



---

3-1-1977

## Execution of Foreign Sentences in the United States: A Treaty with Mexico.

Patrick J. Kennedy Jr.

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [International Humanitarian Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Patrick J. Kennedy Jr., *Execution of Foreign Sentences in the United States: A Treaty with Mexico.*, 9 ST. MARY'S L.J. (1977).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol9/iss1/7>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact [egoode@stmarytx.edu](mailto:egoode@stmarytx.edu), [sfowler@stmarytx.edu](mailto:sfowler@stmarytx.edu).

## EXECUTION OF FOREIGN SENTENCES IN THE UNITED STATES: A TREATY WITH MEXICO

PATRICK J. KENNEDY, JR.

The United States has embarked on a significant venture into the field of international criminal law by executing a treaty allowing reciprocal enforcement of foreign criminal sanctions.<sup>1</sup> Previous development of an international criminal law has been hampered by jealously guarded principles of territorial sovereignty and municipal law.<sup>2</sup> These principles receive particular expression in the United States through insistence on individual guarantees of due process.<sup>3</sup> Any attempt to compromise them will meet strong resistance. This comment examines the provisions of the treaty and their effect on these principles by analyzing the due process requirements which have been established by the courts, Congress, and international convention.

### THE TREATY WITH MEXICO

#### *Background and Purpose*

The treaty is a result of the coincidence of Mexican and American concern for citizens incarcerated in foreign jails. In the United States the political forces set in motion by increasing public attention to the problem of prisoner treatment in Mexico have encouraged the execution of the agreement. Dramatic press accounts of Mexican jailbreaks,<sup>4</sup> private investigations,<sup>5</sup> letters from prisoners,<sup>6</sup> and a Congressional investigation<sup>7</sup> have

---

1. Treaty on the Execution of Penal Sentences, Nov. 25, 1976, United States-Mexico [hereinafter cited as Treaty].

2. See Fuller, *Jurisdiction Over Offenses with a Foreign Element*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 5, 38-39 (M. Bassiouni & V. Nanda ed. 1973); Schwarzenberger, *The Problem of an International Criminal Law*, in INTERNATIONAL CRIMINAL LAW 3, 35 (G. Mueller & E. Wise ed. 1965).

3. See Mueller, *International Judicial Assistance in Criminal Matters*, 7 VILL. L. REV. 193, 220 (1961-62).

4. See Reid, *The Great Mexican Jailbreak*, TEX. MONTHLY, Sept. 1976, at 84; N.Y. Times, March 13, 1976, at 28, col. 4; *id.* May 9, 1976, at 9, col. 1 (describing jailbreak involving 14 American prisoners).

5. Collection of private interviews with American prisoners in Mexico and other investigative materials by Paul Parsons, law student at the University of Texas, and submitted to the International American Committee of Human Rights.

6. Letters from United States prisoners in Lecumberri Prison, Santa Marta Women's Prison, and Santa Marta Men's Prison to Hon. Dante B. Fascell (Jan. 15, 1976), cited in U.S. Citizens Imprisoned in Mexico: Hearings Before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations, 94th Cong., 1st Sess., pt. 2, at 45-46 (1976) [hereinafter cited as *Hearings on Prisoners*].

7. See generally *Hearings on Prisoners*, *supra* note 6, pts. 2, 3.

all contributed to the growing public concern. In Mexico former President Echeverria's interest in becoming the United Nations Secretary General and his image as a champion of human rights have created a climate favorable to such advances in international relations.<sup>8</sup>

The problem which the treaty seeks to remedy operates on a humanitarian as well as political level. Its stated purpose is to assist in combating crime and to further the administration of justice by promoting the offender's social rehabilitation.<sup>9</sup>

### *Provisions for Transfer*

The procedural framework for "transfer"<sup>10</sup> of prisoners between the two countries is contained in the body of the treaty, but specific details remain undetermined.<sup>11</sup> The terms provide the transferring nation with exclusive authority to effect a transfer<sup>12</sup> subject to agreement by the receiving nation<sup>13</sup> and the express consent of the offender.<sup>14</sup> The prisoner may also petition the transferring country to initiate the proceedings.<sup>15</sup> As such, at least three parties must agree to the transfer and if the conviction is under authority of an individual state of one of the countries, then both state and federal authorities must agree.<sup>16</sup>

The criteria for transfer relate directly to the stated purpose of the treaty, which is the promotion of the offenders' social rehabilitation.<sup>17</sup> The nature of the offense, prior criminal record, medical condition, and

8. N.Y. Times, Sept. 11, 1975, at 7, col. 1; *id.*, Oct. 8, 1975, at 5, col. 1 (President Echeverria's interest in replacing Kurt Waldheim as United Nations Secretary General); *see* Echeverria, *Message to America*, TIME, Oct. 11, 1976, at 61 (Echeverria discusses his intentions and aspirations for the United States, Mexico, and the Third World).

9. *See* Treaty, *supra* note 1, at Preamble; 75 DEP'T STATE BULL. 750 (1976) (press release announcing signing of the Treaty, dated Nov. 26, 1976). An international standard for prisoner treatment has been codified by the United Nations. E.S.C. Res. 663(c), 24 U.N. ESCOR Supp. (No. 1) 11, U.N. Doc. E/3048 (1957). The implementation of these standards is discussed in Skoler, *World Implementation of the United Nations Standard Minimum Rules for Treatment of Prisoners*, 10 J. INT'L L. & ECON. 453 (1975).

10. The program is more properly termed "transfer" rather than "exchange," the popular usage, since no one-for-one requirement is contemplated. *Hearings on Prisoners, supra* note 6, pt.3, at 21; San Antonio Light, Jan. 19, 1977, at 1, col. 2-3 (reluctance of officials to call treaty an exchange).

