

## MODERN DEVELOPMENTS IN THE LAW OF EXTRADITION

By J. MERVYN JONES, M.A., LL.B.

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Sir CECIL J. B. HURST, President, in the Chair

Extradition is a branch of international law which occupied considerable attention during the years following the end of the First World War. In 1924 a Sub-Committee of the Committee of Experts of the League of Nations was asked to consider "whether there are problems connected with extradition which it would be desirable to regulate." Professor Brierly in 1926 produced a report on the subject as a result of which the Committee decided that projects for such regulation must be temporarily postponed. These were days when the movement in favour of the codification of international law, especially the international law of peace, reached a height of enthusiasm which it had never before, and has not since, attained. It is not perhaps surprising, therefore, that, if agreement on so comparatively un-political and technical a matter was not thought practicable, agreement on the larger questions which touch the life of the average man should have become progressively more difficult to achieve. You will perhaps forgive me if, at a time so grave in the history of our country, I have chosen not to dwell upon these larger questions, and if instead I invite your attention to a somewhat narrow field, less momentous with great issues than those daily in our minds, but, from the legal point of view, of the utmost technical interest and importance. I propose to consider those features of extradition law and practice which have come recently into prominence, especially in the light of British practice and opinion. For the sake of convenience I will refer to four major questions.<sup>1</sup> There are many others, no doubt, and in discussion it is to be hoped

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<sup>1</sup> It is difficult to do justice to such a wide subject in so short a space. These observations are therefore necessarily of a somewhat general nature.

some of them will be raised; but in my study of the subject these four aspects of the matter have struck me as deserving of special attention:

- (1) The test of extradition.
- (2) The principle of non-extradition in respect of political offences.
- (3) The principle of non-extradition in respect of nationals.
- (4) Judicial control over extradition procedure.

### I. THE TEST OF EXTRADITION

It has been the general opinion among governments ever since extradition began to be practised that it should only be granted for "grave offences." The reason for this is obvious; only such offences could justify the amount of inconvenience and trouble involved in extradition proceedings. Moreover, there are many offences which do not imply enough moral turpitude to justify governments in depriving individuals of their liberty and handing them over to other governments for trial. Again there are some offences regarded by some nations as meriting severe punishment which do not appear at all in that light to others. Offences against the game laws and driving at excessive speed might be regarded differently in Rutland and in Mexico City, and perhaps we need not choose places so far apart to discover the difference of attitude towards particular crimes. I believe that before the Spanish Revolution of 1931 ladies bathing at Spanish seaside resorts used to wear a long dark two-piece garment with sleeves coming down to the wrist, both the tunic portion and the sleeve being of a voluminousness which defies description. In some countries it would be an offence to wear anything less than the minimum prescribed by police regulations; in other countries it would be a joke to wear such a garment as I have described. Such, in brief, are the considerations which have led to a limit being placed on the number of offences in respect of which extradition may be granted. It is, of course, impossible to draw up a list based on the highest common factor of all those offences which are held by all nations to be serious menaces to social life and public order.

What, then, are we to do about this problem? Some writers

have argued that by customary law States have a duty of surrendering fugitive criminals, subject to the right of the State from whom surrender is requested to decide in each case whether the offence is of a grave character. Such a doctrine, though contrary to the general opinion of international jurists, is not without support in municipal courts and even, to some extent, in international practice. The fact that there are in existence at least forty modern extradition treaties which contain no list of crimes, but lay down a general obligation to extradite for any offence punishable by the law of both States illustrate its influence in practice.<sup>2</sup> Both Great Britain and France, even before an extradition treaty was concluded between them, surrendered each other's criminals on a basis of reciprocity, and it was undoubtedly at one time the view in England that there was no legal objection to this being done. But it was subsequently held by the Courts that statutory authority was required for the surrender, and the practice was replaced by a treaty followed in each individual case by an Act of Parliament in order to place the treaty régime on a sound municipal basis.<sup>3</sup> Since the Extradition Act, 1870, it has never been doubted in this country that extradition can only be granted in respect of offences specified both in the Extradition Act and the extradition treaty. As for the English and American Courts you will find numerous dicta to the effect that there is no duty to extradite in the absence of a treaty. It would therefore be vain to look for a test of extradition in the somewhat nebulous customary law which prevailed before the practice of making treaties became general. In practice the test is whether a particular offence appears in a particular list in a particular treaty. It is hardly possible to say even that by general usage certain offences are usually extraditable. The French Government,

<sup>2</sup> See "Harvard Draft Convention on Extradition," *A.J.I.L.* (1935), *Supplement*, Appendix I. The laws of Turkey and Canada expressly authorise extradition even in the absence of a treaty: *Ibid.* Appendix VI. For decisions of municipal courts illustrating the doctrine that customary international law recognises extradition for grave offences, see the following volumes of the *Annual Digest of Public International Law Cases*: 1919-1922, Case No. 184; 1923-1924, Case No. 156; 1925-1926, Cases Nos. 223-226; 1929-1930, Cases Nos. 173, 174; 1931-1932, Cases Nos. 156, 157; 1933-1934, Case No. 147.

<sup>3</sup> See for the history of the matter Clarke, *Treatise on the Law of Extradition* (4th ed. 1903), pp. 1-26, especially the passage from Chitty's *Criminal Law* (1826) quoted at p. 26.

after the conclusion of the Anglo-French Extradition Treaty of 1841, were prepared to include any number of crimes that the English Government cared to name. But only crimes of a certain kind interested the British Government, and the British treaties since 1870 have tended to repeat the list set out in the Extradition Act of that year. This difference of opinion as to what crimes should be extraditable has existed even between countries with a common legal tradition like Great Britain and the United States. For years after the Webster-Ashburton Treaty of 1842 the British Government attempted in vain to secure the inclusion of embezzlement in its extradition treaty with the United States.

Let me now turn to another aspect of the matter. There is a problem known to private international law as classification. The same problem exists in the field of public international law, and especially in the present context, but scant attention has been given to it by international lawyers. I will take an example of what I mean. If you and I make a contract governed by English law and we use the word "delivery," an English court would be able to decide in the light of English precedents the legal effect to be given to that word. Suppose, however, two States make a treaty and use such words as "trust," "mandate," or, coming nearer my subject, "murder." What meaning is an international lawyer or tribunal to give to such words, which signify one thing by the law of one State and another quite different thing by the law of the other? When "forgery" was mentioned in the Anglo-American Treaty of 1842 it was not perhaps foreseen that "forgery" has one meaning in English law and may have different meanings according to the laws of various State jurisdictions of the United States.<sup>4</sup> What is the answer to this conundrum? Well, the obvious solution might appear to be: Apply the law of the requested State. But if we did this and made it the test of extradition we might get cases of extradition being ordered and yet there might be no crime by the law of the requesting State, and consequently no purpose in the extradition. If, on the other hand, it were sufficient for the crime to be classified by reference to the law of the requesting State, the result would be, as it was put in 1868 by a witness

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<sup>4</sup> *In re Windsor* (1865) 6 Best and Smith, 522.

before the Committee on Extradition, that a "French writ would virtually run in England."

