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THE WHITE HOUSE
WASHINGTON
11. 25. 82

Bill/Steve

Would one of you digest
this sufficiently to tell me
what's afoot. Bassiouni is
as thoughtful Chap & I'd like
to get back to him w. something
intelligent to say.

November 12, 1982

Honorable William J. Hughes
U.S. House of Representatives
2446 Rayburn House Office Building
Washington, D. C. 20515

Dear Congressman Hughes:

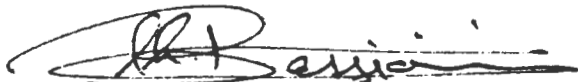
As you know, I had the privilege of testifying before the Senate Judiciary Committee on the 1981 Extradition Act, and before your Committee and the House Committee on Foreign Affairs on the 1982 Extradition Act. I have also provided these three distinguished Committees with written reports and proposed textual language which proved useful and moreso to your Committee. Ever since my appearance before the Senate on that version of the Act, I have repeated my concern that the "political offense exception" has overshadowed the numerous technical aspects of the draft legislation almost to the point where significant matters were not given adequate consideration. As stated before the Senate Judiciary Committee, there are approximately 250 extradition cases every year, every one of which involves bail and probable cause, yet these two major issues have been inadequately covered in the Senate version. Conversely, in the last 30 years, you will find that there have been less than twenty cases involving the "political offense exception" and in the last twenty years only twice has the exception been granted. Nevertheless, more time and effort has been and is spent on this question than on all other important questions such as: "bail," "probable cause," "repeated requests," "provisional arrest," "transit extradition" and others. These questions are either inadequately treated or are not treated at all in S. 1940. H.R. 6046 is in my judgment a far superior bill to S. 1940, in that it not only adequately covers the rights of the individual but provides the government with adequate means to carry out this important process. It would be a significant setback if H.R. 6046 with eventually minor changes does not pass the House and remains unchanged in Conference with the Senate version. The inordinate attention given to the "political offense exception" to the detriment of other crucial issues as expressed in the more desirable approach of H.R. 6046 reflects considerable shortsight by those concerned with the dual purposes of this process: international cooperation in combatting crime, and the protection of the human rights of those subjected to the process.

Regrettably, certain proposals though well intentioned and desirous of furthering human rights, do not serve the best interests of the cause advocated. I am particularly concerned with Judge Crockett's formulation of the "political offense exception" (which has technical deficiencies) and the "rule of non-inquiry" (which has been in part misconstrued because that rule does not deal primarily with the motives of the requesting state but rather with the eventual treatment that the relator is likely to be subjected to in the requesting state).

Since the issues surrounding the Act seem to crystallize around the "political offense exception" and the "rule of non-inquiry," I am taking the liberty of enclosing herewith a copy of my statement to the House Committee on Foreign Affairs which deals with these matters. My views in a more extended fashion have been presented to your Committee in written as well as oral form.

I would like to take this opportunity to extend my warmest congratulations on the efforts of your Committee, your staff, the staff of your Committee, and you personally for the significant efforts made in producing H.R. 6046. I would only hope that the more glamorous political considerations will not overshadow more important issues and ultimately set back such important human rights guarantees as the provisions for bail, the allocation of burden of proof, the limitations on provisional arrest and the requirement of probable cause which are well stated in H.R. 6046. I urge you therefore to continue your efforts in ensuring the successful passage of H.R. 6046 and in pursuing the matter when it reaches the stage of conference to reconcile the House and Senate versions accordingly.

Sincerely yours,



M. Cherif Bassiouni
Professor of Law

Enclosure

cc: Honorable George W. Crockett, Jr.
Honorable Les AuCoin
Honorable David E. Bonior
Honorable William M. Brodhead
Honorable Shirley Chisholm
Honorable John Conyers, Jr.
Honorable Don Edwards
Honorable Walter E. Fauntroy

Hon. Barney Frank
Hon. Anthony Moffett
Hon. B. Rosenthal
Hon. P. Schroeder
Hon. F. Stark
Hon. Gerry Studds
Hon. Ron Wyden

Statement on H.R. 6046,
a Bill to amend title 18 of the United States Code
with respect 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 International Extradition and
World Public Order (1974); A Treatise
on International Criminal Law (2 vols. 1973);
International Criminal Law: A Draft
International Criminal Code (1980);
and eight other books and seventy-two
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

Mr. Chairman, Distinguished Members of the Committee:

It is my privilege to appear before the Committee after having appeared before the Senate and House Judiciary Committees. As one who has had extensive experience in extradition and international criminal law for some two decades, I must express support for H.R. 6046 which is a significant improvement over existing legislation. The Bill is well crafted, well thought out, and balanced in all respects. The House Judiciary Committee, Congressman Hughes and the staff, in particular Mr. David Beier, are to be commended for their work on the Bill. It is with a view to reinforce it that this statement is presented and specific suggestions made.

