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Title: Department of the Taoiseach internal memorandum to Dermot Nally, Assistant Secretary, from Walter Kirwan, Principal Officer, concerning the drafting of a Government statement on fugitive offenders from Northern Ireland and expressing reservations as to its use. Includes copy of draft Government statement.

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Mr. Nally,

I attach the statement on fugitive offenders from Northern Ireland in final forms. Fifty copies of this have now been run off.

However, I should like to express reservation about using this except when we have to do so - and certainly not in any very public forum where we would be exposed to rebuttals from British quarters. From my study of the question, I think there are weaknesses in our case on extradition for "terrorist" offences.

The spirit of international law is moving in the direction of extradition for such offences and this case was made by the British representatives on the Law Enforcement Commission. They referred to the Resolution on International Terrorism dated 24th January, 1972 of the Committee of Ministers of the Council of Europe. The Resolution recites the awareness of the Committee of the growing concern caused by the multiplication of acts of international terrorism which jeopardise the safety of persons, their desire that effective measures be taken in order that the authors of such acts do not escape punishment and their conviction that extradition is a particularly effective measure for achieving that result and that the political motive alleged by the authors of certain acts of terrorism should not have as a result that they are neither extradited nor punished, and recommends that governments of member states when they receive a request for extradition in respect of a number of crimes, including any terrorist act, should take into consideration the particularly serious nature of these acts, inter alia, when they create a collective danger to human life, liberty or safety; when they affect innocent persons foreign to the motives behind them; when cruel or vicious measures were used in the commission of those acts. Governments are urged, if they refuse extradition, to prosecute the offenders and, if necessary, to consider changing their laws to allow this to be done.

The British members of the Law Enforcement Commission stated that this resolution reflected a view which is shared by civilised states that consistently with continuing asylum for the benefit of political offenders in general, the enormity of the crimes in question and their potentially destructive effect, both politically and in terms of human suffering, justify and require the creating of exceptions. The British members argued that "international", in relation to terrorism, need not connote "multinational" and could embrace offences of the type being considered by the Commission. They give one or two other instances of the trend of international law on the matter.

Mr. McCabe has established from the DPP's Office that in cases of terrorism, the policy of the British is to extradite on request.

The Irish members made the case that any departure from the generally recognised principles of international law would not be sufficient to make the departure itself part of international law unless it was so widely accepted as to be so treated - and could not, unless this condition was satisfied, justify a departure in Irish practice from the generally recognised principles referred to in Article 29.3 of the Constitution. An important part of the argument of the British members of the Commission was that international law recognises the right, without imposing the duty, to refuse extradition of political offenders i.e. that it does not forbid extradition in these cases.

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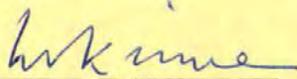
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They also make the point that Article 3.1 of the European Convention on Extradition allows every state, as the requested state, to decide what crimes it will regard as political. This could be done by the Oireachtas although anyone affected would, of course, have recourse to the courts. It would be difficult, to Irish eyes, to exclude most of the offences which are prosecuted in the Special Criminal Court from those offences regarded as political. However, to British or Loyalist eyes, part of the scandal given by the deficiencies they see in current arrangements is precisely that serious criminal acts are regarded as political for extradition purposes. The British members also argued that the United Kingdom and Ireland are free to regulate their mutual relations in respect of extradition by reciprocal legislation and in so doing to exclude the application of the European Convention as between them. This is deduced from Article 28.3 of the Convention which gives a similar freedom, in certain circumstances, to Contracting Parties to the Convention in their mutual relations.

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These points were dealt with by the Irish members of the Commission but not in a manner completely convincing to me. While I must obviously defer to such distinguished lawyers, the point I make is that if ^{we} were to get involved in any public controversy on this matter, the issue would not be seen as clearly decided in our favour by ordinary laymen in Britain or Northern Ireland. For this reason, I think we need to use the paper with caution.



1 October, 1975.

FUGITIVE OFFENDERS FROM NORTHERN IRELAND

Scale of problem

1. Since 1st June, 1971, the authorities in the Republic have received 49 warrants from the RUC seeking the extradition of persons wanted in Northern Ireland in relation to crimes of violence there. This is equivalent to 1 per cent of the number of persons charged in Northern Ireland for such offences or who were the subject of interim custody orders under the British Emergency Provisions Act since 31st July, 1972. Thus, fugitive offenders constitute, in numerical terms, only a marginal problem in the context of the overall security situation in Northern Ireland.

