affirming the lower court's decision denying Doherty bail on the grounds that being held for eight years in jail, without bond, does not violate a detainee's due process rights under the Fifth Amendment).

352. \textit{See} Ira Member, \textit{supra} note 3, at 1. Doherty's attorneys criticized the manner in which the INS deported Doherty before dawn without notifying them. \textit{Id.} They complained of being "stonewalled when they sought to confirm his deportation." \textit{Id.} Further, Doherty was deported while his attorneys awaited a response from Attorney General William Barr on a formal request for an asylum hearing for Doherty. \textit{See} Tom Collins, \textit{Clock Strikes Midnight; Doherty Deported, Ending His 9-Year Legal Battle in U.S.}, \textit{Newspaper}, Feb. 20, 1992, at 3. In addition, over one hundred United States Congresspersons were awaiting a response from the Supreme Court on a formal request to rehear Doherty's case. Goldman, \textit{supra} note 3, at A1.
III. Analysis

Doherty's case provides an excellent illustration of the principle of nonrefoulement in action in both the extradition- and asylum-law contexts. Although this concept is not expressly alluded to in the Doherty opinions, both the district and appellate courts utilized nonrefoulement. Unfortunately, the Supreme Court ignored the principle of nonrefoulement by denying Doherty's motion to reopen. If the Supreme Court had followed this principle, Doherty currently would not be in Northern Ireland, as he falls under the international and domestic definition of refugee, and he does not fall under any exceptions to the use of nonrefoulement.

A. Doherty Fits Within the International Definition of Refugee

The international definition of refugee requires an individual to have a “well-founded fear of being persecuted for reasons of . . . political opinion.”

Under this standard, Doherty is a refugee. He is a staunch supporter of the PIRA, a group that is outlawed in Northern Ireland due to its anti-British stance. Not only is membership in this group forbidden; any acts in which this group participates also are taboo. Doherty’s political beliefs are well known and are reflected in his support of the PIRA. Upon his return to the United Kingdom, Doherty is assured of being persecuted for his politics.

Prior to his flight to the United States, Doherty was tried and convicted under the Diplock court system currently in place in Northern Ireland. This system is renowned for its trampling of traditional due process criminal rights. Law enforcement officials may arrest anyone whom they reasonably suspect may have committed a crime. Once detained, suspects have little opportunity to seek advice from counsel before trial. During trial, suspects are not permitted to have a trial by jury, and any evidence presented is subject to lower admissibility standards than usual. Doherty received a sentence of life imprisonment under the Diplock system.

Many scholars have criticized the Diplock court system as being fundamentally unfair. Congress voiced its opinion in 1986 when it amended the Sup-

353. 1951 Convention, supra note 53, art. 1(2). United States courts have determined that there is a subjective component to this standard of fear, as fear is itself subjective. See INS v. Cardozo-Fonseca, 480 U.S. 421, 428 (1987).
354. See supra note 237 (discussing the IRA).
355. For a discussion of the Diplock court system, see supra notes 244-52, 259-64 and accompanying text.
356. See supra note 247.
357. See supra text accompanying notes 251-52.
358. See supra notes 259-60 and accompanying text.
359. See Doherty V, 908 F.2d 1108, 1121 (2d Cir. 1990). It is interesting to note that a Republic of Ireland Court adjudicated the same case and gave Doherty a sentence of ten years. Id. at 1111.
360. See supra notes 253, 264 and accompanying text (describing criticisms of the Diplock court system).
JOSEPH DOHERTY AND THE INS

Plenary Extradition Treaty to include Article 3(a). Both Congress and jurists contend that the Diplock system violates a suspect's right to a fair trial under several international conventions. In addition, the provisions of the Diplock system would never pass constitutional standards in the United States. Any criminal conviction in Northern Ireland is suspect, and it appears that Doherty may already have been persecuted for his political views in the Diplock system.

Further, Doherty more than likely will face maltreatment in the Northern Irish prison. Judicial authorities and human rights organizations have found that conditions for Republicans in Northern Irish prisons violate international law. Human rights groups still monitor the prisons due to the high number of complaints by Republican prisoners. Since his arrival at the Northern Irish jail, Doherty may already have been subjected to persecution for his political beliefs.

Doherty also fit under the remaining sections of the 1951 Convention refugee definition, which requires the refugee to be "outside the country of his nationality" and "unwilling to avail himself of the protection of that country." At the time of his asylum hearing, he was outside his country of origin.

