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I. Review of Foreign Laws

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I. Review of Foreign Laws

The selection of national law summaries which follows is designed to enable the reader to survey the spectrum of domestic laws governing jurisdiction and judicial assistance. The reader may also find the summaries to be a useful starting point for further research. While the summaries vary somewhat in scope and degree of specificity, the differences are attributable to a desire to provide reasonably authoritative—rather than speculative—synopses of the law.

The Michigan Yearbook of International Legal Studies gratefully acknowledges the kind assistance rendered by the embassies of the Federal Republic of Germany, France, the Netherlands, Switzerland and Thailand.

AUSTRALIA

Law


Synopsis

In Australia, procedures for extradition and obtaining or supplying evidence for transnational criminal matters are governed by two closely related acts, the Commonwealth Countries Extradition Act and the Foreign States Extradition Act. Under these statutes extradition may sometimes be accomplished without the benefit of a treaty. In the case of Commonwealth countries, a treaty is never necessary. Rather, section 8(2) of the Commonwealth Countries Act provides for extradition to all Common-
wealth countries recognized as such by Australian regulations. Non-Commonwealth countries may obtain extradition under the Foreign States Act if extradition relations between Australia and the foreign state were established under the British Extradition Acts of 1870-1935, if Australia and the foreign state have an extradition treaty in force or if the foreign state’s extradition laws give Australia reciprocal extradition rights. Australia’s provision for extradition without a treaty was enacted in 1974 in response to the problems created by informed fugitives who fled Australia to countries not having an extradition treaty with Australia. Another method employed by Australia to close extradition loopholes is to exert diplomatic pressure on the foreign state to exercise its deportation laws in order to send the alleged offender back to Australia.

The procedure to be followed when the Australian Government receives an extradition request is substantially the same whether the requesting country is a Commonwealth country or other foreign state. The decision-making officials do have slightly more discretion in the case of extraditions to Commonwealth countries, however.

Under both statutes, the Australian Attorney-General first must receive a request to surrender the fugitive from the requesting country. The Attorney-General in most cases will then notify a magistrate of the request and, if the fugitive is at large, order the magistrate to issue a warrant for the fugitive’s arrest. The Attorney-General, however, may refuse to notify the magistrate and not take further action on the request if in his opinion the fugitive is not liable to be surrendered to the requesting country. A fugitive is not liable to be surrendered if, for example, the dual criminality requirement of Australian law is not satisfied or if the fugitive is not accused of an extraditable crime. In addition, the Attorney-General may refuse to notify the magistrate if there are substantial grounds for believing that the foreign state made the extradition request for the purpose of prosecuting or punishing the fugitive on racial, religious, or political grounds. If the requesting country is a Commonwealth country, the Attorney-General may refuse under section 11(2) of the Commonwealth Countries Act to notify the magistrate if he is satisfied that the request is trivial, made in bad faith or unjust due to the passage of time since the alleged offense occurred.

If the Attorney-General decides to notify the magistrate regarding the extradition request and the fugitive is apprehended, the magistrate must hear evidence and determine that the fugitive is charged with an extradition offense and that the requesting country has established a prima facie showing of guilt. Where the requesting country is a Commonwealth country, section 16 of the Commonwealth Countries Act requires the magistrate to determine to his satisfaction that the request is not trivial, made in bad faith, or unjust due to the passage of time since the alleged offense
occurred. The magistrate’s inquiry thus duplicates that made by the Attorney-General before notifying the magistrate. When and if the magistrate finally determines that the fugitive should be extradited, the fugitive has recourse to the Australian courts by petition for writ of *habeas corpus*.

In cases where a fugitive has fled Australia the Attorney-General requests extradition from the foreign state. Section 20 of the Commonwealth Countries Act and section 21 of the Foreign States Act do not require that the fugitive be charged or convicted of an extraditable crime; rather, mere suspicion is sufficient. Constitutional due process rights, however, protect the fugitive from abuses. When submitting and receiving extradition requests, Australia adheres to the longstanding British policy of refusing to differentiate between aliens and Australian nationals.

The Commonwealth Countries Act and Foreign States Act also provide for the free flow of evidence pertaining to transnational criminal matters. Under section 33 of the Commonwealth Countries Act and section 26 of the Foreign States Act, documented evidence and testimony are admissible in Australian criminal cases, if authenticated by a judge, magistrate or officer of the foreign state. Similarly, the Australian Attorney-General may authorize a magistrate to take evidence in aid of a trial in a foreign state if requested to do so by that foreign state.

**BRAZIL**

Law


*Estatuto do Estrangeiro*, reprinted in *Vade-Mecum Juridico* at 266-76 (1982).

**Synopsis**

Article 4 of the Brazilian Penal Code adopts the territorial and objective-territorial principles as the basis for jurisdiction with respect to crime. Article 5 of the Penal Code lists the crimes to which Brazilian law applies extraterritorially: crimes against the life or liberty of the President of the Republic; crimes against the monetary system or the security of the union, the states, or the municipalities; crimes against federal, state, or municipal property; and crimes committed by civil servants in violation of the public
trust. For these crimes, the offender will be punished under Brazilian law regardless of whether he has been absolved or condemned abroad.

In addition, Brazil exercises extraterritorial jurisdiction over crimes committed elsewhere that Brazil is obligated by treaty or convention to punish and crimes that are committed abroad by Brazilians. For these two categories of crime, Brazilian law will be applied extraterritorially if: the offender has entered Brazil; the act is punishable in the country where it was committed; the crime is one of those for which Brazilian law authorizes extradition; the agent has not been absolved or punished abroad; and the offender has not been pardoned abroad, or is not immune from punishment under Brazilian law or the law of the place where the crime was committed, whichever is most favorable. Brazilian law also applies to crimes committed abroad by foreigners against Brazilians if, in addition to the above conditions, extradition was neither requested nor denied to the country where the offense was committed, and there has been a petition for prosecution by the Ministry of Justice.

Brazil has signed extradition treaties with only thirteen countries. It will, however, grant extradition to a country that has not signed an extradition treaty if all the requirements of the Brazilian extradition statute are met and the requesting state guarantees reciprocity.

The Brazilian extradition statute sets forth eight cases in which extradition will not be granted: when the requested person is a Brazilian except if nationality was acquired after the facts giving rise to the extradition request; when the underlying act is not a crime under Brazilian law or under the law of the requesting state; when Brazil has concurrent jurisdiction; when the Brazilian punishment for the crime is incarceration for one year or less; when the requested person is being prosecuted or has been absolved in Brazil on the same facts; when the statute of limitations in either Brazil or the requesting country has run; when the offense is of a political nature; and when the requested person would be prosecuted in the requesting state by an irregularly convened tribunal.

Under Brazilian law extradition is requested through diplomatic channels. The requesting state must present a petition containing an authentic translation of the defendant’s conviction or of an order for his preventative detention, information as to the defendant’s identity and the underlying facts of the offense, and copies of the requesting state’s relevant criminal laws. The Foreign Ministry relays the request to the Ministry of Justice, which orders the defendant’s arrest and presentation before the Supreme Federal Tribunal (SFT).

The defense to an extradition request must be based on a showing that the defendant is not the person named in the request, that the request is defective, or that extradition is illegal. If the SFT denies the initial extradi-
tion request, the defendant cannot be requested by the same state for the same offense. No appeal exists from the SFT's decision.

Delivery of the accused will be denied unless the requesting state guarantees that the defendant will not be punished for crimes not mentioned in the request, that the period of detention in Brazil will count toward the defendant's term, and that a death sentence will be commuted to life imprisonment unless Brazilian law also permits the imposition of capital punishment for the same offense. A state which is granted extradition must also give assurances that the defendant will not be delivered to a third state without Brazil's consent, and that political considerations will not aggravate any sentence imposed upon the extraditee.

Foreign letters rogatory are sent to Brazilian tribunals through diplomatic channels. To be acceptable, letters rogatory must contain an authentic translation of the request, a description of the assistance requested, and the signature of the requesting judge. Letters rogatory should first be submitted to the SFT for an order to execute the request (exequatur). Without the approval of the SFT, a lower court may refuse to honor the request if it does not conform to the documentary requirements or is of doubtful authenticity. Brazil will accept letters on all procedural matters but Brazilian law will normally determine the form of execution. Brazilians are permitted to give voluntary depositions before foreign consuls, even though such depositions are not considered valid under Brazilian law.

