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THE DEMISE OF THE POLITICAL OFFENCE EXCEPTION IN EXTRADITION LAW
International Documents, Statutory Case Law and
The Canada-India Extradition Treaty

M. Catherine MacLean

1995

Thesis submitted to
the School of Graduate Studies and Research
in partial fulfilment of the requirements for the M. A.
degree in Criminology

Universite d'Ottawa/ University of Ottawa



Catherine MacLean, Ottawa, Canada, 1995



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ISBN 0-612-07852-3

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ACKNOWLEDGEMENTS

I would especially like to thank my parents and brother John for their ongoing support and the genuine interest they showed throughout my education. I also want to thank my fiancée Greg for his encouragement which motivated me to finish what I had started. Finally, I would like to thank Professor R. D. Crelinsten for his continued patience and valued guidance throughout the preparation of this thesis.

ABSTRACT

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Extradition is one legal procedure which can and has been utilized to combat terrorism. The political offence exception (p.o.e.) is an accepted legal doctrine which is a part of extradition law. This doctrine acknowledges acceptance of man's right to fight against oppression even through violent political uprising. However, modern terrorism has led to an increased international concern for world public order. Many nations through international agreements are attempting to have political crimes viewed as strictly common crime. Their efforts to depoliticize politically violent offences has resulted in a politicization of the process.

This thesis examines the trend toward the limiting of the p.o.e. doctrine in the context of efforts to combat international terrorism. In other words, this thesis examines the trend to view acts of terrorism as strictly common crime and no longer regard them as legitimated political crime. The trend to limit the p.o.e. is illustrated through an analysis of international conventions, treaties and related documents. This thesis also reviews British, American and Canadian statutory case law in which the p.o.e. is raised. This analysis illustrates the practical application of the trend to limit the p.o.e. Finally, the 1987 Extradition Treaty between Canada and India is used as a case study example. This thesis includes

an examination of the social and political process which led to the eventual negotiation of this treaty. Interviews with some members of the Canadian negotiating team and a search of Canadian parliamentary debate on the subject were conducted. The Canada-India case study acts as a case in point toward the limiting of the p.o.e.

The analysis of international agreements and statutory case law illustrate that the p.o.e. is being limited, but ambiguity still exists in both definition and interpretation of terrorism and the p.o.e. doctrine. The examination of the social and political context within which the Canada-India Extradition Treaty was created demonstrates that changes to the law and its interpretation are not apolitical, but they are affected by social and political climate.

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1INTRODUCTION

In light of the ever increasing wave of contemporary terrorism it is not surprising that many nations have taken self-preserving and protective initiatives, both individually and collectively, to combat what they view as an urgent problem. Terrorism is at the fore of international political and relational discourse as well as on the minds of the general public. Extradition is seen as one method by which the international community can effectively combat terrorism. Extradition laws are dispersive and complex (customary law, conventions, agreements and statutory case law, etc.). This consequently makes any analysis of them a difficult and laborious task. The political offence exception in extradition law and its demise are thought to be at the centre of definitional controversies surrounding terrorism and its control. This thesis will examine the existence of the p.o.e. in extradition law and what changes it has undergone.

This thesis combines the examination of international legal instruments and statutory case law with an investigation into the socio-political contexts of Canada, India and the international community. An analysis of various documents which contain examples of exceptions to the political offence exception comprise the first phase of

data collection. The second phase is a review of statutory case law (British, American and Canadian) which illustrates the developments in application of the political offence exception to extradition, from strict application of the "political incidence test" to limitations of the political offence exception for crimes of wanton violence. The final phase of data collection involves a limited examination of one of the socio-political conflicts and a major world terrorist event which perhaps triggered the negotiation of the aforementioned legal instruments. A case study involving the Air India bombing and the Canada-India Extradition Treaty was conducted through interviews with some members of Canada's negotiating team.

The trend to limit the application of the political offence exception is present in both newly developed legal instruments and specific case law. Nevertheless, the factors which led to the limiting of the political offence exception are not easily discernible. It is difficult to determine whether and in which manner, complex and long-term political conflict has affected those nations who have proposed harsher legislation for combatting terrorism. Nor is it possible to attribute certain elements of conflict as being responsible for instigating the negotiation of new legal instruments.

The trend which can be seen throughout this study is that political offenders and the manner in which their acts

are regarded as being depoliticized, while the decision-making process in cases of extradition is being conversely politicized.

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LITERATURE REVIEW

This thesis examines the concepts of terrorism by the non-state actor and political offences. These concepts are important in understanding struggles for power or access to the political realm by insurgents. Extradition, the political offence exception as well as exceptions to the p.o.e. doctrine are examined here. Concepts of international cooperation and community are also discussed as the p.o.e. is a doctrine which is a part of international law. Finally, this thesis aims to examine if a trend exists toward limiting the p.o.e. in extradition law. Such a trend causes acts of terrorism and political violence to be viewed as strictly common crime and no longer regard them as legitimate political crime. The analysis of the demise of the p.o.e. shall also demonstrate that extradition law is not apolitical. This thesis proposes that changes in extradition law are affected by politics and social climate.

TERRORISM

Terrorism today is often referred to as "politically motivated violence engaged in by small groups claiming to represent the masses" (Rubenstein, 1987: XVI). From this it can not be assumed that states themselves are in no way involved in terrorism. Governments also engage in terrorist and counter terrorist activity. State terrorism is said to

be more destructive and indiscriminate than other forms of terrorism, but a discussion of this is not within the scope of my research. Elsewhere in the literature, there are definitions that are attentive to aspects of the phenomena such as terror and sociopolitical structure. A.H. Miller (1982) defines terrorism as the "systematic use of random violence against innocents in order to bring about political change through fear" (Miller, 1982: 1). James Cooms, as cited by Miller, suggests that the "terrorist challenges existing value and belief systems in an attempt to define a new reality" (Miller, 1982: 14).

COMMUNICATION MODEL

Crelinsten (1987), and Schmid (1984 & 1992), contend that terrorism can be viewed as a form of communication. The communication model views "terrorism as a tactic used by those who, rightly or wrongly, see themselves as excluded from the political process" (Crelinsten, 1978: 111). Crelinsten (1987) suggests that a terrorist act is a message which seeks acknowledgement, and if gained, the terrorists themselves or as a group are recognized as legitimate players in the game of politics (Crelinsten, 1987: 419).

TERRORISM: PEACETIME WAR CRIMES

Schmid (1984), in his work on terrorism has created an academic definition that is "all inclusive":

Terrorism is a method of combat in which random or symbolic victims serve as instrumental target of violence. These instrumental victims share group or class characteristics which form the basis for

their selection for victimization. Through previous use of violence or the credible threat of violence, other members of that group or class are put in a state of chronic fear (terror). This group or class, whose members' sense of security is purposively undermined, is the target of terror. The victimization of the target of violence is considered extranormal by most observers from the witnessing audience on the basis of its atrocity; the time (eg. peacetime) or place (not the battlefield) of victimization or the disregard for rules of combat accepted in conventional warfare. The norm violation creates an attentive audience beyond the target of terror; sectors of this audience might in turn form the main object of manipulation. The purpose of this indirect method of combat is either to immobilize the target of terror in order to produce disorientation and/or compliance, or to mobilize secondary targets of demands (eg. a gov't) or targets of attention (public opinion) to changes of attitude or behaviour favouring the short or long-term interests of the users of this method (Schmid, 1984: 111).

Thus, political terrorism bears a resemblance to both crime and warfare, but it is neither (Rubenstein, 1987: 22). It is further suggested by Rubenstein (1987) that to label a politically violent act "terrorism" is to judge it repugnant; which implies illegitimacy. For instance, bombings and kidnapping are rarely seen as justifiable by those who label it. While on the other hand, revolutions and wars are viewed as quite justifiable, "even holy" (Rubenstein, 1987: 17). Thus, it can be said that political definition creates the distinction between mass and small group violence. Violent groups suggest that their activities are a reflection of the "will of the people" whereas individual violence is generally associated with badness. Several authors, Schafer (1974), Crelinsten (1989: 244), and

Rubenstein (1987), all contend that it is difficult to distinguish between terrorism and war because "one man's terrorist is another man's freedom fighter"; it is simply a matter of definition. According to Rubenstein's (1987) definition terrorist activity aspires to be warfare, but it is not (Rubenstein, 1987: 22).

Commonalities between terrorism and common crime are alluded to throughout the literature. Assassinations and kidnapping are done by small groups or individuals, similar to ordinary crime. Targets of terrorist violence and common crime are generally persons or property protected by the laws of government. Observers who do not support the terrorist's politics or methods simply deem them criminals as Prime Minister Trudeau did in the case of the FLQ crisis (Crelinsten, 1987: 434). To label them common criminals delegitimizes the politics behind their behaviour. Whereas crime with a political purpose denotes a level of legitimacy.

POLITICAL CRIME: LEGAL DEFINITIONS

Terrorism as crime, war and communication have been briefly examined. A discussion of terrorism and political crime and their legal definitions shall follow. Bassiouni (1974), in his text on international extradition, states that political offences are not defined in any legislation, but he does note that there is a consensus among principles with regard to political crimes. He defines a political

offence as "that which is directed against the political organization of the state or against the civil rights of its citizens and ... the offence damages the constitutional normality of the country" (Bassiouni, 1974: 393). Political offenders intend their offences to alter present political and social structures. Political offences in the law are divided into two main categories. First, purely political offences are "directed against the form of political organization of the state" (Bassiouni, 1974: 393). The second category pertains to relative political offences which are common crimes committed during attempts to affect the security of the state. A purely political offence results in a public wrong while a relative political offence results in a partial private wrong committed in "furtherance of a political purpose."

A common crime can be differentiated from the above in so far as common crime can be a private and/or a public wrong, but the nature of the crime is not political. The law has little regard for motivation other than as a way to prove intent (Bassiouni, 1974: 383). Hence, the legal perspective on the definition of a political crime is essentially different from that of a socio-political one which requires that both motivation and behaviour be taken into account (Rubenstein, 1987: 25). According to Schafer (1974), it is not political crime, but violence which has increased in the twentieth century. He suggests in contrast

to Bassiouni's definition that all crimes are political in that they are "all prohibitions with penal sanctions that represent the defense of a given value system ... in which the prevailing social power believes" (Schafer, 1974: 19). Rubenstein (1987) states that we must consider both behaviour and motivation of the actor in definitions of terrorism and political crime. Nevertheless, it is evident in the literature regarding terrorism, many states want to consider these two factors separately. "Terrorism" has been described as "crime pretending to be politics" by those who reject the justification of political motivations (Rubenstein, 1987: 2). These definitional conflicts do not only occur in theory, but in practice as well. I will now turn to a discussion of methods used to deal with international terrorists.

EXTRADITION

The term extradition is derived from Latin (ex trans dare); literally translated it means a "handing over outside". Mullally (1986) defines extradition as "the process by which one state (the state of refuge or asylum) surrenders to another (the requesting state) an individual ... accused or convicted in the requested state of an offence for which the requesting state is seeking to subject the individual to trial or punishment" (Mullally, 1986: 1504). It is further noted by Mullally (1986), that extradition was derived from and is founded on a principle

of mutual interest in civilized community and a belief that "crimes...should not go unpunished, and it is part of the comity of nations that one state should afford to another every assistance towards bringing persons guilty of such crimes to justice" (Mullally, 1986: 1504).

The "conceptual framework" for extradition is based on five factors. Mullally (1986) refers to the works of C. Bassiouni who has written a great deal on extradition law. Bassiouni (1974) asserts that extradition is firstly based on a reciprocal recognition of the national interests of the participating parties. Secondly, it is based upon an "international duty to preserve and maintain world public order" (Mullally, 1986: 1504). The third factor upon which extradition is based is the necessary "application of minimum standards of fairness and justice". Fourthly, a "collective duty" exists on the part of all nations to "combat criminality." Finally, Bassiouni notes that all the above factors are balanced "within a juridical framework of the rule of law" (Mullally, 1986: 1504). Thus, any analysis of documents pertaining to extradition must take into account the five fundamental factors governing customary and conventional extradition law.

Even though general principles exist, almost all extradition law is based on treaties both bilateral and multilateral. The International Law Commission defines a treaty as any "international agreement in written form"

between two or more parties; these "parties must be entities endowed with international personality; it [a treaty] must be governed by international law and it should create a legal obligation" (Mullally, 1986: 1508). Some nations in certain circumstances may grant extradition on "comity", as a respectful courtesy to another nation. However, these are exceptions and not the general rule (Mullally, 1986: 1508). Although the law of extradition is found in treaties, decisions are generally restricted by and subject to the "national law and practices of the requested state" (Mullally, 1986: 1509).

Extradition deals with the final stage of governmental intervention after prevention and negotiation. This stage involves the apprehension, prosecution and conviction of an offender. It is based solely on offences which are criminal in nature. Further, it is required that the offence which the extradition is based on is a crime in both the requested and requesting countries. Furthermore, according to Lubet (1982) and Freestone (1981), extradition is governed by international customary law, treaty and domestic or statutory law. International extradition is controlled by national statute. An application for extradition under common law may only be made if there is a treaty in force between the requesting and requested state. On the other hand, civil law tradition bases extradition on international good will in the absence of a treaty. Once a

state has initiated a request for an offender to be extradited, the matter is decided on the basis of the domestic law of the requested state (Freestone, 1981: 208).

How do states decide if an offence is extraditable or not? Often a list of offences may be present in an extradition treaty. The requirement of dual criminality can result in difficulties if an enumeration or listing method is relied upon. Some states may use what is termed the eliminative method "whereby all offences punishable by an agreed degree of severity are extraditable" (Freestone, 1981: 208). Extradition law is also governed by a speciality principle that does not allow a fugitive to be tried for any other offence than the one which he or she was extradited for (Freestone, 1981: 209).

Jurisdiction is another factor which a state must consider when faced with a decision about extradition. Most commonly, jurisdiction rests in the state where the offence was committed. This territorial jurisdiction is drawn from a "state's sovereign right to make and enforce laws governing its territory" (Freestone, 1981: 201). Personal jurisdiction may also be claimed and it is based on the nationality of the offender. Civil law states have utilized this jurisdictional restriction over their nationals while common law states have not. Problems may arise depending on how each system applies jurisdiction to individual cases. For example, a terrorist could commit a violent act in

Northern Ireland, escape to the Irish Republic which according to its constitution will not extradite political offenders. The Irish Republic, also, under common law, would not be able to try the offender for those terrorist acts. Mullally (1986) and Freestone (1981), in their works on extradition, discuss three other principles of extra-territorial jurisdiction. Firstly, the protective principle, which notes a state has the right to try offences that threaten its security, even if the offences are committed outside its territory. Secondly, universal jurisdiction allows states to try offences committed on the high seas or in the air, according to international rather than national law. Anti-terrorist lobbies strongly support this jurisdictional claim. Finally, the passive personality principle of jurisdiction is based on the nationality of the victim. This principle has been accepted in some civil law countries, but it conflicts with other jurisdictional principles. Some international treaties have prohibited the use of this principle (Freestone, 1981:201-9). Hence, it is obvious that the process of extradition is a complex one and there are many loopholes through which an offender can slip.

EXTRADITION DENIED

Extradition may be denied on a variety of principles, but the one most noted and widely accepted is based on the political offence exception. Mullally (1986) in her article on the political offence exception contends the

"duty to extradite" is limited by five types of reservations. The first is a requirement for the requesting state to show probable cause that a crime has been committed. The second is a reservation that nationals do not have to be extradited. This reservation has been asserted by various nations fearful of having their national sovereignty compromised, for example the Netherlands and France (Mullally, 1986:1509-10; Lodge, 1981:186-7). Further, according to Evans and Murphy (1978) and Freestone (1981), some states either by treaty or based on civil law refuse to extradite their own nationals (Evans and Murphy, 1978: xxiii; Freestone, 1981:209). Thirdly, if the death penalty could be imposed as punishment, extradition can be denied on that basis by a state which does not have capital punishment. This limitation on the duty to extradite is also commonly a "reservation" made by signatories to a treaty or convention. Fourthly, extradition is restricted by a requirement of "double criminality". The crime for which an accused may be extradited must be a crime in both the requested as well as the requesting state. Matters may even be confused further if several countries apply for extradition of the same offender. Finally, and most pertinent to the discussion at hand is the restriction of the political offence exception.

POLITICAL OFFENCES

To date almost no international documents contain a

clear, concise definition of the term political offence (Van Den Wijngaert, 1985: 744). This reportedly has not caused any difficulties in judicial decisions with respect to 'pure' political offences such as treason. 'Pure' political offences are those which directly threaten the security of the state and thus, they "exclusively affect the public interest and cause only a public wrong" (Mullally, 1986: 1512). On the other hand, since its inception in a Belgian treaty in 1833, the political offence exception has met with great problems in its application with regard to relative political offences (Freestone, 1981: 208). Mullally (1986) notes that a relative political offence is a "private wrong done in furtherance of a political purpose" (Mullally, 1986: 1512). Despite the obvious distinction, no definition of a relative political offence exists and interpretation of the concept is left to the individual judicial discretion of the requested state in each case. This issue will be discussed later, in more depth.

POLITICAL OFFENCE EXCEPTION (p.o.e.)

Over time, the application of the political offence exception has been altered in response to a variety of social, historical and political factors. According to Mullally (1986), the lack of a universally accepted definition of political offences had led to widespread disparity in extradition decision making. Christopher Pyle (1986) argues that while some nations venture to purport

that judicial decisions in cases of extradition are not politically influenced they fail to avoid it when the executive branch of the government is given final say in extradition cases (for example, U.S.A. and Canada) (Pyle, 1986: 64-5). The influence which socio-political factors can have on both legislative and judicial decision making will be discussed in a later section of this thesis.

THE NATURE OF POLITICAL OFFENCES

Mullally (1986) acknowledges Cantrell's (1977) writings on extradition in which he contends that courts consider three factors when determining whether an offence is political or not. The first is the offender's involvement with a political movement. Secondly, a judge examines the "nexus between the political motive and the crime committed". Thirdly, the act is subjected to the "proportionality test" whereby the crime and its method are compared. The Court examines whether the offence and the method employed are proportional to the desired outcome. For example, hundreds of innocent people not party to the conflict are killed as a result of a bombing at a local shopping centre and the act was intended to affect changes in government. The Court based on the proportionality test would likely find that the intended political crime and the method are not related or proportional. Mullally (1986) contends that an offence is judged political if the "act was predominantly political", however, it is difficult given

that the term is yet to be defined and universally accepted (Mullally, 1986: 1513; Cantrell, 1977: 781).

Moreover, even if extradition is denied, there is certainly more than one method of dealing with a political offender. Theoretically, the granting of political asylum is a separate matter which should be considered after prosecution. Nevertheless, some states do grant asylum to international terrorists without prosecuting. The most common way a fugitive is brought before the courts is through deportation. Deportation "disguised as extradition" is an overt misuse of civil administrative procedures, although it appears to be quite commonplace. An American study cited by Freestone (1981) indicates that between January 1960 and June 1977, 20 states requested the extradition of 87 persons from 21 states, but only six of them were extradited. During the same period, 145 people accused of crimes were deported by 28 states to 25 different locations. Further, Freestone (1981: 201) states that some of these deportations were between countries with no extradition treaty. Crelinsten (1978) notes that many countries deport and/or expell a suspected terrorist in order to avoid dealing with the technicalities surrounding extradition procedures. These individuals may be deported to countries other than the requesting state. This process however, is found to be expedient and much less costly (Crelinsten, 1978: 41-2).

HISTORY OF THE POLITICAL OFFENCE EXCEPTION

Legal experts such as Lubet (1982) and Sofaer (1986) note that extradition, when it first came into being, was used as a tool to apprehend political dissidents. As civilized government evolved, the notion of political dissent became legitimized and, in 1833, Belgium created legislation excluding political offenders from extradition. Over time, the political offence exception became a widely accepted principle in extradition law, so widely that the United States and many other nations assert they do not require a domestic statute outlining the exception (Lubet, 1982: 249). On the other hand, some countries have made the political offence exception part of their constitution (for example, Italy and Ireland) to acknowledge the doctrine's broad acceptance. The United States has included this exception in all 96 of its bilateral extradition treaties with various countries throughout the world. Underlying this exception is the concept of political asylum or the right to self-determination which is a concept outlined in the United Nations Declaration of Human Rights. Paul Wilkinson (1986), in an article on international terrorism, contends that the United Nations have developed conflicting or contradictory legislation by ascribing equally a state's right to sovereignty and an individual's right to self-determination (Wilkinson, 1986: 46).

RATIONALES FOR THE P.O.E.

The rationales supporting the existence of the political offence exception are discussed repeatedly throughout the literature. Mullally (1986) cites four rationales which explain the purpose of the political offence exception. They are (1) the "humanitarian" principle, which protects an offender from being subject to an unfair trial; (2) the principle of "political neutrality", which recognizes that judgements made regarding another nation's political conflict can be viewed as interference in the "internal affairs" of that state; (3) the definition of political crimes as crimes against domestic not international public order; (4) the "right to resort to political activism to foster political change" (Mullally, 1986: 1511). Under the aforementioned concern for human rights lies the belief that any fugitive that has taken up arms against his/her state will never receive a fair trial.

Academics such as Van Den Wijngaert (1985) have criticized these rationales of the p.o.e. It is suggested the rationales are not logically supported. For example, political offenders in every instance are not going to be subjected to an unfair trial. Secondly, political neutrality may not necessarily be present if there is refusal to extradite. Quite the opposite, a refusal to extradite can be clear support for "adversaries of the requesting state"

(Mullally, 1986: 1512). The requested state may recognize its inter-dependence on its adversaries and its nations of alliance and on that basis refuse to extradite (Castel and Edwardh, 1975: 112). As well, the requested state may fear becoming the target of further terrorist attacks in an effort to free the offender. This may explain the number of suspected terrorists who are expelled by requested states to countries other than the requesting state.

It is evident in the literature that the political offence exception, in recent times, is receiving substantial opposition from those who wish to see all violent crime punished whether it is or is not politically motivated. Furthermore, scholarly debate ventures to suggest that the political offence doctrine simply does not apply to twentieth century transnational terrorism (Hannay, 1980: 383; Cantrell, 1977: 818).

The most commonly cited case involving an extradition application is the Abu Daoud case. His extradition was applied for by nations attempting to address concerns regarding increased international terrorism. Abu Daoud was arrested in Paris, France in 1977 by Interpol for the murder of a number of Israeli athletes at the Munich Olympics. Applications for his extradition were made by both Israel and West Germany. However, France refused to extradite him to Israel because the crimes did not occur there. France also refused to extradite Abu Daoud to West

Germany because he was not a national. Abu Daoud was released and went to Algiers, escaping prosecution for his crimes (Mickolus, 1980: 338). This circumstance exemplifies the fact that broad application of the p.o.e. by some countries results in terrorists being granted safe haven. It is not known whether a refusal to extradite is the result of a strong commitment to the p.o.e. doctrine, a fear of the terrorists supporters or an adversary.

EXCEPTIONS TO THE P.O.E.

The possible limiting of the political offence exception to extradition in response to contemporary terrorism is a main consideration of the present research. Mickolus (1980) contends that chronologically modern terrorism began in the mid to late sixties. Paul Wilkinson (1986) indicates the major impetus of the contemporary wave of terrorism began in the Middle East (Wilkinson, 1986: 30). Terrorism has manifested itself in a variety of different forms throughout the world, creating a disturbance in world public order and, consequently, raising concerns within many countries. Juliet Lodge (1981: 165), in her examination of the European Community, found that "the events of the 1960's and 1970's impressed upon many states, ... the need to act in concert and to make common arrangements if terrorist offences were to be countered effectively." This thesis aims to examine the p.o.e. doctrine in extradition law and its potential as a useful tool toward combatting terrorism.

