Vanderbilt Journal of Transnational Law

Volume 12
Issue 1 *Winter 1979*

Article 2

1980

The Unconstitutional Detention of Mexican and Canadian Prisoners by the United States Government

Jordan J. Paust

THE UNCONSTITUTIONAL DETENTION OF MEXICAN AND CANADIAN PRISONERS BY THE UNITED STATES GOVERNMENT*

*Jordan J. Paust***

A recent article by Professor Bassiouni addresses the procedures for the transfer of prisoners under agreements with Mexico and Canada and certain "substantive constitutional issues" in a most interesting way.[1] Nevertheless an interest in addressing constitutional problems from the most thorough of approaches possible compels further comment on federal powers and constitutional rights. Professor Bassiouni's efforts are noteworthy but his stated conclusion that "[t]he scheme for the transfer of offenders is a laudable step which should be supported by the bench and bar"[2] should not be unquestioningly accepted. The transfer agreements represent a retreat from the constitutional protection of fundamental rights and a deplorable attempt to aggrandize federal powers through transnational agreements.

It is difficult to understand why international and constitutional lawyers have not actively opposed the agreements. Recent literature has ignored the fundamental constitutional question of whether a transnational agreement can authorize the continued incarceration in the United States of individuals who were prosecuted for violations of foreign law in a foreign tribunal using foreign procedures. It seems inescapable that no agreement with a foreign government can confer such powers upon the state or federal government.

The United States Supreme Court has stated emphatically that "no agreement with a foreign nation can confer power on the Congress, or on any branch of government, which is free from the

* Although this publication does not often print reactions to articles, the Editors believe the issues raised by Professor Paust are of singular import to practitioners involved in prisoner transfer.

** Fulbright Professor of Law, University of Salzburg, Austria; on leave, University of Houston.

1. *See* M. C. Bassiouni, *Perspectives on the Transfer of Prisoners Between the United States and Mexico and the United States and Canada,* 11 VAND. J. TRANSNAT'L L. 193 (1978).

2. *See id.* at 267.

restraints of the Constitution."[3] This is especially so since the powers of the federal goverment are "entirely a creature of the Constitution."[4] National sovereignty, including those powers not expressly delegated to the national government, remains in the people of the United States.[5] If the federal government has no constitutional power to incarcerate persons under laws and after prosecution by tribunals that were not authorized by Congress, an agreement with a foreign state can grant no such power. Furthermore, if the federal government has no power to incarcerate persons under United States laws after prosecution in an appropriate tribunal whenever a conviction results from unconstitutional procedures, it may not incarcerate persons who were convicted by foreign tribunals under procedures that would have been unconstitutional in the United States. Agreements with foreign governments can add nothing to federal powers that do not exist.

The implementation of such agreements would result in the unconstitutional exercise of control by the federal government over persons within the United States. The government would be exercising powers that do not exist. Moreover, where the original foreign convictions or foreign post-conviction treatment violated United States due process standards, and, possibly, fundamental human rights, the government of the United States would be exercising control over individuals in a manner that is inconsistent with the constitutional guarantees of the fifth amendment.[6] United States enforcement of foreign convictions involving violations of human rights would have serious transnational implications and could potentially disrupt long-term United States foreign policy and the promotion of fundamental human rights. By exercising control over such individuals, the federal government would become a complicitor in a continuous deprivation of fundamental constitutional guarantees and what might amount to an ongoing violation of fundamental human rights. Such a development must be condemned.

3. *See, e.g.*, Reid v. Covert, 354 U.S. 1, 16-17 (1957); *see also* U.S. v. Curtiss-Wright Export Co., 299 U.S. 304, 320 (1936) (Const. and govt. power).

4. *See id.* at 506, adding: "Its power and authority have no other source."

5. *See, e.g.*, J. Paust, *International Law and Control of the Media: Terror, Repression and the Alternatives*, 53 INDIANA L.J. 621, 622 (1978), and authorities cited.

6. Concerning actions abroad, *see, e.g.*, Reid v. Covert, *supra* note 3, at 6-9; Seery v. U.S., 127 F. Supp. 601 (Ct. Cl. 1955); and Bassiouni, *supra* note 1, at 262.

