TREASON, SEDITION AND ESPIONAGE AS POLITICAL OFFENSES UNDER THE LAW OF EXTRADITION

*Manuel R. García-Mora**

Most countries continue to regard treason, sedition and espionage as crimes essentially political in nature and therefore as crimes for which extradition is not granted. Professor García-Mora asserts, however, that there has been in recent years a disturbing trend of an increasing effort by some states to reverse traditional thinking and permit extradition for these offenses. He declares that the individual extradited for a political offense frequently is unable to obtain an unimpassioned trial and thus is deprived of certain of his important human rights. The author examines various constitutional and statutory formulations defining treason, sedition and espionage, the present state of these crimes under extradition law and the methods states have employed to restrict the political character of these crimes in order to justify extradition.

THE crimes of treason, sedition and espionage have been traditionally regarded as political offenses for which extradition is not granted.[1] More particularly, they have been classified in the category of purely political offenses, since they affect the peace and security of the State without containing any element of an ordinary crime.[2] Courts and international jurists generally have agreed on the political aspect of these offenses. However, since the end of World War II increasingly successful attempts have been made to exclude treason, sedition and espionage from the category of political offenses, with the result that extradition has been granted on these charges. Although some of these attempts may have been warranted, there is nevertheless an increasing danger that the well established principle of non-extradition of political offenders as applied to these offenses may be becoming so limited in its scope as to become almost illusory. Such developments are quite disturbing, especially in light of the fact that totalitarian and even democratic countries have increased the number of offenses for which one now may be convicted of treason.[3] It should

* B.S., LL.B., 1943, University of Panama; LL.M., 1944, A.M., 1946, Harvard University; J.S.D., 1948, Yale University. Professor of Law, Fordham University School of Law. Fulbright Visiting Professor of Law, University of San Marcos, Lima, Peru, 1959-1960. Author: INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT (1956) and INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES (1962).

1. In fact, some believe that the term political offense applies only to treason or attempted treason. See for discussion, STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 294 (5th ed. 1963).

2. For a discussion of the distinction between purely political and relative political offenses, see García-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1231-40 (1962).

3. For development, see Evans, *Observations on the Practice of Territorial Asylum in the United States*, 56 AM. J. INT'L L. 148, 151-52 (1962).

be noted, at the outset, that to restrict unduly the political aspect of treason, sedition and espionage in order to permit extradition most surely will result in striking a heavy blow against the protection of human rights in one of its most vital areas. In view of these observations, the nature of the crimes of treason, sedition and espionage will be examined in the ensuing pages in an effort to determine to what extent, if any, these offenses have lost their political character, and in what respect they have retained it.

I. The Nature of Treason, Sedition and Espionage Under Constitutional and Statutory Enactments

A. *Treason*

"No crime is greater than treason," said the Supreme Court of the United States through Mr. Justice Bradley in *Hanauer v. Doane*.[4] The special gravity of this crime stems from the fact that it threatens the very existence of the State. Most generally considered, treason consists of a breach of allegiance to the State.[5] While this particular description of the crime is common to all enactments on the subject, the acts regarded as treasonable vary substantially from country to country, revealing an utter lack of consensus. The crime of treason, considering both constitutional and statutory provisions, has been established under at least three different major formulations. As these formulations show different approaches to the treatment of treason, it is profitable to discuss them separately.

The first formulation not only restricts the kinds of acts that can be regarded as treasonable, but also determines the degree of evidence needed to support a conviction based on these acts. This type of formulation is instructively illustrated by the British and American definitions of treason. The British Treason Act of 1351, which apparently is the oldest treason legislation still in force, declares treason to exist

> In cases where a man doth compass or imagine the death of our Lord the King, the Lady his Consort, or of their eldest son and heir; or if a man violate the King's Consort, or the King's eldest daughter being unmarried, or the consort of the King's eldest son and heir. And if a man levy war against our said Lord

4. 79 U.S. (12 Wall.) 342, 347 (1870).

5. Kawakita v. United States, 343 U.S. 717 (1951). It is generally accepted that an alien domiciled in a country owes temporary allegiance to that state and, thus, can be guilty of treason if he breaches that allegiance. See Calvin's Case, [1608] 4 Co. Rep. 1, 10, 11 (1793); Carlisle v. United States, 83 U.S. (16 Wall.) 147, 154, 156 (1872).

> the King in his realm, or be adherent to the enemies of our Lord the King in the realm, giving them aid and support in his realm or elsewhere; and therefore be attainted upon due proof of open deed by people of their condition.[6]

This provision establishes three treasonable acts: plotting against the King's life, levying war against the King, and adhering to his enemies by giving them aid and support in his realm or elsewhere.[7] The American provision, historically traceable to the English Act,[8] is found in the Constitution:

> 1. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.
>
> 2. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.[9]

Aside from compassing the King's death omitted in the preceding definition,[10] the American formulation conforms to its British counterpart in that it includes the other two treasonable acts of levying war against the United States and of adhering to its enemies by giving them aid and comfort in the United States or elsewhere.[11] Both formulations make explicit and unambiguous reference to specific acts of treason, thus precluding the possibility of adding new categories of treasonable conduct.[12] They prescribe, in addition, the manner in which the

6. Treason Act, 25 Edw. 3, Stat. 5, c. 2 (1351). Translation from the original French in 5 HOWELL, STATE TRIALS 971-77 (1810).

7. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW IN ENGLAND 86 (2d ed. 1890).

8. See Hurst, *English Sources of the American Law of Treason*, 1945 WIS. L. REV. 315.

9. U.S. CONST. art. III, § 3. For a recent comprehensive treatment of the American law, see CHAPIN, THE AMERICAN LAW OF TREASON: REVOLUTIONARY AND EARLY NATIONAL ORIGINS (1964).

10. It seems that this provision of the English Act gave rise to abuses, for the concept of "constructive treason" was derived from it. Apparently, it was because of the early English practice in this regard that the framers of the Constitution left out any reference to compassing or imagining the King's death. In any event, it has been suggested that to have included such a provision in the constitution of a republic would have been incongruous. For discussion, see Hurst, *Treason in the United States*, 58 HARV. L. REV. 226, 815-16 (1945). It should also be mentioned that under this clause of the British Act offenses against the person of the sovereign, as for instance, assassination of the sovereign, are regarded as treason. This of course is not the case under the American provision. For discussion of this aspect of the British law, see 1 OPPENHEIM, INTERNATIONAL LAW 648 (6th ed. Lauterpacht, 1947).

11. The United States Code also provides that "Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason. . . ." 18 U.S.C.A. § 2381 (1948).

