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Major Contemporary Issues in Extradition Law

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

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

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

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

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

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

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

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

REMARKS BY CHRISTOPHER L. BLAKESLEY*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹19 ILM 409 (1980).

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

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

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

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

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

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

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

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

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

REMARKS BY DAVID P. STEWART*

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

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

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

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

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