11. The transfer of prisoners will be administered by the United States Attorneys' Offices and the additional details will be worked out between the parties by letters rogatory and conferences with the designated officials in each country. Letter from Hon. Gilbert J. Pena, Assistant Attorney General of Texas, to author (Mar. 29, 1977).

12. Treaty, *supra* note 1, art. IV, § 2.

13. *Id.* art. IV, § 3.

14. *See id.* art. IV, § 2; *id.* art. V, § 1.

15. *Id.* art. IV, § 1.

16. *Id.* art. IV, § 5.

17. Compare *id.* Preamble, with *id.* art. IV, § 4.

strength of the offender's relation<sup>18</sup> with each country must be weighed by both transferring and receiving parties.<sup>19</sup>

That each country's evaluation of a case may produce an opposing transfer decision results because of different perceptions of the decisive factors and their relation to the optimal criminal offender rehabilitation standards. That a difference of perceptions exists is admitted by the mere fact of the treaty. Therefore, these broad criteria will have to be narrowed as the practice develops or they will become meaningless.

Certain conditions must be met, however, before the procedure can reach this stage of review. The crime must be one which is "generally punishable as a crime in the Receiving State."<sup>20</sup> The offender must be a national of the receiving country<sup>21</sup> and may not be a domiciliary of the transferring country.<sup>22</sup> Political,<sup>23</sup> military, and immigration offenses are excluded from the treaty's operation.<sup>24</sup> A minimum of six months of the prisoner's sentence must remain to be served at the time application for transfer is made<sup>25</sup> and the time for appeal must also have expired.<sup>26</sup>

Once the transfer is accomplished, the remainder of the sentence is to be served according to the "laws and procedures" of the receiving country, including parole or conditional release, though the transferring nation does retain the right to pardon or grant amnesty.<sup>27</sup> All pretrial confinement, time served on the sentence prior to transfer, work-credits,<sup>28</sup> and other considerations to which an offender is entitled must be recognized by the receiving country and credited toward the offender's remaining time.<sup>29</sup> Finally, the treaty prohibits any violation of the transferee's civil rights,

---

18. *Id.* art. IV, § 4. The strength of his connection by residence, domicile, and family relations are to be specifically considered. *Id.* art. IV, § 4.

19. *Id.* art. IV, § 4.

20. *Id.* art. II, § 1. The article specifically provides that this condition not be interpreted to require that the crimes be identical in matters not affecting the character of the crime. Differences in the length of sentences will not disqualify the operation of the Treaty. Letter from Hon. Gilbert J. Pena, Assistant Attorney General of Texas, to author (Mar. 29, 1977).

21. Treaty, *supra* note 1, art. II, § 2.

22. *Id.* art. II, § 3. "Domiciliary" means a person who has been present in the territory of one of the parties for at least five years with an intent to remain permanently there-in." *Id.* art. IX, § 4.

23. Political offenses are those within the meaning of the Treaty of Extradition of 1899, Feb. 22, 1899, United States-Mexico, 31 Stat. 1818, T.S. No. 421. Treaty, *supra* note 1, art. II, § 4.

24. Treaty, *supra* note 1, art. II, § 4.

25. *Id.* art. II, § 5.

26. *Id.* art. II, § 6.

27. *Id.* art. V, § 2.

28. Mexico has a system of work credits which allows individuals to serve portions of their sentences by engaging in labor activities.

29. Treaty, *supra* note 1, art. IV, § 7.

other than the ordinary consequences which a foreign conviction may have on an offender's domestic civil rights.<sup>30</sup>

#### CONSTITUTIONAL ASPECTS OF THE TREATY

The treaty appears simply to contemplate authority to execute a foreign sentence in the offender's home country, but it logically and effectively provides for the recognition of the validity of foreign criminal judgments. There is no precedent in the United States for such an agreement with the exception of an unimplemented provision in the Status of Forces Agreement with South Korea.<sup>31</sup>

Such agreements are not unknown, for legal scholars have urged their use<sup>32</sup> and examples of similar arrangements already exist in Europe.<sup>33</sup> Nine countries have joined in the recently adopted European Convention on the International Validity of Criminal Judgments,<sup>34</sup> which sets out detailed procedures for enforcement of criminal sanctions.

One of the primary considerations in the proceedings to enforce a foreign criminal judgment under the European Convention is the procedure by which the judgment was rendered. In this regard, the two countries should have similar cultural, political, social, and legal structures<sup>35</sup> to the extent that no essential constitutional rights are violated.<sup>36</sup> To assure that the judgment does not violate these rights, the judicial authority undertakes a procedure known as *exequatur* which establishes a method of examining

30. *Id.* art. V, § 6.

31. July 9, 1966, United States-Republic of Korea, art. XXII, para. 7(b), 17 U.S.T. 1677, T.I.A.S. No. 6127. No case has been found where the United States enforced a Korean sentence under the treaty provisions. Memorandum of Law prepared by Professor Detlev F. Vagts, legal advisor to the Department of State, at 7 (December 15, 1976) (on file in St. Mary's University Law School Library).

32. See Oehler, *Recognition of Foreign Penal Judgments and Their Enforcement*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 261, 276 (M. Bassiouni & V. Nanda ed. 1973); Bassiouni, *International Extradition in American Practice and World Public Order*, 36 TENN. L. REV. 1, 25 (1968).

33. One of the earliest examples is Switzerland which authorized its Federal Council to allow a foreign-imposed prison sentence to be served in a Swiss penitentiary. Oehler, *Recognition of Foreign Penal Judgments and Their Enforcement*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 261, 263 (M. Bassiouni & V. Nanda ed. 1973). Spain allows enforcement of foreign sanctions in its country. For a detailed analysis of the social, political, legal, and economic implications of reciprocal enforcement in Spain, see A. BROTONS, *EJECUCION DE SENTENCIAS EXTRANJERAS EN ESPANA* (1974). A treaty exists between Spain and Denmark for reciprocal enforcement of criminal sanctions. *Hearings on Prisoners*, *supra* note 6, pt. 3, at 26.

