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International Extradition: A Summary of the Contemporary American Practice and a Proposed Formula

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INTERNATIONAL EXTRADITION: A SUMMARY OF THE CONTEMPORARY AMERICAN PRACTICE AND A PROPOSED FORMULA

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I

THE MEANING OF EXTRADITION IN THE UNITED STATES

Extradition is the process through which one state by virtue of a legal process surrenders to another state an individual accused or convicted of an offense outside the jurisdiction of the asylum state and within the jurisdiction of the requesting state which is competent to try and punish him and, accordingly, has demanded his surrender for that purpose.[1]

Definitions of extradition have consistently emphasized an interstate relationship predicated on sovereignty and bolstered by reciprocity. Such a view clearly fails to appreciate the fact that states should have an interest in combating crime and in seeing that it does not go unpunished. In other words, *aut dedere aut punire.*

International extradition has existed as early as the ancient times of the Chaldeans, the Egyptians, and the Chinese, where each international agreement was bound up in solemn, religious formulas in the name of national gods. Thus, in the Eastern world, the sanctity of international extradition pacts and the honoring of requests by the heads of state have long been respected and viewed as essential conditions in the life of national communities.[2]

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1. *Compare* Terlinden v. Ames, 184 U.S. 270 (1902), *with* "[L]'extradition est un acte d'assistance judiciaire inter-etatique en matiere penale qui vise a transferer un individu penalement poursuivi ou condanne du demaine de la souverainete judiciare d'un Etat a celui d'un autre Etat." 37 Revue Internationale de Droit Penal 362-63 (1966). *See also* 2 J. MOORE, EXTRADITION AND INTERSTATE RENDITION §§ 516-20 (1891); Bassiouni, *International Extradition in American Practice and World Public Order*, 36 TENN. L. REV. ____ (1969).

2. Kutner, *World Habeas Corpus and International Extradition*, 41 U. DET. L.J. 525 (1964).

Consistent with the ancient origin of international extradition and the conviction of the Eastern nations that such pacts were not only desirable but necessary is the fact that classical authorities—Grotius, Vattel, and Burlemaqui—took the position that extradition was a matter of right under the law of nations, and that the asylum nation had the duty to surrender the accused to the requesting nation.[3]

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 nineteenth century, the relatively new and independent sovereign states of the West found no need for such cooperative undertakings, and asylum was generally granted to fugitives from justice. A sovereign community could enforce the return of fugitives only by force of arms. Such history has given rise to the prevailing, contemporary view that extradition is a matter of favor or comity rather than a legal duty. In *United States v. Rauscher*,[4] 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 to neither ask for nor permit extradition. However, the relative "shrinking" in the size of the earth, as a result of technological breakthroughs in communication and particularly in travel, brought about the death of the isolationism which had previously characterized the United States. The trend toward interdependency of nations and the desire to suppress crime gave birth to the realization that close cooperation is required not only

3. United States *ex rel.* Donnelly v. Mulligan, 74 F.2d 220, 221 (2d Cir. 1934); 1 L. OPPENHEIM, INTERNATIONAL LAW § 327 (8th ed. H. Lauterpacht 1955).

4. 119 U.S. 407, 411-12 (1886).

between the various penal jurisdictions within one sovereign state, but also internationally between sovereign nations. Thereafter treaties for the extradition of persons charged with crime became both more numerous and more extended in their scope. However, the position of the United States remains basically that extradition is an exercise of sovereignty, decided by the executive and predicated on the reciprocity which is required by treaties and noncontractual practice.

Therefore, since the American practice rests largely on treaties wherein the mutuality of obligation exists, it is clear that reciprocity is a *conditio sine qua non*. However, the nature of such reciprocity does not lie in every aspect of the process, but in the principle of mutuality of obligations, even though these obligations may have different applications. The American position is that this is not a question of fairness for the accused nor an individual right, but rather a measure of state sovereignty. Thus, the state can waive it, and the individual whose extradition is sought cannot insist upon it.

Jay's treaty (1794) included the first international extradition pact 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 bilateral extradition treaties between the United States and other nations.[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 which have 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] even though it appears

5. See the enumeration of treaties at 18 U.S.C. § 3181 (Supp. III, 1964).

6. Evans, *The New Extradition Treaties of the United States*, 59 AM. J. INT'L L. 351, 352-53 (1965).

incongruous when considering that a basic tenet of extradition is an act of sovereignty based on an obligation of the character of *pacta sunt servanda*. The argument remains one of state succession obligations, and the United States maintains the position that these treaties are binding, though it prefers negotiating new treaties if and when possible with the said emerging nations.

II

EXTRADITION PROCEDURE IN THE UNITED STATES

International extradition in the United States is a national power pertaining solely to the federal government and absolutely denied to the several states.[7] 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.[8] 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.[9]

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7. Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936); United States v. Rauscher, 119 U.S. 407 (1886); IV G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 305 (1942). 18 U.S.C. § 3184 (1964) states:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

8. Factor v. Laubenheimer, 290 U.S. 276 (1933).

9. 18 U.S.C. § 3184 (1964). U.S. CONST. art. VI, cl. 2 states:

> This Constitution, and the Laws of the United States which shall be made in

The extradition procedure prescribed by this same federal statute may be summarized briefly as follows. Extradition proceedings must be initiated by the demanding nation's filing of a verified complaint charging the fugitive with the commission of an extraditable offense. The extradition 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 determine whether the demanding state has shown reasonable ground to believe the fugitive has committed an extraditable offense. If the magistrate 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 of State 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.[10] 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.[11]

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

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Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

As Chief Justice John Marshall durably interpreted the treaty power:

A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of Justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.

Foster v. Neilson, 27 U.S. (2 Pet.) 195, 238-39 (1829).

