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PERSPECTIVES ON THE TRANSFER OF PRISONERS BETWEEN THE UNITED STATES AND MEXICO AND THE UNITED STATES AND CANADA

*M. Cherif Bassiouni**

TABLE OF CONTENTS

Transfers of convicted offenders have recently begun under United States treaties with Mexico[1] and Canada.[2] Both treaties were ratified by the Senate in July, 1977, and implementing legislation was enacted on October 28, 1977.[3] The treaties represent pioneering efforts in international penal cooporation, and like all such efforts they pose novel operational and constitutional challenges. This article will outline the transfer procedures and highlight some substantive constitutional issues.

I. RATIONALE OF THE TREATIES

The two treaties are comparable in most respects. The purpose of the treaties and of the implementing legislation is to permit

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1. Treaty on the Execution of Penal Sentences, Nov. 25, 1976, United States-Mexico, S. EXEC. DOC. D, 95th Cong., 1st Sess., *reprinted in* H.R. REP. No. 720, 95th Cong., 1st Sess. at 13 (1977) [hereinafter cited as Mexican Treaty]; *see* 77 DEP'T ST. BULL. 758 (1977).

2. Treaty on the Execution of Penal Sentences, March 2, 1977, United States-Canada, S. EXEC. DOC. H, 95th Cong., 1st Sess., *reprinted in* H.R. REP. No. 720, 95th Cong., 1st Sess. at 3 (1977) [hereinafter cited as Canadian Treaty].

3. Act of Oct. 28, 1977, Pub. L. No. 95-144, 91 Stat. 1212 (to be codified in 18 U.S.C. §§ 4100-4115, and other sections in 10, 18, 28 U.S.C.).

persons convicted of crimes in a foreign state to complete their sentences in their national state. The assumptions upon which the treaties are founded include:

1. That a state has an interest in the treatment of its citizens abroad;[4]
2. That a state has an interest in the future behavior of its citizens;[5]

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4. Nationality of individuals has formed the basis of two theories of jurisdiction under international law. *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 251-59 (1974). On the protection of human rights and humanitarian doctrine, see American Convention on Human Rights, Nov. 22, 1969, O.A.S. TREATY S. No. 36, at 1-21; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (1955); International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (no. 16) 52, U.N. Doc. A/6316 (1966); Universal Declaration of Human Rights, G.A. Res. 217, 3 U.N. GAOR 71, U.N. Doc. A/810 (1948); COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS, § 1, Doc. 1 (7th ed. Strasbourg 1971).

Concern over treatment of nationals abroad, even when subject to jurisdiction of a foreign court, has been qualifiedly recognized in judicial decisions. In Gallina v. Fraser, 278 F.2d 22 (2d Cir. 1960), *cert. denied,* 364 U.S. 851 (1960), the court said:

> [W]e have discovered that no case authorizing a federal court, in a habeas corpus proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the relator upon extradition . . . . Nevertheless, we confess to some disquiet at this result. We can imagine situations when the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principle set out above.

278 F.2d at 78-79. Gallina had been tried and convicted *in absentia* by the Italian courts for robbery, and contended that if extradited, he would be imprisoned with no opportunity for retrial. *Accord,* Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied,* 45 U.S.L.W. 3489 (1977) ("A denial of extradition by the Executive may be appropriate when strong humanitarian grounds are present . . . when it appears that, if extradited, the individual will be persecuted, not prosecuted, or subjected to grave injustice.") *See* M. CHERIF BASSIOUNI, *supra,* at 530-31.

5. Rehabilitation is the principle of modern theories of criminal sanctions, recognized by all states in the United States and most countries of the world. *See, e.g.,* M. CHERIF BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 76-106 (1978); L. ORLAND, JUDGMENT, PUNISHMENT, THE CORRECTIONAL PROCESS (1977); and REPORT TO THE FIFTH U.N. CONGRESS ON CRIME PREVENTION, THE FUTURE OF IMPRISONMENT 1-12 (Geneva, Sept. 1975).

The importance of the rehabilitative process to the state whose nationality an offender holds arises from the general practice of returning foreign offenders to the state of their nationality once their sentences are completed. For an historical

3. That states have a common interest in preventing and suppressing criminality.[6]

The first consideration emphasizes the humanitarian nature of the scheme in alleviating the hardships of serving foreign jail sentences and the accompanying personal hardship to the offender and his or her family. The second consideration recognizes that rehabilitation is largely a matter of resocialization, and therefore the social context in which it is attempted has a crucial bearing on the likelihood of its success. Moreover, this consideration recognizes that supervised custody other than imprisonment in an alien environment can be rendered ineffective for a variety of obvious reasons. Thus, permitting offenders to serve their sentences in the state of their nationality will enhance the chances for successful socialization, a matter of particular importance to the states to which offenders will eventually return. The third consideration is no mere truism; the treatment of offenders, including

basis of rehabilitation see J. BENTHAM, PRINCIPLES OF PENAL LAW, pt. 11, Bk. J., Chapter 6 (E. Browning ed. 1943). *See also* Fitzgerald, *The Territorial Principles in Penal Law: An Attempted Justification,* 1 GA. J. INT'L & COMP. L. 29 (1970).

