PROCEDURAL ASPECTS OF THE POLITICAL OFFENCE DOCTRINE

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The political offence doctrine in international law, which posits that political offenders should not be extradited, is a focal point of controversy because of the lack of universal agreement on the definition of the term "political offense." The confusion and ambiguity which surrounds the debate over the formulation of an acceptable definition has carried over beyond the substantive aspects of the doctrine to its procedural aspects. Thus, the debate spills over to such questions as which state should make the final decision over the question whether an act charged has the character of a political offence.

General extradition process. The political offence doctrine is an exception to the law of extradition, which is defined as "the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender."[1] It is said that the principles of international law recognize no right to extradition apart from treaty.[2] Accordingly, extradition is carried on primarily under bilateral treaties, a number of which fall under the "list" type of treaty, *i.e.*, one which carries a list of extraditable crimes.[3]

Extradition may either be an exclusively executive function or it may provide opportunity for a judicial hearing. The latter kind of process obtains in both the United States and Great Britain, which require that a *prima facie* case be made out by evidence before a fugitive is surrendered.[4] Each state decides, as a matter of policy, whether the competent authority to determine the issue should be judicial or executive or a combination of both. Arguments can be advanced in favor of each.

For the judiciary, it is argued that courts proceed in an open and unbiased manner, free from political tensions and pressures. For the executive, it is

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1 Terlinden v. Ames, 184 U.S. 270, 289, 22 S.Ct. 484, 46 L.Ed. 534 (1902).

2 Factor v. Laubenheimer, 290 U.S. 276, 287, 54 S.Ct. 191, 78 L.Ed. 315 (1933).

3 *See* Harvard Research in International Law, *Extradition*, 29 AM. J. INT'L. L. 243 (Supp. 1935).

4 BISHOP, JR., INTERNATIONAL LAW CASES AND MATERIALS 576 (3rd ed., 1971) (hereinafter cited as BISHOP).

argued that publicity is inappropriate in what is a delicate diplomatic matter. For the combination of both the judiciary and the executive, it is argued that a delicate balance is called for.[5]

Decision by asylum state. Because of variant notions of government and policy, different countries hold different views as to what constitutes a political offence. Although each nation is entitled to maintain its own opinions on such subjects, it is accepted that the final decision of the question whether an act charged has the character of a political offence rests with the government on which the demand for extradition is made. This proposition is readily accepted because it is essential to the exercise of the right of refusal, and to the maintenance of political asylum.[6] At the same time, the system of letting the asylum state decide whether or not an offence is political, produces the bothersome consequence that the concept of political offences will be colored by domestic notions of penal legislation, government, and policy towards political offenders.[7]

In the United States, the weight of authority accords with the general view that when evidence offered before a committing magistrate tends to show that the offences charged against the accused are of a political character, the burden rests upon the demanding government to prove the contrary.[8] It is for the requested state in each case to decide the question, having regard to the facts and circumstances. When a state requests the extradition of a person and the requested state starts extradition proceedings, the accused may plead in his opposition to the application for extradition that the offence for which his extradition is sought is political in nature. He bears the burden of proving this plea, but once he makes out a *prima facie* case the burden shifts to the requesting state to prove the contrary.[9]

Although the political offence doctrine is a rule of international law, the political offender has no procedural capacity to demand his right of asylum. Hence, if extradition is granted, he cannot raise the defence in the court of the requisitioning state that as a political offender he is not justiciable before it. As a result, the characterization of an offence as 'political' must be left to the law of the requisitioned state, which must adopt its own standards in the light of its own policies.[10]

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[5] Samuels, *The Fugitive Offenders Act*, 1967-*II*, 3 SOL. J. 976 (1967) (hereinafter cited as Samuels).

[6] MOORE, A TREATISE ON EXTRADITION AND INTESTATE RENDITION 303, 312-313 (1891) (hereinafter cited as MOORE).

[7] Clark, Address on *The Nature and Definition of Political Offences in International Extradition*, 3 AM. SOC. INT'L. L. PROC. 123-124 (1909) (hereinafter cited as Clark).

[8] *Id.*, at 98-114.

[9] MOORE, *supra*, note 6 at 313; De Hart, *The Extradition of Political Offenders*, 2 L. Q. REV. 2 (1886).

[10] O'CONNEL, INTERNATIONAL LAW 729 (1970) (hereinafter cited as O'CONNELL).

The organ of the requested state must determine whether the crime in question qualifies as a political offence.[11] Such organ may draw on the precedents established in numerous jurisdictions and in state practice in making such determinations.[12] In sum, international law grants to the asylum state the sovereign right of deciding, according to its municipal law and practice, the question whether or not the subject offence is a political one.[13] At least in the first instance, the competence to characterize a crime as a political offence is more often than not held to belong to the organs of the state requested to extradite the accused.[14]

That the right of decision pertains to the state of refuge is reflected by the resolutions adopted by the Institute of International Law at Oxford in 1880:[15]

> XIV. The state upon which the requisition is made decides without appeal, in accordance with the circumstances, whether the act for which extradition is demanded, is, or is not, of a political nature.
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> In this decision it ought to be guided by the two following rules:
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> a. Acts which contain all the characteristics of crimes under the ordinary law (murder, arson, theft) should not be exempted from extradition solely by reason of the political intention of their authors.
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> b. In weighing the acts committed in the course of a political rebellion, an insurrection or a civil war, it must be asked whether they would, or would not, be allowed by the customs of war.
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> XV. In every case, extradition must be granted for a crime which has at the same time the nature of a political crime and of a crime under the ordinary law, unless the state making the requisition gives the assurance that the person surrendered shall not be tried by unusual courts.

The United Nations Declaration on Territorial Asylum of 14 December 1967[16] embodies the principle of unilateral qualification with the provision that "It shall rest with the state granting asylum to evaluate the grounds for the grant of asylum."[17] Consonant with the principle of territorial supremacy

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[11] 2 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1019, 1025 (1945).

[12] SEN, A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 366 (1965) (hereinafter cited as SEN). The requested state may also ask from the requesting state information and clarification in order to determine whether or not the offence is political.

[13] STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 352 (1972). Except, of course, cases of international offences, crimes against humanity, and offences designated to be political by pertinent statutes or treaties. PLENDER, INTERNATIONAL MIGRATION LAW 254 (1972) (hereinafter cited as PLENDER).

[14] 5 J. H. W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 350 (1972) (hereinafter cited as VERZIJL).

[15] MOORE, *supra*, note 6 at 313 n. 1.

[16] G. A. Res. 2312, 22 U.N. G.A.O.R. Supp. 16 at 81, U.N. Doc. A/5217, 62 AM. J. INT'L. L. 822 (1967).

[17] Art. 1, para. 3.

of the state of refuge, it is given the sole discretion to accept or reject the fugitive's contention that his alleged conduct falls within the scope of the political offence doctrine. Ordinarily, then, the state of refuge will apply self-serving standards.

