# THE R.P. - U.S. EXTRADITION TREATY AND THE RIGHT OF POLITICAL ASYLUM

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In this world of tangled interests and guarded frontiers the question that is often asked is where to draw the line between law and policy. For those who have nursed a loathing for the excesses of state power, the tendency to temporize where political interests are kept above considerations of decency, has been viewed as an unending threat to the fragile freedoms of individuals everywhere. It is true perhaps, that there can be no assurance that individual liberties will be protected where they are seen in terms of the urges that impel the behaviour of the state, or more accurately, the dominant interests which control its coercive machinery, rather than in terms of a rational scheme of powers and corresponding duties. This is true in international as it is in municipal law.

In the realm of municipal law the exercise of state power is in theory checked by a system of positive law premised on such fundamental principles as popular sovereignty and limited government. Confronting a similar problem in international law, it has been submitted, concededly on the basis of an imprecise analogy between the two spheres of law, that the same checks should be applied to the exercise of external state sovereignty by locating what has been referred to as "human rights" within the "orbit of positive law."[1] To use the words of one writer, the "globalism of international law" must slowly transcend the "parochialism of traditional public policy."[2] It is a proposition however, which, outside the context of a multilateral treaty or an overriding rule of international customary law compelling states to respect human rights, can only be defended theoretically with utmost difficulty.[3]

One exception to the difficulty is the matter of extradition *vis a vis* the right of political asylum. It is proposed that ostensibly paramount considerations of policy, which the former represents, are subject to a legal obligation in international law which the latter imports. The proposition can not be more topical than it is at the present. The Extradition Treaty, signed by the governments of the Philippines and the United States of America in Washington D.C. in November 27, 1981[4] and pending ratifica-

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1 DROST, HUMAN RIGHTS AS LEGAL RIGHTS 12 (1951).

2 CLAUDE, COMPARATIVE HUMAN RIGHTS X (1976).

3 DROST, *supra*, note 1.

4 Letter of Estelito Mendoza to the Committee on Foreign Affairs, Batasan

tion by their respective legislatures, has been assailed as a device to allow the Philippine government to acquire criminal jurisdiction over scores of Filipino political oppositionists exiled in America.[5] The accusation is open to a test of validity separate from a textual examination aimed at finding from the language of the treaty itself how the complete exclusion of political offenses can be circumvented. A textual approach however will not suffice. The conflict between the right to extradite and the right of political asylum, insofar as it illustrates the tension between state prerogative and the impositions of international law, can not be appreciated accurately without viewing the text of the Extradition Treaty in relation to the circumstances that surround it. Why this is so is answered by the very nature of extradition. Originally conceived as a device to combat crime, extradition has allowed repressive regimes to silence political dissenters wherever they may be. It is not an inapt observation that "efforts to secure (the fugitive's) return to the state having a claim to try or punish him may invoke the same sort of sympathy as is extended to the fox in the hunt."[6] More true this is with respect to persons wanted for political offenses. Extradition being a bilateral act, they rely heavily upon the understanding and hospi-

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Pambansa, January 27, 1982.

The letter, recommending the ratification of the Treaty by the Batasan, discloses that the negotiations for the conclusion of the Treaty were undertaken in 1973. "But because of disagreements on certain points, the negotiations were not concluded. Informal conversations in 1980 were entirely negative. A decision to resume negotiations followed the visit of Secretary of State Alexander Haig in June, 1981. The Treaty was agreed upon *ad referendum*...."

The so-called disagreements consisted in the U.S.' insistence on the exclusion of fugitives who were under the jurisdiction of the Military Commisions. The Philippine Panel, headed by Solicitor General Mendoza, "refused because that would be derogatory to the Philippine system of administering laws which included Military Commissions. Moreover, there was no known treaty of the U.S. which excluded military commissions...." However, Secretary Haig prevailed upon the Philippine Panel, about eight years later, to agree to what is now Article 6 of the Treaty, to wit: (1) An extradited person shall not be tried by an extraordinary or ad hoc tribunal in the Requesting State. (2) Extraditions shall not be granted for the enforcement of a penalty imposed, or detention ordered, by an extraordinary or ad hoc tribunal." The Philippine Panel allowed the exclusion "because there are no more military commissions today except those which continue to exist only to terminate existing cases." BATASAN PAMBANSA, COMMITTEE FACT SHEET 3 (February 22, 1982).

[5] Most of the criticisms came from the foreign-based opposition through the foreign media.

"Support for repression abroad inevitably leads to repression at home," says Walden Bello, newly elected Co-ordinator of the Coalition Against the Marcos Dictatorship (CAMD). Bello was referring to the newly drafted extradition treaty... scheduled for U.S. ratificationing in January." Philippine Liberation Courier, Dec., 1981, p. 1, col. 1.