In fact the problem has not been solved at all. Where a designation does not cover an offence by the law of both States to the extent of the difference, no effect can be given to it. This is the so-called "double-criminality" rule, and there are many cases in England and the United States which illustrate its application. Rather than inflict a long list of these upon you I prefer, in a paper of this kind, to mention two of the most recent *causes célèbres* in which the rule appears to have been questioned.<sup>5</sup> The first is the *Blackmer* case decided by the Court of Paris in 1928; the second *Factor v. Laubenheimer* decided by the Supreme court of the United States in 1934. In the first case, the surrender of Blackmer, an American citizen, was demanded by the United States Government from the French Government, under an extradition treaty which included "perjury" in the list of offences. The perjury which he was alleged to have committed in the United States consisted of swearing a false income tax return. According to French law such an act is not perjury, that offence being committed only when a false oath is sworn in the course of judicial proceedings. It was argued that in order to justify extradition, such an act must be perjury by the law of both countries. The court held that the treaty did not say so, and that there was no reason to believe that such a rule was implied. It accordingly rejected the "double criminality" rule. Nevertheless Blackmer was not surrendered, for other technical reasons which need not detain us. In the case of *Factor v. Laubenheimer*, Factor was charged in England with the offence of receiving goods knowing them to have been fraudulently obtained. The British Government demanded his surrender under Article I of the Anglo-American treaty of 1889 referring to receiving any money, etc., knowing the same to have been embezzled, stolen, or fraudulently obtained. The offence with which Factor was charged<sup>6</sup> was not

<sup>5</sup> For these cases see Hudson, *Cases and other Materials on International Law* (2nd ed. 1936), p. 953, Lapradelle, *Les causes célèbres du droit des gens, l'affaire Blackmer* (1929), and *Annual Digest of Public International Law Cases* (1931-1932), Case No. 160. The earlier English and American cases are mentioned in Comment on Article 2 of the Harvard Draft cited above, pp. 81-82, and by Hudson, *A. J. I. L.*, xxviii (1934), p. 274.

<sup>6</sup> The American warrant was issued in 1931 and specified the offence of "receiving money knowing it to have been fraudulently obtained."

criminal in the State of Illinois where he had taken refuge, but was criminal by the laws of several (but by no means all) of the States of the Union. It was argued that since most of the crimes mentioned in the treaty were not qualified by reference to the laws of both States, whereas in one or two cases such a specific reference was mentioned, it must be inferred that there was no basis for the double criminality rule. The court accepted this argument, and ordered Factor's extradition.<sup>7</sup> This decision has been severely criticised, but it is difficult to see how in the case of a federal State any other decision would be satisfactory. The federal government having entered into an extradition treaty must perform it. That performance can hardly be conditional upon the law of the member States unless the treaty contains a specific provision to that effect. If it were otherwise, a fugitive would only have to cross the border from a State in which the offence with which he was charged was criminal into a State where it was not, and thus the treaty would be stultified. The case of the federal State is perhaps an exceptional instance of the unsatisfactory working of the double criminality rule, particularly where, as in the case of the United States, there may be considerable differences between the federal law and the laws of the member-States, as well as between the member-States themselves. On the other hand, the decision of the Supreme Court on the facts commends itself to common sense. We may hesitate to accept the view expressed by the court that the double criminality rule was not a rule of international law; we can confidently assert that it is a rule fairly generally followed in practice and never seriously questioned in any English or American court until the case of *Factor v. Laubenheimer*.<sup>8</sup> The principle adopted by the court that everything turned on the terms of the treaty ignored the importance of municipal decisions as a source of international law, and the interpretation of "evidence of criminality" as relating to procedure and quantum of proof is difficult to accept in view of the many weighty opinions expressed to the contrary that it extends also to the quality of the act charged. When all this has been said I venture to submit that if the decision of the

<sup>7</sup> He was not in fact extradited, because the Secretary of State, in the exercise of his administrative discretion, declined to surrender him, as he was required as a witness in the Tuohy trial.

<sup>8</sup> See Hudson and Borchard, *A. J. I. L.*, xxviii (1934), pp. 274 and 742.

court does not represent the law in the case of a federal State it ought to do so. It would be an intolerable thing if a State negotiating an extradition treaty with a federal State has to satisfy itself that the test of extraditable crimes was adequately provided for by the legislation of every one of the member-States. It is obvious, however, that the question is far too complex to be settled without very careful deliberation. I suppose the same problem might arise in connection with colonies or mandated territory where the law of the metropolitan government makes the offence for which extradition is sought punishable, but the colonial law does not. I am not aware, however, of any concrete instance of this kind.

All this may lead us to think that in many cases a State is as well off without a treaty as with one. Indeed, Mr. Hammond, a Foreign Office official, who gave evidence before the Select Committee of 1868, went so far as to suggest that there should be no treaties at all, but simply a general law of extradition and arrangements for mutual surrender of criminals based on the analogy of the Seamen Deserters Act. Each case would be considered on its merits, and it would be within the discretion of the Government to grant or refuse extradition. The Royal Commission of 1878 adopted a modified version of this proposal, under which the necessity of a treaty would be dispensed with, but a government should still be free (in cases where other governments desired it) to make treaties as before. It also recommended surrender of criminals without reciprocity. It is easy to see that such proposals have advantages—freedom from the delays inseparable from judicial control where such control is exercised, freedom from the difficulties raised by classification, and simplicity of procedure. On the analogy of deportation an advisory committee could perhaps be set up to consider individual cases and make recommendations. On the other hand, governments would be deprived of the opportunity of basing their demands for extradition upon a right laid down by treaty, though it is possible that the uncertainties arising from the interpretation of the treaty may sometimes reduce that right to a shadow, as appears from the *Insull* case which I shall discuss later. The ideas of the Royal Commission of 1878 are probably too advanced for this day and age.

On the basis of existing practice a general test of extradition might be based on one element common to all crimes: punishment. Professor Brierly in 1924 and Article 2 of the Harvard Draft of 1935 recommend that a minimum sentence, imposed by the laws of both States, be adopted as the test of extraditable crimes. The French Extradition Law of 1927 allows extradition not for a list of specific crimes, like the British Extradition Act of 1870, but for all acts punishable by a criminal penalty by the laws of the requesting State or by a correctional penalty of two years' imprisonment, being also an act punishable according to French law.<sup>9</sup> All these texts, however, accept in principle the double criminality rule. The traditional support for that rule and its inherent reasonableness, in the case at least of unitary States, make it difficult to suppose that it can be entirely abandoned in extradition practice. There is a common interest in the suppression of crime; there is not necessarily a common interest in the enforcement of the criminal laws of all States. The former proposition does not help us unless we know what is commonly regarded as a crime; and there is no general agreement upon this point.