The cases uniformly hold that the right to decide whether or not the offence is political belongs to the state of refuge. Its right of decision is so strong that even if its opinion proves erroneous, the decision stands. The exercise of this function, it has been stressed repeatedly, is a right but not a duty of the asylum state. An extradition treaty grants the right to avail of the political offence doctrine only to the signatories and not to any individual fugitive. This means that the asylum state is under no obligation to apply the doctrine.

Obviously, in this situation the political offender has the short end of the stick. He is subject to motivations of bad faith on both sides: the pursuing state might make the request for extradition in bad faith (by camouflaging the fact that the offence is political) and the asylum state might surrender him in bad faith (knowing fully well that his offence is political and will be punished with undue harshness in the requesting state). In either case, the political offender could occupy the role of a helpless pawn. It is clear that to the courts, individual freedom and human rights are not yet sufficiently strong to countervail against state security and notions of public welfare. This is the message borne by the cases.

The *Case of the Cuban Rebels*[18] illustrates how, although it is the requested state which has the right to determine whether or not the act charged is political in nature, the requesting state could influence this determination by the way it applies for the expulsion of the offender. In 1882, three ex-officers of the Cuban rebel army escaped from the Spanish fortress of Cadiz, where they were confined under sentence of transportation. They crossed to Gibraltar, intending to take passage by steamer to the United States.

The Spanish consul at Gibraltar asked for their expulsion, and the Governor appeared to have regarded the request as one for the regular surrender of extraditable criminals. The men were, however, arrested on the ground that they had no passports and, notwithstanding their protest that they were political refugees, put outside the British lines, where they were arrested by the Spanish police.

In a preliminary opinion, the Law Officers reported that the treaty between Great Britain and Spain pointed out the mode in which the surrender of criminals escaping into British territory was to be obtained, and that the

[18] 6 BRIT. DIG. INT'L. L. 669-71 (1965) (hereinafer cited as BRIT. DIG).

treaty expressly excluded those whose offences were political. They said: "This being the case, it may well be urged on the Spanish Government that the Spanish consul ought not to have requested the expulsion of the escaped convicts, suppressing the fact that the offence of which they were convicted was political; and that this mistake of his having led to the error of the British officials, the proper course would be that advantage should not be taken of the mistake arising through the Spanish consul's action."

However, upon the submission to them of further evidence, the Attorney — and Solicitor-General reported further that they did not think the error committed by British officials could justly be said to be due to 'a suppression of fact' by the Spanish consul. But they stressed that the application by the Spanish consul, based upon no ground of international right, was the cause of the error that had been committed, and they urged that advantage ought not to be taken of an act occasioned by such a cause.

The *Spanish-German Extradition Treaty Case*[19] makes clear that the surrendering state decides for itself whether the offence in question is of a political character or not. The accused were extradited by Spain following a request by Germany based on the extradition treaty between the two countries of 2 May 1878. Recognizing the political offence doctrine, the treaty provided in Article 6 that its provisions did not apply to political crimes and that no extradited person should be prosecuted in the state to which he had been handed over for any political crime prior to extradition. The trial in Germany resulted in a conviction for a murder which in the circumstances was asserted by the accused to be a political crime not covered by the Spanish consent to extradition. The accused appealed.

The tribunal held that the appeal must be dismissed. It ruled: "It is a matter for the surrendering State to decide for itself whether the offence in question is of a political character or not." Once extradition has been granted unconditionally, it is no longer of decisive importance that the opinion of the surrendering state as to the nature of the alleged offence has proved erroneous. According to the court, there is no generally recognized rule of international law providing that every extradition takes place under the implied assumption of the non-political character of the offence. The court was not competent to examine whether the accused were extradited in accordance with the extradition treaty.

The court further explained that the political offence doctrine is not a duty but a right of the requested state: "That treaty does not confer rights upon the extradited persons as such; it regulates solely the duties of the two

[19] 3 Ann. Dig. 308 (First Senate in Criminal Matters, German Reichsgericht 1926).

states in matters of extradition. It grants them the right not to extradite political offenders; it does not impose them the duty not to extradite them."[20]

This position was reiterated by the same court in the *Extradition (Germany and Italy) Case*.[21] The accused served in a labour corps in Germany. Ordered to go on night patrol duty, he was informed that the sergeant who was to share duty with him was a spy and that it had been decided to kill him. The accused went on duty and, the sergeant having been murdered by another, helped to bury the body. This conduct of the accused constituted, in the view of the court below, participation in the murder of the sergeant.

After the murder the accused fled to Italy, where he was extradited. He appealed on the ground, *inter alia*, that the crime was political. But his appeal was dismissed, the court holding that the lawfulness of the extradition was not subject to review by the municipal court. It was within the exclusive competence of the government applied to, to decide on its own responsibility whether the legal requirements of extradition were fulfilled. Both the accused and his counsel had made representations to the Italian authorities that the crime was political. If extradition was granted despite these representations, then criminal prosecution in Germany was admissible even if it was concerned with a political crime. Extradition could be granted by the state applied to even in respect of a crime which was not included in the list of crimes for which extradition might be granted.

Similarly, the court in the more recent case of *Diaz v. Ministerio de Relaciones Exteriores*[22] held that the requested state has a right, but not an obligation, to grant or to deny asylum according to the circumstances. Plaintiff, a Mexican citizen, filed a constitutional appeal (*amparo*) requesting the Supreme Court of Guatemala to overrule the decision of the Ministry of Foreign Affairs (*Ministerio de Relaciones Exteriores*), rejecting his petition for political asylum. He had been arrested and held after Mexico had requested extradition. The Mexican request listed the common crimes of murder of several Mexican nationals and one Spaniard during local elections in one of the Mexican states. The plaintiff fled to Guatemala, and by fraud obtained Guatemalan identity card. After his arrest in Guatemala, he requested political asylum, stating

[20] The Note by Prof. Strupp concurs with the judgment, stating: "A mistake on the part of the surrendering State does not render the extradition void if it had been granted unconditionally. Also the extradition treaty creates rights and duties between the Contracting Parties only. It confers no rights upon the extradited person. However, in his extensive note, Prof. Gaerlan points out that although the courts are not competent to investigate the legality of the extradition by the surrendering State, they have jurisdiction to examine whether the prosecution goes beyond the purpose of the extradition as granted by State." *Id.*, at 309.

[21] 5 Ann. Dig. 270 (Reichsgericht in Criminal Matters, Germany 1929).

[22] 32 I.L.R. 292 (Supreme Court of Justice, Guatemala 1960.)

that has was persecuted because of his politics. He claimed asylum as a right due to him under treaties signed by Guatemala.

The Ministry of Foreign Affairs submitted that "according to the Conventions on Asylum and Extradition and provisions of the Law on Aliens and the Constitution, it was not lawful to grant asylum to persons accused of or condemned for common crimes, and they could be compelled to leave the country; that the States had a right to grant asylum, but not an obligation to do so . . . ."

