UNC SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 4 | Number 1 Article 6

Summer 1978

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Double criminality, long an important principle of the extradition law of the United States, stipulates that a person may be extradited for an offense "only if the acts charged are criminal by the laws of both countries."[1] This principle has enabled the United States to refuse to extradite persons blameless by our criminal standards.[2] Yet increasing recognition of both the interdependency of nations and the benefits of a world public order has lessened the tendency of nations to refuse extradition.[3] National treatment of the double criminality principle reflects this evolution.

A recent case, *Freedman v. United States*,[4] illustrates the modern application of the principle of double criminality. The two basic questions posed in *Freedman* regarding the requirements of double criminality were: (1) how similar must the relevant laws of each country be in order to apply the doctrine, and (2) in determining the criminality of the act charged, is state law or federal law the applicable body of law? Concerning the first issue, the court held that a high degree of similarity is required only for those aspects of the crime where the applicable treaty expressly requires it. The court specifically dealt with the applicability of the statutes of limitation of the asylum state as a defense to extradition, and held that these statutes should not bar extradition because this was not specifically required by the treaty. Regarding the second issue, the court held that if no sufficiently analogous law was found in the statutes of the state where the extradition hearing was held, then the common law, the federal law and finally the law of the other states could be consulted. To meet the requirements of double criminality under this test, a number of states sufficient to constitute a "healthy majority" must deem the act charged as being criminal.

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[1] Collins v. Loisel, 259 U.S. 309, 311 (1922).

[2] Hudson, *The Factor Extradition Case and Double Criminality*, 28 AM J. INT'L. L. 274, 284-85 (1934) [hereinafter cited as Hudson].

[3] Bassiouni, *International Extradition: A Summary of the Contemporary American Practice and a Proposed Formula*, 15 WAYNE L. REV. 733, 734 (1968) [hereinafter cited as Bassiouni].

[4] 437 F. Supp. 1252 (N.D. Ga. 1977).

The facts of the present case involved an effort to raise capital in Canada. Ely Freedman was a substantial stockholder and president of a New York corporation owning oil and gas properties in Ohio. In 1970, Freedman and several of the corporation's other large stockholders attempted to raise capital in order to develop further the corporation's properties. With the aid of several Canadian businessmen, Freedman developed the fund raising scheme ultimately implemented. This scheme involved transferring ownership of the New York corporation to a specially created Canadian corporation and selling the latter's stock in Canada.

Eventually Freedman and his associates successfully sold a substantial block of this stock through a Canadian stockbroker to an institutional investor, the Growth Equity Fund of Canada. According to the Canadian government, the stockbroker, in addition to the standard commission, allegedly received an extraordinary secret commission of ten percent. Within a year of the sale, the Growth Equity Fund liquidated its stock at a loss of $168,183.70.[5]

In 1976, Canada filed an extradition complaint charging Freedman with the crimes of tendering a secret bribe to influence the sale of a large block of shares, *i.e.*, commercial bribery, and defrauding an institutional investor, *i.e.*, criminal fraud. A full extradition hearing was held on June 1, 1977 in the state of Georgia where Freedman was residing. The presiding U.S. magistrate found sufficient evidence of criminality to place Freedman in custody awaiting issuance of a warrant by the Secretary of State authorizing his surrender to Canada.

Direct appeal being unavailable for extradition orders,[6] Freedman petitioned the federal district court for a writ of habeas corpus. Habeas corpus review of an order of extradition is restricted to only three issues: (1) whether the committing magistrate had jurisdiction; (2) whether the offenses on which extradition was sought are within the terms of the applicable treaty between the United States and Canada; and (3) whether any evidence existed to support the magistrate's conclusion that there was a reasonable ground for finding the accused guilty of the offense charged.[7] Freedman addressed a number of arguments to each of these issues.

Freedman contended that because he had never been named in the Canadian indictment, there were no criminal charges pending against him upon which jurisdiction for an extradition proceeding could be based. Freedman also argued that the court lacked jurisdiction because the Canadian government had stated that it would not seek Freedman's extradition, and because the prosecution had delayed five years before initiating the extradition proceedings. The court, however, found that a

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[5] The Fund paid $231,635.00 for the stock. 437 F. Supp. at 1257.

[6] Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir. 1976).