"Aquino expressed his fears of extradition proceeding against him and other leaders—among them former Senator Raul Manglapus Sergio Osmeña Jr. and businesswoman Charito Planas—in a speech last week before the Association of Criminal Lawyers in New Orleans. He said he expects President Marcos to try to extradite him and the other leaders, and that the U.S. government would not attempt to block such a move." We-Forum, Oct. 21-23, 1981, p. 1, col. 1.

In contrast to the outcry of the U.S.-based dissenters against the proposed treaty, the coalition of opposition parties in the Batasan Pambansa agreed to keep an open mind and to study the treaty before taking a unified stand. Times Journal, Jan. 29, 1982, p. 1, col. 1.

[6] SHEARER, EXTRADITION IN INTERNATIONAL LAW 1 (1971).

tality of the haven state. And it is a flimsy protection indeed as the attitude of the haven state towards political fugitives is hardly immured from political considerations.

That the political offender, driven to foreign exile by his own state, needs greater protection in law is all too apparent. Having decided to do battle against the political regime in his home state where security is seen to "antedate freedom,"[7] he largely forfeits the protection which the latter accords to even the most notorious of ordinary criminals. Instances of denial of constitutional due process are most numerous which involve those accused of political crimes. Owing perhaps to the low level of tolerance for their disruptive activities, it is not surprising that an international system of laws has been sought as establishing an order which conduces to the preservation of human rights of which the right of political asylum is one.[8]

*Antecedents: Setting the Stage for the R.P.-U.S. Extradition Treaty*

The morass of pragmatism"[9] to which American foreign policy drifted in the middle seventies, after the Vietnam war and the Nixon-Kissinger era, was to change for some time the Manichean perception which the Third World had of the superpower rivalry between Moscow and Washington. Indiscriminately supporting totalitarian regimes whenever the dictates of security required an effective hedge against the challenge of Soviet military power and political influence, "America found herself in a profound moral crisis."[10] Upon his ascent to power in 1976 President Jimmy Carter launched his human rights crusade to "reassert America's moral leadership."

> In ancestry, religion, color, place of origin, and cultural background, we Americans are as a diverse a nation as the world has ever seen. No common mystique of blood or soil unites us. What draws us together, perhaps more than anything else, is a belief in human freedom. Our policy must reflect...that dignity and freedom are fundamental spiritual requirements.[11]

The new foreign policy was elaborated in 1977 by Secretary of State Cyrus Vance in his Law Day Speech, emphasizing the Carter administration's "resolve to make the advancement of human rights a central part of U.S. foreign policy."[12] The policy was sought to be carried out by means of the carrot and stick method, applicable to allies and foes alike, whereby

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7 CLAUDE, *op. cit. supra*, note 2 at 8.

8 Article 14 of the Universal Declaration of Human Rights, signed without dissent in 1948, states that "every one has the right to seek and enjoy in other countries asylum from persecution." Article 13 (2) states that every one has the right to leave any country, including his own, and to return to his country." These rights are elaborated in the United Nations Declaration on Territorial Asylum signed in 1967.

9 We-Forum, Oct. 11-13, 1980, p. 1, col. 1.

10 *Id.*, p. 2, col. 1.

11 Carter, cited in note 10.

12 Vance, quoted in note 10.

foreign aid was given or withdrawn depending upon the foreign government's record in human rights. This "linkage approach" however, was not totally immured from the urges of policy, particularly where for reasons of security military aid had to be pumped into the coffers of Third World allies beseiged by communist insurgency. The Philippines' dismal showing in human rights,[14] while it precluded the conclusion of an extradition treaty with the U.S. in the early seventies,[15] did not altogether rule out military and economic aid.[16] The contradictions thus exposed in Carter's human rights advocacy underscored the overriding influence of foreign policy in the matter of external security upon what was otherwise an unimpeachable devotion to the basic individual freedoms. A. U.S. congressional study admitted that America had been guilty of "embracing governments which practice torture and unabashedly violate almost every human rights guarantee."[17]

Throughout Carter's administration, the U.S. "remained totally blind to the Philippine opposition's activities in the U.S."[18] The consternation caused by Carter's constant criticism of the Philippine government's allegedly repressive policies was appeased only by the official assurance of continued military aid. In the meantime, the circumstances which the Philippine government claimed justified the making of an extradition treaty received wide publicity in the local media. In July, 1978 the President disclosed that he had evidence of the presence of a foreign-based syndicate engaged in arson and responsible for the July rash of fires in Metro-Manila.[19] In December, 1979 the "Light-a-Fire" movement was linked to the "Manglapuz-Lopez" group.[20] In the following month the local press revealed that large quantities of explosives, sophisticated timing devices and manuals in the manufacture of incendiary bombs and on urban guerilla warfare were seized at the Manila International Airport.[21] Shortly after, the government confirmed reports that the U.S.-based Movement For A Free Philip-

[13] Carter recommended to the U.S. Senate a reduction in the budget for foreign aid to countries with egregiously repressive policies *vis a vis* local political opposition. Time, March 7, 1977, p. 24.

