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INTERNATIONAL EXTRADITION

I. Concept and Historical Introduction.

Extradition is generally defined as the surrender of an individual by the state within whose territory he is found to the state under whose laws he is alleged to have committed (or already to have been convicted) of a crime.[1]

The practice originated in early non-Western civilizations such as the Egyptian, Chinese, Chaldean, and Assyro-Babylonian[2], but few references to the subject may be found in legal treatises before the first recognizable extradition statutes as from eighteenth century. This occurs because the evidence found of earlier extradition is sporadic, undeveloped and contradictory[3], even though delivery of individuals to a requesting sovereign was usually based on pacts or treaties, as well as on the basis of reciprocity and comity.

Between 1718 and 1830, around 92 treaties were concluded internationally, mostly between states in Europe[4], more concerned on recovering military and political offenders, when fugitives became more common than ever at that time, due to the many changes in the European society.

There were also treaties between states from different continents, such as the "Jay Treaty" of 1794, between the then recently independent United States of America and Great Britain, which provided the mutual exchange of offenders, according to Article 27 of the document, which stated:

> "It is further agreed that His Majesty and the United States on mutual requisitions…will deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offense had there been committed. The expense of such apprehension and delivery shall be borne and defrayed by those who make the requisition and receive the fugitive".

As the society developed, the concerns expressed in extradition treaties also changed. From the 1830's to 1948, for example, the biggest concerns were suppressing common criminality in the states parties to the extradition treaties; that scenario changed completely especially after World War II, when developments led to the concern for protecting human rights and the need to have international due process of law.[5]

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[1] Lori F. Damrosh, Louis Henkin, Sean D. Murphy, Hans Smit, *International Law: Cases and Materials*, 5th Edition, 2009, page 838.
[2] M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, 3rd Edition, 1996, page 1.
[3] Alun Jones & Anand Doobay: *Jones and Doobay on Extradition and Mutual Assistance*, 3rd Edition, 2005, page 3.
[4] *Id*, at 8.
[5] Bassiouni, at 4.

In sum, extradition, which was once designed for the political and religious interests of states, evolved into an international means of cooperation in the suppression of criminality.

Today, there are a number of regional extradition arrangements that usually supplement the bilateral treaties thereto, being the states part of a region in both political and geographic sense. One good example of multilateral extradition convention was the European Extradition Convention, signed 13 December 1957, which had the objective to uniform rules of Extradition in Europe.[6]

The duty of a country to extradite only by virtue of a treaty, whether it is bilateral or multilateral, has become the prevalent practice among states, even though comity and reciprocity still exist in some states. Thus, today, extradition is a formal process by which a person is surrendered by one state to another based on a treaty, reciprocity, or comity.[7]

II. Extradition of a State's own Nationals.

The issue of whether extraditing a state's own national may vary from country to country, being a common practice in civil law countries not to surrender their citizens to a foreign state.

A typical reason for the requested state not to surrender its citizens is usually contained in extradition treaties, stating that neither party shall be obligated to surrender its nationals[8], thus leaving the matter in the discretion of the requested state.

Most of the civil law countries' judicial decisions deny extradition of their nationals, following the imposition of constitutional restrictions. In Brazil, Article 5, LI of the Constitution states that:

> "No Brazilians shall be extradited, unless the naturalized, in case of common crime practiced before the naturalization, or if proved his involvement in illicit drug trafficking, according to the law[9]."

Though this may be the general rule, the Brazilian Supreme Court recently accepted the extradition request of a native Brazilian, naturalized into an American national, and accused of murderer in Ohio, in 2007.