6. For articles considering international cooperation in criminal matters, see Grutzner, *International Judicial Assistance and Cooperation in Criminal Matters* in 2 M. CHERIF BASSIOUNI & V. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 189 (1973) [hereinafter cited as TREATISE]; Harari, McLean & Silverwood, *Reciprocal Enforcement of Criminal Judgments,* 45 REVUE INTERNATIONALE DE DROIT PENAL 585 (1974); Oehler, *Recognition of Foreign Penal Judgments and their Enforcement,* in 2 TREATISE, *supra,* at 261; Shearer, *Recognition and Enforcement of Foreign Criminal Judgments,* 47 AUST. L. J. 585 (1973).

For the European Convention on Recognition of Foreign Penal Judgments, see Europ. T.S. No. 70, May 8, 1928. For a proposed convention on reciprocal enforcement, see EUROPEAN COMMITTEE ON CRIME PROBLEMS, COUNCIL OF EUROPE, EXPLANATORY REPORT OF THE EUROPEAN CONVENTION ON THE INTERNATIONAL VALIDITY OF CRIMINAL JUDGMENTS (1970). *See also* EUROPEAN COMMITTEE ON CRIME PROBLEMS, COUNCIL OF EUROPE, ASPECTS OF THE INTERNATIONAL VALIDITY OF CRIMINAL JUDGMENTS (1968).

For the Benelux Convention, see Convention Concerning Customs and Excise, Sept. 5, 1952, Belgium-Luxembourg-Netherlands, 247 U.N.T.S. 329 (1956). *See also* K. KRAELLE, LE BENELUX COMMENTE, TEXTES OFFICIELS 147, 209, 306 (1961); De Schutter, *International Criminal Cooperation—The Benelux Example,* in 2 TREATISE, *supra,* at 261. For a proposed convention on reciprocal enforcement, see European Committee on Crime Problems.

The Scandinavian countries' arrangement for recognition and enforcement of penal judgments is reproduced in H. GRUTZNER, INTERNATIONALER RECHTSHILFEVERKEHR IN STRAFSACHEN, pt. IV (1967). The arrangement between France and certain African states is reproduced in 52 REV. CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 863 (1963).

extradition of offenders and mutual judicial assistance in obtaining witnesses and conducting investigations, is a significant factor in the development of close international cooperation in penal matters.

II. Transfer of Offenders Under the Treaties and United States Implementing Legislation

The basic purpose of the treaties and the implementing legislation is to permit persons who are serving sentences in countries other than their own to complete their sentences in their respective countries.[7] In addition, the offense for which the offender has been convicted and sentenced must also constitute an offense under the laws of the receiving state. This provision embodies the "double criminality" requirement so well established in extradition law and practice.

To effect a transfer the "Transferring State" or "Sending State" must first contact the offender's country of nationality, the "Receiving State," and indicate its willingness to transfer the offender. Under the treaty with Canada, the offenders must initiate the process by applying to the government of the Sending State for a transfer. Under the Mexican Treaty, the government of the Sending State initiates the process; however, the Treaty permits offenders to send requests to the detaining government. Thereafter, the Receiving State indicates whether it is willing to accept the transfer. Nothing in the treaties requires the contracting states to accept an offender.

A proposed transfer is always subject to the consent of the offender. The United States, under the implementing legislation, will verify the consent of persons being transferred, either to or from it, through a United States judicial officer.[8] In the case of transfers to the United States, a waiver must be secured from the offender of any rights he or she may have to challenge the validity of the foreign conviction and the sentence imposed by the foreign court in United States courts. The verification of the waiver and the offender's consent is subject to a right to counsel.[9]

The transfer is accomplished upon the receipt by the Receiving

7. *See* Canadian Treaty, *supra* note 2, preface; S. Rep. No. 435, 95th Cong., 1st Sess. 9 (1977).

8. Act of Oct. 28, 1977, Pub. L. No. 95-144, § 4107(a), 91 Stat. 1212 (to be codified at 18 U.S.C. § 4107(a)).

9. *Id.* §§ 4107(c), 4109 (to be codified at 18 U.S.C. §§ 4107(c), 4109).

State of whatever documents it may require in order for it to execute the completion of the offender's sentence. The offender is then delivered to the control of the Receiving State for the completion of his or her sentence and is governed by the laws of the Receiving State in all respects except for any matters pertaining to the conviction or sentence which are exclusively subject to the jurisdiction of the Sending State. This jurisdictional dichotomy is in the two treaties and the implementing legislation. Thus, the Sending State retains jurisdiction over the conviction and sentence and the Receiving State has jurisdiction over the execution of the sentence and all related matters. There is no treaty or legislative provision for resolving possible jurisdictional conflicts, which will therefore be subject to the forum's interpretation.

Should an action be initiated in a United States court seeking to have the offender released, the court must first determine whether it has jurisdiction to hear the matter and then consider the jurisdictional division referred to above. This is immaterial however where the suit challenges the constitutionality of either the treaty or the implementing legislation or in the application to the offender. In the latter case, the court would clearly have subject matter jurisdiction, even if the treaties and the legislation purport to preclude such actions based on the offender's consent to transfer and waiver to challenge the transfer. If a court orders the release of the transferred offender, there would be no valid basis for continued detention or supervision by United States authorities.

Although the treaties are silent on the point of releases prior to completion of sentence, section 4114 of the implementing statute provides for the return of such offenders to the Sending State.[10] The statute creates a "return" mechanism separate and apart from the process of extradition. The mechanism makes the return of such offenders virtually automatic upon a request by the Sending State.

