Recent Developments in Extradition

A Paper submitted by Canada

Extradition as we know it today is itself a relatively recent development, dating back only to the latter part of the eighteenth century. It arose at least partly because the development of modern methods of transportation made it much easier for individuals to avoid prosecution by fleeing the jurisdiction in which they had committed an offence. Britain came relatively late to comprehensive extradition legislation. The Extradition Act of 1870[1] was the first British Act of general application dealing with the subject. At that time Britain had only three extradition treaties with other countries while France, for instance, had fifty-three and the USA almost as many[2]. Canada's current Extradition Act[3], which is an Act of the federal Parliament, was first passed in 1887[4] and largely reflects the British Act of 1870 as does the extradition legislation in many Commonwealth countries.

It has been in the twentieth century, however, that developments in technology, including rapid international travel and communications, and electronic transfer of funds, have dramatically increased the problems of governments in dealing with international crime. There is a steadily increasing movement across borders of prohibited substances, stolen property, proceeds of crime and individuals involved in criminal activities or fleeing from justice. International terrorism and drug trafficking have led governments to develop multilateral as well as bilateral instruments to deal with fugitive offenders. Successful criminals, particularly in the drug trade, become wealthy and powerful enough to increase greatly the difficulties their governments face in bringing them to justice.

Criminal law remains under the domestic jurisdiction of states. While there have been recent developments in the United Nations toward an international criminal court, the prosecution of individuals for criminal conduct still takes place in domestic courts and according to domestic criminal law. It is for this reason that extradition treaties, of which Canada has about fifty, are particularly important in dealing with international crime. They provide the links between the domestic jurisdictions of states that allow fugitive offenders to be transferred from one to the other for purposes of prosecution or serving of sentences. Forging these links is not always easy. Extradition treaties must overcome differences in cultures, legal systems and such matters as methods of collecting and weighing the value of evidence while still protecting the rights of individuals.

A model treaty on extradition has been developed in the United Nations, regional conventions have been developed in the Council of Europe and the Organization of American States and, of course, the Commonwealth has adopted the Scheme for the Transfer of Fugitive Offenders[5]. The latter was amended by Law Ministers in 1990 in Christchurch, New Zealand, in order to provide greater flexibility in regard to the receipt of evidence from the requesting state and to its admissibility in domestic extradition proceedings.

In the last twenty-five years multilateral conventions have been concluded to protect international civil aviation and international shipping against terrorist acts, to combat international drug trafficking, to prevent and punish crimes against internationally protected persons and to protect nuclear material: all of which recognize the importance of extradition in dealing with offences having an international character. These conventions all contain obligations either to extradite or prosecute individuals who are charged with offences established pursuant to these conventions.

The role of extradition in the development of new multilateral instruments is continuing in three further exercises in the United Nations. On May 25, 1993, the Security Council adopted Resolution 827 (1993) which establishes an international tribunal for the purposes of trying persons responsible for war crimes and crimes against humanity in the territory of the former Yugoslavia. The tribunal will be located in The Hague, Netherlands. Provisions of the resolution require that Member States of the United Nations provide assistance to the tribunal, including the surrender of accused persons in their territory.

This raises a number of interesting questions with regard to the implementation of the resolution under existing extradition legislation. Does such legislation contemplate or permit the surrender of an individual to an international tribunal as opposed to a state? If so, may this be done in the absence of a treaty with the international tribunal? If a treaty is required for the purposes of surrender, would a treaty or arrangement with an international tribunal as opposed to a state meet the requirements of existing legislation? It is clear that re-

view and possible amendment of domestic extradition laws will be required in order to comply with Resolution 827.

On a broader level, a working group of the International Law Commission has developed a draft Statute[6] for an International Criminal Tribunal (i.e. a permanent international criminal court) which contains similar provisions on the surrender of fugitives. This will necessitate similar reviews and possible amendment by states of their extradition laws.

The third exercise in the United Nations in which extradition will play an important part is a draft Convention on the Protection of United Nations Peace-keepers which will be discussed in the Sixth Committee of the General Assembly this fall in New York. The decision to promote negotiations on such a convention was prompted by the recent dramatic increase in deliberate attacks on peace-keepers and associated civilian personnel.