[14] President Marcos admitted that "there have been, to our lasting regret, a number of violations of the rights of detainees." Bulletin Today, Aug. 26, 1977, p. 9.

[15] Mendoza implied that the Carter administration's refusal to include within the scope of the proposed treaty persons falling under the jurisdiction of military commissions, owed to the Phiiippines' unacceptable treatment of its political prisoners, especially the remnants of the old Liberal Party who had continued to criticise Marcos' Martial Law administration. Mendoza, *supra,* note 4.

[16] In 1979 the Carter administration promised to provide the Philippines with fifty million dollars in military assistance for the succeeding five years and agreed to give "prompt and sympathetic consideration to requests for specific items of military equipment..." Letter of Jimmy Carter to Ferdinand Marcos, Jan. 4, 1979 in MARCOS, IN SEARCH OF ALTERNATIVES: THE THIRD WORLD IN AN AGE OF CRISIS 165 (1980).

[17] Time, March 7, 1977, p. 24.

[18] Lachica, *U.S.-Philippines Treaty Worries Marcos Critics,* Asian Wall Street J., Feb. 12, 1982, p. —.

[19] Daily Express, Jul. 22, 1978, p. 1.

[20] Bulletin Today, Dec. 31, 1979, p. 1.

[21] Times Journal, Jan. 6, 1980, p. 1.

pines adopted a resolution binding its members to subsidize an armed rebellion in the Philippines.[22] In August, 1980 the President said that exiled oppositionist Benigno Aquino, Jr. "may be guilty of violating American laws on trafficking of firearms and soliciting support against a government friendly to the U.S."[23] In November, 1980 the string of bombings which jarred Manila was reported by the government to be in line with the 1979 amendment to the Movement For A Free Philippines' constitution which "adopted violence as a means of toppling the Marcos regime."[24]

While criticisms by the foreign press of President Marcos' domestic policies swelled,[25] America's foreign policy for the eighties was reverting to the truculent pragmatism of the pre-Carter period. His human rights crusade repudiated by the American electorate, Carter gave way to President Ronald Reagan, who while manifesting his willingness to do the "utmost to bring about improvement in human rights in those countries that are aligned with (the U.S.)," announced that the effort will not be made at the expense "of helping an overthrow by a faction that is totalitarian."[26] The shift was largely a function of the realization of waning American power and the necessity of regaining it. The importance given to securing and consolidating existing American interests around the globe was even more paramount than the concern for the abuses to human rights. Secretary of State Alexander Haig stated thus:

> We are concerned that open societies sometimes get victimized by the practical consequences of their openness and by the lack of access to information about totalitarian regimes where, it is our convicton, the major abuses to human rights are occuring problem related to our more strongly held concern that past human rights policies have in many instances been counterproductive, not only to the objective of strengthening human rights but also from the standpoint of vital American interests.[27]

The demotion of human rights in the scheme of foreign policy priorities altered the attitude of Washington towards President Marcos' regime from one of impatient pedanticism to that of pragmatic tolerance.[28] During

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[22] Times Journal, Jan. 21, 1980, p. 1.

[23] Bulletin Today, Aug. 9, 1980, p. 1.

[24] Daily Express, Nov. 2, 1980, p. 1.

Aside from the M.F.P., splinter or independent groups have emerged from the Filipino middle class, espousing and carrying out the violent overthrow of the Marcos regime by means of a systematic campaign of selective urban terror. Notable among them is the "Light-a-Fire-Movement", headed by Eduardo Olaguer, now under trial, and the April 6 Liberation Movement which maintained that its "purpose is to scare, not to assassinate" and that it is "strongly anti-communist." Alleged bomber Victor Burns Lovely's decision to turn state witness, it is said, has "broken the April 6 Movement," and exposed several U.S. residents, well-known foes of President Marcos. Time, Nov. 3, 1980, p. 25.

[25] *Powder Keg of the Pacific*, Time, September 24, 1979, p. 14.

[26] Interview with Pres. Ronald Reagan in Time, January 5, 1981, p. 26.

[27] Interview with Sec. Alexander Haig in Time, March 16, 1981, p. 15.