Further complications are presented by "waivers" signed by individuals. Even if fundamental constitutional rights can be waived,[7] it is clear that an individual cannot grant a power to the federal government that it does not possess. The United States government is "entirely a creature of the Constitution" and "[i]ts power and authority have no other source."[8] Sovereignty remains with the people of the United States as a whole, and an individual can create no power in the government, even in conjunction with an agreement with a foreign government and congressional "implementing" legislation. Federal powers exist, if at all, under the Constitution. There is an additional question about the legal significance of the "waiver" of a right to challenge the foreign conviction. Such a waiver cannot annul the right to challenge the exercise by federal government of powers that it does not possess. Such a waiver cannot deprive a prisoner of the right to challenge the government's violation of constitutional guarantees.

Any challenges raised by prisoners would not be directed against the foreign conviction as such, but the United States government's control of individuals in an unconstitutional manner. For these reasons, at least transferred prisoners cannot waive the use of the writ of *habeas corpus.* From the human rights standpoint, it is also important to note that a violation of fundamental human rights can be "waived" neither by an individual nor by a government.[9] Such are obligations *erga omnes.*[10] And to the extent that human rights are also constitutionally protected,[11] the acceptability of the prisoner transfer agreements and mechanisms are even more sus-

7. *See, e.g.,* Bassiouni, *supra* note 1; and Note, *Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty,* 90 HARV. L. REV. 1500 (1977).

8. *See supra* note 4.

9. *See* J. Paust & A. Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience,* 11 VAND. J. TRANSNAT'L L. 1, 26-27 and 34 (1978); and J. Paust, Letter, 71 AM. J. INT'L L. 508 (1977). Professor Bassiouni also notes without further comment that human rights violations "would invalidate the waiver." *See* Bassiouni, *supra* note 1, at 259.

10. *See* Paust & Blaustein, *supra* note 9, at 34, and authorities cited.

11. *See, e.g.,* Paust, *supra* note 5; J. Paust, *Does Your Police Force Use Illegal Weapons? — A Configurative Approach to Decision Integrating International and Domestic Law,* 18 HARV. INT'L L.J. 19 (1977); J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee,* 60 CORNELL L. REV. 231 (1975). Concerning human rights to due process of law, *see* Paust & Blaustein, *supra* note 9, at 32; and Harvard note, *supra* note 7, at 1509-10. Whether human rights were violated would, of course, depend upon the circumstances in each case. A new federal hearing should be available for such purpose.

page 70, lines 2-3, change "Actions by the federal courts do no preclude the act of state doctrine" to read: "Federal court remedies are not precluded by the act of state doctrine . . ."

pect. Further, the remedies open to individuals are generally enlarged if human rights were violated.[12] Actions by the federal courts do not preclude the act of state doctrine when the relevant conduct of a foreign state involves violations of international law.[13]

Professor Bassiouni recognizes that the violation of human rights law poses a traditional conflict of laws question: whether the public policy of the United States is thwarted by the recognition of a foreign penal judgment which violates human rights.[14] United States interests are definitely frustrated,[15] but the problems posed are much more substantial. United States implementation of such

12. Beyond constitutional protection of human rights in United States courts, there are possibilities of complaints to the United Nations and the Organization of American States.