SCOPE OF THE STATEMENT

In light of the jurisdiction of this committee, the statement presented herein is limited to four questions: 1) the political offense exception; 2) the relationship of the political offense exception to political asylum; 3) the rule of non-inquiry; and 4) the principle of specialty.

INTRODUCTORY COMMENTS

There are some fundamental principles embodied in the American legal and political systems which bear on the questions that are within the scope of this statement: that individuals should not be persecuted or subjected to criminal prosecution because of their political, religious or racial affiliations, beliefs, and conduct pertaining thereto, and that persons, including those accused or found guilty of criminal offenses, should not be subjected to cruel and unusual punishment.

These principles, which are embodied in the United States Constitution, international obligations binding upon the United States, United States legislation

and the jurisprudence of the courts, find their expression and application with respect to the first three questions to which this statement addresses itself.

The "political offense exception" is embodied in United States extradition treaties and is defined in Section 3194(e)(2) of the 1982 Extradition Act. The definition is a significant improvement over existing legislation, but it should be further refined to assist United States courts in interpreting and applying this provision of the new Act. In particular this refers to: a) the needed clarification of the terms "extraordinary circumstances" which qualify the exception^S to the "political offense exception;" b) the inclusion of language which would bring the provision in line with the terms of the Geneva Conventions of August 12, 1949 (which is ratified by the United States);¹ and c) amending some language in the Section in light of the 1967 Protocol Amending the 1951 Refugee Convention (which has been ratified by the United States)² and which is embodied in the 1980 Refugee Act.³ The 1982 Extradition Act should be consistent with other United States treaty obligations and relevant legislation. Although it is beyond the scope of this statement to re-examine in detail the purposes and policies supporting the "political offense exception" and the goals of the 1980 Refugee Act which incorporates the 1967 Protocol and the 1951 Convention, clearly United States law and policy must remain consistent in the preservation of its legal and political ideals for the protection of those individuals who may commit acts which constitute a legitimate expression of their political, religious, or ideological beliefs and to protect those who may be persecuted by certain regimes because of their political or religious beliefs or racial affiliations or activities.

Separate and apart from these issues is one which stems from the same higher values and ideals embodied in the American legal and political systems and which would make it contrary to United States public policy to use the

legal and political processes of the United States to deliver individuals in the United States to another state where such individuals could be subjected to certain forms of cruel and unusual treatment or punishment as understood within the meaning of the Eighth Amendment to the United States Constitution and as embodied in the Universal Declaration of Human Rights,⁴ the International Covenant on Civil and Political Rights,⁵ the Inter-American Convention on Human Rights,⁶ and the European Convention on Human Rights and Fundamental Freedoms,⁷ all of which prohibit "cruel, inhuman or degrading treatment or punishment."

Under existing legislation and under the 1982 Extradition Act, Section 3194(e)(3)(B), the "rule of non-inquiry" precludes United States courts from examining or inquiring into the conditions of treatment or punishment to which a relator might be subjected upon return to the requesting state. Because of overriding policy considerations and particularly in light of international conventions on the protection of human rights and the Draft Convention on the Prevention and Suppression of Torture⁸ presently before the United Nations, the proposed legislation should authorize limited judicial inquiry into particularly egregious conditions which may be contrary to United States public policy and internationally protected norms of human rights.

The rule of specialty is a well-established rule of international law, and it has been the consistent practice of the United States to apply it. Nevertheless, since the 1982 Extradition Act is intended to be a comprehensive legislation covering all aspects of extradition, it should be specifically included.

I. THE POLITICAL OFFENSE EXCEPTION: SECTION 3194(e)(2)

The "political offense exception" has been the subject of much debate and testimony before the Senate Judiciary Committee, the Senate Foreign Relations Committee, and the House Judiciary Committee. It is once more before this Committee for further consideration. Since the subject has been amply covered in all its facets in previous hearings,⁹ this statement will be limited to two aspects relevant to Section 3194(e)(2): 1) whether the words "extraordinary circumstances" which constitute the exception to the exclusions from the "political offense exception" without further definition are sufficiently clear to provide the judiciary with the necessary standards to determine when such circumstances exist to permit an exception to the non-applicability of the specifically enumerated exclusions in subsection (e)(3)(A)-(H) to the "political offense exception;" 2) whether situations regulated by the international law of armed conflicts, and in particular under the Geneva Conventions of August 12, 1949¹⁰ and Protocol II Amending the Geneva Conventions of August 12, 1949¹¹ (although the Protocol has not yet been ratified by the United States) are covered by this provision.

