THE R.P.-U.S. EXTRADITION TREATY: A BALANCING OF INTERESTS

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> "And what is a conqueror? Have not you too, gone about the earth like an evil genius, blasting the fair fruits of peace and industry; plundering, ravaging, killing without law, without justice, merely to satisfy an insatiable lust for dominion? All that I have done to a single district with a hundred followers, you have done to whole nations with a hundred thousand. If I have stripped individuals, you have ruined kings and princes. If I have burned a few hamlets, you have desolated the most flourishing kingdoms and cities of the earth. What is then the difference, but that as you were born a king and I a private man, you have been able to become a mightier robber than I?"
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> John Aikin in *Alexander the Great and a Thracian Robber* [1]

It is difficult to imagine legal problems more perplexing and formidable than those associated with the law governing matters of extradition.

The concepts of state sovereignty and territorial integrity are so deeply ingrained and a nation's jurisdiction over its nationals so jealously and strongly claimed that divergent views and opinions on extradition become inevitable whenever issues on extradition are considered.

Extradition Defined

Extradition involves a citizen or national of one country who has committed a crime and has fled to another country to escape the authority of his own state.

In *Terlinden v. Ames*,[2] extradition was 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 the other, which being competent to try and punish him, demand the surrender."

Chancellor Kent in the New York case of *In re: Washburn*[3] defined it as "the law and the usage of nations, resting on the plainest principles of justice and public utility to deliver up offenders charged with felony

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1 Cited in BARTLETT'S FAMILIAR QUOTATIONS 6 (1961).

2 184 U.S. 270 (1902).

3 4 John. Ch., 8 Am. Dec. 548 (1819).

and other high crimes and fleeing from the country in which the crime was committtd, into a friendly jurisdiction."

Moore, writing on the subject characterizes it as "the delivery by a state of a person accused or convicted of a crime, to another state within whose territorial jurisdiction, actual or constructive, it was committed and which asks for his surrender with a view to execute justice."[4]

Issues revolving around extradition have become more than matters of academic or scholarly discussions because pending ratification by the Patasang Pambansa today is an extradition treaty between the Republic of the Philippines and the United States of America.

The purely legal issues are difficult enough. Because political considerations are inextricably intermeshed with the legal issues, the problems become truly herculean.[5]

Necessity for a Treaty

The first issue that comes to mind is the necessity for the proposed treaty. Was it at all necessary to conclude the treaty? Is it necessary that it become effective through ratification?

Legally speaking, there can be no obligation to extradite in the absence of a treaty.[6]

In *Factor v. Laubenheimer*[7] it was ruled that "the principles of international law recognize no right to extradition aside from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under a moral duty to do so, . . . the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty."

Fenwick[8] opines that "since the effective jurisdiction of a state is strictly limited to its territorial boundaries, the punishment of fugitive criminals is dependent in most cases upon the willingness of the State of refuge to apprehend the criminal and return him to the State in which the crime was committed. . . . So strictly is the territorial integrity of States construed that under no circumstances whatsoever may one State

[4] Cited in BISHOP, INTERNATIONAL LAW 471 (1962) Hereinafter referred to as BISHOP. Harvard Research in the draft Convention on Extradition defines it as "the formal surrender of a person by a State to another State for prosecution or punishmene" 29 Am. J. Int'l. L. 123 (1935).

[5] See Bassiouni, *International Extradition in American Practice and World Public Order*, 26 TENN. L.R. 1 (1968).

[6] STOCKTON, OUTLINES OF INTERNATIONAL LAW 189-190 (1914).

[7] 290 U.S. 276 (1933).

[8] FENWICK, CASES ON INTERNATIONAL LAW 448 (1951).

exercise the slightest act of jurisdiction within the territory of another without its express permission."

The concepts of State sovereignty and territorial integrity are obviously well-accepted principles for without such an assumption, the whole fabric of international law will fall.[9] Extradition is essentially by its nature an intrusion into the territorial integrity of another State: a delimitation of the sovereign power of a state in its territory. With this in mind, extradition therefore cannot co-exist with State sovereignty and territorial integrity unless precisely, there is a waiver on the part of the asylum state, for the latter to forego some of its exercise if sovereign jurisdiction. Extradition, in order to be effected must therefore be based on agreement between the States.

In *Chandler v. United States,*[10] the petitioner was brought back from Germany, where he made pro-Nazi broadcasts back to the U.S. Chandler claimed that his extradition violated the right of asylum guaranteed by international law to political offenders. The Court held that "in the absence of a treaty, a State may, without violating any recognized international obligation decline to surrender to a demanding State of a fugitive offender against the laws of the latter." The right of the State is to voluntarily offer asylum, not that of the fugitive to insist upon it.

It is obvious that the principle of sovereignty and territorial integrity are universally without exception accepted by all nations. In fact, disagreement with the universality of such doctrines is unthinkable since such disagreement would be anathema to the very idea of statehood. Thus, extradition which in effect is a derogation of the exercise of these powers, then must be available only with consent or acquiescence.

The United States has occasionally obtained the extradition of fugitives despite the absence of a treaty, as an act of comity. In 1934, Turkish authorities removed Samuel Insull from a Greek vessel in Turkish waters and surrendered him to the United States though there was at the time no extradition treaty in force between the two countries.[11]

The whole idea of international comity, so often mentioned by publicists as the basis of extradition means in actuality nothing more than the agreement of States to help each other in some or many ways as the case may be. Friendship among nations is necessarily based on mutual consent and agreement.

There are those who may argue that based on certain international conventions such as the UN Chapter and the Universal Declaration of Hu-

[9] I OPPENHEIM, INTERNATIONAL LAW: A TREATISE 362-369 (1912).
[10] 171 F. 2d 921 (1948).
[11] United States v. Insull, 8 F. Supp. 310 (1934).

man Rights certain rights are guaranteed to individuals everywhere.[12] While such conventions may necessarily constitute international customary law on the matter and certain respects may influence the process of extradition, we must also remember that these international conventions are primarily the product of agreement, of treaties among and between a group of nations. Thus, the concept of mutuality of agreement is still present and hangs over their heads in their various activities.