A review of the literature reveals the European Economic Community has developed an increased awareness of terrorism. This awareness may have resulted in the drafting of legislation which restricts the application of the political offence exception in extradition cases.

INTERNATIONAL COOPERATION

International cooperation has evidently also been improved through a new found willingness on the part of many states to share intelligence information. For instance, in 1983, Interpol amended its constitution to allow information sharing with regard to political offences. The development of treaties on Mutual Legal Assistance are also examples of this willingness. Within individual nations new laws have been created to confront the perceived increases in terrorism by widening police powers (Prevention of Terrorism Act 1974, 1976 in the United Kingdom; National Security Act 1980 & Terrorist and Disruptive Activities Act 1987 in India; Wardlaw, 1989: 59; Amnesty International, 1988: 3-5; Thomas, 1985: 102-103). Finally, L.C. Green's criticism of the United Nations suggests that a new perspective regarding political violence exists. He argues "the U.N.'s concentration on struggles for self-determination and independence has given carte blanche to liberation groups to employ any methods they deem necessary" (Mickolus, 1980: 33/2).

Great controversy exists around the notion of the

political offence exception. Advocates of western liberal ideals, such as the protection of political dissent, are being pushed aside by a strong anti-terrorist sentiment which views political violence as a common crime that ought to be punished. This sentiment was made clear in a statement by former Prime Minister Brian Mulroney, following terrorist bombings in 1986 at Rome and Vienna airports. "Those who murder and maim innocent people, and who bring anarchy to civilized society, should have no sanctuary, no comfort and no indulgence" (International Legal Materials, 1986: 202). This statement is an example of the climate of support for the limiting of the p.o.e. which will be discussed later.

As noted above, a demand for the recognition of human rights in international law, of which the political offence exception is a manifestation, existed as early as 1833 in Belgium. A resurgence of those rights as stated in international legal documents occurred in the 1960's. However, increases in international terrorism throughout the 1960's and 70's has created a more cohesive and restrictive world community as is demonstrated by the documents various nations have developed.

Changes in terrorist activity have taken place and perhaps so has the manner in which terrorism is viewed. It is possible that opinions about political offences and how to combat terrorism may have changed. Alterations in definition may be seen in international legal instruments in

the area of extradition and international cooperation. This thesis aims to examine if a trend toward narrowing of the political offence exception exists. This is achieved through an analysis of legal instruments, a review of extradition case law British, American and Canadian, as well as, one case study.

3METHODOLOGY

This thesis aims to examine if and how the "political offence exception" to extradition has been altered over time in response to the perception of contemporary terrorism. This aim is achieved through an analysis of various legal instruments in the area of extradition and international cooperation. Also considered is a summary of the socio-political contexts within which some of these documents were created as well as a review of statutory case law from Britain, the United States of America and Canada. The political offence exception doctrine is further examined in a case study. The case study consists of interviews with some officials involved in the creation of the Canada -India Extradition Treaty. These same persons were involved in policy construction regarding extradition and the political offence exception. The case study includes a brief overview of a major international terrorist event, the Air India bombing. It also contains reference to general, ongoing political conflict in the regions being studied. Additionally, national legislation, committee hearings testimony , Canadian Parliamentary debates and speeches, have been reviewed.

Interest lies in the documents themselves and the role each document plays in the possible changes to the

political offence exception. The case study interviews are intended to explore possible catalysts to the creation of the Canada-India Extradition Treaty and the uniqueness of the p.o.e. in this treaty. This thesis also strives to discover the socio-political process by which this legal document is created and possibly applied.

The ambiguity of a definition of terrorism and/or the political offence exception is one of the difficulties facing nations trying to deal with the problem of terrorism. There are no universally accepted definitions for political offences or terrorism (Blakesley, 1986: 110). Furthermore, the p.o.e. may be defined in relative terms. The notion of the political offence exception exists in practice (case law) even though a universal definition is absent. The p.o.e. doctrine has not, however, been applied in practice without contradiction.

This thesis attempts to illustrate "key aspects" of the phenomenon and the process by which changes, if any, are taking place to the p.o.e. The following broader issues also arise, namely, that governments around the world regard a doctrine such as the political offence exception to extradition incoherently. A further issue is the modern perception of terrorism and its potential influence on the p.o.e. doctrine in extradition law.

The issues and questions raised in this thesis are exploratory. The causes and consequences of changes to the

p.o.e. are therefore, left unconsidered. The main question arising in this thesis is: Has the political offence exception to extradition changed over time, and if so, in what way?

Certain events or discourse may have been responsible for triggering the creation of new legal agreements which contain the p.o.e. in various forms. Also suggested, is the possibility of an interconnection between socio-political conflict in various nations or regions and the creation of international legal instruments on extradition. Furthermore, an examination of the "legal framework" whereby possible restrictions to the p.o.e. is also considered. The case study component explores aspects of the broader social context within which the Canada-India Extradition Treaty was created.

This thesis is structurally based on the methodological design used by Pamela Roby in her 1969 analysis of New York State Penal Law on Prostitution. Pamela Roby (1969) examined changes in law relative to pressure exerted by various interest groups. Similarly, this thesis examines the interplay between sectors of the government, various national governments, and the role they each play in representing various parties. As an example, in the negotiation of the Canada - India Extradition Treaty (1987), a variety of interest groups (the governments of Canada and India, police, Sikh community, and general public) expressed

concern. However, only some interested groups were granted an opportunity to influence the process. Pamela Roby (1969) argued "theories of law must include a knowledge of political processes" (Roby, 1969: 103). With this in mind, pertinent legal documents, case law, reports from Standing Committees, and interviews with government officials provide knowledge important for an understanding of the political processes that affect extradition law and the p.o.e. doctrine.

Various legal instruments (bilateral treaties, multilateral conventions, and an organizational constitution etc.) were found in a variety of sources. Initially, I had a bibliographic search done of terms such as terrorism, extradition and the political offence exception. I looked through treaty indexes, Canadian, American, World, and the United Nations Treaty Series. Amongst other things, the latter chronologically lists all international documents, conventions, and drafts of conventions. Words such as 'extradition', 'terrorism', and 'political offences' were also used as keys for the search. Issues of the Journal of International Legal Materials from 1975 onward were searched for pertinent documents. Also, the Treaty Registry at the Canadian Department of External Affairs was contacted in order to obtain a copy of the extradition treaty which was negotiated between Canada and India in 1987. As such, the structure of data collection is rather flexible allowing for

a multitude of sources to be utilized.

The initial source of data for this study is a collection of international legal instruments created bilaterally and multilaterally by regional and international organizations around the world. The second source is a list of statutory case law on extradition from Britain, the United States of America and Canada that examined the p.o.e.

Following the examination of legal documents which illustrated the limiting of the political offence exception in extradition law, an example was selected to be used as a case study. The Canada - India Extradition Treaty (1987) represented a departure from all other treaties negotiated before it; especially with regard to the political offence exception. A further advantage for the selection of the Canada - India Treaty was the availability of material and interview subjects.

A search of the University of Ottawa's library and inter-library resources indicated no texts or documents regarding the process of treaty negotiation were available. A thorough examination of the list of the Government of Canada's all party committees from 1984 onward revealed that no committee existed strictly for the purpose of developing government treaties. The drafting of the Canada - India Extradition Treaty was not debated publicly and transcripts of committee hearings were not available. Therefore, information regarding the process and drafting of the treaty

had to be gathered by interviewing those individuals directly involved. The purpose of conducting interviews as a part of the "case study" methodology is to gather information not otherwise available in the literature. Interviews also assist in exploring the social and political processes leading to the creation of the Canada - India Extradition Treaty.

A decision to utilize the indepth interview method with members of the negotiating team was made based on the fact that several persons who were actively involved in its creation were readily accessible. Also, there was a lack of documented information on the development of the Canada - India Extradition Treaty.

A "snowball sample" was used in this study. In this type of sample, the subjects may or may not be representative. Therefore, the results of the study are "illustrative" of the sample. A study cited by Chadwick, Bahr and Albrecht (1984) examined the assessment of environmental effects on public land by a coal strip mine. They state public officials may be interviewed and asked to identify others who may have similar experiences on the matter. 'Snowballing' may continue until the researcher feels "confident most if not all of the relevant 'expert' informants have been identified" (Chadwick, Bahr and Albrecht, 1984: 66). The 'snowball sample' method was used in this thesis to determine with whom interviews should be

conducted. Each person from the Canada - India Treaty negotiation team I spoke with was asked what other individuals similarly participated in the negotiation process.

The interview schedule developed follows an open-ended question format (see Appendix 2). In an open-ended interview schedule there are predetermined questions, but no set response categories. According to Chadwick, Bahr and Albrecht (1984: 105), these schedules are suitable for exploratory research and for "studies in which detailed information might be needed on more complex and detailed issues". In developing the interview schedule for this thesis, the following guidelines were taken into account: The interview should begin with a statement about the study. The questions should be ordered from interesting and non-threatening to more complex. Probe questions will be used by the interviewer when necessary to avoid involuntary errors. The respondent should be asked to refer to any pertinent notes or drafts (Chadwick, Bahr and Albrecht, 1984: 117-118).

Efforts were made to conduct interviews with four of the six members of the Canada - India Treaty negotiation team. Unfortunately, two of the members of the team were deceased shortly after negotiations, a third member declined to be interviewed and a fourth did not respond to any requests I initiated. Therefore, two complete interviews

were conducted, one with William Corbett of the Department of Justice and the other with Brian Dickson of the Department of External Affairs. (see appendices 3,4, and 5).

4LEGAL INSTRUMENTS, CONVENTIONS, TREATIES AND RELATED DOCUMENTS

A bibliographic search of library and archive materials found several legal instruments and related documents in the area of extradition and international cooperation. The documents shall be presented in chronological order illustrating the development of exceptions to or restrictions of the notion of the political offence exception. "It is universally accepted in that virtually all domestic extradition laws and international treaties contain the exception" (Blakesley, 1986: 110). A clear example of the political offence exception in an extradition agreement is found in an Arab League Extradition agreement, Sept. 14, 1952, whereby Article 4 states that "Extradition is not to be granted for political offences subject to the qualification of a Belgian clause" (Lillich, 1982: 153). The Belgian clause is cited as the first account of a political offence exception to extradition in law. It was part of an 1833 Belgian law from which came the phrase the Belgian clause (Sofaer, 1986: 126).

A/ HAGUE (1970) and MONTREAL (1971)**INTERNATIONAL CIVIL AVIATION ORGANIZATION CONVENTIONS (ICAO)**

Offences such as hijacking are seen as being adverse to world public order and therefore must be controlled. The ICAO has been a leader in developing international legal

instruments to combat the problem of terrorist activity. Both ICAO documents are early examples of the narrowing of political offence exception in extradition law. The restriction in this case is only applicable to offences of hijacking and not "political offences" in general.

CONVENTION ON THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT (Hijacking) The Hague, December 16, 1970.

CONVENTION ON THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION

(Sabotage) Montreal, September 23, 1971.

The following article is the same for both the above noted conventions:

Article 8:

(1) The offence[s] shall be deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States. Contracting States undertake to include the offence in every extradition treaty to be concluded between them.

(2) If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition in respect of the offence extradition shall be subject to the other conditions provided by the law of the requested State.

(3) Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested State (Alexander, Browne, & Nanes, 1979: 59 & 67).

Although the aim of these conventions might have been to strictly condemn all offences against aircraft (hijacking) by requiring all offenders to be extradited, without exception, these ICAO conventions have been highly criticized within the academic literature, as well as by organizations such as the Council of Europe. They are

regarded as too weak to successfully wage war on terrorism (Lodge, 1981: 166). The Hague and Montreal conventions deal with a variety of issues regarding the safety of aircraft, but as Lodge (1981) notes, they are not "universally applicable" and any offender could still escape prosecution. The state could accept the political offence exception and fail to prosecute, if they are not party to the convention or do not have an extradition agreement with the requesting state (Lodge, 1981: 166-7).

B/ ORGANIZATION OF AMERICAN STATES (O.A.S.):

INTER-AMERICAN CONVENTION AGAINST THE ACTS OF TERRORISM.

Washington, Feb. 2, 1971.

At first reading, this convention appears to contradict the notion of a trend toward the demise of the political offence exception in international legal instruments. Literature on the p.o.e. suggests this trend begins with the European Convention on the Suppression of Terrorism in 1977. The O.A.S. Convention was developed in 1971 and it is unusual that the limiting of the p.o.e. began so early. However, it is possible the U.S.A. influence present in the Organization of American States instigated a narrowing of the p.o.e. earlier than elsewhere in the international community. Perhaps this convention illustrates an element of foreshadowing.

The convention is as follows:

Article 2:

For the purposes of this convention, kidnapping, murder, and

other assaults against the life or personal integrity of those persons to whom the state has the duty to give special protection according to international law, as well as extortion in connection with those crimes, shall be considered common crimes of international significance, regardless of motive. [this is a refusal to accept the p.o.e.]

Article 3:

Persons who have been charged or convicted for any of the crimes referred to in Art 2. of this convention shall be subject to extradition under the provisions of the extradition treaties in force between the parties or, in the case of states that do not make extradition dependent on the existence of a treaty, in accordance with their own laws. (Union of International Associations, 1985-6: 392)

Why does there appear to be a rejection of the political offence exception as early as 1971? Cantrell (1977), throughout his article on the political offence exception argues that the U.S. and the various organizations which it is a member (O.A.S.) are far behind nations such as Great Britain and other western European countries in developing "liberal" interpretations of the political offence exception in extradition law. This may account for what appears to be an early example of demise of the political offence exception. Perhaps the O.A.S. had not fully accepted the p.o.e. doctrine from its inception. Hence, this explanation would also account for what seems to be a late liberalization of this organization's documents towards political offenders. It was not until 1981 that the political offence exception was clearly asserted in an Organization of American States: Inter-American Convention on Extradition.

**ORGANIZATION OF AMERICAN STATES:
INTER-AMERICAN CONVENTION ON EXTRADITION**

Caracas, February 25, 1981.

Article 4: Grounds for Denying Extradition.

Extradition shall not be granted:

4. When, as determined by the requested State, the offence for which the person is sought is a political offence, an offence related there to, or an ordinary criminal offence prosecuted for political reasons. The requested State may decide that the fact that the victim of the punishable act in question performed political functions does not in itself justify the designation of the offence as political. (International Legal Materials, v20 1981: 724) [this is a p.o.e., but its application is limited]

Although the term political offence is used in this convention, its reference to offences of a political nature is limited and still the p.o.e. is not explicitly defined.

C/ COUNCIL OF EUROPE:

THE EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM.

Strasbourg, January 27, 1977

Resolution (74) 3 on International Terrorism is as follows:

Resolution (74)3: Aware of the growing concern caused by the multiplication of acts of international terrorism which jeopardize the safety of persons; Desirous that effective measures be taken in order that the authors of such acts do not escape punishment; Convinced that extradition is particularly effective measure for achieving this 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. [Adopted by the Committee of Ministers on 24 January 1974.] (Council of Europe Explanatory Report, 1977: 29)

Article 1.

For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives: [this list is an exception to the p.o.e.]

a. an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970;

- b. an offence within the scope of the Convention for the Suppression of Unlawful acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;
- c. a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
- d. an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
- e. an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
- f. an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

Article 2.

1. For the purposes of extradition between Contracting States, a Contracting State may decide not to regard as a political offence or as an offence connected with a political offence or as an offence inspired by political motives a serious offence involving an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person.
2. the same shall apply to a serious offence involving an act against property, other than one covered by Article 1, if the act created a collective danger for persons. (Council of Europe Explanatory Report, 1977: 21-22.)

An obligation to extradite without exception clearly exists in article 1, even for those offenders who claim the political offence defense. That obligation is expanded in article 2 of the convention to include acts of violence against any persons as well as property.

D\ INTERPOL'S RESOLUTIONS ON TERRORISM.

INTERPOL'S INTERNATIONAL SYMPOSIUM ON VIOLENT CRIME

(March 1984)

Note: The following resolution does not specifically refer to the p.o.e. This Interpol resolution is a commentary on international criminal justice information sharing. However, it does enable the international community to cooperate more effectively with respect to extradition cases as well as other criminal justice matters.

Resolution:

Subject: Application Of Article 3 Of The Constitution

I. Rules and Procedure

1. Under Article 3 of the Constitution, the Organization is strictly forbidden "to undertake any intervention or activities of a political, military, religious or racial character".

II. Analysis Of Positions Adopted In Specific Instances

3. When offences are committed by persons with definite political motives but when the offences committed have no direct connection with the political life of the offenders' country or the cause for which they are fighting, the crime may no longer be deemed to come within the scope of Article 3. This is particularly true when offences are committed in countries which are not directly involved (i.e. outside the "conflict area") and when the offences constitute a serious threat to personal freedom, life or property (TVI, 1985: 7).

The resolutions provide "guidelines for interpreting Article 3 and remove the political ramifications from crimes committed against innocent victims or against property outside the area of conflict" (TVI, 1985: 3). These resolutions are considered to be a breakthrough in legal mechanics in dealing with terrorism. Even though an act of violence is rooted in a political cause, if the target is not directly related to that cause, for example the government, it cannot be viewed as political (TVI, 1985: 4). This perspective is also asserted in statutory case law in the case of *Meunier* (1894) which will be discussed later, in the case law section of this thesis. The resolutions state that countries are no longer prohibited from sharing technical information regarding terrorism. The resolutions give the authority to all National Central Bureaus to share

information regarding the prevention of terrorism. Central bureaus were not previously allowed to openly exchange information regarding political offences. This is seen as a move to improve international co-operation in dealing with acts of terrorism (political offences). Previously, law enforcement agencies were unable to coordinate their efforts through this international vehicle (Interpol). As early as 1973 (Vienna), Interpol was making resolutions to regard terrorist acts such as hijacking, letter bombs, and hostage taking as purely criminal offences, regardless of motivation and to allow all 136 participating nations to freely share and exchange information on terrorist activity. (TVI, 1985:4)

**E/ UNITED KINGDOM-UNITED STATES: EXTRADITION TREATY
SUPPLEMENT LIMITING THE SCOPE OF POLITICAL OFFENCES TO
EXCLUDE ACTS OF TERRORISM, Washington, June 25, 1985.**

Article 1.

For the purposes of the Extradition Treaty, none of the following offences shall be regarded as an offence of political character: [this list is an exception to the p.o.e.]

- (a) an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at The Hague on 16 December 1970;
- (b) an offence within the scope of the Convention for the suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature at Montreal on 23 September 1971;
- (c) an offence within the scope of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature at New York on 14 December 1973;
- (d) an offence within the scope of the International Convention against the Taking of Hostages, opened for signature at New York on 18 December 1979;

- (e) murder;
 - (f) manslaughter;
 - (g) maliciously wounding or inflicting grievous bodily harm;
 - (h) kidnapping, abduction, false imprisonment or unlawful detention, including the taking of a hostage;
 - (i) the following offences relating to explosives;
 - (1) the causing of an explosion likely to endanger life or cause serious damage to property; or
 - (2) conspiracy to cause such an explosion; or
 - (3) the making or possession of an explosive substance by a person who intends either himself or through another person to endanger life or cause serious damage to property;
 - (j) the following offences relating to firearms or ammunition:
 - (1) the possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life; or
 - (2) the use of a firearm by a person with intent to resist or prevent the arrest or detention of himself or another person;
 - (k) damaging property with intent to endanger life or with reckless disregard as to whether the life of another would thereby be endangered;
 - (l) an attempt to commit any of the foregoing offences.
- (International Legal Materials, 1985: 1105-7)

The President of the United States and the Secretary of State in Letters of Transmittal to the United States Senate regarding the U.S.-U.K. Supplementary Treaty state:

The Supplementary Treaty...represents a significant step in improving law enforcement cooperation and combatting terrorism, by excluding from the scope of the political offence exception serious offences typically committed by terrorists... narrowing the application of the p.o.e. to extradition,
(International Legal Materials, 1985: 1104)

The Supplementary Extradition Treaty would exclude specified crimes of violence, typically committed by terrorists, from the scope of the political offence exception to extradition. Article 1 of the Supplementary Treaty effectively limits the scope of Article V, paragraph (1) (c) to (i) of the current Extradition Treaty - the political offence exception - by listing the crimes

which shall not be regarded as offences of a political character,
(Intl Legal Materials, 1985: 1104).

The President of the United States and the Secretary General state clearly the intent of the Supplementary Treaty is to deal "effectively" with terrorist activity. This legal instrument has however been criticized in the literature for creating legislation that jeopardizes human rights.

Christopher Pyle (1986) suggests that this right wing move to deny the political offence exception could lead to regrets on the part of the U.S. over time. He refers to the political offence exception as one of America's proudest traditions. He further suggests that the U.S. and U.K. governments wish to deny the judiciary the power to grant the political offence exception independent of political consideration. He states that the government aims to prevent the court from shielding fugitives who the administration does not favour. He believes the document is in effect saying that there is no defense (or exception) for oppressed people who take up arms against a so-called "democracy". He suggests that some states may be democracies in name only and consequently, oppressed peoples may have no access to political decision making. (Pyle, 1986: 63-8) Within the literature there are advocates of both sides of this argument. Some nations call for greater restriction, (eg. Great Britain) while others (ie. France) suggest that the flexibility which the political offence exception provides

in extradition cases is necessary to maintain respect for human rights.

F/ EXTRADITION TREATY BETWEEN CANADA AND INDIA.

New Delhi, February 6, 1987.

Article 5.

1. Extradition may be refused if:

(a) the offence in respect of which it is requested is considered by the requested state to be a political offence or an offence of a political character;

[this is the political offence exception]

3. For the purposes of this Treaty conduct constituting the following offences according to the law of the requested State shall not be regarded as political offences or offences of a political character:

[this is an exception to the p.o.e.]

(a) an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on December 16, 1970;

(b) an offence within the scope of the Convention for the Suppression of Unlawful acts Against the Safety of Civil aviation, signed at Montreal on September 23, 1971;

(c) an offence within the scope of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, signed at New York on December 14, 1973;

(d) an offence within the scope of any convention to which both contracting States are party and which obligates the parties to prosecute or grant extradition;

(e) an offence related to terrorism;

(f) murder, manslaughter, assault causing bodily harm, kidnapping, hostage-taking, offences involving serious damage to property or disruption of public facilities and offences relating to firearms, weapons, explosives, or dangerous substances;

(g) an attempt or conspiracy to commit an offence described in subparagraphs (a) through (f) or counselling the commission of such an offence or participation as an accomplice in the offences so described. (Canada, 1987a: 5-6) (See also Appendix 1)

The exception to the p.o.e. is abundantly clear in Article 5

(1) (a) of the treaty between Canada and India. A comparison between C/ The European Convention on the Suppression of Terrorism and F/ The Extradition Treaty between Canada and

India illustrates a significant increase in those offences considered extraditable regardless of political motive. The main indicator that the Extradition Treaty between Canada and India was developed in response to the Air India bombing June 23, 1985 (a terrorist event) is in Article 5 (3) (e).

It is noted in a Report of the Special Senate Committee on Terrorism and Public Safety that Canada since 1985 has begun to regard its extradition arrangements in a new light. The report states:

New treaties will be revised to focus more clearly on terrorist crimes by specifically removing certain offences (such as those dealt with by the civil aviation conventions) from the scope of the political offence exception. The extradition treaty entered into earlier this year with India is a case in point and will apparently be a model for subsequent extradition treaties entered into by Canada. (Canada, Report of The Senate Special Committee, 1987b: 25-6)

This Extradition Treaty was drafted following the Air India bombing in June of 1985. It is one of the clearest examples within international legal instruments of the trend toward restricting the application of the political offence exception to extradition. The pertinent article is ironically entitled, "EXCEPTIONS" to extradition (See Appendix 1).

