Pragmatic Solutions To Challenges Presented To National Systems By The UNCAC Extradition Regimen

Chapter IV of the UNCAC\(^1\), specifically Article 44, deals with the framework proposed for extradition in the instances of rendition between State Parties. Amongst the many challenges posed by the UNCAC and this regimen is the issue of preventing safe haven to those who would abuse their public position in aid to amassing enormous wealth and follow this crime by fleeing to a jurisdiction in which they believe they can find shelter from prosecution. Oftentimes this shelter is not purposefully provided by the country to which these criminals have fled, but is the result of the inefficacy of the extradition mechanisms extant between the injured state and the state reluctantly providing safe haven. It cannot be denied that even in the most sophisticated extradition regimens between states there are on occasion: 1) long periods of delay between the request for extradition and the decision on rendition; 2) extraordinary procedural demands made by the legal regimen in the Requested State; 3) difficult and unnecessary proofs required prior to extradition; 4) the danger of the party being sought fleeing yet once again and 5) other problems that delay the procedure which results in at least a temporary safe haven for these criminals. Thus it is that Article 44(9) of the UNCAC requires that "State Parties shall ... endeavor to expedite extradition procedures and to simplify evidentiary requirements relating thereto ... ".\(^2\)

This paper will address only a few of these problems as they have surfaced in the extradition regimen of the US and demonstrate the manner in which that system has dealt with simplifying its evidentiary and procedural requirements in extradition proceedings in an effort to create a more efficient extradition process. As all countries ratifying the UNCAC will be called upon to 'expedite' and 'simplify' their procedures, it is hoped that some of the processes outlined here may prove useful in other systems.

A Central Authority -- Often, in connection with mutual legal assistance and other recurring matters involving foreign governments, treaties require

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\(^1\) United Nations Convention Against Corruption

\(^2\) Id. at Article 44 (9)
that Parties "designate a central authority..." to be responsible for the coordination of intergovernmental efforts to accomplish a variety of tasks. In extradition matters this can be particularly important given the time constraints that invariably accompany the extradition process.

Within the US Department of Justice, all matters relating to extradition must be handled through the Office of International Affairs (OIA). While that office does not by necessity actually appear at the in-court extradition hearing (and more often than not does not appear), it is always responsible for coordinating the efforts of the US in these proceedings; e.g., the representation of foreign governments by the United States government in extradition matters must be done in coordination with the OIA. The government prosecutors actually appearing in court are advised by members of OIA which is also responsible for insuring assistance in seeing that all time parameters of the extradition processes are met amongst the other technical requirements that attend this intergovernmental effort. What is most important about the concept of the OIA is that these attorneys are specialists on the topic of extradition and thus are current on the law that governs the process. This expertise and up to date understanding of the law and current policy helps to insure that embarrassing and harmful errors do not jeopardize international relationships. While it might seem as though having a layer of authority above the attorneys actually handling the case would slow the process, experience has demonstrated that because that layer of authority reduces errors and stimulates timeliness in meeting deadlines, a comparatively small cadre of attorneys deals effectively with the problem in some 94 federal districts. To the extent that maintaining an office specifically for purposes of monitoring and supervising extraditions might be seen by some as extravagant, it should be pointed out that this office currently employs a relatively small staff to accommodate the needs of a very large constituency. Perhaps most importantly, having one central office deal with all extradition matters involving foreign governments assures 1) consistency in results; 2) the utmost in efficiency of results and 3) the assurance that one office must ultimately answer for the results obtained.

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3 The homepage for the Office of International Affairs is found on the Internet at:
http://www.usdoj.gov/criminal/oia.html

AMERICAN BAR ASSOCIATION
Asia Law Initiative
In summary as to this issue, all matters dealing with extradition involving the United States must be dealt with through the OIA which can be contacted at the US Department of Justice through:

Criminal.Division@usdoj.gov

**Extradition Under US Law** -- Extradition under the law of the United States can be accomplished only when: 1) there is a treaty in place between the country requesting the return of the fugitive and the country in which the fugitive is found and 2) only where the request for extradition meets the terms and conditions specified in that treaty.\(^4\) Thus for UNCAC purposes, the US can be described as one of those countries "...that makes extradition conditional on the existence of a treaty..."\(^5\) Once it is established that a treaty exists and that the request for extradition meets the terms and conditions of the treaty, the question to be answered by the courts of the US is whether the evidence is “sufficient to sustain the charge under the provisions of [that treaty]”.\(^6\)

**Common Scenario For Extradition From The US To A Foreign Jurisdiction** -- The following set of facts illustrates a common, but not the only, scenario where a requesting state seeks the extradition of a fugitive from the US to the requesting state.

