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Statement on S. 1639, the 1981 Extradition Act,

to amend chapter 209 of title 18, United States Code, relating

to extradition and for other purposes

by

M. Cherif Bassiouni
Professor of law, DePaul University
Secretary-General, International Association of Penal Law
Dean, International Institute of Higher Studies in Criminal Sciences
Author of <u>International Extradition and World Public Order</u> (1974); <u>A Treatise on International Criminal Law</u> (2 vols. 1973); <u>International Criminal Law: A Draft International Criminal Code</u> (1980); and eight other books and 72 law review articles on criminal law and international criminal law
The author served as an Expert-Consultant on international criminal law to the United Nations, the Departments of State and Justice

INTRODUCTORY COMMENTS

The general orientation of the proposed Act is that it is a supplement to treaties and that all procedural matters are to be regulated by treaties. This is the reverse assumption of existing legislation and of almost all similar legislation in most countries of the world.

The Extradiction Act should be the legislation applicable to all extradition matters and should regulate its procedure. Treaties should be the exception; that is, they should regulate those matters not included in the legislation or negotiated in the treaty as an exception to the legislation.

If the legislation is not the general rule, then every treaty becomes a separate procedural law, with the result that there could be as many as one hundred different procedures applied by the courts. The obvious result would be inconsistency and jurisprudential confusion. Because precedents would only affect the interpretation of the provisions of each and every treaty, this approach would stimulate and increase justiciability with the result that the judicial case load would be significantly increased, especially at the appellate level, for a number of years to come. In addition to the obvious advantage of uniformity and reduction of litigation, a national legislation would also reduce the burden of the U.S. government in having to renegotiate procedural matters in extradition treaties as well as reduce the tempation of foreign governments to negotiate different procedural matters in treaty provisions.

The proposed amendments herein are designed to accomplish the goal of a truly national legislation with a view to providing judicial uniformity and harmony and to reduce opportunities for litigation by clarifying certain procedural matters.

GENERAL

1. Section 3191. Extradition authority in general

Proposed amendments: change the term "foreign state" to "requesting state";

add the following subsection (b):

"(b) there is a multilateral treaty containing an extradition provision to which the United States and the requesting state are signatories; and"

Commentary

This provision offers the opportunity to the United States to comply with those provisions in multilateral treaties to which it is a signatory, which allow reliance on the applicable extradition provisions in these treaties instead of or in addition to bilateral treaties. Such provisions exist, e.g., in the Single Convention on Narcotic Drugs, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, as amended by the Protocol of 25 March 1972 amending the Single Convention on Narcotic Drugs, 1961, 8 August 1975, E/Conf. 63/9, 26 U.S.T. 1439, T.I.A.S. No. 8118; Convention on Psychotropic Substances, 21 February 1971, U.N. Doc. E/Conf. 58/6, T.I.A.S. No. 9725; Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, 31 January 1971, OAD/Off. Rec./Serv. P./Doc. 68, 27 U.S.T. 3949, T.I.A.S. No. 8413; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 14 December 1973, G.A. Res. A/3166 (XXVIII), 28 U.S.T. 1975, T.I.A.S. No. 8532; Tokyo Convention of Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219; Hague Convention on the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, I.C.A.O. Doc. 8920, 22 U.S.T. 1641, T.I.A.S. No. 7192; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 25 September 1971, I.C.A.O. Doc. 8966, 24 U.S.T. 564, T.I.A.S. No. 7570.

The term "requesting state" has been substituted for "foreign state" as being more appropriate terminology.

2. Section 3192. Initial Procedure

Proposed amendment: add the following paragraphs:

"(b)(2)(A)(iii) a copy of the arrest warrant, and
(iv) a copy of the charging instrument, if the person was formally charged with a crime in the requesting state, and

(v) a copy of the order or judgment, if the person was convicted of a crime, and

(vi) any other evidence of the existence of probable cause that the person may have committed the crime of which he is accused, charged, or convicted."

