

# NON-EXTRADITION OF NATIONALS

## A Review and a Proposal<sup>\*</sup>

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Few, if any, articles appear more uniformly in international extradition treaties than those which relieve a State from a duty to extradite a criminal who is one of its own nationals. The provision takes two forms. In one it is provided that nationals of the requested party may not be surrendered. In the other it is provided that the contracting parties "shall be under no obligation" to surrender their own nationals. The former (which is more common) thus presents an absolute bar to the extradition of a State's own nationals, while the latter is usually regarded as allowing a discretion to the requested State to grant or refuse a request for the extradition of one of its own nationals.<sup>1</sup> The effect of the absolute prohibition in the case of States whose law does not provide generally for the punishment of crimes committed extraterritorially is to render a criminal immune from process for no reason other than accident of birth. The same effect, more often than not, arises also from the discretionary form of the exception of nationals, since States are generally unwilling to exercise their discretion in favour of extradition except upon guarantee of reciprocity by the other party in a future case. Moreover, even in those States where the law provides generally for the prosecution and punishment of crimes committed abroad, the criminal may stand in a privileged position by virtue of his remoteness from the sources of evidence against him.

When in other areas of international co-operation States are being increasingly inspired by supranational ideals, and when the tendency is becoming more apparent to treat individuals as well as States as being subject to rights and duties under international law, the non-extradition of nationals takes on a growingly "reactionary" aspect. A re-evaluation of the practice seems to be timely.

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1. However, the United States courts have interpreted this provision as an absolute bar. See further *infra*, 288ff.

The history of the practice of non-extradition of nationals can be shortly summarized.<sup>2</sup> The roots of the practice go back to ancient times. We are told that the Greek city states did not extradite their own citizens, and that the Italian cities observed the same custom.<sup>3</sup> Roman citizens were not normally surrendered to foreign States.<sup>4</sup> In these times extradition was more a matter of grace than of obligation and was only exceptionally formalized in a treaty.<sup>5</sup> Moreover, conditions in the ancient world were such that to remove a subject from his own State for punishment in another was tantamount to abandoning him to an unpleasant and probably permanent exile, if not death. It will be suggested later that this ancient practice, as well as more recent treaty practice which appears to be based on similar distrust of standards of justice in foreign countries, is no longer relevant in modern times.

The starting-point of the modern practice of non-extradition of nationals appears to be the policy that governed the extradition relations between the Low Countries and France and which were secured by the enactment of reciprocating municipal ordinances in 1736.<sup>6</sup> Billot ascribes this policy to the Brabantine Bull which was commonly regarded as guaranteeing that the inhabitants of the Low Countries would not be withdrawn from the jurisdiction of their local courts. This explanation would tend to support Nussbaum's assertion that the religious rivalries in Europe at this time were inimical to the idea of extradition, in that it was felt that Catholics would not receive fair treatment at the hands of Protestant courts and vice versa.<sup>7</sup> On the other hand, the Brabantine Bull was issued in 1355 — long before the Reformation — and was extended from Brabant by usage to the Netherlands and later to France.<sup>8</sup> It probably reflected a more general feeling that the citizens of one State or region would be always at a grave disadvantage in securing justice from the courts of another.

2. See further A. Baltatzis: 'La non-extradition des nationaux', 13 *Revue Hellénique de Droit International* (1960), 190; H. Donnedieu de Vabres: *Introduction à l'étude du Droit Pénal International, Essai d'histoire et de critique sur la compétence criminelle dans les rapports avec l'étranger* (1922); Robert W. Rafuse: *The Extradition of Nationals* (1939); Harvard Research in International Law: Extradition (1935), 29 A.J.I.L., Supp. Part I, 123-137.

3. Baltatzis, *op. cit. supra* n. 2, 197.

4. Mommsen: *Römisches Strafrecht* (1899), 108; Sir G. C. Lewis: *Foreign Jurisdiction*, 51n.

5. Baltatzis cites a treaty between Sardes and Ephesus which specifically exempted nationals: *op. cit. supra* n. 2, 197.

6. Billot: *Traité de l'extradition* (1874), 38, 39; Harvard Research, *loc. cit. supra* n. 2, 123.

7. *A Concise History of the Law of Nations* (1947), 208. See also H. Lammasch in F. von Holtzendorff (ed.): *Handbuch des Völkerrechts* (1877) iii, 457, 458.

8. Rafuse: *The Extradition of Nationals* (1939), 75; P. Fiore: *Traité de Droit Pénal International et de l'extradition*, 413.

It may nevertheless be significant that when France and Spain — both predominantly Catholic countries — concluded an extradition treaty in 1765, the extradition of the requested State's own nationals was specifically included.<sup>9</sup> France had also established extradition relations with the Catholic cantons of Switzerland, before these relations were broadened to cover the whole country, which provided at least in part for the surrender of nationals of the requested party.<sup>10</sup>

The first treaty in which an express exemption of nationals appeared was in the treaty of 1834 between France and Belgium. French treaty practice after 1834 uniformly excluded the extradition of the requested State's own nationals.<sup>11</sup> France in a real sense led the world in the matter of extradition and its practice with regard to nationals was widely emulated. Of the total of 128 extradition treaties printed in the League of Nations Treaty Series and the first 400 volumes of the United Nations Treaty Series, 68 except the nationals of the requested State absolutely, 54 give to the requested State a discretionary right to refuse to surrender its nationals, while only 6 provide for extradition regardless of the nationality of the fugitive.<sup>12</sup> It is not suggested here that the extent of the practice is to be explained wholly by the influence of French practice. While that influence must be regarded as significant, it is nonetheless true that the practice has been defended in many countries on practical, juridical and emotional grounds. As recently as 1958 a meeting of the Netherlands Association of Jurists voted overwhelmingly against a proposal to recommend that future Netherlands treaties provide for the extradition of Netherlands nationals to foreign countries.<sup>13</sup>

A preliminary reference should be made to the rule of personal jurisdiction as it affects the question of the extradition by a State of its own nationals. International law recognizes the criminal competence of a State over the acts of foreigners committed on its territory and over the acts of its own nationals committed abroad.<sup>14</sup> Nationality is also a recognized basis for the exercise of civil jurisdiction; the English courts, for example, will enforce a foreign judgment against a defendant who is a subject of the foreign country where the judg-

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9. Billot: *Traité de l'extradition* (1874), 42, 43.

10. See further *infra*, 281, 282.

11. With the exception of the treaties of 1843 with Great Britain and the United States: see further *infra*, 282.

12. See list of treaties in the Appendix, *infra*, 306-308.

13. M. Van Dulleman: 'Uitlevering in de Praktijk', *Nederlands Juristenblad* (1960), 188.

14. Although not in issue, both propositions seem to have been assumed by the Permanent Court in the *Lotus Case*, P.C.I.J. Reps., Ser. A, No. 10. See also the commentary to Article 5 of the Draft Convention on Jurisdiction with Respect to Crime in the Harvard Research in International Law, (1935) 29 A.J.I.L. Supp. Part II, 519 ff.

ment was obtained, even though the defendant may not otherwise have submitted himself to that jurisdiction.<sup>15</sup> The rule of personal jurisdiction in criminal law, while not unknown to Anglo-American law,<sup>16</sup> extends in European and Latin-American systems of law to a much wider range of offences committed by nationals, even to the entire criminal code.<sup>17</sup> Under these systems of law, therefore, the competence to prosecute nationals for all or most serious offences committed abroad, while subject to certain practical difficulties to be discussed later, ensures that application of the rule excluding nationals from extradition will not necessarily result in a complete failure of justice. In a number of treaties the parties in fact expressly undertake to prosecute their own nationals where their extradition has been refused on account of nationality.<sup>18</sup>

Before the considerations commonly advanced in justification of the non-extradition of nationals are criticized, a survey of State practice in the matter, in the legislative and judicial as well as in the treaty-making spheres, should be made in order to bring the *lex lata* into perspective.

### *British and Commonwealth Practice*

The practice of excluding the extradition of one's own nationals has never been favoured officially by Great Britain. Its first treaty was with the United States in 1794 which applied to all persons irrespective of their nationality.<sup>19</sup> So also did the next two treaties with the United States (1842) and with France (1843). That France was willing to conclude a treaty which did not provide for the exclusion of its own nationals is a curiosity for which no complete explanation has been given; at all events, no French subject was ever extradited to Great Britain under this treaty.<sup>20</sup>

Very soon, however, the British Government found other countries insisting on the express exemption of their own nationals; in the three treaties negotiated after 1843 and before 1870 the obligation to extra-

15. Cheshire: *Private International Law* (6th ed. 1961), 648, 649.

16. *Blackmer v. U.S.* (1931), 284 U.S. 421; *The Trial of Earl Russell* [1901] A.C. 446; *Joyce v. D.P.P.* [1946] A.C. 347.

17. The Harvard Research in International Law: Jurisdiction with respect to Crime (1935) 29 A.J.I.L., Supp. Part II, 523, divides national legislation into five categories according to the offences made punishable: (1) all offences; (2) all offences which are also punishable by the *lex loci delicti*; (3) all offences of a certain degree; (4) offences against co-nationals; and (5) certain enumerated offences only.

18. See the Appendix, *infra*, 306-308.

19. In 1779 in the case of *Walsh (alias Robbins)* a claim that the suspect was a citizen of the United States and therefore not liable to surrender to Great Britain was ignored, there being no indication that the treaty excluded the surrender of nationals: 6 *British Digest of International Law*, 683.

20. Billot: *Traité de l'extradition* (1874), 73.

dite was limited to persons other than the subjects of the party on whom the requisition was made.<sup>21</sup>

In 1878 a Royal Commission sat to inquire into all aspects of the law of extradition. Lord Cockburn C.J., who in the previous year had declared in court that the exception of nationals from the treaty with Switzerland was a "blot upon the law",<sup>22</sup> was chairman of the Commission. The arguments in favour of exempting nationals from surrender were succinctly and fairly summarized by the Commission as follows:

1. a subject ought not to be withdrawn from his natural judges;
2. that the State owed its subjects the protection of its laws;
3. that it was impossible to place entire confidence in the justice of a foreign State especially with regard to the subject of another country;
4. that it is a serious disadvantage to a man to be tried in a foreign language, and where he is separated from his friends and his resources, and from those who could bear witness to his previous life and character.

In rejecting the proposal that Great Britain henceforth adopt a similar policy of refusing surrender of British subjects, the Commissioners emphasized the overriding consideration that a person residing in a foreign country owes obedience to its laws in return for its protection. Why, because he had escaped beyond the jurisdiction of that law, should an offender whose surrender is demanded, be in a more favourable position than that in which he would have been in the country from which he escaped?<sup>23</sup>

When a new treaty was negotiated with Switzerland in 1880, the Swiss Government insisted that its own citizens be exempted from surrender to Great Britain. Preferring to waive reciprocity rather than to compromise the principles recommended by the Royal Commission, the British Government agreed to a provision whereby while British subjects would be surrendered to Switzerland, Swiss citizens would not be surrendered to Great Britain but would be prosecuted in Switzerland according to the laws of their canton of origin for offences committed in British territory.<sup>24</sup> Similar unilateral exemptions appear in the treaties with Spain and Luxembourg, but without the undertaking to prosecute.<sup>25</sup>

21. France (1852), 41 B.F.S.P. 20; Denmark (1862), 52 B.F.S.P. 27; Prussia (1864), 54 B.S.F.P. 16. The first and the last of these treaties failed to secure Parliamentary approval and were never brought into force.

22. In *R. v. Wilson* (1877) 3 Q.B.D. 42, 44.

23. Report of the Royal Commission on Extradition, Parliamentary Papers, 1878, vol. 24, Reports etc., 907-917.

24. 71 B.F.S.P. 54.