361. See supra notes 182-91 and accompanying text.
362. See supra notes 182-86 and accompanying text (describing congressional reaction to the Supplementary Extradition Treaty).
363. In addition to the life sentence he received under the Diplock court system, the record in Doherty's case reflects that he, as well as his family, already have been subjected to persecution. His counsel stated:

Family members have been subject to repeated arrest and interrogation. A sister's home has been often raided by the security forces; on one such occasion, the security forces seized the transcript of Mr. Doherty's testimony before Judge Sprizzo [the extradition magistrate]. Relatives, friends, and neighbors have been victims and targets of sectarian attacks running the gamut from beatings, to attempted murder, to actual murder. Mr. Doherty's family and the other occupants of their tiny nationalist enclave live subject to the intrusive daily presence in their homes and on the streets of the British Army and the paramilitary Royal Ulster Constabulary (RUC). In addition to Mr. Doherty, a sister was interned by the British government and, as with him, imprisoned without charges and without trial. The family home was destroyed when bombed by loyalist paramilitaries. In addition, Mr. Doherty has already been the victim of persecution in the United Kingdom, having been tortured and beaten while in the custody of the security forces.

364. See supra notes 253-58 and accompanying text (discussing conditions in Northern Ireland prisons). Before his removal to the United Kingdom, Doherty was quoted as stating:

I'm apprehensive of what is ahead. No one can guarantee [that] my rights won't be infringed upon, there is no guarantee [that] I won't be physically hurt. My life is at risk if I'm sent back to British jurisdiction. It is not the United States. There is no First Amendment, no Fourth or Fifth. There is basically nothing there.

Gail Appleson, Doherty Says He Fears for Life on Return to Britain, REUTERS, Jan. 16, 1992 (a.m. cycle).
365. See supra notes 253-58 and accompanying text.
366. See 1951 Convention, supra note 53, art. 1(2).
(Northern Ireland), and was unable and unwilling to return. The protection Northern Ireland would provide for Doherty is dubious, given its criminal justice system and its exhaustive efforts to secure his extradition. Doherty was unwilling to return to Northern Ireland and serve his sentence in a prison where he might have faced persecution for his political views. Therefore, Doherty satisfies the international definition of refugee contained in the 1951 Convention. He also satisfies the United States definition.

B. Doherty Fits Within the United States' Refugee Standard

The United States definition of refugee parallels the international definition, with one exception. The United States definition precludes individuals from receiving the protection of nonrefoulement if they fall under six exclusionary categories. In contrast, the international definition excludes individuals if they fall under four of the six United States categories. The United States definition is much more narrow and much more difficult to utilize than its international counterpart. If Doherty survives the U.S. exclusions, he automatically survives the international exclusions.

The first two limitations bar nonrefoulement if the individual falls outside the refugee definition, or is firmly resettled in a foreign country. As Doherty falls under the definition of refugee, he satisfies the first condition. Second, Doherty did not firmly resettle in a third country. One could argue that since Doherty had been living in New York City from 1981 to 1992, he had resettled. However, the United States is not a third country in this situation, as it was a party to the extradition, the asylum, and the deportation proceedings. Further, Doherty was incarcerated in the Manhattan Correctional Center from 1983 to 1992—hardly a firm resettlement of his choice. Thus, Doherty easily side-steps the first two bars to nonrefoulement.

The next two provisions prohibit the use of nonrefoulement if the individual has been convicted by final judgment of a particularly serious crime, or if the individual himself participated in the persecution of others on account of race, religion, nationality, membership in a particular social group, or political opinion. These two restrictions really concern whether the refugee has engaged in acts of terrorism. Doherty has not.

Under the theory of permissible targets outlined in the Geneva Conventions, parties and participants of the conflict are permissible targets. Doherty is a permissible target for an attack by Unionist groups or British Security Forces. Similarly, members of Unionist or British Security groups are permissible targets for Republican attacks. Geneva law stresses that groups

367. See supra text accompanying notes 127-29 (listing the United States exclusion categories).
368. See supra text accompanying notes 67-68 (listing exclusions under international law).
369. 8 C.F.R. § 208.8 (1988).
370. See Doherty V, 908 F.2d 1108, 1110 (2d Cir. 1990).
371. See 8 C.F.R. §208.8.
372. See supra text accompanying notes 273-76 (discussing the theory of permissible targets).
not participating in the strife are impermissible targets. Thus, the Republican and Unionist groups must avoid random or indiscriminate injury to the lives or property of innocent civilians. They will not violate international law if they exclusively attack one another.