Traditionally, UN peace-keepers monitored or supervised cease-fires, truces or armistice agreements where they were unlikely to encounter serious casualties or deliberate attacks. More recently, however, peace-keeping missions have become more complex and diverse. Their mandates now include supervision of the disarming and disbanding of armed factions; the establishment of protected areas for persons subjected to human rights abuses; the enforcement of sanctions; the monitoring of elections, borders, human rights and repatriation of refugees; and the protection and delivery of humanitarian supplies to civilian populations. As such, peace-keepers are operating amidst armed conflict, both of an international and non- international character.

At least one draft before the Sixth Committee includes provisions on the obligation to prosecute or extradite those individuals suspected of committing serious crimes against UN peace- keepers. Among the issues to be decided during the negotiations will be the scope of application of the Convention, including which persons, which UN operations and which offences will be covered.

Canada's experience with extradition has been mostly with the United States for obvious reasons. We have a 5,000 kilometre, undefended border. Because criminal law in both countries is rooted in the British tradition, issues do not arise out of misunderstandings over fundamental concepts.

Canada's extradition experience with the United States dates back to the Jay Treaty of 1794 which provided for the transfer of offenders between the United States and Great Britain. It is likely that most of the transfers under this treaty were between the United States and the British colonies that are now Canada because of the common boundary between them. The Ashburton-Webster Treaty of 1842[7] between the United States and Great Britain again contained provisions for the return of fugitive offenders which remained in force, as amended periodically, until they were replaced by the 1971 Canada-United States Extradition Treaty which, with some amendments, is in force today[8].

In 1992 the United States accounted for almost eighty per cent of extradition requests to and from Canada. The system works well. Both governments are committed to the aims of the Treaty, both have a great deal of experience in implementing it and officials of each government are very familiar with the legal system of the other. However, our extradition relations with our neighbour to the south, have not been entirely without problems. This will be discussed below.

With Commonwealth countries, Canada has had relatively few rendition cases in recent years. In 1992 Canada received only five requests for rendition and made only four requests to other Commonwealth countries out of a total of 183 requests to and from all sources for that year. Unfortunately, rendition is not possible between Canada and those Commonwealth countries that do not recognize the Queen as Head of State. Canada's Fugitive Offenders Act applies to "every person convicted by a court in any part of Her Majesty's Realms and Territories[9]" and, therefore, does not apply to those convicted in the countries of the Commonwealth which have adopted a presidential form of government.

Most of the balance of Canada's extradition requests are to and from countries in Europe. It is here that Canada has experienced some of its greatest problems in achieving effective extradition relations with friendly countries. The principal problem is one of reconciling different legal systems, particularly differences in methods of investigating and prosecuting crime. Canadian extradition law still requires the establishment of a prima facie case and evidence that is supported by first person affidavits devoid of hearsay. The manner in which evidence is gathered and presented in criminal cases in most European countries is simply not geared to meet these requirements. Even among countries of the same legal system (ie, common law), difficulties have arisen due to the prima facie case requirement. For example, Canada has also encountered problems with the United Kingdom from time to time.

For the past several years Canada has been following two paths to increase the effectiveness of its extradition relations. First, it is pursuing a programme of renegotiating its extradition treaties to bring them more into line with recent developments in extradition law and practice. It is very unlikely in light of the Canadian Charter of Rights and Freedoms[10] that Canada could abandon the prima facie case test, but the new treaties use existing Canadian law to alter the evidence requirements. These new treaties would require and make admissible a "summary of the evidence" which would be

much more compatible with the form of document produced in countries with a civil law tradition.

Second, Canada has undertaken a fundamental review of its extradition legislation, both the Extradition Act and the Fugitive Offenders Act, again to bring it into line with modern trends in extradition law and practice. The latter Act, which governs rendition to and from Commonwealth countries, will be combined with the former. It will remove the anomaly in our current Fugitive Offenders Act which applies only to those who have been convicted of offences in "Her Majesty's Realms and Territories" thus not permitting rendition to and from those countries of the Commonwealth which no longer have the Queen as Head of State. If the new Act is adopted as currently envisaged, it will contain a system of general and specific designations by order-in-council which will allow considerably greater flexibility than the current legislation in applying the Act to Commonwealth countries. It is difficult to say when such new legislation will be passed.