The court upheld the decision of the Ministry of Foreign Affairs, saying: "It had a right, but not an obligation, to grant or to deny asylum according to the circumstances." It said the constitutional precepts which established the right of asylum had not been infringed or restricted, because the evidence did not show that the appellant was persecuted on political grounds.

Finally, in *Japan v. Kono*,[23] the court stressed that in international law, a state has the discretion either to refuse to allow political criminals to stay or to order their deportation for reasons of its security and public welfare, or to surrender them to their own country if necessary. Respondent Mitsuyo Kono became acquainted with Liu Wen Chin, who was in Japan from the Republic of China to study and was student of the Tokyo University of Education. They lived together without being married and respondent Takao Kono was born to them. The respondents and Liu Wen Chin lived a peaceful family till 30 March 1968, when Liu Wen Chin was forcibly deported to the Republic of China.

The Tokyo District Court, in which the case was originally brought,[24] noted the following facts to be admitted: the politico-social situation in Taiwan, the punishment of political criminals in that country, and the movement for the independence of Taiwan and the United Formosans for Independence (UFI). It was not disputed that Liu Wen Chin became a member of the UFI in 1963. In 1965, he assumed the important positions of Central Committee Member and Chief of the Information Section, thus actively participating in the political movement denouncing the repressions of Chiang Kai Shek's regime.

The lower court ruled that the principle of non-extradition of political criminals is a rule of international customary law with certain limitations, and that the principle is recognized only for a purely political crime. The Tokyo High Court disagreed, holding: "Thus, in international law a state has the discretion either to refuse to allow political criminals to stay or to order their

[23] 16 JAP. ANN. INT'L. L. 88 (Tokyo High Court, Japan 1971).
[24] 15 JAP. ANN. INT'L. L. 194 (Tokyo District, Japan 1971).

deportation for reasons of its security and public welfare, or to surrender them to their own country if necessary. From a moral point of view, this may lead to a problem of bad faith of the state. Nevertheless, the extradition itself does not constitute a breach of international obligations."

Burden of proof on fugitive. It is generally recognized[25] that the burden of proof is upon the accused to show that the crime is political in character, as illustrated by the *Case of Silberstein.*[26] The Russian government demanded from Switzerland the extradition of Silberstein on a charge of embezzlement by forgery committed while he was a director of the local branch of the Union Bank at Lebedinsk.

Silberstein defended on the ground that his offence was political in character, the money having been sent to the revolutionary committee in Russia. But he introduced no evidence supporting his assertion, and instead contended that it was not incumbent upon him to prove the political character of the act, and that it was incumbent on the prosecution to prove the money alleged to have been embezzled by him was used for his personal benefit.

The court held that the burden of proof is upon the accused to show that the crime is political in character. The accused must present such facts as would produce the inference of a political aim. It is not necessary for the accused to introduce complete proof of these facts but only such facts as would put the committing magistrate in such a position as to form a well-founded opinion indicating concrete facts about the nature of the delictual act, or about the elements which are indispensable to allow him to form an opinion. In this case, not only was proof of the political nature of the act absent, but also a portion of the embezzled money was found in the possession of the accused upon his arrest.

The holding was similar in the later case of *Re D'Emilia.*[27] Argentina requested the extradition of Evhenero Jupiter D'Emilia Alvarez on charge of fraud. As there was no extradition treaty with Chile, Argentina invoked the Convention on Extradition signed at Montevideo on 26 December 1933, which was ratified by Chile in 1935 and by Argentina in 1956. It was argued, *inter alia,* on behalf of the petitioner that extradition should be denied because he might be subjected to persecution as a political offender. The case was brought to the Supreme Court on appeal, which held that the request for extradition must be granted.

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[25] *E.g.,* H. BIRON & K. CHALMERS, THE LAW AND PRACTICE OF EXTRADITION 17 (1903) (hereinafter cited as BIRON AND CHALMERS): "It is, however, for the criminal to bring himself within the exception — the burden of proof is on him, ..."

[26] AFRICA, POLITICAL OFFENCES IN EXTRADITION 4, 69-70 (1927); 40 J.D.I.P. 673 (Federal Tribunal, Switzerland 1911).

[27] 24 I.L.R. 499 (Supreme Court, Chile 1957).

The court affirmed that the burden of proof is on the accused to show that the extradition request had been made for this purpose. D'Emilia had testified, *inter alia,* that "he supposed he would be tried" for offences of a political character because he had "sympathized with the ideology and political program of ex-President Peron." But the court ruled that a supposition is not the same thing as a categorical affirmation, and the record did not contain the proof necessary for credence to be given to this argument.

Although the burden of proof is on the accused, American cases such as *Diaz* and *Cruzata, infra,* hold that when evidence offered before the court tends to show that the offences charged against the accused are of a political character, the burden shifts to the demanding government to prove to the contrary. It is an essential part of the case for the demanding government that it be established not only that the crime charged is one of those enumerated in the extradition treaty, but also that it is an extraditable one.

Where extradition is refused. If the state of asylum refuses to grant extradition or if the aggrieved state refuses to accept extradition, then the former could invoke the rule of universal jurisdiction and prosecute the fugitive for common crimes committed in the latter, on the authority of two Austrian cases.

In the *Universal Jurisdiction (Austria) Case,*[28] the accused, a Yugoslav citizen, left Yugoslavia in order to escape prosecution for criminal offences alleged to have been committed by him in Yugoslavia. After his arrival in Austria he committed further offences there, but before he could be arrested he fled to Germany. The German authorities handed him back to Austria, where he was duly convicted for the offences he had committed in Austria. While serving his sentence, his extradition was requested by Yugoslavia for the offences committed there.

The Austrian authorities refused the extradition of the accused on the ground that while in Germany he had estabished contact with a Yugoslav refugee organization opposed to the Yugoslav government and was therefore in danger of political persecution in Yugoslavia. Instead, the Austrian authorities instituted criminal proceedings against the accused for the offences which he had committed in Yugoslavia.

The accused contended that the Austrian authorities were not entitled to prosecute a person whose extradition had been refused on political ground and that, under the Austrian Criminal Code, they would have been entitled to do so only in a case in which Austria had been willing to grant extradition but the foreign state in which the offence had been committed had been un-

[28] 28 I.L.R. 341 (Supreme Court, Austria 1938).

willing to prosecute. The court below upheld this contention, and the Public Prosecutor appealed.

The appellate court held that the appeal must be allowed. As the offences charged were offences which would have been punishable under Austrian law if committed in Austria, the Austrian courts were entitled to exercise jurisdiction on the basis of the rule of universal jurisdiction which permitted the prosecution of a foreign national for common crimes committed in a foreign country. The principle of universal criminal jurisdiction is based on the concept that the fight against crime is a common task of all civilized states.