The clarity of the trend toward developing exceptions to the political offence exception increases beginning with the ICAO's conventions which aimed to limit the political offence exception's application specifically with regard to offences affecting aviation. The framework of

the trend outlined by the documents presented in this thesis end with the Canadian document which strives to have the concept of terrorism through legislation disregarded as an acceptable method of political activism.

The doctrine of the p.o.e. and exceptions to it exist in varying types of documents, however each document reviewed here adds to the narrowing of the doctrine as is demonstrated above. The International Civil Aviation Organization agreements represent an early departure from the p.o.e. doctrine by limiting its application. Offences directly affecting their organization were not to be excluded from extradition. The Organization of American States and the European Community both developed multi-lateral agreements with nation members of their organizations. The O.A.S. rejected the p.o.e. while the European Community developed an agreement which commenced the process of slowly limiting the doctrine. Interpol, an international police organization, took the initiative and amended its constitution enabling its members to share information with other police forces regarding political offences. Previously reluctance to share information by this police organization and others enabled some terrorists or violent political offenders to avoid apprehension. Interpol's lead may prompt other criminal justice organizations to develop similar legislation of their own, further limiting protection for offenders who commit acts of

terrorism and claim the p.o.e. defense. The Extradition Treaty between Canada and India as well as the Supplement to the United States - United Kingdom Extradition Treaty are both examples of bilateral treaties. Extradition in most cases occurs as a result of an agreement between two nations being in place. These agreements govern how those nations respond to an application for extradition and in cases where the p.o.e. is raised it is now strictly limited. However, those examples which do not support the existence of a trend toward limiting the p.o.e. cannot be ignored. As early as 1971 the O.A.S. agreed to specific restrictions of the p.o.e. doctrine in the Inter-American Convention Against Acts of Terrorism. It appears in fact, that the O.A.S. had not acknowledged the p.o.e. as a valid doctrine contrary to other regional organizations that are concerned with issues which affect the international community. Additionally, Greece and France in their negotiations for an extradition treaties with Canada, after 1987, refused to agree to any restrictions of the p.o.e. (Appendix 3 Corbett, p.154; Appendix 4 Dickson, p.160)

The method used to narrow the p.o.e. varies from one legal instrument to the next. The 1952 Arab League Extradition Treaty includes a statement of general permission for political offenders not to be extradited. On the other hand the O.A.S. agreement rejects absolutely the p.o.e. The I.C.A.O. agreements refer to a specific list of

offences affecting aviation. The European Community refers to the I.C.A.O. agreements and includes a short list of other offences which are exempted from the p.o.e. The U.S.-U.K. Supplementary Treaty lists all offences which are to be considered extraditable which is quite lengthy. The Extradition Treaty between Canada and India attempts to move away from the long list approach, but does cite the I.C.A.O. agreements. This treaty includes broad terms such as terrorism, which would include any number of violent offences that might have been a part of a list. Canada is attempting to move away from the listing approach so that recently negotiated treaties do not become "obsolete" soon after they are negotiated. (See Appendix 3, Interview 2, Explanations for the Transition Q. 8; Appendix 4, Drafting and Negotiations, Q.4)

SOCIO-POLITICAL CONTEXT

There are important factors which need to be considered when examining international extradition law. First is the fact that nations are cooperating, but their obvious differences in national law must be taken into account. Secondly, from a historical perspective, modern developments in technology, international travel and communication have reduced many of the obstacles an offender must conquer in order to seek refuge in another country. Perhaps these modern developments have also led to an increase in international terrorism. Correspondingly, terrorist acts committed by those striving to have their political ideologies recognized have increased with these advances in technology (Cantrell, 1977: 777-8; Pierre, 1988: 37). Terrorist activity or what is generally regarded as terrorist has shifted from offences being committed in essentially domestic struggles which only affected national public order to new methods of transnational and international crime against third party victims. These international crimes disrupt world public order. In an interview to be discussed later, Mr. Brian Dickson of the Department of External Affairs supports this notion of distinction between domestic and international terrorism (Appendix 4, Dickson).

PURPOSE OF EXAMINING SOCIO-POLITICAL CONTEXTS

The justification for examining some major world terrorist events and socio-political conflicts occurring is two-fold. The conflicts present in the regions represented in the treaties and related documents reviewed earlier in this chapter are relevant. Examining the context within which these documents were developed enables an exploration of whether legislation and legal decision making are influenced by their social and political circumstances. Secondly, a review of the socio-political context illustrates governmental examples of support for the limiting of the p.o.e. to extradition in government debates and documents.

AVIATION: THE I.C.A.O. AGREEMENTS

The Hague and Montreal conventions were developed shortly after a dramatic increase in offences against or on board aircraft, (hijacking) during the 1970's (Pierre, 1988: 42). These conventions were specifically aimed at dealing with crimes like hijacking. Along with these conventions, a variety of preventative measures have been adopted by nations around the world. Stringent advances in airport security have made airlines safer such as the once frequently threatened Israeli El Al Air. While, on the other hand, tests done by security forces reveal that the Athens, Greece airport was one of the most unsafe airports in existence (Rosie, 1986: 15). Hence, it is obvious that

there has not been a concerted effort on the part of all nations to achieve high or even reasonable levels of security so as to avoid these types of events.

LATIN AMERICA: THE O.A.S. CONVENTIONS

Well documented, political conflict in nations like Nicaragua, Uruguay, Peru, and Argentina perhaps can partially account for the Organization of American States delay behind other international organizations to liberalize the p.o.e. doctrine. The Council of Europe was the first international organization to liberalize the interpretation of the p.o.e. doctrine in a statutory document. However, it is also the organization which shifted to the political right by restricting the p.o.e. Rosie (1986) contends that insurgency has been a common state of affairs from the 1960's in Nicaragua with the left wing Sandanista's finally overthrowing Somoza's dictatorship in 1979. Since then, the right wing Contras, supported economically by the United States used terrorist acts to regain power (Rosie, 1986: 17). In a nation like Nicaragua, alternately from one decade to another individuals who were politically violent were seen as being either terrorists or freedom fighters. Hence, there is "confusion over who is a terrorist and who is not" (Rosie, 1986: 17). This has "persistently plagued efforts by the international community to grapple with the problem" (Rosie, 1986: 17-18). Since 1968, terrorist activity or the tactics used by insurgents in Latin America

shifted because "left wing guerrilla movements ... were frustrated by the failure of rural guerrilla tactics" and consequently moved into "urban terrorism" (Clutterbuck, 1992: 264). Reportedly, a great deal of insurgency against "democracies" for example in Brazil has backfired. Terrorism may have initially enabled these insurgent groups in the 1960-70's to secure freedom for imprisoned compatriots. However, in time, the government developed a strategy to respond with little concern for maintaining "civil liberties" (Clutterbuck, 1992: 264). According to Rosie, another Latin American example of insurgency which had a negative outcome is the case of Uruguay. A subversive group ended up replacing an already "tenuous" democracy with a repressive right wing regime (Rosie, 1986: 23). Similarly as will be shown in the case study section of this thesis, the Indian Government responded to violent political unrest with legislation that limited human rights.

Impediments to combatting terrorism include support by governments as well as indirect support by multinational business corporations. An example of what seems to be a domestic terrorist event is actually an event of international significance. In Argentina in December of 1973, a Peugeot plant manager was kidnapped by a terrorist organization, which demanded and received a ransom of 14.2 million dollars (Mickolus, 1980: 425). Some international corporations cooperate with terrorists and, in turn,

indirectly fund terrorist groups so that they do not have to close their plants in nations where the threat is always there, but labour is cheap. These corporate executives fear for their families. Their companies cooperate with the terrorists in the hope that they will avert further kidnapping.

EUROPE: THE EUROPEAN CONVENTION

The commonly cited incident involving the murder of eight Israeli athletes during the Munich Olympics (1972) is perhaps one of the key events which triggered the drafting of the European Convention on the Suppression of Terrorism from 1973-76. There have been countless attacks on airports and other targets prior to and following the creation of various international documents. There is constant conflict within Northern Ireland and the United Kingdom as terrorist organizations, like the Provisional Irish Republican Army and the Irish Republican Army, wage attacks on members of the British Parliament, British Army and the Royal Ulster Constabulary. They have bombed "pubs, shops and buses killing innocent civilians" (Rosie, 1986: 17). In Spain, the ETA Basques waged "their campaign of assassination against the Spanish military, and their bombings against Spain's economically vital tourist hotels and beaches" (Rosie, 1986: 10). Palestinian and Sikh terrorism had also spread to European territory. For example, the bombings of Rome and Vienna airports were perpetrated by members of the

Fatah faction of the PLO (Rosie, 1986: 11). Furthermore, prior to the E.C.S.T. there had been many Italian, French and West German terrorist events and political conflicts in Europe. It is however, not possible to discuss all of these events within the confines of this thesis.

INTERPOL'S RESOLUTIONS

Interpol's resolutions allow the sharing of security information with regard to political offences. These resolutions are an expression of international concern for world public order in the face of increased terrorist activity. Interpol's amended constitution is only one example of coordinated international efforts to create anti-terrorist intelligence forces in the battle against terrorism. Rosie (1986) suggests that "self-defensive measures which terrorism imposes on states have a way of eroding civil liberties by giving the police and security services extraordinary powers" (Rosie, 1986: 15). According to Bonner (1992), if a government is to react effectively to terrorism it must establish measures which function within "rule of law" and human rights conventions (Bonner, 1992: 201).

THE UNITED STATES: U.S.-U.K. SUPPLEMENT

In recent years, American citizens have been the selected victims of many terrorist attacks in airports and on vessels. A prime example of this is the Achille Lauro hijacking which took place on an Italian cruiseliner in

October of 1985. An American passenger on the ship, Leon Klinghoffer, was murdered by one of the Palestine Liberation Front (P.L.F.) hijackers, (Abdullah Hammid) (Rosie, 1986: 39; Clutterbuck, 1992: 275). It has been suggested that as airport security tightens around the world new forms of terrorist attack will become the vogue, such as hijacking of ships, attacks on off shore oil platforms as well as attacks on oil and gas refineries or pipelines. In light of the apparent vulnerability of U.S. citizens, world wide, the United States government has campaigned for tougher and harsher measures for combating terrorist activity. Furthermore, the American government's fear that the U.S.A. may become a haven for PIRA and IRA terrorists has elevated the government's desire for stricter application of the p.o.e. extradition cases that U.S. courts hear (Pyle, 1986: 63).

THE CANADA-INDIA EXTRADITION TREATY

The bombing of an Air India Boeing 747 in June 1985 329 fatalities. This terrorist event was considered significant by the international community (Rosie, 1986: 45). The Air India bombing caused even greater concern in the nations involved in the creation of the 1987 Canada-India extradition treaty. Sikh terrorism in the Punjab region of India has spilled over into Britain, the U.S. and Canada. The dispersal of Sikh terrorism in the 1980's suggested that it could develop into all out warfare (Rosie,

1986: 34). The numbers of terrorist attacks in Canada or against Canadian citizens are far outnumbered by those against citizens of the U.S.A. Nevertheless, terrorist events affecting Canadians have been significant enough to instil fear and raise concern within the Canadian government. Enough concern existed after 1985 that the Canadian government was willing to initiate the development of an extradition agreement with India which would restrict the application of the p.o.e.

LEAGUE OF ARAB STATES EXTRADITION TREATY

Political conflict which exists in the Middle East region is highly significant to any discussion of terrorist or political offences. It was however, not possible to obtain the most recent League of Arab States Extradition Agreement. "The Middle East, with its tangle of Muslim, Socialist, Zionist and Falangist loyalties, remains the worlds most dangerous flash point" (Rosie, 1986: 11). The Palestinian people are living a poor and meagre existence since they fled what was considered Palestine 40 years ago (Rosie, 1986: 11). The Six Day war of 1967, when Egypt invaded Israel on Yom Kippur directly led to what is now known as the occupied territories of the West Bank. Peace keeping forces were sent in and Israel pulled out of only some of the occupied territories (Ferencz, 1980: 53-4). The plight of the Palestinian people has become an international issue. Various governments feared acts of reprisal and as a

result, 150 Palestinian terrorists were arrested in Western Europe between 1983 and 1988. "All but nine, according to one estimate, have been quietly released with or without trial" (Pierre, 1988: 46). This conflict is complex. Rosie (1986) asserts that "as long as the Israelis, Palestinians, Jews and Arabs are locked in a lethal conflict over the same small patch of the Eastern Mediterranean, the focus of world terrorism will remain the Middle East" (Rosie, 1986: 34). Although recently a peace agreement has been reached in the Middle East, it will take time for development of obvious changes in attitudes and lifestyle of those most affected.

5STATUTORY CASE LAW

Any discussion of international extradition law must consider not only customary and conventional law, but also the development of statutory case law, as every aspect of the law is integral to international relations. Because I lack the knowledge and ability to read Arabic and Spanish, judicial rulings on cases in the Arab League region and Latin America are not a direct part of this review unless they have otherwise been referred to in British, American or Canadian case law. British and American extradition case law in which the p.o.e. was raised is more extensive than Canada's. Therefore, this study contains a greater number of British and American decisions. Given the limited number of extradition hearings in which the p.o.e. was addressed in Canada, the Canadian judiciary has had to rely on British case law in accordance with common law tradition. Additionally Great Britain and the United States, more so than Canada, have taken a greater international stand on issues such as terrorism and methods to combat it (Lodge, 1981: 176). Great Britain and the United States have been more outspoken with regard to terrorism possibly because they have been affected in a more direct manner than Canada. Acts of international or transnational terrorism affect nations that are direct targets, but terrorist acts also

disrupt world order and threaten the international community's feeling of peace and security (Cantrell, 1977: 781).

PURPOSE OF REVIEWING CASE LAW

The purpose for reviewing case law in which the political offence exception is raised by the fugitive to avoid extradition is two-fold. First, those cases in which the p.o.e. is applied demonstrate support and confirm the doctrine's existence in extradition law. Secondly, those cases where similar circumstances surrounding the offences exist, but are interpreted differently by the judiciary may be considered departures from the p.o.e. doctrine. Each case example of a restriction in the application of the p.o.e. will support the claim that this doctrine is in decline and any example of a broader interpretation of the p.o.e. challenges the proposed hypothesis.

Should there be flexibility in extradition decision making? Those who agree there should be flexibility argue that it is necessary to ensure that resistance fighters with new methods of revolution can be protected. For instance, Castel & Edwardh (1975: 93) find it is wise to be adaptable to "world political scene changes." Comments of those justices who have considered these issues shall be reviewed next.

Setting aside for a moment the question of whether law and juridical decision making are apolitical, it is

important to consider the purpose of an historical survey of the application of the p.o.e. in extradition case law. New developments in case law indicate changes in social and political condition as well as government policy. The social and political climate also influence judicial decision making. A review of the legal application of the p.o.e. can help to explore the question of which comes first?

THE RULE OF LAW

Historically extradition has been governed by law. Under the standards of the "rule of law" those accused of an international crime and subject to an extradition hearing are guaranteed the rights of "due process and equal protection under the law" (Pyle, 1986: 67). In essence, legal safeguards require that judges deciding cases of extradition "transcend political partisanship and military alliances" (Pyle, 1986:67). Judges are to remain neutral, only having regard for the facts of law. They consider individual circumstances such as whether a political conflict was present at the time of the offence; how is the accused connected to the offence; and whether the act was authorized. The courts are to pass judgement with respect to the immoral conduct of the accused and not the "morality" of their "political associates" (Pyle, 1986: 70).

FACTORS INFLUENCING EXTRADITION: LEGAL AND POLITICAL

In examining extradition case law, crucial questions arise specifically with respect to the doctrine of the

political offence exception. The lack of a universal international definition of terrorism and political offences has caused problems for the courts in many instances. Judicial decision making with regard to the political offence exception has fluctuated throughout time. According to Van Den Wijngaert (1985: 743), the court's interpretation of the political offence exception has altered with each sort of political conflict. The following examination of case law in this thesis shall illustrate the existence of those varying interpretations.

In principle the courts are to make decisions independent of political considerations, however, it is possible that in various extradition cases socio-political contexts have influenced the judgements handed down.

Some scholars suggest court "flexibility" in these decisions is necessary, while others see it as arbitrary. Christopher Pyle (1986: 72) argues that all IRA members cannot be painted with the same brush, otherwise it would "destroy the possibility of any distinction between terrorists and freedom fighters." Many countries even within the same region view conflicts differently and in fact that is why large international organizations like the United Nations have had little success combatting terrorism through international cooperation.

Why is there so much disagreement over a doctrine that has been uniformly accepted and utilized in case law

throughout the world? Van Den Wijngaert (1986) relates that there are practical implications of the application of the p.o.e. to extradition. A "potentially very serious offence" may go unpunished as long as extradition may be refused based on a variety of factors, subject to the court's interpretation (Van Den Wijngaert, 1986: 750). The most commonly cited case in which an accused went unpunished after having committed an extremely serious international terrorist crime was **Abu Daoud**. He was apparently responsible for organizing the murder of eight Israeli athletes at the 1972 Munich Olympics. When he entered France in 1977, he was arrested by the police without the Foreign Office's knowledge. Both the German and Israeli governments applied for his extradition. However, "the French government, under pressure from Arab governments with whom they wished to maintain friendly relations, refused the Israeli request on the grounds that Munich was not in Israel, and claimed that the Germans had not sent the necessary follow-up documentation" (Clutterbuck, 1992: 270). The French courts released Abu Daoud and he was flown to Algiers on January 11, 1977. Daoud was not prosecuted for his offences (Clutterbuck, 1992: 270).

PROCEDURE

The Canadian extradition procedure is designed to allow the executive branch of the government, through the Minister of Justice, an opportunity to override judicial

decisions in extradition cases which may contradict their political stance. Although the Supreme Court of Canada has the final legal ruling in these matters, in the June 1989 *Cotroni* case the Court stated that it was "not inclined to override executive discretion," as the executive is more greatly apprised than the courts "regarding the wisdom of surrendering a fugitive". The Court also did not wish to become involved unnecessarily in "decisions that involve the good faith and honour of this country in its relations with other states" (Canada, 1990a: 10).

Canada, follows the same procedural safeguards as Britain with regard to extradition (Castioni, 1891: 152, 163-4). British and American governments, as well as many other governments are canvassing to change legislation which would grant the responsibility of extradition to the executive branch of their respective governments. This would remove all discretion in these cases from the judiciary. These efforts suggest that United States government is attempting to eliminate the p.o.e. doctrine from extradition law. Christopher Pyle (1986), however argues that "the loophole that the administration wishes to plug is not the political crimes defense itself, but the judiciary's power to grant that defense independent of political considerations" (Pyle, 1986: 65). The Reagan administration sought to eliminate the p.o.e. "only from treaties with 'stable democracies' in which 'the judicial system provides

fair treatment'" (Pyle, 1986: 65-6). The American government through its efforts to have such legislation passed appears to want to make the p.o.e. selectively available to only those individuals who commit terrorist acts against governments they do not support.

CASE LAW

Some of the cases that will be discussed date back to the nineteenth century and although they have not in themselves directly led to the creation of the various aforementioned legal instruments, they may have influenced their development. These cases continue to be cited by the judiciary and are the basis of their decisions on extradition matters involving the political offence exception as well as its limitation. Hence, they are the groundwork for most modern day perspectives on contemporary terrorism. The following case law is discussed in both a chronological order as well as according to the various nations.

THE PROPORTIONALITY TEST

In international extradition law, each nation acting as the requested state is responsible for determining the crime's political element. As noted earlier, courts generally consider three factors when deciding whether an offence is or is not political. These factors have been derived from the following case law. An early illustration of the proportionality test applied by the courts (see

Literature Review, The Nature of Political Offences) can be seen in the Swiss case of *In re Ockert*. The proportionality test means the crime and the method of the crime are compared. If, the crime committed is politically motivated and proportional to the goal sought to be achieved, it may be judged political. The following cases establish legal precedent for the proportionality test where the p.o.e. is raised in an extradition hearing. *Ockert*, a German national, allegedly murdered a member of the National Socialist Party. His extradition to Germany was refused by the Swiss courts in 1933 based on the political nature of his common crime (Mullally, 1986: 1513). In another case *Kaphengst*, was apparently responsible for a bombing in Prussia in 1929. The *Kaphengst* (1930) extradition case redefined the proportionality test. The Swiss courts required that a direct link between the crime itself and the individual's aim to effect changes in the state structure be present for the p.o.e. to be accepted. The court of Switzerland ruled that the *Kaphengst*'s act was not a "part of a general movement directed towards obtaining a particular object but rather served merely terroristic ends" and ordered *Kaphengst* extradited (Mullally, 1986: 1513). The Swiss at that time, regarded terrorist acts as extraditable in line with the limited interpretation of the proportionality test (Mullally, 1986: 1513).

BRITISH CASE LAW

The British courts have developed a "political incidence test" similar to the Swiss proportionality test. The landmark case commonly cited is **Castioni** (1891), where extradition was denied on the basis that the offence was committed "during a political disturbance and was incidental to and formed part of the disturbance" (Cantrell, 1977: 785) [Castioni, 1891: 153]. From this case, the "political incidence test" was born. **Castioni** (1891), is the original standard upon which many extradition cases involving the p.o.e. are based. In the strictest sense, Justice Denman argued that to be excluded from extradition the offence must be "done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising or in dispute between two parties in the state as to which is to have the government" (Green, 1984: 182) [Castioni, 1891: 156]. Justice Denman also stated in his decision that an offence might be considered political in nature if it was not possible to have an "organized political movement" in the nation and the proceeding against the individual was driven by political motives and not punishment for conventional crimes (Green, 1984: 182).

The above interpretation of a p.o.e. has been continually reexamined with each case in which it might apply. For example, in 1894, the case of **Meunier**, resulted

in a further clarification of the political incidence test and the p.o.e. **Meunier (1894)**, a French anarchist, bombed a cafe and army barracks in France and escaped to Britain. **Meunier** claimed his acts were political. In the case decision, the court held that a "state" must be two or more parties "each seeking to impose their government of choice on the other" (Cantrell, 1977: 787) [Meunier, 1894: 415]. It was judged by the British court that **Meunier's** acts were not committed in an attempt to gain "control of the government", but that his crimes were against all forms of government and therefore not political (Mullally, 1986: 1514) [Meunier, 1894: 419]. The **Meunier (1894)** case is an example of the **Castioni (1891)** political incidence test being limited (Mullally, 1986: 1514).

Evidence of the political connection between substantive case law decision making and socio-political circumstances exists in the decision by Justice Cave, in **Meunier (1894)**. According to Castel and Edwardh (1975: 97), Justice Cave commented that "anarchy is the enemy of all Governments" whose "offences are mainly directed against private citizens". Justice Cave's remarks demonstrate the extent to which "the concept of a political offence is intimately tied to the existing social and political conditions of a country as well as to the prevailing beliefs of acceptable forms of political opposition and struggle" (Castel & Edwardh, 1975: 97). It appears current cases

involving terrorist acts are today being regarded in a similar manner as anarchist acts were during the 1890's.

The 1947 case of **Gatti** further clarified the **Castioni** test (1891) when the British Justice rejected **Gatti's** claim that his attempt to murder a communist party official in the Republic of San Marino was politically motivated. The court determined that "political offences are those which injure the political organism." Since his offence was not directed at the government (Cantrell, 1977:391).

