

1978

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Recommended Citation

John Simon and Charles G. Dawes, *Extradition: The Statute of Limitations is Tolloed By Constructive Flight*, 10 Case W. Res. J. Int'l L. 521 (1978)

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NOTES

Extradition: The Statute of Limitations is Tolloed By Constructive Flight—Jhirad v. Ferrandina, 536 F.2d 478. (1976).

APPROXIMATELY ELEVEN YEARS after the occurrence of alleged acts of embezzlement, the Government of India requested the extradition of Elijah Ephraim Jhirad from the United States. The Treaty of Extradition between the requesting and requested states provided that extradition could not take place if the statute of limitations in both countries was tolled. Jhirad was charged with a non-capital offense. Section 3282 of Title 18 of the U.S.C. allows a five year statute of limitations in all non-capital cases but the statute is tolled by "any person fleeing from justice."¹ The response to the confusion generated by the interpretation of this phrase has led to a series of inconsistent circuit court opinions. Some courts have held that absence from the jurisdiction sufficed to toll the statute while others felt that the key factor was the existence of an intent to evade justice. The Second Circuit, in an unprecedented opinion, held that "constructive flight" was sufficient to toll the statute. Whether this term has changed the focus of the inquiry under the statute or whether it is merely new terminology used to express the intent to examine the reason behind an absence from the charging state's jurisdiction will be discussed below. A brief description of the history of extradition, its purpose and its policies will follow in order that an interpretation of this phrase in keeping with these policies can be proposed.

I. THE HISTORY OF EXTRADITION

By one's decision to join a community, that individual chooses to surrender his absolute freedom for the security and predictability that arises from the creation of a stable community.² This self-imposed limitation is based upon the practical realization that each individual's absolute freedom, if exercised, would infringe upon that of other like individuals. Once larger communities are established, the rights of all the individual members must be considered. State government

¹ 18 U.S.C. § 3290 (1970) states that: "No statute of limitations shall extend to any person fleeing from justice."

² "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain." *Munn v. Ill.*, 94 U.S. 113, 124 (1877).

developed to insure that this consideration would take place. Therefore, the state has been given the power to create a balance between the personal rights of the individual and those of the other members of society.³ The state has a legitimate interest in protecting all the rights of its members. This goal has been achieved through the promulgation of criminal codes by each sovereign state. These codes define those acts that unnecessarily infringe upon the fundamental rights of others. Effective enforcement of these laws assures that the rights of every citizen will be protected. A violation of these rules by an individual is a threat to the entire structure of the society. The state, therefore, in order to properly fulfill its role must make certain that no violations take place and must punish those that do occur. Failure to do so would be a breach of its duty to the individual members of society to provide the safety for which they originally surrendered their rights. The predictability and stability that they desired would be absent and with it the very reasons for denying their total freedom.

Suppression of crime transcends national borders.⁴ As national boundaries became more firmly established, each state became a refuge for the violators of the laws of another state. Flight from the community whose laws had been violated became a method of escaping the power of the state to enforce compliance with its regulations. Because each state has an interest in enforcing its own criminal code there was an early interest in the international suppression of crime.⁵

The shifting pattern of habitation from village to city, the greater mobility caused by advances in technology, and the resulting lessening of xenophobia prompted the creation of a formal arrangement to answer such questions as:

- a) How can the state punish an individual once he has fled its borders;

³ "The whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." *Id.*

⁴ 1 J. MOORE, EXTRADITION 113 (1891). This is a 19th century treatise that is an excellent source of information on the history of extradition.

⁵ *Id.* at 8-9. An early obstacle to extradition was the notion of asylum. In ancient Rome if any state was in alliance with Rome an investigator was appointed to investigate and deliver up any party who had offended the laws of the state.

Some early examples of American extradition treaties include: The Treaty of Amity, Commerce, and Navigation (The Jay Treaty), Nov. 19, 1794, Great Britain-United States, art. 27, 605 Malloy 590; The Webster-Ashburton Treaty, Aug. 9, 1842, Great Britain-United States, 93 Consol. T.S. 415.

- b) How the fleeing criminal can be returned involuntarily to the jurisdiction whose laws he has violated for proper punishment in keeping with his violation;
- c) What will be the applicable statute of limitations for the prosecution of these crimes?

Because a sovereign state cannot exercise judicial power over foreign citizens or territory absent an agreement, offenders who fled the jurisdiction of the state would in most cases go unpunished.⁶ Under traditional concepts of international law one government has no right to enter the territory of another to enforce its laws, especially laws that may not be applicable in the other jurisdiction.⁷ This need for a process by which fugitives from the laws of one state who fled to another might be surrendered, or extradited, in part was the result of a lack of any practical alternatives to the problem of such flight.⁸ Abduction is a possibility, but it is not, nor is it going to be a widely accepted solution. In the first place, it represents a serious infringement on the sovereignty of the state in which the accused is currently located and secondly, it would be a very inefficient process which would result in most offenders going unapprehended. Assumption of jurisdiction by the state in which the offender is located is another possibility. In application however, it is an unsatisfactory solution because of the disparity between the penalties imposed by different states for the same

⁶ 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 243 (1906). Criminal jurisdiction is based on two theories: (1) territorial; actual (when the offense is committed within the territory) and constructive (when the place of the offense is deemed to be the territory such as aboard a ship flying the flag of a certain state), and (2) non-territorial (such as citizenship). In the United States the basis of criminal jurisdiction is the place of the crime or territorial jurisdiction.