10. 18 U.S.C. § 3188 (1964); *see In re* Normano, 7 F. Supp. 329 (D. Mass. 1934); *In re* Dawson, 101 F. 253 (C.C.D.N.Y. 1900).

11. Jiminez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963).

such a state or territory; if the offense is against the laws 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. One author summarized the American procedure very aptly as follows:[12]

> A classic case that illustrates the substantive and procedural limitations is that of Jimenez v. U.S. District Court. Procedurally, in the United States, the surrender of an alleged fugitive to a foreign Government is dependent upon the filing of an accusation charging the offense specified in the treaty of extradition. It is not necessary under the statute to require a requisition from a demanding Government. Extradition, liberally constituted, a mixed question of law and fact, is a proceeding within the "business of the courts" and a complaint may be made by an authorized agent of the demanding Government and need not be sworn to. The complaint should set forth the knowledge of the complainant on which he makes the complaint, the substance of the offense (not barred by the statute of limitations in the requisitioned country), and, where the proceeding is before a Commissioner, the special authority of such commissioner to act. But in a general sense refinements of pleading are not adhered to. The record of proceedings before the foreign court need not be attached to the complaint if they are in the custody of the one making the complaint and the commissioner or judge is possessed of the information which they contain, although it is advisable that certified copies of the foreign complaint and warrant be attached to and made a part of the local complaint and presented to the statutory officer of the court of the United States, or to any judge of a court of record of general jurisdiction of any state. A complaint sworn to upon information and belief is held to be sufficient. Provisional arrest and detention underlies the spirit of all extradition treaties of the United States with other nations and the right to bail is sparingly recognized. The entire hearing is governed by a showing of probable cause to believe that the alleged fugitive had committed the extraditable offense, charged and within the treaty particulars, and the evidence in the extradition proceedings

12. Kutner, *World Habeas Corpus and International Extradition*, in INTERNATIONAL BAR ASSOCIATION, TENTH CONFERENCE REPORT 246, 249-50 (1964) (footnote added).

need not be sufficient to convict or pass on technical rules governing admissibility in a criminal trial. In the event a second extradition proceeding is instituted after the discharge of the fugitive on the ground of insufficiency of the evidence, the second arrest and examination are proper. Res judicata and autrefois acquit[13] do not apply. A review of an extradition order directing the Secretary of State to execute the order of deportation may be tested by an "appeal" by habeas corpus. State appeals are not proper. Habeas corpus will not lie to review the magistrates issuance of warrant of arrest in extradition proceeding if magistrate had jurisdiction, offense charged was within the treaty with the demanding state, and there was evidence warranting finding of reasonable ground to believe accused guilty.

Alleged error in the reception or rejection of evidence cannot be considered. In the event the alleged fugitive is discharged on habeas corpus, an appeal may be properly prosecuted by the Consul on behalf of his demanding Government.

Here again, if the identity of the prisoner has been established and probable cause has been shown extradition will be ordered. The final delivery of an accused rests with the Secretary of State, who is not obliged to order the delivery of the committed person to a representative of a foreign Government, it being permissible for him to review the evidence before, and the opinion of, the committing magistrate and decide whether a case is one calling for surrender.

III

BASIC TREATY PROVISIONS

Several basic provisions may be found in most general treaties of extradition. Some of these provisions reflect the prevailing attitude toward the concept of national sovereignty, while other provisions are designed to safeguard the fugitive's fundamental rights and the integrity of the process.

A. Territorial Jurisdiction

The first of such provisions is some form of embodiment of the principle of territoriality 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

13. *But see* pp. 743-45 & notes 27-30 *infra.*

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, through application of this concept, define territorial jurisdiction as including territorial waters and the airspace 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]

The problems which may arise out of the principle of territoriality and the definition of territorial jurisdiction is illustrated by the Holohan murder case.[15] In September 1944, Major William V. Holohan, a member of the top-secret wartime Office of Strategic Service, was dropped behind enemy lines in Northern Italy, along with Sergeant Lo Dolce, in order to assist Italian partisans in Northern Italy. On December 6, 1944, Holohan disappeared, and his companions reported that he had been slain by a German patrol. Several years later, two Italian partisans who had fought with Holohan and Lo Dolce came forward with a new story. They said that Holohan had in fact been murdered by Lo Dolce and his body dumped into Lake Orat. Holohan's body was recovered almost perfectly preserved, and an autopsy confirmed this second version of Holohan's death.

Despite the seriousness of the crime, no American court had jurisdiction to try the case. No court martial had jurisdiction over the murder because the would-be defendant was not a member of the armed forces. Since criminal jurisdiction in the United States is based upon the concept of territoriality, no criminal court in the United States could take jurisdiction, since the crime was committed in a foreign country. One of the most important issues, then, was whether an Italian court could exercise jurisdiction over the case, since the crime occurred in Northern Italy.

The court defined jurisdiction to mean "dominion and control," and held that the fact that the area had been occupied by

14. Convention on Extradition with Israel, Dec. 10, 1962, art. IV, [1963] 2 U.S.T. 1707, T.I.A.S. No. 5476 (effective Dec. 5, 1963); Convention on Extradition with Sweden, Oct. 24, 1961, art. IV, [1963] 2 U.S.T. 1845, T.I.A.S. No. 5496 (effective Dec. 3, 1963); Treaty of Extradition with Brazil, Jan. 13, 1961, art. IV, [1964] 2 U.S.T. 2093, T.I.A.S. No. 5691 (effective Dec. 17, 1964). *See also* INTERNATIONAL CRIMINAL LAW 48-128 (G. Mueller & E. Wise ed. 1965).

15. *In re* Lo Dolce, 106 F. Supp. 455 (W.D.N.Y. 1952).