The next case broadens the application of the p.o.e. to apply to those cases that apparently require consideration of "the political circumstance existing at the time of the offence" or the type of government from which the offender escaped. In the case of **Kolczynski** (1955), the offender committed non-political offences to escape to Britain and avoid persecution in Poland. Under Polish law at that time, it was treasonous to escape to another country (Mullally, 1986: 1514). The court held that **Kolczynski** (1955) did not require a political uprising to have the p.o.e. accepted because the requesting state was totalitarian (see also U. S. Artukovic, 1951) (Mullally, 1986: 1515).

The political offence exception was broadened in Britain by the decision in the case of **Schtraks vs Government of Israel** (1967). Lord Radcliffe ruled that for

the p.o.e. to apply, the requesting state must want the offender for another reason than to enforce laws that only apply in the requesting state.

In a subsequent British case the application of the p.o.e. is further refined. **Tzu Tsai Cheng** (1973), attempted to kill a member of the National Chinese government in the U.S. and later escaped to Britain. It was found by the British court that the logical connection between the offence and the political motivation disappears when the act is directed at a third state, in this case China (Cantrell, 1977: 788).

The British court decision in the case of *ex parte Hammond, Keane and Fernandez* alternately broadened the application of the p.o.e. The court held that the offender no longer has to show that he committed a political offence, just that his politics would stop him from getting a fair trial if surrendered (Cantrell, 1977: 794).

The Irish situation is highlighted by the Extradition Act 1965, and its application in the case of **Bourke** (1973), who helped a Soviet spy (Blake) escape from a British prison. It was judged that because Blake was in prison for a political offence, **Bourke's** aid to him is therefore connected to a political offence. In this case "connected offences" may have a political character of their own as long as they are committed "with a view to preparing for, ensuring the commission of, concealing or preventing such an

act" (a political offence) (Cantrell, 1977: 799). The second case specifically related to the Northern Ireland and Britain is **Magee** and **O'Rourke**. They had stolen explosives from the British military for the IRA, but had also been involved in countless other offences not related to the political movement. **O'Rourke** in England claimed that he would be persecuted for his offences against the military. In this case, the Irish Justice commented that one nation could not assume that the other would violate its agreement to apply the p.o.e. (Cantrell, 1977:801). Representatives of both countries met following this case to make a joint statement regarding the manner in which violent crimes shall be dealt with. "All persons committing violent crimes in Ireland must go to trial". This statement according to Cantrell, was also meant to include those "who were acting through political motivation" (Cantrell, 1977: 801).

A continental European case shall be presented here to provide evidence of contradiction to earlier British decisions. Changes that are occurring in the European community are effect the European economy, but may also influence political and justice related matters. The European case which contradicts the liberal application of the p.o.e. in **Artukovic** (1951, U.S.A.) is the **Piperno** (1979) case. **Piperno** (1979) was alleged to be the leader of Italy's Red Brigade and to have executed the 1978 kidnapping and murder of Aldo Moro, as well as, committed 45 other serious

offences. The French court's decision to extradite **Piperno** (1979) was a sign that the French courts were becoming more stringent with regard to international terrorism. In this case, evidence was submitted to France by the Italian government implicating **Piperno** (1979) in the Moro murder. The court acknowledged in its decision that **Piperno's** crimes were of a political nature, but because they were so serious, they could not be considered political. The principle applied here permits extradition for heinous crimes that take place even if they occur in the presence of a civil disturbance (Hannay, 1980: 409-10). The **Piperno** case is a clear example of a restriction of the p.o.e. doctrine and clearly a move away from **Castioni** (1891).

UNITED STATES OF AMERICA CASE LAW

There are a number of cases that have dealt with the issue of the p.o.e. in the United States of America. The first case outlines the early U.S. interpretation of the p.o.e. **Ezeta** (1894) occurred four years after the **Castioni** (1891) decision. The magistrate in **Ezeta** (1894) used the "political incidence test" to deny extradition for offences of murder and robbery that occurred during a Salvadoran civil war. The liberal application of the p.o.e. is viewed as humane, but has also resulted in abuses of the doctrine's application in some instances. The case of **Artukovic** (1951) involves the Yugoslavian government who requested extradition based on war crimes **Artukovic** (1951) allegedly

committed in Croatia. The U.S.A. court found that **Artukovic's** crimes were political offences and the U.N. resolutions made on war criminals were not sufficient as law, so as to exclude his crimes from the political offence category (Cantrell, 1977: 794-7). The **Artukovic** (1951) case was significantly influenced by the Cold War and the fact that a communist country made the extradition application. It appears the United States government did not believe **Artukovic** (1951) would be unfairly treated based on his offences because prior to Yugoslavia's extradition application the U.S. had tried to deport **Artukovic** (Hannay, 1980: 394).

Two cases where the offenders in positions of political power committed common crimes (murder, robbery, and torture) in the absence of an uprising, but who later had to flee their countries as a consequence of their governments being overthrown involved **Jiminez** (1962), Venezuelan president and **Gonzalez** (1963), Dominican national. Their crimes were regarded as extraditable because they were not incidental to any uprising (Mullally, 1986: 1522). The U.S. court decision was similar in the case of **Ramos v Diaz** (1959), two individuals who had escaped from prison in Cuba (Hannay, 1980: 395). Judicial decisions in extradition case law in the U.S.A. have not been pivotal as the judiciary have relied heavily on **Castioni** (1891) and the political-incidence test (Cantrell, 1977: 797).

The **Abu Eain** case refers to the indiscriminate bombing of a bus shelter in Tiberias, Israel in 1979. At the extradition hearing in the U.S., expert testimony was given regarding the constant state of conflict in the Israeli occupied territories (Hannay, 1980: 403). **Eain** (1979) was a member of the Al-Fatah, an organization that was trying to establish a "democratic nonsectarian state" in Israel and was willing to use violent means if necessary. The main question confronted in this case is whether the p.o.e. is meant to exempt all forms of violence no matter how barbarous. U. S. Magistrate Jurco in the **Eain** (1979) decision held that the exclusion of "relative political crimes exists only where such crimes are directed against the political organization" (Hannay, 1980: 405). The decision in **Eain** (1979) is similar to the **Gatti** (1947) decision cited above. **Eain's** (1979) act of indiscriminate violence was judged extraditable because no connection between the crime and the Palestine Liberation Organization's movement to overthrow the Israeli government was found (Mullally, 1986: 1524). It is however, suggested in the literature that many important legal issues could not be addressed in this case due to the limited focus of an extradition hearing (Hannay, 1980: 405). Arguments supporting this decision claim that the p.o.e. was never intended to protect those who commit "anarchist" violence or anti-social acts for personal reasons (Mullally, 1986: 1524)

(see also **Schtraks** vs the Government of Israel, 1967, U.K.).

A contemporary U.S. case is that of **McMullen** (1978), a member of the Provisional Irish Republican Army (PIRA), who was charged with the bombing of British military barracks. The Magistrate found there to be a political conflict in Northern Ireland, and because **McMullen** (1978) was a member of an organized movement, his acts could be considered "a part of the politically motivated uprising" and should therefore not be extradited. The decision in the **McMullen** (1978) case appalled the U.S. and U.K. governments. Many academics including Hannay (1980) criticize Magistrate Woelfen for strictly applying the political uprising terminology of **Castioni** (1891) to heinous acts committed by a small group of revolutionaries, not accepted by their countrymen (Hannay, 1980: 401). Hannay (1980) notes that the Justice failed to make reference to the humanitarian issues of victims asserted in **Meunier** (1894) or **Gatti** (1947). In addition to **McMullen** (1978), there are the cases of **Mackin** (1983) and **Doherty** (1986). All three individuals were members of the P.I.R.A. In the **McMullen** (1978) case it was judged that a political conflict was indeed taking place in Northern Ireland and the PIRA was an organization that was a part of the movement to nationalize Northern Ireland. **McMullen**, therefore, could rightly claim the p.o.e. for his crimes (Mullally, 1986: 1523-7). Based on **McMullen** (1978) similar decisions were made in both the cases of **Mackin**

(1933) and **Dorherty** (1986). **Quinn** (1986) refers to the case of a convicted Irish Republican Army member whose extradition was initially denied, but the decision after several appeals was later overturned by the U. S. ninth Circuit court. **Quinn** (1986) was ordered extradited for murder, apparently because the shooting of a police officer he was alleged to have committed occurred in London, England. It was ruled that the political uprising only took place in Northern Ireland. An uprising was defined as a 'revolt by indigenous people against their own government' (Mullally, 1986: 1527). Hence, geographically the p.o.e. could not be applied (Mullally, 1986: 1527). However, the decision in this case is considered problematic, in light of the fact that England and Northern Ireland are "constitutionally and politically the same entity" (Mullally, 1986: 1540).

CANADIAN CASE LAW

The denial of extradition based on the application of the p.o.e. in Canadian case law history is almost non-existent. In fact, the only Canadian extradition case in which the p.o.e. was relied upon to deny surrender occurred during the American Civil War (1865). It was a case involving **Lieutenant Bennet Young**. He and several compatriots (Confederate soldiers) raided St. Albans, Vermont setting fires and pillaging. Also, during that time one person was murdered. Following the raid, **Young** (1865)

sought refuge in Canada. The United States requested his extradition based on Article X of the Ashburton Webster Treaty of 1844. The p.o.e. doctrine had not been directly written in the treaty nor was it present in any domestic statute on extradition at that time. Nevertheless, according to Canadian legal experts on extradition, La Forest (1977), and Castel and Edwardh (1975), the p.o.e. was understood and accepted by the judiciary in application to the extent that "political offenders" should not be subject to extradition. It was stated by the Judge in *Young's* (1865) case:

political offenders have always been held to be excluded from any obligation of the country in which they take refuge to deliver them up... No nation of any recognized position has been found base enough to surrender, under any circumstances, political offenders who have taken refuge within their territories, or if there be instances, they are few in number, and are recorded as precedents to be reprobated rather than followed (La Forest, 1977: 63); (Castel and Edwardh, 1975: 91).

Canada has not been liberal with its application of the p.o.e. since the decision of *Young* (1865). Canada has applied quite strictly those provisions cited by Justice Denman in his decision in *Castioni* (1891). The British decision in *Castioni* (1891) and the "political incidence test" is often cited by the Canadian judiciary as well as most other common law countries in their decisions on extradition and political offences (Green, 1984: 182). Perhaps because Canada has been presented with so few extradition cases involving the p.o.e. defence, neither the

courts nor the government wished to play a significant role in determining liberal boundaries of an international legal doctrine that has been widely accepted but is controversial. The possibility of interpreting political crime more liberally did exist under British precedent. Canada has however, chosen to be stringent in its application of the p.o.e., with the exception of Young (1865). Reliance on tradition and a rigid position would allow Canada to avoid criticism with regard to these decisions even if social and political conditions had changed. By allowing other nations with more experience in these matters (U. S., U. K.) to initiate the first departure, Canada could avoid making errors and possibly threatening its international relations.

The p.o.e. issue has been addressed in Canadian courts on four other occasions. However, extradition has not been refused in any of those cases cited. Exceptions to the p.o.e. by statute exist both in the British and in the Canadian Extradition Acts as well as in bilateral treaties negotiated by Canada. The definition of political offences however is a matter left up to the courts, to be interpreted on a case by case basis. According to Castel and Edwardh (1975), exceptions for political offenders are "a matter of domestic public policy" (Castel & Edwardh, 1975:93).

They further argue that:

Each state has taken upon itself to define the scope and the extent of the political offence

exemption in accordance with its own national interests.... In fact the "political offence" is a political question (Castel and Edwardh, 1975: 93).

These authors find support for their argument in the fact that the Minister of Justice (Extradition Act, R.S.C. 1985, sec. 22) has the final say in extradition matters and certainly in cases where political crimes might possibly be involved.

In chronological order the next case which is significant to Canadian case law is **Federenko** (1910). He was a Russian national whose extradition from Canada was applied for based on the grounds that he was alleged to have murdered a night watchman. **Federenko** (1910) and a friend were apparently visiting someone in a Russian village where martial law had been imposed. A local constable and several others including the victim, went to investigate the possible presence of unauthorized visitors to the area. **Federenko** (1910) and his friends were described as "bad men" because of their attire by one of the constables when the constables arrived at the house. While trying to escape the grasp of the watchmen, **Federenko** (1910) was alleged to have shot a constable (Castel and Edwardh, 1975: 98; **Federenko**, 1910: 269-70).

Even though **Federenko** (1910) was a member of the social democratic party whose aim was to change the government and the system of ownership through "revolutionary outrages" and the dissemination of

propaganda, the crime he was alleged to have committed was not done to further the social democratic party's political position [Federenko, 1910: 270]. Justice Mathers cited the reasoning given by Justice Denman in *Castioni* (1891), "for an act such as murder to be excluded from extradition it must be shown that the act was 'done in furtherance of, ... in the course of ... a political rising'" (Castel and Edwardh, 1975: 99; Federenko, 1910: 269). The decision to surrender *Federenko* (1910) was not made contrary to any p.o.e. issues raised by the defense, reportedly the p.o.e. was not addressed by the court. Justice Mathers simply stated he did not find the death of a policeman had sufficient connection with a political movement in Russia to determine the offence was an act of political character [Federenko, 1910: 270-71]. The case of *Federenko* (1910) did not satisfy the elements necessary to be excluded from extradition based on those factors cited in *Castioni* (1891). The *Federenko* (1910) decision clearly shows the p.o.e. existed and was recognized by the Canadian judiciary as a doctrine which must be examined closely in cases where it was raised. It also demonstrates that non-extradition of a political offender was possible if the case satisfactorily met the requirements for exemption.

A much more recent Canadian case addressing the issue of political offences is the *State of Wisconsin and Armstrong* (1972). Karelton *Armstrong* (1972) was sought by

the United States government for the alleged murder and four counts of arson which took place at the University of Wisconsin (Madison). The Army Math Research Centre had been bombed and one death occurred. Four other fire bombs were used to burn down several other buildings also connected with American military research (R.O.T.C. buildings). In the months surrounding the incident there was widespread protest against the Vietnam War, the economic system in general and corporate investment in nations which violate human rights legislation. Following his alleged crimes **Armstrong** (1972) sought refuge in Canada as did many others in that period (Castel & Edwardh, 1975: 108) [**Armstrong**, 1972: 451].

The trial judge, Justice Waisberg ruled that **Armstrong's** (1972) crimes were not political and he should be surrendered as requested. In his judgement, he cited Viscount Radcliffe's decision in **Schtraks vs the Government of Israel** (1964). He found the United States government and courts were requesting **Armstrong's** (1972) return so that they may prosecute him for his conventional crimes. Justice Radcliffe had stated that "the central government stood apart and was concerned only with the enforcement of the criminal law in its ordinary aspect". Justice Waisberg asserted the same argument and ordered **Armstrong** (1972) extradited (Castel and Edwardh, 1975: 108; **Armstrong**, 1972: 450). Castel and Edwardh (1975) in their review of this case suggest Radcliffe's original decision in **Schtraks** (1967) may

have been misinterpreted by some courts. In the case of **Armstrong** (1972) the Canadian court proposed that a crime cannot be judged political unless the requesting state is seeking extradition in order to "politically persecute" the offender (Castel and Edwardh, 1975: 109; Armstrong, 1972: 451). According to Castel and Edwardh (1975), in trying to define political, Justice Radcliffe stated the accused must be at odds with the state, not that the state must necessarily want to persecute the offender. Justice Radcliffe's intention was simply to make the connection between the state and the actor (Castel and Edwardh, 1975: 110).

Upon appeal, the Federal Court upheld the ruling of the trial judge in **Armstrong** (1972). Justice Thurlow and Justice Cameron concurred with Justice Waisberg that not enough evidence existed to link **Armstrong's** (1972) offences to "the political events that had occurred on the campus and across the United States" (Castel & Edwardh, 1975: 110) [Armstrong, 1972: 458]. Thus, the accused's motive for the crimes was not clear. In this hearing however, the presence of political motive was required by the judge. Justice Waisberg also noted in his ruling that **Armstrong's** (1972) crimes were not directed against state property nor was a political uprising present. In fact, the accused's crimes were revolutionary only against the university and not the government authority [Armstrong, 1972: 451-452].

Justice Sweet of the Federal Court of Appeal, in a separate opinion, restricted the p.o.e. further. Justice Sweet acknowledged Radcliffe's decision in *Schtraks* similar to Justice Waisberg in *Armstrong*, suggesting that the individual's motive is not the sole factor which defines a crime as political. Furthermore, Justice Sweet did not see any evidence of persecution by the state of this individual, for his views or affiliations. Therefore, he did not require political asylum (Castel and Edwardh, 1975: 111; Armstrong, 1972: 450-451). Armstrong's (1972) remote connection to the anti-war movement did not make his crimes political according to Justice Sweet. His argument for surrender is further supported by the opinion that the bombings were not an accepted activity of the anti-war movement and that Armstrong was acting solely as an individual (Castel and Edwardh, 1975: 112; Armstrong, 1972: 451).

A short time after Armstrong (1972), the Commonwealth of Puerto Rico requested the extradition of Humberto Pagan Hernandez from Canada (1972). Hernandez (1972) allegedly shot and killed a police officer in the midst of a riot on the campus of the University of Puerto Rico. The fight began between a group of students (3,000) and Royal Officers Training Corps R.O.T.C. cadets. During the hearing, it was submitted that the conflict between these two groups had been present for some time. Apparently a group of students and faculty on campus were vocally

opposed to Puerto Rico maintaining its Commonwealth status. Many of the students were also angered by their possible conscription into the military under the United States of America during the Vietnam War and more so by the fact that their nation did not even have an official vote in Congress. The police were seen by the students as representatives of the state and supporters of the present colonial status and therefore acting in opposition to the student movement (Castel and Edwardh, 1975: 106; Commonwealth of Puerto Rico v Hernandez, 1972: 435-36).

In the final decision, Hernandez (1972) was not to be extradited because there was a lack of evidence presented to reasonably show that Hernandez (1972) was actually the person who was alleged to have murdered the policeman [Hernandez, 1972: 439]. His extradition was denied, but not based on the political offence exemption. However, counsel in this case did request that the issue of political character be addressed. Justice Honeywell was of the opinion that the murder was not a crime of a political nature. He viewed it as a "one sided on-campus confrontation" and it should not be regarded as an uprising against the government. Justice Honeywell strictly adhered to the principles set out in Castioni (1891), requiring a political insurrection and that the act be committed "in furtherance of a political rising" [Hernandez, 1972: 440-41]. Although extradition was denied, this case cannot be held up as an

example of the direct application of the p.o.e. doctrine. Nonetheless, the case and the court's acknowledgment of the p.o.e. doctrine demonstrate its presence in the 1970's as a matter to be examined in cases of extradition, where applicable.

As reported by La Forest (1977) in his text on extradition, the final and most recent extradition case to be dealt with by Canadian courts in which the issue of political offences was raised is **United States of America and Peltier** (1977). **Peltier** (1977) was believed to have committed the 1976 murders of two F.B.I. agents in South Dakota, as well as the attempted murder of two others [Peltier, 1977:121]; (La Forest, 1977: 64).

According to William Corbett, Senior Legal Advisor of the Canadian Department of Justice, the **Peltier** (1977) case was a political one, however, his counsel did not raise the p.o.e. directly in submissions to the court (Appendix, Interview March 5, 1990: 5). Through a survey of the reported case law material on **Peltier** (1977), the p.o.e. does not appear to have been considered in the extradition decision by the courts. **Peltier** (1977) is an example of the absence rather than the presence of the p.o.e. doctrine if compared to the cases reviewed above. Notably, Peltier's extradition was not denied even after several appeals to higher Canadian courts (La Forest, 1977: 64).

Thus, the groundwork for political offenders to be

excluded from extradition was laid by both the British and Canadian Extradition Acts. The p.o.e. doctrine is clearly supported in the case of **Young** (1910) and the doctrine's existence is reconfirmed in each of the other cases reviewed above. Even though the fugitives themselves, **Federenko** (1964), **Armstrong** (1972), **Hernandez** (1972), and **Peltier** (1977), could not be considered to have committed crimes of a political nature, the possibility that they could have been excluded from the procedure of extradition however, existed. This point is further supported by the remarks of each Justice in their final decisions.

Through a review of statutory case law it can be stated that disparity in decision making may be attributed to either the international political climate at the time of the ruling and/or the relationship between the requested and requesting states. A nation's political position with respect to another state's politics is asserted through key extradition cases such as the **Abu Daoud** (1979) case.

6CASE STUDY: CANADA - INDIA EXTRADITION TREATYTHE TREATY

The Canada - India Extradition Treaty (1987) represents a departure from all other Canadian Extradition Treaties negotiated before it with regard to the p.o.e. (See Appendix 1). According to William Corbett, Senior Counsel for the Department of Justice, the creation of this treaty was not debated publicly and therefore, there are not any specific committee hearings available to trace its development. This fact is confirmed by the Standing Committee on Justice and Solicitor General hearing March 20, 1990 at which Mr. Corbett was a witness. This Standing Committee addresses justice related matters on a general basis. Consequently, interviews as an alternative were conducted with some members of the team who participated in the drafting and negotiation of the 1987 Extradition Treaty with India.

INTERVIEWS

As noted above, this research aims to trace the changes to the p.o.e. in extradition law. Both the Canada-India Extradition Treaty itself and the role it plays are a case in point of the possible development of a trend toward the limiting of the p.o.e. The process by which the Canada-India Extradition Treaty was created reveals important information about how political pressure influences the creation of legislation and its implementation. This

information was obtained through interview with members of the team who were responsible for drafting and negotiating the Canada-India Extradition Treaty.

PURPOSE OF CONDUCTING INTERVIEWS

The reason for conducting interviews as a part of the case study was to gather information not otherwise available in the literature. The interviews were designed to gather information explaining the social and political process leading to the creation of the Canada-India Extradition Treaty.

THE ZEITGEIST TOWARD A LIMITED P.O.E.

The interviews with Mr. Corbett (Appendix 3) and Mr. Dickson (Appendix 4) in March-April 1990 confirm that the limiting of the p.o.e. is a part of a general trend. The changes to the p.o.e. are intended to assist in combatting terrorism (Appendix 3 & 4). The Canada-India Extradition Treaty is the first Canadian example of the zeitgeist toward a restricted p.o.e. Since then, a number of other treaties following the Canada-India example have been negotiated such as with the United States, Philippines, Netherlands, Greece, Spain, Italy, Germany, Switzerland, and Portugal (See Appendix 3 & 4). Greece and France are countries which took exception to the limiting of the p.o.e. and would not agree to a limited p.o.e. being included in the treaty negotiated with them (Greece - Appendix 3, Interview 1; France - Appendix 3, P.O.E., Q. 2). Mr. Corbett during his interviews

cited several reasons for interest in limiting the p.o.e. by the international community. The following are statements taken from those interviews. Mr. Corbett stated:

We want to make sure that justice is served. International concern has shifted. The p.o.e. is a well established rule. It used to be protecting fledgling democratic countries was important. Now, escalated levels of violence and the fact that it is no longer just affecting the other guy. ...Yesterday's freedom fighter is today's terrorist (Appendix 3, Transition of the P.O.E., Q.7). ...escalated levels of violence are all over... groups fighting against a government or other sects There is no public sympathy these days (Appendix 3, Explanations for the Transition, Q.1 & 2). ...the fact that terrorism is everywhere even in Canada, it has led to the balanced reduction of the p.o.e. (Appendix 3, Explanations for the Transition, Q. 3).