⁷ The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible to no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the same extent in that power which would impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.

Schooner Exchange v. McFaddon, 9 U.S. 116, 136 (1812).

⁸ 1 J. MOORE, *supra* note 4, at 4. Extradition has been likened to a contract; the two or more states are the parties, the subject matter is the delivery of the criminal, and the suppression of crime is the consideration.

crime.⁹ In addition, procedural and other safeguards differ widely between states. Absent some assurance that a majority of states would adopt this notion of jurisdictional assumption, most criminals would gravitate to those non-cooperative states. While the use of border patrols might alleviate this problem, the costs associated with such a program would be prohibitive. The astronomical expense of maintaining guarded borders allowing entry only to those individuals without criminal records would render this alternative impractical.¹⁰ Deportation of all known foreign criminals within the state's borders, while possible, is not only expensive but inefficient.¹¹ Given the lack of practical alternatives, most states have chosen to enter bilateral and/or multilateral treaties of extradition with other states.¹² The value of this solution is that the signatory nations can specifically delineate the offenses, persons, and methods whereby the fleeing criminals will be surrendered to the requesting state. Because the power granted by a treaty need only be invoked upon the occurrence of an event that triggers extradition, it represents an efficient allocation of resources and eliminates the above mentioned procedures and practices required to provide compliance with an individual state's criminal code. Furthermore, it accomplishes the goal of protecting the rights of all citizens by punishing all violators despite their attempt to escape the jurisdiction of the national government, while at the same time upholding the sovereignty of both states.

II. THE SOURCES OF THE UNITED STATES' EXTRADITION POWERS

Because individual municipal laws can not be enforced outside of the promulgating states' jurisdiction, the extradition of a fleeing offender from one country to another requires international interaction among states. In the United States, despite the fact that the individual

⁹ 2 J. MOORE, *supra* note 6, at 225. "No act committed in one country, however criminal, according to its laws, is criminal according to the laws of the other. Crimes, in the legal sense, are local, and are so only because acts constituting them are declared to be so by the laws of the country where they are perpetrated." *Id.*

¹⁰ I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 91 (1971).

¹¹ The act of deportation merely expels an unwanted foreigner from the territory of the state while extradition causes the individual's return to a requesting state for trial. Interpol (The International Police Organization) can aid in this process of expulsion if the crime is of an international nature. Interpol only provides information to national police which concerns known criminals. It does not handle the type of fugitives that an extradition treaty would reach. *Id.* at 202.

¹² For a list of the United States' treaties see *TREATIES IN FORCE* (1977).

states promulgate laws and punish breaches of their own criminal codes, the national government is responsible for all international obligations including those associated with the extradition of criminal offenders. This division of power is made clear under the municipal law of the United States. Under the United States Constitution the Federal government has the power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations."¹³ It specifically states that "no state shall enter into any Treaty, Alliance, or confederation."¹⁴ The President, as representative of the United States for all international agreements, is given the "power, by and with the advice and consent of the Senate, to make treaties."¹⁵ Case law supports this division of power for international obligations. The Supreme Court in *United States v. Rauscher* stated that:

There is no necessity for the states to enter upon relations with foreign nations which are necessarily implied in the extradition of fugitives from justice found within the limits of the state.¹⁶

The President's power cannot be arbitrarily exercised.¹⁷ The requirement for Senate approval grows out of the need to insure that the rights of the individuals to be extradited will be considered in the treaty making process. Congress has provided additional safeguards to insure the protection of the individual offenders. Legislation has been enacted that balances the need of the requesting state to punish violators of its criminal code no matter where they are located, with the right of an individual to be free from unwarranted governmental intrusion. This balance was struck in § 3184 of Title 18 of the U.S.C. which states that:

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging

¹³ U.S. CONST. art. 1, §8, cl. 10.

¹⁴ *Id.* §10.

¹⁵ *Id.* art. 2, §2.

¹⁶ 119 U.S. 407, 414 (1886).

¹⁷ "The Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive direction to surrender him to a foreign government." *Valentine v. United States ex rel. Neidecker*, 229 U.S. 5, 8 (1936).

any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all testimony taken before him, to the Secretary of State. . .¹⁸

The procedure for extradition is initiated by the filing of a complaint.¹⁹ At this time, the requesting government presents facts in an effort to establish that probable cause exists, that a crime has been committed, that the fugitive was involved in the crime, and that the crime is an extraditable offense. A warrant is then issued and a hearing held at which time the requesting government presents evidence as to the fugitive's identity and his involvement in a crime that is extraditable under the treaty.

For a number of reasons a fugitive is not given a full trial to determine his guilt or innocence. In the first place, it would be difficult for a court in one state to rule on questions of fact that have occurred in another jurisdiction. Secondly, "it is not the business of . . . courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation."²⁰ The requesting state must therefore prove a *prima facie* case with evidence as to all the elements of the crime established according to the law of the jurisdiction in which the fugitive was found.²¹ The only issue facing the court is the narrow question of whether there is sufficient evidence to justify a trial.²²

Before such an inquiry is undertaken it must be determined whether the crime committed by the fugitive is an act deemed to be an

¹⁸ 18 U.S.C. § 3186 (1970) provides that: "The Secretary of State may order the person committed under section 3184 . . . to be delivered to any authorized agent of such foreign government. . . ." Thus the Secretary acting for the executive branch of government can review the case and decide whether to extradite or not.