The Brazilian Supreme Court Justice Luís Roberto Barroso recently decided[10] that the woman had lost the Brazilian nationality the moment she waived any other nationality and sworn fidelity to the United States of America. According to Justice Barroso, article 12, §4°, II of the Brazilian Constitution states that Brazilian citizens who become another country's national may lose the Brazilian nationality, *in verbis*:

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[6] Id, at 13.
[7] Id, at 5.
[8] *International Law: Cases and Materials*, p. 844.
[9] Brazilian Federal Constitution, Article 5, LI, states in Portuguese: "Nenhum brasileiro será extraditado, salvo o naturalizado, em caso de crime comum, praticado antes da naturalização, ou de comprovado envolvimento em tráfico ilícito de entorpecentes e drogas afins, na forma da lei."
[10] http://www.migalhas.com.br/Quentes/17,MI256469,21048-Concedida+extradicao+de+brasileira+naturalizada+americana+acusada+de

> "Art. 12. Brazilians are those:
> §4°. It will be declared the loss of the nationality of the Brazilian whom:
> II – acquire another nationality, except in the cases:
> a) of recognition of nationality originated by foreign law;
> b) of the imposition of naturalization, by foreign law, to the Brazilian resident in a foreign state, as a condition for permanence in its territory or for the exercise of civil rights".[11]

Barroso correctly decided that the woman did not meet the exceptions provided by the Constitution, since she had obtained the American citizenship through marriage, which is a voluntary act, thus not following the exceptions provided above.

Although they might not extradite its citizens, except in few cases, civil law countries have broad jurisdiction to try and punish their nationals for crimes committed in other countries, consistent with the nationality principle.

Common law countries, on the other hand, take a different approach and may surrender their nationals to other states, unless exempted by treaty. The United States surrenders its nationals even in the absence of reciprocity. 18 U.S.C. § 3196 ("If the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender to that country of a United States citizen whose extradition has been requested by that country if the other requirements of that treaty or convention are met")[12]. The United Kingdom also surrenders its own nationals. Extradition Act, 1870, 33 & 34 Vict. C. 52 § 26; 1 Oppenheim at 956.

Now that extradition proceedings are known under certain jurisdictions and according to the treaties they have signed, it is important to make a distinction from these proceedings to those found in extradition without treaties.

III. Human Rights Challenges.

III.I. Introduction.

The lack of a due extradition proceeding may lead to a discussion on the issue of Human Rights, but even in cases where the extradition proceeding is observed, there might be some human rights challenges to deal with.

In many extradition cases, defendants have argued that they would be subjected to lack of procedural due process or even suffer unjust treatment following extradition in the requesting state. Courts have applied that the general rule in most of the cases is to reject those arguments, and they have typically considered that the treaty obligation to extradite precludes such an inquiry, and that is the responsibility

[11] Art. 12. São brasileiros:
§ 4º - Será declarada a perda da nacionalidade do brasileiro que:
a) de reconhecimento de nacionalidade originária pela lei estrangeira;
b) de imposição de naturalização, pela norma estrangeira, ao brasileiro residente em estado estrangeiro, como condição para permanência em seu território ou para o exercício de direitos civis;
[12] *International Law*, at 845.

of the executive branch in negotiating and implementing an extradition treaty to ensure adequate safeguards for the treatment of extraditees[13]. Thus a "rule of judicial non-inquiry" has been applied under which the court considering an extradition request concerns itself only with whether the treaty standard for extradition is satisfied and does not usually entertain evidence about the quality of the justice in the requesting state[14], leaving this role to the Secretary of State, in making the final discretionary decision whether to go forward with the surrender after the court's regular proceedings.

More recently, however, some requesting states have been considering certain practices in the requesting states to be contrary to fundamental human rights. In fact, "there has now been a significant number of cases in which extradition has been withheld (or made subject to conditions) by virtue of differing positions in the requesting and requested state with respect to death penalty and related practices"[15], as well as other cases involving concerns regarding practice of torture or other forms of cruel, inhuman or degrading treatment or punishment in the requesting state.

The objective of this chapter is to analyze the above-mentioned rules and human rights challenges deriving from them.

III.II. Rule of Non-Inquiry.

In general, this rule states, "[w]here a treaty exists, judges of both countries are specifically prohibited from inquiring into the fairness of the legal system of the requesting country or to consider the treatment that is likely to be encountered there[16]." Courts in the United States have so far refused to inquire into the processes by which a requested state secures evidence of probable cause to request extradition, the means by which a criminal conviction is obtained in a foreign state, or the penal treatment to which a relator may be subjected upon extradition.