34. May 28, 1970, Europ. T.S. No. 73.

35. Oehler, *Recognition of Foreign Penal Judgments and Their Enforcement*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 261, 276 (M. Bassiouni & V. Nanda ed. 1973).

36. *Id.* at 276-77.

the procedural, rather than the substantive, aspects of the foreign judgments.<sup>37</sup>

The decision for transfer under the Prisoner Transfer Treaty does not include such a procedure, but consists only of an evaluation of the offender's social rehabilitation. Because the treaty fails to provide express procedural safeguards, the courts and Congress will be faced with inevitable constitutional questions arising from implementation of the agreement.<sup>38</sup> They will have to determine what standards of due process, if any, will be required before foreign sentences can be served under United States' auspices. Questions arise as to whether the test will be full United States due process guarantees, some lesser standard based on the principles of the foreign country rendering judgment, or an international standard. The first step in answering these questions is an examination of Mexican law and procedure.

#### MEXICAN DUE PROCESS

The Political Constitution of Mexico enumerates certain specific guarantees for every criminal trial.<sup>39</sup> Conspicuously absent from this list are two

37. *Id.* at 278. See generally A. BROTONS, *EJECUCION DE SENTENCIAS EXTRANJERAS EN ESPANA* (1974).

38. See *Hearings on Prisoners*, *supra* note 6, pt.3, at 26. Four constitutional objections were raised during early stages of discussion on the treaty for transfer of criminal sanctions.

39. CONSTITUCION POLITICA DE LOS ESTADOS MEXICANOS art. 20, §§ I-X. The Organization of American States translation provides:

Article 20. In every criminal trial the accused shall enjoy the following guarantees:

I. He shall be freed on demand and on furnishing bail which shall be fixed by the judge, according to his status and the gravity of the offense with which he is charged, provided, however, that such offense is not punishable with more than five years' imprisonment. No requisites shall be necessary other than placing the stipulated sum at the disposal of the proper authorities or giving adequate security or personal bond for acceptance of which the judge is responsible.

The security or bond shall be not more than 250,000 pesos except for offenses by which the offender profits or the victim suffers financially; for such offenses the security shall be at least three times the amount of the profit obtained or the damage suffered.

II. He may not be forced to be a witness against himself; wherefore denial of access or other means tending to this end is strictly prohibited.

III. He shall be publicly notified within forty-eight hours after being turned over to the judicial authorities of the name of his accuser and the nature of and cause for the accusation, so that he may be familiar with the offense with which he is charged, and reply thereto and make a preliminary statement.

IV. He shall be confronted with the witnesses against him, who shall testify in his presence if they are to be found in the place where the trial is held, so that he may cross-examine them in his defense.

V. All witnesses and other evidence which he may offer shall be heard in his defense, for which he shall be given the time which the law deems necessary for the purpose; he shall furthermore be assisted in securing the presence of the persons whose

fundamental United States guarantees: the right to trial by jury<sup>40</sup> and the unqualified right to be confronted by the witnesses.<sup>41</sup> The problem of evaluating Mexican procedure is compounded by the fundamental differences between the common law system of the United States and the civil law system of Mexico.

The civil law "trial" is essentially a two step proceeding that begins the moment the accused is taken into custody.<sup>42</sup> During the first step, the *sumario*, all evidentiary material is collected by interviews and by inquiry of the court itself through the prosecutors.<sup>43</sup> Pleas are formulated and when

testimony he may request, provided they are to be found at the place where the trial is held.

VI. He shall be entitled to a public trial by a judge or jury of citizens who can read and write and are also residents of the place and district where the offense was committed, provided the penalty for such offense exceeds one year's imprisonment. The accused shall always be entitled to a trial by jury for all offenses committed by means of the press against the public peace or against the domestic or foreign safety of the nation.

VII. He shall be furnished with all information on record which he may request for his defense.

VIII. He shall be tried within four months, if charged with an offense whose maximum penalty does not exceed two years' imprisonment; and within one year, if the maximum penalty is greater.

IX. He shall be heard in his own defense, either personally or by counsel, or by both, as he may desire. Should he have no one to defend him, a list of official counsel shall be submitted to him, in order that he may choose one or more to act in his defense. If the accused does not wish to name any counsel for his defense, after being called upon to do so at the time of his preliminary examination, the court shall appoint his counsel for the defense. The accused may name his counsel immediately upon arrest, and shall be entitled to have him present at every stage of the trial; but he shall be obliged to make him appear as often as required by the court.

X. In no event may imprisonment or detention be extended through failure to pay counsel fees or for any other monetary obligation, on account of civil liability, or for other similar cause.

Nor shall detention be extended beyond the time set by law as the maximum for the offense charged.

The period of detention shall be reckoned as a part of the term of imprisonment imposed by sentence.

GENERAL SECRETARIAT, ORGANIZATION OF AMERICAN STATES, CONSTITUTION OF MEXICO art. 20, §§ I-X (1917, amended 1972).

40. *Id.* § VI.

41. *Id.* § IV.

42. *Chattin Case (United States v. Mexico)*, 1927 Opinions of Commissioners 422, 4 R. Int'l Arb. Awards 282. The pertinent parts of the case are cited in H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 367, 371 (2d ed. 1976). For convenience, subsequent references to *Chattin* will be to the more accessible Steiner & Vagts reproduction of that case, and will hereinafter be cited as *Chattin*.