The United Nations has "chipped away" at the p.o.e. and so have various countries in their regional and bilateral negotiations in an attempt to confront terrorism that has affected them (Appendix 3, 3rd Interview). He explains that "it is easier to wheedle away at it until there is nothing", rather than completely eradicate a widely accepted doctrine. Mr. Corbett contends an immediate and complete elimination of the p.o.e. would meet with significant opposition (Appendix 3, 3rd Interview). This is the case with countries like France and Greece.

Both interviews with Corbett and Dickson confirm that the presence of a limited p.o.e. in the Canada-India Extradition Treaty. They contend Canada first presented the notion of a limited p.o.e. in the draft of the treaty sent

to India. This proposed article 5 (3) in the draft treaty did not meet with any opposition from the Indian government when they responded and is included in the treaty in its entirety (Appendix 1). According to Mr. Corbett, India is concerned with "terrorism" and the term's inclusion in the treaty was India's primary request in negotiations. Mr. Corbett stated "that is why we have it in the preamble. We did not want it in the treaty because there is no way to define it" (Appendix 3, Explanations for the Transition, Q. 4 & P.O.E. Q. 4). The issue of a lack of a universal definition of terrorism and political offences was examined in the Literature Review chapter. Nonetheless, extradition with a limited definition and interpretation of the p.o.e. is considered an effective method to combatting terrorism (Appendix 4, Dickson). At the time of the negotiation of their Extradition Treaty, both Canada and India were concerned about terrorism in light of the Air India disaster.

The zeitgeist toward limiting the p.o.e. shall be explored by a variety of Canadian documents, speeches, and discussion in the House of Commons. In India, the zeitgeist is explored through an examination of special domestic legislation created as a result of political violence in the Punjab region of India. These will be fully examined in the next section.

THE PROCESS OF DEVELOPING AN EXTRADITION TREATY

Little or no information is available on the process of drafting and negotiating extradition treaties. During the interview with Mr. Dickson he confirmed that the process is standardized. However, he states it is flexible in practice, so that negotiations can be tempered with compromise and avoid a stalemate (Appendix 4).

The process of developing of the Canada-India Treaty was initiated as a result of political pressure which resulted from the Air India bombing (Appendix 3, P.O.E., Q.3 & Appendix 4). It was commenced expeditiously for practical reasons. Both the Department of Justice and External Affairs were made aware by the Royal Canadian Mounted Police during their investigation of the bombing that no treaty between Canada and India existed for the purposes of extradition (Appendix 3, General Information Q.3). It was believed the fugitive responsible for the attack, Inderjit Singh Reyat, was in India and therefore the negotiation of a treaty was paramount. In addition, it was thought that the individual who was responsible for the 1982 shootings at the Osgoode Hall court, Kuldip Singh Samra, whom Canada sought, had escaped to India. Canada attempted to have him extradited citing the Fugitive Offenders Act which applies in all Commonwealth countries. However, India did not respond. India subsequently suggested an exchange for Talwinder Singh Parmar, who was wanted in India for several murders, but

Canada did not concur (Appendix 3, Interview 1; Kashmeri and McAndrew, 1989: 23). Once the Canada-India treaty was signed, Canada requested Samra's extradition pursuant to the treaty. However, India replied that they no longer knew his whereabouts. Kashmeri and McAndrew (1989) suggest that the Samra fiasco was the first act of "covert meddling by the Indian government in Canadian Affairs." The Canadian Sikh community had argued Indian government involvement had been occurring for some time (Kashmeri and McAndrew, 1989: 22-23). Mr. Corbett commented during an interview that the limiting of the p.o.e. "evolved through a lengthy and frustrating period of not being able to effectively deal with extradition cases" (Appendix 3, General Information, Q. 8). It is likely that his statement refers to those difficulties experienced in relation to the above noted cases.

The process for the development of treaties is not generally scrutinized by the public. According to Mr. Dickson, agreements that are not "politically sensitive" are drafted, negotiated and ratified through a simple process especially with other common law countries as was the case with India (Appendix 4, General Information Q. 6). This lack of scrutinization by the Canadian public through Members of Parliament is highlighted during the proceedings of the Standing Committee on Justice and Solicitor General on March 26, 1990. Mr. Kaplan registered an "opposition to entering

into agreements or changing our law in a way that would destroy our prerogative of keeping people in Canada who might be fugitives, if we do not want to take sides on an issue in their country of origin" (Canada, Justice and Solicitor General, 1990c: 26:11). Mr. Corbett stated that Mr. Kaplan was not aware the Canada-India Treaty had already been signed and in force. The Canada-India Extradition Treaty clearly limits Canada's "prerogative " to refuse extradition of fugitives from India. Mr. Dickson also advised that in cases of contradictory legislation any bilateral treaty negotiated prevails over domestic legislation such as the Extradition Act (1985) (Canada, Justice and Solicitor General, 1990c: 26:11). Mr. Corbett indicated during an interview that I could not have access to written information regarding negotiation of the Canada-India Extradition Treaty as it was "confidential" (Appendix 3, P.O.E., Q. 3). Mr. Corbett is the same individual who testified before the Justice and Solicitor General Committee and the person who was interviewed by the researcher for this thesis.

Clearly, Canada negotiated its 1987 Extradition Treaty with India in the absence of public scrutiny. In fact, several years after the document was signed by the former Minister of External Affairs, Joe Clark, a Member of Parliament questioned its validity. Similarly, Roby (1986), reports that most articles of the New York Penal law "were

passed without public notice and that the politics involved in their formulation were confined to the room of the Penal Law Revision Commission" (Roby, 1986: 86). It appears that potentially controversial legislation can be developed and entered into force in the absence of public scrutiny in Canada as well as New York, U.S.A.

Efforts were made to contact other members of the Canadian team responsible for negotiating the Canada-India Extradition Treaty. However, those efforts were unsuccessful. Bill Hobson from the Department of Justice, when contacted by telephone April 10, 1990, stated that at that time he had been transferred to the War Crimes Unit of Justice and would be out of town a great deal on cases. He advised that he was the Assistant Deputy Attorney General at the time the Canada-India Treaty was negotiated and confirmed his participation. He declined to be interviewed, citing "no time" as his reason. He noted that Mr. W. Corbett consistently worked in the area of extradition and would be able to answer any of my questions. He did state that he recently attended an Extradition Conference in Syracuse, Italy during which a participant, a lawyer by training, claimed that "India got exactly what they wanted and Canada sold out". Mr. Hobson indicated that he clarified the misconception and informed the conference that "Canada achieved its own goals through the negotiation of the treaty". He further stated that as a result of the

development of the Canada-India Treaty politically charged violent incidents have stopped.

A letter was also forwarded to Mr. L.A.K. James a representative of External Affairs Department Canada (see Appendix 5). At the time the Canada-India Treaty was negotiated he was posted in New Delhi, India. He was later transferred to New Zealand. This information was received from Mr. B. Dickson, Department of External Affairs, and was reconfirmed in a catalogue of Canadian Representatives Abroad produced in 1989 by the Department of External Affairs. The letter requesting Mr. James' participation in this research and a copy of the interview schedule as a questionnaire was forwarded along with a self addressed stamped envelope. He was also presented with the option of being interviewed in person should he return to Ottawa during the summer of 1990, as planned. Mr. L.A.K. James failed to respond to the request for his participation in this thesis.

The negotiation of this treaty was strictly an executive decision (see Appendix 3 & 4). Departmental and executive consultations took place between 1985, after the Air India bombing and 1987, when the Treaty was signed. This conclusion is supported by a variety of Canadian government documents, such as the Throne speech, which support the negotiation of a Treaty with India and other nations limiting the p.o.e. A full review of supporting documents

shall be examined next.

**SUPPORTING DOCUMENTS FOR THE ZEITGEIST TOWARD THE LIMITING
OF THE P.O.E. - CANADA**

Several issues come to mind when considering the trend toward limiting the p.o.e. To what degree are civil liberties guaranteed? Is political crime legitimate dissent or should it be considered conventional crime? To what extent are these changes a new element of social and political control on the international level?

As early as 1970, Canadian foreign policy stated that a broader international interdependency between nations existed. Canada from an economic perspective, also needed to examine ways to establish increased economic relations with countries in the quickly expanding Pacific rim (Canada, Foreign Policy for Canadians, 1970: 14-15 & 39). The framework for Canada's national policy was based on the following: foster economic growth; safeguard sovereignty and independence; work for **peace and security**; promote social justice; enhance the quality of life; ensure a harmonious natural environment.

The second document to be examined recognizes the importance of cooperation of nations around the world to address international issues, in this case specifically terrorism. A joint statement on international terrorism issued at the July 17, 1978 Summit in Bonn, Germany, in which Canada took part, registered Summit members' concern

and desire for international legal responses. They stated:

The heads of state and government, concerned about terrorism and the taking of hostages, declare that their governments will intensify their joint efforts to combat international terrorism....in cases where a country refuses extradition or prosecution of those who have hijacked... governments should take immediate action to cease all flights to that country. ...halt all incoming flights from that country (International Legal Materials, 1978: 1285).

In 1985, External Affairs Canada produced a policy paper on international relations entitled Competitiveness and Security: Directions for Canada's International Relations. This report's stated purpose is to outline "the future directions of Canada's international relations" and assist in a forthcoming parliamentary review (Canada, 1985: foreword). Economic issues are seen as becoming more important in Canada's international relations. Finally, the government plans to "play an active role in the management of international affairs" (Canada, 1985: foreword). The policies contained in this document are founded on the following: unity; sovereignty and independence; justice and democracy; peace and security; economic prosperity; and the integrity of our natural environment (Canada, 1985: 3). Security and the economy continue to be fundamental issues and seem to drive Canada's international policy. The degree of importance which they hold at any particular time is reflective of what is taking place politically. For example, in the 1970 policy statement cited above, environmental issues were not seen as a prominent concern. In an

explanatory note, authors of the policy acknowledge that "There are linkages between these objectives;" and that "...emphasis we place on them shifts from time to time....[In the] 1930's ...our preoccupation was the economy. By 1939, it was security. Today it is both" (Canada, 1985: 3). Under the subheading Asia and the Pacific, India is cited as a "potentially vast market" with "new trade and investment opportunities for Canada" (Canada, 1985: 15). Concern is expressed in the policy paper that Canada will not be able to keep up with the fast pace of development of other nations around the world which could have a detrimental impact on our "strong international position essential to job creation and our continued well being" (Canada, 1985: 23). This concern will affect economic policy and decision making. The Pacific Rim is the area expected to "outpace the rest of the world in economic growth" (Canada, 1985: 29). Canada can therefore be expected to pursue any economic opportunities offered involving nations in the Pacific Rim. India is one such example. In addition to economic potential, security issues are also of importance. "Canadian political/security interests in the region are increasing steadily" (Canada, 1985: 15). The Canadian government recognized the ongoing importance of security and for the future envisions the international community becoming more integrated. Under the subheading "Directions for Change", the report states that

international **"collective security will remain necessary"** and **"interdependence will deepen"** (Canada, 1985: 29). Finally, most pertinent to this thesis, the Canadian government addresses international peace and security issues. The government states that threats to Canadian security are the result of "conflict in the Third World (which) is being carried to North America and Europe by **terrorist** groups, some state-sponsored" (Canada, 1985: 37). It is possible that extremists fighting for an independent state of Khalistan within the Punjab region of India were waging their conflict from within Canadian borders. This issue shall be a part of a later discussion on the political and social context in India that may have led to the limiting of the p.o.e. in the Canada-India Extradition Treaty.

The speech from the throne which marked the opening of the second session of the thirty-third Parliament of Canada was presented October 1, 1986, in the House of Commons. The speech contained a statement about **"constructive internationalism"** which was referred to by William Corbett during his interview as a catalyst to the negotiation of the Canada-India Extradition Treaty (Canada, 1986a: 13). The throne speech also confirms that the Canadian government holds the view that security matters are a top priority; " No task is more important to Canadians

than preserving world peace and security" (Canada, 1986a: 13).

The Report of the Special Joint Committee on Canada's International Relations entitled Independence and Internationalism was completed in 1986. This report refers to two previous government policy papers on foreign policy and international relations from 1970 and 1985, both of which have been reviewed above. This 1986 report can be distinguished from the two former policy documents because this report was prepared by a committee who sought to obtain "public participation" (Canada, 1986b: 1). In accordance with previous foreign policy, international security and economics are issues that appear to be considered most important.

SECURITY

According to the Special Joint Committee on Canada's international relations, the majority of Canadians are confident with "existing alliance relationships" while there was some reluctance registered by a group of witnesses with regard to "Canada's present alliances" (Canada, 1986b: 10). In discussing issues of national unity, the committee stated that "it is not in the national interest to allow ethnic communities to draw Canada into taking sides on rivalries and disputes in their countries of origin" (Canada, 1986b: 32). This may not be a specific reference to Canadians of Indian origin who promote their belief in an

independent Sikh state of Khalistan from India, but it does clearly state the committee's perspective on such issues. The committee's report also indicates that peace and security concerns are reflected in the national unity issue which was ranked first in 1985.

The committee recognized Canadian's concern with regard to international terrorism. They noted that Canada should attempt to address this issue at the "global level" rather than get involved in specific regional conflicts which can develop into greater ones. Furthermore, the committee stated that Canada "should want to see the suffocation of international terrorism" (Canada, 1986b: 34). Those Canadians who participated in the committee's hearings are of the view, that the elimination of terrorism can be achieved by "settling disputes peacefully and on a much wider scope for the rule of law" (Canada, 1986b: 34). The latter could be a reference to the negotiation of extradition treaties which include a limited p.o.e. enabling Canada to extradite and seek extradition for a much broader number of politically motivated violent acts without exception.

This report also devotes an entire subsection to the issue of **terrorism**, recognizing that it had become a problem that the international community can not ignore. The committee is of the opinion that "diplomacy, prevention, bringing terrorists to justice and strict sanctions against

them are essential instruments in the struggle" (Canada, 1986b: 62). The development of the Canada-India Extradition Treaty can be seen as such an achievement.

ECONOMIC BENEFIT EXCHANGED FOR IMPROVED POLITICS

Sovereignty and independence, according to the committee, must be sought after by the Canadian government. However, it is recognized that they exist "within a context of considerable interdependence" (Canada, 1986b: 33). This is especially true of economic realities. India is cited as a country which "merits special consideration" with regard to Canadian business development (Canada, 1986b: 80). It is also acknowledged that India is not only the ninth largest manufacturing country in the world, but a nation with a vast consumer base (Canada, 1986b: 78). Finally, the committee states that if Canada is to benefit from this developing market it must make some important changes to its past practices. For example:

A Canadian trade strategy will have to recognize that the close relationship between business and government in these societies requires more co-operation between Canadian government officials, business leaders and business organizations (Canada, 1986b: 78).

The committee indicated that Canada should promote the pursuit of increased international business relations particularly with India. India "is expected to have one of the fastest growing economies over the next decade" (Canada, 1986b: 81).

Ian Mulgrew (1988) acknowledges that India was a

potentially large economic prospect for Canada during the 1980's. He contends that the Canadian government held back financial support of a department of Sikh studies at a British Columbia university, fearing that it would affect the Indian government's decision with regard to a Canadian firm's bid for a pipeline in India. Mulgrew (1988) quoted the External Affairs Department on the issue of funding a Sikh studies program in Canada: "such a move 'would likely be misunderstood by the government of India, and might well cause damage to our bilateral relations with India'" (Mulgrew, 1988: 166). The state of Canada's relations with India in the context of India's political climate will be examined more closely in the following section.

ONTARIO COURT OF APPEAL CASE: SUPPORT FOR A LIMITED P.O.E.

The 1986 Ontario Court of Appeal decision in the case of **Kevork , Balian and Gharakhanian versus the Queen** denounces "politically motivated violence" (Kevork, Balian and Gharakhanian, 1986b: 6). Justice Smith states that the community's abhorrence of such acts is a factor considered in sentencing. Also, general deterrence should reflect the sentence handed down (Kevork, Balian & Gharakhanian, 1986a: 6-10). In regards to **Kevork**, Justice Smith remarks "your writings and your actions ... make you a terroristYou are not a hero. In my view you are a criminal...I have an obligation to make clear that distinction" (Kevork, Balian & Gharakhanian, 1986a: 15). Although this is a domestic case

involving a 1982 planned attack on the Turkish Embassy in Ottawa by Armenian terrorists, the decision reflects Canadian sentiment toward politically motivated violence during the same period the Canada-India Treaty was created. Mr. Corbett, Department of Justice, indicated in his interview this case had not directly influenced the negotiation of the Canada-India Treaty. It was, however, an example of a domestic case of which they were aware (see Appendix 3 & 4).

CANADIAN MEDIA EXAMPLES OF THE ZEITGEIST

According to a 1985 Globe and Mail article, three men of Armenian descent were charged with an attack on the Turkish Embassy March 15, 1985. The three, Noubarian, Marachelian and Titizian, were charged with several explosives and weapons-related offences, as well as murder and attempted murder. A Montreal lawyer argued that the three were not guilty of first degree murder because the "killing of the security guard ... was a political and not criminal act." However, this argument is not likely to be accepted as a defense (Globe and Mail, 1985: 5).

An editorial article dated February 9, 1987, suggests that two recent visits to India by the then External Affairs Minister, Joe Clark, reflect "Canada's resolve to build closer economic relations with the future superpower of South Asia" (Globe and Mail, 1987: A6). The article states that Canada is likely to become aware of the

Indian government's close ties to business: "New Delhi is not adverse to making trade ties conditional upon political cooperation" (Globe and Mail, 1987: A6). According to the editorial Canada's acquiescence to India's request for a bilateral extradition treaty, raised fears among Sikh Canadians: "Canada's Sikh community frets that the treaty will provide New Delhi with a powerful stick to use on expatriate Indians whom it considers a political nuisance" (Globe and Mail, 1987: A6). The editorial suggests their concerns are not unfounded, given that two Indian consulate officials in Canada "were involved in covert efforts to divide and discredit the Sikh community" (Globe and Mail, 1987: A6). Although Sikh Canadians fear India, who is struggling with a very real terrorist threat, safeguards exist in the extradition treaty, such as the principle of duality and rules of evidence (Globe and Mail, 1987: A6).

Finally, when former External Affairs Minister Clark visited India in February 1987, he was questioned vigorously by Indian journalists with regard to Canadian currency laws which might allow expatriates to fund Sikh terrorism in their country of origin. He also answered questions regarding an extradition treaty which Canada's Sikh community said was "already in place, but Mr. Clark categorically denied it" (Globe and Mail, 1987b: A4). Mr. Clark refused to answer further questions on the extradition treaty and stated "the agreement was intended to 'deal with crime, and not to

stifle political dissent' among Sikhs in Canada" (Globe and Mail, 1987b: A4).

CANADIAN PARLIAMENTARY DEBATES

On February 5, 1987, M.P. John Nunziata called for delay in the signing of the Canada-India Extradition Treaty. He argued that "Canadian Sikhs are justifiably alarmed ... feel this treaty will allow the Indian Government to terrorize and intimidate ... the Canadian Sikh community" (Hansard, 1987: 3142). He asked that the signing of the treaty be delayed until the "necessary consultation with Canadian Sikhs had occurred" (Hansard, 1987: 3142).

After the treaty was signed, the issue was raised in the House of Commons, this time by M.P. Nelson Riis on February 12, 1987. He submitted that the government meet with the Canadian Sikh community to address their fears and discuss how the treaty can be applied. "They wish to be assured that it will not be abused" (Hansard, 1987: 3363). Mr. Riis alleged that the Sikh community has been attempting to schedule a meeting with the Minister of External Affairs for two and a half years without success (Hansard, 1987: 3363).

On February 16, 1987, M.P. John Nunziata stated that "Canadian Sikhs have been critical of the fact that there was no prior consultation before the treaty was signed" (Hansard, 1987: 3470). The Secretary of State for External Affairs responded by stating consultations are not a matter

of practice when negotiating treaties of any kind by this or any other government. He attempted to alleviate fears by assuring Canadian Sikhs they were protected. He stated:

That treaty is the first of a new generation of extradition treaties in Canada which incorporate fully the protection set out for Canadian citizens under the Canadian Charter of Rights (Hansard, 1987: 3470).

Next, the issue of new draconian laws being passed in India which allowed the police to detain an individual for up to two years without trial or charge was raised by Mr. Nunziata. In response, Mr. Clark argued a number of "safeguards" exist for all Canadians which also apply in extradition cases (Hansard, 1987:3470).

Under the subheading of **ROUTINE PROCEEDINGS**, the Canada-India Extradition Treaty was tabled in the House of Commons on March 27, 1987 and it was said to have gone into force February 10, 1987 (Hansard, 1987: 4636).

On September 15, 1987, during a debate on the matter of Mutual Legal Assistance in Criminal Matters, M.P. Ernie Epp discussed openly a letter he had sent to the Minister of External Affairs and the response. In his correspondence, he expressed a concern that in some cases immigration officers have to deal with very authentic looking forged documents and suspects the same could apply in cases of extradition. However, the Minister of External Affairs responded by stating "Extradition treaties are a fundamental and valued element in international relations and I would doubt that

any country would seek to misuse such arrangements through fraudulent documentation" (Hansard, 1987:8961). The Indian government took part in covert operations in Canada in an attempt to discredit the Canadian Sikh community. Finally, Mr. Epp, referred to the section on political offences in the extradition treaty. He stated "recognizing the way in which terrorism is treated these days, there are next to no protections" (Hansard, 1987: 8962).

LAW REFORM COMMISSION RECOMMENDATIONS FOR LEGISLATION

In its June 1987 report on Recodifying the Criminal Law, The Law Reform Commission calls for the criminalization of terrorist activity which is politically motivated. The recommendation is that terrorist motives be included in a separate section under murder. Article 6(4)(d) would read "First Degree Murder. Murder is first degree murder if committed: (d) for terrorist or political motives" (L.R.C., 1987: 58). The alternative 6(4)(a) states "First Degree Murder. Murder is first degree murder if the offender deliberately subordinates the victim's life to his own further purpose of: (a) advancing terrorist or political objectives" (L.R.C., 1987: 58-59). These are proposed changes to domestic legislation not actual law. It is however, important to remember that domestic law governs a great deal of what is done with respect to an international terrorist incident. Domestic statutes outline the procedures which are followed with regard to an extradition

application. Similar to the Extradition Treaty between Canada and India, these recommendations indicate that **terrorism** is a factor which triggered the proposed and actual legislative changes.

CONDEMNATION OF CANADIAN SIKH ORGANIZATIONS AFTER THE TREATY

Although the following statements took place after the negotiation and signing of the Canada-India Treaty, they highlight the opinion of the Canadian Government with regard to some of the Canadian Sikh community only a year after the treaty was signed. M.P. Sergio Marchi moved during question period in the House of Commons on March 10, 1988 that the then External Affairs Minister Joe Clark made an error by sending a letter to seven Provincial Premiers to boycott three Sikh organizations in Canada and should apologize (Canada, Hansard, 1988: 13581). The organizations were the Babbar Khalsa, the International Youth Sikh Federation and the World Sikh Organization. They are organizations which exist primarily to promote an independent Sikh state of Khalistan (Canada, Hansard, 1988: 13586). Mr. Marchi argued that the letter condemned the entire Canadian Sikh community and denied them their right as Canadians to "free and peaceful expression of their opinions" (Canada, Hansard, 1988: 13581). He acknowledged that some "individual members of the World Sikh Organization may have made statements in support of armed struggle to obtain an independent Sikh state, but it is arguable whether those statements were made

and they are certainly not reflective of the entire organization's views" (Canada, Hansard, 1988: 13583). Mr. Marchi and Mr. Kaplan questioned whether the Minister of External Affairs Canada should be commenting on domestic issues of foreign governments and noted that it "undermine[d] the rights of Canadians" (Canada, Hansard, 1988: 13583 and 13589). Mr. Marchi stated that the Indian High Commission denied that they requested the boycott which was implied in Mr. Clark's letter (Canada, Hansard, 1988: 13584).