In accordance with this principle of universal criminal jurisdiction, the Criminal Code provides that where the home state of a criminal offender, or the state in the territory of which a criminal offence has been committed, refuses to undertake the prosecution of the offender, the punishment of the criminal must, as a general rule, take place in accordance with the provisions of the Austrian criminal law. In the view of the court, with the exception of political offences, the Austrian courts are entitled to exercise jurisdiction in pursuance of the Criminal Code where extradition cannot be affected for reasons other than the refusal of a foreign state to take over the prosecution. Otherwise, the right of the state of refuge to institute proceedings could not be carried into effect.

The court declared that the extradition of the accused would have been permissible as the facts charged constituted common crimes. The refusal of the request for extradition, however, was based on grounds which, although not connected with the nature of the offence, had nevertheless to be taken into account in view of the analogous application of the Convention on the Status of Refugees (1951). It is a requirement of the proper administration of justice of a state which, the greater its generosity in granting asylum to political refugees (and not only politically persecuted persons), the less must be its inclination to waive its subsidiary right to institute criminal proceedings in respect of common crimes committed by such refugees in the territory of a foreign state.

The same line of reasoning was pursued by the court in the *Hungarian Deserter (Austria) Case*,[29] involving the same provision of the Austrian Criminal Code. The accused was a Hungarian national who, in order to escape from Hungary, where he was doing his compulsory military service, shot and killed a Hungarian frontier guard. The request of the Hungarian government for his extradition for murder was refused by the Austrian authorities, the decision of the Court of Appeal being subsequently confirmed by the Federal Ministry of Justice. The refusal of the Court of Appeal was based on the reasons that

[29] 28 I.L.R. 343 (Supreme Court, Austria 1959).

neither the death of the guard nor the intention of the accused to commit murder had been adequately proved, and that apart from that the accused, who had fled for political reasons, would be in danger of life and liberty if he were extradited.

Proceedings for manslaughter were then brought against the accused in the Austrian courts, which held that manslaughter committed in the course of desertion and escape from a totalitarian country was not a political offence, and that the Austrian courts were competent to try the accused for manslaughter.

There are certain observations to be made of these two Austrian cases. The provision of the Austrian criminal code embodying the principle of universal criminal jurisdiction assures that a common criminal will not escape punishment because his home state, or the aggrieved state, refuses to undertake his prosecution. The Austrian court extended this principle to cover cases where extradition cannot be effected for reasons other than the refusal of a foreign state to take over the prosecution, *e.g.*, cases where by reason of a state of war or the lack of diplomatic relations, or for reasons of retorsion, there is no existing machinery for extradition, or in particular cases where it is impossible to ascertain whether the offence has been committed in Austria or in the territory of a foreign state.

Up to this point, there is no major problem. But evidentiary problems do arise when the state of refuge conducts a trial for an act which took place within the territory of another state. Diplomatic problems also arise when the asylum state conducts this trial after refusing a request for extradition. The even bigger problem is the approach used by the court of the asylum state to distinguish a common crime from a political offence. In the *Hungarian Deserter* case, the court held that manslaughter committed in the course of escape from a totalitarian country was not a political offence, notwithstanding that Swiss and English courts had already held that acts committed in the course of escape from political persecution were political in nature. The decision in *Hungarian Deserter* seems even more anachronistic in the light of the fact that the accused fired at the frontier guard because the latter resisted the attempt of the former to escape over the frontier into Anstria.

These problems illumine the difficulties that arise when the right of decision is vested in the asylum state, leaving the political offender without an effective remedy.

Procedure in Great Britain. The Extradition Act of 1870[30] lays down that extradition shall not take place if the offence for which surrender is re-

[30] 33 and 34 Vict. c. 52 (1870).

quested is one of a political character. The Fugitive Offenders Act, 1881[31] contained no such proviso and even specifically mentioned treason — which has been called the objective political offence *par excellence* — as one of the crimes for which surrender could be granted.[32] It was replaced by the Fugitive Offenders Act, 1967,[33] which prohibits rendition for political offences absolutely,[34] following the European Convention on Extradition of 1957.[35] The Extradition Act governs the rendition of persons, both British subjects and aliens, to foreign states, while the Fugitive Offenders Act governs the rendition of British subjects and aliens to authorities within the Commonwealth.

Section 3 of the Act of Parliament of 1870 provides:

> A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a *political character*, or if he prove to the satisfaction of the police magistrate, or the Court before which he is brought on *habeas corpus*, or the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a *political character*.

And Section 9 provides, *inter alia*, that

> the police magistrate shall review any evidence which may be tendered to show that the crime of which the prisoner is accused, or is alleged to have been convicted, is an offence of a *political character*.

The Act uses the term "offence of a political character" rather than "political offence." The two terms are not synonymous. "Political offences" is a generic and colloquial term applicable to acts which may lie outside the criminal law. "Offences of a political character" includes offences which are in their elements political, and ordinary crimes which are committed with political intention.[36]

The Act left to the courts rather than to the law officers of the Crown, the definition of a political offence. This expedient was criticized on two grounds. Firstly, since the courts can only declare what the actual state of the law is and cannot, like the legislature, make it what it ought to be, it is possible that judicial decision would not be in harmony with the wishes of the nation. Secondly, the question of the surrender of a fugitive criminal could be left to the British courts only in the event of a foreign government calling upon England for his extradition; in the converse case, there was nothing in British treaties to prevent another power from interpreting the expression "political offences" in the widest possible manner.[37]

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[31] 44 and 45 Vict. c. 69.
[32] Sec. 9.
[33] H.M.S.O., London, Cmnd. 3008.
[34] Sec. 4.
[35] See Art. 3.
[36] PIGGOTT., EXTRADITION 22 (1910) (hereinafter cited as PIGGOTT).
[37] De Hart, *supra*, note 9 at 178.

To insure that the Act would not be employed to recover political offenders, there had to be scrutiny of the foreign demand and the evidence in support of it. It appears that Parliament imposed this duty upon the magistrate in the first case, then upon the High Court, and finally upon the Secretary of State. It has been pointed out that by imposing on the magistrate the duty of receiving evidence to test the political or non-political character of the offense, the Act would seem deliberately to have imposed on judicial officers the duty of collecting and shifting such evidence, and not of leaving that duty to a political officer.[38]

The High Court took this view in *Re Castioni*,[39] holding not only that it could review the decision of the magistrate as to the political character of the offence charged, but also that it could receive further evidence in aid of that review.[40] In attempting a judicial definition of the phrase "offence of a political character," the court incidentally passed judgment on the motive of Switzerland in seeking extradition.

In *Re Meunier*[41] and in *Re Francois*[42] the court heard and considered fully all evidence presented to show that the offence was of a political character. Instead of attempting an exhaustive definition, the court confined itself to determining the definition of a political offence so fas as was needed for the particular decision. It was not called upon to decide whether the surrender was asked with a view to trial for an offence of a political character.

