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From: THE PRIVATE SECRETARY

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18 September 1979

Prime Minister: I asked for this note on "The Political Defence in Extradition" after your talks with Mr Lynch. (There has been a new argument on the question in the European Parliament.) You may like to glance through it. Paras 12-15 of the note make it clear that the Irish position is anomalous.

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Dear Michael,

EXTRADITION

You wrote to Beckett on 6 September about the political factor in extradition. It was subsequently agreed that the Home Office should prepare the analysis you requested. I am, therefore, enclosing a note on the political defence in extradition. I fear that it is a rather long document, but the subject does not lend itself to compression.

We have, bearing in mind the context of your request, put something of an Irish slant into our note; indeed some of it draws on briefing we provided for the Prime Minister's meeting with Mr Lynch.

It may be helpful if I were to comment on some of the observations made by Mr Lynch at the meeting lest they cause misunderstanding. He is quoted as saying that a number of other European countries including France, Denmark and Belgium never extradited their own nationals. Whilst this is true it has little bearing on the extradition to this country from the Republic of those suspected of terrorist offences. Under Part II of the Irish Extradition Act 1965, the extradition of Irish nationals may not be granted unless the relevant extradition provisions (treaties or arrangements) otherwise provide. (The result of this appears to be to substitute a discretion to withhold Irish nationals where the treaty affords one e.g. in the European Convention on Extradition to which the Republic is a party.) There is, however, no such provision under Part III of the 1965 Act which governs extradition to the United Kongdom and reciprocates our Backing of Warrants (Republic of Ireland) Act 1965, which similarly makes no provision for the withholding of nationals. (The United Kingdom traditionally never withholds its nationals in extradition.) Consequently the question of the Republic or the United Kingdom refusing to surrender its own nationals to each other does not arise: refusal of extradition must be justified on grounds other than those of nationality.

In the plenary session Mr Lynch claimed that the Irish Government could not make an agreement such as that which the United Kingdom had just concluded with the Federal Republic of Germany because this would be contrary to the Irish constitution. This assertion seems to be misconceived. The recent agreement in question was a modification of our extradition treaty with Germany

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which inter alia relaxed that treaty's absolute prohibition on the surrender of nationals between the United Kingdom and the Federal Republic of Germany, and substituted a discretion to withhold them, it being recognised that the Germans would exercise their discretion and we would not.

Like many other European countries the Federal Republic possesses wide extra-territorial jurisdiction over offences committed by its nationals and in refusing to surrender them as it is required to do by its Constitution, the Federal Republic is prepared to try them for the offence for which extradition is sought. The European Convention on Extradition, to which the Federal Republic is a party, in fact obliges any Contracting Party to put the case to its prosecution authorities where extradition is refused on grounds of nationality, and in order to comply with that requirement, the Irish Republic assumed wide extra-territorial jurisdiction over its nationals in its 1965 legislation. As I have explained, however, the non-surrender of nationals is not a feature of the simplified backing of warrants arrangements between this country and the Irish Republic and it is difficult to understand the significance of Mr Lynch's comments.

What is at issue - and I hope our note brings this out - is the Irish unwillingness to relax the political safeguard in extradition, either bilaterally with the United Kingdom, or multilaterally by becoming party to the European Convention on the Suppression of Terrorism. As you are no doubt aware, the Irish reasons for their belief that the extradition of political offenders is contrary to international law (and hence contrary to their Constitution) are set out in Chapter VI of the Report of the Law Enforcement Commission (1974, Cmnd. 5627). Our refutation is to be found in Chapter VII of the Report.

I am sending copies of this letter and enclosure to Bill Beckett (Law Officers' Department), George Walden (Foreign and Commonwealth Office), Roy Harrington (Northern Ireland Office) and Martin Vile (Cabinet Office).

Yours ever,
John

(J A CHILCOT)

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THE POLITICAL DEFENCE IN EXTRADITION

1. In general, it has been accepted international practice that persons accused or convicted of "political offences" may not be extradited. This practice originated in the 19th century when persons being proceeded against for political offences were usually liberals in opposition to repressive regimes; it became an established principle that such people, if unsuccessful in attempts to overthrow tyrannies should be granted asylum in countries to which they fled.

United Kingdom practice

2. The political safeguard in United Kingdom extradition law is given effect by section 3(1) of the Extradition Act 1870 in relation to extradition to foreign countries and by section 4(1) of the Fugitive Offenders Act 1967 in relation to extradition to Commonwealth countries. Extradition between the United Kingdom and Republic of Ireland takes place under a simplified procedure governed by the Backing of Warrants (Republic of Ireland) Act 1965 and the Republic's broadly reciprocal legislation. The political safeguard is contained in section 2(2) of the 1965 Act. Texts of these three provisions are to be found at Annex A.

