International Extradition in American Practice and World Public Order.

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INTERNATIONAL EXTRADITION IN AMERICAN PRACTICE
AND WORLD PUBLIC ORDER

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Extradition is the process whereby one state delivers to another state, at its request, a person charged with a criminal offense against the law of the requesting state, in order that he may be tried and/or punished. This involves three basic elements:

1. Acts of sovereignty on the part of two states, whereby,
2. a request is made by one state from another for the surrender of an accused or convicted criminal, and
3. the surrender of the person requested for the purpose of trial or punishment, in response to the request.¹

International extradition has existed as early as the ancient time of the Chaldeans, the Egyptians and the Chinese, where such agreements for the forceful delivery of a requested escapee were bound up in solemn religious formulas, in the name of the respective deities. Thus, in the eastern world, the sanctity of international extradition pacts and the honoring of requests by the heads of state has long been respected and viewed as an essential condition in the life of national communities.²

To fulfill such a request was indispensable for the maintenance of public order since its denial could lead to disruptive consequences as to the tranquil relations between those nations.

Consistent with the ancient origin of international extradition and the conviction of the non-western nations that such pacts were not only desirable but necessary is the basis for the position of classical authorities such as Grotius, Vattel and Burlemaqui, that extradition is a matter of right in the jus gentium, and that the asylum nation has the duty to surrender the accused to the requesting nation.³ Such a position is based on the rationale that duties under the jus gentium are established

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to preserve world public order. The concern for the individual was very secondary to the primary scope of satisfying foreign sovereign requests to ensure good will and peace among nations, which were generally neighbors.

The history of international extradition in the western world has in no sense of the word paralleled that found in the eastern world. Up until the 19th century, the relatively new and independent sovereign states of the west found no need for such co-operative undertakings particularly in view of an almost constant state of suspicion and threat of war. Asylum was generally granted to fugitives from justice of other states. A sovereign community could enforce the return of fugitives only by force of arms and since the threat of war was always impending, extradition as an inducement to peaceful relations was seldom contemplated. Such history has given rise to the view that extradition is a matter of favor or comity rather than a legal duty. In *United States v. Rauscher*, the Supreme Court of the United States stated:

> It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed, for trial and punishment. This has been done generally by treaties... Prior to these treaties, and apart from them there was no well-defined obligation on one country to deliver up such fugitives to another; and, though such delivery was often made, it was upon the principle of comity;... and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.

In the United States, under such a rule, it was the general practice neither to ask nor to permit extradition in the absence of a treaty obligation. However, the relative "shrinking" in size of the earth, as a result of the technological breakthroughs in communication, and means of transportation, brought about the death of the isolationism which had previously characterized American external relations. The trend toward interdependency of nations and the desire to suppress criminality gave birth to the realization that close co-operation is required between the various penal jurisdictions. The greater the concern for world public order the more governmental cooperation developed to reduce tensions and deflate potential conflicts. Treaties for extradition of persons charged with or guilty of a crime became both more numerous and more extended in their scope.

Jay's treaty (1794) included the first international extradition pact

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to which the United States was a party. The three bilateral treaties adopted in 1961 and 1962 between the United States and Sweden, Brazil, and Israel, brought to eighty-one the number of nations to which bilateral extradition treaties between the United States and other nations apply.5 The United States has bilateral treaties with all the Latin American nations, and in addition, is a party to the Multilateral Convention of Extradition signed at Montevideo in December, 1933. The entry into effect of the treaty with Brazil in 1964 marked the completion of the chain of extradition treaties between the United States and all of

the nations of the Western hemisphere, and marked the end of a haven for fugitive criminal offenders from the United States that had existed in Brazil for half a century. Extradition treaties with many of the new nations having achieved independence in the past several years have not yet been realized. However, general treaties of extradition and some supplementary agreements between the United States and Denmark, France, the Netherlands and the United Kingdom are said to be currently binding on the former dependencies or dominions of these states.6

These facts became the more significant in a world presently composed of 140 political units (nations).

The nature and source of world conflicts are gradually shifting from traditional notions of national rivalries to those frictions which arise from the nature of a world urbanization process in an age of technological coexistence. Traditional notions of municipal public order find a broader application in a world context. Private and public wrongs, which heretofore affected only an immediate societal environment, now touch upon the stability of the world's public order. Increased sensitivities of world relations to individual factors are either actuated by or result in the consideration of persons as subjects of international law. The effect of individual conduct nowadays bears upon the whole world order by reason of the very nature of its order. The delicate balance of peaceful world relations and the maintenance of a stable order is ever more affected by the dynamic nature of world developments in all areas of human endeavors and accomplishments. Thus world public order requires a variable dynamic evolutionary content of evolving processes through legality of means and lawfulness of ends. World public order is that concept which is designed to secure the proper means for world development within the rule of law, preserving peace as a condition and stability as a vehicle to whatever objectives nations may have which perpetuate the same public order so that the process can guarantee its own preservation and continuity. The nature of world relations are no longer based on a strict division of nationally independent courses of conduct, but evolve toward a concept of independence within interdependence. World public order becomes the ligament of such interdependence and therefore reaches far beyond traditional concepts of adherence to the letter of the law and specific obligations arising from classical international law. It is in the words of Professor McDougal: "The obtaining in particular situations and in the aggregate flow of

situations, of outcome of a higher degree of conformity with the security goals of preservation, deterrence, restoration, rehabilitation and reconstruction.”

**Basic American Modus Operandi**

International extradition in the United States is a national power pertaining solely to the federal government and denied to the several states. Moreover, the Fifth Amendment to the United States Constitution has been construed to require an applicable treaty or federal enactment before the federal government may seize an alleged fugitive and surrender him to a demanding nation. The federal statute prescribing the procedure to be followed in international extradition clearly requires that there be a treaty or convention between the United States and any foreign government requesting surrender of the fugitive before extradition will be allowed.

The extradition procedure prescribed by federal statute may be summarized briefly as follows. Extradition proceedings must be