The then Secretary of State for External Affairs responded to the above questions and cited numerous incidents of terrorism by which Canadians have been directly affected, including the Air India disaster. He stated:

no nation is immune to the scourge of terrorism. It is for this reason that it is essential that we pursue with our allies the development of concrete measures to combat terrorism... we must put in place protective measures at home and be vigilant in ensuring the prevention of occasions and opportunities for terrorism to incubate or to strike (Canada, Hansard, 1988: 13586).

Mr. Clark further argued that many people come to Canada because they are free to express themselves in a multicultural society, but "in order to have freedom individuals must accept some restraints as set out in the law" (Canada, Hansard, 1988: 13587). He contends that while many Canadians of Sikh origin are "first class..., activities of a small militant minority... represent the most serious internal security threat that faces Canada

today" (Canada, Hansard, 1988: 13587). Mr. Clark reported that the Babbar Khalsa and the Sikh Youth Federation are international organizations which support the use of violence in order to achieve the establishment of an independent Sikh state. He further argued that "such activities invite[d] representations to the Government of Canada from the Government of India" and consequently the Canadian Government was compelled to respond (Hansard, Canada, 1988: 13588).

MINISTER OF JUSTICE CONFIRMS THE ZEITGEIST OF A LIMITED P.O.E.

On January 24, 1990, the Minister of Justice at the time, Doug Lewis, addressed a Conference of the Society for the Reform of the Criminal Law in Washington D.C. In that address, he stated that "Extradition is an important tool of international cooperation in law enforcement" (Canada, 1990b: 4). He confirmed that the environment for the limiting of the p.o.e. existed prior to the Canada-India Treaty's negotiation. He stated:

In 1985, as a part of the government's commitment to constructive internationalism, the Department of Justice commenced a review of our extradition treaties to identify ...countries with whom we needed extradition relations but had none (Canada, 1990b: 7).

In an Ottawa Citizen article, Mr. Lewis' comments to a Washington law conference were quoted as follows: (the Canadian government must) "strive to ensure that our extradition arrangements appropriately meet current needs"

(Ottawa Citizen, 1990: A16). He confirmed that the government is amending all extradition arrangements in an attempt to address extradition problems Canada has faced with either old or no treaties, as was the case with India.

EXTERNAL AFFAIRS DEPARTMENT CONFIRMS THE ZEITGEIST TO LIMIT THE P.O.E.

An internal review by the Department of External Affairs of recent developments in Canadian extradition law states that "since 1987 we have been attempting to address three specific problems; flexibility in extradition, evidentiary problems and the political offence exception" (Allin, External Affairs, 1990: 1). Specific to the p.o.e., the review confirms that increases in international terrorism have caused the shift in perspective with regard to the historically accepted principle of the p.o.e. The report indicates the following:

Extradition treaties have traditionally contained a provision that allows the requested state to refuse to extradite if the offence... is of a political character. Our treaties prior to 1987 contain such a provision. The rise in international terrorism, however, has required changes in the traditional way of viewing political offences. Starting with India (Allin, External, 1990: 3).

FURTHER CONFIRMATION FROM C.S.I.S. AND SECURITY REVIEWS

The Air India bombing is cited in the 1985-86 Annual Report of the Security Intelligence Review Committee. The report stated the investigation into the bombing is ongoing and is a priority of C.S.I.S. and the R.C.M.P. Both the bombing of flight 181/182 and the explosion at Narita

Airport in Japan are thought to be the result of "bombs planted by terrorists" (Canada, 1985-86: 17). There was also testimony by representatives from the World Sikh Organization (W.S.O.) and the Sikh Professional Association before the CSIS Review Committee during 1990. During January 1990 Mr. Karnail Singh Gill, Director of Administration for the W.S.O. testified before the Review Committee of the CSIS Act and the Security Offences Act that Indian security agents were present in the Indian High Commission in Canada and consequently, Canadians of Sikh descent have been experiencing problems (Canada, 1990d: 10: 24). This statement according to Mr. Gill, was congruent with statements made by Kashmeri and McAndrew in their book entitled Soft Target (1989). They argued the government of India commenced "subversive activities" in Canada around 1980 (Canada, 1990d: 10:24). Mr. Gill also testified a number of people in India had been tortured and/or murdered as a result of intelligence information provided to the Indian government by Canada (Canada, 1990d: 10: 33). He stated the W.S.O. was most concerned with India's lack of regard for human rights which had been directly or indirectly affecting the Canadian Sikh community (Canada, 1990d: 10:34). Finally, according to Mr. Gill, the W.S.O. believed "the Government of India was interfering improperly in Canadian affairs and in the Sikh community in Canada ... [and] the Government of India was behind the Air India

crash" (Canada, 1990d: 10: 36).

Mr. Suresh Singh Bhalla of the Sikh Professional Association of Canada was the second representative of the Canadian Sikh community to testify before the CSIS Review Committee. In his testimony before the committee he also cited the Kashmeri and McAndrew text. He testified the Government of India launched a "disinformation campaign" in 1983-84. He stated that by 1985, the R.C.M.P. and C.S.I.S. grew tired of investigating false claims by the Indian government regarding the Sikh community and they were surprised by the Air India bombing (Canada, 1990e: 20: 5-6). Finally, Mr. Bhalla testified, CSIS ceased sharing intelligence information with the Indian government as "Indian intelligence agents were more of a threat to security than a helping hand" (Canada, 1990e: 20: 6). As well, he stated that CSIS determined that "agents of the Government of India were linked to the Air India and Narita bombings" (Canada, 1990e: 20: 6).

INDIA'S SOCIAL AND POLITICAL CONTEXT

Violent political uprising and terrorism had been a concern of the Indian government for some time, even before it became an issue which was addressed by the international community. That is evidenced by a 1937 Convention on Terrorism. India was the only nation to ratify the agreement (Williams and Castel, 1981: 195).

An examination of Sikh extremism and the Indian

government's response to Sikh calls for an independent state of Khalistan are both pertinent to this case study. Learning about the history of the Sikh religion helps any student come to an understanding of Sikh violence. Colonel Brian Cloughley (1986) states Sikhism grew out of the Bhakti movement in India which opposed the Hindu caste system in their society during the fifteenth and sixteenth centuries. The religion grew, but developed its own caste system resulting in "persecution within and outside the religion" (Cloughley, 1986: 33).

The Sikhs fought against the British in the nineteenth century in an attempt to maintain their land. While they were defeated, they were respected by the British as strong opponents and later made up a great portion of the military in India.

Early in the twentieth century, many Sikhs emigrated to the Far East, the United States and Canada. In 1947 when Pakistan and India broke into independent nations many Sikhs were forced to leave Pakistan and settled in the Punjab region of India. Although many Sikhs lived in this region there were not enough to ensure a majority Sikh government. This situation led to the "political development of Sant Jarnail Singh Bhindranwale" who was the leader of a militant Sikh movement toward an independent state of Khalistan (Cloughley, 1986: 33).

Sikh militancy led to Indira Gandhi's decision to

initiate a military assault on the Sikh Golden Temple in Amritsar in 1984. Subsequently, she was murdered by her own Sikh bodyguards who were avenging the attack on the Golden Temple (Cloughley, 1986: 36).

Brian Cloughley (1986: 35) argues the longer the Indian government put off Sikh requests for discussion regarding special provisions in the constitution for Sikhs the more Sikh militancy grew. Sikh violence was responded to with greater force by the Indian government. For example, Operation Blue Star involved a bloody raid on the Sikh Golden Temple. As well, the Indian government began to implement legislation which would allow the police to search and arrest without a warrant (Cloughley, 1986: 35).

By 1985, Sikh leaders had split and Rajiv Gandhi who succeeded his mother, after her assassination, managed to build alliances with moderate Sikh leaders. A short time later, Sant Harchand Singh Longowal, President of the Akali Dal, a moderate, was murdered by extremists (Cloughley, 1986: 37). Other political efforts to transfer the capital Chandigarh to the Punjab, a predominantly Sikh area by the Mathew Commission, were fruitless. Consequently, unrest grew. Radicals, according to Cloughley (1986: 37), refused to see the "impossibility of their aspirations" for an independent state of Khalistan.

On the international scene, India argued it should be granted the right to take "direct action" against

supporters of Sikh militants in other countries. However, that assertion was opposed by societies where human rights proponents objected (Cloughley, 1986: 37).

Cloughley (1986) suggests Sikhism is thought to be the catalyst behind Sikh nationalism, but it is "alleged ill-treatment of Sikhs by the Indian government that fuelled the fires of discontent (Cloughley, 1986: 33).

LEGISLATIVE CHANGES IN INDIA

According to a 1988 Amnesty International review of India, legislative changes have led to human rights abuses by the government that have been unchecked by the international community. The review indicates that "the government has assumed wide powers under special laws designed to deal with violent opposition ... for example in the state of Punjab" (Amnesty International, 1988: i). The National Security Act, which was passed in 1980, made it legal to detain individuals without trial or charge for "loosely-defined security reasons for up to one year (two years in Punjab)" (Amnesty International, 1988: 3). The review suggests that this legislation can be used to limit "legitimate opposition". It also alleges that political and religious leaders were being detained for participation in "peaceful demonstrations against security forces" (Amnesty International, 1988: 3).

The Jammu and Kashmir Public Safety Act, enacted in 1978, also granted broad powers of arrest to the police. In

1987, a High Court ruled in favour of a detainee and stated that Section 10 A "removed constitutional safeguards" (Amnesty International, 1988: 4).

Additionally, according to the Amnesty International report the Terrorist and Disruptive Activities (Prevention) Act TADA, passed in 1985, violates standards of detention, public trials and the presumption of innocence. The TADA has provisions which grant witnesses anonymity and establish special courts to hear trials in camera (Amnesty International, 1988: 4-5).

The Indian government also enacted the Terrorist Affected Areas (Special Courts) Act in 1984. The powers granted by this legislation are similar to those in the TADA. For example, 366 Sikhs were arrested after the raid on the Golden Temple in Amritsar in June 1984, many of whom were either there to worship or employees. Originally they were detained under the National Security Act and "later charged with 'waging war' under the Terrorist Affected Areas Act" (Amnesty International, 1988: 6).

The Indian Constitution was amended in contravention to the International Covenant on Civil and Political Rights according to Amnesty International's report. This amendment enables the government to invoke a state of emergency based on a "vaguely defined 'internal disturbance'". Previously, the Constitution allowed only for a state of emergency to be invoked if India was threatened by an external force or war

(Amnesty International, 1988: 7). An individual's right to life and personal security as guaranteed by India's Constitution, Article 21, is suspended by the above amendment. Security forces are not restricted by law. "When making arrests or detaining people or even when arbitrarily shooting people in Punjab," security forces cannot be subjected to any form of prosecution in the case of injustice (Amnesty International, 1988: 8). India's concern with political violence or terrorism has superseded, in many cases, the Indian government's obligations toward human rights as illustrated above. It is difficult to know to what degree these political circumstances influenced India's desire to negotiate a bilateral extradition treaty with Canada, but it is likely to have had some impact.

Thomas (1986) also confirms the existence of a "Sikh crisis in Punjab" and he acknowledges that the Indian government used force during the 1984 raid on the Golden Temple. He states that the incident at the Golden Temple is one of several examples that have occurred in India since 1947 (Thomas, 1986: 4).

Thomas (1986: 6) contends that many changes have taken place in India's "external security and domestic political environment". Due to "internal violence and political turmoil" in India changes were made to India's national security policy. The military was called upon more often to control domestic political violence. In addition,

they were granted the opportunity to participate in the development of internal security policy. The latter was a new role for the military (Thomas, 1986: 8).

Fears that citizens' rights would be sacrificed in order to grant the government greater powers to enforce laws have existed in India since the suspension of the constitution between 1975 and 1977, according to Thomas (1986). This emergency resulted in economic hardship for the Indian people. According to Thomas (1986: 8), it is questionable whether India has the ability to ensure state security within a democratic system. Thomas states:

The government's attitude under the late prime minister (Indira Gandhi) was that terrorist activities call for the suspension of basic democratic principles and the resort to ... curfew, mass arrests and detention without trial, and restrictions on the freedom of the press (Thomas, 1986: 61).

India's development of security policy and legislation has been directly affected by their social and political circumstances as illustrated above. Also given the above, the restriction of the p.o.e. in extradition law could be considered an insignificant change by comparison to the laws enacted in India since the late 1970's.

6CONCLUSIONS: DISCUSSION

This thesis explores whether a trend to limit the p.o.e. within extradition law exists. In fact, it appears the p.o.e. began to be limited by the I.C.A.O. Their aim was to eliminate specific acts of terrorism, hijacking (Hague, Montreal). Then, efforts were made by various nations to protect special groups through the development of the Convention on the Hostage Taking of Internationally Protected Persons. Recently, there has been a move to eradicate all other forms of violence used by those committing violent political offences for example, indiscriminate or wanton violence. The aim of many of these documents, beginning with the International Civil Aviation Organization's conventions was to ensure the extradition of offenders (hijackers) under any circumstances, regardless of motive. However, this was not achieved. Final drafts of these conventions only assured that a choice to extradite or try ("aut dedere, aut judicare") was present. These conventions do not ensure that each contracting state is obligated to extradite, regardless of motive. Additionally, there is a concern that exists with regard to various nations' responses to international laws including extradition, not the documents themselves. Hannay (1980: 382) summarizes this concern in the following statement: "international law is effective only to the extent that

sovereign states are willing to abide by it". No vehicle for legal recourse exists, if a nation chooses not to adhere to international law. Therefore, it is difficult to ensure that signatories who fail to abide by their agreements shall be faced with sanctions. Iran is commonly cited as an example of a nation in violation in light of the hostage taking incident at the American Embassy in Teheran. According to Lodge (1981), extradition was only one aspect of criminal law that was being examined as a method to improve "cooperation" in combatting terrorism. Therefore, efforts to address terrorism are limited by this narrow focus (Lodge, 1981: 186).

The trend toward the limiting of the p.o.e. doctrine in extradition law exists, but it is not without exceptions. Several of the legal instruments reviewed in this thesis contain limitations and restrictions on the application of the p.o.e. for a specific list of acts (U.S.-U.K. Supplementary Treaty, The ECST, and the Canada-India Extradition Treaty). A restricted interpretation of the p.o.e. exists in these documents. The documents also contain reservations which aim to ensure that principles like political neutrality, humanitarian concerns and the right to pursue political change through activism are maintained. These reservations are intended to protect those principles under which the p.o.e. doctrine was established. Although it is not the object of this thesis, one manifestation of the

development of legal instruments intended to combat terrorism is the establishment of the 'extradite or try' principle ("aut dedere, aut judicare") (Mullally, 1986: 1535). Perhaps, it is easier to establish a principle of choice rather than obligation.

Parallel to collaborative European community efforts to increase security is the continual creation of bilateral extradition agreements between various nations. According to Lodge (1981: 179) international cooperation of this nature is usually contingent upon actual terrorist incidents taking place in those states. She (1981) contends that the Aldo Moro case (Italy) is responsible for the EEC's discussion of broader proposals of "enforcement" beyond a "common undertaking to extradite terrorists" (Lodge, 1981: 180). It may also have triggered the creation of new agreements between Italy and France. Lodge reports that issues such as "police liaisons, arms supply, EEC citizens' rights and a common judicial area" had all been canvassed in the European parliament in response to this 1978 case (Lodge, 1981: 180). Evidence suggests that the Air India bombing in June 1985 had a similar effect on the Canadian government. Soon after that incident, Canada and India negotiated a new and strict extradition treaty which included a restricted interpretation of the p.o.e. The treaty went into force in 1987. Two of the members of Canada's team who participated in the negotiations of the Canada-India Extradition Treaty

confirm that the Air India bombing led to the immediate negotiation of that extradition treaty. Additionally, the Air India bombing prompted a review of all other Canadian extradition treaties.

Three specific cases have been important catalysts to the Council of Europe's creation of the European Convention on the Suppression of Terrorism. One example is the case of **Abu Daoud** (1972), the individual who allegedly arranged for the murder of eight Israeli athletes at the Munich Olympics. France refused his extradition to both Israel and West Germany, later deporting him to Algiers. Another example is the case of **Holder and Kerkow** (1972), two Americans who hijacked a U.S. aeroplane and sought refuge in France. They also were deported to Algiers, rather than extradited. A third example is that of **Klaus Croissant**, who in 1977 helped to share information between imprisoned and free members of the Baader Meinhof (a terrorist organization). In his case France again denied extradition based on the p.o.e. France, as recently as 1994, quietly released assassins of an Iranian political leader, Bakhtiar, who was assassinated during Iran's revolutionary uprising. France's decision may result in the development of other European legal instruments which would stop nations from freeing such individuals without bringing them to justice.

American cases involving alleged PIRA terrorists [**McMullen** (1978), **Mackin** (1983) and **Doherty** (1986)] are

believed to have contributed to the negotiation of the 1985 U.S.-U.K. Supplementary Treaty on Extradition (Mullally, 1986: 1532). Extradition of these offenders was refused based on a liberal interpretation of the p.o.e. by the U.S. courts and an acknowledgement by the courts of an ongoing political conflict within Northern Ireland.

In conclusion, the move to coordinate efforts on an international basis is a sign that those nations negotiating such legal instruments, through cooperation, fear the damaging effects of terrorism on world public order.

By convention and by treaty, the application of the p.o.e. has been limited. Additionally, precedent setting cases have contributed to the trend toward limiting the p.o.e. Tests applied by the judiciary, which determine offenders' motivations and political goals, have altered throughout this century [Castioni (1890); Abu Eain (1979), Piperno (1979)] (Mullally, 1986: 1510). The limitations of the p.o.e. in case law parallel changes that have occurred within international statutory and conventional law. However, there are examples of divergent case decisions. One example is the case of McMullen (1978) where the governments of the U.S. and the U.K. were appalled by the judicial decision to refuse extradition based on the political nature of McMullen's offences. Other examples are found in the Piperno (1979) and Abu Eain (1979) cases. These are examples of the trend to limit the p.o.e. Although his crimes were

judged to be of a political nature, **Piperno** (1979) could not be exempt from extradition due to the serious nature of the acts committed. This clearly contradicts earlier European case law as in **Artukovic** (1951), who allegedly committed barbarous war crimes in Yugoslavia, and was judged not extraditable. In the case of **Abu Eain** (1979), the central question was whether the p.o.e. is meant to exempt all forms of violence, no matter how barbarous. **Eain** was ordered extradited because his crimes were directed at innocent civilians rather than the political organization. It has been suggested that the decision in the **Abu Eain** (1979) case was intended to demonstrate that the U.S. is not a 'haven' for terrorists and that the U.S. expects cooperation from other nations who might be harbouring "terrorists who commit violent acts against Americans" (Mullally, 1986: 1537-8).

This thesis has identified three main concerns. One of my concerns is the lack of an effective international effort in the fight against terrorism. Remedies that the U.N. has developed have accomplished little with respect to combatting terrorism. Perhaps this is due to a lack of a universally accepted definition of terrorism or political offence. The absence of a definition is in part due to discrepancies between the political positions of Western and Third World nations. Hence, the interpretation of agreements and these terms has been left solely to domestic courts. A substantial number of states or groups view terrorism as an

acceptable response to perceived oppression. Others feel politically restrained from challenging this view and therefore, condone it as in the French case of **Abu Daoud** (1977). This concern has again been raised by Sudan's 1994 extradition of an elusive international terrorist, **Carlos**, to France. **Carlos** is believed to have orchestrated the kidnapping of several OPEC ministers in 1975. While some nations argue that under no circumstances could terrorism be tolerated, other nations argue that state terrorism is more intolerable than any assaults by individuals or small groups. Those who support insurgent acts against oppressive regimes note, "any struggle against racism, colonialism, foreign occupation is a 'struggle for Justice' and therefore any means to attain national liberation should be permissible even supported" (Ferencz, 1980: 68-9). Seemingly, these conflicting political perspectives are irreconcilable as one man's terrorism is another man's heroism.

A second major concern I have raised in this thesis is the reluctance of many nations to become involved in a collaborative effort to combat terrorism. Mullally (1986) suggests that the reservations asserted by Article 3 of the U.S-U.K. Supplementary Treaty are representative of the fear expressed by nations that people will no longer be protected by humanitarian and neutrality principles and will undermine their right to pursue political activism (Mullally, 1986:

1544-5). Cantrell (1977) notes that nations, like the U.S., in their efforts to protect humanitarian principles, fear creating political safe havens for terrorists. He suggests that it is better to gradually limit the availability of legislation (including the p.o.e.) to political offenders and/or terrorists thereby diminishing the development of havens which may be created in individual nations who support their activity.

The third concern I have raised in this thesis is that political offences are both political and legal in nature. A discrepancy has been identified between those who create legal instruments (government) and those who apply them (judiciary). Special courts designed to deal solely with political offences have been suggested as a solution to this discrepancy. Crelinsten and Schmid (1992) suggest that special courts dealing with terrorism must consider these offences the "peacetime equivalent of war crimes". The courts could acknowledge the "special nature of the crime", but recognize that it is not a "formal state of war". Therefore, it would not be necessary to involve the military in addressing these terrorist incidents and most importantly it would not result in the suspension of democratic rights (Crelinsten and Schmid, 1992: 336).

Mullally (1986) notes that there is widespread support in the international community for retaining certain elements of the p.o.e. while some argue for complete

eradication of the concept. Some nations wish to limit the p.o.e.'s application to certain offences. Strict limitations through state legislation will encroach on judicial discretion and politicize decisions being made in these types of cases, not the acts themselves. The resulting noticeable trend is the growing development of international cooperation towards limiting the p.o.e. to the point that this juridical concept will no longer have formal application.

This thesis confirms the existence of a trend to view acts of political violence and/or terrorism as strictly common crime rather than legitimated political crime. The acceptance of the p.o.e. doctrine which acknowledges a person's right to fight against oppression is slowly being restricted in international agreements and in practical application of extradition law. Terrorists of today are dealt with in much the same manner as violent offenders who advocated anarchy in the early part of this century (Schiff, 1983: 442). This case highlights that a restriction of the p.o.e. doctrine may be a political decision motivated by the political climate. The interviews, parliamentary debate, legislation and committee hearings which are a part of the Canada-India case study indicate that the law and its application are not apolitical. This thesis provides an indication that the changes to the p.o.e. are influenced by both political and social factors.

The inability to show a direct causal link between socio-political conflicts and specific legislative changes limits the conclusions presented in this thesis. However, a socio-political conflict has been identified as the impetus for the specific legislative change, namely the Canada-India Extradition Treaty. A strength of the data collected through interviews is the scope of materials and knowledge that William Corbett, of the Department of Justice, provided as he has worked extensively in the area of extradition. Indeed, he was one of the members of the Canadian team involved in negotiating the Canada-India Extradition Treaty.

Future research may consider a comparison between the use of the administrative deportation procedure (to return political offenders and terrorists) and extradition which includes a limited p.o.e. Additional research involving an examination of treaties negotiated since the Canada-India Extradition Treaty may help to further the findings contained in this thesis. Such research may further highlight that a causal link exists between socio-political conflicts, changes to legislation, and the application of law.