1. "Extraordinary Circumstances"

As defined, Section 3194(e)(2) excludes certain types of conduct from the political offense exception. The types of conduct in question are enumerated in subsections (A) through (H), and constitute essentially any acts of violence. The Section, however, also provides that such acts of violence may be considered within the scope of the "political offense exception" if "extraordinary circumstances" exist. It is conceded that the term "extraordinary circumstances" leaves an opportunity for the courts to exclude the most extreme situations from the "exceptions to the exception." Nevertheless, lack of defining "extraordinary circumstances" creates ambiguity in the law which is likely to result in increasing the burden of the courts in their attempt to fashion a

jurisprudence consonant with the intent of Congress. It is therefore recommended that the term "extraordinary circumstances" be defined to take into account the international regulation of armed conflicts and internationally protected norms of human rights, as well as to set forth more explicit guidelines.

A. International Regulation of Armed Conflicts

Prescinding from certain aspects of the customary law of armed conflicts,¹² the Geneva Conventions of August 12, 1949 differentiate between various levels of hostilities and distinguish between two general types of hostilities: international armed conflicts, and non-international armed conflicts (i.e., internal conflicts).

Under the Conventions, acts of violence committed in the context of international armed conflicts cannot be considered political crimes for which extradition may be denied through the application of the "political offense exception." Instead, violent acts in this context are either justified and therefore not criminal, or they are unjustifiable and are "grave breaches" or "war crimes" for which extradition or prosecution is required. Whether the violent act is to be deemed a crime depends on whether the act violated the terms of the Geneva Conventions. If the act of violence conforms to the requirements of the Conventions, it is not a crime; thus, extradition of an individual who has committed such an act cannot be granted because it is justifiable under international law and therefore could not be a crime under United States law, so that the requirement of dual criminality, Section 3194, would not be fulfilled.

Acts of violence which are committed in the contexts of internal conflict, on the other hand, may be considered within the scope of the "political offense exception." These contexts include: 1) internal armed conflicts; and 2) internal civil strife.

Acts of violence committed in the context of internal armed conflicts are regulated by Common Article 3 of the Geneva Conventions. This article prohibits acts such as killing, torturing or taking hostage individuals who are not actively engaged in the armed conflict, such as the wounded, sick, shipwrecked, and civilians. Article 3 does not provide that such acts are to be considered criminal acts, however; furthermore, it does not provide that other acts of violence are to be deemed justifiable. Instead, it leaves this determination to states' application of their national criminal laws and to their definitions of the political offense exception in extradition treaties. Thus, the "political offense exception" becomes relevant when an act of violence which does not violate Article 3 has been committed. Because the United States is a party to the Geneva Conventions, the 1982 Extradition Act should be consistent with these Conventions by providing that "extraordinary circumstances" include those situations wherein an act of violence has been committed in the course of an internal armed conflict as provided under Common Article 3 to the Geneva Conventions of August 12, 1949 and is deemed permissible under the terms of these Conventions.

Acts of violence which are committed during periods of civil strife are not regulated by the Geneva Conventions; instead, they are regulated solely by national criminal laws and are therefore subject to the existing meaning of the Section's exceptions to the "political offense exception."

Section 3194(e)(2)(A)-(H) lists those crimes that shall not be considered political offenses. These crimes are defined by reference to some of the relevant international criminal law conventions to which the United States is a party and which define the crime in question. In addition, Section 3194(e)(2)(D) provides that a violent act shall not constitute a political offense if it is "an offense with respect to which a treaty obligated the United States to either extradite or prosecute a person accused of the offense." The offense of "war crimes" -- i.e., "grave breaches" of the Geneva Conventions of August 12, 1949 -- are not included in the enumerated exceptions, but should be. This offense could be interpreted as within the ambit of subsection (e)(2)(D), because the United States is a party to the Geneva Conventions, which obligate the United States to prosecute or extradite individuals who have committed grave breaches of the Conventions. To avoid unnecessary ambiguity, a specific statement should be made to exclude such violations, namely: "grave breaches of the Geneva Conventions of August 12, 1949 and any amendments thereto to which the United States may become a party."¹³

B. Internationally Protected Norms of Human Rights

History teaches us that certain regimes at times create conditions which are so deprivatory of minimum standards of human rights that a person subjected to such conditions has no alternative but to seek redress or even escape except by means which necessitate the resort to some violent conduct. Under this proposed legislation, such persons subjected to these conditions would not benefit from the "political offense exception" and would be returned to the requesting state where they are likely to be subjected to prosecution (or persecution; the issue of political persecution is a separate one and is discussed below).

The 1982 Extradition Act should provide that violent acts committed in this context are to be considered as committed in "extraordinary circumstances."

SUGGESTED AMENDMENT TO CLARIFY THE TERMS

"EXTRAORDINARY CIRCUMSTANCES"

"Extraordinary circumstances include:

1. Acts of violence which are committed within the context of a conflict of a non-international character as defined under Common Article 3 of the Geneva Conventions of August 12, 1949 and any conventions amending the Geneva Conventions to which the United States becomes a party, and which are deemed permissible thereunder; and
2. Acts of violence committed as a last resort by a person who has been subjected, in the state where such acts occurred, to serious violations of internationally protected human rights and for whom such acts were the only reasonable means of protection or flight from such conditions.