25. 69 B.F.S.P. 6; 71 B.F.S.P. 48.

The unilateral nature of the nationality clause in the treaty with Switzerland of 1880 drew adverse comment from the Foreign Office in an exchange of correspondence with the Home Office. The two Offices shared the view that it would be desirable in future treaties to secure the right to refuse the surrender of British subjects where no adequate guarantees existed that they would receive a fair trial.<sup>26</sup> In proposing a discretionary (faculative) clause for future treaties, the Home Office expressed doubt that the recommendations of the Royal Commission of 1878 were intended to apply "in dealing with a class of countries essentially different from those with whom we have hitherto concluded extradition treaties". Although nothing in the Royal Commission's Report supports this interpretation, it can at least be said that the adoption of the discretionary formula preserved the position that the British Government remained ready in principle to extradite its own nationals to other States. The discretionary clause was inserted in the treaty with Mexico in 1886, which provided that either State might "in its absolute discretion refuse to deliver up its own subjects" to the other party.<sup>27</sup> With minor changes of wording, this formula has found its place in twenty-seven out of forty-four extradition treaties currently in force between Great Britain and other States.<sup>28</sup>

It is evident that the provisions of the supplementary treaty with Belgium in 1887 were similarly intended to import a discretion, since they replaced the absolute exclusion clause of the treaty of 1876. The new provision read: "In no case, nor on any consideration whatever, shall the High Contracting Parties be bound to surrender their own subjects, whether by birth or naturalization."<sup>29</sup> This provision was held to be quite different from one which exempted the extradition of the parties' own nationals entirely, and that a British subject might be surrendered to Belgium notwithstanding that the Government was under no obligation to do so.<sup>30</sup> This view must be contrasted with that of the United States Supreme Court which has held otherwise in respect of similar provisions appearing in the treaties of the United States with other countries.<sup>31</sup> It has also been held that where the

26. 6 *British Digest of International Law*, 685-687.

27. 77 B.F.S.P. 1253. This was also the effect of the treaty with Austria (1873), Art. III, which provided: 'In no case and on no grounds whatever shall the High Contracting Parties be held to concede the extradition of their own subjects.'

28. Albania (1926); Argentina (1889); Austria (1963); Belgium (1901); Bolivia (1892); Chile (1897); Colombia (1888); Cuba (1904); Czechoslovakia (1924); Finland (1924); France (1908); Hungary (1873); Iraq (1932); Israel (1960); Liberia (1892); Mexico (1886); Monaco (1891); Netherlands (1898); Panama (1906); Paraguay (1908); Peru (1904); Poland (1932); Roumania (1893); San Marino (1899); Sweden (1963); Thailand (1911); Yugoslavia (1901).

29. 78 B.F.S.P. 757.

30. *Re Gahwey* (1896) 1 Q.B. 230, distinguishing *R. v. Wilson* (1877) 3 Q.B.D. 42.

31. *U.S. v. Valentine ex rel. Neidecker*, *infra* 290, 291.

treaty provides for discretionary surrender of nationals, the discretion is exercisable by the Executive only and is not a question cognizable by the courts.<sup>32</sup>

Despite the formal adoption of principles disfavouring the outright prohibition against the extradition of nationals after 1878, seven treaties containing absolute exclusion clauses presently in force were concluded after that date.<sup>33</sup> The explanation for this apparent inconsistency in practice is that the other parties in negotiations would not accept a discretionary clause and insisted on the absolute exception of nationals. Executive policy having rejected, after the treaty with Switzerland, the non-reciprocal formula, there remained no alternative but to accept the terms of the other parties.<sup>34</sup> It is to be noted, however, that in one case consideration was given to the proposal that an absolute exception clause be insisted upon by the British negotiators, since in this case wide dissatisfaction existed with the current standards of justice prevailing in the territory of the other party. It was rightly pointed out, on the other hand, that it would hardly be proper to countenance in such circumstances the surrender of nationals of third States, and thus for a time the negotiations were suspended. These scruples were apparently overcome six years later (or perhaps conditions in the other country had improved) for negotiations were resumed on the basis of a standard discretionary nationality clause. This proposal finally gave way to an absolute exception clause since it appeared that the municipal law of the other party absolutely forbade the surrender of its nationals; in these circumstances a discretionary clause would have been in practice necessarily one-sided.<sup>35</sup>

British treaties with the United States (1931)<sup>36</sup> and Israel (1960)<sup>37</sup> contain no provision relating to nationality and thus, according to a settled rule of interpretation, apply to all persons irrespective of nationality. British courts have never countenanced the argument that

32. *Re Galwey* (1896) 1 Q.B. 230. An Australian decision to the same effect is *R. v. McDonald ex parte Strutt* (1901) Q.L.J. 85.

33. Ecuador (1880); El Salvador (1881); Uruguay (1884); Guatemala (1885); Portugal (1892); Nicaragua (1905); and Greece (1910). The unilateral type of exclusive clause has already been noted in discussion of the treaties with Spain (1878), Luxembourg (1880), and Switzerland (1880). Treaties negotiated before 1878 containing an absolute exclusion clause and still in force are: Italy (1873), Denmark (1873) (to which Iceland later became a separate contracting party by state succession), Norway (1873), and Haiti (1874).

34. See, e.g., the comments concerning the treaty with Portugal (1892): 6 *British Digest of International Law*, 691, 692.

35. *Id.*, 692, 693 (correspondence respecting a treaty of extradition with Greece, 1904-1910).

36. 163 L.N.T.S. 59.

37. 377 U.N.T.S. 331.

the non-extradition of nationals is a customary rule of international law and ought therefore to be implied in the treaties. In the case of *Bennet G. Burley*, where a British subject in the service of the Confederate States during the American Civil War escaped to Canada after participating in an abortive attempt to free prisoners from Johnson Island in Lake Erie, Richards J. of the Toronto Practice Court said:

"Whatever may be considered to have been the general rule in relation to a Government surrendering its own subjects to a foreign Government, I cannot say that I have any doubt, that under the Treaty and our own Statute, a British subject who is in other respects brought within the law, cannot legally demand that he ought not to be surrendered merely because he is a natural-born subject of Her Majesty."<sup>38</sup>

What has been said of the practice of Great Britain in respect of its nationals applies equally to the countries of the Commonwealth of Nations. Member countries of the Commonwealth, and former members, have either continued in force the Imperial Extradition Act 1870 or have substantially re-enacted it. Moreover, these States have, in general, acknowledged their succession to British treaties. Thus it can be affirmed that the laws of Australia, Burma, Canada, Ceylon, Gambia, Ghana, India, Israel, Jamaica, Kenya, Malawi, Malaysia, Malta, New Zealand, Nigeria, Pakistan, Rhodesia, Sierra Leone, South Africa, Tanzania, Trinidad and Tobago, Uganda and Zambia, together with those of Great Britain, do not reject in principle the extradition of their own citizens to foreign countries. Despite the obvious fact that this policy was spawned from the one source, such a widespread readiness in principle to surrender nationals cannot but weaken the claim that non-extradition of nationals is a customary rule of international law. The only exception in Commonwealth practice is Cyprus, whose Constitution forbids the expulsion of any Cypriot citizen. This provision (the reasons for which will be clear to anyone familiar with the communal problems of the island) was interpreted in 1961 by the Supreme Constitutional Court of Cyprus as preventing even the surrender of a Cypriot to Great Britain under the Fugitive Offenders Act 1881.<sup>39</sup>

38. 60 B.F.S.P. 1241, 1261. The British Government entered into lengthy correspondence with the United States regarding *Burley*, not to dispute United States jurisdiction, but merely to ensure that the United States was intending to prosecute him only in respect of the offence for which extradition had been ordered by the Canadian court, *i.e.* theft, and not for the more serious (and capital) crime of piracy: *ibid.*, 1241, 1273, 1274.

39. *Re Attorney-General and Andreas C. Afamis* (1960-1961) 1 Reports of the Supreme Constitutional Court of Cyprus, 121. This case involved a conflict between the Constitution and municipal law only. With regard to treaty extradition, where nationals are not excepted in the applicable treaty, a conflict between the Constitution and international obligations will arise for resolution.

*European Practice*

According to Moore, the European rule of non-extradition by a State of its own nationals was first established "by the merest accident."<sup>40</sup> The accident to which he refers is the extension by usage of the provisions of the Brabantine Bull to the whole of the Netherlands and the subsequent incorporation of the practice in the reciprocal arrangements implemented by France and the Netherlands in 1763.

This interpretation must be challenged. In the first place, as has been noted above,<sup>41</sup> French treaty practice did not absolutely exclude the extradition of its own nationals until 1834, and even then the treaties of 1843 with Great Britain and the United States departed from the rule. Secondly, the arrangement of 1763 between France and the Netherlands was not a treaty but merely reciprocating municipal legislation which took into account certain religious and historical factors relating to that geographic area. Indeed, the same religious factors applied to much of Europe. Thirdly, French treaty practice between 1765 and 1834 demonstrated a flexible approach to the question of nationals in extradition which reflected a wide variety of political and practical considerations.

For example, in 1765 France concluded an extradition treaty with Spain which specifically applied to nationals of both Parties as of third States.<sup>42</sup> In the same year France and Wurtemberg signed a treaty which made no special provision in respect of the Parties' own nationals.<sup>43</sup> In 1777 France and the Helvetic League agreed that each Party would not extradite its own nationals except for a crime *grave et public*.<sup>44</sup> A clause in similar language was inserted in the treaty with Basle of 1780.<sup>45</sup> In a supplementary treaty with Basle in 1781 it was agreed that in respect of crimes committed within three leagues of the frontier of the two States the Parties would surrender their own nationals for minor crimes (such as simple theft), but in the case of other crimes (presumably falling short of the crimes *grave et public* for which special provision had already been made in the treaty of 1780) the treaty imposed an obligation on the parties to carry out the judgment of the court of the *locus delicti*, whether that judgment was given *contradictoire* (that is, in the presence of the accused) or *par contumace* (by contumacy).<sup>46</sup> A further noteworthy feature of this treaty was that in the case of crimes calling for capital punish-

40. Moore: *Extradition*, i, 153.

41. *Supra*, 275.

42. Convention of 29 September 1765; Billot: *Traité de l'extradition* (1874), 42.

43. Martens: *Recueil de traités* (2e. ed.) i, 310.

44. *Id.*, ii, 507, Art. XV.

45. *Id.*, iii, 327, Art. XI.

46. *Id.*, iii, 376, Arts. I, II.

ment (including capital offences) the courts of the *locus delicti* were to institute and carry the criminal proceedings to the point of judgment, whereupon the case was to be transferred to the courts of the State of refuge where the "natural judges" of the accused would pronounce sentence according to the local laws and ordinances.

These treaties supply ample evidence to suggest the France in the late eighteenth century was applying no doctrinaire approach towards the question of extradition of nationals; the evidence rather shows that each treaty was negotiated according to the prevailing circumstances and in light of local needs.

In 1811 Napoleon issued a decree<sup>47</sup> by which Frenchmen could be extradited to foreign countries, but it is said that the decree was never executed.<sup>48</sup> Billot argues that extradition of nationals was prohibited by French public law as early as 1788 when the principles were first enunciated by Parliament that later appeared in written form in the Charter of 1814.<sup>49</sup> Whether even the Charter of 1814 should be interpreted as precluding the extradition of nationals is, however, disputable.<sup>50</sup>

French practice cannot be said definitely to have been settled until the Circular of the Minister of Justice prohibited the surrender by France of French nationals in 1841.<sup>51</sup> Even after 1841, as has been noted previously, France negotiated treaties in 1843 with Great Britain and the United States which contained no exemption of nationals, although no French national in fact was ever surrendered under those treaties.<sup>52</sup> From 1844, however, French treaty practice has consistently exempted surrender of its own nationals.<sup>53</sup> The provisions of Article 3(1) of the Extradition Law 1927 lay down the principle that no French subject may be extradited.