Secondary Sources

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CANADA

Law


Synopsis

Canada follows a rule of territorial jurisdiction in criminal matters, applying its law to conduct occurring within Canada and to conduct occurring outside of the country which has an impact within the country. While Canada does not object to use of the nationality principle of criminal jurisdiction by other states, Canada itself will employ such jurisdiction over its nationals only in instances of the most serious crimes such as treason. Once a fugitive is before a Canadian court, the question of whether or not he has been legally arrested and conveyed to Canada is not a consideration by which the jurisdiction of the court may be undermined.

Extradition from Canada is typically based upon treaty, though provision for extradition in the absence of a treaty is made in the Extradition Act. A foreign state initiates extradition from Canada by instructing its diplomatic mission in Canada to make a formal request for the return of the fugitive to the Department of External Affairs. The Department relays this request to the Department of Justice which in turn acts through the provincial attorney general’s offices in securing the fugitive’s arrest. The fugitive is then brought before an extradition judge, usually a county court judge, for a hearing.

The purpose of the inquiry is to determine whether there exists a prima facie case showing that the fugitive has committed an extraditable crime. No special treatment is accorded Canadian nationals in these proceedings. The fugitive has few defenses available to him during the extradition hearing, save for mistaken identity or a time bar. Canada does recognize the political offense exception to extradition. However, a recent U.S.-Canadian treaty, which may serve as a model for future extradition treaties, stipulates that hijacking and crimes against internationally protected persons will not be deemed political offenses.

If the judge decides to release the accused, there is no appeal of that decision, but the accused remains liable to renewed proceedings which can be initiated by the prosecutor. If the fugitive is committed to be extradited, no official right to appeal exists, but the Trial Division of the Federal Court may intervene via a prerogative writ and the Extradition Statute is explicit in allowing the accused fifteen days to apply for habeas corpus. No surrender of the fugitive may occur until a decision on either writ has been rendered. Moreover, the Minister of Justice may always intervene to either quash a proceeding or to refuse to surrender the fugitive, though both actions are infrequent. Procedures similar to, but less rigorous than those which accompany extradition are present in the rendition proceedings between Canada and a fellow Commonwealth country.

The Canada Evidence Act applies both to civil and criminal matters pending before a foreign tribunal. The Act allows Canadian courts to order
appearances, testimony under oath, and document production, when presented with the request of a foreign tribunal. Concomitantly section 27 of the Extradition Act provides that all of the fugitive's possessions at the time of his arrest may be returned with the fugitive to the requesting country, so long as there are no intervening rights of third parties over the property. All material collected under either the Evidence Act or the Extradition Act is first forwarded to the Department of Justice for authentication and then transmitted to the requesting country. Assistance in all facets of international judicial cooperation may be available from the Private International Law Section of the Bureau of Legal Affairs, within the Department of External Affairs.

Secondary Sources


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CHILE

Law

Código de Derecho Internacional Privado, arts. 436, 437 (1934), reprinted in II Códigos de la República de Chile (1937).

Código de Procedimiento Civil, art. 76 (7th ed. 1977).

Código de Procedimiento Penal (8th ed. 1979).

Chile will assert jurisdiction over any national or foreigner accused of committing a crime in Chilean territory, except in cases which are excluded by generally recognized rules of international law. The territorial principle of jurisdiction is extended to encompass crimes committed by nationals or foreigners on board a Chilean war ship anchored in the territorial waters of a foreign state, and crimes committed on board any Chilean vessel on the high seas.

Chile will also assert jurisdiction over persons accused of crimes committed outside of Chilean territory. Employing the protective principle, Chile will assert jurisdiction when a national or a foreigner "in the service of the Republic" is accused of crimes against the national security, extortion, fraud, bribery, espionage, misappropriation of public funds, or breach of trust while in the possession of government documents. Chile also employs the protective principle to assert jurisdiction over any person accused of crimes against the public health, and over nationals or foreigners found in Chile who are accused of counterfeiting Chilean currency, the official state seal, or instruments of credit issued by the state, municipalities, or public institutions.

Chile combines the nationality and protective principles to assert jurisdiction over crimes committed by diplomatic or consular agents in the exercise of their duties (funciones). The nationality and passive personality principles are employed with respect to crimes committed abroad by Chileans against fellow nationals. In the latter case, jurisdiction will be asserted only if the accused returns to Chilean territory without having been tried in the state where the crime was committed. Finally, Chile will invoke the universality principle of jurisdiction with respect to crimes constituting piracy, and will assert jurisdiction with respect to other crimes if required by treaty to do so.

Chile's rules governing extradition are set forth in Title VI of the Penal Procedure Code (Código de Procedimiento Penal). Although most extradition proceedings are based on bilateral or multilateral treaties, Chile may agree to extradite upon a promise of reciprocity by the requesting state in accordance with the principle of optimal extradition (extradicción facultativa). It is theoretically possible for Chile to extradite a national, but in practice it is highly unlikely. However, when Chile denies a foreign state's request for the extradition of a Chilean national, the accused is tried in a Chilean court. Chile will not grant an extradition request unless the acts alleged constitute a crime both in Chile and in the requesting state and are punishable by at least one year imprisonment in both jurisdictions.

The Penal Procedure Code does not include specific requirements as to
how the extradition process is to be initiated. However, the requesting state will usually begin the process by communicating with the Ministry of Foreign Relations. Upon receiving a request for extradition, the Ministry will forward it and any supporting documents to the Supreme Court. The President of the Supreme Court will require proof that the prospective extraditee is the same person who is accused (or convicted) of the crime; that the crime of which the prospective extraditee is accused (or convicted) is an extraditable crime, and that the accused actually committed the crime attributed to him. Once the requirements have been satisfied, an arrest order will be issued by the President of the Supreme Court.

While in custody, the prospective extraditee will be required to make a statement concerning his identity and his role in the crime attributed to him. Once the investigation has been completed, the record will be forwarded to the Public Ministry which will recommend that the extradition request be either granted or denied.

At this point a record of the entire proceedings will be forwarded to the accused who will have twenty days to reply before the President of the Supreme Court reaches his final decision. If the accused does reply, there will be a final hearing at which the agent of the requesting state, the accused, and a representative of the Public Ministry will be given an opportunity to be heard. Within five days of the hearing, the President will reach a decision which may be appealed to the whole Supreme Court. If the decision is not appealed, there will be an automatic review through a procedure called consulta. Whether review is by appeal or consulta, the Court will have before it all the relevant documents and records and will afford all of the interested parties an opportunity to make an oral argument. If the decision of the Court is to grant the extradition request, the accused will be removed to the Ministry of Foreign Relations, and from there will be turned over to the diplomatic agent who requested the extradition on behalf of the foreign state. On the other hand, if the Court denies the request the accused will be set free and the Court will communicate its decision to the Ministry of Foreign Relations by sending it an authorized copy of the opinion.

In general, a request to Chile for judicial assistance should be initiated by sending a letter rogatory through diplomatic channels to the court whose assistance is needed. However, this is not a hard and fast rule, and in some cases other means of initiating a request may be acceptable. When a letter rogatory is used, it should be drafted in the language of the requesting state and must be accompanied by a certified Spanish translation. In addition, the interested parties in the requesting state must appoint an agent to help carry out the request (que se encargue de las diligencias) and must assume financial responsibility for any costs incurred in the process.

There are two methods for obtaining testimonial evidence from Chile
for use in a foreign tribunal: a letter rogatory may be directed to the Chilean court in whose jurisdiction the witness is to be found, or diplomatic or consular agents of the requesting state may take the testimony themselves. These two methods may be used to take the testimony of nationals and foreigners alike. The success of the latter method, however, depends upon the voluntary cooperation of the witness. On the other hand, if the former method is used, Chilean procedure will be employed. Thus, a subpoena may be used if necessary, the witness will testify under oath, and the judge will elicit the witness' testimony by asking questions which have been formulated by the attorneys. The transcript of the testimony will be in summary form.

Although there are no special provisions in Chilean law pertaining to assistance in obtaining documentary evidence for use in a foreign court, in practice requests for such documents are sometimes granted by Chilean courts. Similarly, there are no specific provisions authorizing the Chilean courts to summon a witness to appear in a proceeding before a foreign tribunal. Nevertheless, since Chile regularly requests similar assistance from foreign courts in exchange for a promise of reciprocity, it is clear that Chile will grant such assistance.

Chilean courts will not enforce the criminal judgments of foreign courts, at least insofar as the judgments involve the imposition of a criminal sanction. They may, however, enforce a civil judgment arising in the criminal context if it was pronounced by a competent judge or tribunal and if Chilean notions of due process were satisfied.