German troops preempted the Italian government's jurisdiction. The decision thus made jurisdiction dependent upon actual physical control of territory rather than the generally accepted international law meaning which gives deference to the notion of sovereignty.

The principle of territorial jurisdiction shows glaring weaknesses. Despite the fact that the United States has numerous extradition treaties which allow the extradition of its own nationals, and also status of American forces treaties with countries wherein troops are garrisoned, the door is still open for criminals to evade punishment. The theory of criminal jurisdiction attaching to the person of the offender wherever he might be is not prevailing. However, offenses committed outside the United States which have or may have an effect inside the United States' territory are prosecutable in the United States, notwithstanding the fact that they were physically committed outside the territorial jurisdiction. This is demonstrated in cases of income tax violations, crimes of conspiracy wherein the crime is to be committed in the United States, and other violations of certain foreign trade laws (anti-trust, export controls, etc.).[16]

B. Double Criminality and "Fairness"

The second common provision worthy of note is the requirement of double criminality. Extradition is not authorized unless the fugitive is alleged to have committed one of the offenses enumerated in the applicable extradition treaty. As to those treaties which do not define these offenses, 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.[17] The federal courts uphold the doctrine of double

16. For the extraterritorial effect of tax laws see Wurzel, *Foreign Investment and Extraterritorial Taxation*, 38 COLUM. L. REV. 809 (1938). For conspiracies engaged in outside the state see Poliafico v. United States, 237 F.2d 97 (6th Cir. 1956); United States v. Steinberg, 62 F.2d 77 (2d Cir. 1932), *cert. denied*, 289 U.S. 729 (1933); United States *ex rel.* De Moss v. Pennsylvania, 198 F. Supp. 570 (E.D. Pa. 1961); Commonwealth v. Thomas, 410 Pa. 160, 189 A.2d 255 (1962). For trade violations and foreign trade negotiations see Bassiouni & Landau, *Presidential Discretion in Foreign Trade and Its Effect on East-West Trade*, 14 WAYNE L. REV. 494 (1968); Bassiouni & Landau, *United States Public Fund Sources for International Investment and Trade*, 17 DE PAUL L. REV. 77 (1967).

17. Wright v. Henkel, 190 U.S. 40, 61 (1903).

criminality as a condition to extradition. In that respect, the conduct complained of must be criminal according to the laws of both the requesting and the asylum nations in order for the offenses to be extraditable.[18] Some American extradition treaties contain a general provision explicitly embodying the requirement of double criminality;[19] others are completely silent concerning the substantive law to be applied.[20] Most treaties,[21] however, specifically require double criminality only with regard to certain offenses, usually financial crimes.[22] Interpreting such a treaty, the Supreme Court, in *Wright v. Henkel*,[23] 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 *Factor v. Laubenheimer*,[24] however, the Court, applying the mode of analysis denoted by the maxim *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. The Court permitted extradition for the offense of receiving money knowing such to have been fraudulently obtained, although the offense was not criminal under the laws of Illinois, where the extraditee was found. It was sufficient, the Court stated, that the offense was specified in the treaty and considered "by the jurisprudence of both countries" a criminal act.

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18. Collins v. Loisel, 259 U.S. 309 (1922); Kelly v. Griffin, 241 U.S. 6 (1916); Wright v. Henkel, 190 U.S. 40 (1903).

19. *E.g.*, Treaty of Extradition with South Africa, Dec. 18, 1947, art. 5, [1951] 1 U.S.T. 884, T.I.A.S. No. 2243; Treaty with Switzerland for the Extradition of Criminals, May 14, 1900, arts. I & II, 31 Stat. 1928 (1901), T.S. No. 354.

20. *E.g.*, Convention with Colombia for the Extradition of Criminals, May 7, 1888, 26 Stat. 1534 (1891), T.S. No. 58; Treaty with Ecuador Relative to Extradition, June 28, 1872, 18 Stat. 199 (1873), T.S. No. 79.

21. Approximately 64 out of 70 treaties fall into this category.

22. *E.g.*, Extradition Treaty with Albania, Mar. 1, 1933, art. II, para. 22, 49 Stat. 3313 (1935), T.S No. 902; Extradition Treaty with Great Britain, Dec. 22, 1931, art. 3, 47 Stat. 2122 (1933), T.S. No. 849; Treaty with Austria on Extradition, Aug. 8, 1930, art. II, 46 Stat. 2779 (1930), T.S. No. 822.

23. 190 U.S. 40 (1903).

24. 290 U.S. 276 (1933); Hudson, *The Factor Case and Double Criminality in Extradition*, 28 AM. J. INT'L L. 274 (1934).

The criminal nature of the extraditee's conduct does not have to conform to a specified offense, nor does the offense have to contain the same legal elements. What is required is that the nature of the conduct be deemed criminal in substance. Thus, while the requirement of double criminality is *in concreto* criminality in both states, it should be sufficient that it be *in abstracto* in the asylum state. It must be noted, however, that no reasoning by analogy can be used to find a given conduct criminal when otherwise it does not constitute in its broad substantive meaning a crime in the United States. This is a requirement imposed by the maxim *nullum crimen sine lege* which, as an element of notice, is a constitutional requirement for the legality of the offense.[25]

It must be noted also that, in the case of treaties clearly listing extraditable offenses, the United States has treated such listing as exclusive and not illustrative. To that extent, the American practice requires *in concreto* criminality in the requesting and asylum states.