If the request for return is processed as prescribed, the offender may be able to challenge it in a United States court, and thereby obtain a ruling on the validity of the return procedure. A favorable decision would protect the offender from either detention by United States authorities or return to the Sending State. An unfavorable decision would require return to be conditioned upon the receipt of proper credit for time spent in United States custody.

10. *Id.* § 4114 (to be codified at 18 U.S.C. § 4114).

The offender would then complete his or her sentence in the Sending State. It should be noted that, under section 4102 of the Act, the Attorney General is empowered "to make regulations for the proper implementation of such treaties." Thus, any future procedural developments would have to be examined in light of administrative regulations pursuant to this legislative delegation of power.

III. Substantive Transfer Issues

A. *Eligibility for Transfer*

Transfer eligibility is governed by article II of the Mexican Treaty, article II of the Canadian Treaty, as well as provisions of the implementing legislation.[11] The offense for which the offender was convicted must be punishable in the Receiving State and cannot be a violation of immigration or military laws. With respect to transfers with Mexico, under an extradition treaty of 1899[12] offenses cannot be deemed "political" in the sense of a "political offense exception."[13] No definition for a "political" offense, however, is contained in the 1899 treaty.

1. Timing

Article II of both the Mexican and Canadian treaties provides that no offender is to be transferred until any pending appeal or collateral attack on the conviction or sentence is disposed of and the time for appeal has elapsed. Additionally, there must remain at least six months to the offender's sentence at the time of transfer.

Although on its face this statutory language appears to foreclose any waiver of the right to appeal to secure eligibility at an earlier date, it is possible that a judicial determination would construe such a waiver as causing the time for appeal to elapse, and therefore allow the waiver. In this regard, a court may be influenced by a number of policy considerations:

1. The humanitarian aspect of the treaties favors such a construction, so that offenders whose offenses were minor could take advantage of the treaties, even though

11. *Id.* §§ 4103-4107 (to be codified at 18 U.S.C. §§ 4103-4107).

12. Treaty on Extradition, Feb. 22, 1899, United States-Mexico, 31 Stat. 1818, T.S. 243, supplementary convention, Aug. 16, 1939, 55 Stat. 1133, T.S. 967.

13. *See* M. Cherif Bassiouni, *supra* note 4, at 368-429.

the completion date of their sentence and the ending date of the appeal period are less than six months apart.
2. None of the purposes of the treaties or interests protected by them would be jeopardized in any way by such a construction. Principles of treaty interpretation encourage maximizing individual rights whenever treaty language is susceptible of more than one interpretation.[14]
3. The legislative history of the implementing statute indicates that the question is open, since the enacted language is silent on the subject.

2. Relationship of the Offender to the States

Only offenders who are United States citizens or nationals may be transferred to the United States and only citizens or nationals of a potential Receiving State may be transferred to that country under 18 U.S.C. § 4100(b). This right is limited, however, by article II(2) and (3) of the Mexican Treaty, which provides for transfer of offenders who are nationals of the Receiving State, but not domiciliaries of the Sending State. A "domiciliary" is defined in article IX of the Mexican Treaty as "a person who has been present in the territory of one of the parties for at least five years with an intent to remain permanently therein." As a result, American citizens who are domiciliaries of Mexico are ineligible for transfer to the United States even though the implementing Act makes no such distinctions. This exception could be deemed a violation of the equal protection clause of the fifth amendment of the United States Constitution, since there is no rational basis for such discrimination within the same class of offenders.[15] By contrast, article II(b) of the Canadian Treaty provides that transfer of offenders between the two states shall apply to all their respective nationals and citizens and is therefore consistent with sections 4100(b) and 4102(6) of the implementing Act.

14. Asakura v. City of Seattle, 265 U.S. 332, 342 (1924). *See also* S. ROSENNE, THE LAW OF TREATIES 214-19 (1970) (arts. 27, 28 of the Vienna Convention on the Law of Treaties and their legislative history).

15. *See Implementation of Treaties for the Transfer of Offenders To or From Foreign Countries: Hearings on H.R. 7148 Before the House Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 187-94 (1977) (statement of M. Cherif Bassiouni). *Transfer of Offenders and Administration of Foreign Penal Sentences: Hearings on S. 1682 Before the Subcomm. on Penitentiaries and Corrections of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 139-40 (1977) (statement of M. Cherif Bassiouni) [hereinafter cited as *Judiciary Hearings*].

Both treaties by implication exclude permanent residents of the United States who are not American citizens or nationals,[16] since such persons are not entitled to diplomatic protection abroad under traditional international law doctrine and practice. However, this does not address the issue of the applicability of United States law to permanent residents who are not nationals in light of United States Supreme Court decisions giving residents of the United States substantially the same rights as United States citizens.[17] Thus, a permanent resident of the United States who has declared his or her intention to become a citizen, but has not yet been sworn as a citizen and who is convicted of an offense while vacationing in Canada or Mexico is ineligible for transfer to the United States. This exclusion could be the basis of a challenge to the constitutionality of the treaty and implementing statute on equal protection grounds. The exclusion would also be in contravention of the underlying purposes of the treaties and implementing statute as discussed above.