All Chilean requests for assistance from foreign tribunals are sent through the Supreme Court, which forwards the requests to the Ministry of Foreign Relations. The Ministry of Foreign Relations in turn will generally send the requests to a Chilean diplomatic or consular representative in the requested State. The diplomatic representative will then seek the intervention of the appropriate tribunal.

Secondary Sources


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FEDERAL REPUBLIC OF GERMANY

Law

GRUNDGESETZ (W. Ger.)


Synopsis

Two important provisions in the West German Constitution apply to extradition. Article 16(2) provides that no German shall be extradited to a foreign country, and that persons persecuted on political grounds shall be granted the right of asylum. Article 103(3) provides that no one may be punished more than once for the same act.

The Federal Republic of Germany is a party to two Council of Europe Conventions, the Europe Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters. The Federal Republic of Germany has also signed bilateral agreements on extradition and judicial assistance with many non-European states. The bilateral extradition treaty between the United States and the Federal Republic of Germany is a typical agreement.

Under the provisions of the treaty, the parties agree to extradite persons who have been charged with an offense or who are wanted for the enforcement of a penalty for an offense committed within the territory of the requesting state. Extraditable offenses include the major crimes listed in the appendix to the treaty, as well as any offense which is punishable under the federal laws of the United States and the laws of the Federal Republic of Germany. Extradition will be granted for the prosecution of offenses which are punishable by imprisonment for a period exceeding one year, for the enforcement of a sentence of at least six months imposed for a prior conviction, and for any attempt or conspiracy to commit an extraditable offense. Article 4 incorporates the political offense exception while noting that murder of the Head of State or a member of his family will not be considered a political offense.

The treaty provisions on extradition of nationals are consistent with the German Basic Law. Under Article 7, neither party is bound to extradite nationals, though the requested state is bound to try to suspend naturalization proceedings in respect of a person sought until a decision is made on extradition. Article 8 prohibits the granting of extradition when the requested person has already been discharged or punished. In addition, extradition may be refused if the person sought is being proceeded against in the requested state for the same offense or if the offense is punishable
Requests for extradition must be sent through diplomatic channels and accompanied by all relevant information concerning the person sought and the text of the applicable law. In addition, a warrant for arrest or judgment must be submitted. Article 18 provides for a simplified extradition procedure where the person sought agrees to extradition. Decisions regarding extradition must be promptly communicated to the requesting state with reasons for refusal of extradition if the request is denied. If extradition is granted, surrender must take place within thirty days of notification of the requesting state. In addition, the Federal Republic of Germany and the United States have agreed in Article 23 not to re-extradite a person to a third state without the consent of the requested party.

The rule of specialty is incorporated in Article 22 of the treaty between the United States and the Federal Republic of Germany. Under this principle, neither country will prosecute or punish a person for any offense other than that for which he was extradited. Exceptions are made when the requested state consents to prosecution for other offenses and when the extradited person stays within the territory of the requesting state more than forty-five days after his final discharge.

Property which may be used as evidence or which has been acquired as a result of the offense and is found in the possession of the person sought must be surrendered if extradition is granted. Article 26 provides for transit of a person extradited from a third state through the territory of the contracting state for offenses extraditable under Article 2. Expenses involved in transporting the extraditee to the requesting state shall be borne by that state.

The provisions of the European Convention on Extradition are similar to the provisions of the treaty between the United States and the Federal Republic of Germany. Article 2 of the Convention provides that an offense can be excluded from the application of the Convention by reservation if the law of the party does not allow extradition for the offense. However, Germany has made no such reservation. Under Article 9 of the Convention, extradition will not be granted if final judgment has already been passed by the requested party or if proceedings regarding the offense have been terminated. The rule of specialty is codified in Article 14 of the Convention, and is subject to the same exceptions as the rule in the treaty with the United States. A request for a provisional arrest may be made by the party seeking extradition in cases of urgency. As in the treaty with the United States, the requesting party will be informed of the decision regarding extradition and given reasons for any rejection. In cases where extradition is granted, the requesting party shall be informed of the date, time, and place of the surrender. The European Convention on Extradition
supercedes any bilateral treaty between Germany and another contracting party.

Judicial assistance between the Federal Republic of Germany and other European countries is governed by the European Convention on Mutual Assistance in Criminal Matters. Under the Convention, the parties agree to provide the broadest possible measures of mutual assistance including letters rogatory, service of writs and records of judicial verdicts, appearance of witnesses, experts, and provision of extracts from judicial records, as well as any other kind of mutual assistance needed in a criminal proceeding. Assistance in the prosecution of nationals of the requested party is not excluded.

The parties to the Convention have agreed on several exceptions to the rule of compulsory assistance. No party is obliged to render assistance in cases of a military nature. Optional exceptions to the obligation to render assistance may be raised on a case-by-case basis where the offense alleged is of a political or fiscal nature, and in cases where assistance is likely to prejudice the sovereignty, security or other essential interests of the requested country.

Judicial assistance is also available to some countries with whom Germany has no bilateral or multilateral agreement. Assistance will be given to any country whose government, philosophy and legal system are similar to those of the Federal Republic of Germany. Both the Federal Republic of Germany and the other country must agree to give assistance on a reciprocal basis, and requests must be submitted through diplomatic channels. In general, when considering a request for judicial assistance which is not based on a treaty, the Federal Republic of Germany follows the same standards which govern judicial cooperation with other European countries.

Secondary Sources

COUNCIL OF EUROPE, EUROPEAN CONVENTION ON CRIMINAL MATTERS (1962).


France

Law


Synopsis

France recognizes the territoriality principle of jurisdiction, applying its law to criminal offenses even where only one element of the offense is committed in France. France also employs the nationality and passive personality principles of jurisdiction. Additionally, under the terms of Article 694 of the Criminal Procedure Code, French tribunals will assert jurisdiction over a foreigner who, outside the territory of the Republic, commits or is an accomplice to a crime against the security of the state or against French agents, diplomats, or consular officers, or counterfeits the state seal or national currency. French courts will exercise universal jurisdiction under Article L. 121-8-2 of the Civil Aviation Code when an offense is committed against an airplane, the passengers, or the crew of the airplane. Article 696 of the Criminal Procedure Code authorizes the exercise of universal jurisdiction in accordance with other international conventions which have been or will be ratified by France.

French extradition law is governed partly by the Law of March 10, 1927. The primary purpose of the Law is to enable France to extradite foreigners when the requesting state has not signed an extradition treaty with France. However, the law also applies when a treaty is totally or partially silent on an issue or inapplicable to the facts of a particular extradition case. The law provides that extradition from France will be granted only if the offense that is the basis of the request was committed in the territory of the requesting state by a subject of that state, or outside the territory of the requesting state by a foreigner when the offense is recognized as
punishable in France. Most international agreements concluded by France after enactment of the Law of 1927 contain a clause which achieves a similar result. These agreements provide that extradition will be denied if the offense for which extradition was requested was committed outside of the requesting state by a foreigner when the legislation of the requested state does not authorize the prosecution of similar offenses committed outside its territory by a foreigner.

Extradition procedure in France involves two phases. The first takes place in the Chambre d'Accusation and consists of judicial consideration of the possibility of extradition. In the second stage the executive decides whether or not to actually grant the extradition request. The prospective extraditee is entitled to the assistance of counsel throughout the extradition process.

The Chambre d'Accusation of the Court of Appeals of the jurisdiction in which the individual was arrested determines whether extradition is legally possible. In making this determination only the legal basis of the request is examined. Thus, the facts alleged in the request and the imputation of them to the accused are taken as established. The law does however allow a tribunal to recognize an obvious error in the identification of the accused and deny the extradition request.

One of the legal factors to be considered by the Chambre d'Accusation is the sentence which can be or is already imposed on the individual sought. If the individual is to be extradited for trial, the offense must be punishable by a sentence of two years or more for the extradition request to be granted. In the case of an individual who has already been convicted, the sentence imposed must be greater than two months or the extradition request will not be granted. Double criminality is also a requirement for extradition under Article 4 of the Law of March 10, 1927 and in every bilateral extradition treaty signed by France.

An order of the Prime Minister granting extradition can be appealed before the Conseil d'Etat by the individual who is sought for extradition, although the individual is frequently extradited before he has an opportunity to appeal. If the decision of the courts is to grant extradition, the government may nevertheless deny extradition. If the courts decide to deny extradition, the government is bound.

In the absence of an agreement providing for judicial assistance, requests for assistance must be sent through diplomatic channels. Articles 30 through 34 of the law of March 10, 1927 outline the procedure for executing letters rogatory, giving notice of procedural acts or judgments, and communicating documents of conviction, summons, or subpoenas.