The doctrine of double criminality furthers the objective of protecting the individual's substantive rights. National laws may vary regarding certain conduct, and it seems justifiable to refuse extradition for conduct which is lawful in the asylum state though criminal within the demanding nation. Such protection has continued to be afforded the individual despite the *Laubenheimer* case. In practice, lower federal courts have continued to apply the criminal law of the state where the fugitive is found.[26] Further, 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.[27] This is deemed to be commendable, since

25. M. Bassiouni, Cases and Materials on Criminal Law 32-34, 2d ed. 1963 (unpublished course materials for use at De Paul College of Law). *Cf.* Lewis v. Commonwealth, 184 Va. 69, 34 S.E.2d 389 (1945). Justice Holmes, in Roschen v. Ward, 279 U.S. 337, 339 (1929) (emphasis added), stated: "We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously *mean*." The meaning in double criminality rests in the purposes of prosecuting and punishing an offender who has some element of notice that his conduct is prohibited. It is not in the sense of allowing him to evade extradition on mere technicalities wherein he was otherwise granted a fair process. The acceptance of the maxim *aut dedere aut punire* will obviously have great bearing on the concept of double criminality.

26. United States *ex rel.* Rauch v. Stockinger, 269 F.2d 681 (2d Cir.), *cert. denied*, 361 U.S. 913 (1959) (same treaty and offense as in *Factor*; New York panel law applied); Villareal v. Hammond, 74 F.2d 503, 505-06 (5th Cir. 1934).

27. Convention on Extradition with Sweden, Oct. 24, 1961, art. III, [1963] 2 U.S.T.

such provisions uphold the privilege of asylum for individuals charged with trivial offenses technically falling within the treaty's list of extraditable offenses.

A problem arises in cases wherein the penal action is extinguished or the punishability of the actor is forgiven by the state in which the offense took place. The manifestation of such cases is expressed by the application of: statute of limitations, pardon, grace, prescription, or any other form in which the penal action is extinguished or criminal liability forsaken. Seldom do the laws of the requesting and asylum states coincide, and, therefore, the issue is which one applies. Most of the causes which end criminal prosecution or punishability in the United States are in the nature of affirmative defenses to be raised by objection of the defendant. Seldom does it constitute a condition of nullity. In all events, it is recognized as a question of public or criminal policy which inherently emanates from the sovereignty of the state. In addition, it is regarded in extradition matters as a question of "fairness," and, therefore, the prevailing view is that the law of the requesting state applies, unless it so violates the sense of fairness of the asylum state that the latter will assert its own law. The rationale being that the asylum state is using its power to surrender the accused and, therefore, the terms and conditions for the use of such power must not offend its own policy. In the case of a federal government, the laws of the state wherein the accused is found are to be applied to determine the question of double criminality unless the treaty stipulates otherwise.

In furtherance of the fairness concept of double criminality, one must also recognize the maxim *non bis in idem*. Essentially, it is a condition which emanates from the belief that a person should only suffer once the consequences of his crime. Engrained in natural law and canon law, it finds its expression (as a principle) in every code of justice. It is guaranteed by the fifth amendment prohibition against "double jeopardy," which so far applies only to federal courts.[28] All states have a similar provision, but different standards prevail. While the federal courts, for example, hold that

1845, T.I.A.S. No. 5496 (effective Dec. 3, 1963); Treaty of Extradition with Brazil, Jan. 13, 1961, art. III, [1964] 2 U.S.T. 2093, T.I.A.S. No. 5691 (effective Dec. 17, 1964).

28. *See* THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 1274 (N. Small & L. Jason ed. 1964).

"substantially identical" offenses shall not be prosecuted twice, many states hold that the "identical" offense shall not be prosecuted twice. Multiple offenses arising out of the commission of the same act may also be tried separately and consecutively in some states,[29] while they cannot be in others. But of greater significance is the doctrine of "separate sovereignties" applied in the United States.[30] This doctrine allows both the state government and the federal government to prosecute and punish separately and consecutively for the same offense; thus, in effect, placing the individual twice in jeopardy of his life and liberty, because each prosecution is allegedly an offense committed against a different sovereign. Hence, it is not a one-act, one-punishment approach, but one offense, one punishment. This raises problems at the extradition level because of the accepted defense of *non bis in idem* as a general affirmative defense against subsequent prosecutions by the same sovereign. But where the offense is also an extraditable crime against another sovereign, the United States could not refuse extradition on the grounds of double jeopardy because of its separate sovereignty doctrine. However, the viability of the separate sovereignty doctrine is perhaps questionable. In a recent Supreme Court case,[31] where a majority of the Court refused to reach the constitutional issue, four members expressly indicated that the fifth amendment double jeopardy provision should be incorporated in the due process clause of the fourteenth amendment. Although the cause dealt with double prosecutions solely on the state level, reliance by the concurring and dissenting justices for their constitutional interpretation was placed on the dissenting opinion of Justice Black in *Bartkus*. Thus, if double jeopardy finally becomes a question of "fundamental fairness," such a development will then mean that the United States courts will deny extradition whenever it is for an offense for which the accused has already been placed in jeopardy in the sense of the principle of *non bis in idem* as applied by the American courts.

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29. *E.g.*, Ciucci v. Illinois, 356 U.S. 571 (1958).

30. Bartkus v. Illinois, 359 U.S. 121 (1959); *see also* Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U.L. REV. 1096 (1959).

31. Cichos v. Indiana, 385 U.S. 76, 80-82 (1966).

C. *The Political Offense Exception*

This exception, which appears in all American extradition treaties now in force, expressly prohibits the surrender of persons charged with "any crime or offense of a political character."[32] Some treaties also prohibit surrender for "acts connected with such crimes or offenses."[33] The reasons for the political offense exception ultimately rest upon the asylum state's sense of humane treatment. It is generally acknowledged 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 impossible.[34] Asylum states also feel that political offenses, unlike ordinary crimes, reflect the individual's resistance to the regime of the demanding state alone so that the presence of the offender in the asylum state is not a threat to its domestic tranquility.[35]

The commendable objectives of the political offense exception have unfortunately not 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 constitute political offenses lie within the authority of the asylum state, and the courts of such states have 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 State. Thus, such offenses as treason, sedition, and espionage are generally regarded as political—for which extradition is denied. In terms of the traditional law, these offenses are "purely political offenses" or objective offenses, since they have no element whatever of an ordinary crime.[36]

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32. Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1322 (1962).

