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Notes

1 In this article, except where the context otherwise requires, the feminine and masculine are interchangeable.
2 *University of Warwick v Sir Robert McAlpine* and others, 42 BLR, p 1, at p 22.
3 Judgment of Lord Denning MR in *Whitehouse v Jordan* in the Court of Appeal [1980] 1 All ER p 650, at p 655f.
4 *Whitehouse v Jordan* [1981] 1 All ER p 267, at p 276a.
5 *Palmer v Durnford* (a firm) [1992] 2 All ER, p 122.
6 *Whitehouse v Jordan* [1980] 1 All ER at p 656a-b.
7 Ibid at p 654e.
8 Ibid at p 662j.
9 Ibid [1981] 1 All ER, at p 270j.

CRIMINAL LAW

Internationalisation of Crime in Poland: Are Effective Defences Available in Extradition Cases?

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Introduction

Poland's transformation from a centrally planned economy to a market-oriented system has complex implications for all areas of Polish law, including international criminal cases. In terms of models to assist the development of a legal infrastructure to support and complement changes in the economy, Eastern Europe has little to offer and the considerable experience of Western Europe is not easily adapted to the Polish situation. A recent World Bank study[2] accurately observes that one role of the law during a transition period is to provide the necessary legal and institutional framework for privatisation, essentially to stipulate what is permitted and what is forbidden, to define property rights, and to establish a stable framework within which the economy can function without undue administrative and political interference. But to be effective, law reform in Poland must recognise the broad range of changes that have accompanied the introduction of a free market, not the least of which are changes in the criminal activities and movements of offenders.

During the current period of growing economic interdependence between Poland and other countries, an increasing number of criminal cases coming to the attention of Polish criminal justice authorities have international aspects. For example, in 1992, approximately 400 foreigners, one third of whom come from the Commonwealth of Independent States, were detained in Polish prisons, either under sentence or awaiting trial. However, only ten extradition requests were made to Poland by other states and only a dozen were made by Poland during the same period.[3]

The numbers suggest that loopholes may exist in Poland's national legal arrangements. In fact, how extradition cases should be handled under Polish law is ambiguous and potentially contentious. This is especially true regarding the protection of human rights within the framework of international cooperation. Recently, the existing juridical gaps have given rise to controversy in several cases where neither the interests of the state nor the rights of the alleged offenders were adequately observed.

In order to invite detailed examination of this specific area of criminal law, this article describes three recent extradition cases. In future, it is likely that the number of criminal cases with international implications, which may involve extradition, will continue to increase. The recent cases point to a need to establish clear legal means for criminal cooperation between Poland and other states that are consistent with international obligations to protect human rights. Hopefully, the issues raised in the cases below will encourage countries in transformation to develop modern laws to address crime problems, which will protect society through the efficient operation of criminal justice systems and guarantee the rights of individuals.

Trafficking in arms (Poland-Germany-US)

A group of seven people, one American and six Poles, was reportedly arrested in Frankfurt-am-Main, Hesia, Germany, on 10 March 1992 on charges of attempting to smuggle weapons to Iraq. The arrest operation, code named '*Sting*', was prepared by agents from the US customs service who from the beginning of negotiations purported to represent the interests of an Iraqi party. According to the news media reports, the contract exposed by the American agents provided for the sale of 105,000 Kalashnikov machine guns, 4,000 RPG-7 antitank grenade launchers, 1,000 Striela air rockets and 200

rocket launchers — all amounting to a total value of US $ 50 million.[4]

In the absence of an extradition treaty between Poland and Germany, the Polish authorities asked Germany through diplomatic channels to turn over the Polish suspects invoking the principle of reciprocity. In pursuance of the extradition treaty between US and Germany, the American authorities prepared a request for extradition of all the suspects involved allegedly in violating the United Nations sanctioned embargo on the sales of weapons to Iraq.[5] The German authorities, following the opinion of the Supreme Court of Hesia (*Oberlandesgericht*), decided to extradite the suspects, despite repetitious requests of the Polish authorities to turn them over to Poland. In the meantime, the German attorneys of some of the suspects brought an appeal before the German Constitutional Tribunal (*Verfassungsgericht*) claiming that basic constitutional rights of their clients had not been observed, eg the attorney of one defendant had reportedly only one hour to examine the defendant's file.[6] Five Polish citizens were extradited to the US very quickly and one was returned to Poland after a protracted diplomatic exchange between the US and Germany on the one side and Poland-Germany on the other side.