13. *See, e.g.*, J. Paust, Letter, 18 VA. J. INT'L L. (1978), and authorities cited. The Harvard note failed to address the question in terms of fairly clear violations of international law and is thus misleading on this point. *See supra* note 7, at 1520-22. It should also be noted that a federal denial of a United States judicial remedy for relevant human rights violations would necessarily clash with the obligation to affirmatively guarantee an "effective remedy" in competent national tribunals that is recognized in Article 8 of the Universal Declaration of Human Rights, which is itself a significant indicia of the human rights obligations of the United States that are contained in the United Nations Charter. *See, e.g.*, Paust & Blaustein, *supra* note 9, at 15-16; R. Higgins, *Conceptual Thinking About the Individual in International Law*, 24 N.Y. L. REV. 11, 22 (1978); L. Sohn, *The Human Rights Law of the Charter*, 12 TEXAS INT'L L.J. 129, 133-34 (1977) (actually considering the Declaration as now a part of customary law); H. Hansell (Legal Advisor, U.S. Dept. of State), Address, 1977 PROC., AM. SOC. INT'L L. 207, 208 (1977) ("authority and guidance"); L. Meeker, Address, 1975 PROC., AM. SOC. INT'L L. 225 (1975) (defining content); C. Maw, Address, *id.* at 261; B. Schulter, *The Domestic Status of the Human Rights Clauses of the United Nations Charter*, 61 CAL. L. REV. 110 (1973), especially *id.* at 126 n. 92 (citing authorities); F. Newman, *Interpreting the Human Rights Clauses of the U.N. Charter*, 5 HUMAN RIGHTS J. 283 and 285-86 (1972); *see also* C. Schreuer, *The Impact of International Institutions on the Protection of Human Rights in Domestic Courts*, 4 ISRAEL YRBK. H.R. 60, 77-88 (1974) (with many useful examples of state court implementation); G. TUNKIN, THEORY OF INTERNATIONAL LAW 79-81 (1974); Preamble, 1969 American Convention on Human Rights, *reprinted in* 65 AM. J. INT'L L. 679 (1971); and other authorities cited in Paust & Blaustein, *supra*. Article 25 of the American Convention, *supra*, recognizes the same right to a prompt and effective remedy.

14. *See* Bassiouni, *supra* note 1, at 262, 264. *See also* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 443 (1972).

15. *See, e.g.*, 22 U.S.C. § 2304(a)(1) (1976); *see also* 22 U.S.C. § 1732 (1976). On United States Supreme Court use of human right norms *see, e.g.*, J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content*, forthcoming.

a judgment jeopardizes not only our public policies, both foreign and domestic, but our system of government as well. It can be argued that when human rights are violated by a foreign government, subsequent incarceration by the United States in accordance with a prisoner transfer agreement violates the obligation of the United States under the United Nations Charter to take "joint and separate action" to insure universal respect for and observance of human rights and fundamental freedoms.[16] United Nations charter obligations clearly prevail over any inconsistent agreements between the United States and Canada or Mexico,[17] and fundamental human rights, as obligations *erga omnes,* would prevail as well.[18]

One of the reasons why United States courts have refused to execute a foreign penal judgment in the United States[19] is the desire to prevent the subversion of constitutional guarantees for protection of the civil rights of persons accused of crime. Another important reason appears to be the determination of the courts to be di
by foreign courts and the refusal to allow, in effect, the exercise by foreign courts of the powers of the federal judiciary. Such underlines the importance of the point made above that the United States government has no constitutional powers to implement within the United States or abroad the sentences passed by a foreign tribunal utilizing foreign procedures and applying what is purely a foreign criminal law.

The subversion of United States constitutional guarantees and the system of constitutionally derived federal powers are the primary reasons why the new prisoner transfer scheme must be opposed and ultimately declared unconstitutional. We have fought too long and hard for democratic values to allow them to be undermined by agreements with foreign states that are designed to aid a few hundred United States citizens incarcerated abroad.[20] The

16. *See* U.N. CHARTER, arts. 55(c) and 56; and 1970 Declaration of Principles of International Law Concerning Friendly Relations and Co-Operation, U.N.G.A. Res. 2625 (1970) (state "duty").

17. *See* U.N. CHARTER, art. 103.

18. *See, e.g.,* Paust & Blaustein, *supra* note 9, at 26-27, 33-34.

19. *See* Bassiouni, *supra* note 1, at 264; and RESTATEMENT OF CONFLICT OF LAWS, § 427 (1934), "no state will punish a violation of the criminal law of another state." The case of *Cooley v. Weinberger* cited by Bassiouni, *supra* at n. 24 might be distinguished or even disapproved by the United States Supreme Court for reasons stated above.

20. *See, e.g.,* N. LEECH, C. OLIVER, J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 597 (1973).

authority of our constitutional system is too precious to allow its ultimate subversion because of a theory that the ends justify the means. The human rights of United States citizens incarcerated abroad can also be protected by greater attention by the Executive and Congress to the protection of human rights abroad, especially with regard to the minimum rights of all prisoners to due process and to human post-conviction confinement.[21] The transfer of prisoner agreements, in effect, forestall the forces of public opinion and efforts made toward such a transnational implementation.

21. *See also* 22 U.S.C. § 1732 (1976).