Additionally, the following should also be considered:

Acts of violence occurring during a context of war, revolution, civil strife, insurrection, or severe social-political disturbances, and committed as part of or incidental to such conditions by a person involved in the events in question and whose political, social or ideological motives are preponderant in the act which is a direct outgrowth of such conditions. "

II. RELATIONSHIP OF THE POLITICAL OFFENSE EXCEPTION TO POLITICAL ASYLUM:

SECTION 3194(e)(3)(A)

Section 3194(e)(3)(A) provides that the Secretary of State has the discretion to determine whether a requesting state is seeking extradition for the purpose of prosecuting or punishing a person because of "such person's political opinions, race, religion, or nationality." Such a decision is non-reviewable under the Administrative Procedures Act. The content of such a judgment and its application to a person about whom such a decision is to be made are the same as under the terms of the 1967 Protocol Amending the 1951 Refugee Convention,¹⁴ which is embodied in the 1980 Refugee Act.¹⁵ However, the language of Section 3194(e)(3)(A) is different from that of the 1967 Protocol and the above-mentioned United States legislation,¹⁶ and this diversity is likely to produce conflicting judicial and administrative results. Furthermore, the procedures established under the 1980 Refugee Act¹⁷ provide for procedures which precede the use of discretion by the Attorney General. Since there is already an established procedure for the determination of whether an individual is entitled to be considered a political refugee consistent with international treaty obligations, it is advisable that the 1982 Extradition Act adopt the same substantive requirements and procedures set forth in other United States legislation. Consequently, rather than having the Secretary of State decide the issue at his discretion, after the court decides on the relator's extraditability without considering his claim to status as a political refugee, the court should direct the relator to file for political asylum under the 1980 Refugee Act. The court would then withhold the final surrender order pending the determination of the Immigration and Nationality Service of whether the individual is entitled to be considered a political refugee within the meaning of United States law. If he is deemed eligible for the status of

political refugee, then the surrender would not issue; the order of extraditability would be reopened and a finding of non-extraditability entered. If he is not found eligible for the status, the the court would issue the surrender order. There is no need for any additional language in the Act to confer discretion upon the Secretary of State, since he can rely on "executive discretion" to refuse surrender of a person certified extraditable by the courts.¹⁸ Nevertheless, if the present language is to be retained it should be in addition to a provision on political refugees as discussed above.

III. THE RULE OF NON-INQUIRY: SECTION 3194(e) (3) (B)

The Section provides that only the Secretary of State in his own, unreviewable discretion may deem that the return of a relator to a requesting state is "incompatible with humanitarian considerations." This provision is in keeping with long-standing United States practice that the court not inquire into the prospective treatment that a relator may face upon return to a requesting state.¹⁹ It is to be noted, however, that certain practices of corporal punishment or cruel and inhuman punishment are contrary to United States public policy as well as contrary to internationally protected norms of human rights.²⁰ To specifically state that discretion is given the Secretary of State to make such determinations (although he has such "executive discretion") might place the United States in a position of embarrassment vis à vis a foreign government and could burden relations between the United States and that government. It is suggested instead that the United States government be shielded from having to make such decisions which may impair its foreign relations with such a state. There are three possible solutions to this problem. The first would be to condition extradition in certain cases to the non-applicability of such treatment or punishment which would be contrary to United States law and policy and internationally protected human rights norms. The analogy in this case is to the practice of a number of states which prohibit extradition where the death penalty may be imposed.²¹ It is possible in such instances that the requesting state undertakes not to mete out such a punishment and therefore eliminate the obstacle. The same could be done with respect to corporal punishment, torture, and the like.

The second alternative is to conditionally extradite the relator on the condition that upon his conviction he will be returned to the United States as a transferred prisoner so that his sentence will be executed in the United

States in accordance with 18 U.S.C. §§ 4100 et seq. The third alternative is to deny extradition. Section 3196 provides for all of the above but the question is still left to the exclusive discretion of the Secretary of State.

The following is proposed language to substitute for Section 3194(e)(3)(B):

"Upon a prima facie showing by the requested person that he or she is likely to be subjected to cruel, inhuman or degrading treatment or punishment, extradition shall not be granted unless the requesting state shall present to the Secretary of State satisfactory assurances that such treatment or punishment shall not be imposed; or where a treaty between the United States and the requesting state for transfer of prisoners exists, that the extradition shall be conditional upon the return of the relator upon conviction for the execution of the sentence in the United States. The Secretary of State shall negotiate these conditions in accordance with Section 3196 and their terms shall be presented to the court and made part of the order. Only in the most egregious cases shall the court deny extradition. The Secretary of State may in any event exercise his discretion after a finding of extraditability by the court."