[28] U.S. Vice Pres. George Bush was overheard to have said that the U.S. government "loves the Philippines for Pres. Marcos' adherence to democratic principles and the democratic processes." We-Forum, Jul. 18-24, 1981, p. 1.

his visit to the Philippines in June, 1981, Secretary Haig promised the Philippine government that Washington would prosecute Marcos' opponents in the U.S. who were helping leftist insurgents.[29] Shortly thereafter, negotiations for the Extradition Treaty, aborted in 1973, resumed.

*Veiled Motives and Hidden Perils*

An extradition treaty, whereby two or more states cooperate for the suppression of crime, has been defined as "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of another, which, being competent to try and to punish him, demands the surrender."[30] It is a national act[31] predicated upon mutual state interest. Unlike trade agreements which predetermine the parties' rights and obligations with respect to the subject matter thereof, an extradition treaty, though rendered executory upon its ratification by the proper authorities, does not impose an obligation to extradite upon the requested state until the latter had made its own judgment. In every instance the parties are guided by their respective national interests. For the Philippine government, the Extradition Treaty is an answer to the fact that the U.S. in recent years "has become the most convenient haven of those who violate the Philippine penal laws."[32] According to the Philippine Solicitor General,[33] the Treaty was negotiated with the view of trying and carrying out judgments against "those who malversed hundreds of millions of pesos, those who swindled us, and who are enjoying in the U.S. simply because they were able to flee."[34] On the part of Washington, the interest lies in implementing a new policy of creating "an all-encompassing world-wide scheme of extradition treaties"[35] to enforce legislations against terrorism.

To carry out the ostensible intendment the Treaty provides:

(1) for a coverage that is broader than that of any other treaty signed by the U.S.;[36]

(2) that of the seventy listed offenses sixty-eight are specific, while two are general;

(3) for a retroactive application;[37]

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[29] We-Forum, Dec. 9-11, 1981, p. 1.

[30] Terlindan v. Arnes, 184 U.S. 270, 289 (1902).

[31] 6 WHITEMAN, INTERNATIONAL LAW 727 (1968).

[32] Mendoza, note 4.

[33] Mendoza headed the Philippine Panel which also included Ambassador Jose Plana, Minister-Counselor Leonides Caday, and Consul Willy Gaa. BATASANG PAMBANSA, COMMITTEE FACT SHEET 3 (Feb. 22, 1982).

[34] Interview with Estelito Mendoza in Observer, February 28, 1982.

[35] Mendoza, note 4.

[36] Extradition Treaty with the United States of America, November 27, 1981, Bulletin Today, Feb. 13, 1982, p. 15 (hereinafter referred to as the Treaty).

[37] Treaty, Art. 21.

(4) for an exclusion as to political offenses or offenses connected with a political offenses, or where there are substantial grounds for believing that the request for extradition had in fact been made to try or punish the person sought for such an offense;[38]

(5) that any question which arises as to (4) shall be decided by the Executive Authority of the Requested State;[39]

(6) for an *attentat* clause;[40]

(7) for the non-extraditability of military offenses which are not punishable under non-military laws;[41]

(8) for a commitment for either party not to try an extradited person by an extraordinary or *ad hoc* tribunal or to enforce a judgment of such tribunal;[42]

(9) that is (7) the determination of any issue relating to military offenses or extraordinary tribunals shall be decided by the Executive Authorities of both governments;[43]

(10) for provisional arrest;[44]

(11) for the principle of specialty.[45]

What executive pronouncements or a cursory reading of the text of the Treaty do not readily show is the ominous implication to political offenses insofar as they are generally regarded as exempt from the coverage of the Treaty. The events which followed the signing of the agreement must be looked into.

On January 6, 1982 the Court of First Instance of Rizal ordered the arrest of Mr. Aquino, Raul Manglapus and thirty-eight other oppositionists, most of whom were seeking refuge in the U.S., for alleged violations of the Revised Subversion Act.[46] Two weeks later the President issued a warning to the Opposition not to compel him to use his extraordinary powers all over again by joining the illegitimate opposition and encouraging violence and terrorism."[47] The events import a threat, nay a resolve, to employ what the treaty once ratified can accomplish. Particularly with respect to the Treaty provision that the Executive Authority shall decide any question

[38] Treaty, Art. 3 (1).
[39] Treaty, Art. 3 (1).
[40] Treaty, Art. 3 (2) (a).
[41] Treaty, Art. 3 (3).
[42] Treaty, Art. 6.
[43] Treaty, Art. 6.
[44] Treaty, Art. 11.
[45] Treaty, Art. 15.
[46] Bulletin Today, Jan. 6, 1982, p. 1.
[47] Bulletin Today, Jan. 18, 1982, p. 1.