The question of who qualifies as a "national" or "subject" or "citizen" of the requested State is in general a question for the law relating to nationality rather than extradition. It has been held in France that, so far as extradition law is concerned, the material point of time

47. Reprinted in Billot: *Traité de l'extradition* (1874), 70, 71.

48. *Id.*, 72.

49. *Id.*, 65. Judge Manton cites a declaration against the extradition of nationals by the Parliament of Paris as early as 1555: 'Extradition of Nationals', (1935-1936) 10 Temple L.Q. 12.

50. Billot: *Traité de l'extradition* (1874), 72; Travers: *Droit Pénal International* (1922) v, 23. Travers records the extradition of a French citizen to Switzerland as late as 1820: *ibid.*, 23, 24.

51. *Circulaire du Ministre de la Justice*, 5 April 1841, ¶ 2; 63 B.F.S.P. 1034.

52. Billot: *Traité de l'extradition* (1874), 73.

53. Convention with Luxembourg, 26 September 1844. The treaties with Liberia (1897), Great Britain (1908) and the United States (1909), provided that either party might refuse to surrender its own nationals, thus keeping open the principle favoured by Anglo-American law while at the same time allowing France to pursue its opposite policy.

at which this question is relevant is the time of the commission of the offence and not of the actual request for surrender. A fugitive who became a naturalized French subject in 1950 was accordingly extradited to Italy from France since the crime of which he stood accused had been committed in 1945.<sup>54</sup> As a matter of statute and treaty construction in this case, it might appear that the prohibition was directed at the delivery as such, and that it was this point of time which ought to have been regarded as decisive.<sup>55</sup> At all events, international treaty practice has tended towards specific regulation of the questions arising out of change of nationality in extradition, and in particular towards providing that the acquisition of the nationality of the requested State after the commission of the offence for which a requisition has been made shall be no bar to extradition.<sup>56</sup>

In Germany the rule has been stated by the Federal Supreme Court to be "based on the idea that the home State should not lend its assistance so as to enable another State to exercise jurisdiction over its nationals when that State is unable to do so in exercise of its own unaided power".<sup>57</sup> This statement is said to reflect the German legal principle of *Treupflicht* – that the State has a special duty to extend its protection to all its subjects, and that applied in the field of extradition this principle requires the non-extradition of German nationals.<sup>58</sup> It has been held at least twice by German courts, on the other hand, that this prohibition does not extend to the "re-extradition" of a German national, that is, where a German national is under trial or sentence in a foreign country which delivers him up to Germany for proceedings there subject to the understanding that he will be returned later to that foreign country.<sup>59</sup>

The absolute prohibition laid by German municipal law on the extradition of German nationals contained in the Basic Law of the Federal Republic<sup>60</sup> has a long legislative history dating back to

54. *In re A.* (1951) 18 I.L.R. 324 (Court of Appeal of Aix).

55. Cf. the decision of the Swiss Federal High Court in *Re Del Porto* (1931-1932) 6 Annual Digest, Case No. 167. See also Article 6 of the European Convention on Extradition, *infra*, 286.

56. See, however, Article 6(c) of the European Convention on Extradition, *infra*, 286.

57. *Extradition of German Nationals Case* (1954) 23 I.L.R. 232.

58. Heinrich Meyer: *Die Einlieferung* (1953), 73: 'Decisive, however, against the extradition of nationals (*Inländer*) is the old German legal principle of faith-duty (*Treupflicht*) between State and citizen, on which is based Article 16 II (1) of the Basic Law. The State has the duty to extend to its citizens protection in every measure, especially legal protection.' (Author's translation.) See also the reasons given in 1889 in defence of the German practice of non-extradition of nationals reproduced in Moore: *Report on Extradition* (1890), 92.

59. *Extradition of German Nationals Case* (1954) 23 I.L.R. 232; *In Re Utschig* (1931-1932) 6 Annual Digest, Case No. 158.

60. Basic Law of the Federal Republic of Germany, 1949, Art. 16 II; 155 B.F.S.P. 503.

the *Beschluss des Deutschen Bundes* of 1854, which exempted from extradition "a subject of the State called upon to deliver him up".<sup>61</sup> The German Penal Code gives to the German courts jurisdiction to try and punish persons for offences committed abroad provided that they are punishable both by German law and by the law of the *locus delicti*.<sup>62</sup>

Swiss law similarly prohibits the extradition of Swiss nationals and provides for their prosecution in Switzerland for crimes committed abroad.<sup>63</sup>

Belgian law and treaty practice has been clear and consistent since the enactment of reciprocating legislation in respect of France in 1833.<sup>64</sup> That legislation applied only to "foreigners", and the same limitation was expressed in the Extradition Law 1874.<sup>65</sup> Provision is made in Belgian law for the prosecution of a Belgian who has committed an extraditable offence abroad.<sup>66</sup>

The Netherlands extradition laws of 1849 and 1875 both contained the rule of non-extradition of Netherlands nationals.<sup>67</sup> The treaty practice of the Netherlands has consistently excluded nationals from surrender with two early exceptions, neither of which is any longer in force.<sup>68</sup>

Italy appears to have based its exclusion rule mainly on its rule of personal jurisdiction over acts committed abroad. It is significant, as Rafuse points out,<sup>69</sup> that the treaty of 1819 between the Two Sicilies and Sardinia provided that the accused subject of the asylum State should be prosecuted in that State for crimes committed in the terri-

61. Resolution of the Confederation relating to the extradition of criminals in the territory of the German Confederation, 26 January 1954, Art. 1; 51 B.F.S.P. 274.

62. Section 3(1) of the German Criminal Code.

63. Arts. 2, 6 of the Swiss Penal Code; *Kaiser and Attenhofer v. Basle* (1950) 17 I.L.R. 189; *Re Neumann* (1919-1922) 1 Annual Digest, Case No. 188; *Re Del Porto* (1931-1932) 6 Annual Digest, Case No. 167. See also H. Schultz: *Das Schweizerische Auslieferungsrecht* (1953), 487.

64. 52 B.F.S.P. 1033.

65. 66 B.F.S.P. 729.

66. *Code d'Instruction Criminelle* (1878), Art. 8.

67. 66 B.F.S.P. 124. The law did not prohibit expressly the extradition of Netherlands nationals, but this is the necessary implication arising from its application only to 'foreigners'. The Penal Code (1881), Art. 5, provides for the prosecution of a Netherlands national in respect of a crime committed abroad which is a crime by both Dutch law and the law of the *locus delicti*.

68. The treaty with the old South African Republic (1895), 89 B.F.S.P. 487, with which there were ties of kinship; and the treaty with the neighbouring State of Hanover (1817) (Martens: N.R.G., iv, 1), Art. 3 of which made the following interesting provision: subjects of the requested State would be surrendered only for 'serious and horrible' crimes that rendered the miscreant 'unworthy to hope for the protection of his government'. Such persons as 'murderers, those who have committed robbery by breaking in, robbers who make the public highway unsafe, and others of the like' were defined as coming within the category.

69. *The Extradition of Nationals* (1939), 93.

tory of one of the other parties, thus creating a no-nationals rule indirectly. In 1881, however, we find an Italian Government Commission reporting that the rule against the extradition of nationals is required on the ground that Italy "owes protection to its sons, and cannot abandon them to their lot, if charged with crime, to the mercy of foreign law and judges. . . . The national dignity cannot consent that a citizen . . . should be compelled to bow his head in obedience to the commands of a foreign authority".<sup>70</sup> This is a good example of the kind of polemic which Judge Manton has criticized as doing "severe violence to sound standards of law and policy."<sup>71</sup>

The Report of 1881 was followed by an article in the Penal Code of 1889 which forbade the extradition of nationals, and provided for their prosecution in Italy for acts committed abroad.<sup>72</sup> Italian law took a different turn after 1930. The Penal Code of that year enacted that: "Extradition of citizens is not granted unless specifically provided for in international conventions".<sup>73</sup> The supremacy of international treaties over municipal law was not, of course, new to Italian lawyers. The true significance of the new enactment lay rather in the abandonment of a rigid policy of excluding the extradition of nationals; treaties which might provide for such extradition in future would now be consonant with the law and not conspicuous for their contrariety to it. The flexibility thus impliedly extended to the negotiators of extradition treaties resulted in an article of the treaty with Brazil in 1931 which allowed liberty to the two States to refuse to surrender their own subjects only where they themselves were competent to prosecute.<sup>74</sup> In 1946 in an exchange of notes with the United States, the parties agreed "having regard to the present state of Italian legislation . . . to the provisions of Article 1 of the [Extradition Convention of 1868] also being applied, under conditions of reciprocity, to individuals having Italian citizenship".<sup>75</sup> This agreement not only marked a radical departure from previous Italian practice but also brought to an end a long and unhappy chapter in Italian-American relations, during which Italy had consistently refused to extradite its own citizens despite the absence of an exemption clause in the treaty.<sup>76</sup>

70. Cited by Rafuse: *The Extradition of Nationals* (1939), 94.

71. 'Extradition of Nationals', (1935-1936) 10 Temple L.Q. 12.

72. Art. 9; *Re Mastroienni* (1938-1940) 9 Annual Digest, Case No. 145.

73. Art. 13(4).

74. 134 B.F.S.P. 621, Arts. 3, 7.

75. 206 U.N.T.S. 263.

76. Rafuse: *The Extradition of Nationals* (1939), 97-106. A Department of State memorandum concerning the case of *Porter Charlton* acknowledged in 1910 that the United States had in practice ceased to request the surrender of Italian subjects from Italy while not formally acquiescing in the Italian construction of the treaty: (1910) *Foreign Relations* 656.

The European Extradition Convention, signed in 1957 under the auspices of the Council of Europe, attracted the support of 12 States.<sup>77</sup> At the end of 1962, however, only Denmark, Greece, Norway, Sweden and Turkey had ratified the Convention.<sup>78</sup> Article 6 of the Convention provides as follows:

1. (a) A Contracting Party shall have the right to refuse extradition of its nationals.

(b) Each Contracting Party may, by a declaration made at the time of signature or of deposit of its instrument of ratification or accession, define so far as it is concerned the term "nationals" within the meaning of this Convention.

(c) Nationality shall be determined as at the time of the decision concerning extradition. If, however, the person claimed is first recognized as a national of the requested Party during the period between the time of the decision and the time contemplated for the surrender, the requested Party may avail itself of the provision contained in sub-paragraph (a) of this article.

(d) If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the means provided for in Article 12, paragraph 1. The requesting Party shall be informed of the result of its request.

A significant emphasis is evident in the phrasing of the first paragraph of this Article. Unlike the previous draft<sup>79</sup> which read "The requested Party may grant extradition of its nationals if its law so permits", the present Article seems to accept extradition of nationals as the normal practice while permitting a refusal on the ground of nationality. Whether this change was intended as a change of emphasis to reflect more of a spirit of supranationalism, or whether it was to accomplish any more specific object is not clear from the *travaux préparatoires*. It may be doubtful whether the Article, even in its present form, is such a "specific" obligation as would empower the Italian Government, for example, to extradite an Italian national under the Penal Code of 1930.<sup>80</sup>

77. Council of Europe, *European Treaty Series*, No. 24. The following States signed the Convention: Austria, Belgium, Denmark, France, Germany, Greece, Italy, Luxembourg, Netherlands, Norway, Sweden, Turkey. The Convention came into force between Norway, Sweden and Turkey on 8 April 1960.

