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Major Contemporary Issues in Extradition Law: Remarks

M. Bassiouni, *DePaul University*

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MAJOR CONTEMPORARY ISSUES IN EXTRADITION LAW

The panel was convened by its Moderator, M. Cherif Bassiouni,* at 8:30 a.m., March 31, 1990.

REMARKS BY M. CHERIF BASSIOUNI

The topic of extradition is in the forefront of the media and the minds of public officials, prosecutors and defense counsels. It has been brought to their attention because of the difficult cases often encountered when dealing with international extradition, however, the issue is not one of recent creation. The concept of extradition was known even in the times of Pharaonic Egypt. For example, during the reign of Ramses II, an extradition clause was included in a peace treaty between Ramses, as Pharaoh of Egypt, and Hattusili, Prince of the Hittites. Even during that period treaties were so important that Ramses had this particular one carved into the walls of the Karnac Temple at Luxor.

The recent trend in extradition has been to favor bilateral treaties, on the assumption that one country will have a stronger bargaining position to obtain more favorable treatment for persons sent out of the state, or greater guarantees that a person who has been brought into the state will have a smooth and fast process.

I have always been in favor of the multilateral approach, with the bilateral approach acting as a supplement. There are too many policy dangers to the bilateral approach to allow it to function alone. This is because, first, policy, as a political creature, fluctuates a great deal in response to the state of the relationship between the two countries. Second, there are practical difficulties to the bilateral approach. As the number of bilateral treaties increases, it becomes more difficult to negotiate new treaties and it becomes more difficult for those in the judicial and prosecutorial areas to administer them. Given the fluctuating nature of the interstate relationships on which bilateral relations are based, there can be no development of jurisprudence or practice with any degree of consistency.

Unfortunately, the practice and processes of extradition have remained the same for the past two hundred years, in what could be called "contemporary practice." Yet, during the same period, the volume has increased significantly. In almost every country of the world there are too few people in the departments and ministries of foreign affairs and justice who administer the mechanics of extradition. Additionally, there are far too few people at the prosecutorial level who are familiar with extradition and its intricacies. As a result the process bogs down; it becomes slower, and more difficult to implement. Political officials are tempted to find short-cuts, rather than strengthen the process in a way that does not curtail the rights of the accused or violate the sovereignty of states.

The solution may be an increase in the number of staff persons directly involved in the administration of the process or the development of other simple mechanisms, such as concentrating the venues of extradition cases in certain tribunals where the judges would develop a degree of specialization; developing advanced training programs for those prosecutors and judges who would be handling those cases; or having cases of extradition handled by a special staff of prosecutors within the venue. Invariably it is said that extradition requires too many conditions, and that it is laden with guarantees for the relator. Some government officials argue for reducing the guaran-

*Professor of Law, DePaul University College of Law.

tees and curtailing traditional procedures, but the safeguards not only benefit the relator, but also ensure the integrity of the legal process.

Most states have legal systems that rise above the expectation of violations of legal processes. More confidence should be placed in the legal systems of these countries. Additionally, in examining the notion of probable cause as the initial issue in extradition, one may want to give greater deference to the findings of these courts which have achieved a high level of judicial integrity.

This does not mean that one should find ways to avoid the application of certain rules, such as specialty, by which government officials or prosecutors agree among themselves to produce the dossier in such a manner as to make it difficult for the relator to present an adequate defense. The problems in administration, practice and application have frequently caused the process to be subverted, and consequently governments often seek short-cuts that affect the integrity of the legal process.

There is no doubt that the processes of extradition need to be developed in such a way as to be consonant with reality: better means of communication, swifter movement of persons and goods, greater possibilities for the destruction and elimination of evidence, and new forms of transnational and international criminality that require a greater degree of international cooperation.

The time has come for the notion of *aut-detere-aut-iudicar* (the duty to prosecute for criminal acts) to be recognized as an international *civitas maxima*. It should be recognized that states do have a duty to prosecute or extradite not only in reference to transnational and international crimes, but also with respect to common crimes. And a way should be found to make the process more efficient and effective.

The remainder of the panel will focus on specific problem areas; for example, the peculiarities of dealing with drugs and organized crime, which are not the everyday, garden-variety crimes of theft and murder, and the extradition of foreign public officials, particularly in an era when human rights have gained recognition. Unless human rights are going to be enforced, it is difficult to see how they will continue to advance, other than in the perception and expectations of the people.

To enforce human rights means, in essence, to look for those people who commit the more egregious crimes, such as torture, and extradite and prosecute them. Usually, however, they are public officials or heads of state, who violate human rights or abscond with the treasures of their people, and they pose very difficult problems for extradition. In this era of human rights, we might find that the notion of crimes against humanity, which was recognized in 1945, still has some viability today, as such crimes continue to occur in various parts of the world. We should be able to extradite those officials who commit these crimes, without incurring the problems of the various doctrines of immunity.

The procedures of extradition that exist in all countries today are not equipped to deal with these problems. The fear is that every time a problem is encountered in the field of extradition, the solution will be to develop procedures that elude legal control, rather than let the legal system evolve to meet contemporary needs.

REMARKS BY CHRISTOPHER L. BLAKESLEY*

I believe that heads of state and high government officials can be extradited when they commit the so-called high crimes of international law. Those crimes to which I refer are serious violations of human rights, the commission of genocide or torture, or

*Professor of Law, Louisiana State University Law Center.

participation in terrorism. I also believe the kidnapping or arresting of foreign officials, or the invasion of a country to apprehend foreign officials, is generally inappropriate and illegal under international law. Generally, these acts cause more problems than they resolve. In fact, these acts may promote international anarchy in the long run. In examining the various issues in extradition, I will point out those areas which I believe may apply to Noriega.

I will begin by posing a hypothetical, to which I will refer again later. The Government of Libya issued an indictment bearing former President Ronald Reagan's name. This indictment was for acts committed by the United States in the bombing of Tripoli. For the sake of argument, assume that Reagan is vacationing in the south of France, or in Greece. While on vacation, he is tempted out onto a yacht in international waters. Libyan officials are waiting onboard the yacht ready to take Reagan to Libya in order to prosecute him for the bombing of Tripoli.

The first question is whether that act would be consistent with our taking of Noriega, as Maximum Leader of Panama. I think it would be illegal for the Libyans to create such a situation in order to gain access to Reagan.