Cashing in on double interest rates (Poland-Israel)

Two owners of a dynamic Polish company (*Art 'B'*) with highly diversified operations, used slow (taking up to one week) postal transfers of the money borrowed from 19 commercial banks, with 118 branches, while they transferred company funds the same day by their own transport, including cars and helicopters.[7] Because of the alleged complacency of some bank officials and poor telecommunications, the said company, practising an old 'floating' technique, forbidden in more developed banking systems, was reportedly able to receive double interest rates for the same money deposited on current accounts (*á vista*) with a 12 per cent interest rate. Figures of some US $350 million were considered in some damages estimates as the loss to the commercial bank which credited the company and, ultimately, to the central bank which guaranteed the transactions during the transfers. Both owners left Poland for Israel, with which Poland has no extradition treaty. As in the case above, Poland asked Israel to extradite them on the basis of the principle of reciprocity. One of them had acquired Israeli nationality and another owned a sizeable action portfolio in an Israeli state petroleum company, but both reportedly declared that they were nevertheless willing to return to Poland and face the charges, provided that they would not be arrested pending the outcome of the trial. In the meantime, the suspects invited their Polish attorneys to Israel for consultations. The issue of extradition seems to have stalled.

Filing false tax returns (Poland-US)

On 2 February 1992, Polish authorities arrested the owner of a successful Polish private bank, pursuant to a request by the US under a 1927 extradition treaty between Poland and the US. According to media reports, the suspect left the US in 1987 for Austria and later for Poland, after pleading guilty to filing false tax returns to evade taxes and promising to pay New York and Federal tax authorities close to US $5 million.[8] The US-Poland treaty does not provide for the possibility of extradition for tax crimes unless interpretation of the treaty was stretched. Reportedly, American request for extradition initially quoted tax crimes. The extradition request was later extended to cover forging or falsifying documents. According to suspect's attorney, the American authorities initiated his prosecution for *assistance* in falsifying the documents by his partner. Both, the suspect's attorney and Polish ombudsman argued that there were doubts concerning double criminalisation of the offence in question.[9] The suspect's attorney raised this matter before the Supreme Administrative Court and the ombudsman with the Attorney-General who is also the Minister of Justice. The suspect's attorney acted on the assumption that the question of the suspect's extradition is an administrative decision and therefore he had the right to appeal to the Supreme Administrative Court. The Attorney-General did not wait for the verdict of the Supreme Administrative Court nor he acted on ombudsman's request but ordered to proceed with the suspect's extradition which ended with his escorted flight to the US.

Areas for legal assistance

Leaving aside other legal implications of the above cases, there remains the question of the legal assistance which suspects are entitled the under international criminal law, and the legal consequences when their right of defence is not fully or adequately observed. The last case of extradition involving filing false tax returns offers most suggestions in the above terms, while the implications of the other two cases provide the basis for more general observations. It appears that in the extradition case, although quite an elaborate legal defence work was performed, the international implications of the extradition may still need to be more fully explored.

Poland is a party to the International Covenant on Civil and Political Rights and its First Optional Protocol allowing for individual complaints. Article 13 of the Covenant requires that expulsion of aliens may follow after exhausting remedies provided by the domestic law. In the case *Giry v Dominican Republic*, the United Nations Human Rights Committee (HRC) noted that 'expulsion' should be broadly interpreted to include 'extradition'. In the case *Hammel v Madagascar*, the HRC added that these remedies must be 'effective'.[10] In light of the above action of the Attorney-General the remedies may be regarded as not 'effective'. Moreover, in the individual opinion on the *Giry* case written by four HRC experts, they pointed out that his extradition should have fallen 'within the competence of administration'.[11] By acting on the grounds of the extradition treaty, it may be argued that the Attorney-General took a problematic, if not controversial decision.[12]

In sum, it may also be argued that under the Optional Protocol to the Human Rights Covenant the rights of the suspected alien provided under article 13 were not fully observed by Poland. First, because the remedies were not

'effective', secondly because the extradition order should have had an administrative nature and not a criminal law nature. In the end, if the HRC interpretation were accepted, compensation may be sought by a victim of unlawful arrest (art 9 §5 of the Covenant).[13]

In the '*Sting*' and '*Art B*' case, when only the will of a requested State determines the status of the alleged offender, the role of the attorney is even more difficult, as no extradition treaties or general principles of international criminal law exist, the interpretation of which can give firmer ground to legal action in defence of the offender's rights. The older treaties (like those signed between the US and Poland and the US and Austria) rather marginally addressed 'white collar' crimes and are not really suited to serve in combating the current international crime scene where money laundering operations involve very sophisticated types of crime not covered in those treaties. Moreover, in the absence of treaties, or because of their antiquated contents, countries are tempted to 'take the law into their own hands', as reportedly was the case of the abduction in Poland by Ukrainian militia of an Ukrainian suspect wanted for homicide and robbery,[14] or as illustrated by the US Supreme Court decision in *US v Alvarez-Machain*.[15] In such cases the rights of the defence are so seriously compromised, that the process of delivering justice can hardly be rectified by invoking international remedies, if at all.