When a letter rogatory is sent to the Ministry of Justice, it is transmitted to the appropriate tribunal where it is assigned to a judge d'instruction for execution. The judge d'instruction can delegate the powers to execute the
letter to a judicial police officer who then proceeds with the requested investigation or interrogation. A proces-verbal is established and addressed to the requesting authorities. The judge d'instruction can also refuse to execute all or part of the letter rogatory if the aim of the letter rogatory is contrary to the general principles of French law or the formal requirements of French criminal procedure. The President of the tribunal, the judge d'instruction or his designee are the only authorities competent to execute a letter rogatory. A foreign representative cannot undertake a pretrial motion or hearing on criminal matters in France. However, some mutual assistance agreements provide that foreign representatives can assist in the execution of a letter rogatory by the judge d'instruction or by the designated judicial police officer.

The decision to request judicial assistance regarding a criminal proceeding is within the competence of the judicial officers presiding over the prosecution. The letter rogatory must be transmitted to the French Ministry of Justice by the Procureur de la Republique. France adheres to a liberal standard regarding the admission of evidence in criminal matters. All evidence is admissible and is submitted for the consideration of the criminal judge, including evidence emanating from a foreign country. The general principles of the French judicial system are the only limit on the admissibility of such evidence.

French law prohibits the recognition of a foreign criminal judgment. Recognition is considered contrary to the territorial principle of criminal law because recognition would give the foreign criminal judgment effect outside the territory of the foreign state.

Secondary Sources

Letters from Francois Popffer, First Counselor of France to the United States to Michigan Yearbook of International Legal Studies (February 2, 1982).

INDIA

Law

INDIA PEN. CODE

Citizenship Act, 1955 (Act 57 of 1955)


Synopsis

Within a relatively short period of time following independence, India codified its law on matters relating to international judicial assistance in the criminal field. The critical statutory framework is provided by sections of the Indian Penal Code, the Indian Citizenship Act of 1955, and the Indian Extradition Law of 1962.

Section 2 of the Indian Penal Code incorporates into Indian law the established international law principle of territorial jurisdiction. Section 4 of the Code incorporates the nationality principle of jurisdiction.

The Indian Extradition Act of 1962 comprises the entirety of the statutory regulation on the subject. The 1962 Act supplements all extradition treaties, but does not displace them. It is not necessary for a country to have an extradition treaty with India in order to effect the return of a fugitive, but procedures will be determined in a slightly different fashion if there is no treaty. The only absolute pre-condition of an extradition proceeding, as set down in Sections 3(1) and 12(3) of the Act, is that the requesting state must have been identified by the Central Government of India as a state entitled to secure extradition and notice to that effect must be published in the Government Gazette. After that notification, procedure is determined according to whether the requesting state is a treaty state or a non-treaty state and whether the requesting state is part of the British Commonwealth. A requesting state may make an extradition request to the Ministry of External Affairs via its own representative to India or by contacting India’s representative in the requesting state.

The list of extraditable offenses cataloged in the 1962 Act will be resorted to in the absence of specific treaty language on the subject. The proceeding to determine whether the fugitive will be returned is primarily a judicial one, with some parallel authority in the executive branch. Once a request for extradition has been received, the Central Government may appoint a magistrate to conduct the inquiry, but can end the matter by refusing to do so. Once appointed, a magistrate may issue a warrant for the fugitive’s arrest. A temporary warrant of arrest may be issued prior to the appointment of a magistrate, but detention under such a warrant may not exceed three months. Evidence from both sides is accepted in the proceedings which follow arrest. Section 10(1) of the Act allows depositions and documents of non-Indian origin to be submitted to the proceedings.

Section 7(2) authorizes the magistrate to inquire whether the alleged offense is in fact a political one, and to review the motives of the requesting state. The principle of specialty is also incorporated in the Act. The magis-
trate will review the facts to determine if the demanding state's claim is
time-barred, and whether that state has produced a prima facie case of the
accused's guilt. Though no specific provision of the 1962 Act states that
an accused shall not be subject to double jeopardy, that principle is part
of the magistrate's consideration, owing to the broader demands of the
Indian Criminal Code. Though the 1962 Act does not provide for appeal
of the magistrate's decision, in the past the accused has succeeded in
gaining review by both the Indian High Court and the Indian Supreme
Court of an order to extradite.

If the accused is discharged by the magistrate, the Central Government
cannot review that decision. The Central Government can, however, con-
duct an independent review into the basis of an extradition order, and for
any of the reasons which the magistrate could have employed—political
offense, double jeopardy, etc.—it can refuse an extradition request. If the
Central Government chooses to enforce an order to extradite and issues an
order of shipment, the order must be carried out within two months. This
policy has also recently resulted in Indian Courts allowing an Indian sen-
tence to be set-off against time which a convicted criminal has spent in
detention abroad while awaiting extradition to India. India p'aces no spe-
cial restrictions on the extradition of its own nationals.

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JAPAN
Law
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Synopsis

The United States is the only country with whom Japan presently has an extradition treaty in force. The original treaty on extradition between these two countries was enacted in 1886 and revised in 1906. A full-scale revision of that treaty was made in 1977 and formal ratification was completed by the United States on December 13, 1979.

The new treaty greatly enlarges the scope of extraditable crimes. Under this treaty, extradition will be granted for any one of forty-seven enumerated offenses punishable by the laws of both Japan and the United States by death or deprivation of liberty for more than one year. In addition, any other offense not specified in the treaty which fulfills the requirements of double criminality is extraditable.

Extradition will be granted only if the requested state is presented with evidence establishing probable cause for the belief that the suspect committed the crime or that he was properly convicted by a court of the requesting party. Extradition will be denied for political offenses, in cases where the person sought has already been prosecuted by the requested party, and in cases where the requested state would be barred from prosecution or execution of punishment under its own laws. The requested state is entitled to refuse extradition when the person sought has been tried and acquitted or punished in a third state for the same offense for which extradition is requested. When the person sought has been prosecuted in the requested state for an offense other than the one for which extradition is requested, the requested party may defer his surrender until the conclusion of the trial and full execution of punishment. Neither state is bound to extradite its own nationals, but may do so at its discretion.

Sections 1 and 2 of Japan's Penal Code give Japanese courts jurisdiction over crimes committed by Japanese nationals outside of the country. Under article 6 of the Japan-U.S. treaty, consistent with Japan's domestic penal code, extradition may be granted for offenses committed outside the territory of the requesting state. Thus, extradition to Japan and prosecution of a Japanese national who has committed a serious crime in Europe and has fled to the United States is facilitated by the terms of the treaty.

Requests for extradition should be made through diplomatic channels. The request should be accompanied by documents that describe the identity of the person sought, the facts of the case, and texts of the applicable laws. The requested party bears the expenses incurred in detaining the
person sought, excluding transportation costs, which are paid by the requesting party. All physical evidence relating to the offense charged or the alleged offender will be surrendered if extradition is granted.

While no country other than the United States has a current extradition treaty with Japan, extradition has been carried out on a voluntary basis with countries with which Japan does not have a treaty. However, examples of extradition to and from Japan are relatively rare. From the beginning of this century Japan has extradited twenty-eight fugitives to other nations (of which ten were to the United States) and has received eight from other nations (four of which came from the United States). Although voluntary extradition is possible, Japanese legal scholars anticipate that Japan will seek treaties with other countries similar to the treaty with the United States.

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Law
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CONSTITUCION POLITICA, TITULO PRIMERO.

Synopsis
Mexico employs the territorial principle of jurisdiction with respect to all crimes that are within the competence of either the federal courts (tribunales federales) or the state courts (tribunales comunes). In addition, the Mexican Penal Code sets forth specific instances in which jurisdiction will be exercised on the basis of other principles. Article 2 provides for the exercise of jurisdis-
tion with respect to "crimes which are begun, prepared, or committed outside Mexican territory, but which produce or are intended to produce effects in Mexican territory." The same article also mandates the assertion of jurisdiction for "crimes committed... against [consular] personnel, when they have not been tried in the country where they were committed." Article 3 of the Penal Code provides for the assertion of jurisdiction with respect to continuous crimes (delitos continuos), when some element of the crime has taken place in Mexico. Mexico will assert jurisdiction over continuing crime regardless of the nationality of the accused.

Mexico employs the nationality principle and the passive personality principle to assert jurisdiction over crimes committed in foreign territory if the accused is in Mexico at the time jurisdiction is asserted, the accused has not been tried and sentenced in the country where the crime was committed, and the act in question constitutes a crime both in Mexico and in the country where it took place.

