REPORT ON EXTRADITION BY THE COMMITTEE OF EXPERTS OF THE LEAGUE OF NATIONS

The possibility of regulating the extradition of criminals by general conventions was one of the questions considered at the very first session of the League of Nations Committee for the Progressive Codification of International Law. The subject was entrusted for study and report to Professor Brierly of Oxford as *rapporteur*, and M. de Visscher of Ghent, two well known and very competent authorities.

Extradition is a subject matter well advanced for codification, both in doctrine and practice, not so much because there is any wide body of customary international law applicable to it, but because, with rare exceptions, extradition is carried out in modern times under provisions already contained in treaties. A great majority of such treaties are bilateral. A certain few, such as the treaty signed between the States of Central America in 1923, are multilateral. An extradition treaty was signed in 1902, but not ratified, between the United States and eleven other countries of the Western Hemisphere. The problem is now whether regulation by a general convention making practice uniform between a large group of states is possible and desirable.

As a result of the report of Mr. Brierly, and of observations submitted by M. de Visscher,[1] the committee has concluded that certain questions connected with extradition are susceptible of being dealt with by way of a general international convention. These questions are as follows (Publications of the League of Nations, V. Legal, 1926. V. 8):

1. The question whether and in what conditions a third state ought to allow a person who is being extradited to be transported across its territory.

2. The question which of two states both seeking extradition of the same person from a third state ought to have priority over the other.

3. The questions which arise as to the extent of the restrictions on the right of trying an extradited person for an offence other than that for which he was extradited, and on a state's right to extradite to a third state a person who has been delivered to it by way of extradition.

4. The questions as to the right of adjourning extradition when the person in question has been charged and convicted, in the country where he is, for another crime.

5. The question of confirming the generally recognized rule by which the expenses of extradition should be entirely borne by the claimant state.

The questions, though important, are nevertheless connected mainly with the *procedure* of extradition. The enumeration of extraditable crimes is omitted entirely. The reasons advanced by Professor Brierly for this omission are, (a) because the needs of states differ, neighboring states requiring a wider list of crimes than those whose boundaries do not abut;

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(b) because a uniform list of extradition crimes is hardly possible without uniformity of criminal law, which does not exist. As to the former reason, one would be inclined to say that codification might very well adopt a *minimum* list of extraditable crimes, acceptable in most cases, leaving other states free to extend the list according to their special needs. As to the latter reason, the same objection of the lack of uniformity of criminal law might be urged against bilateral treaties. A sufficiently common conception exists of the more important crimes to permit of a large number of extradition treaties between nations of divergent systems of law. An examination of the extradition treaties of the United States passed over a given period will not show any great diversity in the list of extraditable crimes. The later treaties tend to extend the list, but the line of cleavage cannot fairly be ascribed to any divergence in the definition of crimes.

We venture to say that there is a much greater divergence in the penalties prescribed in different countries for the same offence than in the definition of offences; yet both Mr. Brierly and M. de Visscher prefer the adoption of a principle by which extradition is to be granted for any act punishable with a certain prescribed severity. This is the method adopted in the treaty of Central American States, but it would scarcely be found acceptable except among a group of states that regarded the same crime as being dangerous to society in equal measure. Furthermore, the most modern tendency of criminology is to allow the environment of the criminal and the circumstances of the crime to play a much more important rôle than hitherto in the determination of the penalty. In short, the penalty will be found to be too closely associated with the ideas of social progress in each particular country to permit of its adoption as a test in a general international convention.

The committee has omitted the definition of "political crimes" from the list of subjects suitable for inclusion in a general convention because of the difficulty of achieving agreement. Nearly all extradition treaties exclude such crimes from the category of extraditable offences. Attempts at a definition of "political crimes" have been made but none has secured general acceptance. Mr. Brierly doubts whether any of them has been satisfactory. Many otherwise extraditable crimes are thus excepted from the scope of the treaties merely by proving a political motive; yet the Institute of International Law at its Oxford session in 1880 agreed that the state requested to grant extradition has the sovereign right of determining whether the act is political. This right, as M. de Visscher aptly observes, "which necessarily implies the right of appreciating the motives involved, has not infrequently created difficulties between states." Particularly is this true of countries like Switzerland, which over a long period has steadily accorded the right of asylum to political refugees.

