Extradition and International Law

by

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INTRODUCTION

The role of international law is primarily to promote better relations between states on the international scene by the development of certain accepted codes governing the behaviour of states in relation to their neighbours. In achieving this end the concept of international law has been little concerned with the individual. It is generally accepted that the individual must look to the sovereign state within whose territory he finds himself for protection and enforcement of his rights. It is only in recent times that there has been any tendency for the international legal world to recognise any rights vested in individuals. This is exemplified particularly in the European Convention on Human Rights where an aggrieved individual is entitled to bring an action against a state which it is alleged has denied him certain rights vested by this convention.

Extradition is a concept which by its very nature is not a matter regulated by international law. It is municipal in that it falls within the domestic jurisdiction of a state to decide on what occasion it will agree to surrender persons within its borders and to determine procedurally how this will be done. However, the consequences of such municipal law are very much regulated by the effect of international legal concepts and as a result there is an interesting merger between municipal law and international law.

The term extradition denotes the process whereby one state surrenders to another state at its request a person accused or convicted of a criminal offence committed against the laws of the requesting state usually within the territory of the requesting state the latter being competent to try the alleged offenders.[1]

[1] Starke J. G., *An Introduction to International Law* (4th Ed.), 260.

Most states are today anxious to protect absolutely their sovereign rights in relation to domestic jurisdiction and accept that the punishment of challengers to their government's authority is a serious one likely to prejudice order and security within the sovereign territory. It is therefore desirable that serious crimes should not go unpunished and this is the principal rationale for the practice of extradition. Whilst it is recognised that provided a domestic statute does not contravene international law, a state can provide for extraterritorial jurisdiction, the same state cannot proceed against an offender who has taken refuge within the territory of another state, because the doctrine of sovereignty prevents it from so doing. This problem was recognised early in the development of international law, and, in fact, in the development of early municipal law and the maxim *aut punire aut dedere,* i.e. the offender must be punished by the state of refuge or surrendered to the state which can and will punish him.

A second and more practical principle in support of the concept of extradition is that the evidence is most freely available where the offence is alleged to have been committed and the state whose law has been broken has the greatest interest in punishment of the offender and likewise has the greatest facility for ascertaining the truth. Further each government desires to protect its own nationals from the menace to which their tranquillity is exposed by the immigration of dangerous persons and likewise desires to promote friendly relations with their neighbours by refusing to allow criminals fleeing from the justice of the country where crimes have been committed to seek asylum within its borders.[2]

Technological advances in transport and communications during the 19th century saw a great increase in international contact and it was during this period that there was the greatest development in mutual aid on the international scene for the apprehension and punishment of accused fugitives.

The Status of Extradition

Although there has been international awareness of the need for extension of extradition arrangements between states for a number of centuries now there has been much debate on the question whether or not there is an international right to surrender of fugitives. One would normally expect that a concept of law which has been with us for several centuries could well be classified as customary international law. However, extradition appears to be an exception to the

[2] Biron and Chalmers, *The Law and Practice of Extradition* (1903), 1. Also 29 A.J.I.L. 34 and see generally the Report of The Royal Commission on Extradition (1878).

rule. Although one cannot argue with the suggestion that the concept has been present for this period of time it is clear on the modern authorities that there is no acceptance of a customary right to extradition. The only authorities of any consequence who adopt a contrary view were Grotius[3] and Vattel.[4] Both these writers considered that there did exist an international legal duty to surrender accused persons and wrote most strongly in support of this in their work on international law. In 1617 Sir William Bird, the Attorney General in England, reached a similar conclusion in a case concerning the wrongful arrest of a King's messenger who had been carried off to Holland by a Dutch sea captain. He also suggested that there was a customary duty on the part of the Dutch sovereign to surrender the captain for trial and punishment in England. So far as can be ascertained this is the only occasion on which an English lawyer has delivered an opinion supporting customary rights to extradition.

Extradition is a matter eminently suited to bilateral treaties. It is a national act and can only be concluded finally by exercise of the sovereign power. It was accepted early in the development of English law that this was one field which could be useful in furthering political and diplomatic friendships with other states and was an excellent occasion to obtain reciprocal arrangements. It was early recognised that treaties were beneficial in that they set out precisely what obligations each state undertook, in what circumstances they would agree to surrender of fugitives and they determined the procedure for applying for the extradition of persons seeking refuge in a particular state. States recognised at the same time that a signed and ratified treaty created an absolute binding right on the contracting party to surrender a person once it had been clearly proved to the satisfaction of the requested state that a particular fugitive fell within the scope of the treaty arrangement.