Mexico extends the territorial principle under Article 5 of the Penal Code to cover crimes committed on board Mexican ships on the high seas. It is irrelevant in such a case whether the accused is a national or a foreigner. Similarly, Mexico will assert jurisdiction over crimes committed on national warships in the territorial waters or port of a foreign country. This principle also encompasses crimes committed on board Mexican merchant vessels if the crime occurred in waters claimed by another country and the accused has not been tried in that country. In addition, Article 146 applies the universality principle to make membership in a pirate crew, or any act constituting piracy, a crime under Mexican law. The article applies equally to sea piracy and to air piracy.

Mexico's rules on extradition are set forth in the Extradition Law of May 19, 1897. Article 1 of the Extradition Law authorizes extradition with or without a treaty. If there is a treaty between Mexico and the requesting state, the rules of the treaty will govern the extradition process, subject to Constitutional limitations such as the prohibition against extradition of political offenders. In accordance with Article 32 of the Extradition Act, Mexico will grant extradition in the absence of a treaty only if the government of the requesting state promises reciprocity. Extradition without a treaty is governed by the provisions of the Extradition Law.

Article 2 of the Extradition Act stipulates that Mexico will only grant extradition for "intentional common crimes" (delitos intencionales del orden comun). The acts in question must be crimes both in Mexico and in the requesting state, and must be punishable by imprisonment of at least one year in the Distrito Federal and in the requesting state. Mexico will not extradite its own nationals as a general rule. However, extradition of Mexican nationals may be granted under Article 10 "in exceptional cases, at the discretion of the Executive." Similarly, Mexico will refuse to extra-
dite naturalized citizens, except in those cases where extradition is requested within two years of the date of naturalization.

Generally Mexico requires that extradition requests be made through diplomatic channels. However, in urgent cases the executive may provisionally imprison the prospective extraditee if the requesting country sends a written or telegraphed request containing the charge, assurance that the request emanates from a competent authority, a promise of reciprocity, and an assurance that a formal request—accompanied by proof of the facts and law upon which it is founded—will be forthcoming. If the Office of the Secretary of Foreign Relations (Secretaría de Relaciones Exteriores) does not receive the formal request and accompanying documents are not received within a "reasonable time"—in no case more than three months—the prisoner will be set free and may not be arrested again for the same offense.

Mexico requires that a request for extradition be supported by the following documents: (1) proof that a crime was committed, (2) proof of the identity of the accused, (3) evidence—if not proof—of the guilt of the accused, consistent with Mexican notions of due process, (4) the text of the foreign law that defines the crime in question and sets the applicable punishment, (5) an authorized declaration of the present validity of that law, and (6) a copy of the sentence, if one has been imposed by a court in the requesting state. All of these documents must be authenticated (legalizados) and, if they are in another language, translated into Spanish.

Once the Office of the Secretary of Foreign Relations has received the request and supporting documents, they will be forwarded to the district where the prospective extraditee is residing, or, if his whereabouts are unknown, they will be given to the district judge on duty in the capital, who will take charge of the proceedings and will remain in charge regardless of where the accused ultimately is found. When the judge receives the foreign government's request and an arrest order issued by the Secretary of Foreign Relations, he will pass the order for the arrest of the accused on to the local police authorities.

When the prospective extraditee appears before the district judge after arrest, he will be informed of the request and have an opportunity to examine the supporting documents. At that point he may raise any of three possible defenses to extradition: (1) he may argue that the request is contrary to treaty provisions or to the provisions of the Extradition law; (2) he may claim that he is not the person whose extradition is sought; and (3) he may argue that extradition in his case would violate one of the guarantees of the Mexican Constitution. These defenses must be raised within three days of the accused's appearance before the district judge and must be proved within twenty days. After the expiration of this period, the judge will set a time to hear the arguments of both parties, during
which he may consider *sua sponte* any of the three above-mentioned defenses which could have been, but were not, raised by the accused. After hearing the parties' arguments and considering all defenses, the judge will decide whether or not, in his opinion, the extradition should proceed. At that point, regardless of his opinion on the matter, the judge will remand the accused to the custody of the Secretary of Foreign Relations.

The Secretary of Foreign Relations makes the ultimate decision whether or not to honor the extradition request. In doing so, he is to consider, but is not bound by, the conclusions of the district judge. If the Secretary decides not to honor the request, the accused will immediately be set free. If the Secretary decides to honor the request, the accused will be so notified, and the Secretary will inform an agent of the foreign state of the decision and order the accused bound over to him. If the foreign state lets two months pass without taking custody of the extraditee and removing him from Mexico, the extraditee will be set free.

Mexico recognizes two procedures by which other countries may request assistance in obtaining testimonial evidence for use in foreign tribunals: through consular officials and by letters rogatory (*exhortos*). When the former method is employed, the witness' testimony is given voluntarily; there is no way to force an unwilling witness to cooperate with consular officials, nor are there any sanctions for false testimony. On the other hand, a witness may be required to make a declaration before a Mexican tribunal if a request has been made through a letter rogatory. In the latter case the form of the testimony will conform to Mexican procedure. Generally the format used is oral testimony given in response to questions put directly to the witness by counsel. In the absence of a request by one of the parties that the witness' answers be transcribed verbatim, the parties will receive a summary of the testimony.

Mexican law provides that letters rogatory may be sent through diplomatic channels, or mailed directly to the court whose assistance is requested or to the interested parties provided the documents have been authenticated (*legalizados*) by a Mexican diplomatic or consular representative in the requesting country. The documents must be translated into Spanish, and the translation must be approved by the opposing party. If the Mexican judge who receives the request is in doubt about his competence in the matter, he is required to consult with the Public Ministry. If he receives no response within three days, he will execute the request.

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THE NETHERLANDS

Law


Synopsis

The Extradition Act of 9 March 1967 contains the Netherlands’ law relating to extradition and other forms of international assistance in criminal matters. The Act was introduced in Parliament simultaneously with the European Convention on Extradition and the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters. The procedures and prerequisites for extradition contained in the Act conform substantially to the requirements of those multilateral treaties.

Article 2 of the Extradition Act states that extradition shall not take place except in pursuance of a convention. The Netherlands has adopted a double criminality rule, which states that extradition of a suspected offender may be granted for offenses punishable under the laws of the requesting state and of the Netherlands by imprisonment for a period of at least one year. Extradition of a convict for execution of a prison sentence will be granted if the sentence is for a period of at least four months confinement. The same procedures are applied to the extradition of suspects and convicts. Article 4 states that nationals of the Netherlands will not be extradited.
The Netherlands requires that requests for extradition be submitted in writing to the Minister of Justice. The request must be accompanied by an authentic copy of either an enforceable criminal conviction or an arrest warrant for the person claimed, a detailed enumeration of the offenses, the text of applicable regulations, and information needed for establishing the identity and nationality of the person claimed. If the Minister deems the submitted information inadequate, authorities of the requesting state will be offered reasonable time to supplement or correct the information.

When adequate documentation has been submitted to the Minister of Justice, the documents and the request for extradition are forwarded to the public prosecutor at the court of the district in which the wanted person is located. The public prosecutor will then order his arrest. A preliminary hearing must be held before the public prosecutor within twenty-four hours after the arrest. At the preliminary hearing the public prosecutor decides whether to order the person claimed remanded into custody to await an extradition hearing before the district court.

Within three days after receiving the request for extradition, the public prosecutor will apply to the district court for a hearing regarding the extradition request. The presiding judge will immediately set the time of the hearing, giving it high priority. If the person claimed does not have counsel, it will be provided. The court will investigate the identity of the person claimed, the admissibility of the request for extradition, and the propriety of granting it. Should the person claimed contend that he or she is not guilty of the offense, this contention will be investigated by the court.

The court will declare extradition impermissible only if the submitted documents are deemed insufficient, if the request cannot legally be granted, or if there is no reason to believe that the person claimed is guilty of the offenses for which extradition was requested. Thus, although Dutch extradition law rejects the requirement of \textit{prima facie} evidence of guilt, it does not permit persons to be deprived of their liberty if there is clear evidence of their innocence.

The court's judgment and recommendations concerning the extradition request will be sent to the Minister of Justice. Both the public prosecutor and the person claimed may appeal the district court's decision on a point of law to the Supreme Court. Any judgment made by the Supreme Court will also be sent to the Minister.