The second question is if Reagan was not tempted out on the yacht, but was simply in the south of France, would he be extraditable by means of an extradition treaty between France and Libya on a charge of terrorism. In order to answer this question, it is necessary to review what precedent is available.

The first situation to review is that of Kaiser Wilhelm II, and application of the Versailles Treaty. By the terms of that Treaty, those persons who committed war crimes were required to be extradited and sent back to Germany to stand trial. The Kaiser was in the Netherlands, which refused his extradition under the political offense exception. The U.S. delegation was also opposed to his extradition, believing he enjoyed head of state immunity.

In opposition to the situation of the Kaiser, there is precedent for the extradition of officials for violations of international law. The indictments at Nuremberg were for conspiracy to commit a war of aggression, commission of a war of aggression, war crimes, crimes against humanity (murder, extermination, deportation, enslavement and other inhumane acts against civilian populations) and the persecution of persons on the basis of political, racial and religious grounds.

There were problems with some of the charges, as they were committed by Germans against German nationals prior to 1939. The Nuremberg Tribunal elected not to make any decision on those charges which stemmed from the pre-1939 acts. However, there were individuals who were convicted for the same crimes if they had been committed during the war. The indictments and the ultimate judgments provide interesting language for consideration.

Under certain circumstances, the principles of the various immunities under international law will not protect representatives of states when they commit acts that are condemned as criminal by international law. The official position of defendants, whether as head of state or responsible officials in governmental departments, should not be considered as freeing them from responsibility or as mitigating their punishment.

Any person who violates the laws of war cannot obtain immunity while acting in the pursuance of the authority of the state, if the state, in authorizing such action, moves outside its competence under international law. If a certain conduct is illegal under the law of war, *i.e.*, the killing of innocent civilians, the torturing of people, the killing of prisoners of war, the killing of those who have been captured, kidnapped or

hijacked, a fortiori, that same conduct is criminal under international law in peacetime.

The U.S. District Court for D.C. has made a statement of similar tone in the *Letelier* case: "There is no discretion to commit or have one's officers commit an illegal act. No matter what policy options exist for a foreign country it has no discretion to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity recognized in both national and international law."[1]

In *Ex Parte Quirin*, the Supreme Court said, "Crimes against international law are committed by men not by abstract entities, and only by punishing individuals who commit such crimes shall we accomplish the goals of international law."

I am not going to examine the problems that do exist in the hypothetical situation stated earlier regarding double criminality, the military offense exception or the political offense exception. However, in passing, the military offense exception may constitute a defense, although I do not believe that crimes that are embodied in the civilian law will exempt the military under the military offense exception. The political offense exception may also serve as a defense, in the event of an on-going war.

We now turn to the issues of act of state immunity, diplomatic immunity and sovereign immunity. The term "act of state" generally applies to civil acts. The *Jimenez* case serves as an example of the act of state doctrine. There, a former Venezuelan general was extradited to Venezuela by the United States for acts committed in Venezuela while he was in power. This may constitute the groundwork to extradite Noriega back to Panama; however, this probably will not happen until the situation in Panama has developed to the point that the government is capable of receiving him.

The act of state doctrine is a judicially created opportunity for the courts to avoid becoming involved in problems that might embarrass the Executive Branch, or enmesh the judiciary in matters of foreign affairs. It is not a matter of jurisdiction, but rather a matter of the separation of powers doctrine. In this manner the judiciary can exercise its discretion in order to avoid trouble. I think the act of state doctrine most likely does not apply to serious international crimes.

The question becomes whether the act of state doctrine would apply to conduct which, pursuant to a decision, has been declared an act of war against the United States. Such a case exists in the context of drug trafficking. If it were decided that Noriega participated in drug trafficking as a means of combating the so-called American imperialism in Panama, the question becomes, would Noriega enjoy immunity obtained under the act of state doctrine. I do not believe Noriega would be able to escape responsibility on that basis. Certainly section 443, note C of the *Restatement (Third)* says that in the context of torture, immunity probably would not be obtained under the act of state doctrine. Therefore, a claim arising out of the violation of human rights, on behalf of a victim of torture or genocide, for example, probably would not be defeated by the act of state doctrine.

The issues of head of state immunity and sovereign immunity are muddled. They originally came from the same notion, but have since grown into two separate concepts. I think they generally apply to acts that are of a civil nature. I feel the United States has adopted a restricted view of sovereign immunity. In the case of Noriega, I do not anticipate that sovereign immunity would ultimately be a bar to the prosecution. Returning to the hypothetical stated at the beginning, if Libya were to adopt a

[1] 19 ILM 409 (1980).

similar limited view of sovereign immunity, it most likely would not act as a bar to the prosecution of Reagan.

A more interesting approach is to view head of state immunity as a type of diplomatic immunity. Diplomatic immunity is the strongest immunity from criminal prosecution for those who are acting as diplomats, and heads of state who are acting in a ceremonial or diplomatic capacity. The doctrine of diplomatic immunity is so strong that it is regarded almost as an absolute bar. If it could be argued that the conduct perpetrated by Reagan, or by Noriega, occurred in the pursuance of a diplomatic status or function, then they would enjoy immunity under the doctrine of diplomatic immunity. However, I do not believe they would enjoy such immunity. Certainly under U.S. law, Noriega would not be immune, because his conduct is considered, more or less, a private crime. Under the Diplomatic Relations Act, once he has been removed from his diplomatic status, he may no longer avail himself of diplomatic immunity. Because his conduct is not considered to have been in the furtherance of a diplomatic function, he may not longer be protected by that defense.

It has been argued by Jordan Paust, among others, that for very serious international crimes, such as terrorism and torture, diplomatic immunity never obtains. Thus, there is opportunity, once you have access to alleged perpetrators, to prosecute them for those crimes under international criminal law if the domestic regime has the wherewithal to do so. Therefore, I do not believe diplomatic immunity will ultimately be a bar.

In conclusion, there are some cases where I believe none of the immunity doctrines would exclude extradition or prosecution. I believe the jurisdictional problems would be overcome, and I believe that persons are extraditable and open to prosecution when they commit crimes. I am not saying that under my hypothetical, Reagan ought to be extradited and prosecuted. However, if there is a situation in which international crimes are alleged sufficient to meet the test of probable cause, and some nations are wanting to do away with that requirement, the person who committed them could be extraditable and prosecutable for those crimes and none of the immunity doctrines would be a bar. Clearly, abduction is not appropriate.