Concern and action of Irish Government

2. Nevertheless, the Government have been concerned at all times that the territory of the State should not be used as a haven by persons responsible for violence in Northern Ireland and should not be a source of arms or explosives. The following extract from a statement by the Taoiseach in the Dáil on 26th June, 1974 sets out the position:-

"The Government have recognised that our territory might be used as a haven by those responsible for bombings and killings in the North or might be a source of arms and explosives. We have resolved that this should not be allowed to happen..... We have taken effective steps to ensure that arms and explosives do not fall into the hands of irregular or illegal organisations. Our security forces have apprehended and our courts have convicted and sentenced hundreds of those engaged in crimes connected with the campaign of violence. We have undertaken to introduce legislation to deal effectively with the problem of fugitives wanted for such crimes and the Government will continue to take every action open to them to prevent the killing and destruction. "

3. In an earlier statement, on 26th February, 1974, the Taoiseach said:-

"I want to make it clear that we do not see action to deal with violence as something which we must do on our part in return for agreement on other issues of more direct concern to us

It is quite clearly in the interests of all of us to ensure that those who insist on having their way by violence will find no refuge anywhere in this country, north or south. "

4. In order to give effect to their concern about fugitive offenders, the Government formulated specific proposals to deal with the problem and presented these proposals to the Sunningdale Conference of December, 1973. These proposals for a common court system were not immediately accepted at Sunningdale. Instead the whole question was referred to a Commission set up by the British and Irish Governments jointly to consider all the proposals put forward at the Conference and to recommend the most effective means of dealing with those who commit crimes of violence.

5. The Law Enforcement Commission, whose members were distinguished lawyers including two judges of the Irish Supreme Court, reported in April 1974. They were agreed that the method chosen to deal with the problem should be limited to an agreed schedule of offences and should be applied only to those who were believed to be fugitive political offenders. They could make no agreed recommendation about extradition. They were agreed that there were no legal objections to the trial by domestic courts committed of offences outside their normal jurisdiction and recommended a procedure for taking evidence on commission in the jurisdiction where the offence was committed. The members who were against the adoption of extradition recommended the extra-territorial method. The members who favoured extradition as their first choice also recommended the extra-territorial method if extradition were not available.

6. Following receipt of the Commission's report, the Irish and British Governments agreed to promote legislation to introduce extra-territoriality between the two parts of Ireland. The British Act was passed on 7th August, 1975, but has not yet been brought into force. The corresponding Irish Bill, entitled the Criminal Law (Jurisdiction) Bill, 1975, has been passed by the Senate and is now before the Dáil. The following extract from

the statement made by the Minister for Justice, Mr. Patrick Cooney, T.D., on 24th April, 1975, when introducing the Second Stage of the Bill show clearly the Government's attitude to the problem of fugitive offenders:-

"This Bill is designed primarily to deal with the fugitive criminal who is able to avoid being extradited by successfully claiming the political exemption which the extradition process allows I feel that there is well nigh universal embarrassment in this country at the predicament in which our judges find themselves, being constrained as they are in these extradition applications to release persons accused of the most serious crimes. This widespread embarrassment is compounded by the knowledge that the release of these fugitives is a matter of grave scandal in Northern Ireland where our fellow-Irishmen have suffered so much in their persons and properties at the hands of these people. In addition there is widespread unease here that people of such a character should seek to join our community. There is, I think, an unspoken feeling or a latent mood in this country that wants all the sanctions of the law imposed on these people. There is a growing intolerance of and impatience with their philosophies and activities. There is a great yearning for peace and one way we here in Parliament can respond to that yearning and encourage it is to use this debate to demonstrate our unequivocal abhorrence of violence and to articulate our desire to see an end to it."

7. The main purpose of the Irish Bill is to extend the criminal law of the State, so far as concerns certain serious offences, to things done in Northern Ireland. If the thing done there would, had it been done in the State, constitute one of these offences, it will be an offence against the law of the State and punishable as if committed in the State. The offences in question include most of the more serious offences against persons and property including murder, manslaughter, arson, serious firearms offences, serious offences relating to explosives, causing grievous bodily harm or wounding with intent to do so, and they will become extra-territorial offences. The Bill will provide that persons charged in the State with these offences will have the option of being sent (in custody) for trial there instead of being tried in the State. It includes provisions for the taking of evidence in the State for use by courts in Northern Ireland trying similar offences committed in the State and for the admission at trials in the State of evidence taken in Northern Ireland.