12. For elaboration, see Hurst, *supra* note 10, at 807.

government must prove the existence of treason in a specific case.[13] Further, the American formulation limits the power of Congress to enact legislation for the punishment of the crime.[14] The policy reason underlying all of these restrictions is clear, *i.e.*, the well-founded apprehension that treason, because it is the most heinous of all crimes against the political order, lends itself to being used as an instrument of partisan politics in the struggle for power within the State.[15] Hence, the basic policies that seem to be at stake in the restrictive definitions are preventing the legislature from unduly enlarging the scope of the crime and ensuring that public passion and personal prejudice do not influence prosecutions on treason charges.[16]

In the practical application of the American and British provisions, the courts have given them a narrow construction so as to confine them within the intended restrictions. The language of the statutory and constitutional prescriptions suggests that the treasonable conduct there envisaged requires proof of both intent and overt act as prerequisites to conviction. An unbroken line of English and American decisions treats intent and overt act as two distinct and separate elements of the crime.[17] The kind of intent necessary for conviction is an intention to betray, that is, an intention to assist the enemy.[18] This requirement seems to assume, most naturally, that unless a person intends to assist the enemy in some hostile design against the United States or Great Britain, no criminal intent can be found and, therefore, an essential element of the crime of treason is lacking.[19] It logically

13. See generally THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 638-39 (Corwin ed. 1952).

14. See the comments of James Madison on the treason clause of the Constitution in THE FEDERALIST No. 53.

15. Thus, in United States v. Burr, 25 Fed. Cas. 2, 13 (No. 14692a) (C.C.D. Va. 1807), Chief Justice Marshall said:

> As this is the most atrocious offense which can be committed against the political body, so is it the charge which is most capable of being employed as the instrument of those malignant and vindictive passions which may rage in the bosoms of contending parties struggling for power. It is that of which the people of America have been most jealous, and therefore, while other crimes are unnoticed, they have refused to trust the national legislature with the definition of this . . . .

16. See Ex parte Bollman, 8 U.S. (4 Cranch) 75, 125 (1807), in which the Chief Justice said: "As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made, a deliberate and temperate inquiry."

17. See Cramer v. United States, 325 U.S. 1, 30 (1945); Haupt v. United States, 330 U.S. 631, 641 (1947); The King v. Casement, [1917] 1 K.B. 98; The King v. Lynch, [1903] 1 K.B. 444; Joyce v. Director of Public Prosecutions, [1946] A.C. 347.

18. Rex v. Steane, [1947] 1 All E.R. 813; Iva Ikuko Toguri D'Aquino v. United States, 192 F.2d 338, 366 (9th Cir. 1951).

19. See Haupt v. United States, 330 U.S. 631 (1947), where the Supreme Court said that the help given by a father to a saboteur son as an individual is not treason, as the intention to assist him in his hostile design is clearly absent. In this case, however, the jury

follows that no treasonable offense can be deemed to exist if the person accused of treason did not know of the hostile design of the enterprise to which he allegedly gave aid and comfort.[20] The overt act, on the other hand, is the externalization of the "disloyal state of mind,"[21] and, therefore, must tend towards the accomplishment of the criminal design.[22] More carefully viewed, the overt act element performs the double function of showing the defendant is no longer on the level of thought and opinion, but has now moved into the realm of action,[23] and of eliminating the possibility (seen, *infra*, in the law of other countries) of using the treason charge to suppress peaceful political opposition.[24] To be noted also is that the overt act must be proved, not by circumstantial evidence, but by direct proof—by direct testimony of two witnesses.[25] Clearly, then, it may be said that under the relevant statute and case law, if the intent and the overt act are not present, the American and British courts will not recognize the existence of the crime of treason.[26]

---

found that the father gave the help to assist the son to carry out his hostile action. *Id.* at 641-42. With respect to England, it is generally held that the British law requires that the Crown prove the existence of an intent on the part of the accused to assist the enemy. See 4 STEPHEN, COMMENTARIES ON THE LAWS OF ENGLAND 127-28 (Warnington ed. 1950). For a case where this point is emphasized, see Rex v. Steane, [1947] 1 All E.R. 813.

20. In Cramer v. United States, 325 U.S. 1, 29 (1945), the Supreme Court said: "a citizen may take actions which do aid and comfort the enemy—making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength —but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason."

21. *Id* at 30.

22. *Id.* at 7. See also Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

23. Hurst, *supra* note 10, at 830.

24. Cramer v. United States, 325 U.S. 1, 27 (1945).

25. *Id.* at 30. It seems that the two-witness requirement also prevails in England. This requirement first appeared in the English Treason Trials Act of 1696, 7 & 8 Will. 3, c. 3. See also United States v. Fries, 3 U.S. (3 Dall.) 515 (1799), 9 Fed. Cas. 826 (No. 5126) (C.C.D. Pa. 1799). Confession in open court is also competent evidence under the Constitution; U.S. CONST. art. III, § 3.

26. In further illustration of the first major type of formulation the definition incorporated in the Argentine Constitution may be noted, for it follows very closely the American formulation. Thus, the Argentine Constitution says:

> Treason against the Nation shall consist only in taking up arms against her, or in adhering to her enemies, giving them aid and comfort. Congress shall declare by a special law the punishment of this crime, but the penalty for treason shall apply only to the offender and no infamy therefrom shall affect his relatives, regardless of the degree of relationship.

ARGENTINE CONSTITUTION OF MARCH 6, 1949, art. 33. For the English text, see 1 PEASLEE, CONSTITUTIONS OF NATIONS 67 (1950). The same provision was found in Article 103 of the CONSTITUTION OF 1853. For text, see FITZGIBBON, THE CONSTITUTIONS OF THE AMERICAS 30 (1948). For discussion of this provision, see generally 2 ANTOKOLETZ, TRATADO DE DERECHO CONSTITUTIONAL Y ADMINISTRATIVO 704 (1933). See also Article 24 of the Argentine Penal Code, as translated in 6 THE AMERICAN SERIES OF FOREIGN PENAL CODES 87 (Muller ed. González-López transl. 1963).

In summing up the salient points of the definitions found in the first major category it is clear that, in requiring the commission of specified acts and in establishing the type of evidence necessary for conviction, they firmly establish the special character of treason, sharply distinguishing it from an ordinary crime.[27] The most conspicuous fact about the crime thus postulated is the political motive of the offender, and it is precisely because of this motivation that treason generally is classed as a political offense. In this sense, the restrictive definitions have remained faithful to the distinction, firmly established in nineteenth century jurisprudence,[28] between political offenders and ordinary criminals.