From the foregoing what becomes clear is that extradition as a remedy or a power is not a permissive but a prohibitory one; that there is international customary law on the matter; that it consists of delimiting the existence or possibility of extradition only in the cases where there is mutuality of agreement or consent between nations. Otherwise, where there is no such implied or expressed consent (usually the latter) the process is a derogation of the concept of sovereignty and cannot exist.

Which brings us to the next question. Was it necessary to negotiate and conclude the treaty at this particular time and considering the continuing political crisis even after the lifting of martial law?[13]

Non-Political?

Solicitor-General Estelito P. Mendoza who negotiated the proposed treaty for the Philippines has sought to assuage fears that the treaty is directed at particular individuals or specific groups.[14] He called these fears "erroneous speculations." Mendoza stressed that "indeed the treaty is no more than a positive manifestation of the policy of the Philippines to cooperate in the effort of the international community to repress crime." He stated that "the enforcement of penal laws cannot be effective unless States have the capability to apprehend, prosecute and punish those who violate these laws . . . (and) such a capability can only be developed with the cooperation of States."

Newly appointed U.S. Ambassador to the Philippines Michael H. Armacost by categorically stating that it is not intended for political offences, attempted to calm misgivings on the purpose of the treaty.[15]

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[12] Gutierrez, H., *Human Rights an Overview,* NEW CONSTITUTION AND HUMAN RIGHTS 1 (1978).

[13] The political opposition, especially those based in the United States have been vocal against the treaty. In a speech before the Association of Criminal Lawyers in New Orleans, former Senator Benigno Aquino, Jr. expressed fears of extradition proceedings against him and other opposition leaders. See VE FORUM, Oct. 21-23, 1981, p. 1, col. 1.

[14] Bulletin Today, Jan. 29, 1982, p. 1 cols. 5-6, January 30, 1982, p. 1, cols. 5-8; Times Journal, Jan. 29, 1982, p. 1, col. 2. Jan. 30, 1982, p. 1. See also Times Journal, Feb. 4, 1982, p. 1, col. 4 where Solicitor-General Mendoza stated that offenses which are the subject of convictions by military tribunals are not extraditable.

[15] Times Journal, May 6, 1982, p. 1, col. 6.

The Philippines asserts that the pact is intended for common criminals especially economic saboteurs who malverse or swindle funds in the hundred millions and flee to the United States to enjoy their ill-gotten wealth.[16]

Solicitor-General Estelito P. Mendoza, head of the Philippine panel that negotiated the treaty puts it thus:

> "Is it good national or international policy to allow an individual to escape punishment for a crime by simply leaving the country? Why should an individual who steals millions of pesos or commits murder be able to escape punishment simply because he can afford to travel and a poor individual who commits theft sent to jail because he cannot afford to travel?" [17]

The present negotiators may have been thus motivated. However, long before the American sanctuary became an incentive for the commission of economic crimes by corrupt public officers and crooked businessmen, the use of an extradition treaty to reach out to opposition leaders and rebels using the United States as a base or at least to frighten them into minimizing their activities was desired.[18]

There were no determined efforts on record during the thirty-six years since independence in 1946 to negotiate and conclude a treaty of extradition with the United States. Yet now, one is being rushed during a time of grave economic and political crisis characterized by a growing atmosphere and spirit of dissent. There was practically no hope for such a treaty during President Jimmy Carter's administration because of his well propagandized campaign for human rights.[19] Only with the coming into power of President Ronald Reagan did success in negotiating a treaty become a distinct possibility. The opposition and rebel groups in the United States became possible sources of leaders with a national following.[20] President Reagan was not only a conservative at heart, dedicated to stamping out criminality and disturbances to public order, he was also determined to stamp out the threats posed by foreign opposition groups to governments of countries wherein Americans had considerable financial interests.[21]

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16 Bulletin Today, Feb. 6, 1982, p. 1, col. 3, (Press Statement of Foreign Minister Carlos P. Romulo).

17 Interview in OBSERVER, Feb. 28, 1982, p. 34.

18 See Bataclan, *An Analysis of the Philippine-Indonesian Extradition Treaty*, 54 PHIL. L. J. 63 (1979). See note 13, *supra* and compare with observations of Solicitor-General Mendoza, note 17, *supra*. See also Batasan Committee on Foreign Affairs Meeting Transcripts (Jan. 28, 1982) for the debate on the various issues involved in the treaty.

19 See *Human Rights: The Challenge is Enormous* (Speech by US Deputy Sec. of State Warren Christopher before the American Bar Association, reprint issued by US-ICA); *Human Rights: An Idea Whose Time Has Come* (Speech by Zbigniew Brzenzinski before the Trilateral Commission in 1977, reprint by US-ICA). See also Gutierrez, H., note 12, *supra*.

20 See SCHIRMER, THE REAGAN ADMINISTRATION AND THE NEW THREAT OF US MILITARY INTERVENTION 2 (1981).

21 See Barret, *The White House Sensitivity Gap*, TIME Feb. 1, 1982, p. 7; Russel, *To Save El Salvador* TIME Feb. 15, 1982, pp. 6-9; Russel, *Keeping the Options Open* TIME Mar. 1, 1982, pp. 16-17.

Lopsided Benefits

Common to all extradition treaties are the principles of reciprocity and mutuality.

And yet, it must be admitted that the benefits to be derived from the proposed extradition treaty are distinctly lopsided in favor of the Philippines.

The favorite destination of Filipinos running away from prosecution—whether the crime committed is political or civil—is the United States. Invariably, there are relatives and friends who make problems of adjustment practically nil. Facility with the English language, familiarity with the American way of life, and the ease with which suitable employment may be found make the United States the logical choice to hide from Philippine justice.