3. Minors

Persons under 18 years of age are eligible for transfer, provided that a parent, a guardian, or the court having jurisdiction over the offender consents to the transfer. The problem of waiver and consent to transfer by minors in this context is not unlike its counterpart in juvenile proceedings throughout the United States. The United States Supreme Court has not ruled on the issue of waiver of constitutional rights by minors, parents, or guardians in juvenile proceedings, but it is likely that some of the factors taken into account by juvenile courts throughout the United States will be relied upon. Among these factors, the most important is that the waiver and consent, both linked in the process of effectuating the transfer, may be deemed valid because of the benefits derived from the waiver. This factor would be particularly relevant where the parent, guardian, or court refuses to grant consent and thus deprives the minor of the benefit of transfer. Such a circumstance would fly in the face of the rationale for the process.

16. "National" is defined in 8 U.S.C. § 1101(a)(21), (22) (1970).

17. A national is defined as a person owing permanent allegiance to the United States, which excludes permanent residents who have no such status. *Id.* Aliens are as entitled to equal protection as other "persons" who are United States nationals. Graham v. Richardson, 403 U.S. 365 (1971).

B. *Compliance with Transfer Requirements*

The transfer procedures differ in the two treaties and should be examined carefully to assess government compliance therewith.[18]

1. Initiating the Transfer Process

Under the Mexican Treaty it is contemplated that transfers of offenders from Mexico will generally be initiated by the Mexican government. However, an express provision is made permitting offenders to petition for consideration. Formal requirements for such petitions will presumably be established by Mexican administrative measures, but in the absence any such guidance, it may be possible to draft successful petitions by relying on the purposes of the treaties, demonstrating how the transfer of the offender in question would serve those purposes and detailing the offender's eligibility for such transfer. Nevertheless, the transfer decision is at Mexico's discretion.

The Canadian Treaty contemplates that offenders will make application for transfer to the detaining state, which will then transmit the applications to the Receiving State. In the United States inquiries concerning application forms would be directed to the Attorney General who is empowered to make regulations under the Act.

Whether the first step is by application or by petition, the Transferring or Sending State is under no obligation to consent to the transfer, nor is the potential Receiving State required to consent to any proposed transfer. Accordingly, administrative intercession in the respective states may be sought by the petitioning offender's counsel, family or friends. The United States Attorney General has indicated that all petitions and applications shall be entertained, provided that they comply with the applicable treaties and legislation in force.

2. Waiver Consent

The Canadian Treaty provides that offenders will be informed of their right to apply for transfer. Consent of the offender is required by the Mexican Treaty as a precondition to transfer. This

18. *Compare* Canadian Treaty, *supra* note 2, arts. III, IV *with* Mexican Treaty, *supra* note 1, arts. II, III.

precondition does not exist under the Canadian Treaty since the process therein is initiated by offenders. Sections 4107 and 4108 of the implementing statute require offenders to waive the right to judicial review of their sentences or convictions in the Receiving State's courts as a precondition to transfer to or from the United States, and section 4108 further requires the appointment of a magistrate to verify consent and waiver. In addition, section 4109 requires counsel to be made available to any offender consenting and waiving rights pursuant to a transfer request. The United States shall provide a federal public defender as counsel in cases involving indigents. For United States detainees abroad the counsel of choice could be a United States or local attorney, but counsel appointed under section 4109 should be an attorney licensed in the United States.

3. Transfer of Documents and Records

Under article IV of the Mexican and Canadian treaties, the Transferring or Sending State must provide the Receiving State with such documents or records as it may require to supervise completion of an offender's sentence. Because transfer itself is discretionary with the states involved, if these materials are unavailable, a Receiving State may be prevented from accepting a proposed transfer. Although some of the information in such documents and records may be damaging to the offender, there will be an opportunity to attack its reliability or admissibility in any United States judicial proceeding. These materials may also contain other information beneficial to the offender.

C. *Post-Transfer Issues*

1. Parole, Probation and Supervision

The implementing statute makes all matters relating to probation and parole subject to United States jurisdiction in accordance with 18 U.S.C. § 4203(a).[19] Accordingly, whereas an offender may have been ineligible for parole in Mexico or Canada, upon his or her arrival in the United States, immediate eligibility for parole is possible under section 4106. This grants transferees greater benefits than persons convicted under United States law. Under sections 4104 and 4106, transferred probationers and parolees shall be

19. Act of Oct. 28, 1977, Pub. L. No. 95-144, § 4106, 91 Stat. 1212 (to be codified at 18 U.S.C. § 4106).

treated as if their conviction had been rendered by a United States court, but presumably without the benefit of collateral attacks upon the conviction.

2. Procedural Challenges

Any failure by the authorities of the state involved to follow the requirements of the treaties, or by United States authorities to follow the requirements of United States implementing legislation may provide basis for an attack on the validity of an offender's transfer and detention. If such an attack were made successfully prior to the transfer, the offender would remain in the potential Sending State. But if it were made after the transfer, there is a chance that the offender would be released by the Receiving State. Whether such a release would be followed by return of the offender to the state of his or her conviction depends on the validity of the "return" process.

3. Waiver as a Bar to Judicial Challenges of Conviction and Sentence

It may be contended that the offender's waiver of the right to challenge the conviction or sentence in the courts of the Receiving State which is made at the time of consent to transfer would act as a bar to any form of collateral attack, including use of the writ of *habeas corpus.* The concept of *habeas corpus* lies so close to the roots of constitutional notions of due process that its elimination, other than as provided under the President's emergency powers under the Constitution,[20] is unlikely to withstand judicial scrutiny.