## II. NON-EXTRADITION OF POLITICAL OFFENDERS

The non-extradition of political offenders is really only a special aspect of the test of extradition which I have just been discussing. There being no common political authority above States, it is impossible to treat acts of mere political treachery as extraditable offences. The liberal tradition of the Anglo-American world which favours sanctuary for political refugees has done much to extend, and in my view to exaggerate, this doctrine. Some limits must be recognised even to political crime. Sir Thomas Henry in 1868 proposed the simple test: is it treason? It is obvious, however, that this would not do at all; treason is a technical conception of English law, and feudal law at that. Moreover, there are many political offences which do not amount to treason—for instance, sedition or defaming high personages. But the non-extradition of political offenders has not been regarded as acceptable as an absolute rule. The Belgian solution

<sup>9</sup> See Article 4 of the French Extradition Law, 1927. An English text is given in Appendix VI to the Harvard Draft, No. 6.

—the “attentat clause”—permits the extradition of political offenders if the offence takes the form of an act of violence directed against a Head of State or Government. It has not, however, been deemed sufficiently exhaustive by most critics. The Swiss law of 1892 offers the “predominance” test; that is to say, if the act in question is primarily a common offence (“crime de droit commun”), the Federal Tribunal may grant extradition, notwithstanding that the act was done with a political end or motive. This has been objected to as being too vague, and leaving too much to the discretion of the tribunal. The Finnish law of 1922 made a political offence extraditable if the act constitutes an atrocity. The French law of 1927 lays down a similar test; acts of odious barbarity or vandalism committed even during a civil war are extraditable. Crimes inspired by Anarchism or Communism were also held by French law to be extraditable. English law agrees with French law so far as Anarchism is concerned, on the ground that “Anarchy is the enemy of all governments” and is not merely opposed to a particular government.<sup>10</sup> Nevertheless Anarchism is certainly a political faith. The German law of 1927 accepted the general notion of a political offence, but provided that acts which were deliberate offences against life were extraditable unless committed in open combat. The Italian Penal Code of 1930 did not expressly exclude extradition for political crimes at all, but in the famous case of the Croat terrorists, *In re Pavelic*, the Turin Court of Appeal in 1934 rejected a French request for extradition, relying however on the clause of non-extradition for political offences contained in the treaty between Italy and France.<sup>11</sup> These political opponents of King Alexander of Yugoslavia were responsible for the assassination of the King and of M. Barthou at Marseilles in 1934. After this event attention began to be given to defining terrorism as a special form of political offence which ought to be extraditable. Thus the Convention on Terrorism of 1937 was signed by a large number of States but not by Great Britain. The Convention was a fair attempt to define a type of political activity against which States should take common

<sup>10</sup> *In re Meunier* (1894) 2 Q.B. 415.

<sup>11</sup> *Annual Digest of Public International Law Cases* (1933-1934), Case No. 158.

action. I will not now embark on a detailed account of its provisions, which are in any event a dead letter, but I would in passing invite your attention to an interesting provision in Article 19:

“the characterisation of the various offences dealt with in the present Convention, the imposition of sentences, the methods of prosecution and trial and the rules as to mitigating circumstances, pardon and amnesty are determined in each country by the provisions of domestic law.”

It may be thought that this provision adequately safeguards the conception of a political offence.

The British attitude to the Convention may be summarised in the following points:

(1) English criminal law already covered some of the acts which it was proposed to make criminal by the laws of the Contracting Parties.

(2) The English construction of the term “political offence” was very narrow, and there was little danger of genuine cases of terrorism being regarded as non-extraditable here.

(3) The British Government opposed the setting up of an International Criminal Court, as it would not administer any single system of substantive law.

The changes in English law which would be required in order to carry out the Convention were such that Great Britain did not sign.<sup>12</sup> On August 31, 1939, only British India had ratified it.

I suppose that any English or American international lawyer must approach the doctrine of non-extradition for political offences with reverence, otherwise he is apt to find himself greeted with sinister accusations of reactionary sympathies. In my view, however, though this is perhaps an unsuitable time to express it, the doctrine has been carried too far, and it is reasonable to ask that the vagueness which characterises it should be somewhat qualified. I know that there is a traditional British attitude to this matter which cannot lightly be abandoned, and this is something to be thankful for. I do not see, however, why

<sup>12</sup> See the observations of the British Government League, Doc. A. 24, 1936, v (series 1), p. 6. They were developed in detail by Sir John Fischer Williams, British delegate to the Conference.

political assassination should be tolerated by international practice, even when we may be heartily glad to hear of the demise of the victim of it.<sup>13</sup> For these reasons it seems regrettable that no definition was reached at the Conference on Terrorism in 1937 which would have been acceptable to this country.<sup>14</sup>

The Harvard Draft Convention on Extradition of 1935 defines political offences as including treason, sedition, espionage, and offences connected with the activities of an organised group directed against the governmental system and security of the State. Nothing else is a political offence. In my judgment the definition is practically valueless, as it is based exclusively on a particularly nebulous field of the English common law. "Offences connected with the activities of organised groups" may include ordinary offences which, were it not for such a connection—however vague and remote—would be reprehensible breaches of criminal law. Would counterfeiting currency be a political offence? It is always conducted by organised groups and is undoubtedly directed against the security of the State. At the Conference on the Counterfeiting of Currency in 1927 it was suggested that it might be so regarded, and Article 10 of the Convention accordingly provided that counterfeiting offences as defined by Article 3 should be deemed to be included in any extradition treaty already made or which might thereafter be made.<sup>15</sup>

There is obviously no agreement as to what constitutes a political offence, and I am somewhat doubtful as to the wisdom of the attempt which may be seen in Article 5 (b) of the Harvard Draft to define this conception. It seems too subjective for definition. On the other hand, I think that the provision contained in Article 5 (a) is too narrow in so far as it deals with the political motive for a requisition, though it is a real advance so far as it goes. I do not see why it should be necessary to confine its application to the case where it appears that extradition is sought for the purpose of *prosecuting* or *punishing* in respect of a political

<sup>13</sup> Cf., however, in the light of present conditions, Mannheim, *Transactions of the Grotius Society*, xxi (1935), p. 109.

<sup>14</sup> See *Proceedings of the International Conference on the Repression of Terrorism* (Geneva, 1938).