Furthermore, there is a growing tendency in American courts to realign with positions connected with the protection of human rights.[22] Two recent cases illustrate this. In *Filartiga v. Pena-Irala*[23] the defendant Paraguayan Inspector- General of Police was held liable by the U.S. Court of Appeals for the death by torture in Asuncion, of Joelito Filartiga. Chile in the other case of *Letelier v. Republic of Chile*[24] was held liable for torture inflicted upon civilians. In a suit for money damages for the death of Orlando Letelier and Ronni Moffit at the hands of DINA (chilean Secret Police) agents, the U.S. Court applied the Foreign Sovereign Immunities Act[25] which has been increasingly used or relied upon for human rights protection.

To Filipinos contemplating a crime and surveying the place of refuge, the human rights orientation of American courts and decades of fighting for civil rights made the coddling of perpetrators of crime appear to be a legal virtue. In the 1974 case of *U.S. v. Toscanino*,[26] the defendant drug smuggler who was spirited out of Bolivia with the help of INTERPOL was ordered released when the court found out that his arrest was made through misrepresentation by U.S. Narcotics agents.[27] A treaty to overcome the above became a necessity from the viewpoint of the Philippine government.

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22 Gutierrez, H., note 12, *supra*.
23 19 Int. Leg. Mat. 966 (1980).
24 19 Int. Leg. Mat 1418 (1980).
25 15 Int. Leg. Mat. 1388 (1976).
26 500 F. 2d 267 (1974).
27 Compare with Ker v. Illinois 119 U.S. 436, 30 L. Ed. 421 (1886) which opined that the requesting state may recourse to illegal abduction which does not affect the jurisdiction of the requesting state to try the person abducted for the crime he was charged. Israel later on relied heavily on this American pronouncement to justify its rights to try Adolf Eichmann for Nazi war crimes. Eichmann was kidnapped in Argentina by Israeli agents and flown to Israel for trial [See INBAU and SOWLE, CRIMINAL JUSTICE 1012 (1960)].

There are no statistics on the number of Americans who escape to the Philippines to avoid prosecution in their country. But it appears safe to state that there are only very few or perhaps none at all. Absent a treaty of extradition, there is no legal obligation for any country to surrender a fugitive from another nation's justice. And yet, considering the influence wielded by the American government and the irresistibility of extra-legal pressures it can apply, the Philippines would probably voluntarily surrender a fugitive from American justice or even use the near plenary deportation powers of the Executive under Section 68 of the Revised Administrative Code should the "undesirable" American resort to the courts to prevent his return. The extradition treaty is essential to Philippine efforts to catch Filipino fugitives. The same is not necessarily true for the United States.

There are other reasons.

It would be a violation of egalitarian principles and of social justice if the rich and influential persons guilty of serious offenses can find permanent refuge in the United States while the poor and ignorant charged for lesser or lighter offenses always remain to face trial.

International terrorism is on the rise.[28] Facility of international travel and easy movement across state boundaries require extradition treaties as crime deterrents.[29] The attractions of a foreign sanctuary encourage the commission of crimes of the nature usually committed by those for whom the proposed treaty is intended.[30]

Coverage

Article 2 of the proposed treaty defines the extraditable offenses as those referred to or described in the appended list and punishable under the laws of both contracting parties. Even if not so listed, an offense is extraditable if punishable under the Federal laws of the United States and the laws of the Republic of the Philippines.[31]

There are two ways of approaching the issue of coverage.

One is to have general coverage. All offenses would be extraditable except those specifically excluded. Another is to limit extraditable offenses to those specified. Anything not listed is excluded.

The treaty opts for the second type of coverage. The listing of 42 crimes in the appended schedule of offenses may appear impressive. Actually, the

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28 Interview with Robert A. Fearey, US News and World Report, Sept. 29, 1975.
29 Refer to SCHWARZENBURGER, POWER POLITICS 208 (1975).
30 Hannay, *International Terrorism and the Political Offence Exception to Extradition* 18 Columbia J. Trnst'l L. 381 (1980).
31 For a good discussion on the double criminality doctrine, refer to Hudson, *The Factor Case and Double Criminality in Extradition,* INTERNATIONAL LAW IN THE TWENTIETH CENTURY 364 (1969).

more specific is the listing, the more are the possible exceptions to extraditable offenses.[32]

Political Offense Doctrine

Article 3 of the proposed treaty specifically excludes political and military offenses from its coverage. In her dissertation on *Political Offenses in International Law*, Dr. Miriam Defensor-Santiago cites Lawrence[33] as authority for the declaration that the political offense doctrine is the most important and yet the most difficult of the conditions to be found in most modern extradition treaties.

Historically, extradition treaties were evolved precisely for political offenses. Dr. Defensor-Santiago cites the treaty between Rameses II of Egypt and Hattershilish III of the Hittites signed in 1280 B.C. and "witnessed by the thousand gods" as intended for the extradition of the "great men of the land" or the political offenders.[34] Threats to the Crown of one state posed by political offenders hiding in a neighboring state could be eliminated in the absence of extradition only by going to war or by invading the sanctuary state to apprehend or destroy the threats to the Crown. Extradition for political crimes was in the interest of peace and friendly relations among States. This practice continued during the period of the Greek city-states, the Roman Empire and up to the 14th century which saw France and Savoy concluding a treaty calling for the surrender of political offenders. Santiago speculates on the reasons behind such practice and comes up with the conclusions that "firstly" the importance attached to political crime compared with ordinary crime by a loosely policed society and "secondly" the absence of the diplomatic and judicial machinery making extradition an easy and normal proceeding."[35] A deeper reason according to her was that the political theories of the period had little place for the right of revolution, implying that sovereigns were not overly much concerned with democratic ideals. And of course, common criminals were sufficiently punished in those days by exile itself and their absence was hardly to be lamented.