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9. Laubenheimer v. Factor, 61 F.2d 627 (7th Cir. 1932); cert. denied, 289 U.S. 713 (1932).
11. Generally, § 3181 et seq.; Agent to receive fugitive, § 3182; Authority over offenders, § 3193; Extraterritorial jurisdiction of United States, § 3183; Protection of accused, § 3192; Secretary of state, surrender of fugitive to foreign government, § 3186; Transportation, § 3194; Application of rules, Rule (54 (b); Arrest, § 3190; Extraterritorial jurisdiction, § 3042, 3183; Provisional arrest and detention, § 3187; Foreign countries, § 3184; Provisional arrest and detention, extraterritorial jurisdiction, § 3187; Certificates and certification; Diplomatic officer, § 3190; Evidence, § 3190; Extraterritorial jurisdiction of United States, § 3183; Fees and costs, § 3195; Foreign countries, § 3184; Indictment, etc., § 3182; State or territory to state, district or territory, §§ 3182, 3183; Witness fees and costs, § 3195; Commissioner, fees and costs, § 3195; Continuance of law in force, § 3181; Costs, payment, § 3195; Country under control of the United States, § 3185; Discharge of prisoner committed, § 3188; Escape, retaking accused, § 3186; Evidence, § 3190; Countries under control of United States, § 3185; Expenses, § 3195; Extraterritorial jurisdiction of United States, provisional arrest and detention, § 3187; Foreign countries, §§ 3184; Continuance of law, § 3181; Country under control of United States, § 3185; Payment of fees and costs, § 3195; Secretary of state, surrender of fugitives, §§ 3185, 3186; Hearing, § 3189 et seq.; Witnesses for indigent fugitives, § 3191; Indictment, state or territory to state, district or territories, § 3182; Indigent fugitives, witnesses, § 3191; Juvenile offenders, § 5001; Orders of court, discharge of person committed, § 3188; Payment of fees and costs, § 3195; Place of hearing, § 3189; Protection of accused, § 3192; Provisional arrest and detention within extraterritorial jurisdiction, § 3187; Resistance to extradition agent, § 1502; Retaking accused, escape, § 3186; Secretary of state; Fees and costs certified to, § 3195; Foreign country under control of United States, order of secretary, § 3185; Surrender of fugitives, agent of foreign country, § 3186; Time of commitment pending extradition, § 3188; Transportation of accused, § 3192; Extraterritorial jurisdiction of United States, §§ 3183, 3194; Receiving Agent, §§ 3193, 3194; Venue, hearing, § 3189; Witnesses, fees and costs, § 3195; and Indigent fugitives, § 3191.
initiated by the demanding nation's filing a verified complaint charging
the fugitive with the commission of an extraditable offense. The extra-
dition magistrate, who may be a federal or state judge or United States
Commissioner, issues a warrant for the fugitive's arrest and detention.
The magistrate then conducts a hearing in the fugitive's presence to deter-
mine whether the demanding state has shown reasonable ground to
believe the fugitive has committed an extraditable offense. If the magis-
trate deems the evidence sufficient, he orders the fugitive incarcerated and certifies the evidence and transcripts of the hearing to the
Secretary of State. The Secretary may thereafter issue a warrant of
surrender upon requisition by the demanding nation. If the prisoner
has not been delivered up to the demanding nation within two calendar
months after the magistrate's commitment order, the fugitive is entitled
to be discharged from custody.

However, when the fugitive has instituted review of that order, the two-month period commences from the
time the fugitive's claims are finally adjudicated.

When the United States is to be the demanding nation, application
for requisitions must be addressed to the Secretary of State. If the alleged
offense is within the jurisdiction of the state or territorial courts, the
application must come from the governor of such a state or territory; if the offense is against the law of the United States, the request should
come from the Attorney General of the United States. The application
must state that the fugitive is guilty of one of the offenses specified in the
extradition treaty, and also that the person sought has been found in
the asylum country or is believed to have sought asylum therein. The
Secretary of State then acts upon such applications, in his discretion.

The American extradition process centers around the basic notion
that extradition is a formal public expression of the nation which
affects its foreign relations with all that which the term has come to
comport in terms of international political implications.

The insistence on reciprocity and governmental involvement requir-
ing decisions at the highest echelons of the governmental ladder (the Secretary of State) to allow extradition for the prosecution or punish-
ment of a foreign national (in most cases) denotes a greater interest for
those political implications than genuine concern for world public order.
The unbridled discretion of the Executive, often based on poltical fac-
tors, weakens the expected reliability (of foreign governments) of the
American extradition practice. Such applications (which will be dis-

12. 18 U.S.C. § 3188 (1968); see In re Normano, 7 F.Supp. 329 (D. Mass. 1934); In
13. Jiminez v. District Court, 84 S.Ct. 14 (1963); and infra note 64.
cussed below) contribute to increase world tensions at precisely those times when the world public order is more likely to be threatened by strained relations.

Several basic provisions may be found in most general treaties of extradition. Some of these provisions are reflections of the American attitude towards the concept of sovereignty, while others are designed to safeguard the fugitive's individual rights. Nowhere is there exhibited concern for the maintenance of world order or increased criminal and judicial cooperation on a world wide basis.

The Problem of Jurisdiction: Clashes Between Vertical Authoritative Processes

The jurisdictional clause of every American treaty is the embodiment of the principle of territorality upon which the jurisdiction of the requesting state and of the asylum state is based. The treaty offenses provided for in the treaty must have been committed within the territorial jurisdiction of the requesting state, and the fugitive must be found within the territorial jurisdiction of the asylum state. The latest treaties, though applying this concept, define "territorial jurisdiction" as including territorial waters and the airspace thereover belonging to or under control of one of the contracting states, and vessels and aircraft belonging to one of the contracting states or to a citizen or corporation thereof when such a vessel is on the high seas or such aircraft is over the high seas.14 In the United States territorial jurisdiction means dominion and control over the territory. This theory is the narrowest of all theories of criminal jurisdiction.15 However, the United States is gradually expanding its jurisdictional theories as its interest becomes more significant in such matters occurring outside its confines but affecting it or its citizens. Such a broadening approach finds support in the constitution and several extraterritorial theories hereinafter referred to briefly.

Article IX of the Constitution subjects offenses against the law of nations, piracy and felonies on the high seas to the jurisdiction of Congress. Wherefore, such crimes as defined by International Law and by Congressional Acts are punishable in the United States even if territorially committed outside the United States.16

The imposition of sanctions for violations of the laws of war and warfare as embodied in the meaning of "war crimes," "crimes against

14. Article IV, Treaty with Brazil; Article IV, Treaty with Sweden; Article III, Treaty with Israel; Supra note 5.
humanity," and "crimes against peace" are subject to municipal jurisdiction because of the universality of jurisdiction over such crimes, which is a derogation to the strict territorial aspects of municipal criminal jurisdiction. In 1927, the permanent court of international justice in the S.S. Lotus case (France v. Turkey) recognized the principle that in criminal matters, municipal jurisdiction applies in the absence of an express jurisdictional principle established by International Law.

The territorial principle is based on the right of the state "to exercise supreme authority over all persons and things within its territory." The essence of such a concept is predicated upon the sovereignty of the state and the equality of all sovereigns. A sovereign entity can protect itself from injurious conduct engaged into abroad and which affects the said sovereign per se. The material element of such offenses against the sovereign, though committed in one territory results in harm elsewhere. Such a crime sees one of its elements, i.e., the resulting harm produced in a jurisdiction other than the one wherein the actus reus was committed. The Supreme Court ruled in Strassheim v. Daily that:

Acts done outside a jurisdiction but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.

It was not until the twentieth century that the United States felt the need to give judicial recognition to such a theory. The probable reason is that the geographic location of the United States and its political complexion did not give rise to such need. Whereas countries with national rivalries and geographically surrounded by neighbors who may harbor political dissidents conspiring to its overthrow have found an earlier need to protect themselves from such expectation. The United States first saw the need to protect its economic structure and competitive system of free enterprise by the extraterritorial application of its antitrust laws. The resulting legal theory was to consider conduct per-

17. See infra note 65.
19. 1 OPPENHEIM, INTERNATIONAL LAW 286 & 325, (8th ed., Lauterpacht, 1955); also FENWICK, CASES ON INTERNATIONAL LAW § 420 (2d. ed., 1951); 3 MOORE, INTERNATIONAL LAW DIGEST 820-854, (1906); 1 MOORE, A TREATISE ON EXTRACTION AND INTERSTATE RENDITION (1891) and the case of In re LaDolce, 106 F.Supp. 455 (W.D.N.Y. 1952); also U.S. v. Icardi, 140 F.Supp. 383 (D.C. 1956).
22. 211 U.S. 280 (1910).
23. Id. at 285.
formed abroad and having injurious effects internally as tantamount to the constructive presence of the actor. The conflicting jurisdictional theories which were faced by American courts were: forum domiciliis, forum delicti commissi and forum deprehensious. The United States applied them alternatively depending upon the nature of the offense and the social interest sought to be protected by the respective legislation; and conduct where committed which is injurious to the United States as a sovereign is held prosecutable and punishable in the United States.