The validity of the waiver provided for under the implementing statute is open to attack in at least three ways. First, the circumstances under which it was secured may negate a finding that it was voluntarily given. The alternative to the waiver may be continued imprisonment in a foreign state, possibly under conditions below certain humane standards. The imprisonment may be based upon a conviction for a crime proven by serious human rights violations. Such coercive circumstances would invalidate the waiver.[21]

20. The problems relating to rendering *habeas corpus* relief unavailable by jurisdictional allocation or otherwise are discussed in authorities collected in Note, *Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty,* 90 HARV. L. REV. 1500, 1519 nn.53-90 (1977).

21. Faretta v. California, 422 U.S. 806 (1975) (for waiver of right to assistance

Second, section 4108 of the implementing Act provides that the offender must be informed of the exclusion of collateral attacks on convictions or sentences in the Receiving State in order for his or her consent to be valid. Accordingly, it could be deemed a bar acknowledgement that the offender was consenting to the transfer despite the possibility that no United States court would entertain such a collateral attack and not a waiver of constitutional rights.

In any event such waiver and consent to transfer must be in the presence of a United States judicial officer and with the advice of counsel of the transferee's choice or appointed in cases of indigence. Court-appointed counsel should be a licensed United States attorney whose representation of the indigent transferee should not be jeopardized by a conflict of interest in the event that appointed counsel is a government attorney. Failure to follow such procedures is subject to judicial review, and if the procedures are found to be faulty, the offender shall be returned to the Sending State.

4. Collateral Attack of Sentence or Conviction

The treaties expressly reserve jurisdiction over collateral attacks on convictions and sentences to the Sending or Transferring State which imposed them.[22] The transfer of custody of detainees is premised on two assumptions: first, that a foreign penal judgment can be enforced in the United States, and second, that the United States Constitution and criminal justice standards do not apply extraterritorially. Both assumptions are, however, only partially justified in light of United States law and practice. It is relevant in this context to note that the treaties with Mexico and Canada are based upon these two premises and presume to preclude their judicial testing in the respective domestic courts by prohibiting collateral attack on the conviction and sentence rendered abroad. The same limitations appear in the implementing statutes of the three states.

(a) *Recognition, Enforcement and Execution of Foreign Judgment.*—A distinction must be made between recognition, en-

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of counsel); Boykin v. Alabama, 395 U.S. 238 (1963) (where guilty plea operates as waiver of rights against self-incrimination, to trial by jury and to confrontation of witnesses); Bumper v. North Carolina, 391 U.S. 543 (1968); Fay v. Noia, 372 U.S. 391 (1963) (for waiver of right to *habeas corpus* relief); *see* M. CHERIF BASSIOUNI, *supra* note 5, at 376.

22. Canadian Treaty, *supra* note 2, art. V; Mexican Treaty, *supra* note 1, art. VI.

forcement and execution of foreign judgments,[23] because historically the United States has held the position that it does not enforce foreign penal judgments.[24] The "Full Faith and Credit" clause of article IV of the United States Constitution does not even require the enforcement of sister-state penal judgments. Foreign penal judgments have nonetheless been given effect in the United States. For example, the United States gives effect to a foreign penal judgment under extradition procedures by relying on it to execute the return of a person accused or convicted in a foreign state.[25] Should the treaties on transfer of prisoners be merely an administrative consequence of recognizing a foreign penal judgment, then the scheme finds strong support in the long-established practice of extradition. It must also be noted, however, that if such an interpretation is not given to the scheme and United States courts should consider the treaties to be a form of enforcement of foreign penal judgments, some precedent exists for that approach. These precedents include the enforcement in the United States of penal sanctions imposed by foreign consular officers,[26] the enforcement of status of forces agreements, particularly the agreement between the United States and the Republic of Korea on the status

23. *See Penal Treaties with Mexico and Canada: Hearings on Ex. D and Ex. H Before the Senate Comm. on Foreign Relations,* 95th Cong., 1st Sess. 262-65 (1977) (statement of M. Cherif Bassiouni).

24. In *The Antelope,* 23 U.S. (10 Wheat.) 66, 123 (1825), Chief Justice Marshall declared: "The courts of no country execute the penal laws of another." It may be noted that the penal sentences involved in the Mexican and Canadian treaties do not include fines or criminal sanctions other than restraints on liberty, confinement, probation, parole, and some forms of supervision. *But see* Cooley v. Weinberger, 518 F.2d 1151 (10th Cir. 1975) (Iranian conviction for the murder of a woman's spouse was given legal effect in the context of determining her eligibility to receive social security benefits). *See also* Foran-Rogers, *Recognition of Foreign Countries' Penal Judgments,* GLOBE, vol. 14, no. 6, at 1-7 (Illinois State Bar Association Newsletter 1977).

25. *See* M. CHERIF BASSIOUNI, *supra* note 4, at 27-78, 502-57. *See also* United States v. Rauscher, 119 U.S. 407 (1886).