<sup>15</sup> For comment on the Convention see Fitzmaurice, *A. J. I. L.*, xxvi (1932), p. 533.

offence. A State may request surrender for political motives and not intend to punish or prosecute, but simply detain the fugitive.<sup>16</sup> It seems to me, however, that no State will wish to abandon its right to decide what is a political offence, and it is unlikely that any definition, however comprehensive, could include the variety of circumstances which the courts of different countries, with their differing ideas of public order, would regard as falling within the conception of a political offence. For these reasons it is submitted that extradition treaties should aim at specifying what is *not* a political offence, and leave the positive aspect of the matter at large.

### III. NON-EXTRADITION OF NATIONALS

Great Britain has always consistently opposed this principle, and, subject to reciprocity, she has been prepared to extradite her own nationals for crimes covered by the relevant extradition treaties.<sup>17</sup> The Royal Commission of 1878 declared that no exception should be made in favour of nationals: Professor Brierly in his 1926 Report specially singled out for criticism the doctrine of non-extradition of nationals: the Harvard Draft of 1935 takes the same line.<sup>18</sup> The Anglo-American attitude to the subject is therefore well known. It is based on the principle that the *forum delicti commissi* is the competent jurisdiction in crime, more simply that criminal jurisdiction is territorial. To this rule, however, there may be exceptions, and some of them were indicated during the famous Lotus case of 1927, when the doctrine was very thoroughly examined, and indeed somewhat roughly handled, by the Permanent Court of International Justice. It can hardly, therefore, be an adequate answer to the argument that nationals are not extraditable to say that this is contrary

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<sup>16</sup> Article 5 (a) reads: "A requested State may decline to extradite a person claimed if the extradition is sought for an act which constitutes a political offence or if it appears that the extradition is sought in order that the person claimed may be prosecuted or punished for a political offence."

<sup>17</sup> She undertook to surrender her nationals without reciprocity for a short time after the Report of the Royal Commission of 1878, but soon dropped this practice. On the outbreak of the present war there were two treaties between Great Britain and foreign countries providing for reciprocal surrender of nationals—with Ecuador and the United States. See Rafuse, *The Extradition of Nationals* (1939), chapter iv.

<sup>18</sup> See comment on Article 7 of the Harvard Draft Convention.

to the principle of territorial jurisdiction over criminal offences, for the practical issue in extradition cases is not where a man is to be tried, but whether he is to be tried at all. What, then, is the argument in favour of the non-extradition of nationals? Territorial jurisdiction is not denied in these cases; it is merely contended that Governments should not facilitate its exercise over their own nationals when they have fled to their own country for refuge. It is said that the national tie gives a national a moral claim to be judged by his fellow-countrymen—*ses juges naturels*. But there is usually no guarantee he will be judged at all. And if this were accepted as a serious legal proposition it would mean a right of asylum for all alien criminals. I do not, however, think it is to be so construed. It is rather a ground of policy for excluding nationals from the provisions of extradition treaties, an attitude which recalls to mind the capitulatory régime and the extraterritoriality treaties of the Far East and North Africa. Such an attitude can only be justified where there is no confidence in the judicial system and the impartiality of the courts of other countries, and is hardly to be expected as between civilised States. It is open to the objection that a fugitive criminal who returns to his own country, in circumstances where the exception applies, will probably go scot-free. Although there are many offences for which a national may be punished in those countries which exercise a large degree of personal jurisdiction, there will for obvious reasons be difficulty in many cases in obtaining the evidence necessary to convict.<sup>19</sup>

It is not easy to form an impression of the magnitude of this problem, as official figures on the subject are not available. It is possible, however, that its importance may have been exaggerated by English writers, and I have not seen any really shocking case cited in which the exception defeated the ends of justice. There are, however, a very large number of treaties containing a clause excluding the extradition of nationals in an absolute or qualified form.<sup>20</sup> A compromise solution is sometimes suggested like that

<sup>19</sup> The best and most recent study is by R. W. Rafuse, *The Extradition of Nationals* (1930). See for a list of statutes making provision for such offences: *Ibid.* pp. 187-141.

<sup>20</sup> See Rafuse, *op. cit.* The results in practice are less satisfactory in the United States than elsewhere, because its laws provide for very few offences in respect of which a national may be punished if he commits them abroad: *Ibid.* p. 143.

adopted by the Institute of International Law in 1880, namely, that nationals should be surrendered as between countries whose criminal systems were analogous and who had a mutual confidence in each other's judicial institutions. This proposal seems purely theoretical and is really a statement of the problem rather than a contribution to its solution. I do not believe that there are "analogous criminal systems"; even when you have two legal systems with a common root, criminal law is a subject on which they may have least in common.

#### IV. JUDICIAL CONTROL OVER EXTRADITION PROCEDURE

I have reserved this subject to the last, and I think no aspect of extradition is more important than that of judicial control. In common law countries this control is regarded as an essential safeguard of personal liberty. Indeed the Extradition Act of 1870 was declared by the British Government to be "the embodiment of what was the general opinion of all countries on the subject and as beneficial to all and injurious to none." It is believed to have been based on an American Act of Congress of 1848 on the same lines. I am afraid, however, that the language used by the British Government was somewhat insular. There are other systems of extradition which do not provide for judicial control or which divide responsibility for extradition between the judiciary and the executive.<sup>21</sup> Up to the year 1927 France had no Extradition Law and fugitive criminals were handed over at the discretion of the executive. This so-called "executive system" prevails in a number of other civil law countries. The French Extradition Law of 1927 sets up what may be called a "facultative system," that is to say, if the court decides that the claim to extradition is well founded, the executive may, but is not bound to, grant extradition. On the other hand, if the court holds that

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<sup>21</sup> These systems are described in the Comment to Article 17 (1) of the Harvard Draft Convention of 1935. In England and the United States a decision in favour of the prisoner is final and binding on the executive; a decision in favour of extradition still leaves a discretion with the executive to refuse surrender if it thinks fit. In England a decision of a Divisional Court in favour of the prisoner is final and without appeal; in the United States an extradition case can be fought up to the Supreme Court. Thus, in *Factor v. Laubenheimer*, although the American warrant was issued in 1931 the decision of the Supreme Court ordering Factor's extradition was not handed down until June 6, 1934.

the offence is not extraditable, the prisoner must be released, and the executive has no further discretion in the matter. This system is similar to that prevailing in England and the United States. A system intermediate between the executive and judicial systems provides for extradition if the judiciary advise that it should be granted, but such advice does not bind the executive. This system prevails in Belgium, the Netherlands, Mexico, Japan, and a number of other countries. The German Law of 1929 provided for complete judicial control. According to that law the court's decision as to whether an extradition should be granted or not was binding on the executive.