IV. THE PRINCIPLE OF SPECIALTY

This principle, which is well established in the jurisprudence of the United States, requires the requesting state to prosecute or punish the returned individual for the crime for which he was requested unless authorization is obtained from the United States. The same limitation exists on re-extradition from an originally requesting state to another state.²² These requirements are designed to insure the United States that its treaty relations and legal processes are not used for a purpose different than the one which is specified in the applicable treaty. This principle should be preserved and the Act should reflect it.²³

A proposed text is as follows:

"A returned person shall not be prosecuted, punished or re-extradited while under prosecution or punishment in the requesting state without the specific approval of the Secretary of State who may at his discretion authorize any variance in prosecution or punishment in the requesting state or re-extradition upon a showing of probable cause.

FOOTNOTES

1. Geneva Conventions of August 12, 1949:

- No. I, For the Amelioration of the Condition of the Wounded and Sick in the Armed Forces of the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31;
- No. II, For the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85;
- No. III, Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135;
- No. IV, Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287;

- 2. Protocol Relating to the Status of Refugees, signed January 31, 1967, entered into force, November 1, 1968, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.
- 3. Refugee Act of 1980, March 17, 1980, Pub. L. No. 96-212, 94 Stat. 102.
- 4. U.N.G.A. Res. 217A(III), 3 U.N. GAOR 71, U.N. Doc. A/810, 10 December 1948, art. 5.
- 5. U.N.G.A. Res. 2200(XXI), 21 U.N. GAOR, Supp. (No 16) 52, U.N. Doc. A/6316, 16 December 1966, art. 7.
- 6. O.A.S. Off.Rec. OEA/Ser. L/V/II. 23 Doc. 21 Rev. 6, 22 November 1969, art. V(2).
- 7. 218 U.N.T.S. 221, Europ. T. S. No. 5, 4 November 1950, art. 3. For an analysis of human rights protected in the criminal process, including the right to be free from cruel, inhuman or degrading treatment or punishment, see M. C. Bassiouni, S. Hertzberg, & C. Zammuto, "The Protection of

Human Rights in the Criminal Process under International Instruments and National Constitutions," 4 Nouvelles Etudes Penales (1981) (Association Internationale de Droit Pénal).

8. U.N. Doc. E/CN.4/NGO 213. See Bassiouni, "An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture," 48 Revue Internationale de Droit Pénal 17 (1977).
9. See Hearings on H.R. 5227, The Extradition Act of 1981, before the Subcommittee on Crime, House Committee on the Judiciary, 97th Cong., 1st sess. (1981); Hearings on S.B. 1639 and 1940, Extradition Act of 1981, Committees on the Judiciary and Foreign Relations, 97th Cong., 1st sess. (1981). For a detailed discussion of the "political offense exception" in a comparative context, see C. Van den Winjgaert, The Political Offence Exception to Extradition (1980).
10. Geneva Conventions of August 12, 1949, supra note 1.
11. Protocol II Additional to the Geneva Conventions of August 12, 1949, 10 June 1977, Int'l Rev. Red Cross (Special Issue August-September 1977).
12. Hague Conventions of October 18, 1907:
 - No. III, Relative to the Opening of Hostilities, 36 Stat. 2259, T.S. No. 538, 3 Martens Nouveau Recueil 3d 437;
 - No. IV, Respecting the Laws and Customs of War on Land, 36 Stat. 2277, T.S. No. 539, 3 Martens Nouveau Recueil 3d 461;
 - Annex to No. IV, Embodying the Regulations for Laws and Customs of War on Land, 2 Scott, Hague Peace Conf. 376;
 - No. V, Respecting the Rights and Duties of Neutrals in War on Land, 36 Stat. 2310, T.S. No. 540, 3 Martens Nouveau Recueil 3d 504;

- No. VIII, Relative to the Laying of Automatic Submarine Contact
Mines, 36 Stat. 2332, T.S. No. 541, 1 Bevans 669;
- No. Relative to the Right of Capture in Naval War, 36 Stat.
2396, T.S. No. 544, 1 Bevans 711;
- No. IX, Concerning Bombardment by Naval Forces in Time of War,
36 Stat. 2351, T.S. No. 542, 3 Martens Nouveau Recueil
3d 604;
- No. X, for Adaptation of the 1906 Geneva Convention Principles
to Maritime War, 36 Stat. 2371, T.S. No. 543, 3 Martens
Nouveau Recueil 3d 630;
- No. XIII, Regarding Neutral Powers in Naval War, 36 Stat. 2415,
T.S. No. 545, 1 Bevans 723.