¹⁹ 6 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 935 (1968).

²⁰ *Jhirad v. Ferrandina*, 536 F.2d 478, 484 (2d Cir. 1976).

²¹ Application for the Extradition of D'Amico, 185 F. Supp. 925 (S.D.N.Y. 1960), *appeal dismissed*; *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir. 1973) (state law defines the elements of a treaty of extradition offense).

²² *Charlton v. Kelly*, 229 U.S. 447 (1913) (a hearing is not a trial).

extraditable offense under the extradition treaty.²³ Acts enumerated in such treaties are not made crimes by their presence in the documents, but are acts so held by the signatory states to be violations sufficient to trigger a return for trial in the requesting state.²⁴ There are two main methods of formulating the offenses that will trigger extradition under a treaty: enumeration and elimination.²⁵ In the former, an exhaustive list of offenses is included in the treaty itself specifically enumerating all acts that will cause surrender to a requesting state. In the latter, the crimes are described only in terms of the period of time attributable to their violation. The United States prefers the enumerative type in that it provides a specific document that details the limits of its responsibility. In addition, the "no list" treaties, as the latter are called, present a problem when the judicial systems involved are incompatible. The laws of one state might provide for a harsher penalty for a crime than those of another state. Since the object of the treaty is to insure that neither party will have to surrender to the other individuals whose crime would not be extraditable under the laws of the requested state, this is unsatisfactory. To eliminate this problem some extradition treaties only require that the offense committed be criminal under the laws of both signatories. This solution also deals with the difficult problem of describing offenses that differ in name in the criminal codes of the treaty states but describe the same acts.²⁶

The United States has opposed the "no list" extradition treaty but most other states are adopting this approach because of the ease of incorporating crimes omitted from the original version of the treaty.²⁷ Because they are easier to administer, the "no list" treaties are more practical. They eliminate the time-consuming and expensive negotiations that are necessary under enumerative treaties to incorporate omitted or additional extraditable offenses.

²³ 6 M. WHITEMAN, *supra* note 19, at 734. In the United States extradition can only be accomplished through a treaty or other agreement.

²⁴ 1 J. MOORE, *supra* note 4, at 113. "[A]ll offenses which nations have a common interest in punishing should be subject to extradition. The object to be accomplished in all these cases is . . . the punishment of malefactors, the common enemy of every society." *Id.*

²⁵ I. SHEARER, *supra* note 10, at 134.

²⁶ 6 M. WHITEMAN, *supra* note 19, at 772.

²⁷ As of 1971, 84 countries preferred the "no list" to the enumerative type of treaty. I. SHEARER, *supra* note 10, at 219.

A. *Rules of Interpretation for Extradition Treaties*

The responsibility of characterizing certain acts as crimes rests ultimately with the municipal courts of a state for they must determine whether an act is a crime under its criminal code. In order to insure that an individual is deprived of his freedom only in a jurisdiction in which his alleged act would constitute a crime, the practice arose by which extradition would only take place if the acts sought to be punished were violative of the criminal laws of both states. Once this rule of 'double criminality' is satisfied, the courts must next determine whether the offense listed in the treaty must be the exact crime punishable in both jurisdictions or whether the acts themselves were sufficient to trigger extradition. The Supreme Court has resolved this problem in the United States by ruling that a strict translation of the name of the crime was not necessary so long as the elements of the offense were similar in both countries.²⁸ Therefore, so long as the crime in the requesting country is similar in composition to that of the crime under which extradition is sought, this rule has been satisfied.

After a court determines that a crime is listed in the treaty or is recognized by both signatory states as a basis for surrender to a requesting state, the next problem the court faces is that of burden of proof. If the requested fugitive is a convicted criminal, only a certified copy of the final sentence passed at his trial is necessary for his extradition. An accused offender however, is given a hearing.²⁹ At this hearing a determination is made that he be extradited for trial on the charge based on the evidence presented by the requesting state.

An accused or convicted individual is not subject to the threat of extradition indefinitely.³⁰ In the United States § 3282 of Title 18 of the U.S.C. imposes a five year statute of limitations for all non-capital offenses. This provision may be tolled under 18 U.S.C. § 3290 which denies the benefit of a statute of limitations "to any person fleeing from justice."³¹ In keeping with the purpose of the statute, the law

²⁸ *Factor v. Laubenheimer*, 290 U.S. 276 (1933).

²⁹ *Application for the Extradition of D'Amico*, 185 F. Supp. at 925.

³⁰ Most treaties of extradition contain a statute of limitations or incorporate the statutes of the signatories. See *Extradition Treaty*, Dec. 22, 1931, Great Britain-United States, art. 5, 47 Stat. 2122, T.S. No. 849, reprinted in the appendix, *infra*.

³¹ 18 U.S.C. § 3282 states that: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

protects only those individuals not actively seeking to avoid punishment for their crimes.