26. *See* Gordon B. Baldwin, Department of State, *Report on Prisoner Exchange Agreements* (July 20, 1976) (unpublished), who refers to various United States precedents on the enforcement of foreign criminal penalties such as § 5 of the Service Courts of Friendly Forces Act. Act of June 30, 1944, c. 326, 58 Stat. 644, (codified at 22 U.S.C. § 705 (1970)), which authorizes confinement in Federal facilities of persons serving sentences imposed by foreign courts-martial. Baldwin also refers to the enforcement in the United States of criminal sanctions imposed by the foreign consular officers under 22 U.S.C. §§ 256-258a (1970). Sections 256-258a were upheld in Dallemagne v. Moisan, 197 U.S. 169 (1905), thus providing a precedent for enforcement of foreign final judgments.

of United States armed forces in Korea,[27] and recent case law developments in giving judicial effect to foreign penal judgment.[28]

(b) *United States Public Policy in Minimum Standards of Criminal Justice and the Recognition and Enforcement of Foreign Penal Judgments and the Execution of Foreign Penal Sentences.*—It is a well-settled principle of private international law that no state shall recognize or enforce the judgments of other states if they are contrary to the public policy of the recognizing or enforcing state.[29] The question therefore arises whether certain minimum standards of criminal justice as embodied in the meaning of the due process clauses of the fifth and fourteenth amendments to the Constitution and those specific rights enunciated in the Bill of Rights which have been incorporated in the due process clause, must be observed in the process leading to the recognition, enforcement or execution of a foreign penal judgment which the United States will recognize, enforce, or execute. Nothing in the Constitution requires that only systems of criminal justice which are similar to that of the United States be given recognition. In fact, the position of the United States Supreme Court on extradition[30] and on the constitutionality of status of forces agreements[31] has been to respect other criminal justice systems even though they may be very different from that of the United States. Nevertheless, contrary to established jurisprudence, there are some indications that certain constitutional protections may be held applicable extraterritorially whenever United States agents abroad engage in behavior which is violative of certain constitutional principles.[32] Therefore inquiry should be made into the facts

27. July 9, 1966, 17 U.S.T. 1677, T.I.A.S. No. 6127.

28. *See* Cooley v. Weinberger, 518 F.2d 1151.

29. *See* 2 A. EHRENZWEIG & E. JAYME, PRIVATE INTERNATIONAL LAW 81-83 (1973); H. GOODRICH & E. SCOLES, CONFLICT OF LAWS 14-15 (9th ed. 1964); L. STIMSON, CONFLICT OF CRIMINAL LAWS 20-25 (1936); Paulsen & Sovern, *"Public Policy" in the Conflict of Laws,* 56 COLUM. L. REV. 969 (1956). *Cf.* Huntington v. Attrill, 146 U.S. 657 (1892) (enforcement between domestic states); Intercontinental Hotels Corp. (Puerto Rico) v. Golden, 15 N.Y.2d 9, 203 N.E.2d 210, 254 N.Y.S.2d 527 (1964) (enforcement of gambling debt incurred in Puerto Rico).

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

31. *See, e.g.,* Wilson v. Girard, 354 U.S. 524 (1957); Reid v. Covert, 351 U.S. 487 (1956), *rev'd on rehearing,* 354 U.S. 1 (1957); Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972), *cert. denied,* 409 U.S. 869 (1972); Coker, *The Status of Visiting Military Forces in Europe: NATO-SOFA, A Comparison,* in 2 TREATISE, *supra* note 6, at 115.

32. Traditionally the United States has accepted the fact that *in personam* jurisdiction secured by fraud or force is recognizable by the courts. Frisbie v.

upon which the conviction was based to find out to what extent a United States agent may have been involved in practices which are patently offensive to due process standards.

On its face, there is nothing in the criminal justice system of Canada which would warrant a finding that it is incompatible with the public policy of minimum criminal justice standards of the United States.[33] However, Mexico's criminal justice system represents a greater variation from that of the United States than Canada's. Nevertheless, the Mexican system of criminal justice theoretically offers certain minimum guarantees which make it somewhat compatible with the criminal justice standards of the United States. That system affords an accused the right to be adequately informed of the charges, the right to counsel, the right to open and public hearings conducted by an impartial judge, the right to competent testimony in determining guilt and the right to appeal.[34]

Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886). Recently, however, there are indications that if illegal conduct is performed by a United States agent abroad, it could be the basis of the application of the exclusionary rule if the conduct is patently offensive to due process. *See* United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974). The holding in *Toscanino* was subsequently limited in U.S. *ex rel.* Luian v. Gengler, 510 F.2d 62 (2d Cir. 1975), *cert. denied,* 421 U.S. 1001 (1975); and United States v. Lira, 515 F.2d 68 (2d Cir. 1975), *cert. denied,* 423 U.S. 847 (1975). *See generally* Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition,* 7 VAND. J. TRANSNAT'L L. 25 (1973), *reprinted in* M. CHERIF BASSIOUNI, *supra* note 4, at 121-291. On the question of territorial application of United States law, see The Exchange, 11 U.S. (7 Cranch) 116 (1812); 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 889-904 (1968); Bassiouni, *Theories of Jurisdiction and Their Application in Extradition Law and Practice,* 5 CAL. W. INT'L L.J. 1 (1974); Feller, *Jurisdiction over Offenses with a Foreign Element,* in 2 TREATISE, *supra* note 6, at 5; George, *Extraterritorial Application of Penal Legislation,* 64 MICH. L. REV. 609 (1966).

