EXTRADITION TREATIES IN THE LIGHT OF CONTEMPORARY SCENARIO

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INTRODUCTION

Default Rule of International Extradition provides that, when an extradition treaty allows for two interpretations, one enlarging the rights of the parties under it, and the other reducing them, the construction that allows the greater rights should be preferred over the other. [1] But this principle was emerged during those days when those subject to extradition were not recognized to have due process rights, and at a time when extradition treaties had not evolved into the current-modern agreements that focus on protecting human rights as well as facilitating the extradition process. Because the main conditions that gave rise to the default rule have ceased to exist, it should be discarded.

The rule of Extradition originates from two sources bilateral-extradition treaties and multilateral treaties. Majority of the countries makes extradition requests through bilateral extradition treaties with foreign countries, which contain a plethora of human rights and due process protections for the individuals involved in it, commonly known as *Relators*.[2] The number and pervasiveness of these protections prove that the sole purpose of extradition treaties is not simply to facilitate extraditions.

Unlike regular treaties, extradition treaties are self-executing. After ratification, they are readily enforceable without the need for additional legislation. [3] This means that the rights afforded to relators in extradition treaties, such as the requirement of probable cause, are enforceable as if they are the part of Municipal Law.

Despite the substantial citation of the default rule by the lower courts, courts often rely on the

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[1] *Factor* v. *Laubenheimer*, 290 U.S. 276, 293-94 (1933)

[2] M. CHERIF Bassiouni, *International Extradition: United States Law And Practice*, (6th ed. 2014), p. 91

[3] (2nd Cir. 2000); see also BASSIOUNT, supra note 3, at 119 ("Extradition treaties are deemed self-executing and therefore do not need legislation."). See also United States v. Alvarez-Machain, 504 U.S. 655, 667 (1992) ("The Extradition Treaty has the force of law, and if as respondent asserts, it is selfexecuting, it would appear that the court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation.").

general doctrines of treaty construction to reach their conclusions. Recently, two federal courts of appeal in *Patterson* v. *Wagner*[4], and in *Martinez* v. *United States*[5], supported their decisions on general doctrines of treaty interpretation and a thorough consideration of the facts, rather than the default rule. These cases are particular in their substantial analysis of treaty text, the history of negotiations, and other factors such as the subsequent practice of the parties. The contrast between cases such as Patterson and Martinez, in which the courts engage in in-depth treaty construction, and those that categorically apply the default rule, show that the default rule is no longer applicable to modem extradition treaties, and that its simple application runs counter to current doctrines of treaty construction.

LEGAL BASIS FOR INTERNATIONAL EXTRADITION

Treaty is an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law.[6] Even though extradition treaties and the extradition statute are both legal bases for international extradition, treaties contribute more to the process as most conditions are negotiated by the party-states. When conflict-arise between an extradition treaty and the extradition statute, the later of the two must prevail as per the "last in time" doctrine. Since many of the provisions of the extradition statute are more than 150 years old, the applicable treaty will usually prevail in case of conflict. In any case, the power to extradite requires that there be a treaty or statute authorizing it.[7]

Extradition treaties may be "bilateral" between the countries or entity- or among various states, in which case it is called "multilateral." The extradition statute does not specify what type of treaty is proper for extradition, so it is believed that in addition to bilateral treaties, multilateral treaties may constitute a valid basis[8]. Despite such flexibility, nations conduct their extradition requests mostly through bilateral extradition treaties, as they consider the bilateral treaty to be a better tool for the process.

[4] 785 F.3d 1277 (9th Cir. 2014)
[5] 828 F.3d 451, 454 (6th Cir. 2016)
[6] Restatement (Third) of the Foreign Relations Law Of The United States § 301. Treaties are also commonly known as conventions, agreements, protocols, covenants, charters, statutes, acts, and declarations.
[7] *Valentine* v. *United States*, 299 U.S. 5, 8 (1936); *Terliden* v. *Ames*, 184 U.S. 270, 289 (1902) ("In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision.")
[8] Basslouni, ("In the instance where the basis for the extradition request is a multilateral international criminal law convention, the provisions of the Act would be applicable.").

BILATERAL EXTRADITION TREATIES CREATE INDIVIDUAL RIGHTS

Because extradition treaties do not require separate legislation for judicial enforcement in the many nations, they have been traditionally understood as self-executing. Extradition treaties' constitutional ranking is the same as statutes and thus the rights extradition treaties afford relators should be enforced by the courts with the same zealousness, they enforce the rights afforded by statutes. Unlike regular-non-self-executing treaties, extradition treaties do not constitute mere political documents subject to the whims of the Executive. Whereas the courts afford the executive branch substantial discretion in its interpretation and enforcement of international treaties, the individual rights created by extradition treaties should be strictly applied by the courts in consonance with due process and the Constitution.