B. Newly Independent States and Existing Extradition Treaties

Traditionally a state that established its independence began life completely anew.³² It was no longer bound by the treaties of its predecessor nor was it entitled to any of the benefits accorded its predecessor by the other signatory. The modern approach has diverged from this practice. Newly independent states anxious to maintain their treaty benefits have accomplished this in two ways. One method is by "inheritance agreement"; by specifically agreeing with its predecessor to assume the obligations that apply to its territory, the new state acknowledges the terms of the treaty and its willingness to abide by them.³³ The date of the successor state's independence becomes the effective date for the assumption of responsibilities. The second method is novation. Here the newly independent state is required to formally express its intention to become bound by the predecessor's treaty. Once it receives the assent of the other signatories, all parties become bound.³⁴

III. CONSTRUCTIVE FLIGHT

A request by the government of India for the extradition of Elijah Ephriam Jhirad, former Judge Advocate General of the Indian Navy, resulted in a series of five cases challenging the power of the United States Government to arrest and return him to India.³⁵ In the petition for extradition presented under 18 U.S.C. § 3284, the Government of India sought Jhirad's return for trial on charges of embezzlement.

As Judge Advocate, Jhirad was given the duty of administering a Naval Prize Fund. This fund was established by a grant from Great Britain that represented a portion of the revenues from the sale of captured World War II war prizes. The Prize Fund was to be distributed to the officers and men who had served at sea during the war. In a total of fifty-two transactions that occurred between 1959 and 1961, Jhirad allegedly withdrew cash from the fund and then deposited all, or a portion of each withdrawal, in his personal account.³⁶ These activities

³² I. SHEARER, *supra* note 10, at 46.

³³ For an example of this type of treaty see Treaty of Alliance, June 30, 1970, Great Britain-Iraq, 132 L.N.T.S. 364, art. 8.

³⁴ For an example of this type of treaty see Agreement on the Application of French Treaties to the Congo, May 12, 1961, United States-France, 13 U.S.T. 2065, T.I.A.S. No. 5161.

³⁵ 401 F. Supp. 1215 (S.D.N.Y. 1975).

³⁶ 536 F.2d at 482.

went unnoticed by the Indian Government and from 1961, when the fund's proceeds were exhausted, until 1964, Jhirad continued to hold his position.³⁷ In February 1966, the Indian Bureau of Investigation began an inquiry into the fund's management. Jhirad told an investigating officer in May 1966 that all records of the fund had been destroyed with the full knowledge of his superiors.³⁸ It was during this time that the bank's records concerning the Prize Fund were subpoenaed.³⁹

In June 1966, the Secretary General of the World Jewish Congress invited Jhirad to attend the Fifth Plenary Assembly in Brussels in August of that year. Jhirad's wife was also invited to attend an auxiliary conference of the Women's Zionist Organization to be held at the same time.⁴⁰ From the end of June to early July the Jhirads sold various personal possessions, including his law books, and postponed his pending cases until October leaving a junior associate in charge.⁴¹

On July 2nd the Bureau officially registered a complaint against Jhirad. However on July 19th Jhirad obtained permission from his superiors to attend the meeting in Brussels. On the 26th of July Jhirad left India.⁴² After attending the conference he went to Switzerland where he remained until 1967. He later traveled to Israel and in 1972 he entered the United States as a permanent resident alien.⁴³ In the meantime, charges were officially brought against him by the Indian Government in 1968, two years after he had left the jurisdiction and some five years after most of the alleged acts of embezzlement had occurred. However, in 1972 he was arrested in New York and held for extradition on charges of embezzlement.⁴⁴

Normally under § 3184, following the filing of a complaint by a representative of the requesting state, a warrant is issued so that the fugitive can be held in custody until a hearing can be held. A magistrate at this hearing must first determine if the fugitive is the individual sought, and secondly, whether probable cause exists. It is very

³⁷ 486 F.2d 442, 443 (2d Cir. 1973).

³⁸ 401 F. Supp. at 1216.

³⁹ An employee of the Central Bank of India informed Jhirad that the records had been subpoenaed. *Id.*

⁴⁰ *Id.* at 1217.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

difficult to contest an extradition hearing's determination in large part because a § 3184 hearing is not a final order and is therefore unappealable. In order to test the power of the court to order extradition a petition for a writ of habeas corpus must be made.⁴⁵ In *Jhirad I*⁴⁶ such a petition was filed. Since *Jhirad* was free on bail pending the outcome of the hearing, the threshold question became whether habeas corpus relief was available to petitioners who were not in custody. In answer, the court held that although *Jhirad* was not in custody "the restrictions on his freedom. . ." were sufficient to allow the court to hear the case.⁴⁷ A writ of habeas corpus is usually sought after the § 3184 hearing has taken place but *Jhirad* petitioned prior to his hearing in order to challenge the court's jurisdiction. The scope of a habeas corpus determination is very narrow, especially in cases where no hearing has taken place.⁴⁸ Therefore, the issues before the court in *Jhirad I* concerned the jurisdiction of the magistrate in a § 3184 hearing and whether the offense charged in the hearing was a treaty offense.⁴⁹ Absent a treaty between the requesting state (India) and the requested state (the United States) there would be no basis upon which *Jhirad* could be compelled to return to India. After resolving the initial question of *Jhirad's* standing to sue, the next question before the court was whether a valid treaty of extradition existed between the two countries that could be invoked to compel his return. As a former British Colony, India chose by inheritance agreement⁵⁰ to assume all of the rights and obligations under the Treaty of December 22, 1931, originally signed by Great Britain and the United States.⁵¹ The court found that the Republic of India inherited from British India a valid and binding treaty of extradition that would serve as the basis for the present extradition proceeding.⁵²