There are disadvantages in the judicial system from the point of view of requesting Governments: delay, exigencies of proof, and the rule of *prima facie* evidence. The rule that *prima facie* evidence of guilt must be given before the court order for extradition is made creates difficulties in the case of countries whose notions of evidence differ from those prevailing in common law jurisdictions. The Samuel Insull case illustrates this point. There an American charged with larceny, larceny by bailee and offences against the bankruptcy laws escaped to Greece. A request having been made, first for his detention pending the exchange of ratifications of a new extradition treaty between the United States and Greece, and, secondly, for his extradition, the Greek Court of Appeals examined not merely the *prima facie* evidence, as we understand it, but also the merits of the charges against him. Here conclusive and not merely *prima facie* evidence was asked for. He was released and the United States, deeming the treaty useless, denounced it.<sup>22</sup> It was perhaps this case which influenced the jurists who drew up the Harvard Draft which repudiates the *prima facie* rule and provides that extradition shall be granted if certain documentary evidence is forthcoming: that is to say, a written requisition, a copy of the warrant

<sup>22</sup> *A. J. I. L.*, xxviii (1934), p. 327. See also *Annual Digest of Public International Law Cases (1933-1934)*, Case No. 146, and *L'Affaire Insull*, R.G.D.I.P., xli (1934), p. 687. The Extradition Treaty between the United States and Greece provided (Article 1) that "Surrender shall take place only upon such evidence of criminality as according to the laws of the place where the fugitive or person charged shall be found would justify his apprehension and commitment for trial if the crime or offence had been there committed" (138 League of Nations Treaty Series, p. 293). It is interesting to compare the construction placed on these words by the Supreme Court in *Factor's* case.

of arrest, and a copy of the foreign law under which the prisoner is charged. It may, of course, be asked: if the *prima facie* rule is abandoned what is the use of judicial control? There are, however, independently of the merits of the charge against the prisoner, many points which require judicial examination. Evidence of identity and criminality must be produced. The practical safeguard of the rule *Non bis in idem* also lies in judicial control. Nor must it be supposed that the abolition of the *prima facie* rule would reduce judicial control to a mere formality. It would still be possible for a prisoner to contend that the offence in respect of which extradition was sought was not an extraditable crime or that it was a political offence. Nevertheless the fairly general requirement in extradition treaties of "such evidence of criminality as would justify the prisoner's committal for trial" does not seem, in principle, an excessive precaution against a surrender in respect of vexatious or frivolous or possibly even malicious charges. Possibly it may be thought that the Harvard Draft goes further than moderate opinion is inclined to support, in abandoning the *prima facie* rule altogether. The proposal in Article 17 (2) (a) of the Draft that a foreign warrant should be treated as formal evidence of probable guilt may be viewed with some misgiving, considering the nature of the examination which precedes the issue of such a warrant in some countries. Even the British Fugitive Offenders Act does not go so far as this, but requires, in addition to the warrant, "such evidence as . . . according to the law ordinarily administered by the magistrate raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant" (Section 5).

The advantages of judicial enquiry before extradition is granted need no explanation. Under a purely executive system a prisoner is entirely at the mercy of Governments and has no chance of putting his case to an impartial body. Especially is this the case where he is a poor, and possibly illiterate, person. In such cases the assistance of a lawyer and advocate may be of great value. In this country the Poor Prisoners Act of 1930 does not apparently cover such cases.<sup>23</sup> The French Law of 1927

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<sup>23</sup> The Act seems to apply only to "charges" made under English criminal law. It is thought, however, that in a genuine case of destitution, arrangements would be made for representing the prisoner.

makes no provision for assistance; but the German Law of 1929 provided that the court should assign counsel to a person who had not chosen one himself. A general convention granting reciprocity in such matters would be useful.

Of recent years some interesting proposals have been made with a view to extending judicial control in the municipal and international field. The suggestion that there should be extraordinary municipal tribunals for extradition cases is one for which, in my view, there is little to be said. In England the acts of the executive are subject, in general, to review of the ordinary courts of law, and the Report on Ministers' Powers of a few years ago recommended that no departure be made from this principle. In the international field an International Criminal Court has been suggested, and the suggestion took concrete form in connexion with offences punishable under the Convention on Terrorism. I do not think, however, whatever the general merits of such a proposal, that a special jurisdiction in extradition cases would be desirable so long as municipal judicial control is not uniform, and based on the same general principles.<sup>24</sup>

Let me end by asking whether there may not be lessons to be learnt on this subject from two systems of extradition one of which prevails between countries having a common constitutional link, the other between members of a federal union. I refer to the Fugitive Offenders Act, 1881, and to inter-State rendition between members of the American union. Under Part I of the British Act a warrant issued in any part of the Empire may be endorsed and executed in England in respect of a fugitive offender, subject only to the requirements as to evidence set out in Section 5 of the Act.<sup>25</sup> The offences to which Part I of the Act applies are "treason

<sup>24</sup> The case against such a proposal was summed up concisely by Briery, *B.Y.I.L.*, vii (1927), especially at pp. 87-88, where he says: "There is only one class of criminal case the withdrawal of which from the territorial court, which is normally the most convenient court, would seem worthy of consideration, and that is the class of cases which have dangerous political repercussions in the international sphere." This observation is particularly interesting in view of the proposed International Criminal Court in connexion with the Convention on Terrorism.

<sup>25</sup> The relevant part of this Section reads as follows: "If the endorsed warrant for the apprehension of the fugitive is duly authenticated and such evidence is produced as (subject to the provisions of this Act) according to the law ordinarily administered by the magistrate raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant and the offence is one to which this part of this Act applies the magistrate shall commit the fugitive to prison to await his return. . . ." (Italics mine.)

and piracy and to every offence whether called felony, misdemeanour or by any other name which is for the time being punishable in the part of Her Majesty's dominions in which it was committed either on indictment or information by imprisonment with hard labour for a term of twelve months or more" (Section 9). The same Section provides that Part I of the Act shall apply to an offence notwithstanding that by the law of the place where the fugitive is, it is not an offence or not an offence to which Part I of the Act applies. Two instructive inferences may, as it seems to me, be drawn from these provisions: (1) that the rule of *prima facie* evidence is not, as the Harvard Draft appears to assume, *entirely* due to a lack of confidence in the judicial institutions of other States, but is also partly to be ascribed to the desire to protect the interests of the "fugitive" and to avoid handing him over on inadequate grounds; (2) that the double criminality rule is hardly necessary where there is agreement on the general principles of criminal law, though particular offences may be created for special reasons in special areas. There are many features of the procedure set up by the Fugitive Offenders Act which are equally instructive, but I will only mention one more. By Section 10 of the Act the court is given a discretion, by reason of the trivial nature of the case or by reason of the application for the return of the fugitive not being made in good faith or otherwise, to discharge the prisoner.<sup>26</sup> This example of judicial, rather than administrative, discretion in extradition cases may suggest a fruitful line of thought in the wider international field. Passing to a still closer relationship, I may mention the provision in the Constitution of the United States which reads as follows:

"A person charged in any State with treason, felony or other crime who shall flee from justice and be found in another State shall on demand of the executive of the authority of the State from which he fled be delivered up to be removed to the State having jurisdiction of the crime."