Professor BASSIOUNI: There are six protective layers of immunity or defenses: (1) acts of state; (2) sovereign immunity; (3) immunity of heads of state; (4) immunity of diplomats; (5) the political offense exception; and (6) the defense of obedience to superior orders. As you can see, there is no integration of these forms of immunity. Each has developed in international law along a separate path, and as a result, there is no consistency among them. So while the jurisprudence of national courts on the doctrine of the political defense exception has developed extensively, the doctrine of the defense of obedience to superior orders, which arose after the Nuremberg Charter in 1945, is quite limited. The defense of obedience to superior orders should not be applied in its absolute fashion, but in a more practical, flexible manner. The Nuremberg jurisprudence developed under this approach; therefore, if the individual is faced with a moral choice, the defense will not be available.

The London Charter intended to remove the obedience to superior orders defense as an absolute defense, but then the court introduced the requirement of an existing moral choice. Thus, if there was no moral choice, the defense was valid. That approach is in contrast to Oppenheim's 1940 edition of *International Law*, which says obedience to superior orders is an absolute defense; however, it should be noted that in his 1948 edition, Oppenheim removed this absolute form of the defense.

Since the six areas developed without any degree of correlation, we find practitioners in the field of extradition faced with some degree of uncertainty.

Many myths and stories surround these areas of extradition, and often they are the result of misinformation, or misunderstanding of the reasons for and against extradition. As an example, there is a little known historical fact surrounding Kaiser Wilhem II. There was a colonel in the U.S. army who had a "wild-west" spirit. Believing that his government, and the governments of the allies wanted the Kaiser back from the Netherlands, and that Article 227 of the Treaty of Versailles was to be taken literally, he got into a Jeep and drove from Belgium, where he was stationed, into the Netherlands where the Kaiser was in seclusion. Upon finding the Kaiser walking in the gardens, the colonel attempted to bring the Kaiser back to his superiors. However, the colonel was detained until a British brigadier general and another U.S. colonel could arrive and convince him that he really should not do this as it would end up being a terrible embarrassment to their respective governments.

While prosecuting the Kaiser was perhaps not the intent of the various governments, the colonel's approach would have solved the problem of the extradition, because the Netherlands recognized that the Kaiser could benefit from the political offense exception based on an act of state. Frequently we find, not only in extradition, but in many other cases that when the Executive Branch does not want to make a difficult decision, it switches the burden to the judiciary, and an argument made that there was a legal impediment that prevented whatever it was they did not want to happen from happening. It is called passing the buck.

REMARKS BY DAVID P. STEWART*

It is difficult to make any intelligible comments which specifically apply to mid- and low-level government officials, as I do not see a great difference between them and heads of state and high government officials in the field of extradition. I assume the reason for making the distinction is to remove from the extradition equation the kinds of immunity considerations Professor Blakesley has already addressed. If you remove those considerations, there are few difficulties in contemplating the extradition of a government official.

Extradition requests, in this context, may arise in at least three separate situations: (1) where an official of one state commits a human rights violation in another state either directly or through agents, as in the case of the 1976 Letelier assassination in Washington, D.C., by the Chilean secret police; (2) a citizen of one state visits another state and is abused by the officials of the second state, as in the case of an American traveling abroad being tortured by the local police; or (3) a government official commits acts against citizens of his own state and then flees to another country, and his countrymen seek his return, as in the 1988 U.S. case of *Suarez-Mason*.

I would maintain that mid- and low-level officials are extraditable for all of the same reasons that more senior officials are. I suppose there could be issues of attribution in terms of state responsibility, although I am not certain that that issue would be pertinent in the law enforcement context. It may even be that foreign governments are more likely to extradite mid- to low-level government officials for human rights violations than they would the more senior officials.

The requesting government might face more significant practical problems than legal problems. This would be especially true if the conduct took place in the foreign territory; for example, if the conspiracy for an assassination was directed from abroad, or if a visiting tourist was tortured in a rural lock-up prior to being expelled. In any

*Assistant Legal Adviser for Human Rights, U.S. Department of State. Mr. Stewart spoke in his personal capacity.

event, there does not appear to be any specific distinction among the three general situations I propose, so long as the conduct constitutes an extraditable offense.

This leads me to the first of four points. The general articulation of international crimes, such as genocide, torture and illicit drug trafficking, through multilateral conventions, unquestionably increases the likelihood that a treaty basis for extradition will exist for the most significant human rights violations. In some ways it makes no sense to distinguish extradition of human rights offenders from the extradition of any other type of offender. Our domestic law does not make that distinction. In order to be extraditable, the conduct must be a crime covered by an extradition treaty; and for that purpose, as distinct from identifying a defense to extradition, we do not distinguish between crimes on the basis of purpose and motivation. It is difficult, therefore, to see the point in differentiating between serious human rights crimes and serious common crimes.

At the same time, it is also true that there are some procedural and substantive benefits that flow from the fact that some crimes are articulated in international conventions. Most notably, that benefit goes to states that can extradite on the basis of multilateral conventions. The United States, however, cannot do that. Therefore, the mechanism by which a multilateral convention is imported to our domestic extradition law is more complex. Nonetheless, the fact that we are required to establish universal, or more accurately called general, jurisdiction certainly tends to assure that offenders under these conventions find no safe haven in our country or in others.

The conventions do this by way of amending existing bilateral extradition treaties to include the specified offenses as extraditable offenses. The Genocide Convention works differently, but that is a detail that can be omitted in this panel. Some of the conventions in fact enhance the chance of extradition by removing some of the traditional defenses. For example, the convention on genocide in Article 7 provides that genocide, that is, the acts enumerated in Article 3, shall not be considered as political crimes for the purpose of extradition, thereby blocking the political offense exception. The recently adopted Vienna Illicit Trafficking Convention[1] goes further, and precludes denial of extradition on the grounds that the covered offenses are fiscal, political or politically motivated. In the negotiations of that Convention, the United States sought unsuccessfully for another limitation, to overcome the prohibition some states have, either as a matter of law or constitution, against the extradition of their own nationals. The United States thought that was a potential barrier which could apply to mid- and low-level officials as well as to anyone else. In the drug trafficking context this could be usefully removed, but a sizable number of participating states found this approach impossible to agree to.