See I M. C. Bassiouni & V. Nanda, A Treatise on International Criminal Law 295-454 (1973); U.S. Army, Field Manual 94-10 (1956); Dep't of the Air Force, Treaties Governing Land Warfare (1958). See generally D. Schindler & J. Toman, The Laws of Armed Conflict (1973).

13. The reference to "amendments to the Geneva Conventions" is to provide for the United States' eventual ratification of the Protocols Additional to the Geneva Conventions, supra note 11.
14. Protocol Relating to the Status of Refugees, supra note 2.
15. Refugee Act of 1980, supra note 2. For an in-depth study, see Transnational Legal Problems of Refugees (1982 Michigan Yearbook of Int'l Legal Studies).
16. The Refugee Act provides the following definition of "refugee:"

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Pub. L. No. 96-212, Title II, § 201(a), codified at 8 U.S.C. § 1101(a)(42)(A).

17. Pub. L. No. 96-212, Title II §§ 208 (asylum), 209 (adjustment of status), codified at 8 U.S.C. §§ 1158, 1159. See 8 C.F.R. § 208.10 (procedures for review). The Act specifically states that

the Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id. § 203(e), codified at 8 U.S.C. § 1253(h) [emphasis added].

18. See M. C. Bassiouni, International Extradition and World Public Order 531-34 (1974).

19. See Bassiouni, supra note 18, at 466, 569-70. See also Neely v. Henkel, 180 U.S. 109 (1901); Argento v. Horn, 241 F.2d 258 (6th Cir. 1957). But see Gallina v. Graser, 278 F.2d 77 (2d Cir. 1960); Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972); U.S. ex rel Bloomfield v. Gengler, 507 F.2d 925 (2d Cir. 1974); Peroff v. Hylton, 563 F.2d 1099 (4th Cir. 1977) (rule of non-inquiry may be relaxed in compelling circumstances). The House Report noted that the rule of non-inquiry is "not absolute," and may be relaxed in particularly egregious situations. In support, the Report referred to Gallina v. Fraser, supra. See House Report on H.R. 6046, The Extradition Act of 1982, 97th Cong., 2d sess., Rept. No. 97-627, Part I, at p. 20.

20. See supra notes 4-8.

21. See Bassiouni, supra note 18, at 459-63.

22. See Treaty Between the United States and Mexico, art. 17; Treaty Between the United States and the Federal Republic of Germany, art. 32. See also Cosgrove v. Winney, 174 U.S. 64 (1899); Johnson v. Brown, 205 U.S. 309 (1907); Greene v. United States, 154 F.2d 401 (5th Cir. 1907); Collins v. O'Neil, 214 U.S. 113 (1909); United States v. Paroutian, 299 F.2d 486 (2d Cir.

1962); *Fioccoconi v. United States*, 464 F.2d 475 (2d Cir. 1972); *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir. 1973), cert. dismissed, 414 U.S. 884 (1973); *McGann v. U.S. Board of Parole*, 488 F.2d 39 (1973); *United States v. Rossi*, 545 F.2d 814 (2d Cir. 1976); *United States v. Flores*, 538 F.2d 939 (2d Cir. 1976); *Freedman v. United States*, 437 F. Supp. 1252 (N.D.Ga. 1977); *Berenguer v. Vance*, 473 F. Supp. 1195 (D.D.C. 1979).

23. See House Report, supra note 19, at p. 31

M. CHERIF BASSIOUNI

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Statement on H.R. 5227,
a Bill to amend title 18 of the United States Code
with respect to extradition, and for other purposes

by

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1. Relationship between the legislation and treaties

The importance of having a single national legislation providing uniformity in application cannot be underestimated. The Extradition Act should accomplish this purpose by serving as the basis for all substantive and procedural matters, while treaties, on the other hand, should include exceptional matters not covered in the legislation.

If the national legislation is not the general rule, then every treaty becomes a separate procedural statute, with the result that there could be as many as one hundred different procedures applied by the courts. The obvious consequence would be lack of consistency in the practice of extradition and potential jurisprudential confusion. Because precedents would only affect the interpretation of the provisions of each treaty individually, this would stimulate and increase judicial recourses 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 advantages of uniformity and reduction of litigation, a national legislation would also reduce the burden on the United States government of renegotiating with every foreign government basic substantive and procedural matters already contained in the Act. Furthermore, the existence of national legislation, while it would not preclude the government from negotiating treaty provisions that may be contrary to it, would nevertheless strengthen the government's position in its negotiations with foreign governments in maintaining greater

uniformity among treaties and conformity between the treaties and the legislation. The more the legislation in its specific language allows for treaties to regulate certain substantive and procedural matters, the more likely it is that foreign governments will insist on particular clauses which may differ from the legislation. Thus a true national legislation is what is suggested as it is the trend throughout the world as opposed to our Act which merely supplements treaties which would put the United States in a rather unique position among most countries of the world with a tradition in extradition law and practice. The same observation was made by this witness before the Senate Judiciary Committee on Bill 1639. See Hearings, Committee on the Judiciary, 97th Congress, 1st session, October 14, 1981.