In this context "other crime" includes "every offence whatsoever including misdemeanour," and the specialty rule does not apply.

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<sup>26</sup> See for an example of a case where the Court refused, in the exercise of this discretion, to surrender a fugitive, *re Cook* (1932), 49 N.S.W.W.N., 153.

It seems to me that a comparison of such systems with extradition as practised between Sovereign States indicates the limits of what is practicable.<sup>27</sup> Having laid these considerations before you, it seems appropriate to recall the words used by Mr. Neale in the Draft Report he submitted to the British Select Committee of 1868. He said:

“Then and then only will the Law of extradition be upon that footing which the obligations of friendly neighbourhood require it to be placed when the criminal process of one country shall be allowed to take effect in another subject only to conditions the same in kind if not degree which are now required to give effect in Surrey to the warrant of a justice in Middlesex.”

#### CONCLUSIONS

(1) It may appear a simple matter at first sight to draw up a list of extraditable offences and to assume that this list covers in practice all the acts in respect of which extradition is likely to be sought. In practice, however, it may happen that the act charged constitutes an offence falling within the treaty by the law of one of the parties and not according to the law of the other. International practice tends to support the view that in such cases extradition must be refused, and that it must be shown that the act is criminal according to the laws of both States. The decisions in the *Blackmer* case and *Factor* case were deviations from this doctrine in so far as they implied that criminality according to the law of the requesting State is sufficient to justify extradition. Nevertheless the *Factor* case illustrates in a startling manner the unsatisfactory character of the double criminality rule in its application to federal States. It is submitted that apart from this exception the rule is sound in principle. A certain body of learned opinion has of recent years inclined

<sup>27</sup> *À propos* of *Factor v. Laubenheimer* it may be interesting to observe that, for the purposes of surrender under Part II of the Fugitive Offenders Act from New Zealand to the Commonwealth of Australia, it is not necessary to show that the offence with which the fugitive is charged is an offence in every part of Australia. It is sufficient to show that the offence is punishable by the law in force in that part of the Commonwealth where the offence was committed, whether such law be that of the State within whose territory the offence was alleged to have been committed, a law of the Commonwealth, an Act of the Imperial Parliament, or the common law in force in that part of the Commonwealth (*Godwin v. Walker* [1938] *N.Z.L.R.*, 712).

to the view that the list of offences should be abandoned, and that there should be substituted for it the test of a minimum punishment according to the laws of both States. It is submitted that whilst this would safeguard the double criminality rule it would at the same time dispose of the difficulties arising out of classification. The problem of the federal State, however, requires special attention, and probably the rule should be modified in such cases.

(2) The failure to arrive at a satisfactory definition of a political offence is doubtless regrettable from a theoretical point of view, but seems inevitable in practice. The exclusion of such offences from extraditable crimes is necessary so long as States do not agree on fundamental doctrines of public law. If such agreement existed we should not be far from a federal régime under which States would naturally ensure their mutual protection, and the conception of a political offence as a special category of non-extraditable crimes would become obsolete.<sup>28</sup> Nevertheless States ought not to give shelter to political assassins and terrorists. The wide acceptance of the *attentat* clause proves that the general sentiment of States supports this view.

(3) The British criticism of the non-extradition of nationals seems sound in theory and in practice. Little reliance can be placed upon laws providing for the punishment of offences committed by nationals abroad, nor is the existence of such laws an adequate reason for withdrawing a fugitive from the jurisdiction of the *forum delicti commissi*. The Reservation provided for by the Harvard Draft Convention, to the effect that States may decline to extradite their nationals subject to an undertaking to punish the national in question if the offence he has committed is punishable by his national law seems to destroy the value of the provision in the text (Article 7) that in general States may not decline to extradite upon this ground.

(4) A judicial hearing is essential to the satisfactory working of any extradition system, and any general extradition convention would have to provide for it. Such a hearing should not involve an enquiry into the merits of the charges against the prisoner, but should ensure that the rule *non bis idem* is observed, the identifi-

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<sup>28</sup> It may be noted, for instance, that political offences are not excluded from the scope of the Fugitive Offenders Act, 1881.

cation of the prisoner and adequate representation of his interests. The doctrine of *prima facie* evidence rightly understood is not unreasonable, and the provision in the Harvard Draft for its abolition seems unduly radical. The consideration of such evidence seems necessary in any event if judicial control is to be effective, and it may be difficult in practice to apply the double criminality rule in the absence of some such evidence. Nevertheless the doctrine was misapplied in the *Insull* case. As regards a special jurisdiction in extradition cases from the municipal point of view this would introduce a greater lack of uniformity than now exists in judicial practice, and from the international point of view such a court is unnecessary except in cases where grave political issues are involved.

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During the debate which followed the reading of the paper the following observations were made:

EGON SCHWALB, Dr.Jur.: I should like to call your attention to some features of recent International Treaties and recent British municipal legislation which, though not primarily concerned with questions of extradition law, nevertheless bear to some extent on the subject of to-day's lecture. I am thinking of:

(1) The British-American Agreement relating to the Lease of Bases to the United States of America of March 27, 1941<sup>29</sup>;

(2) The Military Treaties concluded between His Majesty's Government and the Allied Governments established in this country;

(3) The recent British legislation relating to the existence in this country of Allied Governments, Allied Forces, and Allied Law Courts, *i.e.* the Allied Forces Act, 1940,<sup>30</sup> the provisions of the Visiting Forces (British Commonwealth) Act, 1933,<sup>31</sup> as applied to the Allied Forces, the Orders in Council made under the Allied Forces Act,<sup>32</sup> and the Allied Powers (Maritime Courts) Act, 1941.<sup>33</sup>

By virtue of the British-American Treaty<sup>34</sup> the United States

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<sup>29</sup> Cmd. 6259.

<sup>30</sup> 3 & 4 Geo. 6, Ch. 51.

<sup>31</sup> 23 Geo. 5, Ch. 6.

<sup>32</sup> S.R.O., 1940, No. 1818; S.R.O., 1941, No. 47.

<sup>33</sup> 4 & 5 Geo. 6, Ch. 21.

<sup>34</sup> Art. 4.

have the absolute right to assume and exercise jurisdiction in any case in which (roughly speaking):

- (a) a person who is not a British subject is charged with having committed an offence of a military nature either within or without the Leased Areas;
- (b) in any case in which a person other than a British subject is charged with having committed an offence of any other nature within a Leased Area;
- (c) in any case in which a British subject is charged with having committed any offence of a military nature within a Leased Area, provided that the British subject was apprehended within the Leased Area.