33. *Id.* at 1322 nn.70 & 71.

34. See Garcia-Mora, *Treason, Sedition and Espionage as Political Offenses Under the Law of Extradition*, 26 U. PITT. L. REV. 65, 85 (1964). *See also* Evans, *Reflections Upon the Political Offense in International Practice*, 57 AM. J. INT'L L. 1 (1963).

35. Garcia-Mora, *supra* note 34. *See also* Evans, *The Political Refugee in the United States Immigration Law and Practice*, 3 INT'L LAW. 204 (1969).

36. Garcia-Mora, *Crimes Against Humanity and the Principle of Nonextradition of Political Offenders*, 62 MICH. L. REV. 927, 942 (1964).

"Relative political offenses," on the other hand, are offenses wherein "a common crime is so inextricably linked with a political act that the entire offense is regarded as political and, hence, nonextraditable."[37] The United States courts basically adhere to the British position, enunciated in *In re Castioni*,[38] 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, the so-called "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 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 revoluntionary activity of the Social Democratic Labor Party, and refused to issue the warrant of surrender.[39] It is felt that the "incidence test" is unusually broad, since such test may be satisfied by any terrorist, assassin, or guerrilla whose criminal acts remotely serve political ends.[40]

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 organizations in order to eliminate asylum for such offenders.[41] 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.[42] The Swedish treaty also adds that the surrender of a fugitive may be

37. *Id.*

38. [1891] 1 Q.B. 149 (C.A. 1890).

39. Note from Secretary of State Root to the Russian Ambassador Rosen discussed in IV. G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 316, at 49-50 (1942).

40. IV G. HACKWORTH, *supra* note 39, at 50-52.

41. Treaty of Extradition with Brazil, Jan. 13, 1961, art. V, [1964] 2 U.S.T. 2093, T.I.A.S. No. 5691 (effective Dec. 17, 1964).

42. *Id.*

denied for humane reasons, such as the "youth or health of the persons sought . . . ."[43]

The establishment of a dividing line between passive political crimes and actual common crimes in furtherance of a political objective is probably the closest one can achieve in providing a more objective criterion. In this respect, however, one should exclude war crimes, crimes against humanity, and the serious offenses in the sense of the Geneva agreements. But even then, the decisive consideration seems to be the extent to which one state is interested in the preservation of the social and political order of the other state. The value judgment rendered by the asylum state on the nature of the crime of the accused and on its proportionality to the alleged political objectives is a relationship and evaluation impossible to define in the present conditions of world relations. But as one author refers to it: "When extradition fails, is abduction the solution?"[44] Political offenses are not the only offenses presenting a problem of definition and value judgment; so do fiscal and economic crimes when they affect the economic structure of a state. The importance of those offenses in the communist and socialist countries is joined in by the emerging nations whose economies cannot sustain any violations. In those cases again, the determining factor will reside in the affinity of the political, social, and economic order of the respective states. Normally, the treaty will contemplate those questions and provide individual solutions more apt to reflect this consideration.

D. The Doctrine of Specialty

The doctrine of speciality is also common in American extradition treaties and practice. This doctrine imposes the limitation that demanding nations cannot prosecute the extraditee for any offense other than that 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

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43. Convention on Extradition with Sweden, Oct. 24, 1961, art. V, [1963] 2 U.S.T. 1845, T.I.A.S. No. 5496 (effective Dec. 3, 1963).

44. Cardozo, *When Extradition Fails, Is Abduction the Solution?*, 55 AM. J. INT'L L. 127 (1961), discussing the problems in extraditing Artukovic and the invitation to use the same means as were employed in the Eichmann case. *See also* the Tshombe case and, in this respect, the World Habeas Corpus Petition submitted on his behalf to the United Nations Human Rights Commission on July 27, 1967. N.Y. Times, July 28, 1967, at 64, col. 1.

from the "manifest scope and object of the treaty."[45] The doctrine is also a principle of international law that would be applicable in the absence of express treaty provisions to the contrary.[46]

Certain narrow exceptions to the doctrine of specialty have been recognized. The extraditee may be prosecuted for offenses committed subsequent to extradition,[47] 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 reextradition of the accused from the United States to a third nation until the accused has been offered his "right of return."[48]

The doctrine of specialty rests on the premise that the asylum state has an absolute right to grant asylum, and that such state surrenders the accused for the special purpose defined in the treaty, and that the authorities of the demanding nation lack jurisdiction of the accused for all other purposes. Obviously, the right of asylum under international law would be grossly subverted if the demanding nation were permitted to prosecute the accused for any charge it deemed sufficient.

Consider also the connection between political and economic offenses and the doctrine of specialty which would insure against faked extraditions for a common crime wherein the object is political.

E. Extradition of Nationals

The final treaty provision which will be examined is that dealing with nationals. American extradition treaties contain three types of such provisions. The first does not refer to nationals specifically, but agrees to the extradition of "all persons."[49] As both judicial construction[50] and executive interpretation[51] have

45. Johnson v. Browne, 205 U.S. 309, 317 (1907).

46. United States v. Rauscher, 119 U.S. 407 (1886).

47. *See, e.g.*, Collins v. O'Neill, 214 U.S. 113 (1909).