The second formulation establishing the crime of treason employs the technique of specific enumeration. That is, a catalogue of concrete situations is set up which seeks to characterize any offense against the State, in any manner, open or covert, as a treasonable act.[29] The provision of the French Penal Code is representative:

> Any French national shall be guilty of treason and sentenced to death, if he:
>
> 1. bears arms against France;
>
> 2. has dealings [*intelligences*] with a foreign power in order to induce it to undertake hostilities against France, or provides it with the means thereof, either by facilitating the entrance of foreign forces into French territory, or by undermining the allegiance of the army, navy or air force, or by any other means whatsoever;
>
> 3. delivers to a foreign power or to its agents, any French troops or territories, cities, fortresses, fortifications, posts, stores, arsenals, materials, ammunitions, ships or aircraft belonging to France or to countries over which France exercises sovereignty;
>
> 4. in time of war instigates soldiers or sailors to enlist in the service of a foreign power, facilitates their doing so or enlists persons to service with a power which is at war with France;
>
> 5. in time of war has dealings [*intelligences*] with a foreign

27. For a discussion of some treasonable offenses, see Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1122-31 (1951).

28. In the Yugoslav Refugee Extradition Case, decided by the German Federal Constitutional Court on February 4, 1959, the court observed that "the 'politization' of large spheres of life and the utilization of criminal law for securing and carrying out social and political revolutions have blurred the boundary line between 'criminal' and 'political' offenses in many States." As reported in 54 AM. J. INT'L L. 418 (1960).

29. In this type, too, the breach of allegiance as a characteristic of treason is controlling. Thus, the Belgian Court of Cassation said in this connection: "Treason implies a failure in a duty of allegiance towards the State. . . ." Auditeur-Général Près la Cour Militaire v. Müller and Others, Belgium, Court of Cassation (Second Chamber), July 4, 1949, [1949] Ann. Dig. 400, 401 (No. 144) (1955).

power or its agents in order to promote the actions of that power against France.[30]

The most fundamental difficulties in this formulation are twofold. The first lies in an overemphasis on overt acts against the State and the comprehensive reach of the provision in which these acts are postulated. Undoubtedly, the policy underlying this inventory is to include within its terms every conceivable offense against the State. But when these acts are more carefully examined, it becomes apparent that this provision of the code is misleading and confusing, for it overlooks the fact that treason involves a breach of allegiance to the State and that not every act against the State technically constitutes such a breach. Apart from bearing arms against France, which was previously the only treasonable act contemplated in the code,[31] and of which the treasonable character is not open to dispute, it must be conceded that all the other forms of hostile activity punishable as treason may undermine the stability of the government and, in wartime, the country's whole war effort. On such a basis, the power of the government to deter such activities in advance as well as to punish them severely afterwards hardly can be denied. What is highly questionable is whether a government can legitimately bring this about by arbitrarily classifying such activities as treasonable, thus meting out the highest penalty under the law without any safeguards both in respect to the scope of these acts and in the manner in which they may be proved.[32] This tendency to regard any act against the State as treasonable is reflected in another provision of the code, in which such other activities as deliver-

30. French Penal Code art. 75. English text in 1 THE AMERICAN SERIES OF FOREIGN PENAL CODES 43 (Muller ed., Moreau and Muller transl. 1960). It should be noted that the provision says "foreign power" rather than "enemy power." The German Penal Code makes a distinction between high treason and treason, describing the former as acts aimed at changing the constitutional order of the Federal Republic of Germany, while the latter consists in betraying state secrets. For the pertinent provisions, see German Penal Code §§ 80 & 99. For the English text, see 4 THE AMERICAN SERIES OF FOREIGN PENAL CODES 51, 62 (Muller ed., Muller and Buergenthal transl. 1961).

31. Bearing arms against France was regarded as the only treasonable act before 1939. The other treasonable activities were added to the Penal Code by the decree of July 29, 1939. See DALLOZ, CODE PÉNAL: ANNOTÉ D'APRÈS LA DOCTRINE ET LA JURISPRUDENCE 86-87 54th ed. 1957).

32. The recent Bidault incident clearly illustrates this point. Georges Bidault is an anti-Gaullist leader, and was charged with treason in that he allegedly plotted against the State. After seeking asylum in West Germany, where because of his political activities he was asked to leave the country, he was given asylum in Brazil. For the story of the incident, see The Christian Science Monitor, March 14, 1963, p. 8, col. 7 (Eastern edition). The recent case of Colonel Argoud is also in point. Argoud was kidnapped by French agents from Munich and was brought to France to stand trial on a treason charge which alleged he had plotted against the life of President de Gaulle, by engaging in terrorist activities in Germany. He was convicted of treason. For the story, see N.Y. Times, December 29, 1963, p. 12, col. 5.

ing to a foreign power secrets of national defense, willfully destroying or damaging ships, aircraft, material supply, or participating in acts aimed at the demoralization of the army or nation, are regarded as treasonable offenses.[33] The mere reading of this provision properly suggests that the acts in question are more likely to fall in the category of espionage and sabotage,[34] but apparently under French law treason and espionage confusingly overlap.[35]

The second difficulty with the specific enumeration method of formulating a definition of treason is the frequent indefiniteness of terms. This is illustrated by the term "dealings [*intelligences*] with a foreign power" in the French provision that seems to pervade the prescriptions of that code. The code nowhere exhibits any effort to clarify this term,[36] and, though it may appear clear in principle, its application in the concrete circumstances and highly emotional moods of wartime likely could result in unjust decisions.[37] Certainly, successor regimes have been known to avail themselves especially of the "dealings with a foreign power" provision in order to gain some measure of political support at home or to find a scapegoat for a national misfortune.[38] The fact of the matter is that "dealings with a foreign power" may involve bad judgment or an honest mistake in foreign policy rather than the commission of a crime.[39] What makes the French treason provision so susceptible of being used for political ends is the broad construction given to it by the courts. Unlike the American and British treason law in which a hostile intent and an overt act are basic elements of the offense, the French law merely requires for conviction that the person charged with treason has entertained anti-French policies, even though a specific hostile intent to injure France may not be present at all.[40] The application of this test

33. French Penal Code art. 76.

34. Some of these acts fall in the category of sabotage under the German Penal Code § 90.

35. It appears that the activities described in Articles 75 & 76 of the French Penal Code are regarded as espionage if committed by aliens. See French Penal Code art. 77. For discussion, see Cohen-Jonathan & Kovar, *L'Espionage en Temps de Paix*, 6 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 239 (1960).

36. Art. 78 of the code clarifies what is meant by secrets of national defense in respect to offenses against the external security of the State. Apparently, this is the only attempt at clarification in this chapter of the code.

37. It seems that the trials of Vichy officials proceeded on the theory that they had "dealings [*intelligences*]" with the enemy. For a full discussion of some of these trials, see Note, *Wartime Collaborators: A Comparative Study of the Effect of Their Trials on the Treason Law of Great Britain, Switzerland and France*, 56 YALE L.J. 1210, 1227-30 (1947).