Extraditions can be sought from the US either through 1) a *formal request* through diplomatic channels; 2) through *provisional arrest* or 3) through both. Where extradition is formally sought through diplomatic channels, the US Department of State reviews the extradition documents submitted to insure compliance with formal requirements. Where provisional arrest is employed, the matter is reviewed and processed for compliance with proper procedure and adherence to protocol by the Office of International Affairs. Following that process, the matter is referred to the appropriate United States Attorney's Office (the prosecutor) for handling in the courts. Thereafter, the court makes a judicial determination as to whether or not the

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\(^4\) T.18 USC 3181
\(^5\) UNCAC Article 44(5)
\(^6\) T.18 USC 3184
person is extraditable according to US law; eg., certifies that the subject is extraditable. Ultimately, the warrant for the subject's extradition, should it be decided that extradition is appropriate, is a matter for the signature of the Secretary of State.

**Bringing The Subject Before The Court** -- As previously pointed out, extradition requests can be received through two separate means; either through a formal request for extradition made through diplomatic channels to the US Department of State or, where the circumstances dictate urgency, by a request for provisional arrest made through the Department of Justice. In either event, the matter will ultimately require the legal services of both the OIA and the US Department of State.

Before a determination is made as to whether a person can be extradited that individual must be brought before the court. This is accomplished through the issuance of a warrant of arrest based upon the facts alleged in the extradition papers forwarded by the requesting state. Upon the subject appearing before the court, a hearing takes place and the sole issue at that hearing is: whether or not "... [the court] deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention...". The court, if it finds that to be the case, then *certifies* that finding to the Secretary of State who makes the final decision as to whether or not the fugitive will be extradited. If in the opinion of the Secretary of State the person should be extradited, the Secretary of State then issues a warrant allowing that the fugitive be surrendered to the Requesting State.

**The Parties In Court** -- Because extradition in the US is a matter of parties entering appearances in court, one such party being the country asking for the return of a fugitive, the Requesting State, and the other being the fugitive resisting that return, representation before the court for the requesting party can be anticipated. By anticipating the need for representation the entire extradition process can be accelerated. The US, although itself not a party to these proceedings, provides representation to the foreign government seeking extradition through its prosecutors offices. To provide clarity as to

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7 Id.
8 Id.
9 There are of course many other scenarios which can occur in which, as in all events, the OIA provides guidance as to the proper procedure.
this aspect of the extradition process, the US often specifies through the terms of the treaty, or through other forms of diplomatic agreement, that it will provide such representation. Having a United States prosecutor represent the foreign government is of great import in that it provides the Requesting State with a representative experienced in US law and serves to avoid errors that would result in costly delays. In the not too distant past, inasmuch as the United States was not a party to the extradition proceedings, the consulate of the country seeking extradition actually hired American lawyers to represent their interests before the court. The far more prevalent practice is that now US government prosecutors handle that task with assistance from OIA. This 1) streamlines the process and 2) makes the cost of extradition more reasonable.

**Appeals From The Court's Decision** -- One of the most often criticized aspects of any legal process is the amount of time consumed between the beginning of the procedure and the accomplishment of its final step; in this case, the time from which extradition is requested until the time the fugitive is returned or the request is denied. One of the methods by which that time is shortened in extradition proceedings in the US is the absence of any appeal as to the certification of extraditability by the court. The court's finding that a person is legally susceptible to extradition cannot be directly appealed.\(^{10}\) Once such a finding is made by the court, the matter is then referred to the Secretary of State for her final decision as to whether the subject will be surrendered. Because the United States federal judicial system contemplates appeal by right to the Federal Appellate Courts and possible appeals to the Supreme Court of the United States under specific circumstances, limiting the right to appeal of the original decision in extradition matters saves a great deal of both time and expense.

**Procedural Rules In Effect In Extradition Proceedings** -- The nature of extradition as characterized under United States law allows for considerable savings in terms of time where extradition is involved. Under the United States' understanding, extradition is a matter not wholly criminal nor completely civil. It is in fact described as *sui generis* (a matter unto itself) and as such, procedures surrounding its execution are likewise unique. In

\(^{10}\) The matter may be attacked collaterally through *habeas corpus* however that process and its ramifications are beyond are purposes here.
that case, the rules of procedure regularly employed in matters before the federal courts of the United States are not applicable to extradition proceedings.11 Because extradition is not regarded in the same light as are criminal proceedings before the courts, it is considered that the safeguards normally surrounding such proceedings are not necessary in extradition matters. Likewise, because of the status of extradition as a *sui generis* proceeding, the rules of evidence ordinarily used in criminal matters before US courts are also not applied in extradition matters.12 Finally, in criminal matters before US courts, the device of discovery is ordinarily available to the defendant. Again, because of the legal characterization of extradition under US law, discovery is not available to the subject of an extradition proceeding. Thus, with the position under US law that the facts proffered in the extradition documents filed by the Requesting State must be accepted at face value, there are few if any factual issues to be resolved in the process in the courts of the US. This being the case, there is no justification for discovery and the time that vehicle usually requires.13 With the elimination of these three procedures from the various hearings, substantial savings in terms of time and expense are avoided in extradition proceedings with no violation of due process standards as defined under US law.