A federal election on October 25, 1993 brought a new government to power. The new extradition legislation will have to be considered in the context of the new government's legislative priorities.

What has drawn a great deal of attention to extradition law recently is the question of transboundary abductions, and particularly the recent decision by the United States Supreme Court in the Alvarez-Machain case[11]. Dr. Alvarez-Machain was indicted in the United States for participating in the kidnap and murder of a United States Drug Enforcement Administration agent and a Mexican pilot who worked for the agency. It was alleged that Dr. Alvarez- Machain's role in the murder was to administer drugs to the DEA agent to prolong his life to enable others to torture and interrogate him. Dr. Alvarez-Machain was kidnapped from his home in Mexico and flown to the United States where he was arrested. The United States District Court ruled that DEA agents were responsible for his abduction although they did not participate in it.

At stake for the United States government in this case was the Ker-Frisbie doctrine, so-named because it was established in two cases decided by the United States Supreme Court: Ker v. Illinois[12] decided in 1886 and Frisbie v. Collins[13] decided in 1952. The doctrine states that the power of a United States court to try a person for crime is not impaired by the fact that that person was brought within the court's jurisdiction by means of a forcible abduction. This doctrine is important to the United States government because, as a matter of policy, it is prepared in certain limited situations to use abduction from another country as a means of bringing an individual to the United States to be tried for a breach of United States law.

Presumably, such abductions would be carried out only as a last resort where it is clear that return of a wanted individual could not be achieved by legal means and in cases where some important national consideration is at stake. In fact such abductions have been relatively rare, and the United States is not the only democratic country that has resorted to such extreme action. On May 11, 1960, Adolf Eichmann, who had been head of the Gestapo department in Berlin responsible for the physical extermination of the Jews, was abducted from Buenos Aires, Argentina, where he had been living under an assumed name since 1950. He was removed to Israel by members of the Israeli Secret Service where he was tried on fifteen counts under the Israeli Nazi and Nazi Collaborators (Punishment) Law[14]..

On the question of whether Eichmann's abduction from Argentina affected the jurisdiction of the Israeli courts to try him, the District Court, sitting as a three-judge trial Court, was faced with very special circumstances. Argentina's sovereignty had admittedly been violated and it had complained very vocally. But the Security Council suggested an amicable settlement[15] and the two countries finally agreed "to regard the incident as closed...", according to their joint communiqué of 3 August 1960. "After that date", said the court, "no cause remained, in respect of a violation of international law, which could have served to support a plea against his (Eichmann's) trial in Israel"[16]. The Supreme Court essentially agreed[17]. Eichmann was convicted and despite an appeal for clemency, was hanged on May 31, 1962.

Another situation in which an individual was taken to a foreign state in circumstances other than by extradition in order to stand trial was that of Manuel Noriega, who was taken into custody following a military invasion of Panama by the United States forces. This is another case in which questions of national policy were involved: United States foreign policy in relation to Central America and its policy against international drug trafficking.

Noriega was found guilty by a Florida jury on eight counts of drug trafficking, racketeering and money laundering. In July of last year, Noriega, who is now close to sixty years of age, was sentenced to forty years in jail. By a rare turn of events, however, he appears to have succeeded in his claim to be considered as a prisoner of war under the Third Geneva Convention.

The question of transboundary abductions is not an academic one for Canada. There have been several abductions from Canada involving United States authorities, the most serious being the Jaffe case. Sidney Jaffe was kidnapped in September, 1981, by two Florida bounty hunters from the lobby of his apartment building in Toronto. He was handcuffed and taken by car across the United States border to Florida where he was tried and convicted essentially on land fraud charges. He was sentenced to thirty-five years in prison and a fine of over 150,000 dollars.