43. See *Chattin*, *supra* note 42, at 371; Keedy, *The Preliminary Investigation of Crime in France*, 88 U. PA. L. REV. 692, 693 (1940); Note, *Reform in Criminal Procedure*, 50 YALE L.J. 107, 111 (1940). This analogy is appropriate since the Mexican legal system is based on the French Civil Code. Perry, *Understanding the Mexican Attorney: Legal Education and the Practice of Law in Mexico*, 10 INT'L LAW. 167, 169 (1976).

the judge considers that he has enough information to make a case, he places the record at the disposal of the parties for any final additions.<sup>44</sup> The *sumario* is then closed<sup>45</sup> and a brief public hearing, or *plenario*,<sup>46</sup> is subsequently held to formally ratify the accusation and to acknowledge the defense of the accused. The case is finally closed and the judge makes a determination of guilt or innocence.<sup>47</sup>

The underlying nature of the civil law proceeding is best described as "inquisitorial," in contrast to the "prosecutorial" nature of the common law trial.<sup>48</sup> The judge is the central figure in the former by virtue of his exclusive decision-making power<sup>49</sup> and his active role in assembling the facts, witnesses, and other evidence.<sup>50</sup> He is given broad discretion to determine the value of testimony and the proper application of the facts to the law.<sup>51</sup> In contrast, the common law approach relies on the adversaries to present the facts, witnesses, and arguments. Emphasis is placed on an impartial trial by a group of peers with the judge functioning as a referee, leaving the ultimate determination of facts and controlling issues to the jury.<sup>52</sup>

Despite the safeguards provided, there is reason to believe that the enforcement of Mexican constitutional principles falls well below the comparable American standard. A series of cases which arose out of the United States-Mexican Claims Commission of 1926-1927 provide substantial insight into the view which American courts have taken of Mexican procedural justice. The Commission was created to arbitrate disputes arising out of mistreatment of Americans by the Mexican government in civil and criminal contexts.<sup>53</sup> In the famous *Chattin Case (United States v.*

44. *Chattin*, *supra* note 42, at 372.

45. *Id.* at 372.

46. *Id.* at 372.

47. *Id.* at 372; see Snee & Pye, *Due Process in Criminal Procedure: A Comparison of Two Systems*, 21 OHIO ST. L.J. 467, 471 n.18 (1960) (helpful collection of source material on civil law proceedings).

48. Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 481 (1975); Ploscowe, *Development of Inquisitorial and Accusatorial Elements in French Procedure*, 23 J. CRIMINOLOGY & CRIM. L. 372 (1932).

49. Absence of jury in Mexican civil law system leaves the judge in the position of trier of fact. See *Chattin*, *supra* note 42, at 371.

50. See *id.* at 370; Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 HARV. L. REV. 433, 433-34 (1935).

51. See Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 HARV. L. REV. 433, 433-35 (1935).

52. See 3 J. WIGMORE, EVIDENCE § 784 (Chadbourn rev. 1970); 9 *id.* §§ 2551, 2551a (1940).

53. Arbitrations took place by authority of the Convention of 1923 between the United States and Mexico establishing a General Claims Commission. A number of cases dealt with denial of due process and the fundamental trial differences between the two countries. H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 365 (1975); see RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 165, 179, Reporters Notes (1965).



*Mexico*),<sup>54</sup> the Commissioners found a denial of procedural justice in several respects and awarded the claimant five thousand dollars compensation for the irregularity of the court proceedings. The court specifically cited improper evidentiary investigations, lack of confrontation of the witnesses, delay of the proceedings, failure to apprise the accused of the charges brought against him, and "a continued absence of seriousness on the part of the court."<sup>55</sup> More recently, in hearings before the Subcommittee on International Political and Military Affairs of the House Committee on International Relations,<sup>56</sup> procedural justice violations<sup>57</sup> were found to have been present in eighteen percent of the Mexican criminal cases involving Americans, despite increasing diplomatic recognition of the problem.<sup>58</sup>

### UNITED STATES DUE PROCESS

#### *Recognition of Civil Judgments*

The features of Mexican procedural justice clearly differ from those of the United States, but the critical issue is the determination of which standards the United States will apply in foreign judgment enforcement. Courts have often recognized foreign civil judgments<sup>59</sup> and some states have made such recognition statutory.<sup>60</sup> In the landmark case of *Hilton v.*

54. *Chattin*, *supra* note 42, at 367.

55. *Id.* at 370.

56. *Hearings on Prisoners*, *supra* note 6.

57. The eight violations tabulated by the Department of State deal specifically with occurrences outside of the trial proceeding. They include denial of access and visitation by consular officials and legal counsel, claims of innocence, abuse at the time of arrest, confiscation of property, abuse in prison, extortion by attorney, and prolonged detention. In a total of 535 cases of Americans imprisoned in Mexico as of July 1975, there were 835 allegations of violations. According to the Department of State, 30% were substantiated, 16% were unsubstantiated, and 50% fell into the "inconclusive" category. *Hearings on Prisoners*, *supra* note 6, pt.2, at 48-9.

58. *Id.* pt.3, at 6.

59. Recognition of foreign civil judgments is based on comity. *In re Colorado Corp.*, 531 F.2d 463, 469 (10th Cir. 1976) (bankruptcy court abused its discretion in not granting comity to decrees of Luxembourg and the Netherlands). The proceedings must be fair and regular and the subject must have been appropriate for the court to adjudicate. *Zorgias v. SS Hellenic Star*, 370 F. Supp. 591, 593 (E.D. La. 1972), *aff'd*, 487 F.2d 519 (5th Cir. 1973). In addition to the requirement of fair procedure, United States courts will ordinarily recognize and enforce a foreign civil judgment if the requisites for adjudicatory jurisdiction were present. *Spann v. Compania Mexicana Radiodifusora Fronteriza, S.A.*, 131 F.2d 609, 611 (5th Cir. 1942) (unsuccessful argument by American citizen that unfavorable judgment rendered against him in Mexico could not be enforced against him in Texas); *Mpiliris v. Hellenic Lines, Ltd.*, 323 F. Supp. 865, 872 (S.D. Tex. 1969), *aff'd*, 440 F.2d 1163 (5th Cir. 1971); *Banco Minero v. Ross*, 106 Tex. 522, 537, 172 S.W. 711, 714 (1915) (court normally recognizes foreign civil judgments if rendered according to due process, but if foreign court has no personal jurisdiction, judgment will not be recognized).