48. United States *ex rel.* Donnelly v. Mulligan, 74 F.2d 220, 223 (2d Cir. 1934).

49. *E.g.*, Extradition Treaty with Great Britain, Dec. 22, 1931, art. 1, 47 Stat. 2122 (1933), T.S. No. 849; Convention with Italy for the Surrender of Criminals, Mar. 23, 1868, art. I, 15 Stat. 629 (1869), T.S. No. 174. *See also* Note, *supra* note 32, at 1321-22.

50. Charlton v. Kelly, 229 U.S. 447, 457 (1913).

51. *Id.* at 473-76 (quoting from memo of Secretary of State Knox).

consistently held that "persons" include nationals, a refusal to surrender for the reason that the fugitive is a national cannot be justified under such a treaty. The second and most common type of treaty provides that "neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."[52] Treaties of this sort are the most numerous due to the insistence of other nations—the policy of the United States in treaty negotiations has been, when possible, to provide for the surrender of nationals.[53] As construed, such a provision prohibits the Secretary of State from surrendering a citizen of the United States.[54] 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."[55] Exercise of the statutory 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 State Department refused to surrender a total of four American citizens to Mexico. In notes to the Mexcian 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.[56]

IV

THE SCOPE OF HABEAS CORPUS AND THE RULE OF NON-INQUIRY

The fugitive's judicial remedies to secure review of the

52. *E.g.*, Extradition Treaty with Iraq, June 7, 1934, art. VIII, 49 Stat. 3380 (1936), T.S. No. 907; Extradition Treaty with Venezuela, Jan. 19, 1922, art. VIII, 43 Stat. 1698 (1925), T.S. No. 675; Extradition Treaty with France, Jan. 6, 1909, art. V, 37 Stat. 1526 (1913), T.S. No. 561.

53. *See* IV G. HACKWORTH, *supra* note 39, § 318, at 55.

54. Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 18 (1936).

55. *E.g.*, Cqnvention for Extradition with Argentine Republic, Sept. 26, 1896, art. III, 31 Stat. 1883 (1901), T.S. No. 6; Extradition Treaty with Mexico, Feb. 22, 1889, art. IV, T.S. No. 242; Extradition Treaty with Japan, Apr. 29, 1886, art. VII, 24 Stat. 1015 (1887), T.S. No. 191.

56. *See* Note, *supra* note 32, at 1322 nn.68 & 69.

magistrate's order to commitment are extremely limited. No direct appeal lies from such order.[57] The incarcerated fugitive has only two courses of action: he may either petition the federal courts for writs of habeas corpus[58] or petition such courts for certiorari[59] to challenge the legality of his detention. The scope of review is the same in both proceedings.[60]

In international extradition cases, the Supreme Court has narrowly restricted the function of the habeas corpus proceeding. The writ cannot serve as an appellate review to rehear what the magistrate has previously considered. In *Fernandez v. Phillips*,[61] 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 ground to believe the accused guilty.

Further, 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 extradition proceeding itself and not the prospective conduct of the demanding state's authorities toward the accused.

In *Neely v. Henkel*,[62] 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, and guarantees of writs of habeas corpus, trial by jury, and the fundamental rights of life, liberty, and property. In reply, the Supreme Court stated:

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57. Collins v. Miller, 252 U.S. 364 (1920).

58. Fernandez v. Phillips, 268 U.S. 311 (1925); Collins v. Johnston, 237 U.S. 502 (1915).

59. Lincoln v. Power, 228 F. 70 (E.D.N.Y.), *aff'd*, 241 U.S. 651 (1915).

60. *Id.*

61. 268 U.S. 311, 312 (1925).

62. 180 U.S. 109, 122 (1901).

> [T]hese provisions have no relation to 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.[63]

The rule that federal courts will not consider alleged oppressive action by demanding states is known as the rule of non-inquiry. This 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* conviction is not conclusive of the individual's guilt, but is treated merely as an indictment or formal charge against the extraditee.[64]

In the first such case, *Ex parte Fudera*,[65] involving the *in absentia* conviction and sentencing of the fugitive for 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. 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*,[66] 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. The federal district court held that this guarantee did not apply to persons extradited for trial under treaties with foreign countries whose laws may be entirely different.[67] However, the fugitive again was ordered released for insufficiency of evidence presented by the Italian government.

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63. *Id.* at 122-23.

64. *Ex parte* La Mantia, 206 F. 330 (S.D.N.Y. 1913); *Ex parte* Fudera, 162 F. 591 (C.C.S.D.N.Y. 1908); *In re* Mylonas, 187 F. Supp. 716 (N.D. Ala. 1960).

65. 162 F. 591, 592 (C.C.S.D.N.Y. 1908).

66. 206 F. 330 (S.D.N.Y. 1913).

67. *Id.* at 332.

The district court in *In re Mylonas*,[68] consistent with prior authority, ruled that Mylonas' conviction *in absentia* did not preclude extradition, even though the fugitive, convicted of embezzlement, had no knowledge of the charges or prosecution by the Greek tribunal, was not representd by counsel, and had no one appear for him.[69] Again, however, the court found a ground upon which it ordered the accused discharged from custody; namely, that under Article V of the United States-Greek 1931 treaty of extradition, the Greek Government's long-delayed effort to take the accused into custody exempted Mylonas from extradition "from lapse of time or other lawful cause."[70]

Thus, in these three cases, the courts, though recognizing the limited scope of habeas corpus and the rule of non-inquiry, were able to free the accused upon other grounds. The following cases, however, presented no such opportunities to nullify the harsh attitude toward the rights of the extraditees convicted *in absentia*. The results were two court opinions which voiced disenchantment with the established law.

In *Argento v. Horn*[71] the Sixth Circuit unwillingly felt itself 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 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. . . . [H]owever, we conceive it our obligation to do so.[72]

Gallina v. Fraser[73] was decided by the Second Circuit Court of

68. 187 F. Supp. 716 (N.D. Ala. 1960).