The shift towards the doctrine apparently occurred during the 18th century as a by-product of the revolt spawned by the ideas of the French Revolution against despotism and absolutism and buttressed by the libertarian ideas of Locke and Mill. While it is unclear, according to Santiago which country first prohibited the extradition of political criminals, apparently, according to her, it started in 1801 when Napoleon castigated the Senate of Hamburg when it delivered to Britain, three Irishmen involved

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[32] Bataclan, note 18, *supra*, discusses in depth the various problems arising from different types of coverage including the so-called Monteviedo type of treaty coverage.

[33] DEFENSOR-SANTIAGO, POLITICAL OFFENCES IN INTERNATIONAL LAW V (Preface), Hereinafter referred to as SANTIAGO.

[34] *Id.* at 4.

[35] *Id.* at 9.

in the rebellion of 1798. From this, it picked up until finally Oppenheim could say that the "principle has conquered the world" [under the aegis of Great Britain, Switzerland, Belgium, France and the United States according to Santiago.][36]

Apparently, the chief motivation that led publicists to conclude that the practice has evolved into international custom is that "practically all treaties of extradition make exception of offenses of a political character."[37] This is also espoused by Santiago when she cites the case of Belgium and the U.S. (1901), of the treaty signed between Great Britain and the U.S. (1889) as well as other agreements ostensibly entered into by states that exempts offenses of a political character.[38]

In *Giletti v. Commissioner of Immigration*[39] the court said that "the development of extradition has evolved the principle that there may be no international extradition for political crimes and offenses." *Re: Ezeta*[40] opined that in keeping with this tenet of international law, most extradition treaties expressly provide that they do not apply to charges of political crimes."

The leading case in the political offence doctrine is *Re: Castioni*.[41] Castioni during a demonstration in Ticino, Switzerland which saw the seizing of an arsenal shot one Luigi Rossi who refused the mentrance into the municipal palace. Escaping to England, his extradition was sought by Switzerland on a charge of wilful murder. Discharging Castioni the English court formulated the now famous doctrine that an offence is political if it is incidental to and forms a part of political disturbances.

The ruling in Castioni has in recent years been reinforced by the case of Peter McMullen. McMullen was a member of the Provisional Wing of the Irish Republican Army who in 1970 bombed the Belfast Palace Barracks. Fleeing to the United States on forged documents, England sought his extradition in 1978. The magistrate denied extradition in 1978. The magistrate denied extradition on the political offense exception saying "the political offense crime must be incidental to or formed as part of a political disturbances and committed as furthering a political uprising. Even though the offense be deplorable and heinous the criminal actor will be excluded from deportation if the crime is committed under these prerequisites."[42]

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[36] *Id.* at 11-16.
[37] *Supra*, note 8 at 450.
[38] SANTIAGO, at 17-44.
[39] 35 F. 2d 687 (1929).
[40] 62 F. 972 (1894).
[41] 1 Q.B. 149 (1891) Citcd in SANTIAGO at 81-90.
[42] *Supra*, note 30. Hannay takes the position that *Castioni* has been made obsolete by the rise of international terrorism and would advocate the removal of the political offence doctrine.

Most writers are now agreed that an extradition treaty concluded in general terms would not cover political criminals.[43]

Nevertheless, it is well and good that the proposed treaty specifically excludes political offenders in this manner:[44]

ARTICLE 3

Political and Military Offenses

(1) Extradition shall not be granted if the offense for which it is requested is a political offense or is connected with a political offense. Nor shall extradition be granted if there are substantial grounds for believing that the request for extradition has, in fact, been made with a view to try or punish the person sought for such an offense. If any question arises as to the application of this paragraph, it shall be the responsibility of the Executive Authority of the Requested State to decide.

(2) For the purpose of this Treaty, the following offenses shall not be deemed to be the offenses within the meaning of paragraph (1):

(a) the murder or other wilful crime against the life or physical integrity of a Head of State or Head of Government of one of the Contracting Parties or of a member of his family;

(b) an offense with respect to which either Contracting Party has the obligation to prosecute or extradite by reason of a multilateral international agreement.

(3) Extradition also shall not be granted for military offenses which are not punishable under non-military penal legislation. It shall be the responsibility of the Executive Authorities of the Contracting Parties to decide any question arising under this paragraph.

There are certain questions which cast doubt on the wisdom of assuming that this matter of exclusion is already a principle of international law, and does not have to be expressly included in the treaty. Firstly, the mere fact that the Western countries, notably those identified with one global political bloc have adopted the principle does not necessarily mean that it has been accepted by the rest of the States of the world. Indeed the experience if the United States, Britain and Belgium cannot serve as representatively certain of the global attitude on the matter. Nor does its unique characteristic of having evolved in these Western countries only in the 18th and 19th centuries help the case. It is noteworthy that prior to this period, the "doctrine" as opined by those that hold that there is such a principle, is that it covered precisely only "political crimes".

Secondly, the mere fact that "most extradition treaties expressly provide that they do not apply to charges of political crimes" should already have put us on guard. That it has to be the constant provision means that it has not yet been universally accepted as automatically applicable and

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[43] See Deere, *Political Offences in the Law and Practice of Extradition*, 27 Am. J. Int'l. L. 247 (1933); Garcia-Mora, *Present Status of Political Offences in the Law of Extradition and Asylum* 14 V. of Pitt. L. Rev. 371 (1953).

[44] R.P.-U.S. Extradition Treaty, Art. 3.

precisely there is need to completely emphasize such stipulations in the formation of modern day agreements.

And finally, as earlier stated, there is not obligation to extradite in the absence of a treaty. By this token, a treaty of extradition is strictly and restrictively interpreted. It has no implied or hidden terms.

Defensor-Santiago states that there is no universally accepted definition of a political offense and that even the most comprehensive definition could not include the variety of circumstances which the courts of different countries, with their differing ideas of public order would regard as falling within the conception of a political offense.[45]

Dr. Defensor-Santiago cites the case of *Re Giovanni Gatti*[46] for the classic definition of a pure political offense. The Republic of San Marino requested Flance for the extradition of Gatti, a San Marino national who had been convicted by default for attempted homicide in that he fired repeatedly at a member of a communist cell. Gatti challenged the extradition by contending that the motive for the offense was incontestably political.