English extradition treaties appear to have commenced in the 14th century. A treaty was concluded with Portugal in 1373, with France in 1498 and several with Spain in the period 1499 to 1506. From the year 1600 forward England had a great many reciprocal arrangements with other states. These early treaties were not as formal and comprehensive as the modern extradition treaties but nevertheless they served the purpose of providing an agreed right for return of criminals in certain circumstances. The first modern stipulation for extradition entered into by Great Britain was contained in the Jay Treaty of 1793. This was concluded between the United States of

[3] "De Jure Belli Ac Pacis" in *Classics of International Law* (1925) Volume II, Book II, 527.
[4] *The Law of Nations* (1760), Book II, 145.

America and Britain and provided for the mutual rendition of persons charged with murder or forgery. This treaty was invoked in 1799 in respect of Jonathan Robbins alias Thomas Nash who was surrendered to Britain on a charge of murder arising out of a mutiny on board H.M.S. *Hermione*. Britain concluded a number of other treaties between that year and 1842. In 1842 the Webster Ashburton Treaty was concluded between United Kingdom and America and it provided for mutual surrender of persons for a large number of crimes. Most extradition treaties since that date have followed this format. The content of extradition treaties will be discussed later in this paper.

By 1850 it was generally accepted throughout the international scene that any customary right to international law had been clearly displaced by the desirability of treaties. In fact it is probably more correct to say that a new customary norm had developed, that is, that in the absence of a treaty there was no obligation to surrender fugitive offenders. The acceptance of this doctrine has been conclusive and it is probable that the modern doctrine is "that no state has an absolute and perfect right to demand of another the delivery of fugitive criminals, though it has what is called an imperfect right, that is, a right to ask it as a matter of courtesy, goodwill and of mutual convenience. A refusal to grant such a request is no just cause for a war. The laws of nations embrace no provision for the surrender of persons who are fugitives from the offended laws of one country to the territory of another. It is only by treaty that such surrender can take place."[5]

It is submitted that the international acceptance of the doctrine of sovereignty is responsible for the development of this new customary law. Nations reserve unto themselves the absolute right to decide which persons, other than nationals shall be accorded the right of shelter within its territory. If this municipal right is accepted then clearly the same state must have the right to decide which aliens shall be surrendered. By entering into bilateral treaties an obligation is imposed provided certain factual requirements are met and hence the imperfect right is generated.

Surrender in the Absence of Treaty

Again this is an area in which there is some conflict. Some legal systems adopt the view that without a treaty there is absolutely no right to surrender a fugitive: others are more liberal and, it is submitted, realistic in their approach. The mere acceptance that there is

[5] Moore, *Digest of International Law*, Volume 4, 245.

no customary right to demand extradition of a fugitive does not necessarily mean that there is no right of surrender vested in the state in whose territory a particular subject is found to be. It is submitted that any state has the following procedures open to it if it desires to facilitate the request of another state for surrender of an individual in the absence of a treaty:

(a) Its inherent right to refuse shelter to any person not a national.
(b) Authority conferred by municipal law irrespective of the existence of treaty.
(c) By exercise of an act of comity.

It is submitted that it must be accepted that a state which is recognised in international legal affairs as being a sovereign state does have the right at international law to determine the number and type of aliens that it will receive into its territory. To suggest otherwise is to place a qualification on the sovereignty of that state which qualification is inconsistent with its recognition as a state. It is submitted that there is no legal obligation upon a state to accept persons other than nationals into its territory and if it were desirable or in the interests of a particular state so to do, then it could decline refuge to any offender and return him to another state without offending any international law. In the writer's opinion a state is not obligated to grant an alien access to its courts, to test its decision, if it desired to surrender a person to another sovereign power. It is accepted that in the English common law system access to the court is granted and is probably desirable but notwithstanding the fact that this practice has developed it seems consistent with international law for a state simply to hand over a fugitive without any treaty or without any explanation other than that it desires to exercise its right to refuse him permission to remain within its boundaries. The usual accepted rationale for providing access to the court is protection of individual rights but it must be remembered that in the context of extradition, a state is not concerned with rights held by its own nationals, but with rights, if any, that a foreigner has within its territory. There is a tendency today in international law to suggest that an alien should not be returned to a state where his life is likely to be endangered, but humanitarian grounds apart, there is little logical reason why this should be so. If a sovereign power decides that it is not in its interests for such a person to remain within its territory then in my submission that is sufficient justification for his removal to the state whence he came. Whether he should be first given the opportunity to remove himself to the territory of another state who will accept him is purely humanitarian and is in my submission discretionary on the part of the state. Denial of this discretion

would not amount to a breach of international law in the writer's opinion, as it is doubtful that this tendency has yet become customary so as to give it legal effect.