In *Re Arton*[43] involving charges of commercial fraud, the affidavits alleged that on several times since the warrants for his arrest were issued in 1892, French government officials had visited Arton in three countries and negotiated for the surrender of documents supposedly in his possession, proving that senators and deputies had taken bribes for their services rendered to the government. Evidence was offered to show that the French Premier had, in the Chamber of Deputies, said, "Arton cannot be condemned on other counts than those on which the Bow Street tribunal has ordered his extradition, but he can be interrogated."

This statement presents a problem, for it implies that while a person cannot be surrendered or tried for an offence excluded from the treaty he can be examined and interrogated on such matters, even though they are un-

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[38] Magistrate's Law, *Political Offences and Extradition*, L. J. 109 (New Series 1896).

[39] 1 Q.B. 149 (1891).

[40] J. Hawkins opined that under the Act, the magistrate is to collect the evidence, but is not bound to determine anything on it. He may, J. Hawkins said, report it to the Home Secretary, or leave it to be reviewed or supplemented by the High Court.

[41] 2 Q.B. 415 (1894).

[42] Unreported, except in the *Times* of 2 December 1892.

[43] 1 Q.B. 108 (1896).

disputably of a political character. Inevitably, the courts would be influenced as to the quantum of punishment by his disclosure or silence. If the interrogatories are part of the procedure for an offence of a political character and he refuses to answer, and is punished for contempt, that punishment is inflicted in the stages of a trial for a political offence.[44]

Mr. Justice Wills apologized for this loophole by saying that the practice was part of the *lex fori* and could not be controlled by the English courts. But the real issue was that such a procedure, while indirect, would be tantamount to a breach of faith. That the demand for extradition was not made in good faith nor in the interests of justice was a question which, to the Lord Chief Justice, bore on the political aspect of extradition; the court therefore lacked both the competence and the authority to investigate it. By this holding, *Arton* appears to have given less than that demanded by the Extradition Act, which charges the court with the inquiry on whether the extradition is asked for a political offence.

If inquiry into the motive of the demand for surrender is allowed, then the accused is entitled to question the good faith of the demanding state, and to present relevant evidence on this point. To decline judicial inquiry into the faith of the demanding state in effect throws on the Home Office a burden properly laid on the courts by law. The danger of the dicta of the judges is that they seemed disposed to decline jurisdiction to inquire into what may be of the essence of a prisoner's proof as to the motives of the demand for his surrender. This would weaken or destroy the judicial barrier wisely set up by the Act so as to prevent the British government from surrendering a particular political offender to a foreign state which for diplomatic reasons it is willing to conciliate.[45]

In deciding that the prisoner must actually have committed a political offence, the court seemed to lay down the principle that a political offender is not, as such, exempted from extradition for other offences; he must prove the existence of the ulterior motive in the requesting government, which might be ignorant of his political offence and may only suspect it. The prisoner is thus "in a cleft stick," for he must prove to the satisfaction of the English court that he has committed the offence, and by so doing gives the requesting government the weapon it wants against him.

Lord Russell said that the court could not permit the prisoner to argue the point that a friendly state was not acting in good faith in making the application. Such considerations, he added, must be adduced to the executive of the country. But how is this pronouncement to be reconciled with the provision in the Act allowing the fugitive to prove the existence of an ulterior

[44] Magistrate's Law, *supra*, note 38, at 110.
[45] *Id.*, at 111.

object? Obviously, the mere allegation of an ulterior motive inconsistent with the treaty contains an imputation of bad faith.

The reconciliation could be effected by allowing such an imputation, provided it is made in the manner and form provided by the Act. The prisoner is allowed to allege such an ulterior motive; but he is not allowed to allege that the demand is made in bad faith. The reason for this fine distinction could be that once a departure from the words of the treaty and statute were sanctioned, such a suggestion might be made in any case where a political offence was not in question.[46]

Should the government, without any judicial finding as to the facts, refuse on their own judgment as to these facts and of their mere motion to hand the man over? Two early British cases answer this question in the affirmative, but their authority is weakened by the doubt and criticism attending the decisions. The first was the *Case of David Juli*.[47] The German Consul General at Cape Town applied for the extradition of David Juli, a German national, on a charge of the murder of one Loutsch, committed in German South-West Africa. The Colonial Ministers informed the Governor that in their opinion the offence was committed in connection with and in furtherance of a revolt against German sovereignty, and concluded that it was a crime of a political character. They also doubted whether the evidence against Juli was sufficient to establish a *prima facie* case. Consequently, the Governor refused to surrender Juli.

The Legal Adviser to the Foreign Office thought the proceeding very unsatisfactory. He expressed the belief that the proper course should have been to bring David Juli before a court which might have committed him for extradition, or which might have declined to do so. In the former alternative, Juli might have sued out a writ of *habeas corpus* and the matter would have been decided by the Supreme Court of the Colony.

Upon the transmission of these observations to the Colony, the Secretary to the Law Department, in a report in which the Colonial Attorney-General concurred, pointed out with reference to Section 7 of the Extradition Act, that the legislature, not satisfied with the express prohibition in Section 3 against surrender for political offences, in plain terms charges the Secretary of State with the responsibility of determining at the very outset of the proceedings whether or not the offence with which the accused is charged is political.

The report continued that as regards British colonies the authority conferred on the Secretary of State under Section 7 is by Section 12(2) conferred

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[46] PIGGOT, *supra*, note 36 at 58-60.
[47] 6 BRIT. DIG. 674.

on the Governor, the latter functionary not only taking the place of the Secretary of State, but also exercising the "powers" of the "police magistrate:" so that he possesses judicial as well as executive functions.

In the second case, doubt was also expressed as to whether it was competent for the colonial ministers to decide off-hand whether the offence was political or whether it was not rather for the competent court to determine the point after the men had been arrested and the case properly heard. In the *Case of the Bondelwarts Natives*,[48] the German Consul-General at Capetown applied to the Governor of the Cape Colony for the extradition of twelve natives of the Bondelwarts tribe on charges of murder, attempted murder, housebreaking, arson and robbery with violence.

The colonial ministers were of the opinion that the crimes with which those persons were charged were crimes in connection with revolt against German sovereignty and therefore in reality political offences. The Governor therefore proposed to refuse to surrender the accused. Although the Foreign Office concurred with the Colonial Office in approving this course, there was expressed internally some doubt as to the wisdom of this arrangement.[49]

In the next case, it was pointed out that there may be occasions when there is room to depart from the usual practice of making the arrest and letting the accused take the point that the offence was political before a court of law. In the *Case of Nord Alexis*,[50] the government of Haiti requested from the governor of Jamaica the surrender of the former president, Nord Alexis, and several of his cabinet, on charges of having caused to be shot various persons accused of complicity in what was called the Colon plot.

The Foreign Office concurred with the Colonial Office in the opinion that in this case there was room to depart from the usual practice. There was no necessity for the governor to issue orders for the arrest. He could properly reply to the Acting Consul of Haiti at Kingston that, having referred the matter to His Majesty's government, he could not take any steps for the arrest or surrender of the accused under the extradition treaty.

