International Procedures for the Apprehension and Rendition of Fugitive Offenders

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Professor RUBIN called for the use of the tools of the law in other contexts. He suggested questioning the credentials in the U.N. General Assembly of the Soviet military occupation regime's Afghan representatives; without questioning the existence of Afghanistan as a state, the group purporting to be its government certainly looked more like a foreign military occupation regime. And surely the acts of the Soviet military forces in Afghanistan could properly be measured against the prescriptions of the 1949 Geneva Conventions even if the armed conflict there were not of international character.

He deplored the Administration's apparent ignoring of the tools of international law and the current emphasis on domestic politics in other contexts, citing the imposition of draft registration as a futile and divisive "signal" to be sending abroad. He expressed dismay over the Administration's appeal to nonexistent presidential authority to withdraw the United States from participation in the Olympic Games and the failure to explore the legal organization of the Games and persuade those with real authority of the wisdom of the President's policy. In this last connection he referred to his own experience as a qualifier for the American Olympic squad (but not the final team) in 1956.

ERIK PETERSON*
Reporter

INTERNATIONAL PROCEDURES FOR THE APPREHENSION AND RENDITION OF FUGITIVE OFFENDERS

The panel convened at 4:30 p.m., April 18, 1980, Alona E. Evans** presiding.

INTRODUCTION BY THE CHAIRMAN

Our topic this afternoon is "International Procedures for the Apprehension and Rendition of Fugitive Offenders." It may be asked why this topic at this time. Everybody knows about extradition. Unfortunately, there is much about extradition which is not generally known to practitioners on the one hand and to extradition magistrates on the other, not to speak of the general public. It is a proceeding beset by various problems, both procedural and substantive. Among the latter, one may single out as a "hot issue" the question of the definition of the "political offense," a matter of particular concern to those involved in the extradition of international terrorists. Are we bound by the Castioni Rule,¹ the political movement engaged in a political uprising? Or should we analyze the offense closely, denying it political character if it was a random act, a private act, an act directed against the civilian population, or an "act of odious barbarism," to quote the Court of Appeal of Paris in the recent extradition case of a fugitive charged with

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¹Re Castioni [1891] 1 Q.B. 149.
complicity in the detention and murder of former premier Aldo Moro of Italy. 2

Extradition is one of our concerns this afternoon, but not the only one. The term "rendition" is used in the title of our topic in a generic sense, for the international practice, there are several ways of acquiring custody of fugitive offenders, some legal, some illegal, some common, some esoteric. These several methods will first be sketched. Then the panel will examine certain ones in more detail.

In considering international rendition of fugitive offenders, extradition is the only lawful method in the international legal system. Thus, it is used in the formula, "extradite or submit to prosecution," which is central to several conventions designed to further the development of international criminal law, such as the conventions proscribing aircraft hijacking, attacks upon internationally protected persons, or the taking of hostages. 3 Founded upon long established practice, 4 there is what may be called a customary law of extradition which is widely followed both in extradition treaties and in extradition statutes. The typical extradition treaty provides that the accused must be found in the territory of the requested state, that the offense charged must be punishable in both the requesting and requested states, that double jeopardy and prescription must be recognized, that nationals may not be extradited, that there can be no extradition on political charges, that the request must be made through the diplomatic channel, that the accused may only be detained for a limited period pending extradition proceedings, and that the accused may only be tried in the requesting state on the precise charge for which he was surrendered. 5 Extradition is usually governed by treaty although some states will extradite on the basis of statute and comity. 6 The United States may extradite only by treaty where it is the requested state (18 U.S.C. §3181). Where the United States is the requesting state, it may ask for extradition by comity but without a commitment to reciprocity in the matter. 7

Extradition is a criminal proceeding which is similar to a preliminary hearing. The accused has his day in court and can raise questions as to identification, double criminality, and the political character of the charges. In no sense is the proceeding a trial although there are instances of courts

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2 Re Piperno, No. 1343-79, Cour d'Appel de Paris, Chambre d'Accusation, 1ère Section, Oct. 17, 1979. See also, In the Matter of the Extradition of McMullen, Magistrate No. 3-78-1099 MG (C.D. Cal. May 11, 1979) (bombing military barracks held incidental to uprising in United Kingdom); In the Matter of the Extradition of Eain, Magistrate No. 79 M 175 (N.D. Ill. Dec. 18, 1979) (bombing market place did not constitute attack upon government); In the Matter of Budlong and Kember, Nos. 199/79, 200/79, Q.B.D., Nov. 30, 1979 (burglary engineered by accused did not challenge government).