Commentary

The complaint is part of the formal process upon which the formal Hearing takes place. As with any charging document, it must contain sufficient information to allow a person to adequately prepare a defense. The complaint therefore should be accompanied by a copy of an arrest warrant if the requested person is subject to one, otherwise the charging instrument such as a complaint, information, or indictment as the case may be under the laws of the requesting state, or in the event the relator has been convicted a copy of the order or judgment. In any event, evidence of "probable cause" that the person is accused, charged, or convicted of a crime should also accompany the three types of documents which would be required to be part of the record.

Proposed amendments: "(c) Arrest or Summons

(1) Arrest or Summons upon Receipt of a Complaint as Specified under (b) Above --- Upon receipt of a complaint, the court shall issue a warrant for the arrest of the person sought, or, if the Attorney General so requests, a summons to the person to appear at an extradition hearing.

(2) Provisional Arrest --- Upon receipt of a complaint in accordance with the provisions of the applicable treaty, the court shall upon a showing of some evidence of probable cause issue a warrant for the arrest of the person sought."

Commentary

Proposed subparagraph (1) is the same under subsection (c) of the proposed Act; a sub-title was added. Proposed subparagraph (2) is a new provision and differs from the authority to make such arrests under the Draft in that it is stated explicitly and requires a showing of "some evidence of probable cause." Under the present Draft there is no requirement of a showing of anything and thus a person could be provisionally arrested for up to sixty days on a mere telex by a foreign government. The need to show some probable cause is a constitutional requirement in that the fourth amendment applies to all forms of arrest and unless a legislative standard is established the court would have to assert the applicability of a constitutional standard. The Second Circuit in Caltagirone v. Grant, 629 F.2d 739 (2nd Cir. 1980) held that a standard of some probable cause is required in provisional arrest. The importance of the standard is therefore self-evident. The rest of the subsection has been deleted since it deals in part with matters of provisional arrest as well as other matters such as release on bail which is better covered in a separate section dealing exclusively with that subject.

Proposed amendment: "(d) Detention or Release of Arrested Person. ---

(2) Special Circumstances --- In determining special circumstances, the court shall consider whether if extradited the person shall voluntarily comply with the order. In so doing, the court shall consider:

(A) the nature of the crime;

(B) the dangerousness of the person sought;

(C) the existence of probable cause on the face of the record;

(D) the safety of witnesses or any other persons in relationship to the offense charged.

(3) If the detention is predicated on a provisional arrest warrant, the person arrested shall

be eligible for release upon a showing of special circumstances as specified above.

(A) In the event that such a person is detained and not released and the formal complaint has not been filed in accordance with the provisions of subsection (b) above, the person arrested shall be unconditionally released after sixty days from the date of his arrest.

(4) A person who has been arrested and released may be subsequently re-arrested for the same charge if additional facts and circumstances are brought to the attention of the court and which were not known to the court at the time of the initial arrest.

(5) If the court orders the release of a person pending the extradition hearing, it will impose reasonable conditions for the release to reasonably assure the appearance of the person at the hearing and his voluntary compliance with any subsequent court order including that of extradition."

Commentary

This section is essentially a section on bail. The term "special circumstances" is retained. It is the standard applied by United States courts since Wright v. Henkel, 190 U.S. 40 (1903). Since then, however, courts have interpreted the meaning of "special circumstances" in a variety of ways which has created inconsistency and confusion. To avoid this, certain legislative criteria are suggested which will clarify the meaning of the standard in accordance with accepted tests for release on bail in criminal cases. These criteria are to apply to those cases in which an individual is subject to arrest as well as provisional arrest. With respect to provisional arrest which is limited to sixty days if the requesting state does not produce the necessary documents which would be sufficient for the issuance of an arrest warrant, the provisional arrest shall be terminated and the individual released (whether he is in custody or on bail). This means that no person can be held without a formal arrest warrant based on probable cause beyond sixty days.

Additionally, subparagraph (4) clarifies a confusion in the decisions of the courts concerning the re-arrest of someone released or discharged and specifies that such re-arrest can be made on the basis of new facts and circumstances. Subparagraph (5) merely gives the judiciary the power it now implicitly has to impose reasonable conditions of bail. This eliminates the question of whether or not the eighth amendment concerning bail provisions applies.