38. Specific illustrations of this application of the code may be found in KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURES FOR POLITICAL ENDS 313-19 (1961).

39. *Id.* at 314.

40. See Note, *supra* note 37, at 1229. This rather indefinite nature of the law of treason

is clearly illustrated by the post-war treason trials of editors, authors, cartoonists, radio script writers and broadcasters. Although the available evidence indicates they were charged specifically with intelligence with a foreign power or demoralization of the nation in that they showed anti-Allied sentiments or support of Vichy policies, the point that bears a special emphasis is that their proof of not having intended to injure France or of the lack of any personal gain or of having had the same opinion long before the fall of France was quickly brushed aside by the court.[41] It is submitted that under the American and British law the intention to betray in the context already seen would have been lacking and, therefore, any charge of treason would have been unfounded.[42]

The third formulation establishing the crime of treason adopts both an enumerative technique by giving an illustrative but non-exhaustive list of specific acts of treason and a broad formula approach by appending these treasonable acts to a most general statement of policy. Perhaps the broadest of these formulas is found in the provision of the Soviet Constitution:

> To defend the country is the sacred duty of every citizen of the U.S.S.R. Treason to the motherland—violation of the oath of allegiance, desertion to the enemy, impairing the military power of the State, espionage—is punishable with all the severity of the law as the most heinous of crimes.[43]

In order to appreciate the full impact of this formulation, the corresponding provision of the Criminal Code should be noted, for it gives a wide and flexible description of the crime. Its relevant provision reads:

> Treason, that is to say, acts committed by citizens of the USSR to the detriment of the military power of the USSR, its State independence, or its territorial integrity, such as espionage, betrayal of a military or State secret, escape to the enemy, escape or flight abroad, are punished by the supreme measure of criminal

is not confined to France. For a similar situation in South Africa, see Karis, *The South African Treason Trial*, 76 POL. SCI. Q. 217, 221-22 (1961).

41. For a comprehensive discussion of these trials, see Note, *supra* note 37, at 1229-30. For a recent case where the accused was sentenced to death on the charge of treason that he participated in acts aimed at the demoralization of the army or the country in time of war, and where the accused fled to Brazil from which extradition was refused, see *In re* De Bernonville, Brazil, Supreme Court, September 28, 1955, [1955] Int'l L. Rep. 527 (1958).

42. See note 20 *supra*.

43. SOVIET CONSTITUTION OF 1936, as amended through June 17, 1950, art. 133. For English text, see 3 PEASLEE, CONSTITUTIONS OF NATIONS 267 (1950). Exactly the same provision is found in the CONSTITUTION OF THE MONGOL PEOPLE'S REPUBLIC, 1940, art. 91. For text, 2 PEASLEE, CONSTITUTIONS OF NATIONS 486 (1950).

> punishment—death by shooting and confiscation of property; in the case of extenuating circumstances punishment consists of deprivation of liberty for ten years with confiscation of property.[44]

Although the Soviet formulation reflects the traditional law in regarding treason as a breach of allegiance to the State, it nevertheless goes amazingly far in lumping together treason, desertion and espionage,[45] and, even more striking, in setting up escape or flight abroad as a treasonable act.[46] The belief that treason is a catch-all formula designed to punish any act against the State is deeply embedded in this definition.[47] Of course, it may be suggested that except for the offense of escape or flight abroad, the remaining acts described in the code might be regarded as treasonable under the French provision examined above and that, in this respect, there is very little difference between the French and Soviet definitions. Nevertheless, what makes the Soviet formulation particularly dangerous and quite different from any other formulation seen thus far is the inclusion among the treasonable acts of the "escape or flight abroad" formula. The danger lies in that this act, in itself, may not involve an anti-Soviet design[48] and, therefore, no criminal intent on the part of an individual fleeing abroad.[49] Yet the Soviet Criminal Code stresses the treasonable character of this act and offers no other index for the guidance of the courts. The policy that seems to underlie such a broad formulation is that of discouraging the exodus of Soviet citizens and controlling their movement abroad.[50] When this view is considered in conjunction with the heavy emphasis a Communist society places upon inte-

44. Soviet Criminal Code art. 58-1a, as quoted in KULSKI, THE SOVIET REGIME: COMMUNISM IN PRACTICE 240 (1954).

45. Yet espionage is very widely defined in art. 58-6 of the Criminal Code. For text, see KULSKI, *op. cit. supra* note 44, at 246.

46. It would seem that this provision of the Soviet Criminal Code is in violation of Article 13, para. 2 of the Universal Declaration of Human Rights that says that "everyone has the right to leave any country including his own, and to return to his country." For text, see 43 AM. J. INT'L L. SUPP. 127, 129 (1949).

47. It is a fact that the political crimes constantly increase in the Soviet Criminal Code. See Berman, *Soviet Law Reform—Dateline Moscow 1957*, 66 YALE L.J. 1191 (1957).

48. KULSKI, *op. cit. supra* note 44, at 240.

49. It seems that the Yugoslav Criminal Code, in force on July 1, 1951, has solved this difficulty, for flight abroad is punished only when the citizen flees abroad "for the purpose of carrying out hostile activity against his homeland." Criminal Code of the Federative People's Republic of Yugoslavia art. 110. For text, see 46 AM. J. INT'L L. SUPP. 36, 37 (1952). Article 54 of the Yugoslav Constitution should also be noted, for it says that "A citizen who is absent from the country may in accordance with law be deprived of Yugoslav citizenship only exceptionally, if by his work he causes harm to the international or other general interests of Yugoslavia, or if he declines to perform his basic civil duties and holds citizenship in another country." See the English translation of the Constitution published by the Secretariat for Information of the Federal Executive Council, Belgrade, 1963.

50. Evans, *supra* note 3, at 151-52.

grity of the economic and social policies of the regime,[51] it does not seem an unreasonable conclusion that under the Soviet formulation the scope of the crime of treason is wide and flexible, thereby giving the government unlimited freedom of prosecution on this charge.[52]

B. *Sedition*

It has been said that sedition frequently leaves off where treason begins.[53] This rather vacuous description of the crime clearly suggests the possibility that the line of demarcation between treason and sedition may be somewhat shadowy. In practice, however, two vital differences between the two offenses can be noted. First, while treason requires the existence of an overt act directed towards the execution of the treasonable intent, sedition requires only some "word, deed or writing" calculated to incite persons to a public disorder, such as riot, rebellion, insurrection or civil war.[54] It follows that sedition can be committed by the preliminary step of writing or speaking words designed to incite people to rebel against legitimate authority[55] even though rebellion never occurs.[56] The second notable difference between treason and sedition is that the fact of allegiance is controlling in the case of treason (only citizens and aliens owing allegiance to the State can be guilty of the crime), but is immaterial with regard to the charge of sedition. Moreover the two offenses are similar in that the objective of both is to injure the interests of the State. It is for this reason that both have been classed as political offenses.