Gradually theorists conceived of a doctrine which would allow a sovereign to maintain its jurisdiction over the person of its nationals wherever they may be. Thus jurisdiction over the person of a national when abroad became a corollary to the nation’s sovereignty. A logical extension became that the sovereign has the right not only to protect itself from foreigners or nationals acting outside its territory against its interests, but also has the right to protect its own nationals from harm incurred by them outside its territorial jurisdiction. Protection of the national abroad attaches to his person and subjects anyone irrespective of his nationality to the jurisdiction of the protecting state. The ever increasing protectionism manifested by such a theory arises out of the concept of sovereignty and may constitute an infringement upon the sovereignty of other nations. It represents a source of potential international friction. Probably the clearest application of such a theory is the continued applications of United States laws over military persons abroad. However the ever expanding United States military presence in foreign countries resulted in certain conflicts with host nations and the United States negotiated several status of forces agreements with countries wherein the United States has military bases. By virtue of such agreements the host country may be allowed to exercise its territorial jurisdiction over American offenders who are in the military, subject to American authorities consent.

The problems of conflicts of criminal jurisdiction are largely due to the narrow and jealously guarded concept of sovereignty. The battles over where to prosecute an accused criminal overshadow the real substance of the issue \textit{i.e.} to prosecute and punish offenders. The alternative is to seek the proper applicable law rather than where the accused should be tried or whether he should be tried altogether because of political differences between the respective requesting and the asylum state.\textsuperscript{30}

The multiplicity of jurisdictional theories do not only result in problems of conflicts of laws but constitute an impediment to effective criminal law enforcement both locally and internationally while subjecting accused offenders to the risk of multiple prosecutions. Indeed, under the passive personality doctrine or the nationality doctrine where more than one state can prosecute for the same offense, the accused will be subjected to double or triple jeopardy whenever he can be extradited on account of an offense committed abroad which may be also punishable in that country or subjected to the threat of prosecution upon return to his state of nationality or a third protective state. The defense of double jeopardy is not yet sufficiently established to remove the effect of such a threat.

The interest in preserving world public order does not conflict with the concern for preserving municipal public peace which requires effective criminal law enforcement. Both do not need for their existence the extinction or abridgement of personal rights. However, all need a reduction in emphasis of the role and function of national sovereignty concepts in matters of extradition.

\textit{In Personam Jurisdiction: Disguised Extradition and Abduction}

The problems of jurisdiction are not limited to conflicting theories of applicable law and competent forum but extend to the means by which in personam jurisdiction is secured.

The process of securing jurisdiction over the person of a fugitive can be by lawful means provided for in the law of extradition and the applicable treaties, or by means which subvert the spirit of the treaty, such as the frequent practice of disguised extradition,\textsuperscript{31} or abduction. The means used in the case of disguised extradition are the result of close cooperation between the governments of two or more countries, usually neighboring states.\textsuperscript{32} The asylum state will refuse to grant the fugitive

\textsuperscript{31} O'Higgins, Disguised Extradition: The Soblen Case, 27 Modern L. Rev. 521 (1964).
the privilege of remaining on its territory by denying his petition for residence; it can also expel the resident fugitive. These practices are an exercise of the sovereign prerogative of the state in which the fugitive sought refuge. Such a state cannot be truly called an asylum state until it has formally allowed the fugitive to remain. Even then it can terminate his stay at its will without any recourse for the fugitive, either under Municipal Administrative Law or International Law. The fugitive has neither the right to asylum and protection nor the standing to claim any such benefit.

The refusal to permit a fugitive's stay or his expulsion may not allow him the privilege of voluntary departure or the choice of a destination. Thus, he will be deported or expelled by actually being seized and literally ejected at the national borders. If the authorities of the neighboring state are conveniently present at that time and place, they may seize the individual (who is then) in their jurisdiction and bring him to trial. Nowhere during the entire course of such conduct is there any compliance with an extradition treaty (if it exists) or customary practice of formal extradition. Such a process is a disguised form of extradition which can be referred to as informal surrender of fugitives or undesirables. From the standpoint of world public order such a practice is probably conducive to good will between neighbor states, if the individual is a citizen of the receiving state, but if he is a citizen of a third state, such practice may involve that third state whose citizen was affected by what could be labelled an international conspiracy. In such a case the practice would seriously threaten world public order. In any event the practice is a violation of the individual's rights to the due process of the law.

The most serious threat to world public order lies in the practice of unlawful seizure of a person in a foreign state and his abduction. The Eichman and Tschombe cases will remain landmarks of such abusive practice. The abduction or kidnapping is a transgression against the sovereignty of the state wherein the fugitive was taken by agents of another state. It is an affront of the asylum state and a challenge to

33. U.S. v. Sobell, 142 F.Supp. 515 (S.D.N.Y. 1956); U.S. v. Sobell, 244 F.2d 520 (2d Cir. 1957); also Ex Parte Wilson, 63 Tex. Cr. 281, 140 S.W. 98 (1911).
35. See Luis Kutner's petition to the U.N., Human Rights Commission, filed on behalf of Mr. Tschombe, July 1967.
36. Preuss, Kidnapping of Fugitives from Justice on Foreign Territory, 29 AM. J. INT. L. 502 (1935); and Preuss, Settlement of the Jacobi Kidnapping Case, (Switzerland v. Germany), 30 AM. J. INT. L. 123 (1936); Dickinson, Jurisdiction Following Seizure or Arrest in Violation of International Law, 28 AM. J. INT. L. 231 (1934); 2 Hyde, INTERNATIONAL LAW § 321 (2d ed., 1945).
the lawfulness of orderly world relations. Not to mention the individual's human rights. The most serious consequences can result from such practice on the peaceful relations of the respective states and are a threat to world public order. American courts accept jurisdiction over the person of an accused present in court and exercise it no matter how it was secured.\(^3\) The means by which the presence of the accused was obtained has never inhibited the courts. Practically every category of unlawful methods of securing jurisdictional presence has been used so far; and the courts have tacitly accepted for purposes of jurisdiction such practices as disguised extradition, abduction and kidnapping, fraud, and false pretenses; all have passed the legal test.\(^8\) This shifting jurisdiction over the person of an accused is the result of a world system of vertical power as between nations. Jurisdiction is after all an exercise of authority and power. It is not subject to horizontal control by an authoritative hierarchy.\(^9\)

The \textit{Eichman} and \textit{Tschombe} cases gave rise to international clamor and demonstrated how potentially harmful the practice is with respect to the maintenance of world peace and public order.\(^40\) But the practice will continue to go unabated so long as the courts will accept in personam jurisdiction on the basis of \textit{Mala Captus Bene Detentus}. The gist of the problem is the violation by a state of the orderly process of legality of conduct, with all that which it comports of inherent transgression of the world's public order and the potential consequences on world peace, thus disrupting world public order.