4 T. A. Shearer, Extrajiction in International Law 5 et seq. (1971).


6 E.g., Fiocconi and Kella v. Attorney General, 462 F. 2d 475 (2d Cir. 1972), cert. denied 409 U.S. 1059 (1972) (extradited from Italy by comity as offense not listed in treaty).

7 Ud. See, 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 737 (1968). See also, United States v. Orsini, 424 F. Supp. 229 (E. D. N. Y. 1976), aff'd 559 F. 2d 1206 (2d Cir. 1977); see DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1977 443 at 446 (J. A. Boyd, ed. 1979).
which have so regarded it. In the United States, as in many other states, the proceeding is handled by the courts. Where surrender of an accused has been recommended, the final decision is that of the Secretary of State who may withhold surrender for reasons of national policy, humanitarian considerations, or a difference with the court on the interpretation of the treaty.*

Extradition may be the established method of rendition, but it is by no means a convenient method or, indeed, a popular method. In a recent study of 231 instances of rendition of persons charged with international terrorist offenses, it was found that only 6 out of 87 extradition requests were granted; on the other hand, 145 terrorists were expelled by 28 states.* Deportation, using this word to cover both exclusion and expulsion of aliens, is a common method of rendition. How does it differ from extradition? For one thing, it is a civil proceeding which has as its purpose immigration control. It is handled by the Executive, with recourse to the courts, if at all, only where administrative remedies have been exhausted. However elaborate the administrative proceedings of deportation may be, as in the United States, and in some states they are conspicuous by their absence, these proceedings are not controlled by the criminal justice standards of extradition which afford protection to the states involved and to the accused. In U.S. practice, the courts will give short shrift to the accused who complains that he should not be tried on criminal charges because he was deported to the United States instead of being extradited. After all, the Ker Rule governs the court's jurisdiction.**

In international practice, then, extradition and deportation are the usual methods of rendition of fugitive offenders. But there are some other ways of accomplishing this objective. A military offender, for example, may be surrendered to a requesting state pursuant to a Status of Forces Agreement with that state.*** Here, there is the formality of a treaty, but the treaty has not been designed for the purpose of rendition per se. The endorsement of a passport compelling the holder to return to the issuing state is a rather esoteric method of rendition which appears to be available where there are criminal charges pending against the holder. And then there are irregular methods of rendition which may be differentiated only as to whether their irregularity is overt or covert. Kidnapping or other forceful measures are


**Ker v. Illinois, 119 U.S. 436 (1866).

***See Agee v. Vance 483 F. Supp. 729 (D.D.C. 1980) (comment by court in finding that there was no congressional authorization for Secretary of State to compel plaintiff to return to United States on grounds that his activities abroad were detrimental to national security or foreign policy).
obvious examples. Less obvious is resort to a repatriation program designed to include (or blackmail) an individual to return to the country from which he has fled, the very flight itself being a criminal act in some states. Participation by U.S. officials in irregular methods of rendition has been condemned in United States v. Toscanino. But pursuing their policy of avoiding inquiries into governmental operations in foreign countries, courts will rely upon the Ker Rule despite allegations that an accused is in the United States because he had been forcibly expelled from a foreign country.

These, then, are the various ways in which international rendition of fugitive offenders can be accomplished. Our panelists are going to analyze some of these methods in detail. Mr. Kenney will consider the practical problems involved in the extradition process. Professor Bassiouni will speculate on whether extradition can be made a more effective method of rendition. Mr. Gordon will examine the question of whether exclusion and expulsion should be recognized as lawful methods of rendition, and if so, what international standards should be developed for their use. Professor Williams will consider the extent to which irregular methods of rendition are in use and how their use can be controlled.

REMARKS BY M. CHErif BASsIOUNI*

These remarks will endeavor to raise a number of questions which have rendered extradition in the United States a cumbersome practice in need of new legislation aimed at its reform without curtailing the constitutional and other human rights of a relator.