The above points are well illustrated by the American law on the subject. The standard treatment of sedition in the United States is represented by three statutes dealing with three possible manifestations

51. KELSEN, THE COMMUNIST THEORY OF LAW 148 (1955).

52. Apparently, the same conception exists in Poland, for in the celebrated case, *Ex parte Kolczynski*, [1955] 1 Q.B. 540, 547 (1954), it was conclusively shown that if the refugees who sought asylum in England had been returned to Poland, they would have been prosecuted for treason on the basis of Article 79, para. 2 of the CONSTITUTION OF THE POLISH PEOPLE'S REPUBLIC OF 1952, which makes it a treasonable act for a Polish national to leave Poland and to go to a Western country without permission.

53. See Regina v. Alexander Martin Sullivan, 11 Cox Crim. Cas. 44, 45 (1868), where the court said: "Sedition is a crime against society, nearly allied to that of treason, and it frequently precedes treason by a short interval."

54. State v. Shepherd, 177 Mo. 205, 222, 76 S.W. 79, 84 (1903), as quoted in PERKINS, CRIMINAL LAW 380 n. 91 (1957).

55. Thus, the Supreme Court of Arizona, adopting the definition of sedition found in 3 BOUVIER, LAW DICTIONARY 3033, said: "Sedition is 'the raising of commotions and disturbances in the State; it is a revolt against legitimate authority.'" Arizona Publishing Co. v. Harris, 20 Ariz. 446, 448, 181 Pac. 373, 375 (1919).

56. In Phipps v. United States, 251 Fed. 879, 880 (4th Cir. 1918), it was held that in an indictment for seditious conspiracy, it is not required that the overt act charged should be the accomplishment of the conspiracy.

of the crime. The first is the statute on seditious conspiracy penalizing conspiracy

> to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof. . . .[57]

The second statute is the so-called "Smith Act," making it a crime to advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof.[58] Included within this offense is the publication and circulation of any writing advocating, advising, or teaching the duty to destroy by force any government in the United States.[59] The third statute is the wartime sedition statute imposing criminal penalties for circulating false reports with the intent to interfere with the operation or success of the military or naval forces of the United States.[60]

The kind of legislation above outlined undoubtedly expands the opportunity of prosecution for political acts,[61] and though the preliminary question concerning the constitutionality of these statutes has been answered affirmatively by the courts[62]—thus opening up vast opportunities for the enactment of more far-reaching sedition legislation[63]—the serious question still remains whether the constructions of

57. 18 U.S.C.A. § 2384 (Supp. 1963).

58. 18 U.S.C.A. § 2385 (Supp. 1963).

59. *Ibid.*

60. This is the so-called Espionage Act enacted in 1917. See 18 U.S.C.A. § 2388 (1951).

61. In his dissenting opinion in Dennis v. United States, 341 U.S. 494, 583 (1951), Justice Douglas said that to make the criminality of the teaching of doctrine turn solely on the intent with which it is taught makes the offense similar to the old English crime of constructive treason.

62. The Espionage Act of 1917 was upheld in Schenck v. United States, 249 U.S. 47 (1919), where the court developed the "clear and present danger doctrine," under which an utterance, before it can be penalized by the government, must have occurred "in such circumstances" or have been of "such a nature as to create a clear and present danger" that it would bring about "substantive evils" within the power of the government to prevent. The same test, with a slight modification, was adopted to uphold the constitutionality of the Smith Act in Dennis v. United States, 341 U.S. 494 (1951), where the court affirmed the convictions of eleven leading members of the Communist Party for violating section 2 of the Act, for advocating, advising and teaching the desirability of overthrowing the Government of the United States by force.

63. Reference should be made here to the Internal Security Act of 1950, 64 Stat. 987 (1950), as amended, 50 U.S.C.A. § 781 (Supp. 1963), which, among other things, provides for the registration of "Communist organizations." For a discussion of this Act, see Note, *The Internal Security Act of 1950*, 51 COLUM. L. REV. 606 (1951). Perhaps more far-reaching is the Communist Control Act of 1954, 68 Stat. 775 (1954), 50 U.S.C.A. § 841 (Supp. 1963), which states:

the sedition statutes have been based on a rather broad definition of the offense.[64] Without seeking to canvass in detail the numerous sedition cases decided by the courts,[65] the observation may be made that while in principle, the statutes are directed against seditious acts and practices, in fact, words, beliefs and opinions are likely to be punished.[66] It is in this respect that the make-up of the crime of sedition may be very broad, and it is also in this sense that the application of the sedition statutes so as to punish beliefs and opinions may involve violations of the constitutional guarantees of the freedoms of speech and of the press.[67] The reason for this situation may be that distinguishing between the legitimate use of the freedoms of speech and of the press on the one hand, and sedition involving subversive, libelous, or inciting utterances or expositions on the other, is a most remarkable undertaking not yet accomplished by the courts. The difficulty in making this distinction is often reflected in the atmosphere of abstraction and ambiguity in which the issues are presented in this type of prosecution.

The foregoing experience of the United States significantly illustrates the difficulties confronting a democratic society in trying to reconcile the enactment of sedition legislation with existing constitutional liberties. It may be instructive to note that other democratic countries have apparently solved this problem by withdrawing any constitutional protection from groups hostile to the prevailing political order.[68] Thus,

---

The Congress hereby [the word hereby does not appear in the U.S.C.A. text] finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States.

For discussion, see Comment, *The Communist Control Act of 1954*, 64 YALE L.J. 712 (1955).

64. Thus, in Dennis v. United States, 341 U.S. 494 (1951), the court held that conspiracy to advocate the overthrow of the government by force was enough to come within the prohibition of the Smith Act. It has been said that in this respect this case is no different from the espionage cases decided after World War I. For an excellent discussion of these cases, see RICE, FREEDOM OF ASSOCIATION 141 (1962). See also note 61 *supra*. However, see Yates v. United States, 354 U.S. 298, 308 (1957), where the *Dennis* holding was somewhat limited in that advocacy of concrete action to overthrow the government by force was punished and not advocacy as an abstract doctrine. Also, the Court, *ibid.*, limited the meaning of "organize" to "creating a new organization" and, therefore, stated the term "organize" could not be applied to "the activities of those concerned with carrying on the affairs of an already existing organization."

65. It is estimated that from 1951 to 1957 the government was successful in obtaining 96 convictions under the Smith Act. See for discussion, RICE, *op. cit. supra* note 64, at 141. See also Note, *Post-Dennis Prosecutions under the Smith Act*, 31 IND. L.J. 104 (1955).