69. *Id.* at 719.

70. Extradition Treaty with Greece, May 6, 1931, art V, 47 Stat. 2185 (1933), T.S. No. 855.

71. 241 F.2d 258 (6th Cir. 1957).

72. *Id.* at 263-64.

73. 278 F.2d 77 (2d Cir. 1960). *See also* Note, *Foreign Trials in Absentia: Due Process Objections to Unconditional Extradition*, 13 STAN. L. REV. 370 (1961).

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. The petition was denied and the court of appeals affirmed. Circuit Judge Waterman stated:

> [W]e 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 so antipathetic to a federal court's sense of decency as to require reexamination of the principle set out above.[74]

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 perspective treatment by the demanding nation. There is hope, however, in view of Judge Waterman's opinion, that in some future case the court might refuse to surrender the fugitive to a foreign nation's oppressive or arbitrary criminal processes.

The thesis of the United States to inquire into the fairness of the proceedings or to impugn the criminal process of the requesting state is indefensible on those grounds alone. It is unclear whether this practice rests solely on the inquiry of "fairness" for the accused in the requesting state or whether it is predicated on the interpretation of the treaty obligation. However, another factor is public policy based on the principle of comity.[75] But since rules and conditions of extradition should apply equally to nationals and

74. 278 F.2d at 78-79.

75. Kuhn, *Extradition from the United States of American Citizens Under Existing Treaties*, 31 AM. J. INT'L L. 476, 479 (1937).

nonnationals, it is understandable that a state and its courts seek to preserve the very basic, fundamental principles of justice and fairness which they view as indispensable to maintain the integrity of their judicial process.

V

EXECUTIVE DISCRETION IN EXTRADITION

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.[76]

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.[77]

In the first judicial recognition of this discretion, *In re Stupp*,[78] Section 5270 of the Revised Statutes was construed to endow the Secretary with power to refuse to surrender 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 obligation. If so, although extradition treaties are

76. 1 J. MOORE, EXTRADITION AND INTERSTATE RENDITION § 361 (1891).

77. *Id.* § 363.

78. 23 F. Cas. 281 (No. 13,562) (C.C.S.D.N.Y. 1873); *see* IV G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 338 (1942).

considered self-executing, the extradition statute, reenacted in 1948, would supersede prior inconsistent treaty provisions under the rule that treaties and statutes are legislation having coordinate authority.[79] 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 our treaty undertakings.[80]

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 to extradite the accused person. 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.[81]

Despite its power of review, the executive (Secretary) has refused surrender infrequently (only twice between 1940 and 1960),

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79. *See* Note, *supra* note 32, at 1316; Harvard Research in International Law, *Draft Convention on Extradition*, 29 AM. J. INT'L L. 21 (Supp. 1935).

80. *See* Note, *supra* note 32, at 1319-21.

81. 1 J. MOORE, *supra* note 76, § 366; Note, *supra* note 32, at 1319-21.

and only then when discretion to refuse surrender of nationals was expressly granted by the treaty.[82] 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 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.

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 extradition, especially since the courts still adhere to the rule of non-inquiry and provide only limited judicial review.

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 nonexercise, adequate safeguards for the extraditee will come only through judicial rejection, as "prophesied" by the court in *Gallina v. Fraser*,[83] of the rule of non-inquiry and a general widening of the scope of judicial review in extradition cases.

VI

EXTRADITION AND THE AMERICAN CRIMINAL PROCESS

The question of extradition by its very definition crosses over several fields of law. Commencing with international law, it affects human rights and is exercised via the judiciary and executive branches of the American government, inevitably touching upon constitutional grounds relating to the powers of the executive, specifically the President insofar as treaties, executive discretion, or

82. Note, *supra* note 32, at 1328.
83. 278 F.2d 77 (2d Cir. 1960).

international cooperation is concerned.[83.1] However, by its subjection to a judicial determination, extradition entails questions which go to the very essence of the American criminal process and its outlook to the relationship of the rights of individuals and the inherently coercive powers of the state.[84]

The reader must first assume an understanding of the American accusatorial process wherein the individual enjoys the presumption of innocence[85] and is, without distinctions, entitled to the "due process of law" concept provided by the fourteenth amendment to the United States Constitution.[86] The concept of such a process presupposes that society (the state) and the individual are in a confrontation of opposing and conflicting rights.[87] Thus, the choice of constitutional protections is provided to ensure certain minimal standards of "fairness" or "fair play" designed to afford "substantial justice" and to maintain a "scheme of ordered liberty" via a rule of law: due process of law.[88] Any process—and notably a coercive and criminal process—must abide by norms of "decency" and be executed through means which do not "offend the sense of decency of a civilized society."[89] Because of its nature, extradition touches the individual and affects his "life, liberty, or property without due process of law."[90]

It must be universally understood by jurists who are not familiar with the American legal system that "no person" within the jurisdiction of the United States can be substracted this

83.1. For an analogous argument see Bassiouni, *The War Power and the Law of War: Theory and Realism*, 18 DEPAUL L. REV. 188 (1968).

84. *See* THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 997-1010 (N. Small & L. Jason ed. 1964).

85. M. Bassiouni, *supra* note 25, at 160-63.

86. *See* note 90 *infra*.

87. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); and, on the implications of *Malloy*, Bassiouni, *Recent Supreme Court Decisions Strengthen Illinois Law Enforcement*, 2 ILL. CONTINUING LEGAL EDUC. No. 4, at 111 (1964). *See also* Palko v. Connecticut, 302 U.S. 319 (1937); Twinning v. New Jersey, 211 U.S. 78 (1908); Hurtado v. California, 110 U.S. 516 (1884).