3. Section 3193. Waiver of extradition hearing and consent to removal

Proposed amendments: add the phrase "willingness to" in subsection (b) Inquiry by the Court, such that the sentence reads:

"The court, upon being informed of the person's willingness to consent to removal, shall ---";

add the following as subparagraph (1) under subsection (b):

"(1) inform him of the offense with which he is charged and for which his extradition is sought; and"

Commentary

The absence of the phrase "willingness to" was an obvious ommission since the consent follows the expression of willingness of a person to do so, who is then informed of certain rights before the consent is entered into the record. The Draft omits the necessary requirement of informing the relator of the offense with which he is charged and for which his extradition is requested, which is an essential part of the record necessary to preserve the principle of speciality, namely that the person extradited can only be prosecuted in the requesting state for the crime for which he was extradited. See M. C. Bassiouni, International Extradition and World Public Order 352-360 (1974).

Proposed amendment: modify subsection (d) such that it reads:

> (d) Limitation on Detention Pending Removal. --- A person whom the court orders surrendered pursuant to subsection (c) may, upon reasonable notice to the Secretary of State, petition the court for release "in accordance with the provisions of section 3192(d) or for an order vacating the extradition order. The court shall not grant the petition to vacate the order of extradition before 120 days from the expiration date of the order and provided that the petition shows good cause why the said petition to vacate should be granted."

Commentary

This section clarifies certain ambiguities about the period of time a person can be detained after having consented to extradition. It specifies that a person may petition for release on bail based on the same standards for bail applicable to arrest and provisional arrest or eventually for an order to vacate the extradition order after 120 days from the period of time from which an order for his extradition has been issued either subsequent to a Hearing or subsequent to consent. What this provision does is to allow a person who is awaiting extradition and who has been certified extraditable after 120 days of custodial detention pending his transfer of custody to the requesting state to request his release on bail or vacating of the order. Such a provision is needed since a person could theoretically be kept in custodial detention awaiting his transfer for an indefinite period of time.

4. Section 3194. Extradition hearing

Proposed amendments: modify subsection (a) such that it reads:

> (a) In General. --- The court shall hold a hearing to determine whether the person against whom a complaint is filed is extraditable "pursuant to a treaty and in accordance with the provisions of this act", unless the hearing is waived pursuant to section 3193. The purpose of the hearing is limited "to the determination of the following:
>
> (1) that the court has jurisdiction; and
>
> (2) the existence of an applicable extradition treaty; and
>
> (3) the existence of a complaint in accordance with the provisions of section 3192(b); and
>
> (4) reasonable grounds to believe that the person charged is the one before the court; and
>
> (5) probable cause to believe that the offense charged has been committed; and

(6) that the offense charged constitutes a crime under the laws of the requesting state and under the laws of the United States or any state within the United States of America; and

(7) that no defense set forth in the treaty or in this act is applicable. The court does not, however, have the jurisdiction to determine the merits of the charge against the person or to adjudicate the guilt or innocence of that person."

Commentary

The amendments underscore that a person can be extradited pursuant to a treaty and subject to the provisions of this act and spell out with certainty the documents and showings that are incumbent upon the government in accordance with existing treaty and legislative standards as well as a body of jurisprudence in the United States which has been consistent for almost 100 years. These showings are therefore identical to the requirements of the court's findings in section 3197. They are self-evident.

In addition, the Draft provision which excluded the court's consideration of a political offense exception has been deleted. Instead, this defense has been included in section 3198, Defenses to Extradition. Present policy providing for the court's determination of the applicability of the political offense exception has been retained. To disallow the judiciary the right to determine the political offense exception which the judiciary has determined since the beginnings of the practice in the United States is to express an unjustifiable distrust of the judiciary. Furthermore, to allow only the Secretary of State to make such a determination is to unduly politicize the process by placing the executive in a conflictual relation to the requesting state which unduly encumbers U.S. good relations with foreign countries. It also allows if not invites political pressure on the executive whether by requesting states or by relators. The result would probably produce unfair application and deny relators equal protection of the law. Of greater significance is the absence in the Draft of any legislative guidelines and review of the Secretary of State's decisions. This will prompt challenges of denial of equal protection and threaten the integrity of the process.