33. P. BOLTON, PROCEDURE AND PRACTICE IN CANADIAN CRIMINAL TRIALS (1974); A. HOOPER, CASES AND MATERIAL ON CANADIAN CRIMINAL PROCEDURE (1974); A. POPPLE, CRIMINAL PROCEDURE MANUAL (1956); R. SALHANY, CANADIAN CRIMINAL PROCEDURE (2d ed. 1972).

34. Miller, *Mexican Jails and American Prisoners,* 51 LOS ANGELES B.J. 439, 442-43 (1976); and G. Sanchez, DERECHO MEXICANO DE PROCEDIMIENTOS PENALES (4th ed. 1977). All constitutional guarantees of the CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS are expressly made applicable to foreigners by article 33 of the document. The guarantees relevant here include:

> Art. 14—Prosecution must occur before previously established tribunals in which the essential formalities of procedure shall be complied with in conformance with laws then in effect.
>
> Art. 16—Arrest orders will be issued only by competent judicial authority upon a complaint supported by an affidavit of a reliable person, except when the crime occurs in the presence of a detaining officer.

Thus, at least on its face, the criminal justice system of Mexico does not patently violate the public policy of the United States.

There is, however, a public policy in the United States with respect to minimum standards of criminal justice as applied. The execution of a foreign penal sentence rendered on the basis of violations of such standards would warrant the denial of execution of such judgments. Such issues can only be determined on an *ad hoc* basis, however, since the denial of such minimum standards to a given individual would depend upon the facts and circumstances of each case. It is very unlikely that the United States Supreme Court would hold the treaties to be unconstitutional on the grounds that they purport to execute the penal sentences of a foreign state whose minimum criminal justice standards are not patently offensive *per se* to United States standards. What the United States courts are more likely to consider is whether on an *ad hoc* basis the foreign conviction of an American citizen transferred to the United States under the terms of the treaties for execution of a sentence has been secured in a manner so patently offensive to United States minimum standards of criminal justice that the further detention of such a person by the United States would be contrary to its public policy. Thus, the concern should not be over the constitutionality of the treaties, but over the criteria of minimum standards of criminal justice which the United States Supreme Court would hold to be applicable to American citizens abroad as a condition to the use of the power processes of this country to execute the sentence of a foreign penal judgment.

Art. 19—No detention may exceed three days unless there is a formal judicial order stating the crime alleged and its elements, and establishing a *prima facie* showing of responsibility.

Art. 20(II)—The accused may not be compelled to testify against himself nor held incommunicado for the purpose of coercion.

Art. 20(III)—The accused shall be told in a public hearing within 48 hours of formal detention the name of his accuser and the nature of the charges.

Art. 20(IV)—The accused has a right to confront and cross examine witnesses against him.

Art. 20(V)—An accused may call his own witnesses and is entitled to court assistance in procuring them.

Art. 20(VI)—The accused is entitled to a public trial by a judge or a jury of his peers if the sentence faced is more than one year in prison.

Art. 20(IX)—The accused has the right to be represented by counsel of his choice or by public defender.

Art. 20(X)—Time served prior to sentencing is subtracted from the sentence.

Art. 22—Excessive and unusual penalties are forbidden.

United States courts would have to inquire into the facts supporting the foreign conviction, which would entail recognition of a right to make a collateral attack on the conviction in *habeas corpus* proceedings. Such collateral attack is ostensibly barred by the treaties and the implementing act as discussed above. This preclusion as set forth in provisions of both the treaties and the implementing statute is likely to be held unconstitutional, unless the courts interpret the provisions in such a broad manner that collateral attacks fall within the scope of the provisions.

The waiver of the rights to collaterally attack the conviction which is specified in the treaties[35] will of course be raised by the government of the Sending State whenever a transferred offender would seek to attack the validity of his or her foreign conviction in a United States court. There is some authority to the effect that such a waiver, when done knowingly and intelligently[36] in the presence of a United States magistrate, is constitutionally valid when made with the assistance of counsel and in order to gain certain benefits otherwise not available.[37] A court may hold that such a waiver was not freely given because an offender was in detention at the time of making the waiver. However, the existence of such conditions, as well as the coercive effect on the waiver of the transferred offender, will have to be proven and therefore will be determined necessarily on an *ad hoc* basis.

In the United States, *habeas corpus* proceedings would require at a minimum that the American detaining authority demonstrate the applicability of the treaty and implementing statute to the offender, and that the scope of inquiry could by some rational extrapolation be extended to the basis for the offender's conviction and sentence. Success at this stage would result in the release of the offender, but it would also result in the government's attempt to return the released offender to the Transferring or Sending State.

5. Return of Released Offenders

The implementing statute purports to create a mechanism that would operate speedily and smoothly to return transferred offenders released by United States courts before their sentences

35. *See* note 22 *supra.*
36. *See* note 21 *supra* and accompanying text.
37. *See* Tollett v. Henderson, 411 U.S. 258 (1973).

are completed to the state that convicted and sentenced them.[38] On its face, this provision would appear to render attacks on the validity of transfer or collateral attacks on conviction and sentence useless, since success in such attacks would merely result in return of the offender to the state from whence he or she came. The validity of section 4114 is questionable, however. To examine its validity the provision should be considered in relation to extradition as that practice is followed in all three treaty signatory states.