66. In Regina v. Alexander Martin Sullivan, 11 Cox Crim. Cas. 44, 45 (1868), the court said that "sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquility of the State, and lead ignorant persons to endeavour to subvert the Government and the laws of the Empire." See also note 64 *supra*.

67. U.S. CONST. amend. I.

68. For discussion, see KIRCHHEIMER, *op. cit. supra* note 38, at 135-36.

the Basic Law of the Federal Republic of Germany specifically regards as unconstitutional "Parties which, according to their aims and the conduct of their members, seek to impair or abolish the libertarian democratic basic order or to jeopardize the existence of the Federal Republic of Germany."[69] Another article prohibits "Associations . . . which are directed against the constitutional order. . . ."[70] Apparently with the intention of outlawing the Communist Party, the Peruvian Constitution provides that legal recognition is not given to "political parties of international organization" and that "those who may belong to such political parties may not discharge any political function."[71] This type of constitutional provision undoubtedly is very effective in suppressing seditious organizations, for any group advocating the overthrow of the government, even as a matter of philosophical theory, is compelled to disband, since it has no constitutional protection. It may be added, however, that this technique of controlling seditious or subversive activities is not confined to the countries mentioned, for it is also found in the constitution of at least one Communist State. Thus, the Constitution of the Socialist Federal Republic of Yugoslavia, after guaranteeing the right of the citizens "to express and publish their opinions," goes on to say that "these freedoms and rights shall not be used by anyone to overthrow the foundations of the socialist democratic order determined by the Constitution. . . ."[72] The net result of these constitutional provisions is to outlaw by a rather bold and wide sweep any organization which may endanger the existence of the constitutional order. Unlike the United States, the countries here mentioned have eliminated the necessity of trying to reconcile their sedition legislation with the maintenance of constitutional liberties.

From the legislation above reviewed, and from the experience of other countries in the same area,[73] the conclusion may be reached that sedition is an offense which may involve any of the following acts:

69. Basic Law of the Federal Republic of Germany art. 9, para. (2).

70. Basic Law of the Federal Republic of Germany art. 21, para. (2). Under this provision the Federal Constitutional Court held that the German Communist Party was subversive. The court ordered the Communist Party to dissolve and forfeit its property to the Federal Republic, and it prohibited the formation of any successor or substitute organization. For the text of this decision, see Schoch, *Recent Significant German Decisions*, 55 AM. J. INT'L L. 352, 353-54 (1958).

71. CONSTITUTION OF THE REPUBLIC OF PERU OF APRIL 9, 1933, art. 53.

72. CONSTITUTION OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA art. 40.

73. For English sedition legislation, see the following statutes: Unlawful Assemblies Act of 1799, as amended by 57 Geo. 3, c. 19; Sedition Meeting Act of 1817, 57 Geo. 3, c. 19; Criminal Libel Act of 1819, 60 Geo. 3 and 1 Geo. 4, c. 8; Incitement to Disaffection Act of 1934, 24 & 25 Geo. 5, c. 56; Incitement to Mutiny Act of 1797, 57 Geo. 3, c. 7, § 1. For discussion of sedition acts, see 4 STEPHEN, COMMENTARIES ON THE LAWS OF ENGLAND 141 (Warnington ed. 1950). In continental law seditious offenses are usually grouped under the head-

1. An attempt or conspiracy to overthrow the government by force;
2. The raising of commotion or insurrection within the State; and
3. The incitement of discontent among the members of the armed forces.[74]

The crime thus postulated affects the State in its internal peace and the enjoyment of its institutions, and, as has been indicated, exhibits a high degree of flexibility.[75] Therefore, far from circumscribing the power of the government to punish for a political offense, as was the case with treason in Anglo-American law, the literal text of the sedition provisions here considered greatly enlarges the area of prosecution, in many cases allowing the limitation of a constitutional liberty in order to ensure the effective prosecution of a crime.

C. *Espionage*

In the popular mind, espionage connotes a cloak-and-dagger affair conducted by an individual on behalf of a foreign government under conditions quite different from those of normal life. In its legal signification, however, the term should be limited to describe a clandestine activity, conducted in peace or in war, by a person commissioned by a foreign government for the purpose of obtaining secret information regarding another State's national defense.[76] Thus, unlike treason and sedition where the offender usually acts on the basis of his own personal interests and convictions, in espionage the offender is the agent of a foreign government or a party or group within the State. Though international law does not explicitly condemn wartime espionage,[77] peacetime espionage is regarded as an international delinquency and a

ing of offenses against the internal security of the State. See in this connection, arts. 87, 91 & 92 of the French Penal Code. For the legislation of European countries in the thirties, see Lowenstein, *Legislative Control of Political Extremism in European Democracies*, 38 COLUM. L. REV. 591, 725 (1938). See also arts. 229 & 230 of the Argentine Penal Code.

74. In Regina v. Alexander Martin Sullivan, 11 Cox Crim. Cas. 44, 45 (1868), the court succinctly gave the objectives of sedition as being "to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion."

75. It is reported that in 1889 the German Reichsgericht upheld the conviction for sedition of a person that from French territory, near the German border, shouted "Vive la France," which was heard in Germany. For report of this case, see BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 464 (2d ed. 1962).

76. See in this connection, Falk, *Foreword* to ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW at *v* (Stanger ed. 1962).

77. This proposition seems to be generally accepted. See MCDOUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 559-60 (1961); STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 563 (1954); ROUSSEAU, DROIT INTERNATIONAL PUBLIC 561 (1953); McKinney, *Spies and Traitors*, 12 ILL. L. REV. 591 (1918). For a contrary opinion see Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 28 BRIT. YB. INT'L L. 1951 at 323, 329 (1952).

violation of international law.[78] In war or peace the wronged State has the right to deal with spies caught within its jurisdiction in any manner it sees fit.[79]

Most legislative enactments defining and punishing espionage require certain specified elements for the existence of the crime. These elements can be seen most clearly in one of the American statutory provisions punishing the offense. It states:

> Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base . . . shall be fined not more than $10,000, or imprisoned not more than ten years, or both.[80]

This provision reveals that espionage consists of two elements, namely, the obtaining or seeking to obtain clandestinely information respecting national defense, and doing so with the intention of either injuring the United States or benefiting a foreign State. It is of some interest to note that these two elements are also present in the enactments of other countries. Thus, in respect to the definition of espionage, there is a remarkable degree of uniformity. As to the first element of

78. See the Dutch case, *In re* Flesche, Holland, Special Criminal Court, Amsterdam, February 17, 1949, [1949] Ann. Dig. 266, 272 (No. 87) (1955). This point seems to be highly debated. Professor Quincy Wright maintains that peacetime espionage is a "violation of the rule of international law imposing a duty upon states to respect the territorial integrity and political independence of other states." See Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs*, in ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW 12 (Stanger ed. 1962). Professor Richard A. Falk put the matter most correctly when he said that "espionage . . . possesses the peculiar quality of being tolerated, but illegal." See Falk, *Space Espionage and World Order: A Consideration of the Samos-Midas Program*, ESSAYS, *supra* at 57. On the other hand, Professor Julius Stone claims that no such rule of international law exists condemning peacetime espionage. See Stone, *Legal Problems of Espionage in Conditions of Modern Conflict*, ESSAYS, *supra* at 32-33.