If a British subject is charged with having committed an offence of a military nature within a Leased Area and has not been apprehended therein, he shall, if in the British territory outside the Leased Area, be brought to trial before the courts of the territory. But if the offence is not punishable under the law of the territory, the British subject shall be apprehended and surrendered to the United States authorities and the United States shall have the right to exercise jurisdiction with respect to the alleged offence. It is provided that in such cases the British subject shall be tried by a United States court sitting in a Leased Area in the territory.

In addition, the Treaty contains the general provisions<sup>35</sup>:

(1) that where a person charged with an offence which falls to be dealt with by the courts of the (British) territory is in a Leased Area, such person shall be surrendered to the Government of the territory,

(2) that where a person charged with an offence which falls to be dealt with by the courts of the United States is in the territory, but outside the Leased Areas, he shall be surrendered to the United States authorities.

In none of these cases any difference is made between extraditable and non-extraditable crimes. But if, I submit, the alleged offender succeeded in reaching some British territory in which no American base is established, a surrender cannot take place

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<sup>35</sup> Art. 8.

and extradition must be asked for according to common Extradition Law and Extradition Treaties.

According to an Annex to the British-Czechoslovak Military Convention of October 25, 1940, which has been made available to me—and I do not doubt that the Treaties concluded with the other Allied Governments established in this country contain similar provisions—the Czechoslovak authorities have without delay to report to the appropriate authority in the United Kingdom the facts in all cases of offences against the Law of the United Kingdom, committed by a member of the Czechoslovak Land Forces, unless the offender is already in custody of the British civil authorities.

On the other hand, by virtue of the Visiting Forces Act<sup>36</sup> (as applied to the Allied Forces),<sup>37</sup> deserters and absentees without leave shall be apprehended by the British authorities and handed over to the authorities of the Allied Power to whom they belong. This kind of *brevi-manu* extradition is restricted to the military offences of desertion and absence without leave, offences which are *per definitionem* non-extraditable in times of peace. But it is only natural that Allied Governments at war should extradite to each other deserters from their forces.

The Allied Powers (Maritime Courts) Act, 1941,<sup>38</sup> goes a step further. The jurisdiction of the Maritime Courts is not restricted either to members of armed forces or members of the crews of merchant vessels. Nor are they competent to try certain offences and own nationals only. Only British subjects are exempted from the jurisdiction of the Maritime Courts. The Maritime Courts have jurisdiction to try offences

- (a) committed by any person on board a merchant ship of an Allied Power;
- (b) offences committed by the master or any member of the crew of an Allied Power in contravention of the merchant shipping law of that Power;
- (c) offences committed in contravention of the mercantile marine conscription law, but only if committed by a person who is both a national and a seaman of the Power to whom both the ship and the Maritime Court belong.

<sup>36</sup> Sect. 3.

<sup>37</sup> S.R.O., 1940, No. 1818; S.R.O., 1941, No. 47.

<sup>38</sup> 4 & 5 Geo. 6, Ch. 21.

Proceedings before Maritime Courts are instituted by the Justice of the Peace or the Sheriff respectively, but the question which these British authorities are called upon to examine is not whether there has been committed a crime for which extradition is to be granted according to Extradition Law, but only if the form and content of the information laid before them comply with the requirements prescribed in the Statute, and it is not a requirement that there must be *prima facie* evidence that a crime has been committed for which extradition is generally granted.

I am fully aware that neither of the cases mentioned is extradition proper, extradition in the technical sense. The sentences imposed by Allied Service Courts and Maritime Courts are generally served in Great Britain, mostly in British prisons and detention barracks. This constitutes a deviation from the general rule that the courts of no country execute the penal laws of another. But it is worth mentioning that a person who has been sentenced by a Maritime Court to detention for a term of one year or more may be transferred from the United Kingdom to any place within the non-occupied territory of the Allied Power in question. This provision applies to nationals of that Power only. But it is obvious that the effect in such a case is entirely equal to that of an extradition proper, although without the qualifications, restrictions and safeguards of the Extradition Law.

DR. ERNST WOLFF: The German Penal Code and the Weimar Constitution of the German Republic contained the provision that no German subject can be extradited to a foreign Government. Such extradition is considered in Germany, like in most continental States, as incompatible with the national dignity, and that is one of the reasons why the provision of the Versailles Treaty concerning the extradition of the war criminals by Germany to the Allied Powers was very much resented in Germany. In order that a German subject who has committed a criminal offence abroad and afterwards succeeded to escape to Germany does not escape punishment, jurisdiction for such criminal offences was conferred upon the German courts. The German Code of Criminal Procedure confers jurisdiction upon the court of the district in which the offence has been committed. For criminal offences committed abroad the court of that district is

competent where the accused person has his or her residence or abode.

The learned lecturer has suggested that a grant of extradition for criminal offence should be dependent only on the punishment, so that from a certain sort and extent of punishment on all criminal offences should give rise to extradition regardless of the character of the actual offence. In my opinion this were only feasible if there were a common basis for the conception of what is punishable in the different countries. But in the present state of the world that is by no means the case. In the dictator States some acts are considered to be severely punishable which in other States are not considered to be punishable or criminal at all. Racial Disgrace is a very characteristic example. It were repulsive if Germany could ask for the extradition of a person who is accused of Racial Disgrace, because under the Nuremberg Laws such offence is punishable with penal servitude.

As long as the present basic differences in the administration of justice in the different States of the world exist, another suggestion cannot be complied with, in my opinion, namely that there should be no preliminary examination whether there is sufficient suspicion against the person whose extradition is in question. If the qualifying only of the offence by the State claiming extradition were sufficient for its grant, the danger would arise that a person is formally accused of a criminal offence whilst in fact his extradition is asked for political reasons.

LIEUTENANT R. KURATOWSKI, LL.D.: I wish to add only a few words to the very interesting paper read by Professor Mervyn Jones.

As I understood, Professor Mervyn Jones is opposed to the principle of the non-extradition of nationals of the extraditing country. I suppose that the suggestion of extradition of nationals will meet in the Continental countries with opposition, because in most Continental countries (and so, for example, in Poland) a national who has committed an offence in a foreign country will be tried, if he is present in his country, by the court of his own country. As the law prescribes to try and to sentence this citizen, he cannot be extradited.