which might arise as to whether the fugitive is a political offender or not, is there the real danger of "individual liberties being overriden by foreign policy considerations."[48] According to Richard Falk, Princeton professor in international law, a totalitarian regime "could draw up charges that would make almost anyone it didn't like eligible for extradition."[49]

But it hardly suffices to argue against the Treaty purely on policy considerations. Unless the right of political asylum can be impressed with a bindingness that characterizes treaty law or international customary law any argument premised solely upon a humanitarian concern for human rights or the universal abhorrence for their disregard is a futile act. Paraphrasing an observer in international law, as the act sought to be enjoined is one which rests on law, "it can only be limited by law."[50] This principle is axiomatic in the sphere of municipal law where precepts are enforceable through sanctions. But it may not be so in international law. For it is generally accepted that any motion of bindingness in the latter sphere can not carry the same coercive element that it has in municipal law. Ultimately to be desired is to regard the motion in the Kelsenian sense as being tied to a vision of a monistic system in which the basic norm of every state is a rule imposing obedience to the rules accepted as binding every state *inter se*."[51] There is no evidence that such a system has become operative. On the contrary, sanctions in international law do not emanate from a supranational source, as there is none, but from such factors as "public opinion, habit, good faith, the possibility of selfhelp, expediency and the combination of reciprocal advantage when the law is followed and fear of retaliation when it is broken."[52] But if the Kelsenian vision remains chimerical in practice it need not remain so in theory.

*The Extradition Treaty and the Political Offender*

Its proponents maintain that the assurance that the Treaty will not include political offenses is "in the Treaty itself."[53] An examination of the Treaty will show that it is not.

The Treaty expressly excludes political offenses. Not being a legal concept however, a "political offense" admits of no precise definition.[54] The Treaty does not define it, and for understandable reasons, one being that the term involves a high degree of popular emotion. For example, it is not settled just whether it is a "crime against the government" or a "crime

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48 Lachica, *op. cit.*, note 18.

49 Falk in *id.*

50 Poblador, *The Military Bases and Mutual Security Arrangements in the Light of the Doctrines of Jus Cogens and Rebus Sic Stantibus*, 51 PHIL. L. J. 264 (1976).

51 LLOYD, THE IDEA OF LAW 196 (1964).

52 BISHOP, INTERNATIONAL LAW 10 (1953).

53 Mendoza, *op. cit.*, note 34.

54 SANTIAGO, POLITICAL OFFENSES IN INTERNATIONAL LAW 49 (1977). "The definition of political offenses constitutes a quagmire in international law."

against the oppressions of government."[55] Under the former notion the penological justification can be easily grounded on the state's undisputed right to self-preservation. But under the latter notion the existence of popular sympathy for political offenders and the nebulous nature of political ideology raise the question as to whether they should be punished at all.

Moreover, a distinction is drawn between purely political crimes and relative political crimes. A purely political offense is an act committed against the government of a state, "injuring only public rights and containing no common crime elements whatsoever."[56] According to Whiteman, this class of political crimes is so unmistakable that most treaties which contain a listing of specific offenses covered do not explicitly exempt purely political offenses, the same being deemed exempted from the fact of their exclusion from the list.[57] This principle does not apply to the Extradition Treaty. One reason is that while the Appendix of the Treaty makes an enumeration of specific offenses, it also includes two general ones, to wit:

a) Item (24): "Offenses against the laws relating to firearms, ammunitions, explosives, incendiary devices, and other prohibited weapons."

b) Item (25): "Offenses against the laws relating to the traffic in, possession or production or manufacture of, narcotic drugs. cannabis, hallucinogenic drugs, cocaine and its derivatives, and other substances which produce physical and physiological dependence."

Another reason is that Article 2(b) provides that offenses are extraditable, whether listed in the Appendix or not, which are punishable under the Federal laws and the laws of the Philippines. Furthermore, that a specific act is listed as an extraditable offense in the Appendix does not discount the possibility of its qualifying as a political offense by indirection, i.e., as a crime committed in connection with a political offense under Article 3(1). In the above three cases the enumeration does not obviate the problem of characterization. For example, whether or not an act falls within the purview of Article 2(b) or Article 3(1) can not be ascertained from the Treaty alone, which neither provides a test of characterization nor a workable definition of a political offense. The implication is that should a case arise under the Treaty, whoever shall make the determination will have to rely on the various tests culled from jurisprudence which are as many as the cases in which they were formulated. This ought to reduce to invalidity the contention that the Treaty is its own assurance that it does not include political offenses.[58]

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[55] Letter of Thomas Jefferson to Cramichael and Short, March 22, 1779, Am. State Pap. For. Rel. 258 as cited in 4 MOORE, INTERNATIONAL LAW DIGEST 332 (1906).