\textbf{The Doctrine of Double Criminality: Reciprocity Within Reciprocity}

Extradition will not be granted unless the fugitive is alleged to have committed one of the offenses enumerated in the applicable extradition


38. Hunt, \textit{Ker v. Illinois Revisited}, 47 Am. J. Int. L. 678 (1953); and for some older cases see: State v. Brewer, 7 Vt. 118 (1835), Ex Parte Brown, 28 Fed. 653 (N.D.N.Y. 1886), People v. Pratt, 78 Colo. 345 (1889); also U.S. v. Insull, 8 F.Supp. 371 (N.D. III. 1934), People v. Rowe, 4 Parker Cr. 253 (N.Y. 1958). The rare decision which refused to entertain jurisdiction on grounds that the presence of the accused was secured by fraud was Dominguez v. State, 90 Tex. Cr. 92, 79 S.W. 234 (1921). However, Texas has consistently recognized its jurisdiction in disguised extradition cases, in cooperation with Mexican immigration authorities.


Treaties do not define these offenses but only name them, and therefore some body of substantive criminal law must be applied by the extradition magistrate to determine whether the act committed constitutes a treaty offense. The substantive law applied is that of the state where the fugitive is found.\textsuperscript{41} Prior to 1933, the federal courts had upheld the doctrine of double criminality, that is, the rule that the conduct complained of must be criminal according to the law of both the requesting and the asylum nations in order for the offenses to be extraditable.\textsuperscript{42} Essentially it is a condition of reciprocity of punishable offenses, but when we consider that the United States only considers extradition on the basis of reciprocity to start with, it becomes reciprocity (of offenses) within reciprocity (of extradition relations). Some American extradition treaties contain a general provision explicitly embodying the requirement of double criminality;\textsuperscript{43} others are completely silent concerning the substantive law to be applied.\textsuperscript{44} Most treaties,\textsuperscript{45} however, specifically require double criminality only with regard to certain offenses, such as financial crimes.\textsuperscript{46} Interpreting such a treaty, the Supreme Court in \textit{Wright v. Henkel}\textsuperscript{47} held that when the offense charged is expressly required to be made criminal in both countries, the law of the state where the fugitive is found will be applied. Broad language in the opinion indicated that the principle of double criminality would be applicable even absent explicit provision. In \textit{Factor v. Laubenheimer},\textsuperscript{48} however, the Court, applying the mode of analysis denoted by the maxim \textit{expressio unius est exclusio alterius}, concluded that when the particular offense charged is not among those required to be criminal in both countries, the act complained of need not constitute a crime in the state where the accused is found. It was sufficient, the Court found, that the offense was specified in the treaty and considered a crime by the jurisprudence of both countries.

The doctrine of double criminality furthers the objective of protecting the individual's rights. National laws may vary regarding certain conduct, and there seems to be some justification to refuse extradition for conduct which is unlawful in the asylum state though criminal within the demanding nation. Such protection has continued to

\begin{footnotes}
\item[41] Wright v. Henkel, 190 U.S. 40, 61 (1905).
\item[42] Collins v. Loisel, 259 U.S. 309 (1922); Kelly v. Griffin, 241 U.S. 6 (1916); Wright v. Henkel, \textit{Supra} at note 41.
\item[43] Extradition Treaties with Union of South Africa and Switzerland, \textit{Supra} note 5.
\item[44] Treaty with Colombia and Ecuador, \textit{Supra} note 5.
\item[45] Some 64 treaties now fall into this category, \textit{Supra} note 5.
\item[46] Treaties with Albania, Austria; and Supplementary Convention with Great Britain, \textit{Supra} note 5.
\item[47] \textit{Supra} note 38.
\item[48] 290 U.S. 276 (1933).
\end{footnotes}
be afforded the individual despite the *Factor v. Laubenheimer* case.\(^4\)

In practice, lower federal courts have continued to apply the criminal law of the state where the fugitive is found.\(^5\) Furthermore, recent extradition treaties contain general provisions requiring the conduct complained of to be punishable in both countries by a term of one year or more.\(^6\) This is deemed to be commendable, since such provisions uphold the privilege of asylum for individuals charged with trivial offenses technically falling within the treaty's list of extraditable offenses.

The rationale for such a doctrine is an extension of the maxim *Nulla poene sine lege.*

The law imposing criminal responsibility must not only be formulated as a law but also contain certain elements of notoriety and notice. These may not hold true in the case of a foreigner who has only entered the country shortly and who does not intend to become a domiciliary. However, if the act deemed an offense constitutes also an offense in his country of origin, then he will be on notice of the prohibited conduct. To hold otherwise may jeopardize the foreigner who will furthermore be universally denied a defense of ignorance of the law. A foreigner who finds himself in the predicament of having violated the local law without knowledge or intent may therefore seek asylum in a third state or return to his country of origin. It is less clear what the function of double criminality is when the fugitive in the asylum state is a national of the requesting state who has violated its laws with full knowledge and intent.

The American position is again predicated on reciprocity but adds the factor of attempting to establish certain standards of fairness which are designed to inure to the benefit of the fugitive. What exactly is the American public interest in this respect is at best doubtful. The practice does, however, add another layer of personal protection to the fugitive. To presume the inadequacy of the judicial process of the requesting state or the validity of its laws and to impose such a condition without apparent public interest for the United States, increases frictions between the respective nations and potentially threatens good relations. In effect it superimposes its authoritative decision to the juridical determination of the requesting state who claims violation of its public order.

\(^4\) *Id.*

\(^5\) United States ex rel Rauch v. Stockinger, 269 F.2d 681 (2d Cir. 1959) cert. denied, 361 U.S. 913 (1959) (same treaty and offense as in *Factor Case, Supra, note 9*; New York Penal Law applied); Villareal v. Hammond, 74 F.2d 503, 506 (5th Cir. 1934).

\(^6\) Treaties with Sweden and Brazil, *Supra* note 5.
The Doctrine of Specialty: The Long Arm of the Surrendering State

This is a common provision in American extradition treaties, and the doctrine imposes the limitation that demanding nations cannot prosecute the extraditee for any offense other than for which the accused was surrendered. Even where the treaty fails to expressly state this reservation, the Supreme Court has indicated that the doctrine may be implied from the "manifest scope and object of the treaty." The doctrine is also considered in the United States a principle of international law that would be applicable even in the absence of express treaty provisions.

Certain narrow exceptions to the doctrine of specialty have been recognized—the extraditee may be prosecuted for offenses committed subsequent to extradition, or for offenses committed prior to extradition providing the demanding nation has given the accused a reasonable opportunity to depart from the country. The doctrine of specialty has also been construed to prevent re-extradition of the accused from the United States to a third nation until the accused has been offered his "right to return." The whole concept of such a doctrine is hardly consistent with the recognized practice of disguised extradition and abduction.