78. Council of Europe: *European Co-operation in 1962*, 209.

79. Council of Europe, Consultative Assembly, *Documents* 3-4, 8th Session 1956, Doc. 556; G. de Freitas: 'A European Extradition Convention' 41 *Grotius Society Transactions* (1955), 25, 37-39.

80. See *supra* 285.

The second paragraph of this Article was intended to provide certain States with an opportunity to clarify the complicated status of certain of their inhabitants, particularly refugees, so far as concerned extradition to other States.<sup>81</sup> The Swedish Government has made a declaration pursuant to this paragraph, not, however, in the sense envisaged, but in order to include within the term "nationals", in addition to Swedish nationals, "aliens domiciled in Sweden, nationals of Denmark, Finland, Iceland and Norway, as well as aliens domiciled in these States". Van Panhuys characterises this reservation as an outright discrimination between Scandinavians and the nationals of other European countries and as incompatible with the ideal of European co-operation.<sup>82</sup> It should be noted, however, that Sweden is a party to the Nordic Treaty 1962, which urges co-operation between Member States in order to attain "the highest possible degree of juridical equality" of all Scandinavian citizens in their territories.<sup>83</sup>

Among countries of the "Eastern Bloc" of Europe, bilateral treaties have in general provided for the absolute exemption of subjects of the requested State.<sup>84</sup> All treaties of the German Democratic Republic with other Communist States provide for this exemption,<sup>85</sup> which is contained also in Article 10(1) of the Constitution of the Republic. At least one Eastern European writer is of the opinion that the question ought to be reconsidered in any future ordering of extradition relations among countries of this bloc.<sup>86</sup>

### *United States Practice*

The United States, like Great Britain, has traditionally opposed the practice of exempting nationals from extradition. Even the failure of

81. See the remarks of M. Kopf, rapporteur of the Committee which submitted the final draft, in Council of Europe, Consultative Assembly, *Official Report of Debates*, iv, 1185 (37th sitting).

82. 'Uitlevering van eigen onderdanen', 70 *Tijdschrift voor Strafrecht* (1961), 23, 37.

83. Treaty of 1 July 1962, 434 U.N.T.S. 145, Article 2. Denmark has made a similar declaration: 444 U.N.T.S. 348.

84. Roumania-Hungary, 416 U.N.T.S. 199, Art. 58; Roumania-Czechoslovakia, 417 U.N.T.S. 37, Art. 58; Roumania-Bulgaria, 417 U.N.T.S. 133, Art. 56; Poland-Hungary, 432 U.N.T.S. 3, Art. 67; Poland-Czechoslovakia, 436 U.N.T.S. 189, Art. 59; Czechoslovakia-Hungary, 438 U.N.T.S. 3, Art. 65; Roumania-Poland, 468 U.N.T.S. 3, Art. 60; U.S.S.R.-Yugoslavia, 471 U.N.T.S. 195, Art. 59.

85. Hans Fritzsche: 'Die Auslieferungsstraftaten im Verkehr der Deutschen Demokratischen Republik mit den anderen Staaten des Sozialismus', 10 *Staat und Recht* (1961), 1314, 1320. The following treaties of the German Democratic Republic are cited: Albania (Art. 57(a)), Bulgaria (Art. 64(a)), Czechoslovakia (Art. 59(a)), Hungary and Poland (Art. 63(3)), Roumania (Art. 58), U.S.S.R. (Art. 57).

86. Fritzsche, *op. cit. supra* n. 85, 1321n.: 'In my opinion cases are conceivable which would make the extradition of one's own nationals to other socialist countries appear desirable, despite the correctness of the general rule. In these exceptional cases extradition should be limited to the carrying out of the trial, since the purposes of punishment and the readjustment of the convicted person into socialist society will be attained most effectively in his homeland.' (Author's translation.)

the other party to a treaty to accord reciprocal surrender of its own nationals cannot be a ground, according to the American view, for the refusal of the surrender of a United States citizen where the treaty does not give such a right of refusal. The United States Supreme Court has held that the word "persons" in an extradition treaty etymologically includes "citizens" and that, in view of the diplomatic history of the United States, there is no rule of international law by which citizens are exempted from extradition unless such an exemption is made in the treaty itself.<sup>87</sup> During the nineteenth century negotiation of extradition treaties was in several instances broken off by the United States over the insistence by the other side on the inclusion of a no-nationals clause.<sup>88</sup>

While the intransigence of other States often led to United States acquiescence in the discretionary form of exclusion clause, it would not appear that the United States has ever been a party to a treaty which expressly prohibited the extradition of nationals in the common formula.<sup>89</sup> Moreover, the United States was more successful than Great Britain (its fellow crusader in the cause of "no exemption of nationals") in securing the assent of other countries to treaties making no qualifications at all respecting the nationality of the fugitive. Apart from the treaties with Great Britain, treaties with eight other countries between 1843 and 1872 *ex facie* applied to all persons irrespective of nationality.<sup>90</sup> France and Italy did not share this interpretation of the treaties and maintained their restrictive policies.<sup>91</sup> Switzerland, on the other hand, agreed that the treaty compelled it to surrender Swiss citizens to the United States despite the fact that this constituted a departure from ordinary Swiss practice.<sup>92</sup>

The discretionary clause, which has been noted already in British practice, has been the subject of controversy in the United States. Until the matter was finally set at rest by the Supreme Court in 1936 it was highly debatable whether a treaty provision which stated that "neither party shall be bound to surrender its own nationals" gave the Executive any power at all to deliver a United States citizen to a foreign country.

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87. *Charlton v. Kelly* (1913) 229 U.S. 447, 467.

88. For the history of these negotiations see Moore: *Extradition* i, 159ff.

89. However, it has been held that the United States is without power to extradite its subjects where the treaty imposes no obligation on it to do so and no specific power of discretionary surrender: see *infra*, 290, 291.

90. France (1843), Switzerland (1850), Venezuela (1860), Dominican Republic (1867), Italy (1868), Nicaragua (1870), Orange Free State (1871), and Ecuador (1872). The treaties with Italy and Ecuador were still in force in 1965.

91. Moore: *Digest*, iv, 290, 298.

92. *Re Piguet* (1890), 17 *Entscheidungen des Schweizerischen Bundesgerichtes* 85; Moore: *Digest*, iv, 198.

The early history of the discretionary clause in American practice and Executive opinion tends to support the view that the phrase "no obligation to surrender" or similar phrases imported no discretionary power to surrender. The formula first appeared in the treaty with Prussia in 1852:

"... and whereas the laws and constitution of Prussia, and of the other German States, parties to this Convention, forbid them to surrender their own citizens to a foreign jurisdiction, the Government of the United States, *with a view of making the Convention strictly reciprocal*, shall be held *equally free* from any obligation to surrender citizens of the United States."<sup>93</sup>

This provision makes clear, first, that it was necessitated by Prussian law, and thus wears a faintly disapproving air. Secondly, the italicized words suggest strongly that no discretionary power to surrender United States citizens was intended; for to be "strictly reciprocal" where Prussian law "forbids" the extradition of Prussian subjects is to exclude outright the extradition of United States subjects. Virtually identical preambles preceded the similar provisions of the treaties with Bavaria (1853), Hanover (1855), Austria (1856) and Baden (1857).<sup>94</sup>

In the treaty with Mexico of 1861 the following simpler provision appeared: "Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty."<sup>95</sup> On its face, this provision might more readily be interpreted as implying a discretionary power to surrender nationals. The other exemptions in the same clause of the treaty were stated more forcefully, for example, "the provisions of the present treaty shall not be applied in any manner to any crime or offence of a purely political character". The Supreme Court of Mexico interpreted the provision in 1878 as making the extradition of nationals permissive and 'discretionary'.<sup>96</sup> Executive opinion in the United States, however, hardened to the view that, since there was no general power to extradite apart from a treaty *obligation*, a treaty provision which expressly denied an obligation to

93. 2 Malloy 1501 (italics added). See also Wheaton: *Elements of International Law* (1863 ed. by Lawrence), 236 which makes it clear that the preliminary draft submitted in 1844 by the Prussian Government contained the formula: 'neither of the contracting parties shall be required to deliver up its own subjects'. Because of this clause, President Polk refused its ratification: Moore: *Digest*, i, 160. That the subsequent treaty of 1852 represented no 'compromise solution' on this point, but rather a concession to Prussian desires, is suggested by the fact that the treaty of 1852 is less open to a 'discretionary' interpretation than was its ill-fated predecessor.

94. 1 Malloy 58, 896, 36, 53.

95. 1 Malloy 1125. See also the treaties with Sweden and Norway (1860), El Salvador (1870), Peru (1870) and Belgium (1874): 2 Malloy 1756, 1548, 1427, 1 Malloy 87.

96. *Re Dominguez and Barrera* (1879) (Vallarta: *Cuestiones Constitucionales*, i, 34), cited by Manton J. in *U.S. v. Valentine ex rel. Neidecker* (1936) 81 F.(2d) 32, 38.

extradite United States subjects deprived the United States of any constitutional power to do so.<sup>97</sup> These opinions were given careful consideration by a U.S. District Court in Texas in *Ex parte McCabe*<sup>98</sup> which finally gave judicial approval to the Executive practice and confirmed that the President had no power to extradite a United States citizen under this treaty. Academic opinion at this time on the whole supported this view of the treaty also.<sup>99</sup> There the matter stood, at least so far as Mexico was concerned, until in 1899 a supplementary treaty was negotiated between Mexico and the United States which provided that neither party should be bound to deliver up its own citizens, but that "the executive authority of each shall have power to deliver them up, if, in its discretion, it be deemed proper to do so".<sup>100</sup>

When the Supreme Court of the United States came to consider in *U.S. v. Valentine ex rel. Neidecker*<sup>101</sup> the meaning of the exemption clause of the French treaty of 1909, which was framed in substantially the same terms as the treaty with Mexico of 1861, the clause added to the latter treaty in 1899 was considered of great significance. For if it must be assumed that the draftsmen of the treaty with France had before them the expanded version of the nationals' clause used not only in the supplementary treaty with Mexico but in six other treaties as well,<sup>102</sup> there must have been special significance in their adherence to the older form. In the Court of Appeals, Manton J., dissenting from the opinion subsequently affirmed by the Supreme Court, held that the State Department had been erroneous in its interpretation of the Mexican treaty and others like it, and that the expanded version of the nationals' clause spasmodically employed in later years only made more explicit the discretionary power already inherent in the original provision.<sup>103</sup> The Supreme Court, however, affirming the Executive opinion of more than fifty years' standing that the United States had no constitutional power to surrender a citizen under a treaty which imposed no obligation on the parties thereto to do so, held that the instant treaty, properly interpreted, did not provide any power at all to surrender nationals. Although the question was not directly before the court, the Justices were clearly also of the opinion that the expanded

97. Case of *Trimble*, Report of Mr. Frelinghuysen, Secretary of State, to the President, 18 February 1834; Moore: *Digest*, i, 166, 167.

98. (1891) 46 F. 363.

99. Wharton: *Conflict of Laws* (2nd ed. 1881), § 841, n.2; Spear: *The Law of Extradition* (1879), 42. Moore reports the dealings with Mexico without critical comment: *Digest*, i, 164ff.

100. Moore: *Digest*, iv, 303. *In Re Lücke* (1937) 20 F. Supp. 658 (D.C. Texas).

101. (1936) 299 U.S. 5.