[56] SANTIAGO, *supra*, note 54 at 54.

[57] WHITEMAN, *op. cit. supra*, note 31 at 800.

[58] Mendoza, note 4.

Nor is that the only objection. Proponents of the Treaty maintain that: "We cannot ask for anything that the Treaty does not allow. Neither government is bound to perform an obligation which is prohibited by the Treaty."[59] Unfortunately, while Article 3(1) contains a prohibition against the rendition of political offenders, it does not define just exactly what it seeks to proscribe. The resort to jurisprudential tests will not solve the problem. On the contrary, it will only further complicate it, inasmuch as in making the choice among various tests, the dictates of policy and state interest will surely have a decisive role to play. Indeed, legal uniformity is the antithesis to the anarchy which policy considerations breed.

The problem posed by purely political offenses is amplified by the more unsettled category of relative political offenses. Santiago defines relative political offenses as those which refer to "offenses in which a common crime is either implicit or connected with the political act."[60] A more elaborate, though not decisively more precise definition was made in *In re Giovanni Gatti*.[61]

> Acts which aim at overthrowing or modifying the organisation of the main organs of the state, or at destroying, weakening or bringing into disrepute one of these authorities or at exercising illegitimate pressure on the play of their mechanisms or on their general direction of the state, or which aim at changing the social conditions created for individuals by the constitution in one or all its elements are also political offenses.

A relative political offense has also been defined as

> one which, while having the characteristics of a common offense, acquires a political character by virtue of the motive inspiring it, or the purpose for which or the circumstances in which it has been committed; in other words, it is in itself a common offense but has a predominantly political character.[62]

Relative political crimes are a cross between common crimes and purely political offenses. From the definitions above-cited one can see that a relative political offense is possessed with the form of a common crime. Thus, unless the motive is inquired into, it is easily confounded with the latter. Inquiries into the motives which impel equivocal actuations are always problematic. They entail the drawing of brush-stroke distinctions. The greater flexibility allowed to the appropriate body which shall make the determination in actual cases affords wider room for the play of extra-legal factors.

The above notwithstanding, it may be argued that there is in Article 3(1) an effective safeguard against discretion being as it were, exercised with abandon, i.e., the clause that "no extradition shall be granted if there

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59 *Ibid.*

60 SANTIAGO, *op. cit. supra*, note 54 at 54.

61 *In re Giovanni*, 14 Ann. Dig. 145 (1947) as cited in WHITEMAN, *op. cit.*, note 31 at 802.

62 *In re Ficarilli*, Int'l L. Rep. (1951) as cited in WHITEMAN, *id.*, at 803.

are substantial grounds for believing that the request has in fact, been made with a view to try or punish the person sought for such an offense." The cited clause seeks to prevent an extradition grounded on bad faith on the part of one or both the parties. Though in principle a commendable restriction, its efficacy is cast in doubt, even negated, by the subsequent clause in the same Article that "if any question arises as to the application of Article 3(1), it shall be the responsibility of the Executive Authority of the Requested State to decide." It would seem that the Treaty is intended to prevent the courts from inquiring into the findings of the political branch of government as to the political character, or lack of it, of an offense.

Under the Revised Statute of the United States, Section 5270 (18 U.S.C., sec. 3184), a request for extradition shall be filed with any court having jurisdiction over the person of the fugitive, which court may issue a warrant ordering the latter to appear before it where a hearing shall be conducted "to the end that the evidence of criminality may be considered." If the evidence be sufficient, the court shall certify to the Secretary of State that a "warrant may issue for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

The decided cases indicate that an extradition which does not conform to the above procedure is void.[63] It is thus doubtful whether the Treaty can be strictly enforced without first amending Section 5270 so as to allow an extradition predicated exclusively on an executive determination. As it now stands, the law requires that the U.S. State Department, to which a request for extradition has been forwarded by the Philippine Ministery of Foreign Affairs, shall endorse said request to the Department of Justice which in turn shall have to commence extradition proceedings before the proper court. There is consequently a critical diminution of the prerogative given to the political department under the Treaty. It is safe to presume however, that whatever checks are embodied in the present federal procedure will have, soon or late, to be removed by amendment in conformity to the clear intendment of the Treaty.[64]

Another point of related significance is that while Art. 9 of the Treaty provides that the request for rendition shall be made through the diplomatic channels, i.e., the political department, the same must be accompanied by a warrant of arrest issued by a julicial authority of the Requesting State

[63] Villareal, et al. v. Hammond, Marshal, 74 F. 2d 505 (1934).