The doctrine of specialty rests on the premises: that the asylum state has an absolute right to grant asylum; that such state surrenders the accused for the special purpose defined in the treaty; that the authorities of the demanding nation lack jurisdiction over of the accused for all other purposes; and that the right of asylum under international law would be subverted if the demanding nation were permitted to prosecute the accused for any charge it deemed opportune once it had in personam jurisdiction.

This is predicated on the notion that because the United States as an asylum state had jurisdiction over the fugitive and exercised it in favor of the requesting state that the United States acquires thereby a special interest in the individual. As if the jurisdiction of the asylum state continued over the person of the fugitive after he was transferred over to the requesting state excepting only his prosecution or punishment for the specific offense upon which extradition was granted.

While it is true that states may use legal subterfuges to obtain extra-

55. Supra notes 39 and 40.
dition of a fugitive, the interest of the asylum state after the surrender of the extraditee is less comprehensible particularly if the extraditee is not a national of the asylum state. The only basis for such a concern is that the asylum state has exercised its governmental processes for (maybe) the unavowed purpose of the requesting state, in other words, that it was used for a purpose for which it did not intend to be used. The logical conclusion for such doctrine is that its violation by a requesting state would cause the United States to consider the requesting state in breach of trust. The potential consequences in this case may also be a threat to the peaceful relations of the respective nations and hence a possible breach of world public order. This is particularly significant if the United States as an asylum state would subsequent to the extradition seek to prevent the prosecution or punishment of the extraditee for an offense other than the one for which the extradition was granted. It is hardly conceivable how the United States can accomplish it, but any diplomatic action it may undertake in this direction is threatening to the peaceful relations of the respective nations. Conversely the conduct of the requesting state is violative of world public order since it provokes the aforementioned reaction. The practice of a state in securing the extradition of a person, whether by threat, fraud, deceit, abduction or otherwise is unlawful in terms of the states obligations to abide by an orderly process and follow established legal procedure. Such a practice may not be considered a per se violation of international law, but its disruptive effects on world public order are more significant.

Political Crimes Exception: A Double Edge Sword

All American extradition treaties now in force expressly prohibit the surrender of persons charged with "any crime or offense of a political character," and some also prohibit surrender for "acts connected with such crimes or offenses."57 The reasons for the political offense exception ultimately rest upon the asylum state's sense of humane treatment and belief in human rights and personal and political freedom.58 It is generally acknowledge that political crimes affect the demanding state's most sensitive desires for peace and security, and therefore inspire a passionately hostile atmosphere which makes an orderly and fair trial very difficult.59 Asylum states also feel that political offenses, unlike

57. Treaties with Albania, Costa Rica, Iraq, Supra note 5.
59. Id.
ordinary crimes, reflect the individual's resistance to the regime of the demanding state only, so that the presence of the offender in the asylum state is not a threat to its domestic tranquility.\textsuperscript{60}

The commendable objective of the political offense exception have unfortunately seldom been realized. The reason for this lies in the fact that in every case, the definition of political offenses and determination of whether the crimes charged by the requesting state constitute political offenses lies with the authoritative decision making process of the asylum state. Courts have often if not always experienced difficulty in arriving at a workable definition of what constitutes a political offense. As a guiding principle, the courts usually begin with the generally accepted view that, broadly speaking, a political offense is an act directed against the national entity.\textsuperscript{61} Thus, such offenses as treason, sedition, espionage or even verbal dissent are generally regarded as political—for which extradition is denied. In terms of the classical extradition law, these offenses are purely political offenses or subjective offenses, since they often have none of the elements of common crimes,\textsuperscript{62} whereas "relative political offenses," are offenses where a common crime is so inextricably lined to the political act that the entire offense is regarded as political and, hence, non-extraditable. The United States courts basically adhere to the English position, enunciated in \textit{In re Castioni},\textsuperscript{63} that "relative political offenses" will not be extraditable when two conditions are met: there must be a political revolt or disturbance, and the act for which extradition is requested must be incidental to or form part of the political disturbance. However, such "political incidence test" has been broadened in America so as to include as a political offense any act connected, no matter how tenuously, to political turmoil. In the famous \textit{Rudewitz} case of 1908, dealing with a Russian revolutionary charged by the Tsarist Government with the common crimes of murder and arson, the Secretary of State overruled the magistrate's decision, and concluded that Rudewitz's crimes were political offenses committed as part of the revolutionary activity of the Social Democratic Labor Party, and refused to issue the warrant of surrender.\textsuperscript{64} It is felt that the "incidence test" is usually broad, since such test may be satisfied by any terrorist, assassin or guerilla whose criminal acts remotely serve political ends.\textsuperscript{65}

\textsuperscript{60} Garcia-Mora, \textit{Treason, Sedition and Espionage as Political Offenses Under the Law of Extradition}, Supra note 58, at 85.


\textsuperscript{62} In \textit{re Fabian}, (1933-34) Ann. Dig. 306, 363 (No. 156).

\textsuperscript{63} I.Q.B. 149 (1890).

\textsuperscript{64} Case of \textit{Rudewitz}, discussed in 4 \textit{Hackworth} § 316, at 49, 50.

\textsuperscript{65} See also the \textit{Ruiz}, proceeding, Id. 50-52; and the \textit{Artukovic Cases}, infra note 64.
The State Department, in an effort to avoid the many difficulties with the political offense exception, has drafted the exception with considerable care in the recent treaties with Brazil and Sweden. The Brazilian treaty exempts from the prohibition "criminal acts" which constitute clear manifestations of anarchism or envisage the overthrow of the bases of all political organization in order to eliminate asylum for such offenders. The treaty also permits extradition for offenses having political overtones, subject to the condition that the extraditee will not be more severely punished because of the political ramifications of the offense. The Swedish treaty also adds that the surrender of a fugitive may be denied for humane reasons, such as the "youth or health of the person sought." 66

The political offense exception is a double edge sword. While it is intended to protect individual rights and personal freedom, it imposes American standards and values to foreign sovereigns; but more significantly it can, for self-serving interests, deny extradition because the presence of the fugitive in the United States serves its political purposes. The fugitive may well have committed an extraditable offense but his sudden political opposition to a foreign regime may render him so desirable to the United States that his extradition will be denied on alleged political exception grounds. 67

The benefits of luring foreign defectors and offering them asylum may be commendable in terms of human rights but highly explosive in terms of global strategy for public order when the defector also happens to have committed common crimes.

Too often the political refugee will be a highly placed foreign official who may have committed common crimes, but their quantity will seem to cast his acts in a political character. 68 It would seem that human considerations and inducements to foreign exiles, defectors, or fugitives should not overshadow concern with punishability of those who have

also committed common crimes. The alternative to extradition should be to try such persons in the United States using the doctrine of renvoi and applying the law of the situs wherein the offense was committed.

While this solution will not fully satisfy the requesting state whose greatest consideration is the political and propaganda effect resulting from the denial of extradition, it will, however, deflate the claim that the United States is harboring criminals. Such a solution may partially assuage the fears and anger of the requesting state while certainly increasing United States credibility and reliability in the eyes of the world community. Nothing can more further world public order than the confidence of the nations of the world that no other nation will offer asylum or refuge to common criminals or stand in the way of their prosecution and/or punishment.

Extradition of Nationals: A Discriminating Practice?