Upon receipt of a final judgment, the Minister will promptly consider the request for extradition. If the court declared extradition improper, the Minister may delay making a decision to allow the requesting state reasonable opportunity to submit additional documents in support of the request. If the request for extradition is granted, the person claimed will be promptly surrendered to the requesting state's authorities.
After the Minister of Justice has decided on the request for extradition there is no procedure for appealing that decision. In recent years, however, persons against whom a successful request for extradition has been made attempted to appeal the Minister's decision by making an application for immediate judgment against the State of the Netherlands to the President of the District Court in The Hague. Such persons claim that by making a specific decision granting extradition, the Netherlands has acted wrongfully against them. None of these actions have successfully prevented extradition.

Technically, the Minister of Justice makes the decision on the request for extradition. In practice, however, most of the 180 to 200 extradition cases dealt with per year are decided on behalf of the Minister by judicial personnel of the Department of International Criminal Affairs. Routine cases may be prepared by non-judicial personnel and decided by the head of the Department who is a lawyer. The public prosecutor, who is an attorney, makes the decision on extradition when the summary proceedings in Articles 41 through 45 are followed.

The Netherlands deals with requests for mutual assistance in criminal matters by referring to the procedures contained in existing treaties and the "International Legal Assistance" provisions of Title X, Book IV of the Code of Criminal Procedure. When the Netherlands requests judicial assistance from other countries it proceeds on the basis of existing treaties.

Article 552h of the Code of Criminal Procedure defines "requests for legal assistance" as a request to carry out or collaborate in an investigation; to supply documents, files or items of evidence; to provide information; or to serve or issue documents or notifications to third parties. Upon receiving a request, the public prosecutor of the district in which the request is to be executed will decide immediately on the course to be followed in complying with the request. Insofar as the request is founded on a treaty or convention it will be complied with as far as possible. Where the request is reasonable although not founded on a treaty or convention or otherwise made compulsory, the request shall be met unless such compliance would be contrary to a statutory regulation or a direction from the Minister of Justice.

Requests for assistance will not be complied with where there are grounds for suspecting that the request has been made to prosecute or punish the suspect for his religious or political beliefs, nationality, race or ethnicity. The Netherlands will deny requests that are irreconcilable with principles of the Criminal Code or made in conjunction with an investigation into an offense already being prosecuted in the Netherlands.

Technically, the legal basis for permitting a representative of a requesting state to be present during the taking of testimony in aid of a foreign prosecution is to be found in a treaty, such as the European Convention
on Mutual Assistance in Criminal Matters. In practice, however, a state's request to have its representative present is never refused. Although the law requires the testimony to be taken by Dutch officials, the representative of the requesting state may specify the questions to be asked by the appropriate Dutch authorities. The requirement that evidence be taken by Dutch officials is not strictly enforced, especially when the witness is cooperative and able to speak and understand the language of the requesting state.

Jurisdiction for trying any crime in the Netherlands is provided for in Articles 2 through 5 of the Dutch Criminal Code. The Netherlands exercises territorial jurisdiction over any person committing an offense in the Netherlands. Protective jurisdiction is exercised over certain offenses listed in Article 4 even if committed outside of the Netherlands. Jurisdiction also extends—under the universality principle—to offenses committed by a foreigner outside of the Netherlands. The Special Law on War Crimes utilizes the passive nationality principle, based on the nationality of the victim. Article 5 establishes nationality jurisdiction for enumerated felonies, as well as any offense that is regarded a felony in Dutch criminal law and is punishable under the law of the state in which it is committed.

The Dutch government's policy regarding jurisdiction is based on the view that the best results are achieved when offenders face justice in the country where they reside (usually their country of origin), even when their offenses were committed in another country. Accordingly, criminal proceedings are frequently transferred to the country of origin by invocation of the nationality principle so that offenders do not spend time in a Dutch penitentiary without exposure to the resocialization efforts of their own society. The policy of transferring criminal proceedings also eliminates the possibility that the offender may later be extradited to face further incarceration in his country of origin for crimes allegedly committed there, after having served a prison term in the Netherlands.

Secondary Sources

PEOPLE'S REPUBLIC OF CHINA

Law

Synopsis

The 1978 revision of the Constitution of the People's Republic of China (PRC) and the newly promulgated codes of criminal law and criminal procedure reflect the seriousness of the current law reform effort in that country. These enactments establish the first codified procedure for the administration of criminal justice in the People's Republic of China.

As a result of having just developed a criminal code and the unlikelihood of foreign criminals seeking shelter in the PRC, there is no standardized procedure covering extradition or judicial assistance. The concept of extradition is only tangentially treated in the constitution and is not mentioned in the criminal law or procedure codes. As a result, extradition proceedings will likely be handled by the PRC's Ministry of Foreign Affairs on a case-by-case basis.

The revised constitution grants the right of residence to any foreign national persecuted for supporting a just cause, for taking part in revolutionary movements, or for engaging in scientific work. The political offense exception is therefore implicit in the constitution. This provision reiterates the Government's commitment to furthering their revolutionary goals. In order to guarantee to the individual the protection of this provision, sympathy to the Chinese revolutionary movement will undoubtedly be required. This sympathy requirement will limit the number of foreign nationals protected from extradition by the constitution. As a result, the PRC will probably be cooperative in most extradition proceedings, particularly where it is politically advantageous to be so.

While little attention has been given to the development of formal procedures for extraditing foreigners from China to their home country, the PRC desires to have its own citizens who commit counter-revolutionary crimes while outside the country extradited and brought to the PRC for prosecution. The Criminal Law Code, in addition, reaches crimes committed aboard PRC ships or airplanes, even if the crime occurs while the ship or plane is outside the territory. Thus, the Criminal Law Code reflects a desire on the part of the PRC to adopt the nationality and protective principles of extraterritorial jurisdiction.

The PRC also expects to prosecute foreigners who commit crimes while in China, but who leave prior to conviction. The Criminal Law Code applies to any crime occurring within the PRC. The only exception is for foreigners who enjoy diplomatic privilege and immunity who will be dealt with through diplomatic channels.

The Criminal Law Code provides for the prosecution within the PRC
of foreign individuals who commit crimes against China or one of its citizens while outside the country. This provision applies only if the crime is punishable by three years or more imprisonment according to PRC law and if the crime is punishable by the law of the foreigner’s nationality. Although the foreigner may have been tried in his home country, the PRC may also want the offender to be dealt with according to PRC law.

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SWITZERLAND
Law
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Synopsis
Switzerland applies the territorial principle to all felonies and misdemeanors. Under the protective principle it exercises jurisdiction over persons in a foreign country who commit crimes against the Swiss state, or who conduct an illegal news service, establish an illegal organization, or disturb military security. Switzerland applies the passive personality principle only to extraditable offenses. The universality principle is recognized only in connection with special offenses, such as crimes endangering aviation safety, violations of the Swiss Narcotics Law, trade in white slaves, and the counterfeiting of money or stamps.

If an offender commits a crime in Swiss territory but is tried in another country, Switzerland will recognize the foreign court’s verdict regarding the offender only if the proceedings were undertaken at the request of Swiss authorities. In other cases, however, Switzerland will acquiesce in the exercise of criminal jurisdiction by a foreign court. When crimes have
been committed abroad by or upon Swiss nationals, or when crimes have been committed in Swiss territory and prosecution abroad has been authorized, Switzerland will not punish the offender if he has been acquitted abroad or if the penalty to which he was sentenced has been executed, suspended, or cut off by a statute of limitations. If Switzerland does retry and sentence an offender for an offense which has already been punished abroad, Switzerland will credit to the offender any sentence or part thereof he has served abroad and require any unserved portion to be executed in Switzerland.

Swiss cooperation in a foreign criminal prosecution is governed by the Law on International Mutual Assistance in Criminal Matters. Requests for extradition, judicial assistance for proceedings abroad, transfer of proceedings and punishment of offenses, or execution of foreign criminal judgments must satisfy the threshold criteria of the Law before the requested assistance can be rendered. Requests will not be granted if there is reason for Swiss authorities to believe that the foreign proceeding will not meet the procedural requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms, will prosecute a person on political, social, racial, religious, or national grounds, or will be tainted with other grave defects such as violations of due process of law. Requests will be rejected as well if the offense to be tried is political or fiscal in nature, unimportant, or if the right to impose a penal sanction has been extinguished in either Switzerland or in the requesting state for various substantive or procedural reasons.

A request for extradition, like requests for other forms of cooperation in criminal matters must be in writing and must contain: identification of the authority from which it emanates, the original or an officially authenticated copy of an enforceable judgment or warrant of arrest, a summary of the facts of the case, the legal classification of the offense, an exact description of the person sought, and the text of the regulations applicable to the offense.