One of a number of problems perceived in current extradition practices is the excessive reliance in many countries, and particularly in the United States, on bilateral treaties. Yet extradition could be carried out on the basis of reciprocity or comity if appropriate national legislation to do this existed in the respective requested and requesting states. While existing U.S. legislation precludes these types of arrangements, there is no constitutional impediment to a revision of Title 18, Sec. 3180 to provide for extradition on the basis of reciprocity or comity without a bilateral treaty. Notwithstanding the requirement of a treaty it is an anomaly in U.S. practice that the United States does not rely on extradition clauses in multilateral treaties. The United States is a signatory to a number of multilateral treaties which provide a basis for extradition covering a number of serious crimes. These treaties state that signatories will include certain crimes in their bilateral extradition treaties, and, in the event that they do not, the signatories will rely on these treaties. The United States has in fact endeavored to include these crimes in its bilateral treaties (e.g. war crimes under the four Geneva conventions of August 1949; hijacking under the Tokyo, Hague and Montreal Conventions of 1963, 1970 and 1971; slavery and related practices under the

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*De Paul University College of Law. The author's reliance in this presentation is on the following works: M. C. Bassiouni, International Extradition and World Public Order (1974); I. Shearer, Extradition in International Law (1971); M. Whiteman, Digest of International Law (1968); M. C. Bassiouni and V. P. Nanda, A Treatise on International Criminal Law (1973); Legal Aspects of International Terrorism (A. Evans and J. Murphy, eds. 1979); and M. C. Bassiouni, International Criminal Law: A Draft International Criminal Code (1980).

Another problem with respect to U.S. reliance on bilateral treaties arises in the practice of listing extraditable offenses in each treaty. This raises numerous problem of interpretation not to speak of the frequent need to revise treaties to include new crimes.

There are a host of other problems which exist with respect to specific offenses and treaty interpretation particularly in determining the applicable jurisprudence. A much better practice would simply be to apply the principle of double criminality in abstracto, that is, if the offense constitutes a crime under the laws of both countries it will be considered extraditable providing it is punishable by no less than one year of imprisonment. This is now the prevailing trend in the European practice. Such an approach would eliminate the problems of frequent treaty renegotiations with all that this process comports of difficulties, and would avoid many judicial delays and reviews which stem from legal battles over the meaning of a treaty-stated extraditable offense and it's interpretation under the law of the state wherein the relator may be found.

Another problem with current extradition practice arises with regard to the apprehension of the relator. Under the provisions of a more recent U.S. extradition treaty there is a clause on provisional arrest. Thus a requesting state may send an arrest warrant, or even a TELEX, to request the United States to arrest an offender provisionally for a period of time (between 45 to 60 days) before the arrival of the formal extradition request. Such informal requests are supposed to provide sufficient information for a judge to issue an arrest warrant. Yet under this procedure, the provisional arrest standards do not meet those required by Title 18, Sec. 3184, namely, "probable cause," because Sec. 3184 refers to extradition proceedings and there is no legislation covering provisional arrest.

While the purpose of provisional arrest is to prevent the flight of the offender, it is questionable whether a TELEX can be accepted as evidence on which a warrant may be issued. Legislation is probably needed to clarify provisional arrest procedures.

In addition, there is no adequate regulation in the existing legislation on questions of bail during the period of provisional arrest and during extradition proceedings. Presumably, to serve the purpose of preventing the flight of the accused, no bail should be set, but that violates constitutional rights, particularly if the relator is a U.S. citizen. Existing case-law places the burden on the relator to show that he has "special circumstances" warranting bail.

Another problem is that of the "political offense exception." Legislative criteria should be set forth determining what the "political offense exception" is, excluding therefrom international crimes. This would be consonant with U.S. obligations under international conventions and with the maxim aut dedere aut judicare. Legislative criteria would help resolve many of the problems now faced in practice and avoid jurisprudential confusion and inconsistencies. Because of the difficulties inherent in the now cumbersome and lengthy practice of extradition, other alternative methods have been developed some of which are illegal, such as abduction, while others derive
from the use and abuse of immigration laws such as deportation or expulsion.

There are two ways of making extradition a more effective method of rendition. The first is to make extradition procedures more simple. The second is to develop an alternative U.S. jurisdictional basis, at least for international crimes. This second alternative would be significant in that the United States could prosecute a person, even for crimes not committed in the United States, instead of extraditing him or her.

The Department of Justice's current investigation of war crimes and of persons accused of committing crimes against humanity for the purposes of deportation and denaturalization is presently the only alternative to bring such persons to justice somewhere in the world, presumably before the Courts of a state willing to do so because they cannot be prosecuted in the United States (the crime not having been committed in the United States). Furthermore there is no specific rule in extradition for exclusion of such offenses from the "political offense exception" in case an extradition request is received. The present practice, however, in addition to being lengthy and cumbersome presents some moral dilemmas.