In most other respects the multilateral treaties leave intact the domestic law of the requested state which governs extradition. That could be felicitous in cases involving the United States, where all the protections available under our domestic law would apply to the requested person pursuant to a multilateral convention. From the point of view of other states, that could be a problem, and I have already mentioned the *Letelier* case, where the U.S. requests for the extradition, expulsion or prosecution in Chile of individuals we sought were met with intransigence.

The second point to be made is that in some instances the conventions provide additional or specific bases for declining extradition. The Torture Convention,[2] which is currently pending before the Senate Foreign Relations Committee, contains a provi-

[1] 28 ILM 493 (1989).
[2] 23 ILM 1027 (1984); 24 ILM 535 (1985).

sion that no state party shall expel, return or extradite a person to another state, where there are substantial grounds on which to form the belief that the person would be in danger of being subjected to torture, taking into account all of the relevant considerations. The Illicit Trafficking Convention contains a provision permitting a state to refuse extradition requests where there are "substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment on the basis of his race, religion, nationality or political opinion, or would cause prejudice for any of those reasons to any person affected by the request."

This could be a potential problem. For that purpose, and in part to protect an important procedural point under U.S. law, the United States clarified on the record at the Convention that the use of the phrase "judicial or other competent authority" in this paragraph grants the states parties full discretion to determine for themselves, consistent with their domestic law, which branch of government is charged with making that decision. This position is based on the rule of noninquiry of U.S. law pursuant to which it is, and has been, the exclusive purview of the Executive Branch to consider issues of this sort.

The third and fourth points are to draw attention to two recent cases in the federal courts. The first case is *In re Ahmad*, in which it was held that courts have the power to interject themselves into matters of extradition despite the noninquiry doctrine "[w]here a case of abdication of the State Department's responsibility for the protection of the accused has been made out." The case involved the extradition of a naturalized U.S. citizen to Israel. Ahmad, also known as Atta, was an alleged member of the Abu Nidal terrorist group, and was accused of using automatic weapons and firebombs to attack a passenger bus in the occupied territory of the West Bank, resulting in death and serious injuries. Atta was apprehended in Venezuela, and expelled to the United States, at which time Israel requested extradition, which was granted by the magistrate. Atta then petitioned for a writ of habeas corpus claiming that, if he was extradited, he would face unfair procedure and inhumane treatment antipathetic to the court's sense of decency. The district court granted an extensive evidentiary hearing on the issue, holding that the traditional rule of noninquiry must yield where a petitioner can rebut the presumption of State Department propriety in assuming the fairness of the judicial process in the requesting country. In this case while the court granted the hearing, the court found that the petitioner had not met his burden of proving the rebuttal, and the extradition proceeded.

The government has contended the decision was premised on a fundamental misperception of the extradition process under U.S. law; in particular, the erroneous conclusion that the State Department's initial referral of extradition requests to the Department of Justice is, in fact, a certification that the accused will be fairly treated upon extradition. The contrary is the case, in that such matters are not considered until after the conclusion of judicial proceedings, when the record is certified to the Secretary of State under statute. That suggests a complementary point to why the extradition process bogs down—the judicial misperception of how the extradition process actually works.

The second case is one that was tried in the Northern District of California and which also bears on some of these issues. *Suarez-Mason* involved the extradition of a former Argentine general from the United States to the Republic of Argentina. Suarez-Mason was accused of forty-three counts of murder, twenty-four counts of unlawful deprivation of freedom and one count of forgery in connection with the so-called dirty-war of the 1970s. Extradition was granted on the bulk of the murder

counts and on the forgery count. The remaining unlawful deprivation of freedom counts were barred by the relevant statute of limitations.

This case was interesting not only because it involved the questionable extradition of an alleged human rights offender, but also in that the accused tried to defeat the request on the political offense exception. Suarez-Mason argued that the exception was available to former government officials with respect to actions taken in suppressing a rebellious uprising. In effect, Suarez-Mason attempted to turn the test on its head. This may be an argument peculiar to mid- and low-level government officials, and less so to more senior officials, in the extradition context. The Northern District of California, however, rejected the argument pointing out that it ran contrary to the fundamental purpose of the political offense exception.

REMARKS BY JOHN F. MURPHY*

The political offense subject is one of great complexity and magnitude, and has been exhaustively considered. In assuming that the subject is well known, only minimal background will be given. I would like to mention, however, that the political offense exception is a standard defense found in extradition treaties, with the possible exception of the bilateral United States–United Kingdom supplementary extradition treaty, where the relevant political offenses have been all but eliminated. The elimination of the defense from this supplementary treaty has created some highly charged political incidents, especially when the IRA or the Palestinian causes are involved.

There are some current trends in regard to the political offense exception that merit attention. There are two primary purposes behind the political offense exception. One is the humanitarian consideration, under which a person who commits political offenses should not be extradited to be tried by the victims of those offenses. The second is the idea of the neutrality of the state from which extradition has been requested. By granting extradition, that state has thereby interjected itself into internal disputes for the control of a country.

There has never been any agreement on the definition of a political offense exception. Quite to the contrary, it has been as difficult to define as terrorism. There have been numerous attempts to define what acts fall within the exception, and a variety of tests have been proffered. The test adopted by the United States, which will be focused on here, is the so-called incidence test. It should be noted that the incidence test has also been adopted by the United Kingdom. Under the incidence test, any act that is committed as part of, or in furtherance of, an uprising against a governmental power, designed to further the cause of those engaged in the uprising, will be considered to be a political offense. As we will see, there have been changes to the incidence test in U.S. jurisprudence which have focused on the nature of the act that has been engaged in. To over-simplify, if the act falls within the area of terrorism, it has generally been regarded as not being encompassed by the political offense exception in cases in the United States.

There are a variety of major contemporary issues regarding the political offense exception, but only four will be mentioned here. The first issue is whether the range of the incidence test should be limited, or whether any act taken in the furtherance of an uprising should be regarded as a political offense. There is a split in the authority. In the U.S. *Quinn* case, at least one member of the court said that as long as the act was incidental to the uprising, within the territory where the uprising was taking place, the act, no matter how atrocious, should be regarded as a political offense which would

*Professor of Law, Villanova University School of Law.

fall within the exception. In the *Quinn* case, according to Judge Reinhardt, because the act occurred in England rather than in Northern Ireland, they found that extradition was permissible. Extradition was possible because under the test, the act must have occurred in the territory where the uprising occurred.