[64] It has been maintained that where the fugitive raises the defense of the doctrine of political offense and thereby questions the jurisdiction of the court, he has the remedy of certiorari should he be ordered extradited. On the other hand, if he is ordered extradited by the Secretary of State himself, he can obtain his release via a writ of Habeas Corpus. Santiago, *Procedural Aspects of the Political Offense Doctrine*, 51 PHIL. L. J. (1976).

and such other documents and statements establishing that a probable cause exists that the person sought to be surrendered committed the offense described and that the offense falls within the scope of the Treaty.[65] Where the fugitive has already been convicted of an extraditable offense, the formal requirements are different.[66]

The *prima facie* case requirement is, to be sure, commendable. It "obviates (the) many dangers in extradition proceedings." But this is true only for ordinary offenses, in respect to which the interests of the party-states and that of the international order call for a careful appreciation of the evidence. In *Gluckaman v. Henkel* Justice Holmes held that:

> while a man is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender.[67]

Where the fugitive raises the defense that the offense he committed is political in character, the *prima facie* case requirement is hardly a guarantee of good faith on the part of one or both of the parties to the extradition agreement.

> The cases uniformly hold that the right to decide whether or not the offense 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 exercse of this function, it has been stressed repeatedly, is a right but not a duty of the asylum state.[68]

Again policy considerations enter here. In one case, the court ruled that in the exercise of its discretion the state can extradite a person even for an offense which was not included in the enumeration of extraditable crimes.[69]

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[65] Art. 9 (2): The request for extradition shall be accompanied by:
(a) documents, statements, or other evidence which describe the identity and probable location of the person sought;
(b) statement of facts of the case, including, if possible, the time and location of the crime;
(c) the provisions of the law describing the essential elements and the designation of the offense for which extradition is requested;
(d) the provisions of the law describng the punishment for the offense; and
(e) the provisions of the law describing any time limit on the prosecution or the execution of punishment.

Art. 9 (4): In addition to those items referred to in paragraph 2, a request for extradition relating to a convicted person shall be accompanied by:
(a) a copy of the judgment of conviction; and
(b) evidence proving that the person sought is the person to whom the conviction refers.

[66] SHEARER, *op. cit. supra*, note 6 at 163.

[67] 221 U.S. 508, 512 (1911).

[68] Santiago, *op. cit.*, note 64 at 24.

[69] *Extradition* (Germany and Italy) *Case*, 5 Ann. Dig. 270 as digested in Santiago. *id.*, 243.

The discussion foregoing clearly shows that a political fugitive cannot seek umbrage within the sheer language of the Extradition Treaty. For one, the language is too imprecise. It cannot forestall a calculated attempt to circumvent its exclusions. For another, even if the language could be made more definite—an unlikely thought in view of the very nature of political offenses—even a politically motivated decision by the Executive Authority to extradite a person who by the evidence presented ought clearly to be entitled to political asylum, may not be interferred with by the judicial authority lest it infringes upon an exclusive domain of the political branch of government.

*Extradition and the Right of Political Asylum*

The proposition was raised at the outset that the right of political asylum is a precept of international law. The realization that even such settled standards as constitutional due process invoked within the framework of municipal law fall short of the need to immune political offenders from "overriding foreign policy considerations" compels the search for guarantees in the domain of international law. However, it must be stressed that a precept of international law relative to the right is important not because it provides a precise test for characterization, as in fact it does not. Even if there be a multilateral treaty or convention on political asylum, the conundrum of characterization would still beg for an answer. Its importance consists rather, in providing a legal basis for a global machinery where the political fugitive can secure an effective legal remedy.[70]

The positivist school would limit the sources of precepts of international law to what are enumerated in Article 38 of the Charter if the International Court of Justice, to wit:

(1) treaty law;

(2) international custom, as evidence of a general practice accepted as law; and

(3) general principles of law recognized by civilized nations.

There is, as yet, no international convention with the binding effect of treaty law on the right of political asylum. This fact alone discounts any pretense to any bindingness founded on positive law.[71] Neither is there an international customary rule as there is no observable uniformity in the practice of states relative to the said right. Evans, for example, states that, depending upon the circumstances of the case, asylum may or may not be granted upon any or any combination of three possible

[70] The proposition assumes that the human individual is a subject of international law, or if not, is possessed with some, but not all, of the attributes of international legal personality. The validity of such a premise is however, not the focus of inquiry of this paper.