The approach of the Draft is contrary to similar legislation. For example, the 1980 Refugee Act codified in part as title 8 United States Code, sections 1101(a)(42)(A) and 1158 provides for a decision by the Attorney General in political asylum requests, but the legislation provides for clear standards. In another vein, the 1976 Foreign Sovereign Immunities Act, title 28 United States Code sections 1602-11 has reversed the prior position which was to leave such determinations to the Secretary of State. Under the 1976 Act, it is a judicial determination subject to legislative criteria.

In keeping with the above, the provision in the Draft was deleted, instead the political offense exception was left as a judicial determination but subject to legislative guidelines set forth in section 3198(a).

Proposed amendments: Add the following subsection under section (b) Rights of the Person Sought:

"(3) he will be provided a copy of the complaint and all documents and evidence submitted against him in these proceedings in order to adequately prepare for his defense."

Commentary

This provision is self-evident as it is part of a general due process requirement of notice.

Proposed amendments: Add the following subsections:

"(c) Evidence.

(4) Other evidence sufficient to enable the court to make its findings as set forth in subsection (d) below.

(d) Findings.

(1) that the court has jurisdiction; and

(2) that a valid treaty exists on which extradition can be based; and

(3) that the complaint conforms with the provisions of Section 3192(b); and

(4) that there are reasonable grounds to believe that the person charged is the one before the court; and

(5) that the evidence presented is sufficient to support a finding of probable cause to believe that such person may have committed the offense charged; and

(6) that the offense charged is extraditable under the treaty and is punishable under the laws of the requesting state and under the laws of the United States or any state within the United States of America; and

(7) that no defense to extradition specified in the applicable treaty or in this act exists."

Commentary

The Draft omitted reference to other evidence sufficient to enable the court to make its findings. This requirement of "Findings" is parallèl to the requirements of section 3194, subsection (a).

It must be noted that the proposed legislation does not contain a requirement of probable cause which exists in the present legislation in section 3184 and has been included in every treaty negotiated to date. It is presumed that it is absent from the proposed legislation in order to allow the government to exclude that requirement from treaties and to have extradition without probable cause. So far, the Supreme Court has not ruled on whether probable cause is a required Constitutional standard for extradition. The absence of legislation would probably compel the Court to take such a position. In any event, probable cause is required for an arrest under the fourth amendment. Consequently, it is difficult to conceive how a person can be arrested with probable cause but can be extradited without probable cause. The government could however argue that probable cause for an arrest is different from probable cause for extradition, thus creating an artificial distinction in legal standards which has not existed heretofor. Clearly this would increase opportunities for litigation while in the meantime ostensibly reduce the procedural guarantees that probable cause requires, which in this case is equivalent to the same constitutional guarantee. The legislation should not enhance the ambiguity inherent in its present silence.

Historically, courts have interpreted the principle of double criminality by reference to state laws and on ocassion by reference to federal laws. To resolve this problem, it is suggested that for probable cause purposes reference is to be to federal law so as to avoid confusion and to promote uniformity and consistency. See M. C. Bassiouni, International Extradition and World Public Order 314-51 (1974).

Proposed amendment: add the following subsection:

> "(e) Evidence standards. --- In finding probable cause, the court may rely on the laws of the United States or that of the state wherein the proceedings are conducted including evidentiary matters and their

> admissibility and sufficiency, except that the court may base a finding that a person is extraditable upon evidence consisting in whole or in part of hearsay. Nothing in this paragraph is to be construed as affecting the requirements of a complaint as specified in section 3192(b) or the requirements for authentication of documents as specified in section 3194(c)."

Commentary

There is confusion and conflict between decisions as to the applicability of evidentiary standards and the proposed amendments clarify it by requiring reliance on federal evidentiary standards while specifically authorizing the use of hearsay.

5. Section 3195. Appeal

Proposed amendment: add "as specified in section 3192(d)(2)" in the textual reference to special circumstances in subsection (b)(1)

Commentary

This change was made to clarify that special circumstances for bail should be determined according to the factors set forth in section 3194(d)(2), in order to ensure uniformity of application at the trial and appellate levels.