Conclusion

Neither extradition treaties nor extradition on the basis of reciprocity give any special consideration to the rights of offenders. While it goes without saying that they are not designed to address such rights, the question of extradition nevertheless discloses an extremely vulnerable juncture between international and domestic criminal law in which the offender may be bound to lose out.

The Polish-American extradition case involving filing false tax returns suggests the need for a more comprehensive and in-depth review of the interaction between domestic and international legal remedies.[16] While, theoretically, both types of remedy make the right to defence a viable instrument in strengthening the rule of law, in various other cases other overriding priorities, not necessarily of a legal nature, may render such a legal defence not 'effective' or possible in the first place.

At the national level, financial exigencies clearly limit possibilities of legal defence to those foreign offenders who cannot afford to have attorneys of their choosing, as is the case of some foreign offenders kept in Poland and some Polish suspects kept in the US. Access to legal defence for offenders with a better financial standing may nevertheless be constrained because of political pressures exerted on or by the requesting or requested State. In such cases expulsion or extradition orders may fall short of required procedures. In those and other cases observance of the rule of law may be jeopardised, especially when democratic judicial guarantees are either ignored or not fully respected.

At the international level, more checks and balances in international criminal law are needed to make extradition proceedings more amenable to the requirements of due process which should govern domestic criminal legislation and courts. First, there should be attempts made to pursue a legal defence despite various constraints. When the criminal defence lawyer cannot enter the case, there may be an ombudsman or other party eligible to bring a motion before the competent court. Secondly, it would definitely be in the interest of all criminal justice professionals to work towards improving and modernising extradition laws and procedures to make the legal situation and rights of the parties concerned clearer than now. In attaining checks and balances, there is a place for national and international legal associations. Bilaterally or multilaterally they could encourage, following on the United Nations 'Model Extradition Treaty'[17] or other relevant examples, to work on new draft extradition treaties or review the old ones. As a result of that process, through domestic and international channels, those associations could invite attention of justice officials to their proposals. Thirdly, and as emphasised in international fora,[18] in the case of conflicting obligations stemming from international criminal law assistance treaties and human rights conventions, the provisions of the latter should prevail. This would give criminal defence lawyers a strong legal argument in favour of their clients, so far not available. Fourthly, and with reference to the emerging practice of abductions, such violations should be recognized as either a legal bar to prosecution or a cause for civil liability in respect of the person concerned and the state whose sovereignty had been violated, or both.[19]

While conflict of interests in the drafting or review process is probably unavoidable, the *de lege ferenda* implications of recent extradition cases in Poland suggest that it is better to have such a conflict aired before the law is enacted than to have a bad law or no law at all and the problem of ineffective legal assistance.

Notes

1 Address for correspondence: Schwemmäckergasse 54, 1210 Vienna, Austria. The authors wish to thank Ms Marcia V J Kran, Crime Prevention and Criminal Justice Branch, United Nations Office at Vienna for her views on an earlier draft of this paper. Those views, nor the views expressed by another staff member of the Branch, co-author of this article, do not necessarily represent the views of the United Nations Secretariat. Responsibility for the views expressed herein rests with them alone.

2 World Bank, Accounting for CPEs in Transition: System of Related issues in Measuring Economic Performance, Measurement of the Private Sector's Contribution, Final report by Bruno Dallago, March 1992, p 91 (mimeographed).

3 'Polityka', 27 August 1992.

4 See further, Arms Racket: Destination Iraq, Voice of Warsaw, 5 April 1992.

5 Treaty between the United States of America and the Federal Republic of Germany Concerning Extradition (in:) United States Treaties and Other International Agreements, Volume 32, in five parts, Part 2, 1979–1980, US Government Printing Office, Washington 1983, pp 1487–1547.

6 'Prawo i Życie' No 36, 5 IX 1992.

7 See further: 'Law & Practice in Poland', Newsletter vol I, No 1, Vienna, Spring 1992.

8 See further: *US Extradition Request of Polish Bank Owner Underscores Need to Modernise International Criminal Cooperation with Central and Eastern Europe*, International Enforcement Law Reporter, vol 8, Issue 2, February 1992, pp 66–68.

9 So as to conform with the rule of a double criminalisation of the act in question. It is interesting to note, however, that the United Nations 'Model Treaty on Extradition' proposes in art 3 that '[w]here extradition of a person is sought for an offence against a law relating to taxation (...), extradition may not be refused on the ground that the law of the requested State does not impose the same kind of tax (...) or does not contain a tax (...) of the same kind as the law of the requesting State (...).' Quoted in: *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal*

Justice, Sales No: E 92 IV 1, United Nations, New York 1992, p 51. See also Sharon A Williams, The Double Criminality Rule and Extradition; A Comparative Analysis, Nova Law Review, vol 15/1991, pp 582–623.