Another subject upon which there is a wide difference of practice is with regard to the extraditability of nationals of the state of asylum. A majority of countries decline to extradite their own nationals. Great Britain and the

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United States, regarding criminal jurisdiction as territorial, make no distinction on principle, though under many of the treaties they are not obliged to extradite their nationals because of the lack of reciprocity.

Mr. Brierly remarks that the theory that a country should try its own nationals for crimes wherever committed, fails (a) because of the impossibility of securing the relevant evidence from abroad; and (b) because it applies even to an escape after conviction, which would mean practical immunity on the general principles of justice that a person may not be tried again for the same offence. The *rapporteur* then adds:

> If, on the other hand, the refusal to surrender a national arises from a lack of confidence that justice will be rendered to him in the foreign State, that would seem to be a reason which would justify the refusal of extradition to that State altogether, but could not justify the practice of differentiating between nationals and other persons.

The *rapporteur* therefore recommends the insertion of an optional clause under which those states which are prepared to surrender their own nationals would agree to do so, either on terms of reciprocity or some other satisfactory terms. The vital point is emphasized by M. de Visscher's observations that even if nationals are not to be extradited, they must not go unpunished. "Extradite or punish," was a phrase frequently used in this regard by the late Louis Renault, the distinguished legal adviser of the French Foreign Office. France has followed this advice at least to the extent of inserting a clause in her extradition treaties that nationals should be considered subject to extradition unless the contrary was otherwise provided. Belgium has gone still farther in the Law of 1878 (Article 8), which provides that persons who have committed extradition offences abroad are to be prosecuted in their own country either on complaint of the injured party or on official notification received by the authorities of the country where the offence was committed. "Might not the attempt be made," says M. de Visscher, "to establish in a general convention a formula imposing the above obligation on all States which were unwilling to accept the extradition of their nationals whether for the reason that they adhere to the rule of nonextraditability of nationals, or for the reason that they only allow extradition of nationals as a measure to be taken at their own option?" With this we may also couple two other correlated suggestions of M. de Visscher:

> (a) To establish in a general convention the rule that extradition may always legitimately be refused when the acts on which the request is founded were committed in the territory of the State requested to extradite (predominant jurisdiction founded on the principle of territoriality);
> (b) and on the contrary to stipulate that, when acts on which the demand for extradition is based were committed in the territory of the State requesting extradition, extradition may not be refused on the mere ground of concurrent jurisdiction, unless the said acts have already, in the State requested to extradite, been made the subject either

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of a final judgment or of a prosecution already commenced (this is, for example, the principle contained in the Swiss Federal Law of January 22nd, 1892).

The result of the report cannot be said to be very encouraging to those who look for immediate results, but perhaps the same is true of any field of codification where there is no uniformity of practice. The report is in itself an approach to the task of codification for the very reasons that it has analyzed the principal problems resulting from divergent practice.

The extradition of criminals plays a very important rôle in the administration of criminal justice generally. The rising tide of crime proceeds very largely in proportion to the advance in the facilities for rapid transportation. Automobiles and aircraft have now been added to all the other mechanical means which have made the territories of all states relatively smaller and escape to foreign soil easier. The increase in the number of states due to the World War has magnified the problem. Self-interest ought therefore to dictate the need for improving the technique of extradition. In this, as in so many other matters, the nations of the world are interdependent, for in large measure it is upon all other nations that each must rely for maintaining the majesty of the law.

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EXTRATERRITORIAL CRIMES

The League of Nations Committee on the Codification of International Law adopted in January last a report on the criminal competence of states in respect of offences committed outside their territory,[1] and found that "international regulation of these questions by way of a general convention, although desirable would encounter grave political and other obstacles."

The reasons for this negative report of the committee are presumably those outlined in the report of the subcommittee, consisting of Mr. Brierly and M. DeVisscher. The subcommittee, for the reasons given by them, gave little attention to crimes committed by nationals anywhere abroad, or by non-nationals outside the territory of any state, and centered their discussion on crimes committed by non-nationals within the territory of another state. An analysis of their report may be stated as follows:

(1) Crimes of nationals abroad.
    Eliminated since "no good purpose would be served by suggesting that a principle so well established should be embodied in a convention."
(2) Crimes of non-nationals abroad, committed—
    (a) Outside the territory of any state.
        Eliminated because "no single principle underlies the cases in which a State may assume jurisdiction over non-

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