Proposed amendment: modify (b)(2) such that it reads:

> (2) not extraditable, it may order that the person be released pending determination of an appeal unless the Attorney General establishes to "the satisfaction of the court" that the person is likely to flee or to endanger the safety of any other person or the community.

Commentary

This modification was made to reflect the requirements of the fourth amendment, which allow for a person's detention for an extended period of time only upon court order and not subject to the Attorney General's decisions.

6. Section 3197. Receipt of a person from a foreign state.

Proposed amendment: add the following subsection:

> "(c) Conditional Extradition by the United States to a Requesting State. --- The Secretary of State may conditionally deliver custody of a person ordered extradited in accordance with the provisions of this act to a requesting state. Such conditions as the Secretary of State may at his discretion impose could be included in the order of court granting the extradition if such a request is made to the court before its order is entered. The person ordered conditionally extradited either by virtue of a court order or by decision of the Secretary of State may be held in custody for a period of no more than 120 days pending the requesting state's acceptance of the conditions for extradition. At the expiration of 120 days, the person may petition the court for release or for an order vacating the conditional extradition. The court shall decide these cases in the same manner as it would concerning limitation on detention pending removal under section 3193(d)."

Commentary

Subsection (c) was added to allow for conditional extradition to a requesting state, and as such is a complement to section 3198(f), which allows the Secretary of State to negotiate extradition terms that limit the scope and degree of punishment the requesting state may impose upon the relator if he is convicted for the crime for which he was extradited. The period of detention is limited to 120 days, to ensure that an individual is not held in custodial detention for an indefinite period of time.

Proposed amendment: add the following subsection:

> "(d) Transit Extradition. --- A requesting state may petition any federal district court for a transit extradition order permitting its agents or the agents of another foreign state to transit in the United States while having custody of a person being transported from one foreign state to another foreign state pursuant to a valid extradition treaty. The petition shall be accompanied by certified and authenticated copies of the extradition order and shall contain information concerning the person transported in custody, the agents accompanying him, and the state to which the person is to be surrendered."

Commentary

The Draft does not contain this essential provision. It was added to facilitate the extradition of a relator from one foreign state to another through the United States. The practice of granting such orders is widely followed in other states such as Western Europe, where extradition from one state to another must be accomplished by passing over many states. Without such a provision a relator can argue that his detention in the transit state is unlawful, which would compel his release before his arrival at the state to which his extradition was granted.

If United States courts are unable to grant transit extradition orders, they would be compelled to grant petitions of habeas corpus to a relator surrendered for example from Canada and in transit in the United States to Mexico, who can make a claim of unlawful detention before the U.S. courts. This would occur because the Canadian extradition order, having no legal effect in the United States, would violate the relator's fourth amendment rights in the United States. This result can be avoided if foreign states are granted transit extradition orders before a transferee's stop-over at locations within the jurisdiction of the United States. Evidence of the extradition order is required in support of the foreign state's petition for such an order to ensure the legally valid transit of the relator through the United States. No probable cause is required in this situation.

7. Proposed amendment: add a new section:

"Section 3198. Defenses to extradition."

<u>Commentary</u>

The Draft does not contain any of the defenses recognized by judicial decisions and usually embodied in extradition treaties.

In order to ensure a more uniform approach, these defenses are covered herein and that will therefore prevent confusion and enhance uniformity.

The amendments proposed are based on existing treaty provisions and their judicial interpretations.

Proposed amendment: add the following subsection:

> "(a) In General. --- A person shall not be extradited if any of the provisions of the applicable treaty or of this act are found to be lacking."

Commentary:

This subsection is added to explicitly state that a person shall not be extradited if the terms of the applicable treaty or of the act are not met.