79. See *Ex parte* Quirin, 317 U.S. 1 (1942).

80. See 18 U.S.C.A. § 793(a) (1950). See also 18 U.S.C.A. § 794 (Supp. 1963), which says:

> Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

It was under this provision that the Rosenbergs were prosecuted, convicted and sentenced to death. See United States v. Rosenberg, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

the crime of espionage, the French Penal Code declares guilty of espionage any foreigner who

> 1. By any means whatsoever delivers to a foreign power or its agents a secret of the national defense, or who acquires by any means the possession of such a secret in order to deliver it to a foreign power or to its agents;
> 2. [W]illfully destroys or damages any ship, aircraft, material, supply, building or equipment which could be used for the national defense, or, either before or after their completion, knowingly performs bad workmanship thereon, of such a nature as to prevent their functioning or to cause an accident;
> 3. [K]nowingly has participated in an action of demoralization of the army or nation aimed at prejudicing the national defense.[81]

While the acts listed in this provision are limited to foreigners, it should be recalled that if committed by citizens they are regarded as treason under the code.[82] It is precisely in this respect that treason and espionage seem to overlap in French Law.[83] The German Penal Code similarly regards as an act of espionage, *inter alia*, compiling and transmitting information about matters of national defense for the purpose of injuring the security of the Federal Republic of Germany.[84] It would seem clear, therefore, that the characterizing object of espionage is to obtain and transmit information which a State regards as secret and not available for general consumption.[85] This information may consist of economic, military or political matters and must be related to the national defense.[86] This characteristic reasonably assumes that espionage

81. French Penal Code art. 77. See also art. 78 which describes secrets of national defense.

82. French Penal Code art. 76. Apparently the same situation obtains in Soviet law, for if acts of espionage are committed by Soviet citizens, they are regarded as treason under Article 58-1a of the Soviet Criminal Code. See KULSKI, *op. cit. supra* note 44, at 246.

83. See note 35 *supra*.

84. German Penal Code § 109f, para. 1(1). See also arts. 222-224 of the Argentine Penal Code.

85. In United States v. Heine, 151 F.2d 813, 815 (2d Cir. 1945), *cert. denied*, 328 U.S. 833, the court held that under the Espionage Act prohibiting the dissemination of "information relating to the national defense," the quoted phrase does not include information which comes from sources lawfully accessible to everyone, and hence, a German-born American citizen who was engaged in collecting all available information about American production of airplanes so that Germany would be advised of American defense in the event of war, could not be convicted for violating the Espionage Act.

86. In United States v. Soblen, 199 F. Supp. 11 (S.D.N.Y. 1961), the defense tried to prove that the information collected by the accused did not involve the national defense of the United States, but was about the Trotskyite wing of the Menshevik Party and Germans living in the United States. See also United States v. Soblen, 301 F.2d 236 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962). As to the British law, the case, Schmid-Marquardt v. Director of Prosecutions, British Zone of Germany, Control Commission Court of Appeal, September 28, 1949, held that in a prosecution for espionage the government must show that the information collected by the accused was related to military or political secrets. For the text of this opinion, see [1949] Ann. Dig. 405, 406 (No. 146) (1955).

activities are calculated to undermine the defensive capacity of a nation by obtaining information as to what that nation's military, economic or political posture would be in the event of war. The broader point, therefore, is that unless the information collected and transmitted is connected with these aspects of defense, no injury to the territorial State should be deemed to exist and, thus, no conviction on an espionage charge should be had.[87]

The second element relates to the intention of injuring the United States or benefiting a foreign nation. It might technically be termed the "subjective element of espionage,"[88] and is clearly discernible in every statutory provision on the subject. A situation can be envisaged where gathering and transmitting secrets of national defense to a foreign power may not be immediately injurious to the territorial State, as in the case where two countries are allies in peace or in war. Confronted with a situation of this kind the American courts have held that what is needed for conviction is proof of intention even if no injury to the United States actually occurs.[89] The intention of the accused is thus an essential requirement of the offense, and this intention can be evidenced by the overt act of transmitting the information so collected to a foreign State.[90] It may be said, therefore, that the fact that the secret information is transmitted to an ally is not an overriding consideration,[91] for information of this nature is made secret presumably because of the requirements of national security and defense, and certainly cannot be allowed to be disclosed, even to an ally, through the agents of the latter. It may be a trite, though nevertheless true, observation, supported by contemporary experience, that today's peacetime allies may well be tomorrow's wartime enemies.

87. In United States v. Soblen, 199 F. Supp. 11 (S.D.N.Y. 1961), the Judge in his charge to the jury emphasized that whether or not the information involved related to the national defense of the United States was a question of fact for the jury, and that if this information was available to everyone who took the trouble to find it, then the defendant could not be convicted of the charge of conspiracy to obtain information and transmit it to the Soviet Union. The charge to the jury is reproduced in 301 F.2d 236, 239 n.2 (2d Cir. 1962).

88. See generally, Cohen-Jonathan & Kovar, *L'Espionage en Temps de Paix*, 6 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 242 (1960).

89. See United States v. Rosenberg, 195 F.2d 583, 590 (2d Cir. 1952), *cert. denied*, 344 U.S. 838.

90. United States v. Coplon, 88 F. Supp. 912, 915 (S.D.N.Y. 1949). In contrast it should be mentioned that under Article 58-6 of the Soviet Criminal Code, espionage is committed by the mere act of collecting confidential information, even if no transmission to a foreign power actually takes place. For discussion, see KULSKI, *op. cit. supra* note 44, at 246.

91. It has been held that under the French provision it makes no difference whether or not the accused has the nationality of the State which is at war with France. See DALLOZ, CODE PÉNAL: ANNOTÉ D'APRÈS LA DOCTRINE ET LA JURISPRUDENCE 88 (54th ed. 1957).

This unfortunate situation only reflects the atmosphere of instability and distrust in which the relations between States presently take place.

Finally, it should be observed that because of the political and ideological movements whose adherents are scattered in many parts of the world community, some statutory provisions punish the gathering and transmission of secret information not only to a foreign power, but also to any party, faction, group or citizen within a foreign State. The American provision is particularly instructive for it regards as espionage the communication, delivery or transmission of secrets of national defense "to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof. . . ."[92] The Dutch,[93] German[94] and Soviet[95] formulations exhibit a similar approach. The traditional definition, on the other hand, confines itself to the transmission of secret information to a foreign power or agent thereof, as illustrated by the French provision previously discussed.