[7] Fernandez v. Phillips, 268 U.S. 311 (1925).

certificate of Canada's Deputy Minister of Justice and a Canadian arrest warrant were sufficient evidence to support the magistrate's finding of jurisdiction.[8] The court also stated that even if Freedman's "plaintive cries of prejudice and unequal dealing at the hands of the Canadian government" were true, these considerations were not relevant to the habeas corpus appeal.[9]

More importantly, Freedman contended that the two crimes for which his extradition was sought did not fulfill the requirement of double criminality, the *sine qua non* of extraditability. Specifically, Freedman argued that the crimes were not enumerated in the applicable treaty and that no analogous counterparts existed in the applicable federal and state laws of the United States. The Webster-Ashburton Treaty, applicable in this case, enumerates the following relevant offenses: "Bribery, defined to be the offering, giving, or receiving of bribes *made criminal by the laws of both countries;*" "fraud by baliee, banker agent ... made criminal by the laws of both countries;" and "obtaining money, or valuable securities by false pretenses or by defrauding the public or any person by deceit or falsehood or other fraudulent means whether such deceit or falsehood, or any fraudulent means would or would not amount to a false pretense."[10] The court deemed this sufficient enumeration of the charged offenses and proceeded to Freedman's second argument, with its primary issues of (a) how closely analogous must the asylum's counterpart be; and (b) which laws of the United States are applicable in this case?

The court reviewed the common law, federal statutes and laws of all the states before finding that sufficiently analogous counterparts existed in only half of the states (not including Georgia) for the charge of commercial bribery. Concluding that this was inadequate to meet the double criminality standard, the court denied Freedman's extradition on that charge. However, it found that several Georgia statutes were sufficiently analogous to support the extraditability on the criminal fraud charge.

The remaining issue on this review of habeas corpus involved the sufficiency of the evidence supporting the magistrate's decision. Freedman argued that the expiration of the statute of limitations applicable to Georgia's counterpart of the Canadian crime of criminal fraud removed an essential element of the act's criminality in Georgia. In other words, Freedman could not be prosecuted in Georgia for the crime charged because of the statute of limitations. The act would thus not be criminal under the laws of Georgia and would fail the test of double criminality. Responding to this unique approach, the court recognized that in any

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[8] *See generally* Bassiouni, *Theories of Jurisdiction and Their Application in Extradition Law and Practice*, 5 CAL. WESTERN INT'L L.J. 1 (1974).

[9] 437 F. Supp. at 1267.

[10] *Id.*, at 1260-62. *See* note 13 *infra*.

event federal rather than state statutes of limitation would apply. The court then stated that absent a treaty provision "making extradition dependent upon a finding of probable cause that the offense committed was within the applicable limitations period under federal law, we are not inclined to modify the express agreement between two sovereign nations by judicial fiat."[11] Thus the court denied Freedman's application for habeas corpus relief.

The power of the United States government to extradite exists only where created by a treaty obligation.[12] Therefore federal court cases interpreting treaty provisions rather than general principles of international law govern the extradition law of the United States. The treaty applicable to extradition procedures between the United States and Canada is the Webster-Ashburton Treaty of 1842,[13] originally made with the British but which remained applicable to Canada after independence.[14] Article X of the treaty enumerates certain offenses for which extradition may be sought. It provides that extradition shall only be granted upon "such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, will justify his apprehension and commitment for trial, if the crime had there been committed."[15] For extradition purposes, this list of offenses has been treated by American courts as exclusive and not illustrative;[16] thus extradition may *not* be granted for criminal acts not enumerated in the treaty. The treaty neither defines the enumerated acts nor specifies whether the "laws of the place" where the fugitive is found refers to state or federal law.

At the extradition hearing the magistrate must determine whether each crime charged meets the double criminality requirement of Article X.[17] Such a determination is required by the "doctrine of specialty" which is generally recognized in American extradition law and treaties.[18] Under this doctrine, the requesting country may prosecute the extraditee only on those charges found to be extraditable offenses at the extradition hearing.

The case law applying the "laws of the place" requirement began in 1903 with the United States Supreme Court case, *Wright v. Henkel*.[19] In that decision, the Supreme Court held that in determining whether an

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[11] *Id.* at 1264.

[12] Valentine v. United States, 299 U.S. 5 (1936). *See generally* Wise, *Some Problems of Extradition*, 15 WAYNE L. REV. 709, 714 (1968) [hereinafter cited as Wise].

[13] For complete text of the treaty *see* 8 Stat. 572, 12 T.S. No. 82 (1842).

[14] Canadian law became independent from British law in 1849 but a Canadian statute in the same year provided for the execution of the Webster-Ashburton Treaty.

[15] 437 F. Supp. at 1264.

[16] Bassiouni, *supra* note 3, at 743.

[17] Shapiro v. Ferrandina, 478 F.2d 894, 906-07 (2d Cir.) *cert. dismissed*, 414 U.S. 884 (1973).

[18] Bassiouni, *supra* note 3, at 748.