In the *Eain* case[1] and in the *Ahmad* case already mentioned, the approach taken was that the incidence test should be modified to focus in on the nature of the act. If the nature of the act was a deliberate attack against civilians, that act would be a crime under the law of armed conflict, or possibly be covered by one of the UN terrorist conventions. As such, those acts would not be considered political offenses under the exception.

A second major issue is whether the so-called relative political offense exception should be available at all in extradition treaties between democratic states. This is the issue that so energized scholars in the debate over the United States—United Kingdom supplementary extradition treaty. The classic case is *In re Doherty*. Doherty was one of the PIRA members subject to a request for extradition by the United Kingdom. The courts found this was a classic incidence-type case, in that Doherty was active in the uprising in Northern Ireland, where he was then involved in an ambush of a patrol in which he killed a British soldier. Hence they found this was a political offense.

There are a number of other IRA cases along the same lines. Partly in response to those cases where extradition has been denied because of the political offense exception, the United States and the United Kingdom concluded the supplementary extradition treaty.

A third point to address is, if it is assumed that the political offense exception should be eliminated as a defense in extradition treaties between democratic states, the question becomes, should another defense be available to take its place? In other words, are there other approaches that would better serve the basic purposes underlying the political offense exception. Again, the humanitarian approach and the idea of neutrality need to be considered.

My view has been that the political offense exception and the incidence test do not very well serve the basic goals at which they are aimed. These approaches create a situation in which, the soldier or police officer in Northern Ireland, for example, is made fair game, as long as the person engaged in the acts can escape to a country such as the United States. So while it may be desirable to eliminate the political offense exception and the incidence test, the purposes that underlay the political offense exception must be met in other ways. On this point I disagree with the Executive Branch's position. I am inclined to the position that appears in Article 3(a) of the United States–United Kingdom supplementary treaty. This is basically the position adopted by Judge Weinstein who indicated that the rule of noninquiry, whereby the courts decline to look into the fairness of the proceedings of the country seeking extradition, or indeed whether the individual can get due process at all upon extradition, is unfair.

I favor the idea of the courts looking into cases, at least in situations where the accused, through the preponderance of evidence, has raised serious questions as to the situation of due process in the country that is seeking to extradite him. This is not to say that I necessarily agree with those who argue that the individual cannot get a fair trial in either Israel or Northern Ireland. This is a decision that should be made by the judiciary, because I think the Executive Branch is simply not the appropriate decision maker here because of the overriding political considerations. I would submit

[1] 21 ILM 342 (1982).

that it is inconceivable that the Executive Branch would ever decline to extradite an individual to the United Kingdom, and the same might be said to be true with respect to Israel.

The second dimension here is that of neutrality. The neutrality concept makes sense only in a situation where the law of armed conflict applies, and the individual has committed an act, the killing of a soldier in Northern Ireland for example, which he is privileged to do under the law of armed conflict. One must realize that under the law of armed conflict, and under Protocol Two which applies to noninternational conflicts, the threshold of applicability is rather high, and deliberately so. Countries that have problems that are characterized as civil war, do not want to have a limitation of the law of armed conflict imposed on them. Under Protocol Two, the uprising must have risen to the point where there is some control of territory, and certainly that is not the situation in Northern Ireland. I would mention in passing, that in respect to *Doherty*, which I regard as the classic case, there has been no attempt to extradite him. Rather, the fight is in the area of deportation.

Deportation is often viewed as an alternative means of returning an individual. Two decisions regarding Doherty by the Attorney General are currently on appeal before the Second Circuit. The first is a decision denying his request to be deported to Ireland as prejudicial to the interests of the United States. The second is a decision overruling a board of immigration decision to grant Doherty a hearing on a request for political asylum.

Indeed, it is interesting that there is a much more developed jurisprudence on the political offense exception in regards to deportation proceedings than there is on extradition under the exception. Certainly, at least, on the humanitarian aspect. One issue is whether the test should be co-extensive, and the same for both proceedings. Obviously, deportation is not governed to the same extent that extradition is by international law. Arguably, however, the law of refugees and the refugees standards apply to the deportation situation as well as to the extradition situation.

The fourth point is who decides whether the political offense exception or some substitute should be available to a person that a country is seeking to extradite. This is particularly relevant in the United States, although the issue may arise elsewhere. In the United States, the question is whether the decision should be made by the Executive Branch, or is it more appropriately a part of the judicial process. It is of particular importance in the United States because of the constitutional dimension created under the doctrine of the separation of powers.

Judge Weinstein's decision in the *Ahmad* case is recommended as a tour de force of a number of questions in the extradition area, in addition to the political offense exception. It is important to note that this was an attack on a bus while on its way to Tel Aviv, in the West Bank. It was found that this was definitely a civilian bus, and indeed the driver was killed. One thing that Judge Weinstein first faced with the classic incidence test. He opted for the approach taken by the *Eain* court. Even if the classic incidence test could be met, if the act was one that would constitute a crime under the law of armed conflict, it could not constitute an act that would fall under the political offense exception. Quoting from the beginning of the *Eain* decision, "Two changes in the law must now be recognized. One, a 'political offense' bar to extradition is narrowed to exclude terrorism and acts of war against civilians. A correlative expansion is required in the court's power to ensure that those extradited are granted due process and treated humanely."

I will conclude with a focus on Judge Weinstein's approach to the due process situation itself in Israel. He presumes that the individual will receive a fair trial in Israel,

and that the Israeli proceedings will be in accord with the basic human rights considerations. This presumption is partly based on the fact that there is an extradition treaty with Israel, and partly, perhaps inappropriately so, on the fact that the United States is forwarding the extradition requests to the courts. His approach, however, notes that:

> if under a preponderance of the evidence standard, the accused can at least raise a question of possible violations of human rights law, we are not applying our standards of due process. Rather the test is whether the process in Israel generally in respect to these cases, would violate fundamental international human rights considerations. That if the accused manages to provide evidence, that under the preponderance of evidence standard, there are serious questions to some practices in the requesting country, then the accused will be granted a hearing on the issue.

In his opinion, Weinstein expressed that he felt the accused had raised enough serious issues to entitle him to a hearing. After the hearing, Weinstein came to the conclusion that the accused had not met his burden of proof, and that therefore, Ahmad should be extradited. This case is now on appeal on habeas corpus to the Second Circuit.