60. Nine states have adopted the Uniform Foreign Money-Judgments Recognition Act:

*Guyot*,<sup>61</sup> the United States Supreme Court established that a judgment rendered after a full and fair trial before a court of competent jurisdiction under "a system of jurisprudence likely to secure an impartial administration of justice" should not be denied comity in the United States.<sup>62</sup> The Court rejected several arguments against recognition including one based on the alleged failure of a plaintiff to submit to cross-examination.<sup>63</sup> Courts have followed *Hilton's* requirement that basic elements of due process be present, but have disagreed on which elements are necessary.<sup>64</sup>

The Uniform Foreign Money-Judgments Act cites failure to render the judgment by means "compatible with the requirements of due process of law" as a basis for denial of recognition.<sup>65</sup> In addition to this nebulous requirement, judgments will be recognized if they are rendered by an impartial tribunal which has jurisdiction over the defendant and which does not contravene the public policy of the recognizing state.<sup>66</sup> The Uniform Act has been adopted by only nine states,<sup>67</sup> but it acts as a composite statement of the previous common law on the subject.

### *International Criminal Law*

Though it appears that foreign civil judgments are rendered under a lesser standard of domestic due process,<sup>68</sup> there is no guarantee that the same standard will be adopted for criminal judgments.<sup>69</sup> The very personal and inalienable rights which accrue to the accused from the Constitution make serious analogy with civil practice wholly inadequate. As such, the most valuable analysis comes from cases considering criminal judgments.

Cases discussing due process and constitutional trial guarantees in the context of United States involvement in international criminal law are

---

Alaska, California, Illinois, Maryland, Massachusetts, Michigan, New York, Oklahoma, and Washington. 13 UNIFORM LAWS ANN. 269 (Supp. 1977).

61. 159 U.S. 113 (1895).

62. *Id.* at 202.

63. *Id.* at 204-05.

64. This is due, at least in part, to the inability of courts to define the changing concept of due process. See Snee & Pye, *Due Process in Criminal Procedure: A Comparison of Two Systems*, 21 OHIO ST. L.J. 467, 468 (1960).

65. UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(a)(1).

66. *Id.* § 4(a), (b).

67. UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT; see note 60 *supra*. Adoption of the act is being proposed to the Texas Legislature during the 1977 session. Legislative Item, 40 TEX. B.J. 40 (1977).

68. *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1319 (2d Cir. 1973) (action to enforce Curacao judgment in New York), *cert. denied*, 416 U.S. 986 (1974).

69. Pye, *The Effect of Foreign Criminal Judgments in the United States*, 32 U. MO. KAN. CITY L. REV. 114, 115 (1964).

70. See Mueller, *International Judicial Assistance in Criminal Matters*, 7 VILL. L. REV. 193, 219 (1961-62); Pye, *The Effect of Foreign Criminal Judgments in the United States*, 32 U. MO. KAN. CITY L. REV. 114, 115 (1964).

generally of three types: extradition, international kidnapping, and those recognizing collateral effects of criminal judgments.

Extradition cases usually arise in the context of a habeas corpus challenge to the extradition of a United States citizen to a foreign country on the grounds that the requesting nation lacked due process safeguards. *Neely v. Henkel*<sup>71</sup> established that constitutional guarantees have no application to individuals who commit crimes outside the jurisdiction of the United States against the laws of a foreign country.<sup>72</sup> The Supreme Court further asserted that United States citizenship does not carry with it the right to trial in a manner different from that followed in the country against which the offense is committed.<sup>73</sup> Courts have continued to follow *Neely* though judges have often expressed reluctance when the requesting country's procedural justice violated acceptable standards.<sup>74</sup> Some courts have denied extradition on other grounds,<sup>75</sup> perhaps in an effort to avoid the unjust results.

Judicial discomfort with the *Neely* doctrine has not prompted its demise because of the nature of the extradition proceeding. The rarefied atmosphere of diplomatic exchange<sup>76</sup> insulates the courts from a position of approbation or participation in questionable foreign procedural justice. The judges can continue to adhere to *Neely* without disturbing their constitutional sensibilities by blaming the foreign government for the prospective injustice or denial of due process.

The level of United States judicial involvement in questionable foreign due process is increased in international kidnapping cases,<sup>77</sup> and courts have consequently expressed greater concern that due process be afforded citizens subject to foreign criminal process.<sup>78</sup> In *United States v. Toscan-*

71. 180 U.S. 109 (1901).

72. *Id.* at 122.

73. *Id.* at 123.

74. *See, e.g., Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960); *Argento v. Horn*, 241 F.2d 258, 263-64 (6th Cir.), *cert. denied*, 355 U.S. 818 (1957); *In re Mylonas*, 187 F. Supp. 716, 721 (N.D. Ala. 1960) (in absentia conviction).

75. *See, e.g., In re Mylonas*, 187 F. Supp. 716, 721 (N.D. Ala. 1960) (in absentia conviction did not prevent extradition, but it was denied on other grounds); *Ex parte Fudera*, 162 F. 591, 592 (S.D.N.Y. 1908) (in absentia conviction not discussed though extradition was denied because the Italian government had offered only hearsay evidence), *appeal dismissed*, 219 U.S. 589 (1911).

76. *See* Schultz, *The General Framework of Extradition and Asylum*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 309, 322 (M. Bassiouni & V. Nanda ed. 1973). 18 U.S.C. § 3181 (Supp. V 1975) lists the current extradition treaties which the United States maintains.

77. The United States has resorted to international kidnapping as a means of acquiring jurisdiction over individuals suspected of violating American law. *See generally* Comment, *Jurisdiction Following Illegal Extraterritorial Seizure: International Human Rights Obligations as an Alternative to Constitutional Stalemate*, 54 TEXAS L. REV. 1439 (1976); Recent Development, 9 VAND. J. TRANSNAT'L L. 131 (1976).