American extradition treaties contain generally three types of such provisions. The first does not refer to nationals specifically, but agrees to the extradition of "all persons." 69 Judicial construction 70 and executive interpretation 71 of such a clause have consistently held that "persons" include nationals and refusal to surrender a fugitive because he is a national cannot be justified under such treaty provision. The second and most common type of treaty provision provides that "neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention." 72 Treaties of this sort are the most numerous due to insistence by other nations. The official policy of the United States in treaty negotiations has been, when possible, to prevent the surrender of nationals. 73 As construed, such a policy prohibits the Secretary of State from surrendering a citizen of the United States unless there is an explicit treaty provision based on reciprocity. 74 The third type provides that "neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up if, in its discretion, it be deemed proper to do so." 75 Exercise of such discretion would be consistent with the treaty obligation, and the Secretary has both granted and denied surrender of American nationals under a treaty of this type. In 1947 and 1949, the

69. Treaties with Great Britain, Italy, Supra note 5.
71. Id. at 475-76, (Memo from Secretary of State Knox).
72. Treaties with France, Iraq, and Venezuela.
73. See 4 HACKWORTH § 318, at 55.
75. Treaties with Mexico, Argentina, and Japan, Supra note 5.
State Department refused to surrender a total of four American citizens to Mexico. In notes to the Mexican Ambassador, the Department invited the attention of the Mexican government to the persistent refusal of Mexico to surrender its nationals. However, despite a similar refusal of the requesting country to surrender its own nationals, the State Department, in a case involving a treaty providing for the extradition of "all persons" considered itself obligated to surrender a United States national.76

Unlike surrender of foreign nationals, this aspect of extradition presents added dimensions to the whole problem. The quality of justice and system of fairness which has evolved in the American system is far from being equalled anywhere in the world in terms of individual rights and personal safeguards. The Constitutional rights and standards of fairness which permeate the American system of criminal justice, are unavoidable in other jurisdictions.

These guarantees however, are operative only when the offense is prosecuted in the United States and do not attach to the person of the national.77

Therefore, in view of this fact, it seems more likely that extradition will be granted to a state which has a "fair" system of criminal justice and less likely to be granted to the state which has a more summary procedure.

It is conclusive that such practice stems from a human concern for the accused but fails to appreciate his criminality or the harm he has caused to a foreign private interest and the public wrong resulting therefrom. Consequently such preferential and discriminating treatment will cause public tensions and tend to disrupt good will among the respective states. The alternative in this case also is to try the accused in a United States court, using foreign substantive law, and local procedure as would be the case in federal practice.78 In the absence of a treaty provision specifically allowing extradition of nationals the United States will not permit it, thus differentiating between its nationals and other nationals. This discrimination is based on a sense of superiority in the American system of justice to the benefits of which all American citizens are deemed to be entitled. It is also believed that executive discretion permitting

77. The issue was raised with regard to the constitutionality of status of forces agreement in Wilson v. Girard, 354 U.S. 524 (1957) and the Supreme Court held that a person is triable wherein he committed the crime and cannot object to his foreign trial on the grounds that he will not be afforded the same constitutional guarantees which as a citizen he would enjoy in the U.S. if he was tried by an American tribunal. See also Neely v. Henkel, infra note 85 and 86.
78. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) and Rule 16 F. R. Civ. P.
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or denying extradition will consider the seriousness of the offense charged and the evidence available. Such consideration of the facts when coupled with other factors affecting the binational relations of the respective countries and other international implications will militate in favor of allowing extradition. The conclusion still remains that a dual standard is applied. In the balance are the personal rights of the person sought by the foreign government, the possibility that a criminal may go unpunished if his extradition is refused and the disturbing consequences which can be incurred by the United States in terms of disruption of friendly relations and breach of mutual confidence with the interested foreign nation or nations. One may also question the orderliness of such conduct by the United States with reference to its adherence to a rule of law concept which would require its faithful observance of certain standards which are necessary for the maintenance of world public order. A breach of world trust or failure to observe lawful means in the course of its public conduct exposes such country to blameworthiness. Not that blame which arises by violating specific norms of international law, but that which results from threatening the world's interest in the preservation of a public order based on the orderly process of conduct of world affairs, without a significant contravailing national interest sought to be preserved by such course of conduct.

The Scope of Habeas Corpus and the Rule of Non-Inquiry

Extradition is not the prosecution of an accused nor the means for testing the merits of the criminal charges proffered against the relator. The extradition magistrate is by treaty and statute limited to the inquiry into the validity of the process in terms of its compliance with the treaty obligation and the relevant federal statute.79

The fugitive's judicial remedies to secure review of the magistrate's order to commitment are therefore extremely limited, even though United States courts seek to increase their supervisory role over the substance of the subject matter. No direct appeal lies from an extradition order,80 and the relator has only two courses of action—he may either petition the federal courts for a writ of habeas corpus or petition the United States Supreme Court for a writ of certiorari81 to challenge the legality of his detention. The scope of review is almost the same in both proceedings.82

82. Id.
In international extradition cases, the Supreme Court has narrowly restricted the function of habeas corpus proceedings. The writ cannot serve as an appellate review to rehear what the magistrate has previously considered. In *Fernandez v. Phillips*, the Court stated:

The alleged fugitive from justice has had his hearing and habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty, and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable grounds to believe the accused guilty.

Furthermore, the federal courts have been unconcerned with the fairness of the fugitive's trial and treatment subsequent to the extradition. On a habeas corpus hearing the subject of the review involves only the validity and legality of the extradition proceedings and not the prospective conduct of the demanding state's authorities toward the accused.

In *Neely v. Henkel*, the fugitive Neely contended that amendments to the federal extradition laws were unconstitutional in that the accused was not assured the rights, privileges, and immunities guaranteed by the United States Constitution upon surrender to the demanding nation. The protections specifically alluded to by Neely were constitutional prohibitions against bills of attainder and ex post facto laws, guarantees of writs of habeas corpus, trial by jury, and the fundamental rights to life, liberty and property. In reply, the Supreme Court stated:

These provisions have no relation to the crimes committed without the jurisdiction of the United States against the laws of a foreign country.

In connection with the above proposition we are reminded of the fact that the appellant is a citizen of the United States. But such citizenship does not . . . entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled.

The rule that federal courts will not consider alleged oppressive action by demanding states is known as the *rule of non-inquiry*. Such rule is brought into sharp focus in the line of cases dealing with in absentia convictions of extraditees by the demanding nation's tribunals and that nation's subsequent attempts to extradite the fugitive from the United States. In such cases, the United States follows the general principle of international law that the in absentia convictions are not conclusive of the individual's guilt, but regarded merely as indictments.

83. 268 U.S. 311 (1925).
84. *Id.* at 312.
85. 180 U.S. 109 (1901).
86. *Id.* at 122-23.
or formal charges against the person or persons sought to be extradited. In the first such case, Ex parte Fudera, involving an in absentia conviction and sentencing of a fugitive for the crime of murder by the Italian courts, the Circuit Court, on a writ of habeas corpus, chose to pass over the question of the propriety of the in absentia criminal prosecution and sentencing. The court instead rejected the Italian government's evidence of guilt as "pure hearsay" and released the fugitive on the ground of insufficient evidence.