**Waiver Of Extradition or Consent To Be Extradited** -- In a process known as "simplified extradition" under some extradition treaties, an individual is advised that he may waive his various rights under the rules of extradition and consent to be returned to the Requesting Country without the need for further judicial proceedings. This process is explained to a subject by the court, his counsel, the prosecutor or all three prior to the time the subject is permitted to sign a written waiver. Securing a written waiver supplies to the States involved the advantage of an obvious saving in time and expense that would otherwise be used in conducting formal proceedings. Where a waiver is obtained the subject can be returned immediately without further formal intervention. The advantage to the subject lies in the fact that he returns to the country seeking his appearance and can more quickly attend to his defense. The disadvantage is that some of the possible protections attendant upon formal extradition are waived where this avenue is taken. In

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11 Federal Rules of Criminal Procedure, Rule 1(a)(5)(A)  
12 Federal Rules of Evidence, Rule 1101(d)(3)  
13 Gill v Imundi, 747 F. Supp 1028; Surrender of Ntakirutimana, 988 F. Supp. 1038 (SD. Texas 1977)
a similar vein, a subject may consent to be extradited wherein he allows the judge, with his consent, to certify him as extraditable without further court appearance. Again this method saves time and expense however, it preserves the subject's rights to various extradition defenses, most particularly the Rule of Speciality.

**Bail (Pre-trial Release) --** One of the most disconcerting aspects of extradition is the prospect that the subject may escape the jurisdiction of the Requested State only to have to be pursued again thus causing further expense and delay. Likewise, it cannot be gainsaid that whenever a fugitive is aware of pending detection and detention, he will take measures not only to escape but also to find further safe haven for his ill-gotten gains. Thus the issue of bail pending extradition proceedings is an important and sensitive aspect of extradition practice.

As previously mentioned, extradition in the United States is not considered to be a strictly criminal offense to which the various constitutional and statutory rules regarding pretrial release must apply.\(^\text{14}\) It is the case in the United States that a presumption favoring bail in extradition cases does not exist and that the opposite is in fact true.\(^\text{15}\) In addition to which it is urged that bail should be denied in extradition proceedings absent "special circumstances."\(^\text{16}\)

**Provisional Arrest --** Oftentimes in matters involving fugitives, it is necessary to act with urgency to insure that a fugitive in transit between countries, one who is likely to intimidate or harm witnesses or one who will dispose of his assets when threatened with arrest will not be able to succeed in these efforts prior to the time a formal extradition request can be prepared and delivered. This is most often accomplished through the provisional arrest of these individuals; arrest provisional upon the condition that a formal extradition request will follow. To avoid legal disputes and the possibility that this mechanism will not be available, the US includes specific provisions in all modern extradition treaties allowing for provisional arrest where urgency is demonstrated. By employing this method, the

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\(^{14}\) T.18 USC Sec. 3142  
\(^{15}\) Beaulieu v Hartigan, 544 F.2d 1,2 (1st Cir. 1977)  
\(^{16}\) United States v Williams, 611 F2d. 914, 915 (1st Cir, 1977)
chances of further flight by an offender before formal extradition can be accomplished are lessened.

**Certification of Documents** – The authentication of documents from foreign countries is often one of the most problematic and time consuming issues in international cooperation. The US has greatly reduced this problem by statutorily eliminating the usual courtroom challenges to these documents by statutorily requiring that in all extradition cases where it is certified by the US consular officer that such documents would be received for the same purposes in the Requesting Country, these documents “shall be received and admitted as evidence…” Thus one of the most time and labor intensive processes in international litigation is made more efficient and less costly.

**Summary** -- As extradition remains one of the most important mechanisms in international cooperation, the effort to insure that it is constructed and utilized efficiently is paramount under the UNCAC. While recognizing that extradition is a legal process and thereby subject to the constraints of due process under the major legal systems of the world, great strides towards a more efficient process can be made by simultaneously recognizing that this process is not one in which guilt or innocence is determined, but one meant to insure that the courts of the offended government will ultimately make such a determination. By regarding the extradition process in that juxtaposition, both efficiency and fairness can be accommodated while at the same time allowing a State Party to meet its obligations under Article 44(9) of the UNCAC.

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17 T.18 USC Sec. 3190