A state may justifiably return an individual to another state in accordance with authority conferred on it by its municipal law. Such authority does not depend in any way on the existence of a treaty. As has been previously pointed out the act of Extradition is a national act and must be granted by the sovereign power. Thus in the United States of America or in Australia it must be the Federal Government or the Federal Courts which makes the order of extradition and not the state jurisdiction. This has not always been so and some American states in the 18th century provided by their municipal law for the surrender of persons to other states. This is no longer possible, but it is still quite legitimate for the Federal laws of the state to provide for the return of certain individuals notwithstanding the fact that there is no treaty in existence.

Two excellent examples of this municipal power are contained in the New Zealand Statutes. The Aliens Act 1948, Section 14(1)(a), provides that the Minister may order an alien to leave if a court certifies that he has been convicted of an offence for which he is liable to imprisonment for a term exceeding one year and the court recommends the alien be deported. Section 14(1)(b) provides that the alien may be deported if the Minister is satisfied that it is not conducive to the public good that the alien should remain in New Zealand and the making of the order is approved by the Governor General in Council. It is the latter of these sections which is interesting. It is a municipal declaration of the sovereign right of the government. There is no right of appeal vested in the alien and it is therefore entirely up to the Minister to decide whether or not it is conducive to the public good that he should remain. It is submitted that this section could be easily invoked if an individual sought protection from New Zealand and his surrender was requested by another state with whom New Zealand maintains friendly political and diplomatic contact or with whom New Zealand was interested in obtaining such contact. If no treaty had been concluded this section could be invoked quite legitimately to achieve the precise effect that an extradition treaty would have obtained. In fact it would be a more conclusive way of achieving the same end because the requesting government would not have to establish a prima facie case and its claim would not be tested before the court. The Immigration Act 1964 provides a similar comparison. Section 4 of that Act provides that certain persons are prohibited from landing in New Zealand and provides for the deportation of any offending person. Subsection 1(c) prohibits a

person who has been convicted of an offence for which he has been sentenced to 12 months' imprisonment or more from landing in this country. This section is little publicised and persons who have been brought before the court on charges laid under it almost invariably deny any knowledge of such restriction. This is of course quite irrelevant so far as the court is concerned since it is a status offence and if a person has been convicted then he is a prohibited immigrant. Such a person is normally deported. To the writer's knowledge this section has been invoked to deport Australian citizens who fall within its ambit on many occasions. The point made is that if Australia at any time desired to arrange for the return of such a person to its shores this Act provides easy return without the formality of an extradition hearing. It must be remembered of course that the Fugitives Offenders' Act 1881 does apply as between New Zealand and Australia.

Surrender by an act of comity, i.e. the exercise out of goodwill of the sovereign powers of the state of refuge either (and usually) on terms of reciprocity or without any terms or conditions and where surrender or rendition is granted on the demand of another state, is a third method of obtaining surrender of fugitive offenders in the absence of treaty.[6] This type of act is closely connected to the inherent right discussed above but has the significant difference in that it is carried out solely as an act of goodwill. It is entirely a matter for the government of the particular country in the absence of an extradition treaty and usually but not always is coupled with a request for an assurance of reciprocity.[7] The learned authors of Moore suggest at page 253, "Governments often make applications to other governments expressly observing that they are under no obligation by way of any existing treaty or a public law to surrender fugitives. They address themselves solely to the courtesy and discretion of the government, to its sense of justice and to the interest common to all nations that notorious offenders should not escape with impunity." There is a hint in this statement of the recognition of a customary right in that the authors refer to an interest common to all nations that offenders should be punished for criminal acts. This is probably more correctly described as a desirable moral standard as opposed to an accepted customary right. It is a moral obligation in the sense that states should not condone criminal acts against the

[6] *British Digest of International Law*, Volume 6, 443.

[7] But note the recommendation of the Royal Commission on Extradition 1878 (Cmnd. 2039): "Even if any state should fail to concede full reciprocity there is no principle which should make this country unwilling to surrender and so get rid of the fugitive subjects of other states who have been guilty of crime and whose surrender is asked for."

sovereignty of other states and should assist as far as possible in international relationships by surrendering fugitives from justice. By granting surrender in such cases states do much to foster friendly relationships in the international arena.