According to the Supremacy Clause, the United States' Constitution, federal statutes, and treaties are "the supreme law of the land[9]. Treaties and federal statutes enjoy the same ranking as law, but a lower one than the Constitution[10]. Despite having the same constitutional standing as federal statutes, treaties normally do not create rights that are readily enforceable. Legislation by Congress is required to enforce them, unless the treaty's language indicates the parties' intention for the treaty to have immediate domestic effect. When the treaty's language reflects such intention, the treaty is considered "self-executing" and thus requires no further legislation to be enforced in courts. The parties' intention that the treaty be self-executing, however, does not need to be stated literally.

Treaties that are not self-executing, on the other hand, are regularly construed as contracts between nations and thus mostly subject to interpretation and consideration by the political branches, not the courts.[11] Unless the provisions of a non-self-executing treaty are further adopted in national legislation, in compliance with the treaty's accords, its provisions will not create individual rights.

Some courts have insisted that international treaties do not create private rights: "International agreements, even those directly benefiting private persons, generally do not

[9] U.S. CONST. art. V1, cl. 2

[10] Artemio Rivera, Probable Cause and Due Process in International Extradition, 54 AM. CRIM. L. REv. 131, 167-68 (2017).

[11] Foster v. Neilson, 27 U.S. 253, 314 (1829). See Alex Glashausser, What We Must Never Forget When it is a Treaty We are Expounding, 73 U. CIN. L. REV. 1243, 1255-56 (2005).

create private rights or provide for a private cause of action in domestic courts.[12] The Supreme Court has noted that various Courts of Appeals *"have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary."*[13]

But extradition treaties, as self-executing law, are not subject to the regular rules of treaty construction because they are not merely political documents. Courts have regularly recognized the private rights of relators to raise individual defenses or exceptions available in extradition treaties, and their right to be protected by due process provisions such as the requirement of probable cause.' Courts, thus, have afforded relators standing to raise treaty-based defenses or requirements, such as statutes of limitations, double jeopardy, double criminality, and political offense, against their extradition requests.[14]

MULTIPLE CLAUSES PROTECTING HUMAN RIGHTS AND DUE PROCESS

Nations maintains bilateral extradition treaties with over one hundred foreign countries. Even though the extradition process is heavily weighted in favour of the requesting country, extradition treaties generally contain several clauses meant to shield relators from an unfair or arbitrary process, and to protect their human rights. The following are some of the most common clauses found in bilateral extradition treaties for the protection of relators:

1. ***Dual Criminality:*** Dual criminality clauses require that an offense be extraditable only "if the acts... (for which extradition is requested are) criminal (ized) by the laws of both countries."[15] Dual criminality does not require countries to name their offenses the same, or that they have exactly the same elements, but rather that the charged conduct constitutes a crime in both countries. Even though there must be an analogous crime in the requested country to the crime charged in the requesting country,6 ° "the elements of the analogous offenses need not be identical.

2. ***Political, Military, and Fiscal Offenses*:** Many treaties disallow extradition when the charged offense is related to a political, military, or fiscal issue. Some sort of political offense exception is contained in almost all extradition treaties.' Offenses that are

[12] Restatement (Third) Of Foreign Relations Law Of The United States § 907 cmt. a at 395 (1986).
[13] *Medellin* v. *Texas*, 552 U.S. 491, 505-06, n.3 (2008) (citing *United States* v. *Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001))
[14] *Patterson* v. *Wagner*, 785 F.3d 1277, 1280-83 (9th Cir. 2015); Jhirad v. Ferrandina, 536 F.2d 478,480 (2nd Cir. 1976)
[15] *Collins* v. *Loisel*, 259 U.S. 309, 311 (1922)

otherwise extraditable should not form the base for an extradition if they are of a political nature.[16] To consider whether an offense qualifies as political for the purpose of the exception, the court must first determine whether the offense constitutes a "pure" or a "relative" political offense.' "Pure" political offenses are those that are naturally related to political intercourse, such as treason, sedition, and espionage, whereas "relative" political offenses are those "common crimes that are so intertwined with a political act that the offense itself becomes a political one." Ordinary crimes such as murder or fraud may constitute political offenses if their commission is sufficiently related to political acts such as rebellions, uprisings, and civil wars.