Finally, the celebrated modern case of *Regina v. Governor of Brixton Prison, Ex parte Kolczynski and Others*[51] is important not only for substantive

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[48] *Id.*, at 673.

[49] *Id.*, at 675: "In this country, the matter is for the decision of the judicial tribunals when it is raised, as it is almost invariably, by or on behalf of the person who is about to be surrendered on a writ of *habeas corpus*, or originally when he is before the committing magistrate. The *onus probandi* is on the prisoner and it is for him to establish that his case comes within the exception in favor of political offences. There is, however, nothing at any time to prevent the Secretary of State on his own initiative ordering the criminal to be discharged on the ground that this was a political offence." Colonial Office to Foreign Office, April 1904.

[50] 6 BRIT. DIG. 677.

[51] 21 I.L.R. 240 (Queen's Bench Division, England 1954).

but also for its procedural rulings. The applicants, seven Polish nationals, filed a motion for *habeas corpus*. The questions that arose under Section 3(1) of the Extradition Act, 1870 were: (1) whether the offence for which extradition was sought was an offence of a political character, or (2) had the applicants proved to the satisfaction of the court that the requisition had, in fact, been made with a view to trying and punishing them for an offence of a political character.

Lord Goddard noted that this section is somewhat obscure, especially when it is remembered that by sub-section (2) a criminal is not to be surrendered to a foreign state unless provision is made by the law of that state or by an arrangement, which must mean by treaty, that he shall not be tried by the foreign state for any offence committed prior to his surrender other than that for which the surrender is granted.

The precise meaning of this difficult section has not yet been made the subject of judicial decision and textwriters have found it difficult of explanation, but in Lord Goddard's opinion the meaning is this. If, in proving the facts necessary to obtain extradition, the evidence adduced in support shows that the offence has a political character, the application must be refused, but although the evidence in support appears to disclose merely one of the scheduled offences, the prisoner may show that, in fact, the offence is of a political character. In other words, the political character of the offence may emerge either from the evidence in support of the requisition or from the evidence adduced in answer.

The present case, in Lord Goddard's opinion, came within the second limb. *Prima facie*, the evidence in support of the requisition merely showed a revolt by two or more of the persons charged on board a ship on the high seas against the authority of the master, and this was a scheduled offence. The evidence, the truth of which the magistrate accepted, showed that the applicants while at sea found that a political officer was overhearing and recording their conversations and keeping observations on them for the purpose of preparing a case against them on account of their political opinions, presumably in order that they might be punished for holding, or at least, expressing them. A resultant prosecution would thus have been a political prosecution. The revolt of the crew was to prevent themselves being prosecuted for political offences and in Lord Goddard's opinion, therefore, the offence had a political character.

The court was pressed by the Attorney-General to consider the opinion of Hawkins, J., in *Re Castioni*, where he appears to hold that the magistrate cannot decide the question whether or not the offence is political although he concedes that it is open to the court to do so on a motion for *habeas corpus*.

Castioni was in some respects adversely criticized in *R. v. Holloway Prison (Governor), Re Silletti.* In that case, Bigham, J. said that the only question that the court could entertain was the question of jurisdiction.

This appeared to Lord Goddard to lay down the true rule: the effect of Section 3(1) is to prevent a crime of a political character coming within the purview of the Act. If, then, the crime is of that character, the magistrate has no jurisdiction to commit. If the magistrate wrongly gives himself jurisdiction by holding that a crime is not of a political character when it is, the court can and must interfere, and both *Re Castioni* and *Re Silletti* affirm this.

Moreover, apart from authority, this is what, in Lord Goddard's opinion, the statute provides. Clearly the second limb of Section 3(1) contemplates a decision of the magistrate on the subject; the first limb deals with an offence which the evidence called to support extradtion shows is political. The second limb contemplates a charge which on its face appears to be one of those set out in Schedule I to the Act, but which on examination of the evidence tendered is shown to be really of a political character. The magistrate must give a decision on this matter and his decision is open to review on *habeas corpus.*

Accordingly, it is the duty of the magistrate to determine on the whole of the evidence whether or not the offence is of a political character, and also whether it is an extraditable crime. He cannot determine this finally against the prisoner because the latter can question the decision on *habeas corpus.* This does not mean that the court will review the magistrate's findings of fact, but they must consider the result of those findings.

Apart from the Extradition Act, 1870, extradition procedure is also governed by the Fugitive Offenders Act. The Fugitive Offenders Act, 1881, followed the original Act and made the decision judicial.[52] But it was rendered obsolete for the most part by several celebrated cases with political repercussions.[53] It was thus replaced by the Fugitive Offenders Act, 1967[54] which prohibits absolutely rendition of political offenders, although there is power to make exceptions to the general scheme by Order in Council.[55] The new Act prohibits rendition for political offences by providing: [56]

> A person shall not be returned under this Act to a designated Commonwealth country, or committed to or kept in custody for the purposes

[52] Sec. 7 and 10.

[53] *E.g.*, the *Enahoro* case, 2 Q.B. 455 (1963), and the *Kwesi Armah* case, 3 W.L.R. 23 (1966).

[54] The Act came into force effectively on 1 September 1967. *See* Samuels, *The Fugitive Offenders Act, 1967-II* in 3 SOL. J. 956 (1967) and *The Fugitive Offenders Act, 1967-III* in 3 SOL. J. 976 (1967).

[55] Sec. 2(3).

[56] Sec. 4(1).

> of such return, if it appears to the Secretary of State, to the court of committal or to the High Court ... on an application for *habeas corpus* or for review of the order of committal —
>
> (a) that the offence of which that person is accused or was convicted is an offence of a political character.

The 1967 Act adopts the parallel jurisdiction principle between the judiciary and the executive. While this may be a reasonable compromise, unavoidably the courts will have to decide political issues, and the Home Secretary will be obliged to refuse rendition in all political cases, regardless of merit.

The 1967 Act follows standard procedure. After the requesting state approaches the Home Secretary, he may, in his discretion, issue an "authority to proceed." If the offence is political, he is likely to reject the approach *ab initio* and thus avoid court proceedings and publicity. But if he issues an authority to proceed, a metropolitan magistrate may then issue a warrant. Any magistrate may issue a warrant even without prior authority from the Home Secretary, but notice must immediately be given to him, and he may cancel the warrant if he wishes. The person is brought before the court at Bow Street. If the magistrate is satisfied that there is a *prima facie* case, he must commit in custody to await rendition.[57] The standard of proof is thus a *prima facie* case.