⁴⁵ *Jimenez v. Aristeguieta*, 290 F.2d 106 (5th Cir. 1961); 28 U.S.C. § 1291 (1970); FED. R. CIV. P. 26; *United States ex rel. D'Amico v. Bishop*, 286 F.2d 320 (2d Cir. 1961).

⁴⁶ 355 F. Supp. 1155 (S.D.N.Y. 1973).

⁴⁷ *Id.* at 1158.

⁴⁸ *Id.*

⁴⁹ A treaty offense is one listed in the treaty as an act agreed upon by the parties to trigger extradition.

⁵⁰ See notes 32-34 and accompanying text.

⁵¹ Extradition Treaty, *supra* note 30.

⁵² See, appendix. Article 14 of the Treaty specifically mentions that Great Britain will accede to the Treaty on behalf of India.

Once the basis for extradition was established, the court turned to the treaty itself to determine whether the crime with which Jhirad was charged was an extraditable offense. Jhirad allegedly embezzled large sums of money in a total of fifty-two transactions. Turning to the treaty for its authority the court noted that Article 3 of the 1931 treaty listed "larceny or embezzlement" and "fraudulent conversion" as extraditable offenses. Under the rules of treaty interpretation in order for an extradition to be valid the charged acts must be criminal in both jurisdictions.⁵³ Under the Indian Penal Code Jhirad was charged with criminal breach of trust of a public servant,⁵⁴ acts that are in essence embezzlement. While the New York statute uses different words,⁵⁵ it is clear that they describe the crime of embezzlement. The dual criminality rule is thus satisfied. Furthermore, in the United States, the Supreme Court follows a rule of liberal interpretation of general crimes enumerated in a treaty.⁵⁶ Citing this rule of interpretation the court found that the acts that Jhirad committed were extraditable under the treaty. Once the acts were deemed to be extraditable, the court had to determine if the treaty established a statute of limitations which was applicable to extradition offenses. Article 5 of the Treaty of 1931 prohibits extradition after the statute of limitations has expired in either the requesting or requested state.⁵⁷ In the United States there is a five year statute of limitations for all non-capital crimes.⁵⁸ Since the alleged transaction with which Jhirad was charged took place between 1959 and 1961 the statute would bar extradition unless it had been tolled.⁵⁹ Under § 3290 of Title 18 of the U.S.C. the statute is only tolled when the offender is deemed to have "fled from justice."⁶⁰ When Jhirad left India in July of 1966, charges based on any transactions five years prior to that time would be barred by the statute unless the statute was tolled when he left the jurisdiction. Therefore those transactions that did not occur within five years

⁵³ 355 F. Supp. at 1161.

⁵⁴ *Id.* at 1160.

⁵⁵ N.Y. PENAL LAW (McKinney) § 155.05 reads: "A person steals property and commits larceny, when, with intent to deprive another of property or to appropriate the same to himself or to a third person he wrongfully takes, obtains or withholds such property from an owner thereof."

⁵⁶ 290 U.S. at 276.

⁵⁷ Extradition Treaty, *supra* note 30.

⁵⁸ 18 U.S.C. § 3282 (1970).

⁵⁹ *Id.* at § 3290.

⁶⁰ *Id.*

of that date would still be pending. There were three such transactions that were found to have occurred during this period.⁶¹ The court decided that "petitioner was fleeing from justice by his mere absence from India in 1966" and consequently the United States' statute of limitations had been tolled.⁶²

Article 5 of the Treaty of 1931 also requires that as requesting state, India's statute of limitations must also not have tolled. The court found that India did not have a specific statute but applied a case law test of reasonableness.⁶³ Since it was not unreasonable for a crime like embezzlement to go undetected for some time the Indian statute was deemed not to have been tolled. The court found that on the basis of these facts the magistrate had jurisdiction over the case.⁶⁴

Following the District Court's determination that absence alone was sufficient to toll the statute, Jhirad, in a second petition for habeas corpus relief, maintained that his mere absence was not sufficient to toll the statute. Jhirad contended that when he left India he was not "fleeing justice" for he openly requested permission to leave the jurisdiction.

The courts in this country disagree as to the definition of the term "fleeing from justice." A finding that mere absence from the jurisdiction is sufficient to toll the statute has been upheld by a number of courts.⁶⁵ Other courts require that an intent to flee the jurisdiction must be proved.⁶⁶ But in response to this second appeal the court chose to apply the mere absence test in finding that the statute had tolled. Because Jhirad was not present in the jurisdiction the court never inquired into the reasons for his absence. Under this mechanical test any absence despite its reason would cause the statute to toll. The purpose of the statute's tolling only for those fugitives fleeing justice would be defeated if the statute tolled whenever an offender left the

⁶¹ There were three transactions that occurred within this period; one on July 27th, and two more on the 25th and 27th of September, 1961.