The Canadian Government formally protested the violation of Canadian sovereignty and law and sought Jaffe's return to Canada, but attempts to secure his release through the United States federal government were unsuccessful. Canada therefore took the unusual step of filing a petition for habeas corpus with the U.S. District Court in Jacksonville, Florida. A series of complicated legal actions resulted in Jaffe's convictions being overturned, new charges being laid and Jaffe being granted bail on the new charges. He returned to Canada and as he did not appear for trial on the new charges, he forfeited his bail in the approximate amount of U.S. $100,000. The charges have not been answered and he remains a fugitive. Canada's petition for habeas corpus was dismissed for lack of standing as Canada was not itself a prisoner. The two bounty hunters were in turn extradited to Canada and convicted of kidnapping; each received a sentence of twenty-one months in jail which the Ontario Court of Appeal saw to fit to reduce, for compassionate reasons, to time already spent in prison[18]. There have also been cases in the other direction. On January 4, 1991, an individual named Derrick Hills was apprehended by a Canadian police officer some two hundred yards within the United States, after being chased through the Windsor-Detroit tunnel that connects these Canadian and American cities under the St-Clair river which marks the common border. The United States lodged a protest and requested a statement of Canadian intentions. The note asserted that "under United States Law judicial dismissal of criminal charges, or judicially ordered release... is not an appropriate remedy for violation of territorial sovereignty" thus making clear the application of the Ker-Frisbie doctrine in the United States. Canada rejected the American position and indicated its understanding that the extradition treaty in force between Canada and the United States "established the only means under which to obtain the return of fugitive offenders." While this was a case of an over-zealous police officer rather than an official abduction, Canada apologized and Hills was returned to the United States to await an extradition request which was presented shortly thereafter.

Canada's response to the Alvarez-Machain case in the United States was very much conditioned by its own experience with transboundary abductions. Canadian concerns were also raised because the Alvarez-Machain case dealt directly with one of the issues that had been raised with the United States in the Jaffe case: the issue of whether a transboundary abduction amounts to a breach of an existing extradition treaty between the two states involved. Canada had taken the position that Jaffe's kidnapping amounted to a breach of the 1971 Canada-United States Extradition Treaty. The Government of Mexico took the same position in the Alvarez-Machain case, formally protesting the breach of the Mexico-United States Extradition Treaty and demanding the return to Mexico of Dr. Alvarez-Machain.

Canada submitted an amicus curiae brief to the United States Supreme Court in the Alvarez- Machain case which argued that transboundary abductions amount to breaches of extradition treaties where they exist between the countries involved, breaches of sovereignty, and breaches of domestic criminal law. The Canadian brief also took the position that the appropriate remedy is the return of the individual to the country where he or she was abducted. It also reported the results of a survey of governments undertaken by the Canadian Department of External Affairs in 1992. Replies were received from Australia, Austria, Britain, Finland, Germany, The Netherlands, New Zealand, Norway, Sweden and Switzerland. All these countries indicated that they would regard such abductions as a violation of international law. Australia, Britain, New Zealand and Sweden consider it a violation of bilateral extradition treaties. Britain, Finland, Germany and the Netherlands would demand the return of the abducted person. If an abducted person were taken to their territory and brought before their courts, Austria, Finland, The Netherlands, Norway, Sweden and Switzerland would consider that the abducted person should be returned. Justice Stevens in the dissent in the Alvarez Machain case[19] also referred to the practice in other countries. He cited a decision in which the Court of Appeal of South Africa held that the prosecution of a defendant kidnapped by agents of South Africa in another country, must be dismissed[20]. It is interesting to note that the South African court's decision was based largely on the decisions of the United States Supreme Court in abduction cases.

The brief submitted by Canada in the Alvarez-Machain case did not make any detailed arguments on the development of the Ker-Frisbie doctrine in United States domestic law nor on any issues that were not of direct concern to Canada.

The Supreme Court upheld the position of the United States Government. Chief Justice William Rehnquist writing on behalf of the majority of the court held that a defendant may not be prosecuted in violation of an extradition treaty. However, he held that in this case there was no breach of the Extradition Treaty between Mexico and the United States. The Chief Justice found that "the language of the Treaty, in the context of its history, does not support the proposition that the Treaty prohibits abductions outside of its terms." He also held that the Treaty did not contain any implied prohibition of forcible abductions. Thus the Court held that the Ker-Frisbie doctrine applied and Alvarez-Machain's forcible abduction from Mexico did not prevent his trial in the United States for violations of American criminal law.