3. ***Statutes of Limitation*:** A statute of limitations defense may be raised against a request for extradition only if the applicable treaty provides for it,[17] but most current extradition treaties contain such provisions." Their language usually allows the barring of extradition when the requesting country has not brought prosecution against the relator within the terms provided by the laws of the requesting or requested state. In such cases, the extradition magistrate is permitted to inquire into the laws of the requesting state to determine whether the statute of limitations has run or not. "Statutes of limitations are meant to "ensure due process and fundamental fairness."[18] They protect the innocent from being charged at a time when they no longer have access to exculpatory evidence, and shield the public from untimely and ineffective prosecutions. The inclusion of provisions for statutes of limitations in extradition treaties is clearly meant to protect relators from untimely and potentially unfair extraditions and criminal prosecutions.

4. ***Double Jeopardy*:** Double jeopardy provisions are contained in most U.S. extradition treaties.' In criminal cases, the constitutional prohibition against double jeopardy is meant "to protect an individual from being subjected to the hazards of trial and

[16] United Nations Model Law on Extradition.

[17] *Merino* v. *United States Marshall*, 326 F.2d 5 (9th Cir. 1963). See also In re Patterson, 2012 U.S. Dist. LEXIS 157843 at 8-9 (C.D. Cal. October 30, 2012) (relator is certified extraditable even though the prosecution was begun by South Korea well after the statutes of limitation for both countries had run because the wording used by the extradition treaty implied that application of the defense was optional by the requested country.).

[18] *United States* v. *Marion*, 404 U.S. 307, 322 (1971). See also, Artemio Rivera, A Case for the Due Process Right to a Speedy Extradition, 50 CREIGHTON L. Rev. pp. 249- 255 (2017).

possible conviction more than once for an alleged offense."[19] The doctrine of double jeopardy may apply in international extradition when the relator already has been prosecuted for the same facts or charges by the requesting or requested country.

Double jeopardy has been held not to apply to extradition proceedings, in terms of protecting relators from subsequent extradition requests.' This means that the denial of an extradition request does not necessarily prevent a future request for the same person by the same country. Courts reason that extradition hearings are preliminary proceedings, and thus the denial of a request for a certificate of extradition does not constitute an acquittal or a decision on the merits. But double jeopardy, or the similar civilian-doctrine of Ne Bis in Idem, may be used as a defense against extradition when the relator already has been prosecuted in the requesting or requested country for the same offense or facts.

5. ***Remedies and Recourses Clauses*:** Many treaties contain clauses that allow relators to benefit from remedies provided under the laws of the requested state. A recurrent issue with remedies and recourses clauses is whether relators can validly assert rights afforded to criminal defendants under the United States Constitution and statutes, [20] such as raising the Sixth Amendment Speedy Trial Clause as a defense. So far, American courts have concluded that constitutional rights afforded to criminal defendants do not accrue to relators because international extradition is not a criminal proceeding, and because the U.S. Constitution cannot be extended extraterritorially. By doing so, U.S. courts have left the purpose of these clauses undefined. Even though American courts are yet to clarify the exact purpose and meaning of remedies and recourses clauses, these clauses at least seem to recognize that relators are protected by the laws of the requested state, in addition to the protections specifically allowed by treaty. This is particularly relevant in cases where the requested country has local legislation protecting relators from unfair or inhumane treatment by requesting countries, as right and recourse clauses may be understood to integrate such rights. The inclusion of these clauses in extradition treaties also supports the

[19] *Green* v. *United States*, 355 U.S. 184, 187 (1957)
[20] *Murphy* v. *United States*, 199 F.3d 599 (2nd Cir. 1999); *Martin* v. *Warden*, 993 F.2d 824 (11th Cir. 1993); *Kamrin* v. *United States*, 725 F.2d 1225, 1227-28 (9th Cir. 1984); *Nezirovic* v. *Holt*, 990 F. Supp. 2d 606, 617-19 (W.D. Va. 2014)

theory of this Article that extradition treaties are meant to protect the rights of realtors, as well as to facilitate the extradition process.

6. ***Death Penalty Exception*:** Bilateral extradition treaties contain at least one provision allowing the requested state to refuse extradition to a death state. These provisions are generally exercised by treaty partners whose municipal laws prohibit the death penalty, and who consider the treatment afforded in the United States to capital offenders as inhumane and torturous.