Proposed amendment: add the following subsection:

> "(b) Political Offense. --- A person otherwise found extraditable shall not be extradited if the court finds that extradition is sought for a political offense, or for an offense of a political character. The determination of the above shall be as follows:
>
> A political offense or an offense of a political character is either
>
> (1) a purely political offense such as an offense based on acts or conduct not involving violence and directed against the state, or essentially constituting freedom of speech, opinion, expression, and their symbolic manifestations not involving violence; or
>
> (2) a relative political offense whereby a person who is politically motivated engages in a political act in the context of a war, revolution, civil strife, civil or political disturbance and in which a crime of violence has resulted as a natural outgrowth of the predominating political act.
>
> (3) an international crime as specified in a multilateral treaty to which the United States or the requesting state is a party shall not constitute a political offense or an offense of a political character and is excluded from the applicability of this provision.
>
> (4) If the person is not a United States citizen, the person who is sought for prosecution

> because of his political, racial, or religious opinions or beliefs may petition the court to suspend the extradition proceeding or the extradition order pending a determination by the Attorney General or the Secretary of State of his petition for political asylum in accordance with the provisions of title 8, United States Code, section 1101(a)(42)(A). If the person is a United States citizen, a finding that the person is sought for prosecution because of his political, racial, or religious opinions or beliefs shall be made by the Secretary of State, who shall then certify that finding to the court and the court shall embody such finding in its order. In so doing, the Secretary of State shall rely on the same criteria set forth for political asylum, as provided in title 8, United States Code, section 1101(a)(42)(A)."

Commentary

Subsection (b) is added to ensure that the determination of whether the relator is being sought because of his political, racial, or religious opinions or beliefs will be made by the courts in extradition proceedings. See Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981)

The specification of a purely political offense, a relative political offense, and an international crime is made to clarify the distinction between the nature of an offense and the motives of the actor.

In the case of a purely political offense, the offense itself is labelled a crime because it constitutes a subjective threat to the state's political, religious or racial ideology or its supporting structure, or both. The offense, however, has none of the elements of a common crime, where a private wrong has been committed through the injury to private persons, property or interests. Treason, sedition, and espionage are offenses directed against the state itself and are therefore by definition a threat to the state's existence, welfare, and security. Thus, they are purely political offenses. If such an act is linked to a common crime, however, it loses its purely political character.

In contrast to a purely political offense which has no element of common crime, a relative political offense contains an element of violence which creates a private wrong. The relative political offense can be an extension of the purely political offense, or it can be a common crime prompted by ideological motives. In determining whether an act constitutes a relative political offense, three factors should be taken into account: (1) the degree of the actor's political involvement in the ideology or movement on behalf of which he has acted, his personal commitment to and belief in the cause on behalf of which he has acted, and his personal conviction that the means (the crime) are justified or necessitated by the objectives and purposes of the ideological or political cause; (2) the existence of a link between the political motive (as expressed above) and the crime committed; (3) the proportionality or commensurateness of the means used (the crime and the manner in which it was performed) in relationship to the political purpose, goal, or objective to be served; and (4) that the relator's political motives and goals predominate over his intention to commit the common crime. These criteria are the embodiment of the jurisprudence of the United States on the political offense exception and are elaborated in greater detail in M. C. Bassiouni, International Extradition and World Public Order 370-425 (1974).

See Eain v. Wilkes, 641 F.2d 504 (7th Cir 1981

International crimes are the exception to the political offense exception --- they are extraditable offenses which are not to benefit from the political offense exception. International crimes are offenses against the Law of Nations or delicti jus gentium and by their very nature affect the world community as a whole. As such, they cannot fall within the political offense exception because, even though they may be politically connected, they are in derogation to the "laws of mankind" in general and international criminal law in particular.

International crimes encompass that which by treaty has been recognized as such. At present these crimes are: aggression; war crimes; unlawful use of weapons; genocide; crimes against humanity; apartheid; crimes relating to international air communications; threat and use of force against internationally protected persons; taking of hostages; unlawful use of the mails; drug offenses; falsification and conterfeiting; theft of national and archeological treasures; bribery of foreign public officials; interference with sub-marine cables; international traffic in obscene publications. See M. C. Bassiouni, International Criminal Law: A Draft International Criminal Code 52-106 (1980). The amendment does not however contemplate that all these crimes be excepted but only those which are embodied in conventions ratified by the United States or at the offer of the United States by the requesting state.