102. Japan (1886); Argentina (1896); Orange Free State (1896); Guatemala (1903); Nicaragua (1905); Uruguay (1905).

103. (1936) 81 F.(2d) 32, 39.

version of the clause which explicitly gave to the parties in other treaties a discretionary power to surrender nationals would effectively give power to the Executive to surrender United States nationals.<sup>104</sup>

The wheel thus turned a somewhat puzzling semi-circle. For while the earlier State Department opinion seemed to be based on the principle that there could be no lawful extradition in the absence of a binding treaty commitment, in which case the addition of a specific discretion to the parties would not repair this lack of power, the Supreme Court in 1936 seemed to regard the problem as one merely of treaty interpretation. The unfortunate fact remains that in this respect, the Supreme Court's view is at odds with the interpretation given to similar provisions in other parts of the world. The decision has been the object of some adverse criticism.<sup>105</sup>

Since *Neidecker's* case the United States has concluded six major extradition treaties up to 1961. In the treaties with Liberia (1937) and Monaco (1939) the simple "not bound" formula was used. Affected, as it were, by notice of the final judicial interpretation of this provision, the draftsmen presumably intended in these treaties to exclude the extradition of nationals altogether. The treaty with South Africa (1947) makes no mention of nationals, thus giving the treaty an unqualified application to all persons. In the treaty with Israel (1961) it was specifically provided that the requested party "shall not decline to extradite a person sought because such person is a national of the requested party".<sup>106</sup> The treaties with Sweden and Brazil, both concluded in 1961, contained what may be regarded as the full flowering of the discretionary form:

"There is no obligation on the requested State to grant the extradition of a person who is a national of the requested State, but the executive authority of the requested State shall, subject to the appropriate laws of that State, have power to surrender a national of that State if, in its discretion, it shall be deemed proper to do so."<sup>107</sup>

### *Latin American Practice*

Refusal to surrender nationals, while still the basic law and attitude, has been losing ground in Latin American countries.<sup>108</sup> The laws of

104. (1936) 299 U.S. 5.

105. James W. Garner: 'Non-extradition of American citizens - the *Neidecker Case*' (1936) 30 *AJ.I.L.* 480; Rafuse: *The Extradition of Nationals* (1939), 51ff.

106. T.I.A.S. 5476.

107. T.I.A.S. 5496, 5691. A protocol to the latter treaty was signed on 18 June 1962, in order to leave no doubt that Brazil was under no obligation to surrender its nationals: T.I.A.S. 5691.

108. See also Julius I. Puente: 'Principles of International Law in Latin America', (1930) 28 *Mich.L.R.* 665, 708ff.

Argentina, Colombia, Guatemala, Mexico, Panama, Peru, Salvador, Uruguay and Venezuela categorically forbid the rendition of a citizen, whether by birth or by naturalization before the commission of the crime, for trial abroad. The law of Brazil, which once provided for the extradition of its nationals on condition of reciprocity, has also forbidden such surrender since 1934.<sup>109</sup>

The fairly uniform exclusion rule presented by the municipal laws of these States is qualified by three factors. First, the rule of personal jurisdiction allows an offender to be prosecuted in his home State for crimes committed abroad, provided that these crimes are cognizable and punishable by the laws of both States. A prosecution may be instituted at the instance of the party aggrieved or at the instance of the prosecuting authorities of the fugitive's own State acting on material supplied by foreign police authorities. The laws of Argentina, Brazil, Chile, Colombia, Costa Rica, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Uruguay and Venezuela provide for the exercise of such jurisdiction.

Secondly, in Civil Law systems international law is generally of superior force to municipal law. Thus, in the event that an extradition treaty should impose an obligation on these countries to extradite a national, this obligation must be discharged notwithstanding the contrary provisions of municipal law. A striking illustration of the working of this principle is afforded by the case of *Milazzo*<sup>110</sup> in Argentina, where the United States had requested extradition under a treaty which provided for the discretionary surrender of nationals. The Argentina Supreme Court of Justice denied the request, not on the ground that Argentine municipal law forbade it, but that the particular circumstances of the case were such that it was proper to exercise the right of refusal given by the treaty and to direct trial of the fugitive in Argentina. It seems clearly to be implied from what the court said that even a discretionary power to surrender nationals given by a treaty would override the contrary provisions of municipal law.<sup>111</sup>

109. For the former law see *Re Gomez* (1929-1930), 5 Annual Digest, Case No. 177; *Re Deleuze* (1919-1922), 1 Annual Digest, Case No. 187. See now, Constitution of Brazil, 1946, Art 141(33), and the Extradition Law, 1938; Evans: 'The new extradition treaties of the United States' (1965) 59 A.J.I.L. 351, 355.

110. *In Re Milazzo, alias D'Amore* (1956) 23 I.L.R. 404.

111. It is to be assumed that this view prevails over a decision of the Court of First Instance in Buenos Aires that an Argentinian national may not be extradited where he has exercised his right under Article 669 of the Code of Criminal Procedure to request trial in Argentina for an offence committed abroad: *In Re Atarga* (1951) 18 I.L.R. 333. *Milazzo's* case seems to regard Article 669 not as giving an unqualified right to request trial, but as a right to be granted only if in other respects it would be proper to exercise the treaty discretion in the fugitive's favour. Contrast the view of the Guatemala Supreme Court in *Re Aldana* (1931-1932) 6 Annual Digest, Case No. 159.

Thirdly, treaty practice in Latin America has been inclining towards the surrender of nationals. The Treaty of Montevideo on International Penal Law, concluded in 1889 between Argentina, Bolivia, Paraguay, Peru and Uruguay, provided that "extradition takes complete effect without regard, in any case, to the nationality of the accused".<sup>112</sup> A more cautious approach was adopted in the Pan-American Extradition Convention signed in 1902 by seventeen States which reserved the right of the signatories to refuse extradition of their nationals if they judged it proper to do so.<sup>113</sup> This constituted a step backwards for the signatories of the 1889 Convention, for the Convention of 1902, to which they were also parties, modified to the extent of any contrariety previous agreements between the parties.<sup>114</sup> The Bustamante Code, 1928, obligated signatory States who refused to surrender their nationals to try them in their own courts.<sup>115</sup> A similar obligation was imposed by the Montevideo Convention, 1933, and the Central American Convention, 1934.<sup>116</sup> The former, however, contained an optional clause, subscribers to which bound themselves not to allow the nationality of the fugitive in any way to impede extradition. Finally, in 1940, a second International Penal Law Treaty was signed at Montevideo which returned, with one qualification, to the principle reached before in 1889. Article 19 provided: "The nationality of the accused may not be invoked as a reason for refusing extradition except where a constitutional provision establishes otherwise".<sup>117</sup> It would appear from an Argentinian court decision in 1951 that a prohibition of the extradition of nationals contained only in the Penal Code or an extradition law would not be a "constitutional provision" giving ground for refusal under this clause.<sup>118</sup>

*Dicta* in judicial decisions display a variety of attitudes towards the question. The Colombian Supreme Court refused the extradition of one of its nationals to Venezuela in 1942 stating that the reason

112. Harvard Research in International Law: Extradition, Appendix III, No. 2, Article 20, (1935) 29 A.J.I.L., Supp. Part I, 275.

113. *Id.* Appendix III, No. 3, Art. 3, (1935) 29 A.J.I.L., Supp. Part I, 280.

114. *Id.* Appendix III, No. 3, Art. 16, (1935) 29 A.J.I.L., Supp. Part I, 281.

115. *Id.* Appendix III, No. 5, (1935) 29 A.J.I.L., Supp. Part I, 285. Brazilian extradition treaties with Paraguay (1922), 138 L.N.T.S. 211, Italy (1931), 132 L.N.T.S. 345, and Uruguay (1933), 141 B.F.S.P. 872, expressly applied to all persons irrespective of nationality. The treaties with Italy and Uruguay were amended after 1934 in order to grant a discretionary right to refuse the surrender of nationals. The treaty with Paraguay had apparently lapsed by 1934: *Indice Geral da Collecao de Atos Internacionais* (Ministério das Relacoes Exteriores, Buenos Aires, 1952).

116. Harvard Research in International Law: Extradition, Appendix III, Nos. 6, 7, (1935) 29 A.J.I.L., Supp. Part I, 289, 293.

117. (1943) 37 A.J.I.L., Supp., 122. The parties were: Argentina, Brazil, Colombia, Bolivia, Paraguay, Peru and Uruguay.

118. *In Re Atarga* (1951) 18 I.L.R. 333. Of the signatories, only Brazil has a constitutional prohibition of the extradition of nationals.

for the prohibition contained in Colombian municipal law was "the risk of possible grave dangers in trial abroad".<sup>119</sup> The Costa Rican Supreme Court gave an advisory opinion in 1941 directing the executive government to exercise the right of refusal given by the Central American Convention of 1923 in the case of a request by Nicaragua for the surrender of a Costa Rican national.<sup>120</sup> No reasons were assigned, nor is it clear whether this opinion was intended to lay down a policy applicable to all future cases. The Supreme Court of Honduras appears to be of the view that the discretion given by the Bustamante Code ought always to be exercised in the fugitive's favour and that he should be tried in the Honduran courts.<sup>121</sup> The Nicaraguan courts, on the other hand, have adopted a more liberal policy. The Supreme Court of Nicaragua stated in 1919:

"Although it is true that Article 4 of the [Convention of Washington, 1907] established that the High Contracting Parties are not obliged to surrender their nationals, it is also true that it does not establish a strict obligation to deny extradition, but a mere faculty or right to be able to do so, when judged suitable for reasons of general welfare; which leads this Supreme Court to consent to the extradition, since it thinks that when the criminal is judged by the authorities of the jurisdiction where the crime was committed, the interested parties will contribute to the cause the necessary elements for the best elucidation of the truth of the facts, so avoiding impunity for crimes."<sup>122</sup>

The Argentinian courts, as already noted, take into account "personal and familiar circumstances of the individual demanded" in exercising its discretion under the treaties.<sup>123</sup>

### *Reasons Advanced in Support of the Exclusion Rule*

In the preceding survey of State practice a number of quotations have been made from sources representative of the reasons commonly given in justification of the practice of refusing to surrender nationals for trial and punishment in other countries. Of these, many are of a practical and even emotional nature. Only two legal principles have been consistently adduced in its support: the principle that a man ought not to be withdrawn from his natural judges, and the principle that a State owes to its subjects the protection of its laws.

119. *In Re Arevald* (1941-1942) 10 Annual Digest, Case No. 99. Venezuela was not a party to the Pan-American Convention of 1902, and the Caracas Convention of 1911, to which Colombia and Venezuela were both parties, was silent on the questions of nationals.

120. *In Re Rojas* (1941-1942) 10 Annual Digest, Case No. 100. See also *In Re Aldana* (1931-1932) 6 Annual Digest, Case No. 159 (Supreme Court of Guatemala).

121. *Re Extradition of López Saravia* (1957) 24 I.L.R. 492.

122. *Re Extradition of Leocadio Rodríguez* (1919-1922) 1 Annual Digest, Case No. 189. See also *In Re Paguaga* (1943-1945) 12 Annual Digest, Case No. 70.

123. *In Re Milazzo* (1956) 23 I.L.R. 404.