Take the case of a 70-year-old man who allegedly has committed war crimes or crimes against humanity. The only alternative is deportation or denaturalization as the case may be (but only if he lied about his past, otherwise not), even though that individual would be returned to a state that could execute him. This poses a very serious problem. While the United States would like to uphold the principle of accountability and responsibility, it might not necessarily approve of the type of punishment that the deported or expelled individual would receive in the country to which he would be sent. The United States thus faces a dilemma. The solution would be to prosecute such an individual in the United States for those international crimes.

A positive development in resolving some of the extradition problems has been the treaties and legislation in the United States providing for prisoner exchange between the United States and other countries. This was originally devised as a mechanism to bring back to the United States nationals imprisoned abroad. It also provides a way to get around the nonextradition of nationals, as long as reciprocity exists, since it would permit them to be sentenced in the country where they committed the offense, and then returned to serve their sentences in their country of origin. Certainly this would ease judicial problems in applying the "rule of noninquiry" since courts would know that the offender would be returned to the United States after his trial abroad to serve his sentence.

Still another positive development is the present initiative of the Office of International Affairs of the United States Department of Justice in proposing new Draft Legislation on extradition and also to expand it to provide for an appeal process on the part of the Government acting on behalf of a requesting state, either on the basis of an interlocutory appeal or an appeal from a decision of the magistrate denying extradition. The Relator's recourse should no longer be by way of habeas corpus but by appeal. But existing legislation should also be amended to cover provisional arrest, bail, and outline the standards for the "political offense exception". In addition Senate Bill 1437, should be amended to establish a jurisdictional basis for the prosecution in the United States of those persons whom the United States does not wish to extradite.
This approach would fulfill the precept of aut dedere aut judicare which is now the basis of a new European Convention on the "European Judicial Space and Cooperation in Penal Matters". This formula would help eliminate many of the legal and human problems judges now face in decisions to extradite, and it would lessen the need to resort to other legal and extra-legal devices as alternatives to extradition.

Extradition is probably the most significant instrument of international cooperation in criminal law and it is important to retain in that practice those standards of international human rights protection of which the presumption of innocence and its legal consequences are not the least. Extradition law and practice can be made more effective and satisfy the need for speedy judicial determination without curtailing basic human rights. To accomplish these goals requires a minimum of legislative imagination and the United States is now in a propitious position to do just that, as it is in the process of reenacting its federal criminal laws.

REMARKS OF WILLIAM S. KENNEY*

Before discussing specific problems encountered in extradition I will identify and review some of the general principles of extradition under U.S. law.

Extradition by the United States to foreign countries is exclusively a prerogative of the federal government which may be exercised only when specifically authorized by statute or treaty. The present law authorizes extradition only when there is a treaty of extradition with the requesting state. There is no statutory prohibition against the United States requesting the extradition of a fugitive from a country with which we do not have an extradition treaty. Many countries condition their willingness to extradite without a treaty upon being given assurances of reciprocity. Since the United States cannot give such assurances it does not ordinarily make a request for extradition absent a treaty. However, there have been some rare instances in which the United States has obtained the extradition of a fugitive, even though it was unable to give assurances of reciprocity.

The Secretary of State has the responsibility and authority to extradite a person found extraditable by the extradition magistrate. It must be noted that the extradition laws do not require the Secretary of State to surrender such a fugitive. They provide only that the Secretary may surrender the fugitive. The Secretary of State may impose conditions on the surrender.

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4 E.g., Germany, Argentina, Austria, Belgium and Japan. See I. Shearer, Extradition in International Law (1971) at 31-32.
6 Id.
7 M. Whiteman, Digest of International Law, 1051-53.
The surrender is for the limited purpose that the fugitive be tried for the offense charged. *

A problem encountered in extradition is the inadequate extradition law. It does not detail the procedures to be observed. This lack of procedural standards is exacerbated by the fact that the Federal Rules of Criminal Procedure,* the Federal Rules of Evidence* and the Federal Rules of Civil Procedure are not applicable to extradition. There are no provisions governing provisional arrest, 2 waiver of extradition; the giving of consent to reextradition to a third country or to the trial of a fugitive for an offense other than that for which extradition was granted; or for temporary extradition. The law authorizes the issuance of a warrant for the arrest of a fugitive on the basis of a complaint under oath by any individual. 