[19] 190 U.S. 40 (1903).

alleged act was made criminal in the asylum country, the laws of the *state* within which the extraditee was found would apply. Here Chief Justice Fuller explained that "for nearly all crimes and misdemeanors the laws of the States, and not the Enactments of Congress, must be looked to for the definitions of the offense."[20]

The interpretation given the requirement by the court in *Wright* persisted until 1933, when the Supreme Court in *Factor v. Laubenheimer*[21] widened the scope of the applicable domestic law from which a court can seek an analogous counterpart for purposes of extradition. The majority in *Factor* explicity found that the act charged in the extradition complaint was not a crime under Illinois law and yet they allowed extradition. Embracing a broad view of extradition treaty obligations,[22] the court held that the act charged was considered criminal according to "the jurisprudence of both countries," and thus satisfied the double criminality requirement.[23]

Writers have criticized the *Factor* decision hoping that subsequent decisions would restrict it to its facts.[24] Indeed lower federal courts have seemed reluctant to apply the full-fledged *Factor* analysis to extradition cases.[25] For instance in *Shapiro v. Ferrandina*, the Second Circuit stated: "The Government contends that the fact that the acts are not criminal as forgery in New York is thus irrelevant. We do not read *Factor* so broadly."[26] On the other hand, *In re Shapiro*[27] illustrates one method of reconciling *Factor*. There the court stated that while the general rule applies the laws of the individual state to determine double criminality, if unique, extraordinary or aberrant provisions in a state's laws would unduly hamper the extradition treaty, then double criminality may be sought elsewhere in American law.[28] Following a suggestion in *Wright v. Henkel*,[29] the *Shapiro* court found that *Factor's* "jurisprudence of both countries" included both federal law and the law of a preponderance of the states. *Freedman* presented the question of whether twenty-five states was enough to constitute a "preponderance of states" for purposes of extradition. In accordance with the reasoning of *In re Shapiro*, the *Freedman* court held that the Georgia statutes were inapplicable only if "extraordinary or aberrant."[30] Thus, although one-half of the states in

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[20] *Id.* at 59.

[21] 290 U.S. 277 (1933).

[22] *Id.* at 292.

[23] Justice Stone contended that twenty-two of the states made the act charged criminal.

[24] Hudson, *supra* note 2, at 274. *But see* Borchard, *The Factor Extradition Case*, 28 AM. J. INT'L L. 742 (1933).

[25] *See* United States v. Stockinger, 209 F.2d 681 (2d Cir. 1959); Villareal v. Hammond, 74 F.2d 503 (5th Cir. 1934).

[26] 478 F.2d at 911.

[27] 352 F. Supp. 641 (S.D.N.Y. 1973).

[28] *Id.* at 647.

[29] 190 U.S. 40 (1903).

[30] 437 F. Supp. at 1262.

this country recognized the crime of commercial bribery, an equal number did not, and neither position could be described as "aberrant." The *Freedman* court also suggested that the law of a "healthy majority of states" and not a mere "preponderance" should be the express requirement to establish aberrance.[31]

Once a court has established the scope of the applicable law within which analogous counterparts may be sought, the question remains, how strict an analogy should be required? In 1903, the Supreme Court said that if the two statutes are substantially analogous or if the essential character of the acts described is the same, then "absolute identity" is not required.[32] In another Supreme Court case involving the similarity of the criminal acts of "cheating" and that of "obtaining property under false pretenses," Justice Brandeis stated: "The law does not require that the name by which the crime is described in the two countries shall be the same, nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions."[33] After this case, *Jhirad v. Ferrandina*[34] went even further. Because extradition treaties are to be liberally construed, the court found that "the general lack of particularity and specificity of the crimes listed ... in the extradition treaty makes it evident that the intention was to describe the crimes in the most general and *inclusive* terms."[35] Clearly, in most cases the similarity requirement will not prevent extradition if all other requirements for double criminality are met.

The inability of the *Freedman* court to find sufficient similarity between the state or federal bribery laws and the Canadian law of commercial bribery seems to imply that the court applied a stricter standard than the ones mentioned above. However, closer attention reveals that even application of the *Jhirad* approach would not have changed the result here. The unique facts in *Freedman* were such that although Georgia had laws dealing specifically with commercial bribery, these laws did not make the act criminal. The Webster-Ashburton Treaty, however, expressly requires the act to be "criminal" in both countries. The court could not ignore this express condition even under the approach of the *Jhirad* court.

The remaining question, regarding the applicability of the asylum country's statutes of limitation to the determination of probable cause, involved a relatively new area in extradition case law. Extradition hearings "are not to be converted into a dress rehearsal trial,"[36] and thus the

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[31] *Id.* at 1261.

[32] 190 U.S. at 58.

[33] Collins v. Loisel, 259 U.S. 309, 312 (1922).

[34] 355 F. Supp 1155 (S.D.N.Y. 1973), *aff'd*, 536 F.2d 478 (2d Cir. 1976), *cert. denied*, 429 U.S. 833 (1978).

[35] *Id.* at 1160 (emphasis added).