Doherty's participation in the Republican ambush of British Security Forces did not violate international law. British Security Forces are a permissible target under the Geneva Conventions. The ambush neither injured nor destroyed civilian lives or property. Further, Doherty behaved properly as a soldier under the St. Petersburg Declaration. His purpose was to weaken the enemy forces by disabling enemy soldiers. The ambush did not violate any combat rules. Rather, it was a legitimate action in a noninternational armed conflict.

Terrorism is defined as “reckless applications of violence against innocent individuals . . . for the purpose of obtaining a military, political or religious end.” Admittedly, the PIRA ambushed the British Security Forces to achieve both a military and political end. The PIRA wanted to decrease the number of British Security Forces, as well as make a political statement against direct rule. However, the central element of terrorism is the application of violence to innocent people. The ambush did not include acts of violence against impermissible targets. This notion was voiced by district court Judge Sprizzo, who expressly stated that the ambush did not cause “indiscriminate killing.” In addition, other courts have found that attacks on police and military forces are not acts of persecution. Thus, Doherty did not participate in a terrorist act, and passes the third and fourth statutory bars to nonrefoulement.

The fifth statutory bar prohibits nonrefoulement if the refugee is a national security risk to the United States. Doherty posed no threat to national security. First, he was incarcerated for almost a decade. Second, his fight is against the Unionist and British groups in Northern Ireland—not against any faction in the United States. Further, Doherty fights for what he perceives to be societal good. He is not a cold-blooded, hardened criminal who kills for personal gain. Rather, Doherty acted to improve society. Thus, he is not a

373. See supra text accompanying notes 273-76.
374. See supra text accompanying notes 270-72 (examining the St. Petersburg Declaration).
375. See supra text accompanying note 277 (depicting the Northern Irish conflict as noninternational strife).
376. See Blakesley, supra note 176, at 902-03.
377. Id.
381. See WIJNGAERT, supra note 160, at 64.
threat either to the community or to national security.

The final limitation on the principle of nonrefoulement is activated if the refugee has committed a serious nonpolitical crime outside the United States. A nonpolitical crime would be one that is excluded from the political offense exception to extradition. The district court encountered this issue during Doherty's extradition hearing. The court analyzed the issue by considering the scope of the political offense exception, the type of group involved in the political act, the act itself, and whether any innocent people were hurt by the act. The court concluded that the ambush was a "classic" example of a political crime under the political offense exception, and refused to grant the United Kingdom's extradition request. Two appellate courts later affirmed this decision.

Doherty's crime was political. Therefore, he successfully closes the final statutory exception to nonrefoulement.

As shown above, Doherty falls within the international and domestic definitions of refugee. He therefore is protected by the principle of nonrefoulement. Thus, Doherty should not have been forced to fight a deportation battle against the United States. Once he circumvented the United Kingdom's extradition request, the United States should have willingly opened its doors to Doherty. The United States traditionally prides itself on sheltering refugees who have been persecuted for political opinion. In this case, however, the United States refused to shelter Doherty.

**C. The United States Has Engaged in Disguised Extradition**

The United States Government, through its executive branch (the INS), used immigration laws to accomplish what its courts would not allow—the return of Doherty to the United Kingdom. The use of immigration laws to extradite an individual is referred to as "disguised extradition." In this instance, disguised extradition violates the customary international norm of nonrefoulement. The United States sent Doherty back to the United Kingdom and thus to Northern Ireland, where he probably will face persecution on account of his Republican views. Doherty's extradition was blocked due to the political offense exception, which incorporates the principle of nonrefoulement. In using deportation statutes to return Doherty to Northern Ireland, however, the United States engaged in disguised extradition, which directly violates nonrefoulement. The United States blatantly ignored a fundamental principle of international law.