As to the first, it would seem obvious that the whole case for the application of the "natural judges" theory falls to the ground where the crime has been committed in another State.<sup>124</sup> The natural judges of a man by early English practice were his neighbours; the decision upon questions of fact was left to a jury of neighbours because they were the people who were likely to be acquainted with the facts. As Holdsworth says, they were in a sense witnesses as well as representatives of the sense of the community.<sup>125</sup> Nowadays a man is tried at or near the place where the crime was committed, but basically for reasons of convenience; in fact, it is a positive disqualification from jury service that a venireman is personally acquainted with the accused or is a witness to the facts in the case. Thus, whether the ancient or the modern basis of the rules of venue in criminal cases is taken, no case can be made out for the trial of a criminal in his home State for a crime committed abroad. The prohibition in French law against the withdrawal of a man from his natural judges has been interpreted by writers as not having any application to the extradition of a person charged with committing a crime abroad.<sup>126</sup>

The second legal basis alleged for the rule, referred to briefly by the British Royal Commission of 1878, has been stated mostly by German writers. These writers refer to the principle of *Treupflicht*, a special duty of protection said to be owed by the State to its subjects.<sup>127</sup> As pointed out before, however, the high judicial tribunals of Germany have not given recognition to this basis of the rule, nor have the commentators on the Constitution relied on it in exposition of Article 16 II.<sup>128</sup> It would appear that *Treupflicht* is more a political than a substantive legal principle in German law.<sup>129</sup> While it would presumably form some moral basis for an appeal by the citizen to the State for diplomatic representation abroad in the event of extradition, it seems an unwarranted extension of the principle to urge it in denial of the power to extradite itself. Moreover, if it were true that the principle obliged a State to protect its subjects against all claims of jurisdiction by a foreign State, then this duty ought equally to be owed to aliens lawfully residing within the State, since international

124. Cf. Harvard Research in International Law: Extradition, (1935) 29 A.J.I.L., Supp. Part I, 128.

125. Holdsworth: *A History of English Law*, i, 317.

126. See *supra*, n. 51.

127. Meyer: *Die Einlieferung* (1953), 73.

128. *Supra*, n.58. Von Mangoldt and Klein, *Das Bonner Grundgesetz* (1957), 493 ff., refer to the *allgemeine Schutzpflicht des Staates gegenüber seinen Bürgern* and also to the *besondere Pflicht des Staates, seine Bürger nicht fremder Gerichtsbarkeit preiszugeben* as cited by publicists, without comment.

129. Lange: *Grundfragen des Auslieferungs-und Asylrechts* (1953), 22; in expressing himself in favour of the abolition of the rule, he refers to the *Treupflicht* basis in German law as a 'tradition' only.

law generally obliges States to extend the equal protection of its laws to all persons within its jurisdiction.

A third legal basis has sometimes been urged, that a citizen has the right to remain undisturbed in his homeland, a right which is often guaranteed in constitutions. This is a weak basis for the exemption of nationals from extradition when it is reflected that the limited surrender of sovereignty represented by the institution of extradition is itself a form of protection of that sovereignty from the incursion of foreign criminals.

The remaining reasons deserving of consideration can be classed generally as of a practical nature. The most serious of these is the avowal that a foreigner cannot expect the same standard of justice to be applied to him in a foreign court as might be expected by a national of that State or by the foreigner in his home courts. This proposition is founded not so much on a fear of arbitrary or grossly unfair proceedings, against which can be put the power of diplomatic representation and the climate of world concern generated by such bodies as the International Commission of Jurists, as on the exigencies of trial before a foreign court or jury. While no jury studies known to the present writer have produced any specific data to support any particular view, common experience would suggest that a foreign nationality is a factor which might possibly dispose a jury unfavourably towards an accused. The concept of diversity jurisdiction in federal States arose from the correlative supposition that local juries would be prejudiced in favour of a local over an out-of-State litigant in civil suits. On the other hand, it ought not to be overlooked that juries are commonly directed to erase from their minds considerations irrelevant to the case against an accused person. Even though it is doubtless Utopian to expect juries to display the impartiality of Solomon, so many factors may prejudice an accused in the eyes of a jury, from the nature of the charge itself to his clothing, that it would seem unreasonable to single out any one upon which to found a broad generalization. In non-jury trials of criminal cases there should be even less basis for the allegation that a foreigner is unduly prejudiced by the fact of his nationality.

That the criminal laws of States vary in substance and procedure ought not to be urged in defence of the practice of non-extradition of nationals. The treaties delimit the offences for which extradition may be granted, and in many treaties a *prima facie* case of guilt must be made out in proceedings in the asylum State (usually the fugitive's home State) before extradition may be conceded. It is a well established practice for the diplomatic representatives of the fugitive's State to make representations on the fugitive's behalf relating to the

arrangements for his defence, the provision of interpreters, his welfare in custody, etc. Moreover, if it would be oppressive to deliver a national to be tried before the courts of another country, it should be equally objectionable to extradite a national of a third State to that country. This point would be a valid comment, too, on a contention that a treaty exempting nationals is often a convenient way of securing the return of one's own criminals from a country whose standards of justice fall below an acceptable standard. In such a case it is a highly cynical diplomatic exercise to conclude an extradition treaty with such a State at all.

In reply to those objections based on emotional appeal or chauvinism, it is enough to note that they belong mostly to an age which is happily vanishing. Even as long ago as 1864 Lord Chief Justice Cockburn remarked that he could sense no loss of dignity, of national greatness or character where British subjects were surrendered to a foreign State to be tried for crimes committed by them there.<sup>130</sup>

The non-extradition of nationals was widely supported by nineteenth century writers. Perhaps the leading writer on the subject in that century, Dr. Heinrich Lammasch, himself against the rule and in favour of a discretionary surrender of nationals,<sup>131</sup> in his review of previous writers on the subject in Europe concluded that support for the rule was so overwhelming that he did not feel obliged to catalogue the authors who had expressed themselves in its favour.<sup>132</sup> Anglo-American writers, as already noted, disapprove of the rule. Among modern European writers who continue to support the rule, or who at least advance the reasons discussed above with no adverse comment, are Baltatzis, Meyer and van Dulleman.<sup>133</sup>

#### *Reasons Advanced in Support of the Extradition of Nationals*

Most supporters of the extradition of nationals do not deny the validity of the practical objections raised by the proponents of non-extradition of nationals. They rather oppose these objections with propositions of preponderant weight. The Anglo-American attitude is dictated largely by the concept of the strict territoriality of crime; this basis is strongly evident in the reasons given by the Royal Commission on Extradition in 1878 for the extradition of nationals:

"The offence is an offence against the law of the country in which it is alleged to have been committed. A person com-

130. *In Re Tivnan* (1864) 5 Best and Smith 645, 679.

131. Lammasch: *Auslieferungspflicht und Asylrecht* (1887), 417, 418.

132. *Id.*, at 381 n.4.

133. Baltatzis: 'La non-extradition des nationaux', 13 *Revue Hellénique de Droit International* (1960), 198, 199; Meyer: *Die Einlieferung* (1953), 71-74; Van Dulleman: 'Uitlevering in de Praktijk', *Nederlands Juristenblad* (1960), 188.

morant in a foreign country owes obedience to its laws in exchange for the protection which it affords him, as much as one of its proper subjects. Why, because he has escaped beyond the jurisdiction of that law, should an offender, whose surrender is asked for, be in a different position from that in which he would have been in the country from which he has escaped?"<sup>134</sup>

While it is true that British and American law do provide for jurisdiction in respect of certain crimes committed by their subjects abroad, this jurisdiction is very limited. In general the criminal laws of these countries are not regarded as having extraterritorial effect unless they so apply expressly or by necessary intendment. There is thus ever present in the minds of Anglo-American lawyers the spectre of persons committing crimes abroad with impunity so long as they escape the jurisdiction of the *locus delicti* and return to their homeland.<sup>135</sup>

In at least one recorded instance, the claim has been made from an official quarter that a crime had been deliberately planned so that advantage could be taken of an exclusion of nationals clause in an extradition treaty. In November 1887 the international mails were robbed from a train in Belgium. In a letter to the Treasury the British Postmaster-General stated that:

"[in this and other like] cases it may be taken as certain that the robberies were planned in England . . . by British subjects, and that this country was selected as the base of operations chiefly because of the practical immunity afforded by its laws, which make it impossible, on the one hand, to punish in England a crime committed on foreign territory, and, on the other, for the British Government to deliver up one of its subjects<sup>136</sup> committing such a crime to be tried by a foreign Power, however strong the evidence of his criminality."<sup>137</sup>

In other countries where the rule of personal jurisdiction over the offender can be invoked in order to bring a fugitive offender to justice, there are nevertheless weighty practical objections to trial in the offender's homeland for crimes committed abroad. Witnesses must be brought long distances at great inconvenience and expense, or must give their evidence in the unsatisfactory form of written affidavits. Expense and inconvenience may preclude altogether access to expert and eye-witness testimony which would otherwise be available

134. Report of the Royal Commission on Extradition, Parliamentary Papers, 1878, vol. 24, Reports etc., 907-917.

135. Cf. Rafuse, *The Extradition of Nationals* (1939), 53.

136. The Postmaster-General must be understood as meaning 'where the relevant treaty is absolute in its exception of nationals'. The treaty with Belgium was amended, as a consequence of this incident, to provide for the discretionary surrender of nationals: see *supra* 278.

137. 6 *British Digest of International Law* 689.

to give a complete picture of the crime. Arrangement must be made for the transportation of documents and exhibits. The possibility of a view of the *locus in quo*, sometimes an important advantage to a trial court, is ruled out. These and other difficulties constitute a grave handicap to both prosecution and defence. Moreover, where the result is an acquittal of the accused — the chances of which are substantially increased by trial under such conditions — the charge can all too easily be made by the authorities of the *locus delicti* that the prosecuting State performed its duty without effort or enthusiasm.

As noted above, most European writers in this century have continued to repeat the old arguments against the extradition of nationals with either active or tacit approval. Donnedieu de Vabres considers that there is "no question of abandoning a tradition so constant".<sup>138</sup> On the other hand, the number of Continental supporters of the opposing point of view is increasing.<sup>139</sup> Professor Richard Lange favours the extradition of nationals and considers that whether the Anglo-American attitude will prevail over the Continental or not will depend upon whether the consciousness that the basic principles of State and fundamental guarantees of due process are common to civilized States is strengthened or weakened.<sup>140</sup> Professor Georg Dahm is of the opinion that "irrational feelings" play the major role in keeping alive the non-extradition of nationals.<sup>141</sup> Professor van Panhuys is strongly opposed to present European practice.<sup>142</sup> The Swiss scholar Bolens also finds the traditional defence of the non-extradition of nationals unsatisfactory and proposes a change of attitude.<sup>143</sup>

The multipartite conventions, codes and draft conventions in the field of extradition with only one exception reject the principle of non-extradition of nationals.

The Latin American Conventions, from 1889 to 1940, provide either that there shall be no exemption based on nationality or that surrender of nationals shall be permissive at the discretion of the requested State.<sup>144</sup> Discretionary surrender is also the solution adopted by the Arab League Extradition Agreement, 1952,<sup>145</sup> and the European

138. *Principes modernes de Droit Pénal International* (1928), 260, 261.

139. Even in the nineteenth century there were influential publicists who were on the whole against the exception of nationals, including Billot, Bomboy and Gilbrin, Bonafos and Lammasch, and others cited by Lammasch: *Auslieferungspflicht und Asylrecht* (1887), 396 n.1.

140. *Grundfragen des Auslieferungs- und Asylrechts* (1953), 23.

141. *Völkerrecht* (1958) i, 290, 291.

142. 'Uitlevering van eigen onderdanen', 70 *Tijdschrift voor Strafrecht* (1961), 35 ff.

143. J. J. Bolens, *Essai sur l'extradition et la non-extradition des nationaux* (Lausanne, 1940) 104, 105.

144. *Supra*, 293.

145. Art. 7. The parties are: Iraq, Jordan, Lebanon, Saudi Arabia, Syria, United Arab Republic and Yemen. English text is given in 159 B.F.S.P. 606.