Subparagraph (4) is added to explicitly recognize the interrelationship of extradition and asylum. The subparagraph merely takes into account the applicable provisions of the Refugee Act of 1980 and leaves these decisions to the executive as they are regulated by appropriate legislation. It does however add U.S. citizens to the category of persons non-extraditable if the same grounds applicable to non-citizens apply to them as well.

Proposed amendment: add the following subsection:

> "(c) Statute of Limitations. --- A person shall not be extradited if in accordance with the provisions of the applicable treaty the statute of limitations of either the requesting state or that of the United States has run out. In the absence of a treaty provision, the court shall apply the statute of limitations of the same offense under the United States Code or under the laws of the state wherein the court is located, whichever is the longer of the two statutes. The court shall apply either United States or state law to determine the conditions for the application of the statute, its period and tolling."

Commentary

The inclusion of the statute of limitations as a defense to extradition recognizes the existence of this defense in current United States extradition treaties. Further, it recognizes the U.S. position that in the absence of a specific treaty provision the defense of lapse of time is governed by title 18 United States Code § 3282, which requires commencement of prosecution within five years from the commission of the crime. Allowing the defense to be claimed at the extradition hearing avoids unnecessary costs to the respective states and unnecessary hardship and cost to the relator.

Proposed amendment: add the following subsection:

> "(d) Double Jeopardy. --- A person shall not be extraditable if he has already been prosecuted, whether acquitted or convicted, for substantially the same crime or offense as the one for which his extradition is sought. Such a determination shall be made on the basis of United States law or the law of the state wherein the court is located."

Commentary

This subsection is added to specifically recognize judicial interpretation holding that the defense of double jeopardy is validly raised as a bar to extradition, when the extradition request is based on the same or substantially the same crime as that for which the relator has been convicted or acquitted. Whether the legal basis of this defense in U.S. law is found in the eighth amendment or the doctrine of *res judicata*, it embodies the principle *ne bis in idem* recognized in various multilateral and bilateral treaties to which the United States is a signatory. *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980)

Proposed amendment: add the following subsection:

> "(e) Immunity or Plea Bargain. --- If the immunity or plea bargain includes or refers to extradition a person who is sought for extradition and who has been granted immunity from prosecution in the United States for substantially the same crime or substantially the same facts giving rise to the offense for which he is requested will not be extradited unless any prosecution or conviction in the United States predicated on the immunity or plea bargain is vacated."

Commentary

This subsection takes into account current U.S. case law holding that a relator cannot be extradited if he was granted immunity or entered a negotiated guilty plea with respect to conduct which is the same or substantially the same as the one giving rise to the criminal charge for which extradition is sought. Because constitutional rights supersede obligations under a treaty, extradition in such an instance cannot be granted unless the plea is vacated. See Santobello v. New York, 404 U.S. 257 (1971); Geisser v. United States, 513 F.2d 862 (5th Cir. 1975), on remand Petition of Geisser, 414 F.Supp. 49 (S.D.Fla. 1976), vacated on other grounds Petition of Geisser, 554 F.2d 698 (5th Cir. 1977); United States v. Pihakis, 545 F.2d 973 (5th Cir. 1977); Scrivens v. Henderson, 525 F.2d 1263 (5th Cir.), cert. denied 429 U.S. 919 (1976); Dugan v. United States, 521 F.2d 231 (5th. Cir. 1973).

Proposed amendment: add the following subsection:

> "(f) Cruel or Unusual Punishment. --- In exceptional and compelling circumstances, the court may withhold issuing the surrender order if the person sought is likely to be the subject of cruel, unsuaul or inhuman or degrading treatment or punishment abhorrent to the provisions of the eighth amendment to the United States Constitution and which the requesting state will not suspend. Suspension of any such treatment or punishment will render the extradition conditional. The Secretary of State shall begotiate these conditions and their terms shall be presented to the court and made part of the order."

Commentary

This subsection avoids the hardship of the rule of non-inquiry. M. C. Bassiouni, International Extradition and World Public Order 466, 569-70 (1974). It allows for conditional