Extradition under the United States-Mexico and the United States-Canada treaties of extradition requires not only that the offense for which the relator is sought be criminal in both states (double criminality), but also that it be among those offenses expressly listed in the Extradition Treaty.[39] The treaties on transfer of prisoners, however, permit transfer whenever the offense in question is criminal in both states, regardless of whether it is listed in any treaty as an extraditable offense. Thus, the possibility exists under section 4114 of the Act that an offender could be returned for an offense which is not among those listed in the extradition treaty between the parties. While a state may make a request for extradition at any time, under section 4114, the request for return must be made within six months of the offender's release. Finally, as a precondition to extradition, federal law requires that probable cause be shown in a hearing.[40] That is, it must be shown that there is sufficient evidence of the offender's guilt of the crime in question as would justify holding him for trial under United States law.[41] Under section 4114, it is sufficient to produce a certified copy of the conviction rendered by the court of the state seeking the offender's return. Should a United States court find that such "return" procedures are merely a form of extradition under another label, it may consider that section 4114 discriminates against returnees as opposed to extraditees who are governed by sections 3181 *et seq.* without any rational basis and consider that provision

38. Act of Oct. 28, 1977, Pub. L. No. 95-144, § 4114, 91 Stat. 1212 (to be codified at 18 U.S.C. § 4114).

39. Treaty of Extradition, Feb. 22, 1899, United States-Mexico, art. II, 31 Stat. 1818, T.S. No. 242; Webster-Ashburton Treaty, Aug. 9, 1842, United States-Great Britain, art. X, 8 Stat. 572, T.S. 119, supplementary convention, July 12, 1889, art. I, 26 Stat. 1508, T.S. 139; *see* 18 U.S.C. § 3184 (1976).

40. 18 U.S.C. § 3184.

41. *See* 18 U.S.C. § 3184 (1976). *See also* Beck v. Ohio, 379 U.S. 89 (1964) (reasonableness of probable cause); Brinnegar v. United States, 338 U.S. 160 (1949) (definition of probable cause); Carroll v. United States, 267 U.S. 132 (1925) (distinction between probable cause and proof of guilt).

a denial of equal protection.[42]

Probable cause as required by 18 U.S.C. § 3184 for extradition may be deemed inapplicable to "return" procedures under section 4114 because, in this case, the return is predicated on a conviction rather than an accusation. If, however, the release was due to a finding by the releasing United States court that the conviction was in violation of minimum criminal justice standards, the question remains how another United States court could rely on the validity of that judgment to order the offender's return. Should the Sending State request extradition of the transferred offender rather than requesting his or her return under section 4114, the Requesting State would have to meet a variety of requirements not included in the simple return mechanism of section 4114. Therefore, release without return is a possibility.

6. Civil Disabilities and Record Expungement

Section 4112 of the Act provides that a person may suffer only such losses and disqualification as "would result from the fact of the conviction in the foreign country." The purpose of this provision is to eliminate disabilities, but neither the treaties nor the statute provides for expungement of records of transferred offenders. This is a serious problem in the United States because such persons would have a United States detention record based on a foreign conviction without the right of expungement which might have been available had the conviction been rendered by a United States court. The possible judicial outcome is uncertain of an action for expungement of records brought under the Act as presently written. The court could apply all relevant provisions on expungement to such records by analogy without the need for specific legislation.

IV. Conclusion

The scheme for the transfer of offenders is a laudable step which should be supported by the bench and bar. Its procedures

42. On denial of equal protection for an unjustified discriminatory reason see United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (interference with rights to food stamps); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel interstate); Skinner v. Oklahoma, 316 U.S. 535 (1942) (interference with privacy and autonomy). The compelling state interest standard is characterized in Printing Indus. of Gulf Coast v. Hill, 382 F. Supp. 801, 808-09 (S.D. Tex. 1974), *vacated and remanded,* 422 U.S. 937 (1975); Coleman v. Coleman, 32 Ohio St.2d 155, 160-61, 291 N.E.2d 530, 534 (1972).

should be the subject of careful scrutiny and the creative talents of defense lawyers should find a fertile field in the representation of United States offenders held in Mexico and Canada and transferred to the United States, as well as Canadian and Mexican offenders held in the United States.[43] The success of this experiment may encourage similar arrangements with other countries.[44] It is hoped that the zeal of lawyers and judges will not result in destruction of the effectiveness of this scheme and turn it into a disguised mechanism for "springing" United States citizens who have committed crimes abroad. If that should be the case, the whole process will be jeopardized and a heavy price will be paid in terms of diplomatic repercussions and loss of opportunities for transfer for future offenders.

43. The right to counsel of choice or court appointed counsel is provided for in section 4109 and is, of course, subject to applicable United States laws and Supreme Court decisions. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainright, 372 U.S. 335 (1963). *See also* Johnson v. Zerbst, 304 U.S. 458 (1937) (choice or waiver of counsel); Powell v. Alabama, 287 U.S. 45 (1932) (choice or waiver of counsel); Fitzgerald v. Estell, 505 F.2d 1534 (5th Cir. 1974) (effectiveness of counsel), *cert. denied,* 422 U.S. 1011 (1975); 18 U.S.C. § 3006A(e) (1976).

44. Negotiations are presently being conducted with Bolivia.