78. Compare *Neely v. Henkel*, 180 U.S. 109, 122 (1901), with *United States v. Toscanino*, 500 F.2d 267, 275 (2d Cir. 1974).

ino,<sup>79</sup> United States agents participated in "kidnapping" a known heroin smuggler from Uruguay in order to bring him before the United States District Court of New York to answer charges. The defendant made allegations of extreme physical torture and abuse which he alleged occurred during the arrest stage outside the territorial jurisdiction of the United States.<sup>80</sup> The Second Circuit held that should the allegations be proven, it would be bound to release the defendant because of the flagrantly illegal law enforcement conduct.<sup>81</sup> It apparently felt compelled to disassociate itself and the American judicial system from a case so tainted by unconstitutionality. Accepting jurisdiction over the defendant and proceeding to judgment would not only have inextricably involved the United States in unacceptable foreign process, but would also have been an intolerable acquiescence in those practices. Subsequent cases have arguably constituted a retreat from *Toscanino*, but none have involved such gross violations of United States or international standards of human rights.<sup>82</sup>

The question of American involvement in foreign criminal judgments is particularly acute in cases dealing with the recognition of the collateral effects of such judgments. While American courts have given collateral effect to some, it is clear that due process must be satisfied.<sup>83</sup> One recent case in this area, *Cooley v. Weinberger*,<sup>84</sup> involved the denial of Social Security benefits to a wife because she had been convicted by an Iranian court of her husband's murder. The wife argued that several due process guarantees were denied her,<sup>85</sup> but the administrative law judge's review of the Iranian trial revealed a criminal process in Iran similar to that in the

---

79. 500 F.2d 267 (2d Cir. 1974).

80. *Id.* at 270.

81. *Id.* at 275-76.

82. Compare *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), with *Lujan v. Gengler*, 510 F.2d 62 (2d Cir.) (kidnapping occurred without the severe torture associated with *Toscanino*), *cert. denied*, 421 U.S. 1001 (1975), and *United States v. Lira*, 515 F.2d 68 (2d Cir.) (kidnapping authorized because U.S. agents did not directly participate), *cert. denied*, 423 U.S. 847 (1975), and *United States v. Orsini*, 402 F. Supp. 1218 (E.D.N.Y. 1975) (participation of U.S. agents in torture warranted evidentiary hearing to determine whether due process was violated).

83. Professor A. Kenneth Pye has written extensively on these collateral effects, which include state double jeopardy, foreign conviction recognition by state multiple offender statutes, exclusion of immigrants on the basis of foreign conviction, and impeachment of a witness in an American trial by establishing a previous foreign conviction. See generally, Pye, *The Effect of Foreign Criminal Judgments in the United States*, 32 U. MO. KAN. CITY L. REV. 114, 120-135 (1964). In the multiple offender statute cases, satisfaction of due process is a prerequisite to recognition, but the immigration exclusion does not require establishing procedural justice safeguards. *Id.* at 128, 132.

84. 518 F.2d 1151 (10th Cir. 1975).

85. She contended denial of the right: (1) to access to her attorney; (2) to be advised of her rights; (3) to post bail; (4) to have indictment issue; (5) to cross-examine the witnesses against her; and (6) to be proven guilty beyond reasonable doubt. *Id.* at 1154.

United States.<sup>86</sup> The United States Court of Appeals for the Tenth Circuit affirmed and indicated that had the procedural steps followed in the Iranian proceeding been "bizarre, arbitrary or capricious" the decision might have been different.<sup>87</sup> The court's statement about Iranian law gives a clue to the United States' attitude towards a foreign trial. Should these same rights be guaranteed United States citizens on trial in Mexico, it is unlikely that the constitutional difficulties raised by the treaty will prevent its implementation.

One further indicant of United States due process expectations in international criminal dealings may be found in its Status of Forces Agreements<sup>88</sup> (SOFA). The North Atlantic Treaty Organization SOFA<sup>89</sup> is typical of most in that it lists seven specific guarantees that a foreign country seeking to exercise criminal jurisdiction over United States military personnel must follow.<sup>90</sup> The United States Senate's advice and consent to the agreement added the extra protection or clarification that the United States defendant must be afforded all the rights guaranteed by the Constitution in a domestic trial.<sup>91</sup> Despite the fact that the provisions apply only to persons connected with the Armed Services,<sup>92</sup> these guarantees constitute the most specific statements of United States international procedural justice expectations.

It is clear that the inherent differences of the civil and common law criminal procedure will not automatically disqualify a foreign criminal judgment from the possibility of recognition.<sup>93</sup> Consequently, the United States will not insist on complete reproduction of the procedural safeguards of the fourteenth amendment. This insistence on domestic standards of due process in international dealings seems unlikely to serve the

---

86. *Id.* at 1155.

87. *Id.* at 1155.

88. Such agreements are primarily intended to clarify the criminal jurisdiction which a foreign country may exercise over friendly armed forces stationed in that country. *Holmes v. Laird*, 459 F.2d 1211, 1212 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972). They establish procedures for exercise of jurisdiction by the foreign country or provide for transfer of jurisdiction to the individual's home country. The U.S. has 25 SOFA agreements in force. S. REP. NO. 1434, 91st Cong., 2d Sess., 8-9 (1970). There is a significant amount of literature on these agreements. See, e.g., T. SNEE & A. PYE, STATUS OF FORCES AGREEMENTS: CRIMINAL JURISDICTION (1957); Norton, *United States Obligations Under Status of Forces Agreements: A New Method of Extradition?*, 5 GA. J. OF INT'L & COMP. L. 1 (1975); Note, *Criminal Jurisdiction Over American Forces Abroad*, 70 HARV. L. REV. 1043 (1957).

89. June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846.

90. *Id.* art. VII(9).