Extradition Treaty, 1957.<sup>146</sup> The Benelux Extradition Treaty, 1962, by way of exception, excludes the extradition of nationals altogether.<sup>147</sup>

Of the Drafts and Codes, Field's *Outlines of an International Code* (1876) made no exception of nationals.<sup>148</sup> The Resolution adopted by the Institute of International Law at its Oxford meeting in 1880, recommended the extradition of nationals on the ground that it was desirable that the courts of the *locus delicti* should render judgment, but expressly reserved this recommendation to countries whose criminal legislation rested on similar bases and which had mutual confidence in their judicial institutions.<sup>149</sup> The Rio de Janeiro Project for an American Extradition Convention (1912) rejected nationality as an automatic bar to extradition and laid an obligation to prosecute in its own courts on any State that refused to extradite its own nationals.<sup>150</sup> Travers' *Project for an Extradition Treaty* (1922) proposes a clear obligation either to extradite nationals or to prosecute them in their national courts.<sup>151</sup> The Draft Extradition Convention of the International Law Association made a similar proposal in 1928.<sup>152</sup> The Harvard Draft Convention on Extradition (1935), which represents the most comprehensive and detailed study of the subject of extradition so far in this century, provided in Article 7 that "a requested State shall not decline to extradite a person claimed because such person is a national of the requested State."<sup>153</sup> The comment accompanying the Article notes that the exception of nationals "is so inadequately supported by the reasons given for it, and is so generally condemned by thoughtful students, that one may hope that the careful consideration which would be given to it at a general conference would result in its abandonment". Recognizing, however, that States whose policies had long excluded extradition of their own nationals were not likely to change these policies overnight, the Draft proposed an optional reservation clause which would permit a refusal of extra-

146. *Supra*, 286.

147. Art. 5; *Benelux Publicatieblad* (1960-1962), 22; see comment by J. Constant: 'Le Traité Benelux d'extradition et d'entraide judiciaire en matière pénale', 43 *Revue de Droit Pénal et de Criminologie* (1962), 75, 91 ff.

148. (2d ed. 1876), 90-127; Harvard Research in International Law: Extradition, Appendix IV, No. 1, (1935) 29 A.J.I.L., Supp. Part I, 296.

149. Art. 6; 5 *Annuaire de l'Institut de Droit International* (1880), 127; Harvard Research in International Law: Extradition, Appendix IV, No. 2, (1935) 29 A.J.I.L., Supp. Part I, 300.

150. Art. 2; (1926) 20 A.J.I.L., Spec. Supp., 331-335.

151. Travers: *Le Droit Pénal International* (1922) v, 526-530; Harvard Research in International Law: Extradition, App. IV, No. 4, (1935) 29 A.J.I.L., Supp. Part I, 305.

152. Art. 3; International Law Association, Report of the Thirty-fifth Conference (1928) 324-329; Harvard Research in International Law: Extradition, App. IV, No. 5, (1935) 29 A.J.I.L., Supp. Part I, 307.

153. Harvard Research in International Law: Extradition, (1935) 29 A.J.I.L., Supp. Part I, 123 ff.

dition on the ground of nationality subject to the duty of prosecution in the courts of the refusing State. A further reservation admitted by the Harvard Draft, bearing on the question of nationality, is that a State may insist that a *prima facie* case must be made out by a requesting State in the case of one of the former's nationals. (The Draft proposes in another Article that the *prima facie* case be generally abolished in extradition proceedings.) The only model code which departs from the generally uniform rejection of the non-extradition of nationals is the Model Draft Treaty drawn up by a Sub-Commission of the International Penal and Prison Commission (1931).<sup>154</sup> This draft treaty provides that nationals shall not be surrendered "except in the case of criminals constituting a special public danger" the determination of whom is left to the discretion of the requested State.

### *An Alternative Proposal*

In order to accommodate the feelings of certain States which have so far proved to be intransigent, the so-called discretionary clause has been regularly advanced by writers and by the draftsmen of codes and conventions. The nature of this clause and its history were examined earlier in this article in connection with American and British practice. Unfortunately, the fact is quite evident that this clause has not generally resulted in the voluntary surrender of nationals, and the hopes of its authors that its use would encourage and gradually bring about a rejection of the exception of nationals have been disappointed. With the exception of Great Britain and (to the extent allowed by the holding in *Neidecker's* case) the United States, who were the original promoters of the discretionary clause, States have generally consistently exercised their right of refusal in favour of their own subjects. The reasons for the failure of the compromise are perhaps not hard to find. The discretionary clause was from the beginning a British and American idea designed to score a point for the Anglo-American attitude without committing the other Parties to a proposition which they firmly rejected; it is therefore not surprising that the latter States have seen no reason to alter an attitude made perfectly clear at the conference tables. An established tradition and a natural conservatism in matters relating to the rights of the individual militate against experimentation; they are not easily overawed by a treaty which grants only a discretionary facility to surrender nationals. There is a natural inclination to give the benefit of the doubt arising from such a fluid obligation to the claimed national, particularly where the rule of personal jurisdiction will

154. Art. 5; *Recueil de Documents en Matière Pénal et Pénitentiaire* (1931), i, 478; Harvard Research in International Law: Extradition, App. IV, No. 6, (1935) 29 A.J.I.L., Supp. Part I, 309.

allow his prosecution in the national courts. It may also be difficult for an Executive to draw up guidelines for itself as to when and when not the discretion ought to be exercised in favour of the surrender of a national. A guarantee of reciprocity by the requesting Party in a future case where the position of the Parties is reversed is difficult to obtain.

A new approach is therefore suggested which would rest firmly upon the principles that the proper court for the trial of a criminal is the court of the *locus delicti*, and that no discretion should be allowed to States in this regard. It is suggested, however, that the extradition ought to be limited to the trial and judgment only; that an extradited national, once he has been sentenced by a foreign court, should be returned to his home State to serve the sentence imposed abroad but subject to the regulations, including those relating to remission or reduction of sentence, parole and probation, in force in his home State.

The main purpose of the proposal is not to protect extradited persons from harsh or discriminatory treatment at the hands of foreign courts. For the reasons given earlier these objections are in any case largely groundless. Nor is the proposal designed to ameliorate the practical disadvantages faced by an alien in a foreign court. The proposal leaves the trial to the courts of the *locus delicti* and the practical disadvantages, exaggerated though they have been by some writers, must still be minimized through co-operation between the requesting and the requested (or national) States. The main purpose of the proposal is to secure to the most appropriate forum jurisdiction over a crime and at the same time to secure to the most appropriate organs the task of corrective punishment and rehabilitation. These latter organs, it is suggested, are those of the prisoner's home State.

Despite this basic purpose and philosophy, the fact need not be disguised that a secondary effect of returning a convicted offender to his home State would be to permit the possibility of his release from imprisonment in the rare case where a miscarriage of justice may be considered to have occurred. It is envisaged that the treaty provision would reserve all powers to the national State after return of the sentenced prisoner, and that the sentence would be treated in that State in all respects as though it were a sentence of a competent national court. This provision would thus admit the right of the national State to exercise its executive prerogative of mercy by way of pardon or partial remission of the penalty, as well as the right of the national State to apply its own laws and procedures relating to probation, parole and other corrective and rehabilitative aids. It is suggested that in this light, many of the objections presently raised against the extradition of nationals would disappear.

The reasons why the organs most appropriate to supervise the corrective process are the national authorities of the criminal's home State should be fairly clear, provided that it is accepted that rehabilitation is at least as important as deprivation of liberty in the corrective process. A returned prisoner's rehabilitation will be facilitated by training in trade skills appropriate to his own society and conducted in his own language. Psychiatric and other therapeutic services are similarly made more effective. The returned prisoner is in closer touch with relatives and friends who may be expected to give him encouragement. Prison conditions and corrective methods, whether more or less advanced than those existing in the trial State, are of the standard to which the prisoner would have been subjected had he not chosen to pursue his criminal activities beyond the borders of his home State. If, on the other hand, the prisoner freely expresses the wish not to be returned to his home State to serve his sentence, there seems to be no reason why he should not be given a right of option.

If the trial State should impose a monetary penalty or combine a monetary penalty with a sentence of imprisonment, the national State could be required to execute a sentence of imprisonment in default of payment. Payment of monetary penalties would more appropriately be made to the trial State. Release on recognizance to be of good behaviour raises a rather more difficult problem of supervision and the question of to which authorities the criminal should be answerable in the event of a breach of such recognizance. In such a case a simple order of deportation to his home State would probably be regarded as sufficient.

If it is accepted that an extradited national of a requested State should be returned to that State for the execution of his sentence, so also might the proposal be equally applied in respect of aliens tried and convicted in a foreign State who were not extradited but who were arrested in that State. So, too, a national of State A extradited from State B to State C should be returned to State A to serve his sentence.

A further refinement of the proposal might be to allow to the national State the right of imposing sentence and limiting the jurisdiction of the trial State to a determination of guilt or innocence only.<sup>155</sup> This suggestion, while allowing the sentence to be formulated in a manner reflective of the social convictions and corrective methods existing in the national State, would have the outweighing demerit of removing from the jurisdiction of the trial State an integral part of the criminal process, a responsibility, moreover, which the

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155. Cf. the treaty between France and Basle, 1781, *supra* 281.

trial judge or judges are best fitted to discharge in the light of all the evidence adduced before them.

Despite the necessary negotiation of points of detail, the proposal does not seem inherently difficult to formalize in a treaty. It may require legislative amendment in some countries in so far as the execution of a foreign penal sentence is involved. Nor is it an entirely novel idea. While it has been briefly suggested by only one modern writer,<sup>156</sup> the device was used in the supplementary treaty of 1781 between France and Basle, described earlier in this article.<sup>157</sup> Adoption of the proposal would not necessitate complete abandonment of the recognized principle that States do not enforce the penal laws or judgments of other States. The proposal is limited to extraditable offences and is merely an extension, in the interest of the extradited criminal, of the judicial assistance already recognized by law rendered by one State to another in order to enable each other to exercise effective jurisdiction over crime.

### *Extradition of Nationals of a Third State*

Where the extradition of a national of State A is requested from State B by State C where the crime was committed, it is generally agreed by the writers that diplomatic courtesy requires that the government of State A be notified of the extradition proceedings.<sup>158</sup> It has not seriously been contested, however, that a State has the right to extradite a foreign national in accordance with its laws without the consent of the fugitive's own government.<sup>159</sup>

If the principle of returning an extradited criminal to his home State for the execution of his sentence, as advocated here, is accepted, it would be consistent with this principle to provide in future treaties, whether multilateral or bilateral, that where nationals of the contracting parties are extradited by third States to one of the contracting parties, such a national should be returned to his home State to serve his sentence. Where, for example, a national of State A is extradited by State B to State C to be tried for a crime committed in State C,

156. Van Panhuys: 'Uitlevering van eigen onderdanen', 70 *Tijdschrift voor Strafrecht* (1961), 35ff. Fritzsche: 'Die Auslieferungsstraftaten im Verkehr der Deutschen Demokratischen Republik mit den anderen Staaten des Sozialismus', 10 *Staat und Recht* (1961), 1321 n., would limit the extradition of nationals to 'exceptional cases' and only then on condition of return to their home State for the serving of their sentence.

157. *Supra*, 281.

158. Moore: *Extradition*, i, 177 ff.; Billot: *Traité de l'extradition* (1874), 79 ff.; Bomboy and Gilbrin: *Traité Pratique de l'extradition* (1886), 26.

159. Moore: *Extradition*, i, 177 ff. See also the opinions of the U.S. Secretary of State declining to intervene in the extradition of U.S. citizens between other countries: Moore: *Digest*, iv, 304 ff.

he should be returned to State A to serve the sentence imposed by the courts of State C.

### *Transit of Nationals*

While the French prohibition against the extradition of nationals does not apply to the transit of French nationals through French territory in the course of extradition between two other States,<sup>160</sup> it has been held by the German Constitutional Court that the German statutory prohibition does so apply. A German national who was brought into Germany in the course of being extradited from France to Austria was accordingly discharged from custody.<sup>161</sup> This extraordinarily rigid application of the non-extradition of nationals rule is given further currency by the European Extradition Convention, Article 21(2), which concedes the right to a State to refuse the transit of one of its own nationals. The principles advanced here militate *a fortiori* against the recognition of any principle of refusing transit on the ground of nationality.