3. The political safeguard in section 4(1) of the Fugitive Offenders Act 1967 is broadly in line with that of other European countries as expressed in Article 3 of the European Convention on Extradition (to which the United Kingdom is not a party). It is appreciably wider than in the 1870 Act, because in addition to the rule concerning political offences it provides that extradition shall not be granted where the request for extradition for an ordinary criminal offence has in fact been made for the purpose of prosecuting or punishing a person on

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account of his race, religion, nationality or political opinions or that the person's position may be prejudiced for any of these reasons. It is likely that this wider safeguard will be included in new UK extradition legislation and in the meantime the practice is to include it in our new extradition treaties whenever the other State agrees. The European Convention safeguard is somewhat broader than the one provided in the 1967 Act because it prohibits the surrender of a fugitive not only if the offence is regarded by the requested party as a political offence but also if the offence is regarded as one connected with a political offence. The Republic of Ireland's Extradition Act 1965, which is based on the European Convention, contains this additional safeguard; our own Act of 1965 does not.

Determination

4. When a request from a foreign or Commonwealth country is received the Secretary of State may refuse to give his order to the magistrate to hear the case if he considers that the offence in respect of which the return of the fugitive is sought is a political offence. The magistrate must direct that the fugitive be discharged if satisfied that the offence for which he is sought is political or that the intention of the requesting State is to try or punish him for such an offence; and the Divisional Court must if so satisfied do likewise on an application for habeas corpus. The Secretary of State has a parallel obligation to refuse to surrender the fugitive on such grounds as well as a general discretion to decline to surrender a fugitive committed by the courts for return on any ground as he thinks fit. In practice, the S of S is unlikely to discharge the fugitive on political grounds where the courts have held that no such grounds exist unless some new evidence is put before him.

5. Under the Backing of Warrants (Republic of Ireland) Act 1965 the Secretary of State has no locus in the matter, and it is for the fugitive to convince the magistrate, or the Divisional Court on application for habeas corpus, that his offence was political. The simplified backing of warrants arrangements with the Republic of Ireland contain no speciality rule (by which the requesting State undertakes not to prosecute a fugitive for other offences committed before his surrender). It has, therefore, on occasion (eg the Littlejohn case) been necessary to seek an assurance that the fugitive will not be tried for other offences or offences of a political character if he is returned. This is not, however, a standard feature of our extradition arrangements with the Republic.

Judicial Interpretation in the United Kingdom

6. There is no statutory definition of an "offence of a political character" and there is little case law on the interpretation of this phrase. This is partly because of the paucity of political cases coming before the courts and also because of the exclusion from the field of crimes for which extradition may be granted of offences which by their nature are of a political character, such as treason and espionage.

7. In the case of Castioni (1891) it was held that some form of political disturbance was necessary to establish that a criminal offence was one of a political character, while in the case of Meunier (1894), an anarchist who was sought and surrendered for causing explosions in France, the judgement was based on the view that in order to count as an offence of a political character it must be aimed against the government of the State and not against all government. There is no subsequent authority until the case of Kolczynski (1955) in which the view was taken that the offences (principally revolt

against the master of a ship on the high seas) were committed in order to prevent the offenders being prosecuted by an oppressive regime for a political offence (treason in leaving Poland and settling in another country), and that the prospect of such a prosecution gave the offences themselves a political character.

8. The judgement in Schtraks (1963-65) is important in that it shows that the provision is intended to give effect to the principle that there should be asylum for political refugees and that the safeguard does not operate to afford indiscriminate protection to persons who choose to represent that ordinary criminal offences have a political purpose. More recently, in the case of Cheng (1972) it was held by a majority judgement that (in the words of Lord Diplock):

> "An act committed in a foreign State was not an 'offence of a political character' unless the only purpose sought to be achieved by the offender in committing it were to change the government of the State in which it was committed, or to induce it to change its policy or to enable him to escape from the jurisdiction of a government of whose political policies the offender disapproved but despaired of altering so long as he was there."

9. The case of Littlejohn, to which reference has been made, was dealt with in 1972 under the Backing of Warrants (Republic of Ireland) Act 1965. Littlejohn, who was sought by the Republic for armed robbery there, alleged that he and his brother had infiltrated the IRA and that the robbery, being an attempt to obtain cash to finance the IRA, was therefore an offence of a political character. The Divisional Court took the view that although Littlejohn and his brother had

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been concerned with the IRA and were not, in robbing the bank, intending to obtain money solely on their own account, there was not a sufficiently close political association to make the offence one of a political character.

10. These judgements are pragmatic rather than consistent; as was observed in the Kolczynski case "the words 'offences of a political character' must always be considered according to the circumstances existing at the time". But in general our courts have accorded a narrow interpretation to the words "an offence of a political character".

Irish Judicial interpretation

11. By contrast, the Irish Courts have tended to interpret the safeguard widely. In general they have taken the view that if the fugitive can show that he was politically motivated in committing the offence of which he is accused then the offence may be said to be "of political character". To uphold a claim to political motivation it has usually been sufficient to show that he is a member of a which has political objectives. organisation such as the IRA./ Furthermore the Irish Courts have placed a very wide construction on the phrase "an offence connected with a political offence" (see paragraph 3 above): thus, in the case of Bourke v Attorney-General (1969) the Supreme Court of the Republic of Ireland held by a majority that the escape of the spy, George Blake, from Wormwood Scrubs was a political offence; that Bourke's offence in assisting his escape was connected with that offence; and hence that extradition was precluded.