[36] 536 F.2d at 484.

extraditee may not present any affirmative defenses.[37] A court need only have a reasonable ground to believe the fugitive has committed an extraditable offense in order to approve extradition.[38] However, prior to *Freedman,* whether the statutes of limitations applicable in a state proceeding would be deemed essential or non-essential elements in the determination of such a reasonable ground had been discussed only in dicta.

In 1930, one federal court found that there being "no Maryland statutes of limitations affecting the offenses here charged . . . the present extradition hearings are not barred by lapse of time."[39] A 1973 case originating in Georgia also found extradition permissible expressly because the applicable statutes of limitation had not expired.[40] *Garica-Guillern v. United States,*[41] decided in 1971, added a new twist: "A treaty is an agreement between two nations and the statutes of limitations of the various states of the United States should not be used to interfere with obligations under a treaty if the crime has not [been] prescribed [*sic*] according to the federal statutes of limitations."[42] Another case, *Shapiro v. Ferrandina,* explained this approach: "The basic intention of international treaties of extradition is uniform, regularized extradition between nations . . . . Because of this clear overriding federal interest in treaties of extradition, we will look to federal laws regarding the limitations question."[43] The court in *Freedman* accepted this view by concluding that if a statute of limitations of the asylum country applied, it would be the federal and not the state statute.

Significantly, in *Shapiro v. Ferrandina,* a district court actually applied a New York statute of limitations to bar a fugitive's extradition to Israel, but only because the United States-Israel extradition treaty expressly required such measures.[44] The *Factor* requirement of liberal construction of treaties in favor of extradition and the aforementioned emphasis of *Jhirad* clearly disfavor the imposition of any non-express conditions to bar extradition proceedings. Accepting this view, the *Freedman* court decided that, absent a special provision in the extradition treaty expressly requiring the application of the asylum state's statute of limitations, these statutes shall not be considered in the extradition proceedings.[45]

The *Freedman* decision represents another step in the movement of U.S. extradition law toward limiting the significance of the double crim-

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[37] Charlton v. Kelly, 229 U.S. 447 (1913).

[38] Bassiouni, *supra* note 3, at 737.

[39] Vaccaro v. Collier, 38 F.2d 862, 871 (D. Md. 1930).

[40] Neal v. United States Marshal at Southern District of Georgia, 476 F.2d 602 (5th Cir. 1971).

[41] 450 F.2d 1189 (5th Cir. 1971).

[42] *Id.* at 1192-93 n.1.

[43] Shapiro v. Ferrandina 355 F.Supp. 563, 574 (S.D.N.Y. 1973), *modified* 478 F.2d 894 (2d Cir. 1973), *cert. dismissed,* 414 U.S. 884 (1973).

[44] 355 F. Supp. at 574.

[45] Wise, *supra* note 12, at 711.

inality principle and expanding the availability of extradition. Historically, principles of double criminality have been the primary method of insuring "fairness"[46] to the potential extraditee. This remains especially true in light of the rule of non-inquiry, adhered to by U.S. courts, which prevents the magistrate at the extradition hearing from considering whether the extraditee will receive a fair and just trial at the hands of the requesting state.[47] The decline of this safeguard for individual human rights resulting from this shift in U.S. extradition law has led some to suggest that a World Court of Habeas Corpus should be formed, in order to hear appeals from extraditees claiming violations of international due process.[48]

Another aspect of the problem in the United States is the role of the Secretary of State. Prior to 1871, although only the Secretary of State could issue an extradition order, he had no discretion to contradict the determination of an extradition magistrate.[49] Thus if a standard of fairness was ever going to be utilized to prevent extradition, it would have to be applied by the magistrate or reviewing federal court who generally accepted this responsibility under the guise of the double criminality principle. In 1873, however, the Secretary of State gained the power to review and reverse a magistrate's extradition ruling. No court or statute has yet defined the power.[50] The result, as illustrated in *Freedman*, has been a shifting of the responsibility for insuring fairness in extradition to the Secretary of State, with a corresponding shift by the courts toward allowing the extraditee only the most technical defenses at the hearing. The court in *Freedman* demonstrated the latter by recognizing many of petitioner's arguments, including Canada's delay in seeking extradition, as relevant to "any discretionary decision not to extradite," but not relevant to the legal proceeding at hand.[51] If fairness is a valid consideration in extradition proceedings, then responsibility for its application should be placed with the courts and not with the Secretary of State, who necessarily gives too much weight to purely political considerations.

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[46] Neely v. Henkel, 180 U.S. 109 (1901).

[47] *See* Kutner, *World Habeas Corpus and International Extradition*, 41 U. DET. L.J. 525 (1964).

[48] *See generally* Note, *Executive Discretion in Extradition*, 62 COLUM. L.REV. 1313 (1962).

[49] In re Stupp, 23 F. Cas. 281 (S.D.N.Y. 1873).

[50] Note, *supra* note 48, at 1315.

[51] 437 F. Supp. at 1258.