Some legal systems do not accept that the right exists to surrender individuals in the absence of a treaty. The British authorities maintain that in the absence of an extradition treaty it is against municipal law and international law to surrender fugitives under any circumstances. Although Britain has on numerous occasions made requests to other states for surrender of individuals relying solely on comity they have always been careful to guard their own situation by making it quite clear to other states that they may not be in a position to reciprocate should the occasion ever arise.[8] The attitude by the British has probably developed out of the dogma of habeas corpus. It is submitted that by continuously maintaining this attitude particularly in the present day situation, Britain has not faced up to its moral obligations to other states in the sphere of control and punishment of crimes. The writer has been unable to find any recorded instance of New Zealand being called upon to return a fugitive by an act of goodwill and it would be interesting to speculate on the outcome of such a request. New Zealand has experienced certain difficulties even within the Commonwealth with requests for extradition and in the writer's opinion it is quite possible that our government would not adopt the same stand that the British authorities accept. However, it is difficult to discuss such a case in the abstract as the political ideologies of the requesting state would be of paramount importance.

The United States do not share the British scepticism on this subject and they have on numerous occasions surrendered defendants without treaties. A similar attitude has been adopted by Spain and Turkey and several South American states.[9]

The Effect and Content of Extradition Treaties

The principal effect of an extradition treaty is that it converts the imperfect right previously discussed into a legal obligation. In New Zealand we are able to take this one step further and suggest that

[8] Britain is the prime example despite the recommendation set out in n. 7 above. Numerous such cases are set out in Moore (*op. cit.*) at pages 246-253.

[9] In 1934 Turkey surrendered one Insull to the United States despite the absence of a treaty. This is mentioned in Bishop, *Cases on International Law*, at page 472. Where there is doubt as to what attitude will be adopted by the state of refuge, there has been a tendency to use self help methods. An example was the kidnapping of Eichmann by Israel and smuggling him out of Argentine. The Israelis were not prepared to run the risk of their request being declined on political or technical grounds, and used this procedure.

where it is proven that a case falls within the scope of an extradition treaty and the Extradition Act of 1965 there is no discretion on the question of surrender unless the court can determine that the offence is of a political character. This was decided in our Supreme Court in *Ex parte Bouvy*.[10]

Most extradition treaties within the English system appear to follow a somewhat stereotyped form. This is understandable as the purpose of the treaty is to determine precisely what obligations each state is undertaking. Treaties must be concluded between diplomatic plenipotentiaries and in New Zealand must be ratified by an Order in Council. Most countries in the English system have municipal statutes regulating the procedure for extradition. Most favoured nation clauses do not cover extradition and treaties are necessary if an arrangement is to be concluded between them. Within the Commonwealth the Fugitive Offenders Act 1881 applies without the necessity for an extradition treaty.

Unless it is specifically stated otherwise within a treaty, it becomes binding on the contracting parties from the date of signature once an exchange of ratifications has occurred. The ratification has in each case a retroactive effect.

An extradition treaty usually begins by defining precisely which offences are deemed to be extraditable offences. It is normal for these to be listed by way of a schedule attached to the treaty. The list is mutually agreed upon by both contracting states and is inserted so there can be no question in the future as to what crimes are covered. This is not without difficulty because some states have a different interpretation of particular crimes.[11] Likewise it is usually provided that in order to be an extraditable offence it is necessary that the crime committed is a crime within the territory of the state to whom the request is made. New Zealand has experienced particular difficulty in this requirement in relation to the offence of intending to defraud in the future.[12] In most circumstances if the offence which the fugitive is alleged to have committed is not an offence within the requested state then extradition is not possible. This principle is known as the docrtine of double criminality. Exceptions can be made

[10] (1897) 18 N.Z.L.R. 593.

[11] In the Treaty between France and Britain there was much conflict over a charge of murder. In France murder requires premeditation; in Britain this is not so. When the treaty was tested in the Courts it was held that the law of the situs of the offence would generally take priority. See *British Digest of International Law (op. cit.)*, 520.

[12] *R. v. Governor of Brixton Prison, Ex parte Gardener* [1968] 2 Q.B. 399. A charge laid under Section 245(1)(b) on false pretences in the future was held not to be an offence in England and an extradition order was refused.

to this rule and an excellent example is afforded by the case of *Factor* v. *Laubenheimer.*[13]