A problem arises in locating the applicable treaty and determining whether it is in force. Treaties in Force includes a reference to the United States extradition treaties under each country and an alphabetical list of the treaties appears in a note to 18 U.S.C.A. 3181. However, questions arise as to whether a treaty listed in one or both of these publications has been modified or abrogated by the domestic law of the country involved. For example, the Irish Extradition Act of 1965 provides that any order made under section 2 of the Extradition Act of 1870, and in force immediately before the commencement of the Act shall continue in force and be deemed an order made under the new Act. The 1965 Act further provides that any such order, if not sooner revoked, expired on January 1, 1972. Since under Irish law there must be an order in force for an extradition arrangement to be in effect, these provisions resulted in the expiration, as of January 1, 1972, of extradition treaties which predated the effective date of the 1965 Act.

Difficult problems also arise when there has been a succession of states, as for example, whether the 1931 extradition treaty between the United States and the United Kingdom is in force for a particular former British colony.

Another problem in relation to the extradition treaties is whether they or all of their provisions are self-executing. If the treaty provides that the United States will or will not extradite for certain offenses, then the treaty would be self-executing. However, if the treaty specifies procedures to be followed by the United States courts it is not clear that such a provision is self-executing.

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*Rule 54.
*Rule 1101 (d).
"Rule 1. The rules govern all suits of a civil nature hence are not applicable to extradition.
"18 U.S.C. § 3187 relates to provisional arrest and detention within the extraterritorial jurisdiction of the United States for extradition to a foreign country.
*Treaties in Force, January 1, 1979 lists four Conventions between the United States and the United Kingdom applicable to Ireland as being in force.
"47 Stat. 2122.
A problem arises in determining whether a particular offense is an extraditable offense since the United States does not have a uniform definition of an "extraditable offense" in the statutes or in the treaties. The U.S. extradition treaties enumerate the offenses which are extraditable. The Model Extradition Treaty lists 39 offenses; the recent treaty with Japan, about 140; the statute authorizing extradition from the United States to a foreign country occupied by or under the control of the United States, 16. To be extraditable the offense must be included in the list of offenses. In addition the act must be a crime in the requesting state and also the requested state. Because of the federal system in the United States problems have arisen in the choice of law to be used in determining double criminality. In *Brauch v. Raiche*, 618 F. 2d 843 (C.A. 1, 1980) the court found that the substantive law of the asylum state (New Hampshire) should be used to determine double criminality even though it might not represent the law of the preponderance of the states. The "check charges" and the "forgery charges" were found to satisfy the requirement but the court found that the "currency charges" were not crimes under the law of England or under the comparable New Hampshire statute.

The "political offense" exclusion from extradition causes many problems. First, who should make the decision that an offense is a political offense, and second, is the offense a political offense? In the first instance the decision is made by the extradition magistrate. If the magistrate finds that the offense is not a political offense and that the fugitive is extraditable the matter goes to the Secretary of State for decision. On the other hand if the magistrate finds that the offense is a political offense the decision is final and not appealable. A "political offense" is not defined in U.S. extradition law or treaties. Tests have been developed by the courts to make this determination. They may be summarized as requiring that the crime must have occurred during an uprising and the accused must have been a member of the group participating in the uprising and must have acted to further the political end. I believe that a brief review of some extradition cases involving the "political offense" exception would be of interest.

England requested the extradition of Peter Gabriel John McMullen from the United States for the bombing of a military barracks in England. The evidence established that McMullen at the time of the offense was a member of the Provisional Irish Republican Army; that the PIRA was engaged in terroristic activities in Northern Ireland and elsewhere seeking to cause the British to leave Northern Ireland; and that McMullen acted in furtherance of the cause of the PIRA. The extradition magistrate found that the crime was a "political offense" and dismissed the extradition proceedings.

1An exception is the Multilateral Montevideo Convention on Extradition. 49 Stat. 3111. This Convention is operative only when there is not a bilateral treaty of extradition in force between the parties.


3T.I.A.S. 9625.