⁶² 355 F. Supp. at 1162.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *McGowen v. United States*, 105 F.2d 791 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 552 (1939); *King v. United States*, 144 F.2d 729 (8th Cir. 1944), *cert. denied*, 344 U.S. 854 (1945); *Bruce v. Bryan*, 139 F. 1022 (4th Cir. 1905).

⁶⁶ "In determining whether a person charged with a crime will be denied the right to be protected by the statute of limitations, the purpose and intent of his absence is an important matter to be inquired into. . . ." *Donnell v. United States*, 299 F.2d 560, 565 (5th Cir. 1956). *See also* *Brouse v. United States*, 68 F.2d 294 (1st Cir. 1933); *United States v. Wazney*, 529 F.2d 1287 (9th Cir. 1976).

jurisdiction. The second argument raised by Jhirad in this petition was that his prosecution was politically motivated. Since Article 6 of the 1931 treaty prohibits extradition for political offenses, if this charge could have been proved the case would have been dismissed. Instead the court dismissed this appeal for lack of evidence.⁶⁷

In the consolidated appeal from both denials of writs of habeas corpus the Court of Appeals reversed and remanded the case.⁶⁸ It held that the treaty was valid between India and the United States and therefore the only issue before the court was whether the offense was one for which extradition could be granted. After commenting upon the division of opinion among the circuits, the court held that "on the basis of the plain language and the purpose of section 3290 . . . the government must show an intent to flee from prosecution or arrest before the statute of limitations is tolled."⁶⁹

The case was remanded in order to make a determination on the question of intent. On remand the magistrate found that Jhirad had not formed an intent to flee at the time he left India. This intent however, matured when he failed to return to India after his vacation had expired.⁷⁰ The court noted that:

Fleeing from justice carries a common sense connotation that only those persons shall be denied the benefit of the statute of limitations who have absented themselves from the jurisdiction with the intent of escaping prosecution.⁷¹

Jhirad's intent to avoid prosecution can be established by examining his reasons for residing in Switzerland, Israel and the United States for such a long time after he could have returned to India.⁷² An intent to avoid prosecution, which is really no more than a desire to avoid punishment for a crime, can be formed at any time. When an individual does not return to the jurisdiction out of fear of possible prosecution he has fled from justice.⁷³

A desire to avoid prosecution by originally leaving the jurisdiction or failing to return to a jurisdiction once you learn of possible prosecu-

⁶⁷ 362 F. Supp. 1057, 1062. "Petitioner has failed to prove that political motivation lurks behind this demand for extradition." *Id.*

⁶⁸ 486 F.2d at 442.

⁶⁹ *Id.* at 444.

⁷⁰ 401 F. Supp. 1215 (S.D.N.Y. 1975). "[T]he intent to flee matured when the supposed vacation . . . exceeded by 150 percent the longest prior vacation." *Id.* at 1218.

⁷¹ 486 F.2d at 444.

⁷² 401 F. Supp. at 1218.

⁷³ "[E]ven if a defendant learns of potential prosecution while his is without a

tion is a flight from justice. The reason behind both the original decision to leave and the subsequent one not to return are the same; a desire to avoid the state's power to regulate the conduct of its citizens by means of its criminal code. The original decision to leave the jurisdiction is "flight" and a subsequent failure to return is also flight but it is "constructive flight." An examination of the reasons for any absence from the jurisdiction is an important factor in discovering whether there has been "flight from justice."

A mechanical "mere absence" test is unreliable because it fails to take into consideration the very important reasons behind an absence and the purpose that was to be achieved by a statute of limitations. All deliberate evasions of justice must be prohibited. In the modern world citizens of every country leave their place of birth, international travel and prolonged residence in a foreign state are frequent occurrences. Absence can be considered flight only when prompted by a decision not to return in order to avoid criminal prosecution. In enacting 18 U.S.C. § 3290 Congress intended that a balance be struck between the interests of a foreign government in prosecuting domestic crime and that of the United States in protecting individuals who are lawfully within its borders. While "constructive flight" is without precedent it is "fully supported by both the language and logic of 18 U.S.C. § 3290."⁷⁴ This has not changed the focus of the inquiry under the statute but is in keeping with its purpose. A statute of limitations is not designed to protect criminals by serving as a defense to their deliberate evasion, nor is it designed to disrupt the lives of individuals who innocently leave a jurisdiction with no intent to escape their punishment or who fail to return for some equally innocent reason. The purpose of a treaty of extradition is to provide a procedure for returning fugitives. The concept of "constructive flight," although new, advances this purpose by making the intent test more practical. This is accomplished by eliminating the distinction between those fugitives who leave the jurisdiction with the requisite intent and those who fail to return for the same reason. Thus the statute takes a new step along the path toward suppression of crime.

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state and for that reason alone chooses not to return to his normal state, there may be a question of flight from justice." *Id.*

⁷⁴ 536 F.2d at 483.

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APPENDIX

EXTRADITION TREATY—UNITED STATES—GREAT BRITAIN, December 22, 1931.