88. *E.g.*, Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Kadish, *Methodology and Criteria in Due Process Adjudication — A Survey and Criticism*, 66 YALE L.J. 319 (1957).

89. *See, e.g.*, Rochin v. California, 342 U.S. 165 (1952); Adamson v. California, 332 U.S. 46 (1947); Powell v. Alabama, 287 U.S. 45 (1932).

90. *See* THE CONSTITUTION OF THE UNITED STATES, *supra* note 84, at 1082-1177, for

guarantee, regardless of the foreign and international aspects of extradition. The appreciation of these basic considerations will offer the reader the conceptual basis for the requirements of "probable cause"[91] at the judicial instance granting extradition and also the purpose and scope of the habeas corpus summary remedy.

In the Continental European legal thinking, the basic assumption is that all states have an interest in mutual assistance to suppress criminality—even though not necessarily reciprocal. Unfortunately, the failing of that assumption lies in its very premise. States are seldom interested in suppressing criminality as defined in other states, and seldom do they have any concern for the maintenance of the political and economic structures of another state. Any possible interest becomes a reality when there is mutuality or reciprocity, and thus states are motivated by selfish reasons and not globally altruistic concepts.

Such concern for the welfare of another state becomes reality when the legal and political systems of the respectively interested states have reached a level of affinity or are interrelated through extraneous circumstances generally pertaining to the real politic. Neither of these emanates from the higher concern of a world community sharing a common interest in the protection against criminal threats directed against its societies.

Thus, witness the many impediments to extradition which often take the cover of conditions of "reciprocity," "double criminality," exclusion of "political crimes," and even some common crimes deriving therefrom. As the practice pursues its course, the hurdles increase, giving rise to the many practical devices used to circumvent precisely that which was sought to be protected. Among these is "disguised extradition" which takes the form of expulsion, deportation, subterfuge to which immigration regulations may lend themselves, and even kidnapping as in the Eichmann and Tshombe cases.[92]

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an extension of the due process concept as an all-encompassing concept of fairness and justice whenever a deprivation of liberty occurs. For its extension to any deprivation of liberty see Bassiouni, *The Right of the Mentally Ill to Cure and Treatment: Medical Due Process*, 15 DEPAUL L. REV. 291 (1966).

91. *See* notes 28 & 84 *supra*. *See also* pp. 716 & 717 *supra*.

92. O'Higgins, *Disguised Extradition: The Soblen Case*, 27 MOD. L. REV. 521 (1964).

Problems of a narrowly construed sovereignty are nonetheless to be reckoned with. Procedural mechanics and limitations of jurisdictional concepts are but some examples which, when examined in the context of questions of double jeopardy, prescription, amnesty, grace, pardon, extinction of the penal action, and statute of limitations, are only some of the issues confronting those in search for speedier procedure ensuring societies against the criminal element without sacrificing the rights of individuals.

VII

CONCLUSION

The ideal solution is, of course, to elevate extradition from the national or parochial plane to the international or universal level. This would first cause us to examine "criminality" in a world-wide sense rather than a provincial one. A criminal would be extradited not because "double criminality" or "reciprocity" was satisfied, but because *aut dedere aut punire*. It would place extradition at a level where basic human rights—enunciated by the Universal Declaration of Human Rights and other international treaties—will find their real and practical expression.

One of the tools should be World Habeas Corpus[93] which, at the local level in the common law countries, has proven so effective and yet so uncumbersome to the aims of criminal justice. These far-reaching propositions will be considered by the 1969 Rome Congress in the terms covered by a proposed resolution introduced

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See also Evans, *Acquisition of Custody Over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice*, 40 BRIT. Y.B. INT'L L. 77 (1964).

93. See generally L. KUTNER, WORLD HABEAS CORPUS (1962); Kutner, *World Habeas Corpus, Human Rights and World Community*, 17 DE PAUL L. REV. 3 (1967); Kutner, *"International" Due Process for Prisoners of War: The Need for a Special Tribunal of World Habeas Corpus*, 21 U. MIAMI L. REV. 721 (1967); Kutner, *World Habeas Corpus: The Legal Ultimate for the Unity of Mankind*, 40 NOTRE DAME LAW. 570 (1965); Kutner, *World Habeas Corpus: Legal Ligament for Political Diversity*, 43 U. DET. L.J. 79 (1965); Kutner, *World Habeas Corpus and International Extradition*, 41 U. DET. L.J. 525 (1964); Kutner, *World Habeas Corpus: A Legal Absolute for Survival*, 39 U.DET. L.J. 279 (1962); Kutner, *The Case for an International Writ of Habeas Corpus: A Reply*, 37 U. DET. L.J. 605 (1960); Kutner, *World Habeas Corpus for International Man: A Credo for International Due Process of Law*, 36 U. DET. L.J. 235 (1959); Kutner, *A Proposal for a United Nations Writ of Habeas Corpus and an International Court of Human Rights*, 28 TUL. L. REV. 417 (1954); Kutner & Carl, *An International Writ of Habeas Corpus: Protection of Personal Liberty in a World of Diverse Systems of Public Order*, 22 U. PITT. L. REV. 469 (1961).

by this author at the Freiburg Colloquium, which was joined in by Professors Levasseur and Pisapia and Attorneys Paradiso, Torrisi, and Giallongo (A.I.D.P. Italy). The following is a translation of this resolution.

> It appears hopeful to substitute in the future to the strictly 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 organized regional or international jurisdictions susceptible of hearing [individual] recourses directed against the decisions of national authorities rendered in violation of the aforementioned individual rights.
>
> These jurisdictions could also be seized 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.[94]

94. The 1969 Siracuse (Italy) pre-conference considered this resolution and prepared a text to be submitted to the Xth International Penal Law Congress (Rome 1969) which embodied the meaning and spirit of the Freiburg resolution.

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