The United States requested the extradition from England of Morrison Budlong and Jane Kember for burglaries. The evidence before the magistrate revealed the following facts. Members of the Church of Scientology unlawfully as trespassers entered various offices of the Internal Revenue Service and of the Department of Justice. They used government property and made photocopies of the contents of confidential government files relating to the affairs of the Church of Scientology and its adherents. They replaced the original documents in the files but stole the photocopies. The actual burglars were caught red-handed and they then revealed that they were acting on written instructions of Budlong and Kember, senior members of the hierarchy of the Church of Scientology. The extradition magistrate issued warrants committing Budlong and Kember to prison to await extradition. They moved for writs of habeas corpus on the grounds that the extradition warrants were unlawful because among other reasons the offenses were of a political character. The Queen's Bench Division, High Court of Justice rejected this contention. Mr. Justice Griffiths noted "In respect of any Government policy there will probably be a substantial number of people who disagree with it and would wish to change it, but it should not be thought that if they commit a crime to achieve their ends it necessarily becomes an offense of a political character." He accepted the idea underlying an "offense of a political character" expressed by Lord Radcliffe in *Schtraks v. Government of Israel* that the fugitive be at odds with the requesting state on some issues connected with the political control or government of the country and that "political" in the context of a political offense is analogous with "political" in such phrases as "political refugee", "political asylum" or "political prisoner." Justice Griffiths found that the applicants did not order the burglaries in order to challenge the political control or government of the United States but did so to further the interests of the Church of Scientology and its members, and in particular of L. Ron Hubbard, the founder of Scientology.

The United States requested the extradition from France of William Holder and Katherine Mary Kercow for aircraft hijacking. On April 14, 1975 the chambre d'accusation of the Cour d'appel of Paris found that the crimes were of a political character and rejected the extradition request. This action was severely criticized by the United States. It appeared from the decision that any offense committed with a subjective political motive would be deemed a political offense and therefore nonextraditable. However, on October 17, 1979 the same chambre d'accusation gave its advice on the request of the Italian government for the extradition of Francesco Piperno which indicates that this is not the rule. The extradition of Piperno was requested for the kidnaping and first degree murder of Aldo Moro and for other crimes. The court rejected the request for extradition for the other crimes on the ground that they were not covered by the Franco-Italian Extradition Convention, others on the ground that the evidence of culpability was insufficient. The court found that the kidnaping and murder of Moro were in no way political in nature. It reached this conclusion on the ground that these ordinary crimes were so heinous that they could not be considered

*Not yet reported. Copy furnished by the British Embassy.


**Digest of U.S. Practice of International Law (1975), 168-75.**
political offenses. The court noted that Article 5 (2)(2) of the extradition act\textsuperscript{22} permits extradition for heinous acts of barbarity committed during an insurrection or civil war and therefore justification of such crimes for political reasons should, be precluded even more when the legal institutions of the requesting country are operating fully and normally. The court gave its advice that Piperno was extraditable.

I have mentioned only some of the problems of extradition but they indicate the need for an adequate extradition law. Changes in the present law were contained in S. 1437, the proposed new Federal Criminal Code, which passed the Senate and are contained in its successor S.1722 presently pending in the Senate. The negotiation of new treaties, developments in the case law, and research conducted since the changes were first proposed dictate that the provisions of S. 1722 dealing with extradition should be modified and expanded. It is contemplated that a new chapter on extradition will be submitted to Congress. I hope that consideration will be given to authorizing extradition without a treaty, to defining an extraditable offense, to including detailed procedural provisions, and to specifying the conditions under which extradition may be granted.

I also hope that in negotiating extradition treaties we will seek, where possible, to abandon totally the practice of enumerating the extraditable offenses as has been done with reference to federal crimes in recent treaties. Consideration should also be given to participating in the negotiation of multilateral treaties such as the proposed Inter-American Convention on Extradition.

\textbf{REMARKS BY CHARLES GORDON\textsuperscript{*}}

Contrary to the views already presented, at present U.S. exclusion and deportation laws are not satisfactory for the purposes of extradition. U.S. immigration laws fail to answer questions about the length of time necessary to complete the immigration process, leaving undetermined the administrative and judicial mechanisms of that process, and questions about limitations of the statutory grounds for exclusion and deportation.

Under the law, immigration officers can stop and question at the border any person seeking to enter the United States. Yet immigration officers may not know whether a person is wanted by some law enforcement agency. Also, the immigration officer’s authority is limited; he has no authority to return an alien to a country in which he has been charged with a crime. The only such authority the immigration officer has is in connection with his duty to bar aliens who have been convicted of crimes or who admit involvement in crimes involving moral turpitude.