Extradition from Switzerland is possible without an extradition treaty, but as a rule a request which is not based on a treaty will be granted only if the requesting state guarantees reciprocity. The procedure for extradition is the same, whether or not there is a treaty. If the person sought by the requesting state claims to have an alibi, the Federal Office for Police Matters of the Federal Department of Justice and Police will investigate the claim. In cases where the validity of the alibi is clear, extradition will immediately be denied. Otherwise, the exculpatory evidence will be submitted to the requesting state, which must reply promptly as to whether it will continue the extradition request.

Extradition will be granted if the offense is punishable not only under Swiss law but also under the law of the requesting state by a minimum
sentence of one year. As long as there is one extraditable offense, extradition may be granted for all other offenses, too. Extradition may be denied, however, if the crime is subject to Swiss jurisdiction or if Switzerland can assume the prosecution or the execution of the foreign penal judgment to protect the interests of the person sought. Furthermore, extradition will be denied unless the requesting state guarantees that it will not: subject the requested person to execution or other physically injurious treatment; prosecute, sentence, or re-extradite the person to a third state for any offense committed prior to extradition and for which extradition was not granted; or try the suspect before an extraordinary court. The requesting state must also give assurance that it will send the Swiss authorities an officially certified copy of the ultimate penal decision upon their request. No Swiss national may be extradited without his written consent.

Foreign nationals may be arrested with a view to extradition on the basis of a request by an Interpol National Central Bureau, the Ministry of Justice of another state, or on the basis of an international list of wanted persons. Objects and valuables which can serve as evidence in foreign criminal proceedings may be seized at the time of arrest. The person arrested may be detained for eighteen days (with possible extensions) while the Swiss authorities await a formal request for extradition and the supporting documents. The arrested person has a right to counsel, to lodge a petition for release, to review the extradition documents, to offer an alibi, and to waive extradition proceedings and request informal surrender. After the decision to extradite has been made, the subject of the order has the right to appeal within five days after notification of the extradition decision and the right to be released if the requesting state does not take the necessary steps to extradite within ten days after it receives notification of the extradition order.

In most cases, the Federal Office for Police Matters renders the decision on extradition. The decision of the Federal Office may be challenged by an administrative court appeal to the Federal Supreme Court in Lausanne. The Federal Office is composed of lawyers and paralegal officials. Nonjudicial personnel examine requests for extradition and execute decisions to extradite, but only attorneys are authorized to sign the arrest warrants and the decisions granting extradition.

Switzerland will participate in exchanges of physical, documentary, and testimonial evidence with foreign nations. It may also grant assistance to the European Court of Human Rights and to the European Commission on Human Rights. Switzerland is a party to the European Convention on Mutual Assistance in Criminal Matters and to a similar bilateral treaty with the United States. In addition, a number of Swiss bilateral extradition treaties contain provisions for obtaining evidence in criminal matters. Where a foreign country has not entered into an agreement with Switzer-
land concerning judicial assistance, or where an existing treaty does not contain provisions for a certain type of assistance, Swiss assistance nevertheless may be granted under the Law on International Mutual Assistance in Criminal Matters. Where treaty provisions do exist, however, they prevail.

Assistance under the Law is not limited to the transmission of information, but may include any official act permitted by Swiss law if the assistance is necessary for criminal proceedings abroad or will aid in recovering the proceeds of the offense. Specific acts of assistance may take the form of serving documents, obtaining evidence, producing records or papers, searching persons, allowing transit through Swiss territory, or maintaining custody of a person surrendered to Swiss authorities. Any particular act, of course, may be specifically authorized or precluded by treaty.

Assistance may be denied if the person involved resides in Switzerland and Swiss proceedings regarding the offense in question are already pending. Although assistance generally is denied where the offense is political or fiscal in nature, there is an exception for cases involving tax fraud. The Swiss treaty with the United States, for example, is without a fiscal offense exception.

Once a request for judicial assistance has been received, attorneys at the International Legal Assistance Section of the Federal Office in Berne determine whether the request meets the formal requirements of the Federal Act or the relevant treaty. If the request does meet the requirements, it will be forwarded to the appropriate cantonal examining magistrate who will take the measures necessary for its execution. A magistrate’s order to execute the request may be appealed to the Federal Office by the person affected. A further appeal to the Federal Supreme Court is also possible.

Searches and seizures, summonses, subpoenas, and other forms of assistance will be ordered only if the acts which constitute the offense in question would constitute a punishable offense under Swiss law as well. This is an essential prerequisite for overcoming Swiss protection of banking and business secrecy.

The cantonal authorities carry out requests for assistance in accordance with their own codes of criminal procedure, although the procedure of the requesting state may be applied to the extent that it is not incompatible with the local rules. A statement made by a witness is usually summarized and signed by both the examining magistrate and the witness. A verbatim transcript may be expressly requested instead, but this causes difficulty because of the lack of qualified court stenographers, especially when the language in which the examination is to be conducted is not an official language of Switzerland.

Foreign officials are generally not allowed to take evidence in Switzerland and can be punished if they do so. Nevertheless, foreign officials may
be present at an examination if authorized either by a specific treaty provision or the Federal Office. Foreign officials who are permitted to attend an examination may ask questions compatible with Swiss law. If Swiss authorities are unable to execute certain requests on behalf of another nation, the Federal Department of Justice may grant permission to foreign officials to perform such acts on Swiss territory.

Switzerland itself requests judicial assistance in criminal matters in much the same manner as other countries do of it, especially since it is party to a number of international agreements on the subject. The Federal Office decides when a request for foreign judicial assistance should be made.

Nothing in its Constitution prevents Switzerland from asserting jurisdiction over a crime or a defendant, as long as this is done in compliance with the Swiss Penal Code or other Swiss laws. However, the Federal Constitution may prevent Switzerland from extraditing an officer or furnishing evidence to a requesting country. In addition, evidence from foreign sources may be excluded from Swiss courts if it was gathered by methods which violate the Federal Constitution. Similarly, constitutional considerations may also prevent Switzerland from executing foreign penal judgments.

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THAILAND

Law


Synopsis
Thai criminal jurisdiction is based on the territorial principle and supplemented by the nationality principle. Thai law requires Thai courts to have jurisdiction over the accused as well as the crime before trying a case.

Thai extradition procedure is governed by the Extradition Act, although procedures may differ where bilateral treaties control. Extradition is possible in the absence of a treaty under Article 4 of the Extradition Act, but the decision to extradite is then purely discretionary. Provisional detainer and arrest is allowed under Article 10 in urgent cases. The state requesting provisional arrest must make a formal request for extradition within two months after the arrest.

An extradition request must be in writing and initiated through a diplomatic official or consular agent of the requesting state. If the individual sought is a convicted felon, a copy of the judgment rendered by a court of competent jurisdiction must be submitted. If the individual is an accused fugitive, the request for extradition needs to be accompanied by a warrant for arrest issued by a competent authority and such evidence as would suffice under Thai law to justify an arrest if the crime were committed in Thailand.

The formal extradition request is referred through diplomatic channels to the Ministry of Interior. The Ministry of Interior is responsible for the agency action needed to institute an extradition proceeding: detention and arrest, incarceration, and presentation of the Government's case brought on behalf of the requesting state. Interior also directs the case to the proper court, after which the proceeding is entirely in the hands of the Ministry of Justice. If, prior to a formal request, a provisional detainer and arrest are granted, the extradition request is transmitted by the Ministry of Foreign Affairs directly to the competent magistrate for a hearing.

Once a formal request is made, and the individual is arrested, the hearing on extradition is held in the San Chanton, the court of first instance. Thai criminal procedure governs the hearing. There is no release on bail.

The quantum and nature of the evidence required for extradition is determined with reference to the Thai Criminal Procedure Code. Evidence supporting the request must be by witnesses, if oral; or by authenticated depositions, if written. If under Thai law there is sufficient evidence to bring the individual to trial, the standard of proof has been met.

Thailand recognizes several exceptions and defenses to extradition. In accordance with the nationality principle, the individual requested will not be extradited if he or she is a Thai national. No extradition will obtain if the alleged offense is not a crime under Thai law or if the criminal conduct is punishable by less than one year of imprisonment under the Thai Penal
Also, Thailand will not extradite if the person requested will be punished for having committed a political offense.