Ruling that motive alone did not give a common crime the character of a political offense, the French court defined the term as follows:

> Political offences are those which injure the political organism, which are directed against the constitution of the Government and against sovereignty, which trouble the order established by the fundamental laws of the state and disturb the distribution of powers. Acts which aim at overthrowing or modifying the organization 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 mechanism 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 of its elements, are also political offences. In brief, what distinguishes the political crime from the common crime is the fact that the former only affects the political organization of the state, the proper rights of the state, while the latter exclusively affects rights other than those of the state. The fact that the reasons of sentiment which prompted the offender to

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[45] SANTIAGO at 176. In this jurisdiction, it has been defined in People v. Hernandez 99 PHIL 515 (1956) thus:

> Political crimes are those directly aimed against the political order, as well as such common crimes as may be committed to achieve a political purpose. The decisive factor is the intent or the motive. If a crime, usually regarded as common, like homicide, is perpetrated for the purpose of removing from the allegiance "to the government of the territory of the Philippines . . . or any part thereof," then the offense becomes stripped of its "common" complexion, inasmuch as, being part and parcel of the crime of rebellion, the former acquires the political character of the latter...
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> Thus, ... international laws and jurisprudence overwhelmingly favor the proposition that common crimes, perpetrated in furtherance of a political offense, are *divested* of their character as "common" offenses and assume the political complexion of the main crime of which they are mere ingredients...."

[46] 14 Ann. Dig. 145 (Court of Appeals of Grenoble Chambre des Mises en Accusation, France 1947). Cited in SANTIAGO at 62.

> commit the offence belong to the realm of politics does not itself create a political offence. The offence does not derive its political character from the motive of the offender but from the nature of the rights its injuries. The reasons on which non-extradition is based do not permit the taking into account of mere motives for the purpose of attributing to a common crime the character of a political offence.

Defensor-Santiago cites another case — *Re Fabijan*[47] — where the object of extradition, together with three companions, created a disturbance in front of the carabineri barracks at a district occupied by Italian troops. When a soldier appeared, Fabijan began to throw stones at the building but ran away at the first warning shot. Later, he stabbed to death a policeman who tried to arrest him. Fabijan fled to Germany.

Defensor-Santiago reports:

> The Supreme Court held that the offence was not political and that extradition should be allowed. It took note that Belgium laid down the principle of non-extradition for political offences in an extradition law in 1833. Many countries incorporated the Belgian principle into their extradition treaties verbatim, or with insignificant variations; Germany was one of these countries. The court said that what the Belgian legislature understood by the term 'political offence' is to be ascertained from the Belgian public and criminal law of the time. The term is to be understood in an 'objective' sense. Using the term not in the legal sense but as it is understood in politics, the legislature meant essentially high treason, capital treason, acts against the external security of the state, rebellion, and incitement to civil war.
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> It was considered that an offence against the state, especially when it took the form of an armed uprising against the existing state authority, ought to embrace other acts attending it and contributory crime in themselves, in particular offences against life and property, as well as offences respecting the person and liberty of the individual. An offence against the state must actually exist.
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> The connection exists if another offence, in itself an ordinary offence, stands in a particular relation to this principal fact. A purely external connection — identity of time, place, occasion, or person — is not alone enough; what is required is a conscious and deliberate relation of cause and effect. Since both acts of the accused were directed only against individual organs of the state and not against the central political authority, they were not political offences. Proof of political motive did not make an act a connected act when there was no concrete political act.

Extradition, however, is no longer limited to pure political offenses. The concept of relative political offenses has evolved.

Relative Political Offences

The drafters of the proposed treaty triel to remedy the problem of definition by not limiting the exclusionary provision to pure "political offenses." The treaty expressly mentions offenses that are "connected with

[47] Ann. Dig. 360 (Supreme Court, Germany 1933). Cited in SANTIAGO at 63.

a political offense." Not content, the drafters also added that extradition shall not be granted "if there are substantial grounds for believing that the request for extradition has, in fact, been made with a view to try or punish the person sought for such an offense."

The drafters have made clear what is intended to be covered insofar as political offenses are concerned. The inclusion of relative political offenses, however, has not made the matter of definition and interpretation any simpler. Any attempt to define political offense or any crime for that matter in the relative sense could be a well nigh insuperable task.[48]

Santiago's example — a conspiracy to blow up buildings with dynamite,[49] regardless of the innocent lives sacrificed, unconnected with military operations but intended to coerce the government into granting the demands of the party to which the conspirators belonged — was written years before the "Light-a-Fire Movement" and other terrorist conspiracies started active operations in the Philippines. She states that the definition of the relative political offense is the very core of the Gordian Knot.[50] The major portion of her book is dedicated to this task of exploring how courts all over the world have tried to unravel what looks to be hopelessly tangled skein of legal thought, what specific approaches have been used, and the three main approaches utilized — (1) the Anglo-American political incidence approach; (2) the Franco-Belgian political objective approach; and (3) the Swiss predominant motivation approach.

Defensor-Santiago writes:[51]

> A study of the decisions reveals that they are animated by several motives. One is consideration of foreign policy strategy, especially when the extradition request points to an individual who plays a major role in the home country, i.e., he is capable of inciting far-reaching changes in the prevailing political set-up. Another is the desire for self-preservation and survival, which in unstable governmental systems gives rise to an uncompromising application of the political offence doctrine in order to maintain a supranational power cabal such as exists in Latin America.
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> Apart from the motivation of domestic tribunals, another pressure point is the interaction between the doctrine and the sentiment of the times. While before, public sympathy extended first strongly to the political contestant with a realistic chance to succeed, now it has spread to the non-political fugitive fleeing a politically motivated persecution in a totalitarian state. Yet, it is doubtful whether we can say that the doctrine now protects the member of a national liberation movement who commits political offence doctrine and the political objectives of power holders, of the prevailing political ecology is no easy thing to pinpoint.