91. 99 CONG. REC. 8780 (1953), *cited in* *Holmes v. Laird*, 459 F.2d 1211, 1224 n.98 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972).

92. NATO SOFA, June 19, 1951, art. VII(9), 4 U.S.T. 1792, T.I.A.S. No. 2846.

93. See *Cooley v. Weinberger*, 518 F.2d 1151, 1155 (10th Cir. 1975); Pye, *The Effect of Foreign Criminal Judgments in the United States*, 32 U. MO. KAN. CITY L. REV. 114, 115 (1964).

interests of the United States or of the international community.<sup>94</sup>

Nevertheless, it is also clear that the United States will not recognize judgments which fall too far below the standard of due process.<sup>95</sup> Therefore, in striking a balance grounded on consent, the most reasonable standard which exists and the one most likely to be followed seems to be the international standard.<sup>96</sup>

#### INTERNATIONAL DUE PROCESS

Different conceptions of the functions of government and the rights of the individual have produced different levels of guarantee and enforcement, but during the past twenty-five years, a number of international instruments have been drawn to establish a minimum standard of procedural justice.<sup>97</sup> Prominent among them is the European Convention on Human Rights and Fundamental Freedoms,<sup>98</sup> which is a modern composite formulation of international justice. It binds signatories to protect human rights by providing specific remedies for violation of the terms of the agreement.<sup>99</sup> The International Covenant on Civil and Political Rights,<sup>100</sup> of which the United States is not a member, has established similar guidelines for a standard of international procedural justice.<sup>101</sup> Another recent instrument that provides specific guidelines for procedural justice is the

94. International criminal law scholars criticize the view that superiority of domestic procedures should preclude recognition of foreign judgments. See Mueller, *International Judicial Assistance in Criminal Matters*, 7 VILL. L. REV. 193, 220 (1961-62); Pye, *The Effect of Foreign Criminal Judgments in the United States*, 32 U. MO. KAN. CITY L. REV. 114, 115-16 (1964).

95. See *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 165, 178-82 (1965). With regard to the United States Senate's insistence on due process guarantees demonstrated by their advice and consent to NATO SOFA see 99 CONG. REC. 8780 (1953).

96. Oehler, *Recognition of Foreign Penal Judgments and Their Enforcement*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 261, 277 (M. Bassiouni & V. Nanda ed. 1973) (suggestion that European Convention for Protection of Human Rights and Fundamental Freedoms serves as good procedural justice standard for foreign penal judgment recognition).

97. See Stone, *Range of Crimes for a Feasible International Jurisdiction*, in TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT 315, 317-22 (J. Stone & R. Woetzel ed. 1970).

98. Nov. 4, 1950, § 1, arts. 5-7, 213 U.N.T.S. 221, E.T.S. No. 5, cited in 45 AM. J. INT'L L. 24 (1951). The agreement was originally signed by 13 countries; 2 others have since joined. INTERNATIONAL CRIMINAL LAW 195 (G. Mueller & E. Wise ed. 1965).

99. Many international agreements acted as mere statements of principle or declaratory-hortatory instruments. An example of this type is the Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948) (especially arts. 10, 11); see Stone, *Range of Crimes for A Feasible International Jurisdiction*, in TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT 315, 320 (J. Stone & R. Woetzel ed. 1970).

100. G.A. Res. 220, 21 U.N. GAOR, Supp. (No. 16) 52-58, U.N. Doc. A/6316 (1966), reprinted in 61 AM. J. INT'L L. 870 (1967).

101. *Id.* arts. 13, 14, 17, 61 AM. J. INT'L L. at 875-76.

Draft Convention on the International Responsibility of States for Injuries to Aliens.<sup>102</sup>

Several United States instruments have embraced the fundamentals of the international standard of justice, which indicates a willingness to compromise the inherent differences of legal institutions and cultures in favor of a workable statement of human rights. The multilateral character of the NATO SOFA gives it the effect of an international set of principles and demonstrates the similarity between United States and international standards. The seven procedural justice guarantees which it contains are similar to those established in some of the international conventions<sup>103</sup> and are broad enough to be operative in civil and common law systems. The *Restatement of Foreign Relations Law* also embraces the international standard of justice that is derived from the relevant principles of these international agreements as well as "international custom, judicial and arbitral decisions."<sup>104</sup> It incorporates trial procedure similar to the NATO SOFA requirements, but lists additional guarantees to be afforded during the arrest and detention stages.<sup>105</sup> The international agreements and domestic instruments that contain like provisions point the United States in the direction of an international standard.

#### IMPLEMENTING THE TREATY

Since Mexican procedures appear to meet this international standard, there should be no constitutional difficulty in implementing the treaty.<sup>105</sup> Should lagging Mexican practice render its constitutional safeguards merely theoretical,<sup>107</sup> however, United States courts will be hard-pressed to find a basis for enforcing such questionable sanctions. A writ of habeas corpus challenging imprisonment under the treaty in this event might be successful, despite the fact that enforcement of a treaty is the duty of the executive branch.<sup>108</sup>

---

102. See Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 548 (1961).

103. Compare NATO SOFA, June 19, 1951, art. VII(9), 4 U.S.T. 1792, T.I.A.S. 2846, with European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, § 1, arts. 5, 6, 213 U.N.T.S. 221, E.T.S. No. 5.

104. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 165 (1965).

105. *Id.* §§ 178-82. See generally Wise, *Note on International Standards of Criminal Law and Administration*, in INTERNATIONAL CRIMINAL LAW 135 (G. Mueller & E. Wise ed. 1965).

106. The only divergence appears to be in the right to cross-examine witnesses, which is guaranteed only if the witness can be found in the place where the trial is held. There is no provision for compulsory process in such cases. CONSTITUCION POLITICA DE LOS ESTADOS MEXICANOS art. 20, § IV (1917, amended 1972), translation quoted in note 39 *supra*.