The immigration authority may become aware that a person is wanted, through comparison with its "lookout books," a set of books kept at each port of entry listing information on fugitive offenders. If a person is determined to be clearly unentitled to enter the United States, immigration officials may detain him and notify the authorities that are looking for him. Yet this is the extent to which there are immigration procedures for returning offenders to their own countries. Once he becomes involved in the immigration process,

\textsuperscript{22}Law of March 10, 1927 relative to the extradition of aliens (J.O. March 11, 1927).
\textsuperscript{*}Of the District of Columbia Bar; formerly General Counsel, U.S. Immigration and Naturalization Service.
however, the alien is entitled to a hearing, which includes the right to
counsel, to an administrative appeal, to a decision on the record, to present
evidence, and to go to the courts for judicial review after receiving a decision
at the hearing. Hearings do not readily lead to extradition, since they tend to
be the start of a long appeal process. If a government were to seek to have a
fugitive returned and if there were grounds in the immigration statute for
returning him, which there usually are not, it would still be a long time
before that government would have access to the fugitive.

The deportation process is not relevant for purposes of extradition because
extradition in itself is not a ground for deportation. Unless there has been a
conviction for a criminal offense, there is no statutory basis for deportation.

Furthermore, a person considered deportable is entitled to full due process
under the law, which includes notice of charges, an opportunity to answer
those charges, to have a full and fair hearing on the record, to be represented
by counsel, and so on. At the end of a deportation proceeding, the judge may
grant voluntary departure, letting the person go where he pleases. This is in
fact customary in almost every case; the deportation statute itself says that
the first step is to permit the person to select the place to which he is to be
depor ted. Of course, he will not select the country that wants to prosecute
him.

In deportation proceedings, U.S. practice has been to give the right of
asylum to a person who claims he would be persecuted in his home country.
This has been formalized in the new Refugee Act of March 17, 1980. Again,
there arises the problem of dilatory procedure under which the Department
of State's views are requested, and because the Department is always
reluctant to express its views, the process drags on. Thus, if the United States
has a person who claims that he has been persecuted, who has designated
another country to which he wants to be deported, and who is likely to be
given the right to go there, it is apparent that deportation becomes a very
ineffective and undesirable means for returning a fugitive to a requesting
country.

The problems involved in using the deportation process as a means of
extradition are illustrated in a number of cases, of which the case of Marcos
Perez Jimenez, the ex-dictator of Venezuela, is one. Venezuela contacted the
Department of Justice, and the Department started deportation and extradi-
tion proceedings. Extradition went gradually forward one way, while depor-
tation went gradually forward another way: finally, the extradition process
was completed. The Secretary of State was about to approve extradition,
when Perez Jimenez raised the argument that first the deportation process
had to be completed in the Board of Immigration Appeals, and asked to apply
for political asylum. The Board vacated the deportation proceeding, however,
and Perez Jimenez was deported to Venezuela.

Hermine Braunsteiner Ryan was a notorious guard in a Nazi prison camp
who married a U.S. citizen, established residence in the United States, and
was naturalized. When Mrs. Ryan's original identity was discovered, she was
reported to the Department of Justice, which initiated deportation proceed-
ings. Up to that point, no one in Europe had begun prosecution of Mrs. Ryan,
and because she had become an American citizen, denaturalization proceed-
ings first had to be brought.

Mrs. Ryan's counsel conceded denaturalization at the proceedings, which
was to her detriment, because the entire procedure of hearings and appeals
would have taken years before she could have been denaturalized and departed. The Department of Justice approached the Federal Republic of Germany and Poland, inquiring if their respective governments wished to charge Mrs. Ryan with a crime so that extradition proceedings could be started. The FRG brought the extradition proceedings, and the deportation proceedings were terminated; Mrs. Ryan was extradited to the FRG. This is an example of the fact that extradition proceedings are generally much more effective than deportation proceedings.

In another case, an officer of the Syrian Army disappeared from his country with a bundle of cash, and the Syrian government requested the United States to extradite him. Because there was no U.S.-Syrian extradition treaty, however, Syria had to rely on the deportation process. He was apprehended and denied bail pending the deportation proceeding. He appealed his detention to the Board of Immigration Appeals, which on the basis of confidential information supplied by the Syrian government affirmed his detention and the denial of bail. The District Court and the Court of Appeals also affirmed the original decision to detain the Syrian and to deny him bail. This process went on and on without result, ending finally when he married a U.S. citizen and became a permanent resident of the United States.