Most extradition treaties define very precisely the obligations of either state to deliver up its own nationals on request. Many of the European countries have insisted that it is now customary international law that nationals are not to be subject to extradition treaties. In view of the fact that most treaties contain specific clauses on this matter it is submitted that no customary rule has yet developed. Britain and America for example have always attempted to conclude treaties providing for the surrender of their own nationals. France and Switzerland have followed suit. These countries maintain that for the benefit of international relations it is necessary that such protection should not be extended to nationals. This point of view certainly places all individuals on an equal basis. In 1894 the Secretary of State for the United States in reply to a request for such an exemption to be included in a treaty with Venezuela said "The President is unwilling to enter into any treaty of extradition excluding citizens of either country from its operation. No good reason is perceived why citizens of the United States who commit crimes in Venezuela or Venezuelan citizens who commit crimes in the United States should not if they take refuge in their own country be delivered by its authorities to the countries whose laws they have violated. A refusal to surrender them would result, in a case of Americans committing crimes in Venezuela, in an utter failure of justice; and although Venezuela may undertake to punish her subjects who after committing crimes here return within her jurisdiction, yet the means of ascertaining the truth and doing justice must under such circumstances always be difficult and often unattainable."[14] The Royal Commission of 1878 considered that the nationality of fugitive criminals was quite immaterial. It felt that the stipulation aganst the surrender of nationals unnecessary and inexpedient and recommended not only that it should be omitted from all future treaties concluded by the United Kingdom but also that every endeavour should be made to excise it from all existing treaties.

The insistence on the part of some states in respect of preserving this right has restricted extradition arrangements. Italy is one country who always insists on the inclusion of this right and because of this very few nations have concluded extradition treaties with that country. The New Zealand-Germany treaty of 1872 (which was con-

[13] 290 U.S. 276.

[14] Reply of the Secretary of State, United States to the Venezuelan Consul re proposed treaty. Reproduced in Moore at page 288. But note the New Zealand attitude as expressed by s. 5(7), Extradition Act 1965, as amended by s. 2, Extradition Amendment Act 1969.

cluded by the United Kingdom) provided in article 3 that neither state shall be required to deliver up its own nationals. This treaty was concluded before the report of 1878 and British treaties since that date so far as possible refrain from providing for such an exemption.

It is submitted that it is doubtful that this right has become a matter of customary international law. If a treaty is silent on the point it is likely that it would be deemed to include all persons and not to exempt state nationals.[15] States who do insist on this absolute right often offer to try offenders who are state nationals within their own system. It is submitted that this is a poor compromise in international law and in this particular field there is much to be perfected. On this particular point then there are four possible provisions that can be concluded as between the parties. Both parties may agree unconditionally to surrender or may provide for optional surrender of nationals or alternatively both parties may agree not to surrender nationals or one party may agree unconditionally and the other may not commit themselves at all. It is the latter which is generally included in treaties with United Kingdom.

Where a treaty makes some provision relating to its nationality the onus of proving nationality rests on the defendant and not on the requesting state. See *Re Guerin*.[16]

The principle of specialty is normally embodied in these treaties. This attempts to limit the jurisdiction of the requesting sovereign state by obliging them only to try the offender for the offence for which he is extradited. This principle has been approved by the Supreme Court of the United States but its application in the English system is uncertain. In *R.* v. *Corrigan*[17] a municipal act was held to prevail over a treaty with France and the offender was tried for an offence other than that for which he was extradited. It is the writer's view that such a stipulation defeats the purpose of justice and that its continued inclusion should not be encouraged. This view is not shared by the majority of writers and there are ample cases which suggest its accepance in a fairly wide field.[18] However, in the writer's opinion this principle is quite illogical. If the purposes of extradition

[15] This is the view taken by Moore at page 287. *The Draft Convention on the Interpretation of Treaties* would seem to support this view. See Article 27(1).

[16] (1888) 60 L.T. 538.

[17] [1931] 1 K.B. 527.

[18] A large number of cases are set out in Moore, Volume 4, pages 306-315. Unless there is a clear breach of faith the surrendering state cannot possibly be offended or embarrassed. Indeed they have probably enhanced their position in the international society by assisting in bringing such an offender to justice.

is to ensure justice and the punishment of criminal offenders there seems little reason why they should not be punished for the totality of offences they have committed. The basis for including this principle seems to be that it is considered immoral in the international sense to extradite a person on a particular charge and then having got him out of the territory and sovereignty of the country of refuge to proceed against him with some other charge other than the extraditable offence. This is quite acceptable except that it is difficult to see why further charges cannot be preferred against the offender. If a state did in fact obtain surrender of a defendant and then refused to try him for the extraditable offence they would be guilty of a breach of faith and it must be remembered that treaties must be carried out in good faith. In this regard see the Draft Convention on the interpretation of treaties of 1968.[19]

Almost all treaties contain a reference to the right of a state to refuse extradition where the offence with which the person is charged is of a political character. In our system it is left to the court to decide whether or not it is in fact the case and if an affirmative answer should be delivered then no order for surrender will be made. This particular provision is the most formidable obstacle to the future development of extradition treaties in the international community. Its ramifications will be discussed later in this paper. Treaties normally require that the offence for which extradition is sought occurred within the territory of the requesting state. See the case of *Keller*.[20] Offences committed on the high seas would now be covered by the 1958 Geneva Convention[21] and similarly offences committed on aircraft are covered by the Tokyo Convention. There is no real difficulty in this requirement. States may also impose certain limitations on the right of a requesting state to carry out capital punishment on surrender fugitives and often provide that an exception must be made. Most states will not surrender persons who have been convicted for merely not appearing before a foreign court and these persons are held not to be fugitive criminals. However, if a state desired surrender of a person in this category they could proceed on an extradition application based on the original crime and in all likelihood would be successful.