2. Reliance on multilateral treaties

Although the definition of "treaties" may be broad enough to encompass multilateral treaties, it is recommended that the definition specifically mention multilateral treaties. This would permit the United States to comply with those provisions in multilateral treaties to which it is a signatory and which allow reliance on the applicable extradition provisions in these treaties instead of or in addition to bilateral treaties. Such provisions exist, for example, in the Single Convention on Narcotic Drugs, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, art. 36, 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, art. 36; Convention on Psychotropic Substances, 21 February 1971, U.N. Doc. E/Conf. 58/6, T.I.A.S. No. 9725, art. 22; 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, arts. 3, 7; 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, art. 8; Tokyo Convention of Offenses and Certain Other Acts Committed on Board Aircraft, 14 September 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, art. 3; 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, art. 8; 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, art. 8. For a listing of international instruments on international criminal law and a bibliography of international crimes, see M.C. Bassiouni, International Criminal Law: A Draft International Criminal Code (1980).

3. Multiple requests

The draft legislation contemplates that in the event a person is held non-extraditable, the Attorney General may not present a second request on the "same factual allegations." To conform more closely to the traditional definition of double jeopardy, it is suggested that the word "substantially" be added to "same factual allegations." This would give the government additional flexibility.

4. Provisional arrest

Because provisional arrest subjects a person to detention without the opportunity for either the government or the relator to know much about the charges or the evidence available to support it, it is recommended that provisional arrest be structured to provide for a very short initial period of detention, (five working days); pending the arrival of "some evidence of probable cause." If this evidence is not produced, the individual should be entitled to release on bail in accordance with the provisions of the Bail Reform Act. This would reduce the individual's burden to meet the requirements of the bail provisions set forth in the Act which are more difficult to meet because he would not have the benefit of having knowledge of the charges or being confronted with the documents and evidence otherwise required by the Extradition Act. See Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980).

5. Extraditable offenses and double criminality

To avoid extradition for minor offenses, it is recommended that the provision on extraditable offenses and double criminality be drafted to require that extradition shall be allowed only if the crime in question is punishable by at least one year of imprisonment under the laws of the United States, the state of arrest, or the majority of states. This will avoid using the cumbersome process of extradition for minor offenses. Certainly it would also avoid the need to list extraditable offenses which requires periodic updating and causes problems of interpretation. See Brauch v. Raiche, 618 F.2d 843 (1st Cir. 1980), which permitted reliance on the criminal laws of the majority of states.

6. Waiver and the rule of specialty

Waiver of the extradition hearing should be linked to the rule of specialty; that is, the Act should provide that the relator can be prosecuted in the requesting state only for the crime for which he has waived the extradition hearing.

In addition, the Act should provide that a relator can consent to a waiver only after he has informed the court of his willingness to consent and has been advised by the court of the charges against him for which his extradition has been requested. These changes are required to ensure an individual's consent is made with full knowledge of the charges against him and to ensure that the court record reflects the charges for which the individual was extradited.

7. Rule of specialty

A separate provision on the rule of specialty should be inserted in the Act. Although specialty may benefit the relator, it is also a right of the government, as the requested state having granted extradition, to ensure that its processes have not been used for a purpose other than the one specified in the treaty. This provision should permit the Government to waive the rule without the need for a judicial hearing provided that the requested state has "probable cause" for the other crime or crimes, and that it does not seek to prosecute the individual for political, racial, religious, or ethnic reasons. See M.C. Bassiouni, International Extradition and World Public Order 352-60, 406-407 (1974).

8. Probable cause and court's findings

The Act should specifically designate the findings the court must make in determining whether an individual may be extradited. The Act should require that the court make the following 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 the Act; 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 other state within the United States of America; and
- (7) that no defense to extradition specified in the applicable treaty or in this act exists.

In its present form, the draft omits some of the requirements set forth in numbers 1, 2, 3, 6 and 7 above. In addition the draft allows extradition on less than "probable cause" or none depending upon the applicable treaty.

The proposed changes listed above would 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 that has been consistent for almost one hundred years.

It must be noted that the Act states that "probable cause" is only required in the absence of treaty language contrary thereto. This means that the government may negotiate away the requirement of "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 argue however 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 heretofore. 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 form. Because of the importance of "probable cause" as a fourth amendment right, it is quite likely that courts would find that requirement to be a constitutional standard.

9. Evidentiary matters

The Act should be more specific with respect to the use of the federal rules of evidence to determine the "sufficiency of evidence" and "probable cause" to ensure that courts will not rely on state rules of evidence if the crime for which the relator is requested is predicated on state criminal law under the principle of double criminality.