May I also add a few words about some special and temporary aspects of the Extradition Law due to the war conditions. As

already remarked by Mr. Schwalb, there are now in the United Kingdom two new aspects of the extradition. The first aspect is due to the presence in the United Kingdom of Forces of the Sovereign Allied States. These Forces have their own service (Naval, Military and Air Forces) courts, who are empowered to try persons subject to the Forces law of the Allied States. In conformity with the Allied Forces Act, 1940, ch. 51, and as provided in the Schedule to the Allied Forces (Application of 23 Geo. V, c. 6, N.1) Order, 1940, the Admiralty, Army Council or Air Council, if so requested by the Officer Commanding an Allied Force, or by the Government of the Allied Power to which the Force belongs, may by orders to any home force direct the members thereof to arrest members of the Allied Force alleged to have been guilty of offences against the law of that Power, and to *hand over* any person so arrested to the appropriate authorities of the Allied Force. This is a real *brevi-manu* extradition. The extradited man will be tried by an Allied service court; if he is sentenced, the sentence will be executed by his own national authorities, outside of the United Kingdom or in the United Kingdom, with or without assistance of the United Kingdom authorities.

The second new aspect of the extradition, also of temporary character, is introduced by Allied Powers (Maritime Courts) Act, 1941, ch. 21. The section 8 of the Act provides that, where a person, being a national of any Power by which Maritime Courts are established, has been sentenced by a Maritime Court of that Power to detention for a term of one year or more, he may, under the authority of an order of the Maritime Court, be transferred to any place within the territory of that Power (not being territory in the occupation of any Power with which His Majesty is for time being at war), there to serve the whole or any part of his sentence; the order of a Maritime Court to transfer such a person abroad has to be for its validity endorsed with a certificate of a Secretary of State. This second aspect of extradition presents, as I suppose, rather a theoretical interest, when the extradition of persons belonging to the Allied Forces is quite often practically applied, as I have observed it in my official capacity as Polish military judge at London.

MR. J. MERVYN JONES: I am much obliged to those who have spoken for their interesting observations. Dr. Schwalb has

referred to the Agreement of March 27, 1941, between the United Kingdom and the United States of America under which certain naval and air bases were leased to the United States for a term of 99 years. The documents attached to this Agreement take the form of ordinary private law leases, free however from all rent, and charges other than compensation to be mutually agreed on to be paid by the United States in order to compensate owners of private property for the loss by expropriation or damage arising out of the establishment of these bases. The Leases are governed by the terms and conditions of the Agreement which gives to the United States certain rights, powers and authority in the Leased Areas. (I do not wish to be drawn into a discussion of the legal nature of these Leases; suffice it to say that I think some precedent can be found in international law and practice for such transactions, as readers of Professor Lauterpacht's famous work on *Private Law Analogies on International Law* will be aware.) The Agreement also gives the United States authorities certain rights in other parts of the territories concerned even outside the Leased Areas. The point which we are asked to regard as novel in extradition law and practice is the provision in Article 8 of the Agreement for the mutual surrender on a basis of reciprocity by the Contracting Parties of fugitive offenders found within or without the Leased Areas, charged with offences which by Article 4 of the Agreement fall to be dealt with by the courts of the other Power. On reflection I do not think these are ordinary cases of extradition at all. The position as I understand it is this. The bundle of rights which constitute jurisdiction in these territories has been divided by the Agreement between the United States and Great Britain. The United States has been given certain special rights of jurisdiction in British territory which it would not otherwise have had, and these rights are defined in the Agreement. In order to make them effective it is necessary to have some such provision for mutual surrender as I have described. The territory concerned remains subject to one sovereignty (for it is generally agreed that whatever else a lease may transfer, sovereignty remains in principle with the lessors). But extradition properly so called is the handing over by one Government to another of fugitive offenders charged with having committed offences

in a country subject to the sovereignty of another State. For these reasons, although I am grateful to Dr. Schwab for inviting our attention to these extremely interesting documents, I do not think that they affect the general law of extradition, or indeed have any special bearing on it. As regards the Allied Maritime Courts Act, 1941, I do not see anything in it which could be described as a provision for extradition. Again I must be excused from a detailed examination of a somewhat controversial matter. The Maritime Courts are given a certain degree of criminal jurisdiction by the Act, but only for a limited purpose, and this I read as an extension of extraterritorial rights and not an extension of the law and practice of extradition. The coercive machinery by which effect is given to this jurisdiction is that of the English courts, but apart from the special case where an offender may be transferred to any place within the jurisdiction of a Power by which a Maritime Court is established under the Act, no person is surrendered to a jurisdiction outside the United Kingdom. I would point out, however, that such transfer can only take place after, and not before, conviction and with the certificate of the Secretary of State. As regards the Allied Forces Act, 1940, I agree that, read with the relevant legislation and the Order of 1940, this Act provides for a very general form of surrender in respect of offences against the laws of Allied Powers, but for the reasons given above I prefer to regard it as an extension of extraterritorial rights rather than of extradition practice.

I turn now to the points made by Dr. Wolff. Although, as I have already said, I think that there is need for a more sympathetic approach to the Continental point of view on the subject, I still cannot agree that non-extradition of nationals is justifiable in principle. It has been suggested that the exercise by States of personal jurisdiction over their subjects in respect of crimes committed by them abroad disposes of the Anglo-American objection to this principle. There is, however, very little likelihood, so far as I can see, that personal jurisdiction in these cases is or can be effectively exercised. I see no real prospect of a Polish or German court trying one of their nationals for an offence committed in London. The witnesses and the evidence will be here, all the indications point to England as the most convenient forum, and I cannot see how there can be a proper trial anywhere

else. Dr. Wolff suggests that it may be right to refuse the extradition of a national because the offence he has committed is not recognised by his national law. But the reason for refusing extradition in such a case is not that the fugitive is a national but that the double criminality rule is not satisfied, and this may well be the case even where the fugitive is not a national of the requested State. Finally, Dr. Wolff criticises the idea that punishment should be the yardstick of extradition, on the ground that certain States may pass laws punishing acts which civilised opinion does not regard as criminal. I think he has misunderstood me. I was not suggesting or supporting the proposition that all acts punishable by the law of the requesting State with a certain minimum sentence should be regarded as extraditable. I agree that the double criminality rule must be retained; the act must be punishable by the laws of both States. If, however, he is suggesting that special provision should be made for the case where one State punishes certain acts with special severity I do not think I agree. If the act is punishable at all with a minimum sentence we cannot enter into niceties of degree. His last point was an objection to the abandonment of the rule of *prima facie* evidence. He thinks the retention of the rule is necessary to prevent extradition being demanded for political or improper motives. I have, on the whole, assumed in my discussion of this subject the existence of good faith between Governments, but nevertheless I think there is some weight in Dr. Wolff's criticism. But I do not think that it should be necessary to trouble the court with *prima facie* evidence on the offchance that some such motives exist. To admit this would create a very unwholesome atmosphere. However, I see no objection to giving a court some such general discretion as that set out in Section 10 of the Fugitive Offenders Act, and I think that a provision on these lines would meet the point adequately. Courts cannot proceed on the assumption that such motives exist and ask for evidence to rebut the presumption: the onus of proving political or improper motives should be on the prisoner.