Political Offences

As mentioned above, the provisions relating to non-extradition for political offences have greatly reduced the effectiveness of extradition

[19] *Draft Convention on The Law of Treaties,* Article 23.
[20] Discussed in *British Digest of International Law (op. cit.),* 502.
[21] Article 5.

treaties. In the early development of extradition it was commonplace for political offenders to be surrendered. Oppenheim in his Treatise on International Law[22] observed "Before the French Revolution the term political crime was unknown in both the theory and practice of the law of nations and the principle of non-extradition of political criminals was likewise nonexistent. On the contrary treaties very often stipulated for the extradition of individuals who had committed such deeds as are nowadays termed political crimes and such individuals were frequently extradited even when no treaties stipulated for it. Great Britain was the first opponent of such extradition. Their attitude was followed by Switzerland, Belgium, France and the United States and it is due to their attitude that the principle has conquered the world."[23]

One of the reasons for stipulating extradition crimes in treaties is that states have agreed that the particular offences stipulated shall be regarded by them both as being destructive of the security of life and property, and that it is desirable that offenders should be punished for these crimes. But states reserve as part of their sovereign right the right to decide whether or not an offence is political in nature and whether or not extradition will be granted. Most states do not regard political crimes as being destructive of the security of life and property and hence their exceptions. It is submitted that this principle has become so widespread that it is now customary international law.

The principal difficulty with political offences however is that although all states desire to protect and have recognised the doctrine of sovereignty, they are all reluctant to recognise that sovereignty extends to their political affiliations and ideology. It would be difficult to find one particular state following a particular political ideology who would not maintain that that ideology is the only correct one. States adhering to a particular ideology seem to adopt the view that it would be beneficial to all other states who do not follow this ideology to do so and they are constantly trying to impress their own views on other sovereign powers. This is particularly so with the western block and Communist block. Each considers its political philosophy to be the only correct one and seeks to influence all other states so far as it can. Thus when it comes to determining whether or not a particular offence is a political one the ideology of the requesting state is of the utmost importance. States with similar political ideologies and traditions are less likely to find evidence in each others behaviour of political persecution than when confronted

[22] *International Law* (8th Ed., 1955), Volume 1, 704.
[23] Oppenheim at 704-705.

with a state whose fundamental structure and political philosophy conflicts with or is at least fundamentally different to their own. Thus if the requested state is a western country it will be much less ready to brand an ally as a persecutor of political or social minorities than a non-ally or a frank antagonist in whose eyes there is nothing to lose. Thus the real purpose of the extradition treaty can be defeated on political grounds. In the English courts the requirements of a political offence have been discussed on several occasions and in the writer's submission the decision reached has in all cases been influenced by the degree of friendship which Britain has with the requesting state.[24] The present practice of granting exemptions for political offences is one of the primary factors in the recent increase in hijacking of aircraft. Any observer will note that offences of this kind always involve an offender who is desirous of obtaining asylum in a state of different political ideology than that from which he came. In no case to date has an offender been surrendered to a requesting state because the concept of political offence and the difference in ideologies is conclusive. It is submitted that until this problem can be overcome there is probably little point in any state making a

[24] There are five important cases on this aspect of extradition. *In Re Castioni* [1891] 1 Q.B. 149 it was held that a murder which took place in the course of a political disturbance was a crime of a political character and extradition was refused. However, in *Re Meunier* [1894] 2 Q.B. 149 it was held that "in order to constitute an offence of a political character there must be two or more parties, in the state, each seeking to impose government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object it is a political offence, otherwise not".

This is certainly restrictive and in the latter case an arsonist was surrendered to France on the basis that he was a confessed anarchist and as such was not concerned with imposing any government on anyone and therefore could not commit a political offence.

In Re Governor of Brixton Prison, Ex parte Kolczynski [1955] 1 Q.B. 540 (commonly known as the Polish Fishermen Case) the Court took a different approach. Mr Justice Cassels said: "The words 'offence of a political character' must always be considered according to the circumstances existing at the time when they have to be considered. . . . Now a state of totalitarianism prevails in some parts of the world and it is a crime for citizens of same to take steps to leave. . . . They committed an offence of a political character and if they were surrendered there could be no doubt that they would be punished as political offenders" . . . at page 549. This is surely a decision dependent entirely on the ideologies of the states concerned.