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160. French Law of 1927, Art. 28.

161. 10 *Entscheidungen des Bundesverfassungsgerichts* 136; (1961) 55 A.J.I.L. 174. Greek law also prohibits the transit of Greek nationals through Greek territory: Baltatzis: 'La non-extradition des nationaux', 13 *Revue Hellénique de Droit International* (1960), 210.

## APPENDIX

*List of Extradition Treaties printed in the League of Nations  
Treaty Series and Volumes 1-400 of the United Nations Treaty  
Series arranged according to Nationality Provisions*

<i>Parties</i>	<i>Date</i>	<i>Treaty Series (Vol./Page)</i>	<i>Note</i>
<i>No exception of nationals</i>			
Egypt-Palestine	7.viii.1922	L. 36/344	} <i>See supra</i> n. 115
Brazil-Paraguay	24.ii.1922	L. 138/211	
Brazil-Italy	28.xi.1931	L. 132/345	
U.S.A.-British Empire	22.xii.1931	L. 163/59	
U.S.A.-South Africa	18.xii.1947	U. 148/85	
Israel-U.K.	4.iv.1960	U. 377/331	
<i>Discretionary surrender of nationals</i>			
Latvia-Lithuania	12.vii.1921	L. 25/312	P1
Latvia-Estonia	12.vii.1921	L. 37/424	P1
U.S.A.-Siam	30.xii.1922	L. 25/394	P1
U.S.A.-Latvia	16.x.1923	L. 27/372	P1
U.S.A.-Bulgaria	19.iii.1924	L. 26/28	P1
Finland-U.K.	30.v.1924	L. 34/80	P2
Finland-Latvia	7.vi.1924	L. 38/344	P2
U.K.-Latvia	16.vii.1924	L. 37/370	P2
U.S.A.-Finland	1.viii.1924	L. 34/104	P1
Estonia-Lithuania	12.vii.1921	L. 43/179	P1
U.S.A.-Venezuela	19.i.1922	L. 49/435	P1
Italy-Czechoslovakia	6.iv.1922	L. 55/171	P2
U.S.A.-Estonia	8.xi.1923	L. 43/277	P1
U.S.A.-Lithuania	9.iv.1924	L. 51/191	P1
U.K.-Czechoslovakia	11.xi.1924	L. 59/269	P1
Estonia-Finland	2.i.1925	L. 43/11	P2
U.S.A.-Czechoslovakia	2.vii.1925	L. 50/143	P1
Estonia-U.K.	18.xi.1925	L. 50/225	P1
Lithuania-U.K.	18.v.1926	L. 61/401	P1
Chile-Colombia	16.xi.1914	L. 82/239	P5, P8
Albania-U.K.	22.vii.1926	L. 67/165	P1
Austria-Estonia	15.x.1926	L. 74/213	P2
Liberia-Monaco	28.x.1926	L. 68/241	P1
Portugal-Czechoslovakia	23.xi.1927	L. 124/7	P3
Latvia-Spain	8.iii.1930	L. 113/135	P1
Germany-U.S.A.	12.vii.1930	L. 119/247	P1
Bulgaria-Spain	17.vii.1930	L. 114/41	P3
Lithuania-Czechoslovakia	24.iv.1931	L. 126/261	P4
Brazil-Switzerland	23.vii.1932	L. 145/167	P1, P8
U.S.A.-Greece	6.v.1931	L. 138/293	P1
Sweden-Czechoslovakia	17.xi.1931	L. 134/133	P2
Austria-Latvia	5.i.1932	L. 133/59	P2
U.K.-Poland	11.i.1932	L. 148/221	P1
U.K.-Iraq	2.v.1932	L. 141/277	P1

<i>Parties</i>	<i>Date</i>	<i>Treaty Series (Vol./Page)</i>	<i>Notes</i>
.S.A.-Turkey	6.viii.1923	L. 153/71	P1
.S.A.-Poland	22.xi.1927	L. 92/101	P1
.S.A.-Albania	1.iii.1933	L. 166/195	P1
.S.A.-Argentina-Brazil, etc.	26.xii.1933	L. 165/45	P1, P8
.S.A.-Iraq	7.vi.1934	L. 170/267	P1
Brazil-Chile	8.xi.1935	L. 181/297	P1, P8
.S.A.-Liechtenstein	20.v.1936	L. 183/181	P1
.S.A.-Liberia	1.xi.1937	L. 201/151	P1
Belgium-Mexico	22.ix.1938	L. 198/397	P1, P8
.S.A.-Monaco	15.ii.1939	L. 202/61	P1
Colivia-Brazil	25.ii.1938	U. 54/333	P1, P8
.S.A.-Colombia	7.v.1940	U. 125/239	P1
Belgium-Brazil	6.v.1953	U. 272/157	P1, P8
Belgium-Israel	26.iii.1956	U. 260/3	P6
Netherlands-Israel	18.xii.1956	U. 276/153	P7
Italy-Israel	24.ii.1956	U. 316/97	P6
Switzerland-Israel	31.xii.1958	U. 377/305	P6
South Africa-Israel	18.ix.1959	U. 373/47	P7
European Convention	13.xii.1957	U. 359/273	P7, P8

*Absolute exception of nationals*

Greece-Germany	27.ii.1907	L. 2/112	E1, E3
.K.-Netherlands	13.iv.1920	L. 1/275	E1
Germany-Czechoslovakia	8.v.1922	L. 23/172	E2
Denmark-Finland	12.ii.1923	L. 18/34	E1, E4
Bulgaria-Yugoslavia	26.xi.1923	L. 26/120	E1
Norway-Sweden	29.xi.1923	L. 23/42	E1
Bulgaria-Roumania	19.iv.1924	L. 33/222	E2
Switzerland-Uruguay	27.ii.1923	L. 63/207	E1
Hungary-Roumania	16.iv.1924	L. 42/145	E2
Roumania-Czechoslovakia	7.v.1925	L. 54/51	E1
Norway-Norway	10.xi.1925	L. 43/381	E1
Austria-Norway	17.xii.1925	L. 48/77	E1
Bulgaria-Czechoslovakia	15.v.1926	L. 60/169	E1
Latvia-Czechoslovakia	6.vii.1926	L. 62/229	E1
Estonia-Czechoslovakia	17.vii.1926	L. 63/255	E1
Belgium-Latvia	11.x.1926	L. 63/299	E1
Roumania-Greece	25.vi.1926	L. 83/305	E2
Belgium-Estonia	11.xi.1926	L. 65/405	E2
Greece-Czechoslovakia	7.iv.1927	L. 88/219	E1
Belgium-Lithuania	17.v.1927	L. 77/123	E2
Belgium-Czechoslovakia	19.vii.1927	L. 73/283	E1
Latvia-Norway	12.ix.1927	L. 71/303	E1
Colombia-Panama	24.xii.1927	L. 87/409	E1, E5
Belgium-Finland	23.i.1928	L. 74/353	E2
Italy-Yugoslavia	6.iv.1922	L. 118/221	E1
Czechoslovakia-Czechoslovakia	7.v.1928	L. 114/117	E1, E5
Norway-Italy	10.vii.1929	L. 111/295	E2
Bulgaria-Turkey	23.xii.1929	L. 122/17	E2
Latvia-Netherlands	27.i.1930	L. 117/343	E1, E3
Latvia-Sweden	30.i.1930	L. 110/139	E1

<i>Parties</i>	<i>Date</i>	<i>Treaty Series (Vol./Page)</i>	<i>Notes</i>
Italy-Venezuela	23.viii.1930	L. 128/377	E1, E5
Denmark-Latvia	28.viii.1930	L. 113/169	E1, E3
Poland-Sweden	30.viii.1930	L. 129/383	E1
Denmark-Czechoslovakia	7.x.1931	L. 127/103	E1, E4, E5
Netherlands-Czechoslovakia	4.xii.1931	L. 129/343	E1
Austria-Belgium	26.i.1932	L. 129/141	E2
Colombia-Nicaragua	25.iii.1929	L. 132/255	E1, E5
Italy-Panama	7.viii.1930	L. 140/241	E1
Czechoslovakia-Turkey	22.viii.1930	L. 138/325	E2
Germany-Turkey	3.ix.1930	L. 133/321	E2
Belgium-Poland	13.v.1931	L. 131/109	E1
Iraq-Turkey	9.i.1932	L. 139/273	E1, E3
Roumania-Yugoslavia	30.i.1933	L. 146/81	E1
Finland-Netherlands	21.ii.1933	L. 139/365	E1, E3
Estonia-Netherlands	8.iii.1933	L. 146/319	E2
Lithuania-Netherlands	1.xii.1933	L. 150/337	E1, E3
Poland-Roumania	26.iii.1930	L. 153/87	E1, E5
Switzerland-Turkey	1.vi.1933	L. 159/329	E1
Estonia-Hungary	8.viii.1934	L. 167/153	E1
Luxembourg-Czechoslovakia	1.xii.1934	L. 168/287	E1, E5
Denmark-Lithuania	20.xii.1934	L. 162/347	E1, E4
Monaco-Czechoslovakia	22.xii.1934	L. 171/27	E1, E5
Colombia-Cuba	2.vii.1932	L. 174/69	E1, E5
Albania-Czechoslovakia	14.iv.1934	L. 188/255	E1, E5
Estonia-Italy	10.viii.1935	L. 185/287	E1
Hungary-Poland	24.iv.1936	L. 181/115	E1
Belgium-Liechtenstein	5.viii.1936	L. 186/33	E2
Belgium-Thailand	14.i.1937	L. 179/419	E2
Greece-Luxembourg	1.ix.1937	L. 193/151	E2
Mexico-Panama	23.viii.1928	L. 194/137	E1, E5
Poland-Switzerland	19.xi.1937	L. 195/297	E1
Belgium-Turkey	9.ii.1938	L. 198/183	E2
Greece-Turkey	7.iii.1939	L. 201/239	E2
Iraq-Turkey	29.iii.1946	U. 54/333	E1
Saudi-Arabia-U.K. (for Kuwait)	20.iv.1942	U. 10/99	E1
Belgium-Germany (Fed. Rep.)	17.i.1958	U. 328/173	E1, E5
Belgium-Morocco	27.ii.1959	U. 390/275	E1
U.K.-Germany (Fed. Rep.)	23.ii.1960	U. 385/39	E1

## LEGEND

- L. League of Nations Treaty Series.
- U. United Nations Treaty Series.
- P1. "Neither Party shall be obliged to surrender its own nationals" (or similar words).
- P2. "In no case nor on any consideration whatsoever shall the Parties be bound to deliver up their own nationals" (or similar words). Concerning the interpretation of this formula, see *supra*, 278.
- P3. "The Contracting States shall in no case be required to surrender their own nationals" (or similar words).
- P4. "In so far as the laws of the Contracting Parties allow, nationals of the requested Party may be extradited" (or similar words).
- P5. "The extradition of nationals of the requested State is not compulsory" (or similar words).
- P6. "The Contracting Parties reserve the right to grant or refuse the extradition of their own nationals" (or similar words).
- P7. "Either State may refuse to extradite its own nationals" (or similar words).
- P8. Where, in addition, the parties undertake to prosecute in their own courts nationals who have committed extraditable offences.
- E1. "Neither Party shall extradite its own nationals" (or similar words).
- E2. "The Contracting Parties undertake to surrender all persons, other than their own nationals, who . . . etc." (or similar words).
- E3. Where the treaty provides an additional right to refuse the surrender of subjects of third States.
- E4. Where the treaty provides an additional right to refuse the surrender of subjects of third States resident two years or longer in the requested State.
- E5. Where the Parties undertake to prosecute in their own courts nationals who have committed extraditable offences.