The Act should also specify that any evidence seized in the United States in accordance with the rules of search and seizure and other constitutional guarantees may be transmitted to the requesting state.

10. Rule of non-inquiry

Two issues arise in connection with the rule of non-inquiry; first, whether the individual upon return will be subjected to cruel, inhuman or degrading treatment; second, whether the relator, although requested for an extraditable offense, was actually requested with the intention of being prosecuted on the grounds of race, religion or political beliefs as defined in the 1967 Protocol amending the 1951

Refugee Convention.

With respect to the first issue, United States courts should be permitted to deny extradition or to request assurances that a person shall not be subjected to cruel or unusual treatment in the requesting state. This has not been the case in the United States so far. See M.C. Bassiouni, International Extradition and World Public Order ^{424, 463, 466, 569} (1974). See also Rosado v. Civilleti, 621 F.2d 1179 (2nd Cir. 1980) (although not an extradition case, it indicated the reluctance of United States courts to inquire into the process of foreign countries.)

With respect to the second issue, the extradition judge should be permitted to apply the provisions of the 1980 Refugee Act concerning asylum if a finding is made according to the provisions of title 8, United States Code, section 1101(a) (42) (A) that the individual would be subjected to persecution in the requesting state on the grounds set forth in that section. At present, an immigration judge at an asylum proceeding may make such a finding; therefore, there is no reason why the extradition judge should not be able to make the same determination based on the same legislative provisions. Any different provisions would create inconsistencies, which should be avoided.

11. Political offense exception

The Act should require that 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. A political offense or an

offense of a political character should be defined as 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. The relative political offense should also, therefore, be included. 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. See Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981). 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).

In addition, the Act should state that 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 the political offense exception.

In the formulation of the specific provision on exclusion of international crimes, rather than listing those international crimes which are excluded -- which would preclude non-listed crimes -- it is suggested that the provision specifically state: "any offenses which an international treaty to which the United States or the requesting state is a signatory which specifically states that the conduct in question constitutes an 'international crime,' or any offense which an international treaty to which the United States is a signatory which provides for the alternative of prosecution or extradition."

This formulation would include a number of international

crimes not encompassed by the present formulation of the Act such as war crimes and crimes against humanity, slavery and slave-related crimes; genocide and apartheid (although the United States has not yet ratified these two conventions); unlawful use of the mails for acts of terrorism; international traffic in obscene materials; and interference with international cables. See M.C. Bassoioni, International Criminal Law: A Draft International Criminal Code 52-106 (1980). In addition, this formulation would include such other international crimes as may be developed by future international conventions such as the "Draft Convention on the Prevention and Suppression of Torture," 1 February 1978, U.N. Doc. E/CN. 4/NGO 213, which is presently before the United Nations.

The Act should also specify that the relator may petition the court to suspend the extradition proceedings or the extradition order pending a determination by the Attorney General or the Secretary of State of the relator's petition for political asylum in accordance with the provisions of title 8, United States Code, section 1101(a)(42)(A), if one is pending. This instance would apply whenever a person has been arrested and for extradition after he has filed a petition for political asylum. In that case, the extradition proceedings would be suspended pending a determination by the Attorney General and the Secretary of State in accordance with the Immigration and Naturalization Act. In the event, however, that the individual raises an issue substantively analogous to the grounds for political asylum within the context of the extradition hearing, the recommendation made under number 10, Rule of non-inquiry would apply.

12. Double jeopardy and immunity and plea bargain

The Act should include a provision stating that 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. The Act should also provide that such a determination shall be made on the basis of United States law or the law of the state wherein the court is located. In this manner, the legislation will codify 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 United States 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. See Sindona v. Grant, 619 F.2d 167 (2nd Cir. 1980). This would also provide for uniformity among treaties.

In addition, the Act should include a provision stating that if 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. Such a provision would take into account current

United States caselaw 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); 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), 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, 554 F.2d 698 (5th Cir. 1977); Dugan v. United States, 521 F.2d 231 (5th Cir. 1973). See also the testimony of M.C. Bassiouni before the Senate Judiciary Committee on Bill 1639, 97th Congress, 1st session, October 14, 1981.

13. Transit extradition

The Act should include a provision permitting the government to petition any federal district court for a transit extradition order permitting federal agents or the agents of a foreign state to detain a person during transit through the United States from one foreign state to another foreign state pursuant to a valid extradition order. The practice of granting such orders is followed in other states such as in Western Europe, where extradition from one state to another may necessitate transit through another state. Without such an order the individual in custody can claim that his detention

in the United States, even though transitory is unlawful,
and by peition a writ of Habeas Corpus challenge his detention.
See testimony of M.C. Bassiouni, Hearings on Senate Bill 1639,
Committee on the Judiciary, 97th Congress, 1st session, October
14, 1981.