Many scholars have criticized states for using immigration laws as disguised extradition. Most of this criticism centers on the limited rights of the fugi-

382. See 8 C.F.R. § 208.8.
384. Id.
386. See supra text accompanying notes 216-25 (discussing use of disguised extradition).
387. See 1 Bassiooni supra note 131, at 49, Wiingaert, supra note 160, at 89; Kennedy et
tives under disguised methods of extradition.\textsuperscript{388} Extradition treaties usually secure at least a minimal due process standard for the extraditee. Certain requirements must be met prior to extradition, and both the judiciary and executive authorities must agree before granting a request. Courts should refuse to try individuals in deportation proceedings once their extradition has been denied. Resorting to immigration procedures subjects the extraditee to an entirely different legal procedure without the constitutional safeguards found under the extradition process.\textsuperscript{389}

Another criticism of the use of disguised immigration procedures for extradition is that it is much easier on officials and creates a frame of mind that immigration procedures should be used for administrative convenience.\textsuperscript{390} As in Doherty's case, officials often resort to deportation proceedings when extradition appears impossible because one of the procedural or substantive elements is not fulfilled, or because a court has found the individual nonextraditable. The United States Supreme Court has never upheld the use of certain laws for mere administrative convenience; immigration courts should follow its lead. As one scholar states, "[T]he rights of the requested person should not be sacrificed to the requirements of a more efficient and a speedier administration of justice."\textsuperscript{391}

In addition, the use of immigration laws as disguised extradition impairs the integrity of the extradition process. International spotlights focus on the actions of the developed nations. If the United States resorts to backhanded means, it sets a bad example and threatens to bring about the demise of international criminal cooperation through legal extradition procedures. Also, it is difficult for the extraditee to accuse INS officials of substituting immigration procedures for extradition. This calls into question the good faith of the entire executive branch.\textsuperscript{392}

Moreover, the most damaging aspect of the government's conduct is that two alternatives exist to its use of de facto extradition. The United Kingdom, at any time, had the ability to refile another extradition request. By avoiding this option, it appears that the United Kingdom is fearful of Article 3(a), and its application to the Diplock court system in Northern Ireland. Given the fact that several convictions of IRA members have been recently overturned due to illegally obtained confessions,\textsuperscript{393} a United States Court facing a second United Kingdom extradition request most likely would find that Doherty would not receive fair treatment in the United Kingdom, and would keep Doherty in the United States.

\textsuperscript{388} See supra notes 224-25 and accompanying text (reflecting criticism of disguised extradition).

\textsuperscript{389} See \textit{Evans \& Murphy}, supra note 166, at 99.

\textsuperscript{390} \textit{Id.} at 103.

\textsuperscript{391} \textit{Wijngaert}, supra note 160, at 59.

\textsuperscript{392} \textit{Id.}

Instead of deporting Doherty, the United States could have permitted him to resettle in a friendly third country. This option would have preserved nonrefoulement. Instead, the government continually refused to send Doherty to any other country besides the United Kingdom. This refusal supports the conclusion that the United States not only is willing, but actually did violate both domestic and international law to return Doherty to the United Kingdom.

The use of immigration laws by the government in Doherty's case hurts all parties involved: the United States, the United Kingdom, and Doherty. The United States is injured in international circles for its exhaustive backhanded efforts to return Doherty to its good ally the United Kingdom. The United Kingdom is ridiculed by Republican groups, who mock its exhaustive efforts to put Doherty in prison on its soil. These efforts have memorialized Doherty as a "folk hero" and as "a leading symbol of opposition to British rule in Northern Ireland." Further, Doherty has been incarcerated for almost a decade. The use of deportation proceedings against him arguably deprived him of due process rights similar to those he lost in front of the Diplock courts in Northern Ireland. Most importantly, the use of disguised extradition violated Doherty's right to the protection of nonrefoulement.

The principle of nonrefoulement protected Doherty in the extradition process through the political offense exception. Similarly, if the process were properly followed, it would have protected him in the asylum and withholding of deportation processes. Unfortunately, the United States subverted the process that has developed over several decades to protect the refugee.

IV. IMPACT

Prior to Doherty's deportation, there were three possible outcomes to the Doherty case: (1) the executive branch could have granted Doherty asylum; (2) the United Kingdom could have filed a second extradition request under the Supplementary Treaty; or (3) the executive branch could have deported Doherty to the United Kingdom. Of these three outcomes, the second possibility is preferred.


395. A practical solution for the United States' dilemma of injuring Doherty's rights through the use of immigration laws as disguised extradition on the one hand, and injuring its relations with the United Kingdom by denying its extradition request on the other, would have been for the United States to employ the doctrine of aut dedere aut judicare. See supra note 226 and accompanying text (discussing this doctrine).