If the magistrate orders the person to be released, a fresh application may be made on the basis of fresh evidence. During the fifteen-day period during which the order to return must be executed, the accused may file *habeas corpus* proceedings in the High Court which may order a discharge on the ground, *inter alia*, that the accusation is not made in good faith. Thus the question of good faith is exposed to full public inquiry and political tensions will probably be lowered. But the Home Secretary retains an overriding discretion to refuse to order rendition, even in the case of a non-political offender whom the courts have refused to release.[58]

Since there is a balance in jurisdiction between the courts and the Home Secretary, a question may arise as to where the balance should be tilted on certain occasions. Where the individual's liberty is at stake, it seems best to tilt the balance in favor of the courts.[59]

Procedure in the United States. American extradition procedure is described as follows by federal statute:[60]

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or

[57] Sec. 7(5).
[58] *See* Samuels, *supra*, note 54 at 977.
[59] *Id.*, at 976.
[60] Revised Statutes, 18 U.S.C. sec. 3184, at sec. 5270.

> judge of the United States, or commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Further, the law adds: [61]

> The Secretary of State may order the person committed . . . to be delivered to any authorized agent of such foreign government, to be tried for the offence of which charged.

The extradition process operates on two independent but interrelated levels, the executive and the judiciary. It has been held that there can be no extradition until both levels, executive and judicial, agree to it.[62] It has been pointed out that a finding by a judge of insufficient evidence of criminality and the subsequent discharge of the accused terminates extradition proceedings; *a contrario,* after a judge commits a relator for extradition, the Secretary of State can refuse to surrender the relator to the requesting state.[63]

This view has prevailed since the time of the original statute.[64] Practice not only accepts the power of the Secretary of State to pass upon the merits of the case, but also lays upon him the duty of doing so, in view of his role as the only person or tribunal by whom the finding of the commissioner upon the merits can be reviewed.[65] He claims and exercises the right to pass upon the weight of the evidence submitted before the magistrate and upon all other matters which are not pure questions of procedure, which are determined upon writs of *habeas corpus* and *certiorari.* Yet it is contended that

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[61] Revised Statutes, 18 U.S.C. sec. 653, at sec. 5272.

[62] 18 U.S.C. sec. 3184 (1968), Fugitives from foreign country to the United States.

[63] Grin v. Shine, 187 U.S. 181, 23 S.Ct. 98, 47 L.Ed. 130 (1920).

[64] BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 370 (1974) (hereinafter cited as BASSIOUNI).

[65] MOORE, *supra,* note 6 at 361, 364 *et sec.*

his power is not final; for if the political offence doctrine is raised as a defence, it would run to the jurisdiction of the commissioner whose determination upon the point would be open to examination, upon *habeas corpus*, to the judicial branch — and ultimately to the Supreme Court.[66]

Hence, it is more accurate to say that the power of final determination of the political nature of the act does not pertain exclusively either to the courts or to the executive, but is a power shared by these two branches. This is illustrated as follows:[67]

> But according to the circumstances of a given case either the executive or the court may in that case finally determine the question. If, for instance, it should be considered that the political character of the offence is a plea going to the jurisdiction and if, having been committed for surrender, the fugitive should contest the decision of the commissioner up through the courts and should have his petition adversely ruled upon by all, even the Supreme Court itself, yet inasmuch as the issuing of the warrant of surrender is wholly discretionary with the Secretary of State, that officer might, if he should reach a different conclusion regarding the political character of the offence, refuse to issue the warrant of surrender and have the marshal directed by the President to discharge the prisoner. In such a case, of course, the ruling of the Secretary of State would be final.
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> But, on the other hand, should the committing magistrate rule that the offence was not political and should the Secretary of State, upon the record being transmitted to him, concur in the finding of the commissioner and issue the warrant of surrender, still it would be possible for the prisoner to sue out a writ of *habeas corpus* and secure his release, should he be able to persuade some judge that the crime with which he was charged was political and not within the terms of the treaty.

The extradition proceeding embraces two proceedings, the executive and the judicial. The initial executive process starts with the formal diplomatic request addressed to the Secretary of State by the requesting state. The requisition can be submitted before, during, or after the judicial proceedings, but it must be submitted before the Department of State can certify the surrender of the accused. The judicial proceedings start with a complaint made by an authorized representative of the requesting government. The complaint is akin to an indictment or an information. The hearing is not intended to determine guilt or innocence but to determine whether there is probable cause to believe the accused committed the offence charged.

Although no appeal lies from the decision to commit the accused for surrender, he may challenge the lawfulness of the order and the legality of

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[66] The court in Ornelas v. Ruiz, 161 U.S. 502, 16 S.Ct. 689, 40 L.Ed. 787 (1885) expressly declined to pass upon this question.

[67] Clark, *supra*, note 7 at 116.

his detention by applying for a writ of *habeas corpus*. But *habeas corpus* is not allowed as a means of inquiring into the treatment likely to be received by the accused in the requesting state; this is known as the "rule of non-inquiry."

At the final point, the Secretary of State exercises executive discretion, the extent of which is unclear owing to the silence on its limits on the part of both the statute and the courts.[68]

According to Hyde, it is the magistrate's duty to pass upon the evidence presented as to the political character of the acts committed. From his decision there is no appeal, save to the Secretary of State who in all cases, whatever be the nature of the defence, exercises the right to review the decision of a magistrate committing the prisoner to await extradition.[69] He concurs with the ruling that "it is not a part of the court proceedings nor of the hearing upon the charge of crime to exercise discretion as to whether the request is made in good faith. Such matters should be left to the Department of State."[70]

There are other technical questions. One is whether the political offence doctrine, when raised as a defence, should be classed as a plea to the jurisdiction or to the merits. That it is a plea to the jurisdiction is supported by the status of a political act, *i.e.*, one not deemed as between nations, and not falling within the meaning of the extradition treaties. Another question goes to the burden of proof and the amount of evidence necessary. It appears that the government establishes its case when it presents the demanding government's complaint, supported by proper affidavits, setting forth facts which show *prima facie* a case under the commissioner's jurisdiction. The fugitive thus bears the burden of bringing to the attention of the commissioner, facts which would defeat the jurisdiction. If he fails to support his plea, the commissioner must proceed on the merits to determine whether or not the accused shall be placed on trial for the crime charged. But the commissioner's findings on this question are subject to review by the courts under writs of *certiorari* and *habeas corpus*. In the first instance, then, the Secretary of State does not, and can not, pass upon the defence offered.[71]

Inevitably, leading American cases have touched on the procedural aspects of the extradition process. In *Re Ezeta*,[72] it was held that the committing magistrate has jurisdiction, and it is his duty, to determine whether the offence

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[68] BASSIOUNI, *supra*, note 64 at 511-34.
[69] HYDE, *supra*, note 11 at 1025-26.
[70] *In re* Lincoln, 228 Fed. 70 (1915).
[71] *See* MOORE, *supra*, note 6 at 570-71.
[72] 4 J. MOORE, DIGEST 334 (1906) (hereinafter cited as MOORE DIGEST); 62 Fed. Rep. 972.

charged is of a political character. In *Ornelas v. Ruiz*,[73] the court affirmed the important doctrine of American law that the court cannot on *habeas corpus* review the decision of the committing magistrate if there is sufficient evidence to support his conclusion.