Three of the Supreme Court Justices disagreed, in very strong language, with the majority decision. Justice

Stevens writing on their behalf stated that the manifest scope and object of the treaty itself "plainly imply a mutual undertaking to respect the territorial integrity of the other contracting party" and found that the United States was in breach of its treaty obligations. He went on to say that he suspected that "most courts throughout the civilized world -- will be deeply disturbed by the 'monstrous' decision the Court announces today."

This decision was indeed met by immediate adverse international reaction. The Government of Mexico issued a press release denouncing it as "invalid and unacceptable" and announced that it had decided to review its Extradition Treaty with the United States. It also announced that it would suspend all of the activities that United States DEA agents were authorized to carry out until new criteria for cooperation and safeguards for national sovereignty could be determined. Bilateral discussions between Mexican and USA authorities resulted in a letter being sent from President Bush to President Salinas containing assurances that his administration "would neither conduct, encourage nor condone transborder abductions" from Mexico. An exchange of letters between Secretary of State Baker and Foreign Secretary Solana of Mexico recognized that transborder abductions by so-called "bounty hunters" and private individuals would be considered extraditable offenses by both countries. The two governments also agreed to review the Mexico-United States Extradition Treaty in order to analyze the implications of the Alvarez-Machain decision and avoid any possible repetitions of events such as the abduction in that case.

Canada's reaction was equally prompt. Canada sent a diplomatic note to the State Department reiterating its position that any abduction of an individual from Canada by United States authorities would be regarded as a violation of the Canada-United States Extradition Treaty, of Canadian sovereignty, of customary international law and of Canadian criminal law. It also confirmed that Canada would prosecute any persons engaged in such an abduction, and if necessary, seek their extradition to Canada. The Note also sought assurances that the United States would operate within the procedures established by the Treaty and would not resort to transboundary abductions to obtain the return of fugitive offenders.

Canada received essentially the same assurances as Mexico. In a letter to the Honourable Barbara McDougall, Secretary of State for External Affairs, Secretary of State Baker stated that "this Administration will neither conduct, encourage nor condone transborder abductions in Canada."

Ironically, once the Supreme Court decided that the United States courts had jurisdiction to try Dr. Alvarez-Machain, he was acquitted by the trial court and returned to Mexico.

The Alvarez-Machain decision is cause for concern on the part of the international community. The confirmation that United States courts have the jurisdiction to try individuals who were abducted from another country is contrary to what appears to be a trend in other countries against the assumption of such jurisdiction.[21] However, it must be recognized that this is a question of domestic law which may very well reflect the situation in a number of friendly countries.

The principal difficulty with the Alvarez-Machain decision lies in the finding by the United States Supreme Court that an abduction carried out by agents of the United States Government in another country does not amount to a violation of an existing extradition treaty with that country unless the treaty expressly prohibits such abductions. Most governments (including that of Canada) would take the position that the provisions governing the return of fugitive offenders set out in extradition treaties are exclusive and therefore transboundary abductions amount to violations of these treaties. The only legal means of returning fugitive offenders outside such treaties would be those specifically agreed upon by the parties.

The dilemma presented by the Alvarez-Machian decision arises out of an international system that does not always work efficiently. It is understandable that governments become frustrated when existing legal mechanisms prove inadequate to bring to trial those involved in such crimes as terrorism and international drug trafficking. The temptation to resort in these circumstances to illegal means to apprehend individuals is all the greater where some important national policy or interest is involved. The broad official goals in these abduction cases are to ensure that the rule of law applies to terrorists and other international criminals and to ensure that fugitives from justice do not enjoy safe havens. These goals are shared by the international community

However, the rule of law must prevail equally in the methods by which states seek to achieve these goals. Governments must resist the temptation to use illegal methods in applying their law and discourage their nationals from doing so. The prospect might be tedious, but the international community must continue to work in order to strengthen international cooperation both in extradition and in mutual legal assistance in criminal matters, so as to help law enforcement agencies deal with international crime in a manner sufficiently effective to make abductions unnecessary.

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