Finally, I will just mention that a supplementary extradition treaty between the United States and Germany was introduced to the Senate Foreign Relations Committee. This treaty is similar to the original version of the United States–United Kingdom supplementary treaty, except that the elimination of the noninquiry rule is not contained within it. According to my sources, this treaty is "dead in the water."

Professor BASSIOUNI: Once again, the interesting point has been made regarding the separate evolution of legal questions that are interrelated. For example, the evolution of the political offense exception doctrine is completely unrelated to the evolution of political asylum as it is embodied in Title 8 United States Code. The political asylum statute has finally become part of the 1984 refugee act. Additionally, the Immigration Code has been amended as a result of the U.S. ratification of the 1967 protocol, which amended the 1951 convention on refugees.

The *Doherty* case is a clear example of a conflict between two jurisprudential approaches. The same is true of the political offense exception and the rule of noninquiry. There are occasions in which the two intersect. When those intersections occur, it is obvious that the linkages between them have not been carefully thought out.

While the political offense exception has acquired a different connotation with respect to the so-called acts of terrorism, it differs still further when used as a defense by persons whose extradition has resulted from alleged violations of international human rights protections, particularly when these practices are criminalized, such as in the cases of genocide, apartheid and torture.

While the application of the political offense exception is fairly well delineated in regards to heads of state and senior government officials, we are still in a grey area, notwithstanding Mr. Stewart's earlier explanation, when dealing with mid-level government officials. This is not a legal problem. This is a practical problem of how one secures extradition of a mid-level official of a foreign government.

The United States has experienced this problem with Mexican drug officials, for example, who have not only engaged in drug-related activities, but also in the torture and killing of U.S. narcotics agents. There are a number of problems of a practical nature relating to narcotics which need be considered.

The area of drugs must be understood in a larger context. The problems of extraditing drug officials, for this panel, is meant to refer to senior level drug personalities. When speaking of organized crime, it also relates to those involved at the senior levels.

There is one further comment to keep in mind. In the area of heads of state and senior officials engaging in human rights violations, terrorism and organized crime, one always sees an insulating layer between the highest level of decision makers and those who are acting on those decisions. In effect, we must operate on two tracks. One, to find the instruments to reach those who participate in the decision-making process, particularly in legal systems where you do not have concepts of conspiracy, such as in the common law system. Two, confront the problem that those who are implementing the decisions receive the protection of the higher level decision makers.

REMARKS BY BRUCE ZAGARIS*

One thing that is obvious when looking at the area of extradition in regards to drug offenses and organized crime, as reflected in the earlier remarks, is that narcotics offenses have been so politically important that they have been developing on a track by themselves. These offenses are causing extradition law to develop more expansively.

In the past I have had the opportunity to reflect on the problems of drug offenses and organized crime for the United Nations Crime Prevention Committee in its attempt to develop international modalities for combating new forms of organized crime. There are five different issues at which to look. First, there is the issue of continuing criminal enterprises and offenses under the Racketeering-Influenced Corrupt Organizations Act (RICO). The second is the concept of specialty of limitations. Third is provisional arrest. The fourth is the concept of double criminality. The fifth is the United Nations Drug Convention.

Most foreign jurisdictions, with the exception of Italy, do not have continuing criminality laws or RICO laws. As a result, when the U.S. Government requests extradition of a person accused of these crimes, foreign jurisdictions are frequently unable to grant those requests. There have been recent developments in an effort to make extradition for these crimes more easily achievable.

In an attempt to correct this situation, several intergovernmental organizations, such as the Inter-American Drug Abuse Commission and the United Nations, have been assisting civil law countries to amend their laws, so as to include these types of offenses. These groups have been using the Italian laws as a model. Another development is that modern extradition treaties, patterned after the United States-Italian treaty, have been inserting a clause that embraces crimes that are committed by associations.

The next point to cover is the specialty limitation. Under the principle of specialty, the requesting state, once it obtains the relator can prosecute that person only for the offenses for which he or she was surrendered to the requesting state. If the requesting state is unwilling to abide by the limitation imposed by the requested state, the requesting state must allow the person to return to the requested state. Since the requested state is the intended beneficiary of the doctrine of specialty, the question arises as to whether the subject of the extradition request has the right to raise the specialty principle. The U.S. courts, and most of the other courts around the world, allow the subject to raise the specialty defense. There have been some recent jurisprudential

*Of the District of Columbia Bar; co-chair, Committee on International Law, Criminal Justice Section, ABA.

developments involving issues relating to drug trafficking, especially when it involves organized criminals.

One such case is *United States v. Cuevas*, in which Cuevas was extradited from Switzerland on fifteen counts of various narcotics, conspiracy and currency violations. The Swiss extradition order prohibited the prosecution of punishment of Cuevas for the fiscal indictments. When Cuevas arrived in the United States, a motion to sever the currency violation counts from the narcotics counts was filed, and subsequently denied. On appeal, Cuevas raised the violation of the specialty provision of the extradition order. The Ninth Circuit rejected the argument, holding that the appropriate test was whether the extraditing country considered the acts for which the defendant was prosecuted as independent from those for which he was extradited. Because the Swiss courts consistently characterize narcotics and currency reporting conspiracies as integrally related, the United States did not violate the principle of the specialty limitation. The *Cuevas* case also shows the importance of formulating the extradition request as precisely as possible. This is necessary in order to allow the courts of the requesting state to decide which counts the prosecution may pursue.

As to provisional arrest, most extradition treaties do have a clause permitting provisional arrest in cases of urgency. Provisional arrest is usually requested to prevent the further flight of a fugitive from a country in which he has sought sanctuary, or to prevent him from going into hiding. It can also be requested if the subject's prior criminal record, or the circumstances of the offense for which his extradition is sought, indicate that he poses a serious danger to the public safety in the country from which his extradition is sought. In most cases, it can be shown that organized criminals will pose a continuing danger.

It should be noted that there are time limitations regarding provisional arrest in the extradition conventions of both the United States and the European States. In short, they mean that states must move much more expeditiously. There has also been some discussion that the provisional arrest provisions in extradition treaties have been abused. Statistics show that provisional arrest is requested in the vast majority of extradition requests.