10 Report of the Human Rights Committee, General Assembly (GA) document A/42/40, vol II, §19.2.

11 Report of the Human Rights Committee, GA document A/45/40, p 42.

12 To confirm this point, in the third periodic report of Poland to the Human Rights Committee, the Deputy-Minister of Justice of Poland explained that '[e]xpulsion of an alien from Polish territory was ordered when there was clear proof that the person concerned acted against the interests of Poland, had been convicted of an offence, had infringed Customs regulations or posed a threat to law and order in a manner specified in the Code of Administrative procedure. The expulsion order was signed by the voivod (provincial governor); appeal could be made to the Ministry of Interior and a complaint brought *before the relevant administrative court* (emphasis added)' (CCPR/C/SR 1104, §27, It should be noted, however, that by broadening the notion of 'expulsion' to include 'extradition', the HRC interpretation may lead to a conflict of two procedures: of extradition, as regulated under criminal procedure (or treaty) law and that of expulsion, as regulated by administrative law. The former procedure is regarded by some scholars as the only one applicable. See, eg L Gardocki, Zarys prawa karnego międzynarodowego (An Outline of International Criminal Law), Państwowe Wydawnictwo Naukowe, Warszawa 1985, p 181.

13 As, however, the Covenant does not specify what sort of compensation it may be and the judicature of the national courts varies in this respect, the compensation may be symbolic.

14 'Rzeczpospolita' No 201 of 27 August 1992. For a review of various forms of bilateral law enforcement co-operation see L Gardocki, op cit, pp 161 and 194–202. None of these forms (ie police delivery of an alien suspect to police of suspect's country or transfer of proceedings) practised in Poland is sufficiently close to exercising in its territory the right of pursuit by police of another State, as was in the case referred to above. Negotiations are, however, underway, to improve transborder police co-operation. See further: J Swieczyński, B Zając, Wojska wyszły, banda weszła (*The Army left, the gang entered*), Prawo i Życie No 9 of 27 February 1993, p 5.

15 See further: Organisation of American States Issued Opinion Declaring Kidnapping in *Alvarez-Machain* a Violation of International Law, International Enforcement Law Reporter, Volume 8, Issue 8, August 1992, p 306.

16 See Peter Müller, Protection of Human Rights in the Administration of Criminal Justice in Central and Eastern Europe and the Soviet Union, International Legal Practitioner, March 1992, pp 18–20.

17 See footnote 9.

18 See, for instance, Resolution of the International Association of Penal Law (AIDP) on Regionalisation of International Criminal Law, adopted in Helsinki, Finland, at the AIDP preparatory colloquium, 3–5 September 1992.

19 As proposed at the recent AIDP colloquium referred to above (footnote 18). See also Donald K Piragoff and Marcia V J Kran, The Impact of Human Rights Principles on Extradition from Canada and the United States: The Role of National Courts, Criminal Law Forum. An International Journal, Winter 1992, vol 3, No 2, pp 225–270.

PERSONAL TAX AND ESTATE PLANNING

A Case Study on Individual Tax and Estate Planning, Wills, Trusts and Succession — The Swiss Position

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The following paper was presented as part of a case study on 'The Wealthy Family' conducted at the International Bar Association's Biennial Conference in Cannes, September 1992. For a full report of the session, see the March 1993 edition of the *International Legal Practitioner*.

Questions posed in the case study

Fred Wiley from Euranasia is interested in investing up to $10,000,000 in Switzerland to purchase a farm or business. He thinks that he might like to migrate there one day, but his married children have no such intention. He asks for advice on the following:

(a) What considerations should he bear in mind in regard to taxation?

(b) What considerations should he bear in mind in regard to estate planning and testamentary dispositions?

Taxation

Company taxation

The first advice to Mr Wiley ('Mr W') is which Canton to chose for the incorporation of a company to undertake the business and which Canton for his personal residence which need not be the same. Mr W's business interests in Switzerland should be held through a company registered in Zug, Canton of Zug. He would be the sole shareholder with bearer shares and Managing Director (with two Swiss nominee Directors).

We assume that the company would earn an annual net profit of Sfr 240,000. Its annual tax charge, also assuming capital stock and reserves of Sfr 2,000,000, would be with Federal and Cantonal/Communal tax combined Sfr 51,525 or 21.5 per cent. We further assume that the company would pay an annual gross dividend of Sfr 50,000 less the 35 per cent Federal withholding tax. A