Extradition Treaty between the United States of America and Great Britain and exchanges of notes extending the applicability of the Treaty to Palestine and Trans-Jordan. Signed at London December 22, 1931; ratification advised by the Senate of the United States, February 19, 1932; ratified by the President of the United States, March 3, 1932; ratified by Great Britain, July 29, 1932; ratifications exchanged at London, August 4, 1932; proclaimed, August 9, 1932. By the President of The United States of America

A PROCLAMATION

Whereas an extradition treaty between the United States of America and Great Britain was concluded and signed by their respective Plenipotentiaries at London on December 22, 1932, the original of which treaty is word for word as follows:

The President of the United States of America, And His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India; Desiring to make more adequate provision for the reciprocal extradition of criminals, Have resolved to conclude a Treaty for that purpose, and to that end have appointed as their plenipotentiaries;

The President of the United States of America:

General Charles G. Dawes, Ambassador Extra-ordinary and Plenipotentiary of the United States of America at the Court of St. James; And His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India: for Great Britain and Northern Ireland:

The Right Honourable Sir John Simon, G.C.S.I., M.P., His Principal Secretary of State for Foreign Affairs; Who having communicated their full powers, have found in good and due form, have agreed as follows:

ARTICLE 1. The High Contracting Parties engage to deliver up to each other, under certain circumstances and conditions stated in the present Treaty, those persons who, being accused or convicted of any of the crimes or offenses enumerated in Article 3, committed within the jurisdiction of the one Party, shall be found within the territory of the other Party.

ARTICLE 2. For the purposes of the present Treaty the territory of His Britannic Majesty shall be deemed to be Great Britain and Northern Ireland, the Channel Islands and the Isle of Man, and all parts of His Britannic Majesty's dominions overseas other than those enumerated in Article 14 together with the territories enumerated in Article 16 and any territories to which it may be extended under Article 17. It is understood that in respect of all territory of His Britannic Majesty as above defined, and the Isle of Man, the present Treaty shall be applied as far as the laws permit.

For the purposes of the present Treaty the territory of the United States shall be deemed to be all territory wherever situated belonging to the United States, including its dependencies and all other territories under its exclusive administration or control.

ARTICLE 3. Extradition shall be reciprocally granted for the following crimes or offences:

1. Murder, including assassination, parricide, infanticide, poisoning, or attempt or conspiracy to murder.
2. Manslaughter.
3. Administering drugs or using instruments with intent to procure the miscarriages of women.
4. Rape.
5. Unlawful carnal knowledge, or any attempt to have unlawful carnal knowledge, of a girl under 16 years of age.
6. Indecent assault if such crime or offence be indictable in the place where the accused or convicted person is apprehended.
7. Kidnapping or false imprisonment.
8. Child stealing, including abandoning, exposing or unlawfully detaining.
9. Abduction.
10. Procuration: that is to say the procuring or transporting of a woman or girl under age even with her consent, for immoral purposes or of a woman or girl over age, by fraud, threats, or compulsion, for such purposes with a view in either case to gratifying the passions of another person provided that such crime or offence is punishable by imprisonment for at least one year or by more severe punishment.
11. Bigamy.
12. Maliciously wounding or inflicting grievous bodily harm.
13. Threats, by letter or otherwise, with intent to extort money or other things of value.

14. Perjury, or subornation of perjury.
15. Arson.
16. Burglary or housebreaking, robbery with violence, larceny or embezzlement.
17. Fraud by a bailee, banker, agent, factor trustee, director, member, or public officer of any company, or fraudulent conversion.
18. Obtaining money, valuable security, or other property, knowing the same to have been stolen or unlawfully obtained.
19. (a) Counterfeiting or altering money, or bringing into circulation counterfeited or altered money.
(b) Knowingly and without lawful authority making or having in possession any instrument, tool or engine adapted and intended for the counterfeiting of coin.
20. Forgery, or uttering what is forged.
21. Crimes or offences against bankruptcy law.
22. Bribery, defined to be the offering, giving or receiving of bribes.
23. Any malicious act done with intent to endanger the safety of any persons travelling or being upon a railway.
24. Crimes or offences or attempted crimes or offences in connection with the traffic in dangerous drugs.
25. Malicious injury to property, if such crime or offence be indictable.
26. (a) Piracy by the law of nations.
(b) Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.
27. Dealing in slaves.

Extradition is also to be granted for participation in any of the aforesaid crimes or offences, provided that such participation be punishable by laws of both High Contracting Parties.

ARTICLE 4. The extradition shall not take place if the person claimed has already been tried and discharged or punished, or is still under trial in the territories of the High Contracting Party applied to, for the crime or offence for which his extradition is demanded.

If the person claimed should be under examination or under punishment in the territories of the High Contracting Party applied to

for any other crime or offence, his extradition shall be deferred until the conclusion of the trial and full execution of any punishment awarded to him.

ARTICLE 5. The extradition shall not take place if, subsequently to the commission of the crime or offence or the institution of the penal prosecution or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the High Contracting Party applying or applied to.

ARTICLE 6. A fugitive shall not be surrendered if the crime or offence in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offence of a political character.

ARTICLE 7. A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has been surrendered.

This stipulation does not apply to crimes or offences committed after the extradition.

ARTICLE 8. The extradition of fugitive criminals under the provisions of this Treaty shall be carried out in the United States and in the territory of His Britannic Majesty respectively, in conformity with the laws regulating extradition for the time being in force in the territory from which the surrender of the fugitive criminal is claimed.