The next issue is that of double criminality. Double criminality has become a problem because most of the older treaties list the crimes for which a person may be extradited, and many countries, especially civil law countries, do not have continuing criminal enterprise or RICO-type statutes. The more modern extradition treaties require only that an extraditable offense be an offense that is punishable under the laws of both states by a deprivation of liberty for a period of more than one year, or something similar in nature. Therefore, it becomes easier to satisfy the double criminality problem.

The problem still exists, however, when viewed in relation to organized crime. Some extradition treaties solve this problem by directly inserting into the treaty a provision similar to Article 22 of the United States-Italian extradition treaty, which provides that any type of an association that commits a crime as provided by the laws of Italy, or conspires to commit an offense as described by the laws of the United States, will be extraditable for the offenses. It would be useful to use this approach in other extradition treaties.

The 1988 UN Drug Convention illustrates that the world community is dealing with drug offenses with great intensity via an international approach. The opportunities for extradition are being expanded in relation to drug offenses and organized crime. In particular, Article 3, paragraph 1, of the Convention provides that extradition is required for the organization, management or financing of any of the prohibited

offenses. In addition, the Convention specifically provides that extradition applies to money-laundering offenses, which are very broadly defined. There are also a number of other advances in extradition in the Convention.

The other important development is that the UN Committee on Crime Prevention is currently drafting a model extradition convention which is likely to be adopted this summer. Its goal is to serve as a model for developing countries in their development of extradition treaties.

In conclusion, the lack of flexibility in international extradition, especially for drug trafficking and organized crime, unfortunately has lead to the circumvention of extradition procedures. This circumvention risks the destruction of the role extradition serves in the fabric of international law. To make extradition continually relevant to drug trafficking, the world community needs to continually review and revise these model extradition treaties. The world community needs also to continue to develop ways to deal with organized crime and drug trafficking. I think the best way, especially in the context of the United Nations, is to have working groups concerned with the topic. These groups exist bilaterally, such as the United States-Italy Legal Assistance Treaty; regionally, as in the Trevi Group in Europe, in which the United States participates as an observer; and globally, as in Interpol's working groups on narcotics and organized crime.

Professor BASSIOUNI: I think we have three categories of serious problems. One is the lack of development in the national legislation of the various countries. This failure has preempted the ability to fashion new legislative definitions of complex crimes committed by those running organized crime and drug activities.

The second is the theory of double criminality as understood in its traditional sense. In that traditional approach it acts in a comparative mode. The doctrine looks at similar crimes, either *in concreto* or *in abstracto*. Nevertheless, if there is legislation that has a definition of a complex crime, such as participation in the Mafia or continuing criminal enterprise, when those cases are argued in different countries, and some of them have taken place in countries such as Australia and Canada, the requested country finds itself in great difficulty in understanding the meaning of continuing criminal enterprise or RICO-type statutes. The requested state is left trying to decide what, in its domestic legislation, corresponds to extraterritorial statutes.

The third group is that of practical problems encountered in actual cases. One such case, *Caltagirone v. Grant*, from New York, lasted several years. During the first two years, many documents were examined. After being appealed to the Second Circuit, the case lasted close to five years, and then was dismissed.

Another case is *In re Assarsson*, which also lasted five years, and twice went to the Court of Appeals before the case was decided. In that instance, the entire case hinged on one word—what "charged" meant when used in the language of the treaty.

If you look at any case involving financial dealings, you realize how cumbersome it is to deal with an evidentiary hearing in the nature of probable cause that requires documents to be examined, translated and legally authenticated. The more complex the case, the more complex the paperwork, the greater the cost of prosecution, the greater the delays, and the greater the strain on the personnel and financial resources of the governments involved. When all of this is taken together, the usual conclusion is that extradition in these types of cases is not a particularly easy solution. I maintain, however, that extradition is workable, and that with a little innovation these problems can be substantially reduced.

REMARKS BY YORAM DINSTEIN*

I believe that we must distinguish between the various modes of rendition by one state to another of fugitives from justice. This panel focuses on extradition. Without diminishing from its prominence, we must not lose sight of the fact that extradition is only one mode of rendition. There are other means which can attain the same end result, ranging from deportation to exclusion (not to mention abduction).

Extradition is characterized by the legal phenomenon that courts in one state consider whether to enable the prosecution of an individual before courts in another state. Our discussion has brought into relief a differentiation between three categories of offenders: (1) heads of state or of government; (2) lower echelon government officials; and (3) what may be termed antigovernment offenders.

There is a natural tendency in a session like the present one, devoted as it is to contemporary issues in extradition law, to concentrate on the third category. Primarily, that means an analysis of the problem of the extradition of terrorists. There is, however, a threshold point which must be underscored. Regrettably, terrorism as such is not yet recognized as an international offense. Of course, there are multiple international conventions penalizing several aspects of terrorism, e.g., hijacking of aircraft, the taking of hostages or acts against the safety of maritime navigation. Still, the most common act of terrorism—an assassination of an ordinary person (not entitled to special protection under international law) on land, where the taking of hostages is not involved—does not amount to an international offense today.

Once it is established that an act of terrorism is criminalized by an international convention, the next question is whether offenders can escape extradition owing to the political nature of their acts. I am under the impression that the wheel has come full circle in the evolution of the law governing political offenses. Reference has been made earlier to the famous peace treaty signed by the Pharaoh Ramses II and the King of the Hittites. Allow me to point out that the treaty imposed a duty of extradition of offenders against either one of the two potentates in circumstances that would be classified by us as political. It was only many centuries later, after the French Revolution to be precise, that it became customary to insert in extradition treaties a clause barring the rendition of political offenders. But we live in a postmodernistic era in which it is fashionable to reintroduce old values. Insofar as political offenders are concerned, the pendulum is apparently swinging back from the nonextradition to extradition. Initially, it was the so-called socialist countries that eliminated from their intrabloc treaties the clause precluding the extradition of political offenders. In 1977, the Council of Europe adopted the European Convention on the Suppression of Terrorism prescribing that specified international offenses should not be regarded as political for extradition purposes. The Supplementary Treaty on Extradition, concluded by the United States and the United Kingdom in 1986, goes even further. In all, I put it to you that the prevailing trend at this juncture is to shift the emphasis from the nature of the offense to the nature of the trial. In other words, it is less important to assess the political character of an offense committed by a terrorist or by any other person whose extradition is sought. It is much more consequential to examine whether that person may expect to benefit from a fair trial following the extradition.