In *Re Lincoln*,[74] the British government requested from the United States the extradition of Ignatius T. Lincoln, who sought to resist extradition on the ground that the demanding government would prosecute him for a political offence. The court said that the government of the United States, through the Secretary of State, should determine whether the foreign government is in fact able to exercise its civil powers, and whether diplomatic and treaty relations are being carried out and respected in such a way that it is safe to surrender an alleged criminal under a treaty. The court expressed the belief that application to the Secretary of State would furnish full protection against the delivery of the accused to any government which would not live up to its treaty obligations.

In *Gallina v. Fraser, U.S. Marshal*,[75] the district court, citing *Ornelas*, reiterated that the function of the writ is not to serve as a writ of error, or other appellate device.

Finally, in *Ramos v. Diaz; Ramos v. Cruzata*.[76] the court ruled that the exemption from extradition of persons who have committed political offences extends not only to persons charged with such offences but also to persons convicted thereof. Extradition proceedings were begun against the two defendants upon the complaints of a Vice-Consul, acting on behalf of the Republic of Cuba. The demanding government submitted as evidence a transcript of proceedings before the Purging and Investigation Commission of the Military Department of La Cabana, Havana, sitting as an ordinary court martial, indicating that the defendants has been convicted of murder. They had been sentenced to terms of imprisonment but had escaped after their conviction.

The defendants contended that their offence was political in nature and therefore not such as to render them extraditable under the extradition treaty between the United States and Cuba, which exempts all offences "of a political character." The Cuban government contended that, once having been convicted, the defendants could not raise the question of the political nature of the offence and that the crime was not political, because, at the time of the offence, the defendants were loyal to the demanding government.

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[73] 4 MOORE DIGEST 336; 161 U.S. 502 (1896).
[74] 228 Fed. 70 (1915).
[75] 31 I.L.R. 356 (District Court, District of Connecticut 1959; Court of Appeals, Second Circuit 1960).
[76] 28 I.L.R. 351 (District Court for the southern district of Florida, United States 1959).

The court held that the complaints must be dismissed and the defendants released from custody. The exemption from extradition of persons who had committed political crimes extended not only to persons charged with such offences but also to persons convicted thereof. The demanding government had failed to discharge the burden incumbent upon it of proving that the crime for which extradition was sought was not political. The provision of the treaty exempting therefrom political offences is not limited to its terms, but applies to all such offences whether or not the person sought to be extradited was convicted, or is merely charged with the commission of the offence. The court said this is the established rule in the United States for the enforcement of such treaty provisions.

Likewise, the Cuban government's contention that there could be no political crime where the demanding government is of the same political side that the defendants were on at the time of the shooting, was not decisive, for again, if the evidence concerning the shooting incident disclosed that the crime was incident to and was committed as a part of a political disturbance between the Batista group and the Castro group, then contesting for political power in Cuba, it was a political crime and as such not subject to extradition.

The court stressed that American authority indicates clearly that when evidence offered before the court indicates that the offences charged against the accused are of a political character, the burden rests upon the demanding government to prove to the contrary. It is an essential part of the case for the demanding government that it be established not only the crime charged is one of those enumerated in the treaty, but also that it is an extraditable one.[77]

Procedural rulings in other countries. The judicial inquiry is to be confined to the juridical aspect of the facts which can only be estimated from the warrant of arrest and from the request for extradition, according to *Re Korosi*.[78] The Czechoslovak government requested the extradition from Italy of the appellant, a Hungarian subject, accused of obtaining money by false pretences. The appellant contended, *inter alia,* that the case was not one of fraud but merely of commercial insolvency; and that the crime had a political character in view of the fact that the request of the Czechoslovak government was due to national antagonism between the two states, Czechoslovakia and Hungary, both of which had arisen on the ruins of the Austro-Hungarian empire.

The appeal failed in the Court of Cassation. As the warrant of arrest and the request for extradition spoke of fraud and not mere commercial in-

[77] *See* Note in 35 NOTRE DAME LAW. 566 (1960) and in 34 TULANE L. REV. 847 (1960).

[78] 3 Ann. Dig. 309 (Criminal Court of Cassation, Italy 1925).

solvency, the objections of the appellant could not be considered. The alleged offence was one belonging to the domain of private law, and it could not, therefore, be transferred to the domain of political crimes according to the more or less good relations existing between the two states.

But the duty of the court to limit itself to the facts as set out in the warrant of arrest or equivalent indictment applies only to the decision whether a prosecution will lie for a criminal act possessing the marks of an offence specified in the list of extraditable crimes, and not to the separate question of the political character of the act, according to *Re Ockert.*[79] The Prussian Minister of Justice requested the extradition from Switzerland of Ockert, a German national and a member of the *Reichsbanner,* a quasi-military organization of the German Social-Democratic Party. He was charged with the homicide of a certain Josef Bleser, but claimed the benefit of the political offence doctrine in the extradition treaty.

The court held that extradition could not be granted. Considering in particular newspaper reports of the crime, which spoke of "Marxist Murder Tactics," "Sacrifice in the Service of the New Reich," and so on, the court concluded that the case was also one essentially of political conflict.

Question was raised of the court's competence to entertain the plea of the accused that there was no proof of his guilt and that the alleged crime was political. The court said that according to binding precedent, the court deciding the question of extradition cannot concern itself with the question of guilt. On the other hand, as to the separate question of the political character of the act, it was free to appreciate the evidence.

In a parallel decision, it was held that the existence of a warrant for arrest issued by the requesting state is not conclusive evidence. In *Re Campora, et al.,*[80] Argentina requested the extradition of Hector Jose Campora Demaestre and five other prominent supporters of the regime of ex-president Juan Peron, who had sought political asylum in Chile after escaping from preventive custody in Argentina. Campora, former president of the Chamber of Deputies, was wanted for malfeasance in office and misappropriation of government property. In the opinion of the Argentine government, these charges and those against the five others constituted criminal offences. The defence pleaded that these charges constituted political offences which were non-extraditable, and invoked, *inter alia,* provisions of the Convention on Territorial Asylum of 28 March 1954 in support of this argument.

The case was brought on appeal to the Supreme Court, which held that the request for the extradition of one Kelly on criminal charges must be

[79] 7 Ann. Dig. 369 (Federal Tribunal, Switzerland 1933).
[80] 24 I.L.R. 518 (Supreme Court, Chile 1957).

granted, and that the request for the extradition of the other five fugitives must be refused because certain charges constituted political offences, for which extradition might not be granted, while other charges were not supported by adequate proof or did not conform to the requirements of Chilean law. The court said that the Code of Penal Procedure empowers the courts to evaluate the evidence submitted by the demanding state in support of its extradition request, to determine whether the charges are valid, and whether the presumption of guilt of the accused is well founded. The existence of a warrant for arrest issued by the requesting state is not conclusive evidence.