The European Convention on the Suppression of Terrorism

12. In the light of their growing concern about terrorism, the Council of Europe elaborated the European Convention on the Suppression of Terrorism. The Convention provides that certain serious, "terrorist-type" crimes, are not to be regarded as

political offences, offences connected with a political offence, or offences inspired by political motives for the purposes of extradition between contracting States, and embodies the principle that if a State refuses extradition in respect of such crimes it should refer the case to its own prosecuting authorities

13. Article 1 of the Convention lists a number of very serious crimes of violence; the application of the Convention to these crimes is mandatory. (Article 2 also lists a number of less serious crimes in respect of which the removal of the political safeguard is discretionary; no prosecution obligation arises in respect of these crimes where extradition is refused). But Article 13 of the Convention recognises that a contracting State might be impeded for legal or constitutional reasons from fully accepting the obligations under Article 1 in relation to the grant of extradition for political crimes and permits contracting States to enter a reservation retaining discretion to prosecute rather than extradite, provided that they undertake to take into due consideration, when evaluating the character of the offence, any particularly serious aspects of the offence. The United Kingdom, which would have preferred to exclude any possibility of reservation under the Convention, has been active in lobbying a number of potential contracting States not to enter this reservation.

14. The Suppression of Terrorism Act 1978 enabled the United Kingdom to ratify the Convention without reservation. The Convention has been ratified by five other Council of Europe countries (Austria, Cyprus, Denmark, FRG, Sweden) and signed by 13 other countries. The Republic of Ireland and Malta alone have neither signed nor ratified the Convention. Reservations under Article 13 have been entered by Sweden, Norway, Portugal, Italy, Denmark and Cyprus.

The Republic of Ireland's objection to the European Convention

15. Article 29 of the Republic's Constitution states that the Republic accepts the generally recognised principles of international law as its rule of conduct in its relations with other States. The view has prevailed in the Republic that the extradition of political offenders is contrary to the generally recognised principles of international law, and that, therefore, the extradition of political offenders is for them unconstitutional. Although the exercise of the facility to enter a reservation under Article 13 of the Convention when ratifying it (see paragraph 13 above) would result in the assumption of very limited extradition obligations the Republic has nevertheless held that it is precluded by its constitution from becoming party to the Convention. The view that international law precludes surrender in respect of political offences is not one shared by the United Kingdom Government, and it is evidently not held by the other States which have ratified or signed the European Convention on the Suppression of Terrorism. Moreover, the Convention does not deny a fugitive a legitimate claim to political asylum. Article 5 of the Convention (included at the instigation of the United Kingdom) provides that there shall be no obligation to extradite if the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that the person's position may be prejudiced for any of these reasons.

The EEC Agreement

16. In accordance with declarations adopted at the 5th, 6th and 7th European Councils, an ad hoc group of senior officials of the Nine was set up to examine, under the guidance of Ministers of Justice, measures to combat international terrorism.

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This group drafted an agreement by which the Nine undertake to apply the European Convention on the Suppression of Terrorism among themselves until such time as they should all have ratified the Convention without reservation. The EEC Agreement contains a special accommodation designed for the Republic of Ireland alone, by which it would have no obligation to extradite in respect of the offences in Article 1 of the Convention which it holds to be political offences or connected with a political offence, or inspired by political motives, but an obligation to consider prosecuting those whom it does not extradite. It is likely that this agreement will be formally opened for signature during October. The Suppression of Terrorism Act 1978, will enable the United Kingdom to become a party to this agreement at an early date. It is not, however, likely to come into force before 1981 because all the Nine will first have to ratify it.

THE POLITICAL SAFEGUARD

Extradition Act 1870. Section 3(1).

A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or he proves to the satisfaction of the magistrate or the court before whom he is brought on habeas corpus, or the the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

Fugitive Offenders Act 1967. Section 4(1)

A person shall not be returned under this Act to a designated Commonwealth country, or committed to or kept in custody for the purposes of such return, if it appears to the Secretary of State, to the court of committal or to the High Court on application for habeas corpus or for review of the order of committal -

(a) that the offence of which that person is accused or was convicted is an offence of a political character;

(b) that the request for his return, though purporting to be made on account of a relevant offence, is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or

(c) that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

Backing of Warrants (Republic of Ireland) Act 1965. Section 2(2)

....nor shall such an order /for return to the Republic/ be made if it is shown to the satisfaction of the court -

(a) that the offence specified in the warrant is an offence of a political character, or

(b) that there are substantial grounds for believing that the person named or described in the warrant will, if taken to the Republic, be prosecuted or detained for an offence, being an offence of a political character.