Articles 14 through 17 of the Extradition Act govern the procedures for appealing an extradition decision. Once the judge in the San Chanton has rendered a decision, the public prosecutor has two days to give notice of his intention to appeal and a total of fifteen days to perfect an appeal from an order denying extradition. The extraditee has fifteen days to appeal an order granting the extradition request. Either appeal is taken to the San Uthorn (Appeals Court), which may review the case if a defense to extradition is at issue or if there is no evidence upon which the San Chanton could have based its decision. No appeal is permitted to the Sam Dika (Supreme Court). An order granting extradition will lapse after three months if the person requested has not been claimed by the requesting country and removed from Thailand.

The Criminal Procedure Code provides for habeas corpus proceedings to protect a requested person from unlawful arrest or imprisonment contrary to the judgment of the requesting state. A section 90 (habeas corpus) petition may be filed with the San Chanton, either by the fugitive, his family, his jailer, the prosecutor or other interested person on behalf of the fugitive. If an irregularity—rising to the level of illegality—in the extradition process is found, the detained individual is released.

Secondary Sources


TURKEY

Law


Synopsis

During the 1920s and 1930s, Turkey adopted a legal system based on European models. The 1929 Turkish Code of Criminal Procedure is a translation of the German Code of Criminal Procedure of 1877, adopted with some changes. The Turkish Criminal Code, enacted in 1926 and amended in 1964, is based on the Italian Penal Code of 1889.

Turkish principles of criminal jurisdiction are governed by Articles 3-8 of the Criminal Code. Anyone who commits a crime in Turkey shall be punished in accordance with Turkish law. A Turkish citizen may be retried in Turkey even if a foreign court has also sentenced him for the same crime. Further, a foreign citizen sentenced abroad may be tried in Turkey on the request of the Minister of Justice.

Anyone who commits a felony in connection with the performance of an office or mission on behalf of Turkey in a foreign country shall be prosecuted in Turkey. Turkey also asserts jurisdiction over crimes against the security or integrity of the Turkish government whether committed by Turk or foreigner. Persons tried for such crimes in a foreign country will be retried in Turkey upon the request of the Minister of Justice.

In accordance with the nationality principle, Turkish jurisdiction extends to felonies committed by Turkish citizens abroad. The crime must carry a punishment of at least three years' imprisonment under Turkish law and the citizen must be in Turkey. Jurisdiction will also obtain over crimes which carry a punishment of less than three years' imprisonment upon complaint of the injured party or the foreign government. If the victim of the act is a foreigner, the act must be punishable under the laws of the country where it was committed.

Contrary to Anglo-American practice, Turkey asserts jurisdiction over an offense committed against Turkey or a Turk by a foreigner in a foreign country. For the courts to exercise this jurisdiction, the foreigner must be present in Turkey. Also, the offense must be punishable under Turkish law by a minimum of one year of imprisonment and the Minister of Justice or the injured party must request prosecution of the foreigner. Where the offender has been tried in a foreign court, Turkish courts may review the case upon the request of the Minister of Justice. If the offender has been convicted and punished abroad, the Turkish court can require the offender to serve out the difference between the sentence imposed by the foreign country and the sentence imposed by Turkish law. If the foreign court acquitted the offender or set his sentence aside, the Turkish court can also examine the foreign court's rationale for doing so. The court can impose punishment under Turkish law or enforce the sentence which the foreign court had set aside if the Turkish court finds these reasons are not in accordance with Turkish law.
Turkey will exercise universal jurisdiction over a suspected perpetrator of a felony who is present in Turkey if three conditions are met. First, the Minister of Justice must request punishment. Second, the act must be punishable under Turkish law by at least three years of imprisonment. Third, there must be no extradition treaty between Turkey and the government of the state in which the felony was committed and the state of which the offender is a citizen, or these governments must have rejected extradition.

Part 1, Article 9 of the Turkish Criminal Code deals with extradition. Turkish law forbids the extradition of a Turkish citizen under any circumstance. Extradition of a foreigner for a political offense is also forbidden.

When a foreign state requests extradition, the case goes before the Court of General Criminal Jurisdiction of the area in which the requested person resides in Turkey. If the court decides that the requested person is a foreigner and that his alleged felony is not a political or military offense, the government will grant the extradition request. If the request is accepted, the local investigating magistrate will issue a warrant of arrest against the requested person.

ZAMBIA

Law


Synopsis

The Zambian Extradition Act of 1968 details three different extradition procedures depending on whether the extradition request concerns a foreign country, a "declared" Commonwealth country, or a "prescribed" reciprocating country for the purposes of mutual backing of warrants. In the absence of an extradition treaty, this Act controls extradition between Zambia and other countries.

Under the Extradition Act, extraditable offenses are crimes which are punishable under the laws of both the requesting country and Zambia by imprisonment for a period of one year or more, or, if the claimed person has been convicted and sentenced in the requesting country, a sentence of imprisonment for not less than four months has been imposed. However, Zambia has adopted the principle of non-extradition of nationals.

The procedure for extradition to and from foreign countries is laid out in Part II of the Act. Although not identical to the procedure for extradition to a "declared" Commonwealth country, it is similar in many respects. The request must be made in writing to the Attorney-General and accompanied
by supporting documents including an enforceable conviction and sentence or other order imposed under the law of the requesting country, a statement detailing the offense for which extradition is requested, a statement of the relevant law of the requesting country, and an accurate description of the person claimed. If the documents submitted by the requesting country satisfy the provisions of the Act, the Attorney-General orders the Magistrate to issue a warrant for the arrest of the person claimed. If the Attorney-General considers the submitted information insufficient, he may request more information from the requesting country which must be received within the time limit he sets. The Attorney-General will refuse extradition if he believes the case is one in which extradition is prohibited under the act. In cases of urgency, a Magistrate may issue a provisional arrest warrant without the order of the Attorney-General.

The person claimed is brought before a Magistrate as soon as practicable after arrest pursuant to either the Attorney-General’s action or a Magistrate’s issuance of a provisional warrant. The Magistrate determines whether or not to imprison the person to await surrender to the requesting country by applying the standards detailed in section 10. The Magistrate must judge whether the evidence of the offense would justify committal of the accused for trial if the act had taken place in Zambia. If the person claimed has already been convicted of an extraditable offense by the requesting country, evidence sufficient to satisfy the Magistrate that the person claimed has been properly convicted of that offense and is unlawfully at large must be submitted. The Magistrate must also be satisfied, after hearing any defenses offered by the person claimed, that extradition was duly requested in accordance with the relevant provisions of the Extradition Act and that extradition is not prohibited by any other provision of the Act.

If the Magistrate determines that the evidence supporting the extradition request is insufficient, he may adjourn the hearing to await further information from the requesting state. If after hearing all the evidence the Magistrate decides that the person claimed should not be surrendered, the Magistrate orders discharge of the person, and notifies the Attorney-General of the order and the reasons for the decision.

A person committed to prison to await extradition under Section 10 is entitled to remain in the country for fifteen days after the date of his committal, the conclusion of any habeas corpus proceedings brought by him or on his behalf, or the determination of any defense raised by the person claimed pursuant to the political offense exception. If the person committed is not discharged by the decision of the High Court in any habeas corpus proceedings, or pursuant to the political offense exception, the Attorney-General will surrender the person claimed to the requesting country.
Part III of the Extradition Act provides for extradition to and from “declared” Commonwealth countries (countries which the President declares to be such by statutory order). The extradition procedure in Part III differs from that of Part II most notably in the standard that must be met before extradition will be granted. The Attorney-General will issue a warrant for the arrest of the person claimed under Part III if satisfied that extradition would not be contrary to any of the provisions of the Act, and if the President is satisfied that the request was not made for political purposes and that the person claimed would not be prejudiced at trial in the requesting country because of his political opinions. If, however, the Attorney-General believes that surrender of the fugitive would be unjust, oppressive, or too severe a punishment because of the trivial nature of the offense, because the accusation was not made in good faith and in the interests of justice, or because of the passage of time since the alleged offense was committed, he may decline to issue the arrest warrant. The bulk of the extradition procedure in Part III, however, resembles that for extradition to foreign countries, though other minor differences between Part III and Part II do exist.

Part V details Zambia’s procedure for the reciprocal backing of warrants. When the President is satisfied that reciprocal provision has been made under the law of another country for the backing of warrants issued in Zambia, the President may, by statutory order, declare that Zambia will honor extradition requests of the other country.

The Extradition Act also provides for judicial assistance. Section 29 states that the Attorney-General shall hand over any evidence seized by a police officer at or after the time of arrest if the evidence appears to be reasonably necessary to prove the offense alleged. This assistance will be granted subject to the needs of any criminal action pending in Zambia against the person claimed and any property rights in the evidence asserted by Zambia or any person in Zambia.