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[48] Evans, *Reflections Upon the Political Offender in International Practice*, 57 Am. J. Int'l. L. 1 (1963), which discusses the right of the Refugee State to determine nature of the offense. See also Deere, note 43, *Supra*.

[49] SANTIAGO at 90 discussing the case of Re Meunier, 2 Q.B. 45 (1894).

[50] *Id.*, at 77.

[51] *Id.*, at 77-78.

> In sum, because of the basic and intimate relationship between the political offence doctrine and the political objectives of power holders, the search for an authoritative definition of relative political offences can only go so far as to trace the rapid shifts of asylum patterns. But a full study of the jurisdiction in this field is still fruitful for the light it casts on the approaches of the decision makers and the fate of political offenders.
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> Judicial control assumed a different role in the Anglo-American systems. Instead of making the judicial function purely advisory, legislation has had the effect of making judicial determination conclusive as to refusal to extradition and advisory as to concession. Where the Court rules that extradition is admissible, the executive may refuse surrender if for any reason it sees fit to do so. Where however, extradition is ruled inadmissible the executive is bound by the determination. cf. US Extradition Statute of 1948.
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> Not only does this system give adequate opportunity to the fugitive to contest his extradition before the ordinary courts, but in effect gives him a further opportunity of making representations to the executive in the event of a judicial determination adverse to him. This may be of special significance to the case of political offences.

The various approaches and theories are amply illustrated by decisions of courts of different nationalities. Precedents can be found.[52]

Executive v. Judicial Determination

The fundamental principle of the law of extradition states that a fugitive who surrendered cannot be tried for offenses not included in the treaty or described in the extradition proceedings. The principle begs the question of who determines what are included in the treaty and described in the proceedings. Who makes the definition?

The proposed R.P.-U.S. extradition treaty follows the unavoidable rule that it is receiving state, the asylum state, which determines whether or not an offense is politically motivated.[53]

Should the definition of an offense be a purely executive function or should it be left to courts of justice in the receiving state?

The proposed treaty clearly provides that "if any question arises as to the application of this paragraph (on Political and Military offenses), it shall be the responsibility of the Executive Authority of the Requested State to decide.[54] The article on Extraordinary or Ad Hoc tribunals also provides that "it shall be the responsibility of the Executive Authorities of the Contracting Parties to decide any question arising under this Article.[55] The more difficult questions are eft to executive determination.

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[52] Ornelas v. Ruiz 161 U.S. 502 (1896); Karadzole v. Artukovic 247 F. 2d 198 (1954); Galliva v. Fraser, 177 F. Supp. 856 (1959); Ramos v. Diaz, 179 F. Supp. (1959); In Re Castioni, *supra;* In Re Meunier, *supra,* Regina v. Governor of Brixton Prison 1 All. E. R. 31 (1955).

[53] See SHEARER, EXTRADITION IN INTERNATIONAL LAW 197 (1971).

[54] *Supra,* note 44.

[55] *Id.,* Art. 6.

It may be argued that because of the principle of reciprocity, the executive authorities of either the Philippines or the United States would not be too free with the wide spectrum of possible definitions of relative political offense or in ascertaining political motive and intent. But as explained earlier and at least for the present and the near future, the bulk of extradition requests would be one way from the Philippines to the United States. Filipinos naturalized as American citizens in the United States are a docile and peace loving lot with no signs of interest in anti-American political activity. In fact, political activity is directed against the Philippines, not against their newly acquired country.

The sad experience of the Philippines in the negotiations for the R.P.-U.S. Military Bases Agreements highlights the ineluctable fact that determinations made by American executive officials are primarily if not wholly based on what is good for the interests of the United States. The determining factors are not judicial precedents, special relations, sentimental ties, nor even the harsh realities of the current situation. Thus, Clark Field and Subic Naval Base are for "mutual defense" even if their use for Philippine defense purposes is of minimal if not negative value. Far from protecting the Philippines against foreign invaders, the bases serve as rallying points for subversives and constitute ever present invitations to nuclear attacks on Philippine soil. Compensation for the use of the bases is termed "foreign aid": it cannot be "rentals" because the bases are ostensibly as much for Philippine defense as they are for American security.

The fact that few Americans wanted for political offenses in the United States flee for asylum to the Philippines will give the executive and political authorities of the United States greater leeway in determining the adequacy of evidence to support a request for extradition or in ascertaining political motives behind the commission of what appears to be a common crime.

Unpredictable fluctuations in American foreign and domestic policy make executive determinations of essentially legal or judicial questions equally unpredictable. The crusade of President Jimmy Carter for human rights in many countries susceptible to American influence or pressure has been replaced by President Ronald Reagan's support for erstwhile proscribed regimes. The odds are in favor of conceivably other future fluctuations, shifts, and directions.

From the viewpoint of the United States as a *requesting* State, the same observations would apply although here the principle of reciprocity would apply fully. For fear that American authorities would tighten the screws on Philippine requests for extradition, and for other foreign and military aid, Philippine executive authorities would only be too glad to hand over what few misguided Americans would choose our country for political asylum. Besides, the Philippines does not have a tradition of offering haven to foreign criminals, including those cloaking their crimes with

the mantle of revolution or political motives. We are hospitable people but we are wary of violently inclined quests.

The Philippine history of prosecution for offenses has not been entirely free from biases, preferences, susceptibility to money and influence, and other unfortunate considerations.

The special court, Sandiganbayan, constituted for crimes committed by public officers or in relation to public office has jurisdiction only over such informations as the Tanodbayan chooses to file. No less than Presiding Justice Manuel Pamaran of the Sandiganbayan has formally concluded that only the small fry are prosecuted, the big fish remain free. His observation was satisfactorily refuted on the basis of the facts of that particular case.[56] However, who can dispute the fact that only clerks and other minor officials regularly appear in the television sentencing by the Sandiganbayan? The same kind of uneven treatment may be experienced in extradition proceedings unless a more certain and objective determination of the terms of the treaty is assured.