107. Evidence of this lagging enforcement of the stated constitutional guarantees has been collected by the Department of State. See *Hearings on Prisoners, supra* note 6, pt. 3, at 6.

108. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)(enforcement of a treaty

It has been suggested that should the standards fall below those acceptable for recognition of foreign criminal judgments, the transferred sanctions could nevertheless be legally executed because the offender expressly consented to the transfer.<sup>109</sup> In essence the consent would act as a waiver of the unconstitutional trial practices under which sentence was rendered in much the same way that one might waive a jury trial. Though United States practice permits some rights to be waived,<sup>110</sup> it is hardly conceivable that those rights may be waived after they have been violated.

An additional, but less pressing, problem occurs as a result of the differences in the length of sentences imposed for crimes in Mexico and the United States. The sentences and parole regulations for drug violations in Mexico are much stricter than for the comparable offense in the United States. As an example, the Mexican sentence for possession of marijuana is two to nine years without parole;<sup>111</sup> a similar offender in the United States may draw no sentence at all.<sup>112</sup> This consideration is significant because approximately eighty-five percent of the American prisoners currently in Mexican jails are drug offenders.<sup>113</sup> Transferring such harsh sentences to the United States has been considered a violation of the constitutional prohibition against *ex post facto* laws.<sup>114</sup> Though it seems unlikely that this argument will be persuasive enough to affect implementation of the treaty, it does point out some of the inequity that may appear.

Practically speaking, there should be no difficulty with this objection, for the treaty provides that the sentences are to be "carried out according to the laws and procedures" of the receiving country.<sup>115</sup> The provision specifically refers to parole, conditional release, and other provisions for reduction of sentences. Though the Mexican sentences are to be fully transferred to the United States, many offenders would be eligible for immedi-

---

is the duty of the political department of the government); *Holmes v. Laird*, 459 F.2d 1211, 1225 (D.C. Cir. 1972) (court refused to consider whether German court complied with NATO SOFA trial guarantees where there were other remedies available before court's jurisdiction could be involved).

109. Memorandum of Law prepared by Professor Detlev F. Vagts for the U.S. Dept. of State on the subject of the Mexican Treaty, at 10 (Dec. 15, 1976) (on file in St. Mary's University Law School Library), *citing* *Tollet v. Henderson*, 411 U.S. 258 (1973); *Jolley v. INS*, 441 F.2d 1245 (5th Cir.), *cert. denied*, 404 U.S. 946 (1971).

110. *See Palko v. Connecticut*, 302 U.S. 319, 324 (1937) (jury trial held not "fundamental" within meaning of fourteenth amendment); *New York Cent. R.R. v. White*, 243 U.S. 188, 208 (1916).

111. CODIGO PENAL arts. 193-95 (1972), which fixes marijuana penalties at two to nine years and opium at three to twelve years.

112. 21 U.S.C. § 844 (1970) which provides for no more than one year in prison or immediate probation at the discretion of the judge.

113. *Hearings on Prisoners*, *supra* note 6, pt.3, at 22-23 (490 of 603 U.S. citizens in Mexican jails were involved in drug related offenses as of June 1, 1976).

114. U.S. CONST. art. 1, § 9, cl. 3.

115. Treaty, *supra* note 1, art. V, § 2.



ate release under the laws of the United States.<sup>116</sup> This is particularly true of the minor offenders who may have already served a length of time in Mexico comparable to the United States sentence for the same offense. In cases where a more serious offense has occurred or the individual is a known offender, parole could be delayed indefinitely at the discretion of the government. In addition to becoming an important law enforcement mechanism, the treaty may be an effective means to secure the release of United States citizens imprisoned abroad, for the President has a statutory mandate to press for release where imprisonment is unjust.<sup>117</sup>

#### CONCLUSION

Ratification of the Prisoner Exchange Treaty with Mexico will thrust the United States into a novel area of international criminal law producing important national and international implications. It will force the United States to define its constitutional guidelines for international criminal practice and will place the country on the growing list of those who already maintain agreements for reciprocal enforcement of criminal sanctions.

The prospects for expanding the agreement with other nations are good,<sup>118</sup> but the courts must proceed cautiously to avoid diluting the constitutional standards on which the United States insists. Maintaining this cautious approach may, ironically, deny some prisoners essential human rights, but the remedy for such denial does not lie in full scale compromise of due process.<sup>119</sup> Practical politics, even in the name of human rights or advancement of international law, is not a valid justification for denying full due process. The spotlight which the agreement has focused on the prisoner treatment problem will probably obviate the need to turn to such remedies and will allow effective operation of the treaty provisions by forcing Mexico to deal with United States citizens in a manner not violative of their constitutional rights or the comparable international standard.

---

116. Drug offenders prosecuted under federal law may receive immediate conditional release at the judge's discretion. 21 U.S.C. § 844 (1971). Many state laws have similar and even more liberal provisions. *See, e.g.* Texas Controlled Substances Act, TEX. REV. CIV. STAT. ANN. art. 4476-15, §§ 4.01, 4.12 (1976).

117. It is the duty of the President to "use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release . . . ." 22 U.S.C. § 1732 (1970).

118. Negotiations with Canada have already begun for execution of a treaty similar to the Mexican agreement. Letter from Detlev F. Vagts, legal advisor on the Mexican Treaty to Dep't of State, to the author (March 1, 1977).

119. The remedy should be sought through invocation of the international standards of justice established by the United Nations. Universal Declaration of Human Rights, Dec. 10, 1948, art. 5, 3 U.N. GOAR (I Resolutions) 71, reproduced in 43 AM. J. INT'L L. 127 (Supp. 1949).

*Editor's Note: The treaty was signed by both parties on November 25, 1976, and approved by the Mexican Senate on December 30, 1976. It was reported to the United States Senate by President Carter on February 16, 1977. Committee hearings are expected to begin in mid-summer on advice and consent to the treaty. In addition, enabling legislation must be introduced and approved by both Houses of Congress.*