8. Section 4 of the Bill also, inter alia, creates offences in relation to things relating to explosives done by Irish citizens, not only in Northern Ireland but also in Britain and, indeed, anywhere outside the State. These things include

- (1) causing an explosion likely to endanger life or cause serious injury to property, whether any such injury is actually caused or not;
- (2) any act done with intent to cause, or conspiracy to cause such explosions; and
- (3) making or possessing explosives with intent to endanger life, or cause serious injury to property, or to enable other persons to do so.

The things at (2) and (3) are to be offences whether an explosion does or does not take place and whether injury to persons or property is actually caused or not.

Legal and constitutional impediments to the introduction by the Irish Government of legislation to provide for the extradition to the United Kingdom of persons wanted for offences of a political character.

Constitutional position

8. Ireland, unlike the United Kingdom, has a written Constitution. The Oireachtas or Parliament is not sovereign and can act only in accordance with the provisions of the Constitution. In relation to legislation, Article 15.4 of the Constitution states:-

- "1^o The Oireachtas shall not enact any law which is in any respect repugnant to this Constitution, or any provision thereof.
- "2^o Every law enacted by the Oireachtas which is in any respect repugnant to the Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid."

The Supreme Court decides on the validity of laws having regard to the provisions of the Constitution.

9. There is no explicit reference to extradition in the Constitution of Ireland. However, Article 29.3 states that

"Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States."

International law on the non-extradition of persons accused or convicted of political offences.

10. It is a generally recognised principle of international law that extradition is not granted for political offences. The only exception seems to be the system of extradition among the Communist States of Eastern Europe and the Soviet Union. This principle is part of the law of many States, for example, Argentina, Austria, Belgium, Brazil, Canada, Denmark, France, Germany, Greece, Italy, Japan, the Netherlands, Norway, Sweden, Switzerland, Turkey and the United States as well as Ireland and the United Kingdom. All multilateral treaties of extradition contain the principle, for example, the Arab League Extradition Agreement, the Benelux Extradition Convention, the European Extradition Convention, the French Community Treaties, the Nordic States Scheme and the British Fugitive Offenders Act. Recent international conventions dealing with international crimes, such as the one dealing with air piracy known as the Tokyo Convention, expressly refrained from qualifying or modifying the principle.

European Convention on Extradition.

11. Among international conventions, one in particular is especially relevant to the position in Ireland. This is the European Convention on Extradition to which Ireland, in common with most of the non-Communist countries of Europe, is a contracting party. Article 3.1 of this Convention provides:

"Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence."

A State cannot itself waive the exclusion of political offences.

Definition of "political offences".

12. There is no generally accepted precise definition of such words as "political offence". The only specific exclusion from the protection of Article 3 made in the Convention is the taking or attempted taking of the life of a Head of State or a member of his family - which for the purposes of the Convention may not

be deemed to be a political offence. Most States, including Ireland and the United Kingdom, approach the definition empirically. In Ireland, it is for the Courts to decide, in extradition cases, whether the offence is a political offence or an offence connected with a political offence.

British attitudes to the principle of non-extradition for political offences.

13. The United Kingdom is not a contracting party to the European Convention on Extradition for reasons which have nothing whatever to do with the exclusion of political offences from extradition. Indeed, it has strongly adhered to this principle over very many years. For example, the British Government's refusal to sign the draft Convention for the Prevention and Punishment of Terrorism drafted within the League of Nations in 1937 was stated by one of their representatives, Sir John Fischer Williams, a distinguished international lawyer, to be non-acceptability to the British people of proposals relating to extradition for political offences. Again, the United Kingdom Government decided in 1962 not to accede to the United Nations Genocide Convention and its spokesman, Mr. Edward Heath, then Lord Privy Seal, made clear to the House of Commons that the mandatory extradition for genocide was the obstacle. More recently the United Kingdom Government failed to support a U.S. proposal to qualify or modify the principle at the International Conference leading to the Hague Convention of 1970 for the suppression of unlawful seizure of aircraft.

14. By agreement between the Government of Ireland and the Government of the United Kingdom the concept of the non-extradition of political offenders was included in the legislation enacted in the two jurisdictions, namely, the Extradition Act of 1965 and the Backing of Warrants (Republic of Ireland) Act of 1965. The then Solicitor General for England, Sir Dingle Foot, informed the House of Commons, while explaining the relevant provisions of the United Kingdom Bill, in the following terms:-

"The exception relating to offences of a political character is thoroughly familiar and has been included in our extradition legislation ever since 1870. Indeed the tradition that we do not return to the country of origin persons who are accused of political offences goes back to the Napoleonic wars."

15. Thus, in fact, the legal position in Ireland, on extradition is exactly the same as in the law of the United Kingdom.

October, 1975.