Use of the principle of aut dedere aut judicare would have been a good solution for all three parties. The United States would have eliminated its (and Congress') concern that Doherty would not receive fair treatment in the highly charged atmosphere surrounding his political crime. The United Kingdom would have eliminated its concern that Doherty would go unpunished. Doherty would have received a fair trial if retried—if not, he would have received good treatment in United States prisons, and probably credit for time served. Most importantly, the choice between extradition or prosecution maintains the principle of nonrefoulement—Doherty would not have been returned to a country where he may face persecution on account of his Republican views. Unfortunately, the United States rarely acknowledges the viability of this practical alternative.
The first scenario envisions INS officials granting Doherty either asylum status or withholding of deportation. If granted asylum status, Doherty would have remained in the United States. If granted withholding of deportation, Doherty would have been able to designate a friendly third country to which he would have been deported. Neither option would have sent him back to the United Kingdom, and neither course would have violated the principle of nonrefoulement.

Some may argue that the asylum or withholding of deportation solution does little to promote international cooperation in the suppression of crime, and might strain relations between the United States and the United Kingdom. The United Kingdom would suffer a humiliating defeat in Northern Ireland, much to the delight of Republican groups. In addition, Doherty would evade responsibility for his act and escape punishment. While this solution reflects the traditional American policy of sheltering political fugitives, its one-sided approach does not equally balance the competing goals of nonrefoulement and the suppression of crime.

However, the underhanded tactics used by the United States in the Doherty case, and the extraordinarily long time Doherty has sat in jail serve to tip the balance in favor of Doherty. He already has served time for participating in the ambush. Justice would have been better served if both the United Kingdom and the United States had abandoned their backhanded methods.

The second scenario envisions the United Kingdom filing a second extradition request under the Supplementary Treaty. This approach is most desirable, as (a) it would give the United Kingdom another chance at extradition, (b) it avoids disguised extradition, and (c) it follows the properly established avenue of recourse for unsatisfied requesting states.

If given the chance to apply the Supplementary Treaty to Doherty, a court undoubtedly would have been persuaded by the McMullen case, and might have found that the treaty, as applied to Doherty, constitutes an unlawful bill of attainder. Even if the court chose not to agree with the result in McMullen, under Article 3(a) of the new treaty, it would have examined the fate that awaited Doherty if returned to the United Kingdom or Northern Ireland. Article 3(a) of the Supplementary Treaty allows the examining court to prohibit extradition where the fugitive may face persecution, unfair treatment, or an unfair trial if returned. The article embodies the principle of nonrefoulement and protects Irish fugitives from persecution. It is more than likely that a reviewing court in this situation would have barred Doherty's extradition to the United Kingdom under Article 3(a) of the Supplementary Treaty.

This second approach allows the United Kingdom to save face by giving it one more chance at extradition. It also allows the executive branch to main-

---

397. See Supplementary Treaty, supra note 154, art. I. Under this treaty, Doherty's crime would not fall under the political offense exception to extradition, because murder is not considered to be a political crime under Article 1.
398. Id.
tain good relations with the United Kingdom, as Congress, not the executive branch, inserted Article 3(a) into the treaty at the last minute. Finally, the Supplementary Treaty allows courts to adhere to the principle of nonrefoulement. Doherty would have received protection against persecution under Article 3(a) of the Supplementary Treaty. With nonrefoulement, Doherty would have been able to thwart the government’s attempts to return him to the United Kingdom.

Instead of utilizing the other two options, the executive branch secretly deported Doherty to the United Kingdom. In doing so, the executive branch stooped to “disguised extradition”—a backhanded method designed to bring about extradition when the legitimate extradition route fails. This method deprived Doherty of the protection embodied in nonrefoulement. This option is most damaging, for Doherty undoubtedly will face persecution on account of his political views in Northern Ireland. Doherty’s deportation to Northern Ireland clearly violates both domestic and international law.

**CONCLUSION**

The principle of nonrefoulement preserves the interests of the political offender, the requesting country, and the asylum country in the areas of extradition and political asylum. The principle is based on humanitarian concerns, and thus protects the political offender from maltreatment and the highly charged and unbalanced judicial process he would face if returned to the requesting country. As nonrefoulement does not apply to international crimes, it allows states to carry out their missions to combat international terrorism by punishing political offenders who commit terrorist acts. Finally, this norm allows the asylum state both to remain neutral in a sensitive foreign relations area, as well as to ensure that the rights of the political fugitive will be preserved.

It is vital that all nations strive to preserve and uphold the protections and guarantees of nonrefoulement. It is not a political tool for nations to use to their advantages, as the United States did in the Doherty case. The umbrella of protection provided by nonrefoulement covers individuals—not states—and should remain permanently open to preserve a refugee’s rights under international law.

*Wendy L. Fink*