The next case, Ex parte La Mantia, similarly involved a murder conviction by an Italian tribunal. This time the fugitive alleged that the Sixth Amendment to the United States Constitution had been violated, since he had been denied the right of confrontation and cross examination. The federal district court held that "this did not apply to persons extradited for trial under treaties with foreign countries whose laws may be entirely different." However, the fugitive again was ordered released and extradition refused for insufficiency of evidence presented by the Italian government.

The District Court in the case of In re Mylonas, consistent with prior authority, ruled that Mylonas' conviction in absentia did not preclude extradition, even though the fugitive, convicted of embezzlement, was not represented by counsel, and had no one appear for him. Again, however, the court found a ground upon which it ordered the accused discharged from custody—namely, that under Article V of the 1931 treaty of extradition with Greece, the Greek Government's long-delayed effort to take the accused into custody exempted Mylonas from extradition "due to lapse of time or other cause."

Thus, in the three above cases, the courts, though recognizing the limited scope of habeas corpus and the rule of non-inquiry, were able to free the accuseds and deny extradition upon other grounds. These, and the general practice, presented however no opportunity to limit the application of the harsh attitude towards the right of the extraditees to oppose extradition based on in absentia convictions. Two opinions voiced disenchantment with the established rule.

In Argento v. Horn the Sixth Circuit unwillingly felt constrained to submit to precedent. Argento, the fugitive, had been convicted in absentia for the crime of murder by the Italian courts. The murder had

90. Id. at 332.
92. 241 F.2d 258 (6th Cir. 1957).
occurred in 1921, and the conviction obtained in 1931, but not until the 1950's did the Italian government initiate proceedings for Argento's extradition. The court stated:

The appellant has apparently been a law-abiding person during the thirty years that he has been in this country. To enter a judgment that will result in sending him back to life imprisonment in Italy, upon the basis of the record before the Commissioner, does not sit easily with the members of a United States court, sensible of the great Constitutional immunities. . . . However, we conceive it our obligation to do so.93

Gallina v. Fraser94 was decided by the Second Circuit Court of Appeals, which also bowed to precedent, but indicated that given a proper case, the rule of non-inquiry might not be followed. In this case Gallina had been tried and convicted in absentia by the Italian courts for the crime of robbery. Gallina petitioned the federal district court for a writ of habeas corpus, contending that if extradited to Italy he would be imprisoned without retrial and without an opportunity to face his accusers or conduct any defense. Judge Waterman stated:

We have discovered no case authorizing a federal court in a habeas corpus proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the relator upon extradition. . . . Nevertheless, we confess to some disquiet at this result. We can imagine situations when the relator, upon extradition, would be subject to procedures or punishment too antipathetic to a federal court's sense of decency as to require re-examination of the principle set out above.95

This was not such a case, however, because Gallina had been represented by counsel at his trial, and was tried along with his alleged associates who were present before the Italian court and were also convicted.

The courts, therefore, have thus far refused to undertake the factual inquiry into the individual's prospective treatment by the demanding nation. In the event Judge Waterman's view prevails in some future case, the court might refuse to surrender the fugitive to a foreign nation's oppressive or arbitrary criminal processes, while his humanitarily commendable concern must be voiced that the criminals do not go unpunished and that a procedure be established in the United States to try them in American courts for crimes committed abroad, using renvoi and applying lex delicto with American procedure.

For a state not to inquire about the fate of a person whose extradition is sought would reflect a disregardful attitude toward human rights. To inquire as to the requesting state's substantive law and criminal pro-

93. Id. at 263-64.
94. 278 F.2d 77 (2d Cir. 1960).
95. Id. at 78, 79.
procedure or maybe its penological policies could be construed as offensive to that state. It would seem that the primary duty of either country is to seek prosecution and if guilt is established to enforce punishment. Fears that foreign penological policies are too harsh and that institutional systems too primitive should not be a bar to the offenders punishment. The alternative is to enter a sentence in the United States and to have the offender serve it in a United States institution. Agreements of the sort would avoid the temptation of inquiry which may result in denying extradition. In the absence of such alternatives United States courts will be tempted to floute the rule of non-inquiry because of humanitarian concerns. The result may threaten friendly bi-national relations and transgress the orderly progress of world public order.

Executive Discretion in Extradition, a Political Tool

Prior to 1871, the function of the Secretary of State upon receiving the magistrate's certification was considered purely ministerial. Once the Secretary had satisfied himself as to the regularity of the proceedings before the magistrate, his duty was to issue the warrant. Thus, in effect, the sole power to commit for extradition or to discharge was vested in the extradition magistrate. Executive discretion was first exercised in 1871, when the Secretary surrendered only four out of seven persons awaiting extradition to Great Britain on charges of piracy and assault with intent to commit murder. No reason for the refusal to surrender the other three prisoners was given.

In the first judicial recognition of this discretion, *In re Stupp*, it was found that federal law endowed the Secretary with power to refuse the surrender of the accused. Stupp's extradition to Prussia had been certified to the Secretary by the magistrate, although Prussia's jurisdiction over the offense was not territorial but was based on Stupp's Prussian nationality. The Secretary refused to issue the warrant on advice of the Attorney General that the extradition treaty applied only when the alleged offense had occurred within the territory of the requesting country.

The extent of the Secretary's discretion is not clear, for both the statute and the courts are silent as to direct limits imposed on such discretion. Usually the treaty obligation to extradite is absolute. The extradition statute might be interpreted to grant the Secretary broad discretion to refuse to surrender in a case included within the treaty

97. *Id.* § 363.
98. 23 Fed. 281 (C.C.S.D.N.Y. 1873).
obligation. If so, although extradition treaties are considered self-executing, the extradition statute supersedes prior inconsistent treaty provisions, under the rule that treaties and statutes are legislation having co-ordinate authority. However, the statute should probably be interpreted to grant the Secretary only limited discretion to differ from the courts in the matter of treaty interpretation. In fact, the Secretary has always based his refusal to surrender upon a determination that the treaty did not require extradition in that instance. Thus, a formulation of the limits of the Secretary's discretion can be derived only indirectly from executive and judicial construction of treaty undertakings.

Whatever such a theoretical formulation might be, in practice, the Secretary acts as an authority for de novo proceedings on the precise issues, previously resolved by the extradition magistrate, and the Secretary apparently considers his discretion only coextensive with the issues presentable at the extradition proceedings.

The United States extradition treaties generally provide that the requesting state must present to the magistrate sufficient evidence of the accused's guilt as would justify the apprehension and commitment of the accused for trial according to the laws of the asylum state. It is in this area that the Secretary's discretionary refusal to surrender is most prominent. Although the extradition magistrate determined that the evidence is sufficient, in several cases the Secretary reached a contrary conclusion and refused extradition. Other instances of the Secretary's exercise of discretion are the refusal to extradite United States citizens to demanding states which have historically refused to extradite their nationals at America's request, the refusal to extradite for crimes deemed by the Secretary to have constituted political offenses, and the deferment of extradition while the fugitive was undergoing prosecution or was imprisoned within the United States.