ARTICLE 9. The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial, in case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the courts of the High Contracting Party who makes the requisition, and that the crime or offence of which he has been convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to.

ARTICLE 10. If the individual claimed by one of the High Contract-

ting Parties in pursuance of the present Treaty should be also claimed by one or several other Powers on account of other crimes or offences committed within their respective jurisdictions, his extradition shall be granted to the Power whose claim is earliest in date unless such claim is waived.

ARTICLE 11. If sufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive, or within such further time as the High Contracting Party applied to, or the proper tribunal of such High Contracting Party, shall direct, the fugitive shall be set at liberty.

ARTICLE 12. All articles seized which were in the possession of the person to be surrendered at the time of his apprehension, and any articles that may serve as a proof of the crime or offence shall be given up when the extradition takes place, in so far as this may be permitted by the law of the High Contracting Party granting the extradition.

ARTICLE 13. All expenses connected with the extradition shall be borne by the High Contracting Party making the application.

ARTICLE 14. His Britannic Majesty may accede to the present Treaty on behalf of any of his Dominions hereafter named—that is to say, the Dominion of Canada, The Commonwealth of Australia including for this purpose Papua and Norfolk Island, the Dominion of New Zealand, the Union of South Africa, the Irish Free State, and Newfoundland—and India. Such accession shall be effected by a notice to that effect given by the appropriate diplomatic representative of His Majesty at Washington which shall specify the authority to which the requisition for the surrender of a fugitive criminal who has taken refuge in the Dominion concerned, or India, as the case may be, shall be addressed. From the date when such notice comes into effect the territory of the Dominion concerned or of India shall be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty.

The requisition for the surrender of a fugitive criminal who has taken refuge in any of the above-mentioned Dominions or India, on behalf of which His Britannic Majesty has acceded, shall be made by the appropriate diplomatic or consular officer of the United States of America.

Either High Contracting Party may terminate this Treaty separately in respect of any of the above-mentioned Dominions or India. Such

termination shall be effective by a notice given in accordance with the provisions of Article 18.

Any notice given under the first paragraph of this Article in respect of one of His Britannic Majesty's Dominions may include any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, and which is being administered by the Government of the Dominion concerned; such territory shall, if so included, be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty. Any notice given under the third paragraph of this Article shall be applicable to such mandated territory.

ARTICLE 15. The requisition for the surrender of a fugitive criminal who has taken refuge in any territory of His Britannic Majesty other than Great Britain and Northern Ireland, the Channel Islands, or the Isle of Man, or the Dominions or India mentioned in Article 14, shall be made to the Governor or chief authority, of such territory by the appropriate consular officer of the United States of America.

Such requisition shall be dealt with by the competent authorities of such territory; provided, nevertheless, that if an order for the committal of the fugitive criminal to prison to await surrender shall be made, the said Governor or chief authority may, instead of issuing a warrant for the surrender of such a fugitive, refer the matter to His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland.

ARTICLE 16. This Treaty shall apply in the same manner as if they were Possessions of His Britannic Majesty to the following British Protectorates, that is to say, the Bechuanaland Protectorate, Gambia Protectorate, Kenya Protectorate, Nigeria Protectorate, Northern Rhodesia, Northern Territories of the Gold Coast, Nyasaland, Sierra Leone Protectorate, Solomon Islands Protectorate, *Somaliland* Protectorate, Swaziland, Uganda Protectorate and Zanzibar, and to the following territories in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, that is to say, Cameroons under British mandate, Togoland under British mandate, and the Tanganyika Territory.

ARTICLE 17. If after the signature of the present Treaty it is considered advisable to extend its provisions to any British Protectorates other than those mentioned in the preceding Article or to any British protected State, or to any territory in respect of which a mandate on

behalf of the League of Nations has been accepted by His Britannic Majesty, other than those mandated territories mentioned in Articles 14 and 16, the stipulations of Articles 14 and 15 shall be deemed to apply to such Protectorates or States or mandated territories from the date and in the manner prescribed in the notes to be exchanged for the purpose of effecting such extension.

ARTICLE 18. The present Treaty shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the High Contracting Parties. It may be terminated by either of the High Contracting Parties by a notice not exceeding one year and not less than six months.

In the absence of an express provision to that effect, a notice given under the first paragraph of this Article shall not affect the operation of the Treaty as between the United States of America and any territory in respect of which notice of accession has been given under Article 14.

The present Treaty shall be ratified, and the ratifications shall be exchanged at London as soon as possible.

On the coming into force of the present Treaty the provisions of Article 10 of the Treaty of the 9th August, 1842, of the Convention of the 12th July, 1889, of the supplementary Convention of the 13th December, 1900, and the supplementary Convention of the 12th April, 1905 relative to extradition, shall cease to have effect, save that in the case of each of the Dominions and India, mentioned in Article 14, those provisions shall remain in force until such Dominion or India shall have acceded to the present Treaty in accordance with Article 14 or until replaced by other treaty arrangements.

In faith whereof the above-named Plenipotentiaries have signed the present Treaty and have affixed thereto their seals.

Done in duplicate at London this twenty-second day of December 1931.

John Simon

Charles G. Dawes