In fact, even the Philippine judiciary is not entirely free when it comes to political requests for the handing over of alien offienders to their own governments. A Philippine judicial system easily abolished through a reorganization act would not be too technical or squeamish in ascertaining political motive. A newly reorganized court system may have the same orientations and inborn prejudices as executive authorities.[57]

More important, the proposed treaty should not be concluded and ratified in terms of what is currently and temporarily expedient.

When Bandits Become Heroes

The proponents of any extradition treaty anywhere in the world may become the future objects of requests for extradition based on their own handiwork. What would be an offense to those in power may become a heroic or patriotic act should the group committing those offenses succeed in taking over political power. The determination of what is a political offense, a relative political offense, and a politically motivated offense should be left to the discretion of the authority least susceptible to change and fluctuating standards.

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[56] See Cortes, *Redress of Grievances and the Philippine Ombudsman (Tanodbayan)*, 57 PHIL. L. J. 1 (1982) for a discussion on the problems confronting the local ombudsman's office.

[57] For a fuller treatment of the Judiciary Reorganization Act, see Gutierrez, D., *The Judiciary Reorganization Act: A Question of Necessity*, 56 PHIL. L.J. 327 (1981). Hereinafter referred to as GUTIERREZ, D. See also De La Llana v. Alba, G.R. No. 57383, March 12, 1982 which upheld the constitutionality of the act.

The Need for Judicial Determination

With all their limitations, the courts of both the Philippines and the United States are the ideal authorities for this difficult determination. There is authority for this view. According to Shearer:[58]

> Judicial control assumed a different role in the Anglo-American systems. Instead of making the judicial function purely advisory, legislation has had the effect of making judicial determination conclusive as to refusal to extradition and advisory as to concession. Where the Court rules that extradition is admissble, the executive may refuse surrender if for any reason it sees fit to do so. Where however, extradition is ruled inadmissible the executive is bound by the determination. cf. U.S. Extradition Statute of 1948.
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> Not only does ths system give adequate opportunity to the fugitive to contest his extradition before the ordinary courts, but in effect gives him a further opportunity of making representations to the executive in the event of a judicial determination adverse to him. This may be of special significance to the case of political offenses.

The availability of a judicial hearing has however been delimited by jurisprudence. In *United States ex. rel. Lo Pizzo v. Mathues*[59] the Court opined that "it is not necessary in extradition proceedings that the evidence against the respondent be such as to convince the committing judge or magistrate of his guilt beyond a reasonable doubt, but only such as to afford reasonable ground to believe that the accused is guilty of the offense charged.

Collins v. Miller,[60] held that the proceeding before a committing magistrate in international extradition is not subject to correction by appeal.

The above rulings do not however deprive the accused of all legal remedies. He still has a right to petition the courts for a writ of habeas corpus, in order that the legal aspects of his detention and commitment may be considered and possibly resolved in his favor.[61]

Habeas corpus of course cannot take the place of an appeal but as enunciated in *Fernandez v. Philipps*,[62] it permits questions on jurisdiction, whether the offense charged was within the treaty and whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.

Speciality Rule

Under what is known as the principle of "speciality", treaties and court decisions usually prevent trial for any offense other than that for which the extradition was granted, unless committed after the extradition.[63]

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58 *Supra*, note 53 at 199.

59 36 F. 2d 565 (1929).

60 252 U.S. 364 (1920). See also the opinion of Chief Justice Marshall in U.S. v. Burr, cited in Note, 31 Mich. L.R. 554 (1933).

61 BISHOP at 474 citing 4 HACKWORTH INTERNATIONAL LAW 174 (1962).

62 268 U.S. 311 (1925). See also Benson v. McMahon, 127 U.S. 457 (1888); MacNamara v. Henkel, 226 U.S. 520 (1913); Collins v. Johnston, 237 U.S. 502 (1915).

63 BISHOP at 474-475.

In *United States v. Rauscher*,[64] the defendant was a mate of the ship J. F. Chapman, who assaulted and killed a crewmember Jaunsen by inflicting cruel and unusual punishment. Escaping to England, he was surrendered to U.S. authorities under the 1842 Webster-Ashburton Treaty. Rauscher was not tried for murder in the U.S. but for a minor offense not included in the treaty of extradition. The Court ordering his release said that he was only triable for the crime charged in the extradition request as only this would be keeping good faith with the country that surrendered him.

This rule has been reiterated in Article 15 of the proposed treaty. It reads:

> ARTICLE 15
> *Rule of Speciality*
>
> (1) A person extradited under the Treaty shall not be detained, tried or punished in the territory of the Requesting State for an offense other than that for which extradition has been granted, nor be extradited by that State to a third State, unless:
>
> (a) that person leaves the territory of the Requesting State after his extradition and voluntarily returns to it; or
>
> (b) he does not leave the territory of the Requesting State within 30 days after being free to do so; or
>
> (c) The Executive Authority of the Requested State consents to that person's detention, trial, or punishment for another offense, or to extradition to a third State. For purposes of this subparagraph, the Requested State may require the submission of the documents mentioned in Article 9 and/or the written views of the extradited person with respect to the offense concerned.
>
> These conditions shall not apply to offenses committed after the extradition.
>
> (2) If the offense for which the person was extradited is legally altered in the course of proceedings, that person may be prosecuted or sentenced provided:
>
> (a) the offense under its new legal description is based on the same set of facts contained in the extradition request and its supporting documents; and
>
> (b) any sentence imposed does not exceed that provided for the offense for which that person was extradited.

The exceptions as specified above leave to much leeway or loopholes that may be utilized to circumvent the rule. Aside from the fact that means of travel are usnally controlled by the requesting State, the giving of almost carte blanche puwers to the Executive Authority of the Requested State negates this principle, subjecting the accused to fall prey to changes in political whims.