In *Ahmad v. Wigen*, 910 F.2d 1063 (2s Cir. 1990), the court denied defendant's habeas corpus petition, in which the issue of whether a Palestinian fugitive would receive a fair trial in Israel on allegations of a terrorist attack. The Second Circuit then affirmed the ruling that the fugitive was extraditable under the "rule of judicial non-inquiry":

> "In *Jhirad v. Ferrandina, supra,* 536 F.2d at 484-85, we said that '[i]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation' (sic)."

In support of this decision, the Supreme Court decided challenges to the quality of the justice system of a foreign state are not proper considerations in the context of a habeas corpus petition. See *Munaf v. Geren*, 128 S.Ct. 2207 (2008).

III.III. Torture.

[13] *International Law: Cases and Materials*, p. 846.
[14] *Id*, at 846-847.
[15] *Id*, at 847.
[16] *Extradition between Canada and the United States*, at 15.

Although the rule of non-inquiry has been the rule in most of the countries, courts have treated torture claims as exceptions to it. Indeed, Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027 (1984), provides:

> 1. No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent patter of gross, flagrant or mass violations of human rights.

Although in *Munaf v. Geren*, supra, the Supreme Court held that the determination as to whether a detained person is likely to face torture upon transfer to another state should be made by political branches rather than the judiciary[17], some U.S. courts have already treated torture claims as exceptions to this rule. In *Mironescu v. Costner*[18], the holding was that an extradition court was competent to answer the "straightforward" question of whether a fugitive would be likely to face torture in the requesting state and noting that American courts routinely answer such questions in other contexts such as asylum proceedings[19].

III.IV. Extradition to Death Penalty Jurisdictions.

Many jurisdictions that do not have death penalty in their penal system do not grant extradition to death penalty states, even if the requesting state assures that this punishment will not be sought. This is the view of Italian courts, for example. In one case, an Italian court was concerned that such assurances would not bind an independent branch of a government, and it decided to apply its own fundamental law to preclude any involvement with surrendering the fugitive to a state where the death penalty was a possibility. See *Venezia v. Ministerio di Grazia e Giustizia*, 79 Rivista di Diritto Internazionale 815 (Ital Const. Ct. 1996).

On the other hand, some other jurisdictions extradite fugitives to death penalty jurisdictions, since there the person will not suffer degrading conditions – such as the extended time in a death row – or that the death penalty will not be applied. In *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (Ser. A) (1989), the European Court of Human Rights acknowledged that death penalty did not violate international law, but it held that the U.K. would violate the human rights of a man by extraditing him to face capital murder charges in Virginia, since there was a serious risk that he would subjected to inhuman or degrading treatment by virtue of prolonged incarceration prior to execution of a death sentence. Soering was later extradited after receipt of assurances that the death penalty would not be applied.

In the Brazilian case mentioned in topic II, the Supreme Court Justice Barroso conditions the extradition to a compromise that the United States shall not apply penalties that are not permitted by Brazilian Law, such as death penalty and life imprisonment. Also, the prisoner shall not spend more than 30 years in

[17] Note that the argument made by the Court was that Iraq's justice and prison systems generally satisfied international standards.
[18] *Mironescu v. Costner*, 480 F.3d 664 (4th Cir. 2007).
[19] *International Law: Cases and Materials*, at 848.

prison, and the time she was imprisoned in Brazil shall be discounted from the penalty to be applied by the competent U.S. federal court.

IV. Conclusion

The purpose of this paper is to analyze how procedures on extradition are held in the many jurisdictions. One may note that the preferable way to send a fugitive from one country to another is following the rules set out previously in an agreement between those countries. However, often times states surrender individuals to other states relying on their political and private reasons and interests, and not on a treaty-based rule. There are basic principles a jurisdiction's authority must follow whenever it will extradite a prisoner. Most times they are included in treaties, but if not, they must be considered implicit, in order to harmonize extradition procedures around the world. Whenever a requested state decide to grant or not extradition of a fugitive to another country, it must observe the rules of international law, the rules set out in the extradition treaty, and its own national laws on extradition, or otherwise it may reach undesirable political results, or even inobservance to basic human rights.

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