A more recent evample is *Re Soblen* [1962] 3 All E.R. 666. There surrender of an American Jew was granted to United States of America . . . a country whose ideology is similar to Britain's. A lengthy criticism of this case is contained in (1963) 12 I.C.L.O. 414. In the writer's view this author does not place sufficient importance on the fact that Soblen was already being returned to America when the forced landing took place. This very fact destroys much of his argument.

Finally in *Re Shalom Schtraks* [1962] 2 All E.R. 176 the Court considered that a political offence must take place in the course of some political struggle and it is not sufficient if it is an act committed on a separate but incidental occasion.

request to a state whose political philosophy is different from its own for surrender of such an offender because it is unlikely that it will be granted. One should remember that it is highly unlikely that a person from a western state will hijack a plane to another western state because such a person is not dissatisfied with the political setup in his own state and would be achieving nothing. In all likelihood his return in those circumstances could be guaranteed. The recent Tokyo Convention on hijacking has in the writer's submission achieved absolutely nothing for the airline organisations of the world and it is submitted that their efforts should be directed to obtaining an agreement for the return of hijackers nowithstanding the fact that they claim their motives to be basically political. Until this is done, it is likely that the hijacking of aircraft will continue unopposed. It is to be noted that the recent New Zealand/U.S.A. extradition treaty provides that hijacking is to be an exraditable offence but one wonders what the likelihood of an American citizen hijacking an aircraft to this country is likely to be. The inclusion of such a crime can only be relevant in the unlikely event of an aircraft under hijack having to make a forced landing in New Zealand. The offender in such an instance would probably continue to hold the passengers and crew at ransom and very little could be done.

Procedure on Extradition

This is basically a municipal matter and in our legal system is determined by the Extradition Act 1965. It is therefore only necessary to make some general observations on procedure insofar as it affects the international community.

The application for surrender of an individual pursuant to an Extradition Treaty is always made at diplomatic level in the first instance. This is provided for in Section 6 of our Act, but it is universally agreed that the request is a state matter and must be communicated through the proper channels. Thus the diplomatic representative or consular officer of the requesting state presents the demand to the Minister of External Affairs, who in turn must forward it to the Minister of Justice, who then hands the matter over to the Court for issue of a warrant and determination of the request. In New Zealand the Minister may make a decision on the application himself if he considers it to be political.

In England, United States of America and New Zealand (and no doubt in most other countries) it is necessary to produce a foreign warrant for arrest, a certificate of conviction if applicable and sufficient evidence upon which the Court can be reasonably satisfied that the offender has been accused of a political offence.

Once the order for surrender has been made there is customarily a lapse of fifteen days before it is effective. This is to allow the accused the opportunity to apply for a writ of habeas corpus. If this is declined then the order is carried into effect. If it is necessary to transport the accused across the territory of another state it is essential that prior consent to do this be obtained failing which consent the other state could, if it so wished, refuse delivery of the offender at its borders or hear and determine an application for habeas corpus.

Another interesting point is that which arises if a Government withdraws its application for surrender after an order has been made. The generally accepted rule is that if this event occurs then the act of surrender must be completed by handing over the offender. This is particularly so if a Court has made the decision for to do otherwise would be an interference in the jurisdiction of the Court.

Competing requests may often occur and in these circumstances it appears to be accepted that the first in time prevails unless there is some contrary provision in a treaty. In the event of the first application being unsuccessful a later one would be heard and may result in the return of an accused to that state. The state whose application was unsuccessful would then be able to make a further request if it had extradition arrangements with the state who had obtained surrender of the individual.

Conclusion

In 1896 Lord Russell, the then Chief Justice of England, observed, "The law of extradition is founded upon the broad principle that it is to the interest of civilised communities that crimes acknowledged to be such should not go unpunished and it is part of the community of nations that one state should afford to another every assistance towards bringing persons guilty of such crimes to justice."[25] *Re Arton.*[26]

It is submitted that a great many states have lost sight of this very desirable principle of international law. This is largely due to the development of the concept of absolute sovereignty. In almost all international dealings in modern times states invoke their sovereign right to decide for themselves what is in their own interests. It was not until the United Nations Charter that there was any attempted restriction on this doctrine. It cannot be rationally argued that extradition is an undesirable concept in the international field and it is indeed unfortunate that many states have seen fit to invoke their