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[64] 119 U.S. 407 (1886).

In the recent case of *Ficconi v. Attorney General*, the U.S. Court of Appeals held that the doctrine of speciality was not a right which can be claimed by the individual who is the object of the extradition proceeding. It opined that such was merely a doctrine of convenience between States.[65]

The Ultimate Guarantee

The proposed treaty has various provisions on what the requesting state may not do to the extradited person. An example would be Article 17 on the surrender of articles, instruments, objects and documents.

Ultimately however, the only guarantees apart from the well-developed guarantees of the due process clause in the two countries' almost identical protections of their Bills of Rights, are the mutual respect each State has for the other and the desire that the provision on denunciation and termination of the treaty should never be utilized.

Equally important and perhaps more crucial in a sense would be the level of human rights protection available in the States-Parties jurisdictions. This is not the time and place to make judgments on the relative state of affairs but suffice it to say that despite protestations to the contrary, the human rights records of both countries leave much to be desired.[66]

Conclusions

We have before us today, an extradition treaty, quite similar to most of its kind in the world, and yet due to the convergence of social and political circumstances, of a grave national economic and political crisis, may well play a crucially different role.

The difficulty of delimiting the political offence doctrine finds special relevance now that there are various opposition groups which are based in the United States. Compounding the problem is despite protestations to the contrary, one gets the feeling that these groups are a major reason for the treaty.[67] Noteworthy is the tact followed by Philippine authorities as regards these rebel groups or at least their leaders. Opposition leaders as the facts of the various court cases now pending show, are at times not charged with crimes involving national security, oftentimes they are charged

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[65] 464 F. 2d 475 (1972).

[66] A good, comprehensive and balanced discussion on the relative state of human rights in the Philppines is found in Quisumbing and Bonifacio (eds.), HUMAN RIGHTS IN THE PHILIPPINES: AN UNASSEMBLED SYMPOSIUM (1977). See also Ferrer, et al., *Supreme Court Record on Human Rights Under Martial Law*, 55 Phil. L.J. 247 (1980), and Casila, et al., *The State of Political Detainees: Philippine Setting* 54 Phil. L.J. 497 (1979).

[67] Kapunan, *A Final Move To Silence the Opposition*, WHO Magazine, Oct. 10, 1981, p. 39. The danger becomes greater when one pauses to consider two U.S. decisions that saw political considerations override other factors in extradition. These are Ramos v. Diaz 179 F. Supp. 459 (1959), which dealt with Anti-Castro Cubans; and Jimenez v. Aristequieta, involving the former President of Venezuela, which was cited in Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 HARV. INT'L. L.J. 61, 74 (1979).

with common crimes like kidnapping, murder, illegal possession of firearms, etc. Thus the political offence doctrine would find hard application, since what then constitutes a political crime?

Perhaps the only possible way out is to have judicial determinations or hearings at both stages of the extradition request. While courts are of course not immune to political blandishments, they are the only agencies in the history of both the United States and the Philippines that have to a certain degree maintained a modicum of fairness, impartiality and justice as opposed to the other political organs of government.[68]

In view of the uncertainties of these problems, the disparate character of the persons in the administration and opposition, and the need not to add potentially explosive increments to the already intolerable burdens of a restless citizenry, we look to the courts since they are the only agency today that can provide a legal, orderly and just resolution to the problems spawned.[69]

The power of judicial review includes the legitimating function. Acts of government, especially in times of disunity and turmoil must be accepted as valid and legitimate. Only the courts can somehow state with authority that actions detested and deplored by some are authorized and legitimate. The people are the final judges of what is valid and what will be obeyed, but in our system of government, it is the judiciary which has the sensitive task of bringing about an acceptance of even that which might be otherwise resented.[70]

The dilemma before us today is essentially one of balancing of interests. There are no doubts as to the benefits to be obtained from an extradition treaty with the U.S. This is so specially as regards the efforts to punish those involved in such financial anomalies as Cebu Highways, Teachers' Camp, and recently Dewey Dee scandals.[71]

But the facility gained in the prosecution of these malefactors would have to be weighed in balance with the possibility that as it stands now, the extradition treaty may well be utilized as an instrument of political repressesion especially against Filipino dissenters in the United States.

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[68] This is essentially true despite the fact that the credibility of the Philippine judicial system, especially the Supreme Court was tarnished with the recent 1981 Bar examinations scandal, that saw the resignation of the entire Supreme Court.

[69] GUTIERREZ, D., at 352.

[70] *Ibid.*

[71] *Supra,* note 17. See also Marasigan. *Extradition,* V PHIL. YRBK. INT'L. L. 114 (1976). He was a member of the Philippine negotiating panel for the Indonesian extradition treaty who stated in the above article that:

> "The suppression of crime can no longer be the concern of only that State where the crime is committed; it is the concern of all, as the welfare of civilized communities demand that crimes should not go unpunished. Crimes are not merely an infraction of a command which particular so-

There is need therefore for constant vigilance in seeing to it that the latter does not overcome the former; that the rosy state of human rights protection so glowingly described by authorities of both countries become the reality of the present.

In the final analysis, the Philippines did not have too much bargaining power in the negotiations which led to the proposed treaty. The Philippines' desire and need for an extradition treaty was specific, clear and compelling. The Americans were apparently receptive because of a well founded fear of international terrorism and liberation movements where American interests were the usual targets.

We may criticize certain provisions but a pragmatic or realistic approach should lead us to be thankful that we have gotten at least so much. It is easier to iron out the kinks, to amend an existing treaty and fashion it to one's real needs than to get the treaty in the first place.

Indeed, as an old Zulu saying goes: "Something always dies when the lion feeds and yet afterwards, there is meat for those that follow him."[72]

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ciety chooses to give, they sap the foundations of social life, they are an outrage upon humanity at large, and all human beings therefore ought to contribute to repress them..."

[72] SMITH, WHEN THE LION FEEDS 294 (1964).