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APPENDICES

APPENDIX 1

EXTRADITION TREATY BETWEEN CANADA AND INDIA

New Delhi, February 6, 1987

Instruments of Ratification exchanged at New Delhi
February 10, 1987

In Force February 10, 1987

EXTRADITION TREATY BETWEEN CANADA AND INDIA

The Government of Canada and the Government of India, desiring to make more effective the cooperation of the two countries in the suppression of crime by making provision for the reciprocal extradition of offenders, and recognizing that concrete steps are necessary to combat **terrorism**, agree as follows:

Article 1

DUTY TO EXTRADITE

1. Each contracting state agrees to extradite to the other, subject to the conditions of this Treaty, any person who, being accused or convicted of an extradition offence as described in Article 3, committed within the territory of the one State, is found in the territory of the other State, whether or not such offence was committed before or after the coming into force of this Treaty.
2. For the purposes of this Treaty, the territory of a contracting State includes all the land, air space and waters within its jurisdiction.
3. There is no duty to extradite a person where the request for extradition is made for the purpose of discriminating against that person on account of his race, religion, colour or ethnic origin.
4. There is no duty to extradite a person who has been convicted and sentenced in respect of an extradition offence, if the sentence imposed or remaining to be served, is imprisonment for 6 months or less.

Article 2

EXTRATERRITORIAL OFFENCES

Extradition shall also be granted in respect of an

extradition offence as described in Article 3, committed outside the territory but within the jurisdiction as asserted by the requesting State if the requested State would, in corresponding circumstances, have jurisdiction over such offence.

Article 3

EXTRADITION OFFENCES

1. An extradition offence is committed when the conduct of the person whose extradition is sought constitutes an offence punishable by the laws of both contracting States by a term of imprisonment for a period of more than one year.

2. When extradition is ordered in respect of an Extradition offence, it may also be ordered in respect of any other offence related to the commission of the extradition offence if it is specified in the request for extradition and meets all requirements for extradition except the term of imprisonment referred to in paragraph 1.

3. Extradition shall be ordered for an extradition offence notwithstanding that it may be an offence relating to taxation or revenue or is one of a purely fiscal character.

Article 4

EXTRADITION AND PROSECUTION

1. The request for extradition may be refused by the requested State if the person whose extradition is sought may be tried for the extradition offence in one of its own courts.

2. In deciding whether or not to refuse a request for extradition for the reason set out in paragraph 1, the requested State shall consider which contracting State has felt or will feel the effects or consequences of the offence more gravely or immediately.

3. Where the requested State refuses a request for extradition for the reason set out in paragraph 1, it shall submit the case to its own competent authority so that prosecution may be considered. In such case, the requesting state shall, upon request, provide all assistance that may be required by such competent authority in respect of the prosecution.

4. Where extradition is granted under this Treaty, the requesting State shall ensure that the person extradited is brought to trial within 6 months of the extradition.

5. Where trial has not commenced within 6 months, the requesting State shall bring the person extradited before its appropriate courts for bail to be considered pending trial and to set a trial date for the charges for which extradition was granted.

Article 5

EXCEPTIONS TO EXTRADITION

1. Extradition may be refused if:
 - * a) the offence in respect of which it is requested is considered by the requested State to be a political offence or an offence of a political character; **[this is the p.o.e.]**
 - b) it appears to the requested State that the request was not made in good faith or in the interests of justice or was made for political reasons or that it would otherwise be unjust having regard to all the circumstances including the trivial nature of the offence.
2. Extradition shall be refused if:
 - a) the offence in respect of which it is requested is considered by the requested state to be a purely military offence;
 - b) the person sought is being proceeded against or has been tried and acquitted or discharged or convicted and punished, by the requested State or by a third state for the offence in respect of which extradition is requested.
3. * For the purposes of this Treaty conduct constituting the following offences according to the law of the requested State shall not be regarded as political offences or offences of a political character: **[these are exceptions to the p.o.e.]**
 - a) an offence within the scope of the convention for the suppression of Unlawful Seizure of Aircraft, signed at the Hague on December 16, 1970;
 - b) an offence within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971;
 - c) an offence within the scope of the convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, signed at New York on December, 14, 1973;

EXCEPTIONS TO EXTRADITION continued

- d) an offence within the scope of any convention to which both contracting States are party and which obligates the parties to prosecute or grant extradition;
- e) an offence related to terrorism;
- f) murder, manslaughter, assault causing bodily harm, kidnapping, hostage-taking, offences involving serious damage to property or disruption of public facilities and offences relating to firearms, weapons, explosives, or dangerous substances;
- g) an attempt or conspiracy to commit an offence described in subparagraphs (a) through (f) or counselling the commission of such an offence or participation as an accomplice in the offences so described.

Article 6

CAPITAL PUNISHMENT

Extradition may be refused when the offence for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not provide such punishment for the conduct constituting the offence, unless the requesting state gives such assurances as the requested State considers sufficient that the death penalty shall, if imposed, not be executed.

Articles 7 through 21 have not been included here in full as they outline issues which do not pertain specifically to the current research. Many of these articles refer to procedural matters.

Article 7:	POSTPONEMENT OF SURRENDER
Article 8:	EXTRADITION PROCEDURES
Article 9:	EXTRADITION EVIDENCE
Article 10:	ADDITIONAL EVIDENCE
Article 11:	PROVISIONAL ARREST
Article 12:	SURRENDER
Article 13:	SURRENDER OF PROPERTY
Article 14:	RULE OF SPECIALTY
Article 15:	MUTUAL LEGAL ASSISTANCE IN EXTRADITION
Article 16:	WAIVER OF EXTRADITION
Article 17:	CONFLICTING REQUESTS
Article 18:	TRANSLATION OF DOCUMENTS
Article 19:	EXPENSES
Article 20:	APPLICABLE LAW
Article 21:	RATIFICATION

APPENDIX 2:**CANADA AND THE POLITICAL OFFENCE EXCEPTION IN EXTRADITION LAW****INTERVIEW SCHEDULE**

University of Ottawa March 26, 1990

A Description of the Research for the Participant.

This research aims to examine the evolution of the political offence exception (p.o.e.) in extradition law. The purpose of these interviews is to acquire some more in depth knowledge about the "New Breed" of extradition treaty. The Canada-India extradition treaty, the negotiation of which you were a part, is considered a case in point. My aim is to discuss with you your role in the process of negotiating this treaty as well as some of your views on several of the larger issues which are confronted by such a treaty.

Background Questions.

(1) How long have you been working for this department in your present capacity?

(1a) How long had you worked in the position which enabled you to participate in negotiations on the Canada-India Extradition Treaty?

* Note 1a applies only to those no longer working in that capacity.

(2) What exactly is or was your title?

(3) What type of professional or academic training do you possess which has prepared you for this sort of position?

(4) Have you ever been involved in treaty negotiations before?

How often and in what capacity?

General Information.

(1) Who was on the negotiating team for the Canada-India Extradition Treaty?

(2) What was your role specifically?

(3) What were the roles the others on the team played?

(4) Where did the negotiations take place?

(5) When did around the table negotiations occur, in relation to the actual signing of the Canada-India

Extradition Treaty?

(6) How was the ratification process with India made simple? As I understand it the Canada-India Treaty was ratified very shortly after it was signed.

(7) Who or which nation first proposed the idea of negotiating a bilateral extradition treaty?

(8) In general, how did the treaty come about?

Probe: Is there anything further that you would like to add?

General: Drafting and Negotiations.

(1) Did you participate in the initial drafting of the treaty?

If not, then, who did? If so, in what way?

(2) What, in your opinion, were the circumstances around which the Canada-India Extradition Treaty was negotiated?

Probe: What causes you to hold that opinion?

Is there any evidence to substantiate your opinion?

(3) Were the circumstances similar to those surrounding the negotiation of any other treaty you have worked on (eg. France)?

(4) Was the development of this extradition treaty standard procedure or was it unique? If so, how?

Specific: Political Offence Exception.

(1) These questions are being posed post hoc, were you aware of the modified nature of the p.o.e. at the time the treaty was being negotiated?

(2) Do you recall if any or all of the early drafts of the treaty contained the p.o.e. and its exceptions as they are in their present form?

(3) Would you say the restriction of the p.o.e., in this treaty was the result of lengthy debates and internal consultations, during the negotiations or was the zeitgeist already in place?

(4) Were any reservations expressed during drafting or negotiation regarding the restriction of the p.o.e.? If so, what were they and who expressed them?

(5) Were you cognizant of the statement made in the House of Commons (Ernie Epp, Nipigon/Thunder Bay) which noted that the Canada-India treaty's article on political crime

acknowledges the manner in "which terrorism is treated these days"? Would you agree that political crime is regarded differently today? How?

Probe: Do you have evidence to support that opinion?

Speculations on the Transition of the P.O.E.

(1) Perhaps not all countries would be interested in negotiating a treaty which so severely restricts the p.o.e.. In your opinion, what was Canada's interest in negotiating the Canada-India Treaty specifically in relation to Article 5(3)?

(2) I understand Canada was recently involved in negotiating an Extradition Treaty with France (1988) which clearly upholds the p.o.e. doctrine, without exception (Article 4). Could you explain the possible reason for the distinct difference between this treaty and the one with India?

(3) At the time the Canada-India Treaty was negotiated what was your ministry's policy on the issue of political offences or offences of political character?

(4) What is their policy if any, at present?

(5) Just how concerned is the ministry with such an issue? For instance, where would the p.o.e. issue lie in a hierarchy of priorities?

(6) Do you in fact support this new trend? Why or why not?

(7) What in your opinion could account for this change in principle toward the p.o.e.?

Probe: What causes you to hold that opinion?

Possible Explanations for the Transition.

(1) Do you think the sort of people committing pure and relative political crimes have changed over time?

(2) Furthermore, have the types of offences they commit been altered within the last fifteen years? How have they changed?

(3) In your view does the uniqueness of the p.o.e. (Art. 5(3)) in the Canada-India Extradition Treaty reflect a response to an increased international concern with terrorism?

(4) Do you know whether this increased concern was primarily India's or did Canada share it? If so, which

aspects of the treaty were emphasized by India and which were of great concern to Canada during the negotiations?

(5) Around the time the treaty was signed there was speculation in the media that the government was interested in negotiating a favourable extradition treaty with India in exchange for secure economic relations. Is it possible that the treaty has any relation to Canada's international economic interests with India?

(6) At the time the treaty between Canada and India was being negotiated were you aware of an Ontario Court of Appeal (O.A.C.) decision that suggested politically motivated murder was an aggravating and not a mitigating factor?

(7) Was your thinking at all influenced by the O.C.A. case in negotiating the Canada-India Treaty? If so, in what way?

(8) I understand the "New Trend" in extradition treaties is not to list offences, in order to avoid their becoming obsolete in the near future. Extradition is to be based on "dual criminality". Why then, in the Canada-India Extradition Treaty is there a specific list of offences to be considered "extraditable" under the section regarding political crimes?

(9) Do you feel that civil liberties are being compromised by this "new generation" of extradition treaties?

(10) Are there any other social or political factors that may have directed this unique change in the definition of political offences, namely the narrowing of the p.o.e. in extradition law (eg. throne speech etc.)?

Substitute Questions

At the time the treaty between Canada and India was being negotiated were you aware the Law Reform Commission was filing its report (June 1987) which called for the criminalization of terrorist activity and/or politically motivated murder by recommending its inclusion as a separate section under first degree murder 6(4)d?

Was your thinking with respect to the p.o.e. influenced by this domestic example of an attempt to restrict the political offence exception doctrine?

APPENDIX 3

TELEPHONE INTERVIEW WITH WILLIAM CORBETT, SENIOR GENERAL COUNSEL, CRIMINAL PROSECUTIONS SECTION, DEPARTMENT OF JUSTICE, CANADA.

December 5, 1989 10:am

The researcher identified herself, explained how his name was obtained as a contact person regarding the Canada-India Extradition Treaty. The purpose as well as the topic of research were outlined and permission was requested to record the following information and was granted.

Mr. Corbett: In the throne speech in 1986-87 a commitment or reference was made to "constructive internationalism" which instigated the Minister of Justice and the Minister of External Affairs to look into initiating renegotiations of obsolete treaties.

So, I worked at identifying the countries with which we have "active extradition relations". There are a list of countries which extradition treaties needed to be updated and that was given to the Minister.

Researcher: Would it be possible to obtain a copy of that list?

Corbett: No, I do not have access to any of these materials. We realized we had no extradition treaty with India and the Fugitive Offenders Act did not apply to India, although it does to all other Commonwealth countries. India doesn't recognize the Queen as Sovereign therefore, this act doesn't apply to them.

Researcher: Do you know which nation might have had a specific interest in negotiating this treaty?

Corbett: At the time of negotiation with India there was one person in India we were interested in and some offenders in Canada that they were after.

Researcher: Where did the negotiations take place?

Corbett: One round of negotiations took place in Canada and one took place in India (New Delhi).

Researcher: Who was on the negotiating team...(See Appendix 2, General Information Q.1)

Corbett: I was a part of the negotiating team. The political offence exception is one of the elements that make this treaty different (unique) from previously negotiated treaties.

Researcher: How long did the negotiations take?

Corbett: Ratification was short, because we are both Commonwealth and our methods for ratification are similar. External Affairs can explain the procedure. There generally has to be approval by both the Justice Minister and Secretary of State for External Affairs prior to signature.

It is an executive act that does not have to be voted on in the House of Commons. 1) There is an Order in Council; 2) it is signed; and 3) then, it is tabled in the House of Commons.

The negotiation process varies from country to country. The evidentiary provisions were not changed in the treaty with India. Because India is a Commonwealth country extradition is only done in prima facie cases based on sworn affidavits.

The specifics of this treaty are... pause... Extradition in this treaty is based on conduct of "dual criminality" is the basis for extradition. It must be illegal in both states. This treaty was designed not to become obsolete there is no list of extraditable offences.

*The p.o.e. in this treaty is "severely curtailed". If there is violent conduct or crime the offender is likely to be returned. So, a treaty should include these elements. The specifics are all outlined in United Nations Conventions on Extradition. Other specifics are about being tried by proper courts, an independent tribunal (judge). The embassy employees in India informed the negotiating team that judges there do operate independently from the government.

The things that one must decide when negotiating extradition treaties. 1) Do you want to have a treaty with that country? 2) If so, what kind, and what will it include?

The Canada-India Treaty aimed to reduce the scope of the p.o.e. because it would be difficult to say no to the requesting country if an offender committed violent acts involving innocent people (not party to the conflict) for example, if they blew up a bus full of school children.

There was an Ontario Court of Appeal decision which referred to the p.o.e. issue. It stated killing for political reasons is an "aggravating factor". It was the case of one of the offenders involved in the attack on the Turkish Embassy Ottawa, Canada. So, if it is applied in domestic law how can we ignore it internationally.

Also, given the Air India bombing investigation at the time. The Royal Canadian Mounted Police had drawn it to our attention as well, that no treaty with India existed at all. A treaty seemed to be of interest to India as well. There was a "lacunae" in our system of extradition.

The negotiating team existed of: myself; Ari Coomaraswamy from a Toronto office, from Sri Lanka and a United Kingdom barrister by training. He has however, passed away since; Bill Hobson who has since been reassigned to the

War Crimes Unit of the Department of Justice.; Brian Dickson from the Department of External Affairs. Norm Belanger of the R.C.M.P., he has also, passed away since the negotiation of the treaty.

Also, we have renegotiated or amended Extradition Treaties with other countries. The United States but, it still has to go before the Senate. France, December 1, 1989 it came into force. The Netherlands, Greece, Spain(signed), Italy, West Germany, Switzerland, Portugal and the Philippines(signed).

Researcher: Which of these treaties can I review for this research?

Corbett: You can only have access to those treaties which are signed, not those that are in the process of negotiation.

** Greece would not agree to proposed restrictions of p.o.e.

Terrorism, is also referred to in the preamble of the Canada-India Treaty. Most countries are not interested, while India was for their own reasons.

Some discussion took place in the House of Commons after the Canada-India Treaty was signed. M.P.'s raised questions in January 1987 and stated that Sikhs in Canada feared that the treaty would be used against them by the Indian government.

Look at the Globe and Mail (Toronto) article Feb. 1987, an editorial. I argued that there are safeguards built into the treaty which should reassure the Sikh community. Article 4(4) and (5) ensures a speedy trial and procedures for bail. The press in India are quite vocal and as noted earlier the judges are independent. If India did not follow the treaty Canada would end it immediately.

Researcher: Which nation first proposed the idea...(See Appendix 2 General Information Q.7)

Corbett: It was the Canadian government's idea to instigate negotiation, but India was also very interested.

Seventy five percent of our extradition work is with the United States. Ten percent with Europe especially Western Europe. Five to ten percent is with Commonwealth countries the United Kingdom, Australia, Philippines and India which the Fugitive Offenders Act applies except for India.

Significant features of Extradition treaties with European countries that are based on civil law there are evidentiary problems with European countries that do not use affidavits. Their cases are built on hear say evidence. For example, France has a "Justice D'Instruction" or examining magistrate which looks into each case. The file is presented

to the court. Article 3 of the Treaty allows Canada to negotiate special rules to have the evidence admitted to our courts. The "dossier d'instruction" may be admitted under a specially designed clause.

The researcher requested an opportunity to interview Mr. Corbett in person. He indicated the researcher should call him again in the New Year (1990).

SECOND TELEPHONE INTERVIEW WITH WILLIAM CORBETT, DEPARTMENT OF JUSTICE

March 5, 1990 11:am

A second request was made by the researcher to interview Mr. Corbett in person. He refused and stated that because he has had previous experiences with the press that were less than satisfactory he does not like to be interviewed. He further stated the work he does with the Ministry of Justice is confidential and he does not like to put himself into a circumstance where he might reveal confidential information. The researcher assured him the interview was strictly for the purpose of completing a Master's thesis and he could decline to answer any questions he wished. He noted he does not recall what information may have been confidential at the time and does not wish to make any errors in that regard, especially surrounding the Air India investigation that is ongoing. Shortly thereafter, Mr. Corbett stated "go ahead and ask me the questions you have".

Researcher: Appendix 2, Background Q.1

Corbett: I've been working here since 1981 and have been doing this stuff since 1984. Now, I'm doing less of the leg work and travel and more supervision on extradition and mutual legal assistance.

Researcher: Appendix 2, Q.2

Corbett: Senior General Counsel, Criminal Prosecutions Section Department of Justice.

Researcher: See Appendix 2, Q.3

Corbett: I am a lawyer.

Researcher: See Appendix 2, Q. 4

Corbett: Often since 1984, recently I participated in negotiations with the Philippines and France as well as others. I have always worked in the same capacity, representing Justice Department matters.

Researcher: See Appendix 2, General Information Q. 1

(Omitted)

Corbett: Previously presented those names to researcher.

Researcher: See Appendix 2, General Information Q. 2

Corbett: To ensure that a treaty is 1) consistent with legal principles for example, the Charter and 2) that it can be implemented by Canadian law. To ensure that its workable within Canadian courts. Also, beforehand we know what the Minister of Justice will and will not accept as a part of the treaty. I am to ensure that the treaty is in line politically with what the Minister finds acceptable. My role is essentially technical. I am there to advise on the Justice and legal aspects and wording of the treaty.

The Minister in his/her office has a person who is there to address these issues (EXTRADITION) because it is a large percentage of our work. That person changes often with each Minister, it is currently [gives name].

Within the Ministry of Justice there is an International Assistance Group which deals with extradition and mutual legal assistance.

I have always taken someone from my department on negotiations with me. [Gives name] is now responsible for extradition here as I am easing out of it slowly. I am still doing some mutual legal assistance work. My role is changing to a more supervisory one.

Researcher: Appendix 2 General Information Q. 3

Corbett: Brian Dickson, External Affairs' role is political, they are to point out which countries we should negotiate treaties with. One's that we see as having good relations with. They give political advice.

Norm Belanger, Royal Canadian Mounted Police was there for protection, he was also there on other business. I wouldn't say he participated in the negotiations. The police point out which countries it is necessary for us to have treaties with. For example, in the wake of Air India they noted we had no means by which to extradite someone from India if the accused had returned there after the bombing.

Researcher: Appendix 2 General Information Q. 4 & 5

Corbett: Canada and India. The main session was in India, New Delhi.

Researcher: Appendix 2 General Information Q. 6

Corbett: Ask Mr. Dickson about ratification that is his area of expertise.

Researcher: Appendix 2 General Information Q. 7

Corbett: We put forward a text of the p.o.e. changes to the Minister. He agreed to it, then we sent a copy to India. Negotiations in India were primarily discussion. Nothing was written in the first round at all. We basically talked about extradition.

Researcher: Appendix 2 General Information Q. 8.

Corbett: Evolved through a lengthy and frustrating period of not being able to effectively deal with extradition cases. Most treaties were ancient. We tried to streamline them. For example, by reducing evidentiary provisions, it used to be we needed first person affidavits devoid of hearsay. Well, what is hearsay and in fraud cases you might need sworn affidavits from hundreds of people all over the world. That was very difficult.

Modernization was to occur in two phases 1) treaties and 2) domestic legislation amendments (Extradition Act). In the Extradition Act there is a section which gives treaties greater power, they are accepted over and above the Extradition Act which makes them domestic law as long as it does not breach the Constitution. The Piperno case is a good example.

Researcher: Appendix 2 General: Drafting and Negotiations Q. 1.

Corbett: Participated in all parts of the treaty. External Affairs Department relies on us, Justice, for technical legal advice. (See also response to Q. 2 General Information).

Researcher: Appendix 2 Drafting and Negotiations Q. 2.

Corbett: Certainly the Air India investigation had something to do with it. We had no Extradition Treaty at all with India because they no longer recognize the Queen as Sovereign and do not follow Commonwealth treaties. The police pointed out and we realized it was necessary to have a treaty. It was a practical matter. There really wasn't any discussion of Air India at the negotiations though. I cannot give you access to any memorandums regarding negotiations as that is confidential information.

Researcher: Appendix 2 Drafting and Negotiations Q. 3.

Corbett: Negotiation of treaties is all a part of the "Modernization" package. We have just recently negotiated on with the Philippines, Mexico and France as well. (See also Interview December 1989).

Researcher: Appendix 2 Drafting and Negotiations Q. 4.
Did not specifically ask the subject this question as he discussed the process on his own initiative.

Corbett: The extradition process: Evidence can be heard by a judge who writes a report to the Minister of Justice under section 12 or 18. He can attach any evidence called on the political offence. The case of **Sudar**, who did submit the p.o.e. He was a bomb maker for Croatian nationalist movement. He would go to the United States and teach them how to make bombs. The Yugoslavian government premises there were blown up and he attempted to extort money to support the movement. He could not claim the p.o.e. because the country whom he committed his acts against was the United States. Justice would be served if he were sent back to the U.S. who is a neutral third party. These cases tend not to come up in court as with the one I just mentioned. We don't have many Canadian examples, so we rely on Britain and their cases, for example *Cheng vs The Governor of Pentonville Prison*. The decision is made by the Minister. These cases are cloaked by "guys like me". The Minister gets a laundered version of cases. He/she then asks us for legal advice which is "protected" information under client/lawyer relationship. He/she then makes a decision regarding the case. Case examples are *Operation Dismantle*, *Schmidt*. The Supreme Court is not likely to second guess the Minister based on the "fairness principle". *Peltier* case about fourteen years ago. He killed two F.B.I. agents. An extradition application was made. It was a political case, but he did not raise the p.o.e.

In the United States it is a principle in Extradition law that the courts won't second guess an executive decision. The exception is in a capital murder case like *Ng*. Where the death penalty could be invoked we do not have that here in Canada.