The Yugoslav government started extradition proceedings against a U.S. citizen of some 30 years, for war crimes. A U.S. Commissioner terminated the extradition process when he found that the citizen was wanted for political crimes. However, with the present outcry against former Nazis the U.S. Government is itself starting deportation proceedings against him.

Yet another case is that of a fugitive from the Romanian government charged with the murder of a large number of Jewish people while he was leader of the Iron Guard. He sneaked into the United States 20 years ago and became naturalized. Denaturalization proceedings were started seven years ago, but he still has not come to trial.

In conclusion, the immigration and deportation process contains important procedures for the individual, such as the protections of due process, of a fair hearing, of fair play, of access to courts, and of the expectation of a legal, measured, and reasonable determination. Because of this constitutional protection, it appears that the U.S. deportation process will not satisfy the needs of foreign governments who wish to have fugitives speedily extradited.

Moreover, while conviction is a ground for exclusion, U.S. courts do not recognize conviction in absentia. The conviction must be one arrived at through established principles of due process.

REMARKS OF SHARON A. WILLIAMS

One of the most frequently used methods of illegal rendition is unlawful arrest. This raises the question of whether such methods of rendering a fugitive from justice impair the jurisdiction of the court over his subsequent trial. In the absence of general universal criminal jurisdiction it is well established that only the state whose criminal law has been violated can try the person of the accused. However, if the accused seeks refuge abroad he must obviously be brought to the state in which he will stand trial.

Will the accused be able to resist successfully any attempt to prosecute him

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on the basis that his presence within the territorial jurisdiction of the court has been illegally obtained? Kidnapping involves the violation of conventions as well as customary international law whether it is by officials of the prosecuting state, or by persons who perpetrate the kidnapping at their instigation. Kidnapping is a violation of the territorial integrity of the state of refuge, and also, on the occasion where an extradition treaty exists, can also be seen as a breach of the agreed-to extradition method.

Can the individual himself use unlawful arrest as a bar to the jurisdiction of the court? The usual approach in Canada, the United Kingdom, and the United States in such a case is not to excuse the offender. This practice has its source in the Roman law concept of *male captus bene detentus* which is the basis for the proposition that the courts, once in the possession of the body of the accused, have jurisdiction, and that due process is not lacking so long as the person is given a fair trial.

The broader questions within the realm of unlawful apprehension relate to the interest of the individual vis-à-vis those of the states. The offensiveness of the illegal arrest must be weighed against that of the alleged crime. Both Canadian and U.S. courts have tended to promote the idea that illegality in relation to pretrial events should not preclude detention. However, it can be argued that the government itself should obey the law, even where criminals are concerned, since there is a social interest in the government setting a good example to its citizens. Buttressing this argument is the fact that the human rights enumerated in several treaties, notably the U.N. Covenant on Civil and Political Rights, include a right to be protected from abduction. However, these rights are often violated, indicating a misplaced sense of justice on the part of many law enforcement officials.

In the cases up to *Toscanino* Canadian courts have rigidly adopted U.S. and United Kingdom approaches establishing that illegal arrest doesn't affect the competence of the judge or the jurisdiction of the court. A number of cases in Canada have followed the famous case of *Ker v. Illinois* and have also followed older English cases such as *Ex Parte Susanna Scott*. In all of these, the courts affirmed that in cases of unlawful seizure the only remedy accorded is one to the government from which a person has been seized.

The more recent case involving unlawful seizure is *Toscanino*, in which the U.S. Court of Appeals of the Second Circuit was seen to adopt a different attitude than in the previous cases where it had adhered to the Ker-Frisbie rule. The court held that the requirement of due process as it was understood in the United States required the court to divest itself of jurisdiction over the accused where that jurisdiction was acquired as a result of illegal conduct on the part of law enforcement authorities.

*Toscanino* had claimed that he had been subjected to torture while being interrogated by Los Angeles County, California authorities, and the Court of Appeals responded that it would consider his claims as evidence if he could prove them. Yet while *Toscanino* showed that he was interrogated roughly, he could not show that his rights were violated. The motion to dismiss the indictment on jurisdictional grounds was dismissed by the District Court for

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1 See The U.N. Covenant on Civil and Political Rights, Art. 9 (1) (5).
3 *B & C 446 (1829), 9 B & C 446, 109 E. R. 166.