This brings me to the human rights dimension of extradition. An exceedingly interesting judgment was delivered in 1989, by the European Court of Human Rights, in the *Soering* case. Here the Court pronounced that the "death row" phenomenon in the United States (entailing life of prisoners convicted of capital crimes "in the ever-

*Professor of Law, Tel Aviv University.

present shadow of death" for many years) amounts to "inhuman or degrading treatment or punishment," which is prohibited in Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. According to the Court, the extradition of a person charged with a capital crime from the United Kingdom to the United States would be contrary to the Convention's prohibition by reason of its foreseeable consequences. I am not entirely persuaded by the logic underlying the *Soering* judgment, inasmuch as the Court actually faults the American legal system for being too lenient in permitting numerous proceedings postponing executions. The incongruous moral of the story is that the United States would not run afoul of human rights if it were to execute without delay all prisoners convicted of capital crimes. But it is noteworthy that human rights considerations, which in the past were generally ignored in extradition proceedings, are now beginning to come to the fore.

Let me move now from antigovernment offenders to government officials other than heads of states. This is the setting in which the most common defense claim is obedience to superior orders. The best examples are to be found in the countless trials of Nazi and Japanese war criminals following World War II. The epitome is the Nuremberg trial in which the defendants (all high-ranking civil and military officials) attempted to evade responsibility for their acts by putting the blame on Hitler who had committed suicide in the notorious bunker in Berlin. The contention was that the Führer had borne sole responsibility for the innumerable crimes of the Third Reich, since the unprecedented massacres and other atrocities had been committed pursuant to his orders. The defense of obedience to superior orders was justifiably quashed by the International Military Tribunal and subsequently by other courts. In a nutshell, under present-day international law, obedience to superior orders does not constitute a defense per se, but it may be considered—in conjunction with other facts of the case—within the scope of an admissible defense based on lack of *mens rea*. I do not deem it proper to elaborate on this question in our session, for I do not think it is of cardinal import in the field of extradition. After all, in extradition proceedings it is not necessary to establish guilt. In the United States all that is required is "probable cause." Under the 1957 European Convention on Extradition, even that is redundant. Be it as it may, it is quite obvious that the issue of obedience to superior orders ought to be examined not in the course of extradition proceedings, but in the actual criminal trial in the requesting state following rendition.

Now let us get to the last category of offenders, which deserves our full attention. I am talking about heads of states or of governments. Evidently, these dignitaries can be—and frequently are—the targets of terrorist attacks. Thus, by way of illustration, there is a notice in the *Washington Post* of March 31, 1990 regarding the extradition to Belgium from Latin America of a person who had admitted kidnapping a Belgian Prime Minister. But heads of states or of governments can themselves be charged with offenses against international law, particularly crimes against peace, war crimes, crimes against humanity or genocide. Almost by definition, a head of state or of government cannot rely on the claim of obedience to superior orders, since archetypically those orders emanated from him or her. All the same, a head of state may avoid a criminal prosecution in another state owing to immunity in compliance with international law.

To understand the nature of this immunity, it may be useful to compare the position of a foreign head of state with that of a foreign diplomatic agent. There are two forms of diplomatic immunity: *ratione personae* and *ratione materiae*. Immunity *ratione personae* in penal matters applies irrespective of the nature of the acts which are the

subject of the proceedings, but it comes to an end upon the termination of the functions of the diplomat in the country to which he or she is accredited. Should a former diplomat return to that country at a later date as a tourist, as a pilgrim, or on business, the immunity *ratione personae* will no longer be available. On the other hand, an ex-diplomat enjoys immunity *ratione materiae* without any time limit. The scope of this indefinite immunity is restricted to official acts performed in the discharge of diplomatic duties.

A foreign head of state enjoys a similar dual immunity. Furthermore, it is at least arguable that almost every act committed by a head of state comes under the protective umbrella of immunity *ratione materiae*, so that the exemption from jurisdiction does not expire in time. By way of an illustration, take an 1894 English judicial decision to the effect that a foreign head of state cannot be sued even in respect of a breach of a promise of marriage made while living in England incognito (*Mighell v. Sultan of Johore*). Was the immunity enjoyed *ratione personae* or *ratione materiae*? To my mind, the marriage of a monarch cannot be viewed as a strictly private affair. Historically, matrimonial pledges by members of a royal family have often been induced by political considerations and made with territorial dowries in mind. If you agree with me, the question is whether other ostensibly personal acts perpetrated by a foreign head of state should not be equally covered by immunity *ratione materiae*.

A reference has been made to Article 227 of the Treaty of Versailles relating to the projected trial of the former German Kaiser, Wilhelm II, before an international tribunal. Two points ought to be stressed when this provision is scrutinized. First, it would be misleading to construe Article 227 as evidence that a former head of state enjoys no immunity from international legal proceedings. In fact as in law, the Treaty of Versailles constitutes a waiver of the former Kaiser's immunity by his country (Germany). After all, the rationale of the immunity of heads of state is the ancient principle *par in parem non habet imperium* (one equal has no jurisdiction over another). In the final analysis, the immunity of heads of states is a facet of sovereign immunity. As such, the immunity is vested in the state which the monarch or the president represents. Hence, that state is free to lift the immunity from the individual in question through waiver.

Second, if one reads the Dutch note refusing to extradite the former Kaiser, it is manifest that the Netherlands did not consider itself obligated under international law to render him to trial. The Netherlands, as a neutral country in World War I, was not a contracting party to the Treaty of Versailles. More significantly, the text of Article 227 demonstrates that even the parties to the Treaty charged the Kaiser with an offense against international morality rather than international law. Indisputably, at that time international law failed to penalize conduct that is now recognized as a crime against peace.

No reference has been made so far to the two cases of heads of states arising from World War II. One was that of the German Admiral Dönitz, who on May 1, 1945 succeeded Hitler as head of state. Dönitz served in the new capacity for one week only, but there is no denying his temporary status as head of state. The International Military Tribunal at Nuremberg explicitly acknowledged that status, but proceeded to convict and sentence Dönitz nonetheless. Once more it must be perceived, therefore, that the Tribunal's Charter stipulated that the official position of defendants—whether as heads of state or otherwise—did not free them from responsibility. The Charter was annexed to the 1945 London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis. It is true that Germany was not a party to the Agreement. But in the aftermath of the unconditional surrender and the