Despite its power of review, the executive (the Secretary of State) has refused surrender of nationals infrequently and only then when discretion to refuse surrender of nationals was expressly granted by the treaty. Three reasons may be suggested for this infrequent exercise of executive discretion. First, as the law of extradition has become more highly developed, extradition magistrates have been more effective in eliminating those cases that do not give rise to an obligation to surrender. Second, the courts, examining such extradition proceedings on writs of

99. Executive Discretion in Extradition, Supra note 76 at 1313, 1316 (1962).
100. Id. at 1319-1321.
101. Id. and 1 Moore § 366.
102. Id. at 1328.
habeas corpus are asserting a greater supervisory role, despite their earlier protestations to the contrary. Third, the State Department wishes to defer to the requests of the other nations, in an effort to maintain good foreign relations and abide by the orderly process of world public order.

Whatever the State Department's reasons might be for refusing to make more frequent use of its discretionary powers, critics feel that the Department's extradition policies are untenable, and serve only to deny the cause of human rights and international due process in the world community. The State Department is constantly urged to be more active in securing human rights through a more liberal use of its power to refuse extraditions, especially since the courts still adhere to the rule of non-inquiry and provide only limited judicial review. Such critics, however, offer no alternative to the unconditional release of a person who may be a criminal.

It would seem, however, that since the power to refuse surrender is discretionary in nature, and as such, subject to arbitrary changes in executive policy as to its exercise or non-exercise, that adequate safeguards for the extraditee will come only through judicial rejection, as "prophesied" by the Court in Gallina v. Fraser,103 of the rule of non-inquiry, and a general widening of the scope of judicial review in extradition cases, after the United States decides to undertake the prosecution and/or punishment of persons who committed offenses abroad and whose extradition it opposes. Executive discretion is the most crucial form of authoritative decision making of purely political character which overrides judicial determination. Its basic rationale should be the preservation of world public order: instead, it is precisely that which it most often threatens.

Conclusion

Extradition in the United States is viewed as the exercise of sovereignty grounded in reciprocity and based on the political convenience of the government. The concern is not, unfortunately, to participate in a politically disinterested struggle against world criminality. Criminals should be extradited notwithstanding governmental political differences and regardless of reciprocity because crime should not be protected. The concept of aut dedere aut punire should prevail, a criminal should be punished because of his offense. This should not however overshadow concern with human rights and the search for the establishment of such guarantees as Professor Kutner's world habeas corpus.104 The

103. 278 F.2d 77 (1960).
The present practice of extradition is full of loopholes and at best impractical. The nature of extradition processes neither serves the cause of human rights nor the efforts of governments to combat criminality. The resulting delays and unwarranted formalities cause some states to circumvent the requirements of the treaties. The practice of disguised extradition as exemplified by the Soblen case and abduction as in the Eichman case set the pattern not only for other “causes celebre” like the Tschombe case but for such practices as expulsion or termination of the residence of a person so as to deport him into the awaiting hands of another state. Those methods which seek to avert the requirements of extradition are a result of impractical treaties and constitute a constant violation and threat to human rights and due process of law. They can be avoided by the establishment of a single universal convention on extradition with a world habeas corpus proviso. Equally significant but potentially more disastrous to the world community is the resulting transgression of the concept of world public order.

This critical appraisal of the American practice is by no means made on the basis of a comparative evaluation. Similar practices are prevalent in many countries, and those nations who avoid the most apparent weaknesses of the system exposed herein do it because they sacrifice individual rights and disregard basic humanitarian concern. The American system attempts to balance individual protection and human rights on the one hand, and the need to preserve an orderly world community on the other. The results often fail to satisfy either, which is the unfortunate lot of any centrist position. However the issue of world public order and punishability of offenders as one of its considerations has not been dealt with forthrightly, if dealt with at all. The punishability of offenders can be established by a variety of methods such as: trying and/or punishing the offender in his own country or in an alternative jurisdiction. Human rights can be secured by the adherence to a single world convention on extradition with agreed minimum standards of due process in criminal justice. The spirit of such a proposal is contained in a resolution proposed by this writer at the 1968 Freiburg International Colloquium on International Extradition, the purposes of the conference was to prepare for the Tenth International Congress of International Penal Law to be held in Rome in 1969.

105. Supra note 31.
106. Kutner, Supra note 2.
107. See Bassiouni, Supra note 1. The suggestion was made at the 1968 Freiburg Colloquium on International Extradition where the author was the American delegate.
108. Supra notes 1 and 104.
The Freiburg Conference prepared resolutions and an agenda for the Rome Conference and discussed the various national reports. The proposed resolution is as follows:

It appears hopeful to substitute in the future to the structurally national concepts of criminality and to the intransigent consequences of national sovereignty an international concept of forms of criminality which, by their very nature, endanger fundamental human and social values and for the preservation of which a closer cooperation between the states is indispensable.

Consequently and in conformity to the contemporary trend to attribute to the individual the quality of subject of International Law, it is suitable to recognize that the individual who is the object of an extradition procedure may uphold before national and international jurisdictions the prerogatives recognized to him by the Universal Declaration of Human Rights and by international treaties.

To this effect and with a measure to foresee a general international convention it might be useful that there be recognized regional or international jurisdictions susceptible of hearing individual recourses directed against the decisions of national authorities rendered in violation of the afore-mentioned individual rights.

These jurisdictions could also be ceased with a procedure inspired by Habeas Corpus which would permit and give a more effective and practical remedy for the establishment of the Rule of Law on a world-wide basis.

This resolution was introduced in the French language by this author and was in part inspired by the concepts of World Habeas Corpus authored by Professor Luis Kutner.

It was joined in by Professor Levasseur of the University of Paris, School of Law, representing France; Professor Pisapia of the University of Milan, representing the Center for Prevention of Crime; and Attorneys Paradiso, Torrisi and Giallongo, representing (Catania) Italy.

The Conference members considered this proposition of such consequence that they have recommended its discussion as one of the topics of the Tenth International Penal Law Congress of Rome (1969).

The question of world public order is an issue of licitety and not of specific violations of an international duty or obligation. Obviously a specific violation results in a threat to world public order, but the licety of a nations conduct is the transgression by a state of an orderly process or lawful condition in a manner which challenges the rule of law and threatens peaceful international relations.\textsuperscript{109} It can best be characterized as a condition which bends the orderly process or maybe

\textsuperscript{109} On the question of illicit conduct by a state in international law, see Bassiouni, \textit{The Nationalization of the Suez Canal and the Illicit Act in International Law}, 14 \textit{DEPAUL L. REV.} 258, 258-263 (1965).
violates it without breaking it, but which leads to retaliatory counter measures and events likely to disrupt world peace. All of which exhibit disregard, contempt or indifference to the need for world public order and its tested channels of orderly processes. World public order is the Rule of law, and the Rule of law is the basis for world peace and peace needs the orderly processes of all matters which affect the world’s public order. World public order is the process of securing the independence of nations within the context of world inter-dependence.

Order is the product of a system of action through the inter-reactions of pluralistic values in the perception realization of the need for an inter-social criteria of acceptable conduct. World order is in the words of Professor Carlston: \(^{110}\) "The global order (as defined) brought into being by constructive action." \(^{111}\) Thus the action of any state reflects the state of world public order by its adherence to or transgression of its norms and processes. In its observance lies the hope of world peace through the Rule of law.

\(^{111}\) Id. at 127.