Negotiations are a dynamic process. Never have more than three possible texts in front of you. For example, 1) Canada's submission; 2) India's submission; 3) the combination of the one you plan to work on. If you wish to raise an objection always have an alternative in mind, if not then you will stall negotiations. You will lose the momentum and good feeling already established. Cooperation is the key. Address their concerns. It is not an adversarial process like S.A.L.T. talks. Everyone is interested in coming up with a treaty. After one week, a standard period of negotiations, you must have a complete treaty. Do not leave things unfinished. We negotiated a Mutual Legal Assistance Treaty with Australia and after we left the table we had a few small things to finish up and it took one and a half years to ratify.

After three days you should have a treaty negotiated to conclusion. The fourth day is simply read through's. Word

for word it is read aloud together two or three times. Each night a text is produced by Embassy staff ready for the session the next morning. The last day, a disk is left with a computer person and we have got our initial text of the treaty. The Netherlands are extremely skilled at negotiations. They are expansive, and flexible. The French and Swiss are extremely fixed and difficult.

Researcher: See Appendix 2 Political Offence Exception, Q. 1.

Corbett: Yes, we proposed the changes to the p.o.e.. Do not really remember specifically how it was developed, but the Minister even called to make sure that the restricted p.o.e. was in the treaty we recently negotiated with the Philippines.

Researcher: See Appendix 2, P.O.E., Q. 2.

Corbett: It was there from the beginning. We may have sent a negotiating text. Not sure which would be approved ahead of time.

Researcher: See Appendix 2, P.O.E., Q. 3.

Corbett: Don't really remember well how it came about, but it has been a long time in coming. The United Nations and other organizations, the I.C.A.O. have been "chipping away" at the p.o.e. for years. You have not got an overlaying. Convention after convention restricting its use. We included it in our text and India accepted it.

Researcher: See Appendix 2, P.O.E., Q. 4.

Corbett: Restriction of the p.o.e. It was our recommendation, but it was supported by India. No reservations. We took the lead in negotiations because they have no experience at negotiating extradition treaties. Their treaty with the United States is a 1932 United Kingdom treaty. Their first modern extradition treaty is with the United States.

India wanted terrorism in the language of the treaty. We compromised and included it in the preamble. That is what they are concerned about. We wanted Article 7 of the Charter. All approved ahead of time.

Researcher: Appendix 2, P.O.E. Q. 5. See interview with W. Corbett December 1989 for a response to this question.

Researcher: Appendix 2, Transition of the P.O.E., Q. 1.

Corbett: The obvious interest in negotiating the Canada-

India Treaty was an obvious gap that needed to be filled. We did not have any extradition treaty or relations with a country we have significant other relations with. Air India made the negotiations an immediate necessity.

Researcher: Appendix 2, Transition of the P.O.E., Q. 2.

Corbett: The French are "stuffed shirts". They claimed the European Convention on Extradition has a strong clause. They did not want to include the restriction of the p.o.e. in this recent treaty (1989).

Researcher: Appendix 2, Transition of the P.O.E., Q. 3.

Corbett: We wanted it restricted or reduced, but we also wanted to balance that reduction with broader discretion in another clause. Reduction of [the p.o.e. in Article] 5(3) and 5(1) comes out of the Fugitive Offenders scheme. It's broadened. We are changing the discretion. What is fair, just and proper in the circumstances having regard to all the circumstances. We are balancing, changing the focus. It's a better assessment of each case. We sought approvals on the text from the Minister before we went. What Minister's wanted was flexibility on surrender based on just cause. We can refuse 5(1). It is also in the Philippine's treaty.

Researcher: Appendix 2, Transition of the P.O.E., Q. 4.

Corbett: Policy hasn't changed since India. The American amendments are a watering of this same treaty with India. France, Philippines, Mexico all similar with minor changes.

Researcher: Appendix 2, Transition of the P.O.E., Q. 5.

Corbett: It is a large part of the Ministry's work; we now have an International Assistance Group.

Researcher: See Appendix 2, Transition of the P.O.E., Q. 6, did not ask this question. Next question Q. 7.

Corbett: We want to make sure that justice is served. International concern has shifted. The p.o.e. is a well established rule. It used to be protecting fledgling democratic countries was important. Now, the escalated levels of violence and the fact that its no longer just affecting the "other guy". Yesterday's freedom fighter is today's terrorist.

Researcher: See Appendix 2, Explanations for the Transition, Q. 1 & 2.

Corbett: Yes, escalated levels of violence are all over. Today, we see groups that we don't know anything about. Small, tiny groups fighting against a government or other sects. There is no public sympathy these days. That has changed.

Researcher: See Appendix 2, Explanations for the Transition, Q.3.

Corbett: External Affairs chooses countries with which we should negotiate treaties, democratic countries where there is official illegal activity (eg. army operated on their own), but they still have an independent judiciary to justly deal with offenders' crimes. We want to balance the reduction with article 5(1) an unjust or just case of extradition. Escalated levels of violence and the fact that **terrorism** is everywhere even in Canada, it has led to the balanced reduction of the p.o.e.

Researcher: See Appendix 2, Explanations for the Transition, Q.4.

Corbett: Canada raised the issue of the limited p.o.e. first and they agreed. India, they are concerned with "terrorism". That's why we have it in the preamble. We did not want it in the treaty because there is no way to define it.

Researcher: See Appendix 2, Explanations for the Transition, Q.5.

Corbett: There is nothing at all economic related to this treaty. I do not know if it is a part of a package. It is an effort to show support for the government of India and countries like the Philippines. In the Philippines it was a big deal for the Aquino government to show they had the support of the Canadian government.

Researcher: Appendix 2, Explanations for the Transition, Q.6.

Corbett: The Ontario Court of Appeal case is an after thought. I guess we were clairvoyant. We were not aware of the case at the time. I still have not found it. Call [gives name], he was involved in the prosecution of one of those Armenian cases. It could be an unpublished case.

The changes to the p.o.e. have developed over a long period of time. The United Nations even included extradition and mutual legal assistance in their newest drug treaty. The United Nations and others have been chipping away at the p.o.e. It supports our thinking.

Researcher: Appendix 2, Explanations for the Transition, Q.7.

Corbett: Our policy is the same now as it was when the Treaty was negotiated.

Researcher: Appendix 2, Explanations for the Transition, Q. 8.

Corbett: We have refined it a little more since then (with India) such as with the Philippines. Canada-India was our first attempt at "gutting the p.o.e.". Listing has not been done in subsequent ones for example, France.

Researcher: Appendix 2, Q. 9 & 10. See above for responses to these questions

THIRD TELEPHONE INTERVIEW WITH WILLIAM CORBETT, DEPARTMENT OF JUSTICE.

April 12, 1990 9:00 a.m.

The purpose of this interview was to gather information not covered by the previous interviews and to more clearly determine the roles of those participants on the negotiating team that could not be interviewed due to circumstances beyond the control of the researcher.

Corbett: Norm Belanger's perspective or approach was that acts of violence against large groups of people like Air India is "crime not politics or terrorism". Don't colour it or confuse it, it is simply crime.

Researcher: Do you think the p.o.e. will ever be totally disposed of or erased given today's political and social circumstances?

Corbett: I believe the p.o.e. is a weed in law. We cannot get at the root. The United Nations keeps chipping away at it. It is easier to wheedle away at it until there is nothing.

I was informed when Canada negotiated a protocol to the Canada-U. S. Extradition Agreement, that it may receive some consideration in the U. S. Senate before it is ratified. It is the Irish question. They might attempt to attach amendments to it. Canada wanted assurance that their treaty would not be considered lumped together with any other Extradition Treaties the U. S. negotiated. To be considered on its own.

Researcher: Are you aware of any Canadian cases involving the application of the p.o.e.?

Corbett: No Canadian cases of refusal to extradite based on the p.o.e. exist except for Lieutenant Bennet Young and St. Albans Raid during the American Civil War.

Eighty percent of our extradition is with the U.S. Not many problems with these cases, because their system is comparable to ours. We know if we send someone back they will get a fair trial. Nevertheless, some people claim they will not get a fair trial such as in the case of Peltier about fourteen years ago.

Researcher: Does External Affairs provide you with a list of countries they will negotiate Extradition Treaties with because they support the government of that nation or are accepting of its standards?

Corbett: Yes, that applies to all our treaties recently negotiated, but that theory breaks down with countries like Romania, Hungary, Italy, and Czechoslovakia after World War II. They were liberated and so we negotiated with them before they became communist. Many of these very old treaties are not used. They are inactive. We did not negotiate one with Germany then.

We base this support for another government in terms of providing a fair trial on United Nations standards for human rights. For example, their trial must be before an impartial tribunal, not just a jury trial and they must have the right to appeal.

The question is can they get a fair trial, if extradited. The issue is one of fundamental justice. France does not have the same system as we do, no jury, but they do maintain a system of checks and balances that are fair and just. Foreign systems may often be different as in the case of Schmidt.

The Security Offences Act has a section to ensure we fulfil our treaty obligations. The Federal Attorney General can take over a prosecution from the Provincial A. G. if they refuse, in the case of an internationally protected person that may have been victimized. The general rule is that the Provincial A. G. prosecutes Criminal Code cases. If the Federal A. G. so decides he/she files a document and it's handed over. Canada must be satisfied. It can't allow a Provincial A. G. to have the final say on a case that affects all of Canada. That is internally political conduct that would have ramification on the entire country.

The only example of a case in which the Federal A. G. took over prosecution was in Fabian, 1984. A Sikh taxi driver in Winnipeg assaulted the Indian High Commissioner. The Provincial A. G. decided not to prosecute, so the Federal A. G. took it over.

Amendments are going to be made to the Extradition Act in the near future to speed up the process and limit the p.o.e.

I also testified before the Justice and Solicitor General Committee about three weeks ago. Horner is the chairman. Kaplan made a statement that he is opposed to any

restriction of the p.o.e. He did not direct a question at me, but responded with a political statement. So, I never bothered to mention that we have already done it with India and others.

APPENDIX 4

INTERVIEW IN PERSON CONDUCTED WITH BRIAN DICKSON, DIRECTOR
LEGAL ADVISORY DIVISION, DEPARTMENT OF EXTERNAL AFFAIRS,
OTTAWA, CANADA
March 29, 1990, 10:00 a.m.

Researcher previously introduced during telephone contact at which time the current interview was scheduled. The participant was provided with a copy of the interview schedule (Appendix 2) to follow along with while the interview was conducted.

Researcher: Appendix 2, Background, Q. 1.

Dickson: I have worked for six years in this department.

Researcher: Appendix 2, Background, Q. 2.

Dickson: My title is Director of the Legal Advisory Division Department of External Affairs. (presented a business card)

Researcher: Appendix 2, Background, Q. 3.

Dickson: I am a lawyer and a member of the Foreign Service. I have worked in India and the United States.

Researcher: Appendix 2, Background, Q. 4.

Dickson: I have worked on all other treaties External Affairs has recently negotiated. The United States Protocol to the 1971 Agreement and it relates to the p.o.e., France, Netherlands, Philippines, Greece and Spain.

Researcher: Appendix 2, General Information, Q. 1.

Dickson: Corbett, Hobson, L.A.K. James from External Affairs who is not a lawyer. I cannot think of the others.

Researcher: Appendix 2, General Information, Q. 2.

Dickson: I was the head of the Canadian delegation. External Affairs's role is to draft and negotiate all international treaties. Extradition is two percent of its work. Legal expertise in terms of what is needed in court on a day to day basis we rely on the other's expert advice. I have to

ensure that it is consistent with Canadian Treaty practice. For example, India asked if we would extradite a person who supports the dismemberment of India. We said no. Someone who bombs Indian parliament? We said, yes. I am to ensure that treaties are negotiated with proper countries and that it is tailored to those and our country. I need general knowledge of what is included in that type of treaty. I coordinate efforts. I ensure the Extradition Treaty fits in with the broader bilateral relationship.

Researcher: Appendix 2, General Information, Q. 3.

Dickson: Others play an expertise role specific to their work.

Researcher: Appendix 2, General Information, Q. 4.

Dickson: Negotiations took place in two rounds. 1) here in Canada in November 1986 it was an exploratory round. Canada initially sent over a draft of a treaty to India with former External Affairs Minister Joe Clark in October or November 1985. India did not propose their own until later, but Canada did not even agree with its basic principle. So, we used Canada's model treaty in negotiations. Canada likes to take the initiative in developing a treaty; that way it ensures that we get what we want.

The second round took place January 1987 in India. So, negotiation of the Canada-India Treaty began with Canada's model text and we allowed India to propose changes to be negotiated.

Researcher: Appendix 2, General Information, Q. 5.

Dickson: The treaty was signed by Mr. Clark shortly after the second round negotiations took place in India, January 1987. He signed it in February 1987 and it was ratified thereafter.

Researcher: Appendix 2, General Information, Q. 6.

Dickson: Ratification was simple with India. Common law countries can ratify quickly, more so than treaties with civil law countries or the United States because of their systems. All we need for an Extradition Treaty is Cabinet approval and then an Order in Council is filed.

In order to get authorization to sign and ratify it must go before a Cabinet committee which meets every Thursday. It could be recommended who should sign the treaty: the Secretary of State, the Prime Minister or the Ambassador. They authorize the person to sign the treaty as well as ratify. This is only for agreements that are not politically sensitive or that would meet great opposition.

For example, you would not take a Free Trade agreement to be signed before this committee.

Researcher: Appendix 2, General Information, Q. 6 & 7.

Dickson: Canada first proposed the treaty in 1985. The Secretary of State for External Affairs went over just after the Air India bombing and presented them with a draft.

Researcher: Appendix 2, Drafting and Negotiations, Q. 1.

Dickson: Yes, myself and several of the others from Justice participated in the drafting and negotiations for the outset. Others do collaborate on the drafts though on the technical parts. I just worked on negotiating treaties with Mexico in January, Mutual and Legal Assistance and Drug Treaties.

We try to be informal at negotiations. The aim is to cooperate and arrive at a solution that is satisfactory to everyone. Sit around a table and discuss the treaty with the model in front of us.

Researcher: Appendix 2, Drafting and Negotiations, Q. 2.

Dickson: This treaty did not have a pronounced political dimension or content. It had domestic political impact, but not a bilateral one between the two governments. It had an impact for Sikhs here in Canada with Air India and it had an effect on the separatist movement in the Punjab.

Certainly Air India brought it to the surface, but the obvious gap or lack of an agreement to deal with these matters was there. For instance, the 1982 case of the Sikh who shot a lawyer and another Sikh in Osgoode court room and then was believed to be in India made us aware of the gap. We wanted to apply for his extradition and realized there was no longer a method by which we could do that; India does not see the Queen as her Majesty. Therefore, Commonwealth agreements like the Fugitive Offenders Act do not apply. It is only since then that there has not been some sort of agreement between Canada and India.

Researcher: Appendix 2, Drafting and Negotiations, Q. 3.

Dickson: Every treaty is different. Certainly the treaty had its own special set of circumstances.

Researcher: Appendix 2, Drafting and Negotiations, Q. 4.

Dickson: This treaty was unique in that it was a new model developed with several departures from previous extradition treaties negotiated. The departure was in the p.o.e. To appease Sikh Canadian fears we included a clause that they

must be brought to trial within six months. There is a no list approach and there are broader discretionary grounds for refusal to extradite. It was the first Extradition treaty we had negotiated in a while except for Belgium in 1981. There was a hold put on the negotiation of extradition treaties when we realized that treaties with civil law countries were not working. It was decided that there should be a review of policy regarding the provision of evidence standards in all extradition treaties.

The Canada-India Treaty was standard in that it is a common law treaty which is based on prima facie evidence.

Researcher: Appendix 2, P.O.E.. Q. 1.

Dickson: Yes we were [aware of the modification to the p.o.e.]

Researcher: Appendix 2, P.O.E., Q. 2.

Dickson: Yes, it was in our first draft. The model we sent to India had the restricted p.o.e. in it from the beginning.

Researcher: Appendix 2, P.O.E., Q. 3.

Dickson: There were internal consultations on all aspects of the draft treaty, but I do not really recall specifically what went on during drafting which took place five years ago. I am sure there were discussions around the issue and various points were raised by people at Justice or myself.

Researcher: **Probe question:** Can I get access to any memorandums or documents that might indicate the process by which you arrived at the policy.

Dickson: No, I do not think so. We sit down with paper and pen and the parts of the treaty we already have and go through it one article at a time.

Researcher: Appendix 2, P.O.E., Q. 4.

Dickson: No reservations were expressed by either side.

Researcher: Appendix 2, P.O.E., Q. 5.

Dickson: I was not aware of this statement and I am not sure what exactly he means but ...pause... Who made the statement? Our government never did think violent political crimes should go unpunished. Article 5(3) does recognize that those who commit wanton violence against innocent people should be justly dealt with.

Researcher: Appendix 2, Transition of the P.O.E., Q. 1.

Dickson: Canada's main interest in negotiating the Canada-India Extradition Treaty specific to Article 5(3) was combatting terrorism. Yes, there were other factors but, that is the most significant.

Researcher: Appendix 2, Transition of the P.O.E., Q. 2.

Dickson: The reason the restriction on the p.o.e. isn't in the treaty with France is because they would not accept it. They would not go for it. France said they have a similar provision in national legislation so, they did not want it in the Extradition Treaty. We did propose it in the draft or model treaty just as we did with the India draft, but France flat out said no to it. So, we compromised; that is what negotiating treaties is all about. We of course updated our treaty with France in the area of evidence provisions.

Researcher: Appendix 2, Transition of the P.O.E., Q. 3.

Dickson: Policy is directed at actively combatting terrorism. This of course follows United Nations developments and Summit declarations on the topic. Extradition is seen as a means to combat terrorism. The next step was to further refine extradition treaties, refinement of policy already in place. The Emergency Coordination Division also helped in the drafting of this treaty.

We recently negotiated with Mexico February 1990 a series of treaties on Extradition, and Mutual Legal Assistance. The signing of several treaties improves on bilateral relationship between the two countries.

Researcher: Appendix 2, Transition of the P.O.E., Q. 4.

Dickson: Policy remains the same. The goal is to eliminate gaps that exist.

Researcher: Appendix 2, Transition of the P.O.E., Q. 5.

Dickson: Canada-India, the policy and first draft was approved by the Minister of Justice. I do not really recall how the new p.o.e. and other departures got drafted at Justice. It would have had to have been the result of several meetings between myself and others in my department and several people at Justice. William Corbett and others from Justice participated in the drafting. I have forgotten who else participated. The person in my department who works on drafts now, was not here in 1985.

Policy is developed rather informally amongst those in each department and then it goes to the Minister of Justice for approval. After exploratory negotiations it goes back to the Ministers of both Justice and External Affairs. Then it goes to an Order in Council.

I am responsible along with two or three others at Justice for developing ideas. The technical drafting and wording is also worked on by others.

Article 5(3) e to g are the only new parts to this model treaty the other section 5(3) a to f have been in existence for a while just not in treaty form.

Researcher: Appendix 2, Transition of the P.O.E., Q. 6.

Dickson: Yes, I support the trend. It follows what I worked on at the United Nations. It follows what has been happening there. I have always believed it is better to have no treaty at all than to have one that advocates some kind of terrorism. There is no such thing as a good terrorist act regardless of the motivation.

Researcher: Appendix 2, Transition of the P.O.E. Q. 7.

Dickson: The trend was established at the United Nations and Summits. The gap and the role of national liberation movements in conflict. **PROBE**. Political crimes have changed recently regarding Russia. Propaganda used to be a political crime. Now it no longer is. The role of national liberation movements is prominent.

Researcher: Appendix 2, Explanations for the Transition, Q. 1 & 2.

Dickson: Well, yes it is changed over time. You sure do not see many hijackings anymore, but you do have the mid-air explosion of aircraft.

Researcher: Appendix 2, Explanations for the Transition, Q. 3.

Dickson: Yes. There is an increased concern with **terrorism not necessarily international terrorism**. There is an increased concern to fill the gap. The gap was not there long because India used to be part of the Commonwealth and we could use Rendition instead of Extradition.

Researcher: Appendix 2, Explanations for the Transition, Q. 4.

Dickson: Concern was shared. A draft is sent. Negotiations are informal. It was a few years ago.

Researcher: Appendix 2, Explanations for the Transition, Q. 5.

Dickson: Absolutely not, there was no connection with

economic relations. That is ridiculous. The idea of linkage of foreign policy issues was not present and it should not be. As a general principle the tone of international relations are important. This applies to negotiating any treaty. A positive bilateral relationship is good. There may be an impetus or target there. If you have political interest in the proceedings it helps. For example, Mexico recently signed several treaties which created a more positive bilateral relationship and during that time former Prime Minister Brian Mulroney proposed the idea of greater free trade. It was the right time and the atmosphere was there, but the other treaties were not negotiated to get free trade.

Researcher: Appendix 2, Explanations for the Transition, Q. 6 & 7.

Dickson: Someone from Justice told me about the O.A.C. case. It supports policy development regarding the p.o.e., but that is not what initiated it. I am not sure if the person at Justice was aware of it before or only after. Perhaps not during drafting, but before we went to negotiate.

Researcher: Appendix 2, Explanations for the Transition, Q. 8.

Dickson: Do you have a better way? That is a very good question. We really don't have a better way to do it, if we want to deal with specifics for example, wanton violent acts. In principle that is a flaw in this treaty. It is not perfect.

Researcher: Appendix 2, Explanations for the Transition, Q. 9.

Dickson: No, civil liberties are not compromised. The principle behind extradition is that those who seek refuge will be returned to face justice. Fundamental rights are protected by the treaty and by our criminal justice system's evidence provisions and levels of appeal. You cannot use the criminal law to punish political acts that is why the p.o.e. was put there. The principle of dual criminality ensures that it is not done. If too much unfair terminology is in the treaty it is not likely to work. Can not have too many broad exceptions to extradition or it will not work. We want treaties to work!

Researcher: Appendix 2, Explanations for the Transition, Q. 10.

Dickson: There is a practical need to fill the gap. We need practically to send someone back. Yes, the Throne speech.

Nothing else comes to mind.

APPENDIX 5

1296 Nesbitt Drive
Sudbury, Ontario
P3E 4E8

May 18, 1990

Mr. L.A.K. James
Counsellor, External Affairs Canada
The Canadian High Commission
P.O. Box 12-049, Thorndon
Wellington, New Zealand

Dear Mr. James:

I am a graduate student in Criminology at the University of Ottawa and I am conducting research on the political offence exception (p.o.e.) in extradition law. I was given your name by Mr. Brian Dickson, Director, Legal Advisory Division, External Affairs here in Ottawa.

I am contacting you for two reasons. The first is to confirm your participation as a member of the negotiating team for the Canada-India Extradition Treaty which was signed by the Honourable Joe Clark in 1987. Secondly, I am contacting you as a resource person who may be able to answer a few questions about the unique process of drafting and negotiating an extradition treaty. Each individual's perspective with regard to this process is of great value. As I am sure you are aware, participation in these negotiations is rather limited and every member's role is varied and significant. It has been my experience since beginning this research that almost no information on the process is available in texts or journals anywhere. Therefore, if you are willing to participate in this research, I would appreciate you filling out the questionnaire enclosed and returning it to the address above.

Mr Dickson informed me as well, that perhaps you will be returning to Ottawa this summer. If you find that you are unable to complete the questionnaire and would find it more convenient to answer my questions in an interview, please do not hesitate to contact me upon your return. Perhaps we could make arrangements to meet at your convenience. You may contact me at the above address or by telephone (705) 522-1641.

Thanking you in advance for your consideration.

Sincerely yours,

M. Catherine MacLean
Graduate Criminology Student
University of Ottawa

Enclosure.