   For "several decades," European states have refused to extradite individuals to the United States without commitments by the United States that the death penalty will not be imposed.[21] An example of a typical death penalty clause is in the extradition treaty between the United States and the United Kingdom, which provides in Article 7, "When the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the executive authority in the Requested State may refuse extradition unless the Requesting State provides an assurance that the death penalty will not be imposed or, if imposed, will not be carried out."[22]

7. ***Extraterritorial Jurisdiction Exception*:** Various extradition treaties limit the extraterritorial jurisdiction of the requesting country. Because of these treaties, requesting states are usually constrained to demand extradition only for offenses committed within their territorial boundaries unless the laws of both, the requesting and requested country, allow for the exercise of jurisdiction outside their territories under similar circumstances. The extradition treaty between Brazil and the United States is an example. It provides that "(w)hen (the) offense has been committed outside the territorial jurisdiction of the requesting state, the request for extradition need not be honored unless the laws of the requesting and requested state authorize punishment under such circumstances."[23] Other treaties include language requiring the requested country to deny extradition when the alleged offense occurs outside the territory of the requesting country and the laws of the requested country would not

[21] Michael J. Kelley, Aut Dedere Aut Judicare and the Death Penalty Extradition Prohibition, 10 INT'L LEGAL THEORY 53, 59-60 (2004)

[22] Extradition Treaty, U.K.-U.S., art. 7, Mar. 31, 2003, 35 U.S.T. 3197, T.I.A.S. No. 10850. See also Extradition Treaty, Brazil-U.S., art. VI, Jan. 13, 1961, 15 U.S.T. 2093; United Nations General Assembly's Model Treaty on Extradition

[23] Extradition Treaty, Braz.-U.S., art. IV, Jan. 13, 1961, 15 U.S.T. 2093.

confer jurisdiction under similar conditions.

8. ***Humanitarian Grounds Exception*:** Some extradition treaties allow the party-states discretion to refuse extradition when the age or health condition of the relator is an issue, or when there are reasonable grounds to believe the request is being made on account of the relator's race, religion, political ideas, or ethnicity. Likewise, some U.S. treaties allow the requested state to deny extradition for unspecified humanitarian reasons, and to protect the relator from unfair proceedings in the requesting country. General humanitarian grounds have been effectively raised against an extradition request in a recent British case.[24]
9. ***Probable Cause Requirement*:** Treaties generally condition extradition on a showing of probable cause that the relator committed the alleged offense. Probable cause for extradition has been defined as "evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." In making this determination, courts apply a 'totality of the circumstances analysis' and 'make a practical, common sense decision whether, given all the circumstances ... there is a fair probability that the defendant committed the crime.[25]

CONCLUSION

Extradition treaties are meant to facilitate the surrender of persons between nations for criminal prosecution and imprisonment while protecting those persons' human rights and right to due process. Even though extradition treaties provide a variety of individual rights, courts routinely cite the default rule for the proposition that the only purpose of extradition treaties is to facilitate extraditions, and thus treaty clauses should be read expansively in favor of extradition. The default rule should be discarded because it is grounded on false assumptions and outdated case law, and because the strong liberty interests of relators dictate that extradition treaties not be construed expansively against them. Because extradition treaties contain a variety of provisions recognizing the human and due process rights of realtors, their only purpose cannot be just facilitating extradition. These provisions, which include requirements for the establishment of probable cause, that the alleged offense

[24] See Extradition Treaty, H.K.-U.S., art. 6(3)(c), Dec. 20, 1996, S. TREATY DOC. 105-3.
[25] In re Paberalius, 2011 U.S. Dist LEXIS 57907, at *38 (N.D. IL May 31, 2011) (weighing evidence brought by the government against evidence presented by the relator to deny extradition request); see also United States v. Froman, 355 F.3d 882, 889 (5th Cir. 2004)

constitute a crime in the requested and requesting country, and that the offense be subject to applicable statutes of limitations, must be enforced by the courts with the same rigor of congressional statutes as extradition treaties are self-executing, requiring no separate legislation for their enforceability in the United States. The default rule should be discarded because it is based on false assumptions about its purpose and on a case that predates the development of the modem due process doctrine. The rule was adopted by the Court in 1933, at a time when the modem doctrine of due process was yet to emerge, before relators were recognized to have due process rights, and before modem extradition treaties adopted many of their current provisions meant to protect human rights and due process. Relators' strong liberty interests require that extradition treaties be either strictly construed against extradition, or at least not liberally construed in favor of extradition. Relators in international extradition face similar or greater limitations to their liberty than defendants in criminal cases. While criminal defendants face potential imprisonment and social stigma if convicted, relators face being surrendered to a foreign country for further imprisonment and criminal prosecution and losing contact with friends and family in the United States. Criminal law's rule of lenity requires that criminal statutes be construed restrictively in favor of defendants. Because of the similarity of liberty interests and potential consequences in extradition and criminal cases, treaty and statutory construction in both fields should be restrictive in favor of the individual, as the rule of lenity provides for criminal cases.