[71] DROST, *op. cit. supra,* note 1 at 44.

grounds: humanitarianism, foreign policy, and domestic policy.[72] It is even less tenable to assign the right the status of a general principle of international law recognized by civilized nations since it is impossible to deduce a "sufficient consensus of general principle from legal systems so varied as the civil law with its multifarious European, Latin American and other variants, the common law with its variants, Hindu law, Jewish law, Chinese law, etc. to give us the basic foundations of a universal system of international law."[73]

The search for a legal predicate must perforce, proceed from the apprehension of the non-exclusive character of Article 38 of the Statute. Ashamoa argues, in this connection, that the United Nations General Assembly resolutions and recommendations are a peculiar species of customary law because, while they represent collective acts relative to a specific matter, the *opinio juris sive necessitatis* needed to give them the impress of law may be established at an abbreviated period of time.[74] Magallona, on the other hand, states that resolutions of the General Assembly are "authoritative interpretations" of the Charter of the United Nations—authoritative in the sense that the Charter empowers the Assembly to make recommendations on matters "within the scope" of the Charter, which scope, not being a "rigid fixity", is determined by the Assembly at "each particular point of time in relation to the specificity of the problem at hand."[75]

Another theory which deserves some mention is that of Hudson. He maintains that when the Assembly passes a resolution, the concurrence of a state is made in two capacities: as a member state and as one contributing to the *voluntas* of the Assembly, i.e., "an act of authorship which must be attributed to the organization as a corporate body and not to individual consenting members nor to the members collectively."[76] Resolutions, Hudson concludes, are as binding as law.

Whichever approach is used, the conclusion is that the various United Nations resolutions on human rights, particularly the Universal Declaration of Human Rights, Article 14 of which defines the right of political asylum, operate as a limitation to the power to extradite. Concededly, their enforce-

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[72] Evans, *Reflections Upon the Political Offender in International Practice*, 57 AM. J. INT'L L. (1963).

[73] BISHOP, *op. cit. supra*, note 52 at 42.

[74] Ashamoa, *The Legal Significance of the Declaration of the General Assembly of the United Nations*, 46-62 (1966).

[75] Magallona, *Some Remarks on the Legal Character of United Nations General Assembly Resolutions*, 5 PHIL. YRBK INT'L L. 84 (1976).

Parenthetically, if as Magallona suggests, resolutions are authoritative interpretatons of a legally binding instrument, i.e., the Charter, the former must also be regarded as legally binding. That being an unavoidable conclusion, how can it be reconciled with the fact that member-states usually vote on a resolution with the express understanding that it shall operate only as a guideline or standard?

[76] Skubiszewski, *Enactment of Law By International Organizations*, 66 BRIT. YRBK INT'L L. 198 (1965).

ment is as much a problem as it has been for all other precepts of international law. For legal compulsion in international law is not the same as in municipal law. Nevertheless, the desideratum is the establishment of a supranational system of sanctions overriding even pretenses to absolute state sovereignty. Should a preeminent machinery be established in the distant future, possessing such powers as will enable it to block and acquire exclusive jurisdiction over all requests for extradition wherever they may originate, such a comprehensive global structure will not be wanting in legality to justify its existence.

*Conclusion*

The right of political asylum is certainly one of the foremost of individual human rights. It proceeds from the principle that a state where the political offender has sought refuge from a repressive and censorious rule in his home state, has the obligation to protect him, not to deliver him back to where he might be silenced and persecuted. The premise is so divorced from any political consideration that it can be said that the United Nations resolutions which sought to give the right legal significance were impelled by an objective concern for human rights. It is thus often the result that extradition agreements entered by states with egregious records in human rights are visited, at the outset, with suspicion. The dilemma, as the foregoing discussion has shown, consists in the fact that states do have the right to enter into any kind of agreement with other states. That is the essence of sovereignty. Moreover, there can be no denial of any state's right of self-preservation. In essence therefore, the conflict between the power to extradite and the right of political asylum goes to the very heart of the conflict between authority and liberty. Experience has shown that where the protagonists in the conflict are left alone to settle their differences, it is always authority which prevails. Indeed, the conflict is largely a question of power. And unbridled power lends itself to abuse.

The R.P.-U.S. Extradition Treaty must be viewed in this light. Extradition, being an executive prerogative, the Treaty must be examined to find out where in its legal language is there the possibility that human rights will be repressed. What is involved, as the foregoing discussion has shown, is more than just a legal analysis of the document or an evaluation of the social and political factors. It involves both. But the inquiry should not stop there. The only acceptable approach to the problem of human rights, particularly the right of political asylum, is upon the premise that only legally binding precepts ought to be used to control an exercise of sovereign power that pretends too, to be based on law. Though the enforcement of human rights is at an incipient stage, such fact should not prevent

attempts to establish a theoretical framework under which human rights can be treated as proceeding from rules that bind states in the same manner that domestic law binds its subjects. This is an important step. For the Extradition Treaty and the circumstances under which it came about have cast a tenebrous shadow upon the fate of human rights in this part of the globe.