[25] *Re Arton* [1896] 1 Q.B. 108, 111.
[26] *Re Arton, ibid.*

sovereign power in a manner which has restricted its development. It is to be hoped that there is a morality of nations developing such that in due course some of the present restrictions will be uplifted. There is no logical reason for instance why one state should desire to protect its own nationals who have committed offences against the laws of another state. Likewise it is submitted that the inclusion of the political offence exceptions has become another weapon for the advancement of political ideologies. The division of the world powers into influential groups dependant on their political ideologies for brotherhood has meant that extradition can only effectively work where there is compatability of political desires. This is now having most unfortunate repercussions on the world scene. In our endeavours to promote the particular philosophy which our society accepts we appear to have confused our sense of values. States have become primarily concerned with furthering their own political ideas as opposed to furthering the cause of justice.

States appear to be more concerned with promoting their political philosophy than ensuring justice in the international and municipal communities. There will be a need in the future for much reform in the political offence exemption category if there is to be any security in municipal jurisdiction.

It is submitted that less weight should be placed on the need for treaties in extradition matters as the essential elements of extradition lie in the promotion of justice. It is a somewhat incongruous situation if a state is prepared to allow an offender to escape justice simply because no formal written contract has been concluded between the state whose laws he has contravened and the state in whose territory he has sought shelter. The basis of reciprocity seems unnecessary in this concept and the words of the Royal Commission should be constantly brought to the attention of all states. These were, "Even if any states should fail to concede full reciprocity there is no principle which should make this country unwilling to surrender and so get rid of the fugitive subjects of other states who have been guilty of crime and whose surrender is asked for".[27] States would do well to remember that they may be placed in the situation themselves of seeking the return of an offender from a state with whom they have not concluded a treaty.

In today's international affairs there is a highly organised international crime ring and co-operation of all states is required if this is to be put down. The existence of such international crime is a serious challenge to the sovereign security of every state. Although

[27] *Supra* n. 7.

many problems lie in the differences in ideology it is submitted that the prime concern of every state should be to see that justice is effectively carried out and administered. The prime object of extradition is to secure co-operation between national administrations of justice and the rights of individuals in this context must be seriously limited. Extradition is not to be confused with the humanitarian exercise of grants of asylum; it is an international matter affecting the administration of justice in all sovereign states. States who continue to insist on the requirement of a treaty may well find themselves subject to an act of retortion in the future when a similar occasion arises in which it is necessary for them to request surrender of a fugitive from a state with whom they have not concluded a treaty.

In the writer's opinion some thought could be given to extradition arrangements on a regional basis. This does not seem to have been considered on any reported occasions but there is no reason why a number of states grouped around a conference table could not arrive at some acceptable proposition relating to the extradition of fugitives notwithstanding the fact that they may have different political ideologies. It could well be that an attempt at this type of extradition treaty will be considered in the future as the need for more comprehensive extradition arrangements becomes more pressing. If there is a continued increase in the number of hijackings and similar offences which prejudice the lives of large numbers of people this need may be shortly realised. A similar problem is perhaps developing with the frequent occurrences of political kidnapping and the ransoming of their victims for release of political prisoners.[28]

It is submitted that the international legal society cannot prosper or survive unless there is international co-operation insofar as it affects the punishment of criminal offenders. It is in keeping with the purposes and principles of the charter of the United Nations enunciated in article 1(2) and article 2(3) that international societies should do everything conducive to international peace and justice. But it must always be remembered that international co-operation is a pre-requisite to this end in modern times since, with the development of transport and technology municipal crimes frequently transcend international boundaries and state sovereignty has become a somewhat ineffective means of coping with the developing problem.

The observation of the Harvard University Research Group into the problem of extradition as carried out in 1935 is a fitting summary and conclusion for this paper. They observed "The suppression

[28] "Political differences have been successfully resolved by Latin American States through Conference Table negotiations; witness their convention on diplomatic immunity."

of crime is recognised today as a problem of international dimension and one requiring international co-operation. States are desirous of punishing those who have broken their laws. They wish therefore to get back those lawbreakers who have escaped to other countries. The state whose assistance in such recovery is requested should view the request with favour for no other reason if because it may soon be in the position of requesting similar assistance itself. In this day of travel and international commerce the victim of a crime committed by another may well be a national of its own. In those circumstances it may well be in the interest of its inhabitants to grant return. The most effective deterrent to crime is the prompt apprehension and punishment of criminals wherever they may be found. For the accomplishment of these services states cannot act alone; they must adopt some effective concert of action.[29]

It is to be hoped that we are entering an era of greater co-operation amongst states in order that this end may be achieved.

[29] (1935) 29 *American Journal of International Law Supplement*, 32.