II. Treason, Sedition and Espionage Under Extradition Law

As has been shown above, a political offense is, broadly speaking, an act directed against the security of the State for which extradition is generally denied. It would appear, therefore, that the most successful defense that a fugitive facing extradition can invoke is that his crime constitutes a political offense for which extradition is not granted. Although domestic tribunals widely differ as to the exact nature of a political offense,[96] the point is generally accepted that treason, sedition and espionage fall in the category of purely political offenses,[97] as distinguished from relative political offenses, since they affect the peace and security of the State without in any way violating the private rights of individuals.[98] Courts and commentators substan-

92. 18 U.S.C.A § 794(a) (Supp. 1963). For a full recital of this provision see note 80, *supra.*

93. Article 98 of the Dutch Penal Code extends the punishment of espionage to those who transmit information for the benefit of "a person or an organization established in a foreign country." For a discussion of this provision, see Cohen-Jonathan & Kovar, *supra* note 88, at 245-46.

94. German Penal Code § 109f.

95. Article 58-6 of the Soviet Criminal Code punishes the transmission of information even if destined to a private person. See Kulski, The Soviet Regime: Communism in Practice 246 (1954).

96. For a discussion of this matter see Evans, *Reflections upon the Political Offense in International Practice*, 57 Am. J. Int'l L. 1 (1963).

97. Beauchet, Traité de l'Extradition 208 (1899).

98. For a most recent opinion in this connection see *In re* Giovanni Gatti, [1947] Ann. Dig. 145 (No. 70) (1951).

tially agree on this aspect of these offenses. Thus, in *Chandler v. United States*,[99] a case involving an American citizen charged with treason for broadcasting propaganda hostile to the United States from Germany during World War II, the first circuit held, *inter alia*, that political offenders include persons charged with treason and that in respect to this offense "it has long been the general practice of States to give asylum."[100] The British courts have taken a similar stand. In the recent case *Ex Parte Kolczynski*,[101] the High Court of Justice said "treason is an offense of a political character,"[102] and refused the extradition of seven members of the crew of a Polish fishing vessel who feared that upon their return to Poland, they would have been prosecuted for treason. The Brazilian case, *In re De Bernonville*,[103] illustrates the same point. In refusing the extradition of a fugitive charged by the French Government with having participated in "acts aimed at the demoralization of the army or the country in time of war," the Supreme Court of Brazil held that Brazilian law expressly recognizes "treason to country among political crimes, the authors of which are not subject to extradition . . . ."[104] Equally interesting is the decision of the German Supreme Court in *In re Fabijan*,[105] where the court succinctly stated that a political offense includes "high treason, capital treason, acts against the external security of the State, rebellion, and incitement to civil war."[106] In almost identical terms, the Swiss Federal Tribunal said in the case, *In re Ockert*,[107] that "high treason, capital treason, and the like" are political offenses pure and simple because "the offense is against the State and its principal organs."[108] The Supreme Court of Guatemala said in *In re Eckermann*[109] that "Universal law qualifies as political crimes sedition, rebellion and other offences which tend to change the form of Government or the persons who compose it . . . ."[110] Finally, in sharp summary of the existing law, the Harvard Research on International Law carefully limited the concept of a purely political offense

99. 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).
100. *Id.* at 935.
101. [1955] 1 Q.B. 540 (1954).
102. *Id.* at 549.
103. [1955] Int'l L. Rep. 527 (1958).
104. *Id.* at 528.
105. [1933-1934] Ann. Dig. 360 (No. 156) (1940).
106. *Id.* at 363.
107. [1933-1934] Ann. Dig. 369 (No. 157) (1940).
108. *Id.* at 370.
109. [1929-1930] Ann. Dig. 293 (No. 189) (1930).
110. *Ibid.*

to treason, sedition and espionage.[111] These opinions are most revealing in that they indicate the effect of each court's determination that treason, sedition and espionage are purely political offenses. In all these cases the courts were faced with the problem of distinguishing treason and sedition from ordinary crimes for the purpose of granting or denying extradition. The opinions suggest that once it has been established that the offender has been requested for any of these offenses, the duty not to extradite arises.[112] The obvious purpose of this doctrine is to advance the claims of humanity, for it must be conceded that since treason, sedition and espionage affect the State in its most sensitive and vulnerable part, namely, its peace and security, they are likely to give rise to a heat of public passion making an orderly and just trial at best a remote possibility. The rationale of these decisions lies in the well founded apprehension that public prejudice and passion may influence this type of prosecution.[113] While it may be argued quite persuasively that treason, sedition and espionage are the most reprehensible and contemptible of crimes, the observation also may be made that these offenses are regarded as such only by the society against which they are directed. The cogency of this last observation is perceived more readily when one remembers that in wars of independence the most honorable of patriots could have been tried and convicted of treason against the mother country had the rebellion not met with success.[114]

Apart from these considerations of humanity, there is a more pragmatic reason of policy which not only underlies the nonextradition of alleged traitors, subversives and spies but of any other political criminal. It is accordingly the policy of the law to regard political offenders as less dangerous to the security of the asylum State than ordinary criminals.[115] One assumption which may be seen to underlie this policy is that a political offender usually

111. Harvard Research on International Law, Part I, *Extradition*, 29 AM. J. INT'L L. SPEC. SUPP. 113 (1935). (Hereinafter cited as Harvard Research).

112. See GARCÍA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT 73-102 (1956).

113. See note 15 *supra*.

114. It is here quite relevant to recall the words of Thomas Jefferson, then Secretary of State, in respect to treason. He pointedly observed: "Most codes extend their definition of treason to acts not really against one's country. They do not distinguish between acts against the *government* and acts against the *oppression of the government*. The latter are virtues, yet have furnished more victims to the executioner than the former. . . . The unsuccessful strugglers against tyranny have been the chief martyrs of treason laws in all countries." Note from Secretary of State Jefferson to Messrs. Carmichael and Short, March 22, 1792, in 4 MOORE, A DIGEST OF INTERNATIONAL LAW 332 (1906).

115. See for this proposition, *In re* Berti, Italy, Court of Cassation in Criminal Matters (United Sections), March 5, 1949, [1949] Ann. Dig. 4, 6 (No. 3) (1955).

rebels against a given set of political conditions distinctly identified with a particular government and, therefore, that there is no reason to believe that he will affect the security of the state of refuge.[116] It is against this background of theory and practice that the previous exposition regarding the definitions of treason, sedition and espionage used by the different states immediately becomes relevant, for it will be remembered that these offenses have a bewildering variety of formulations. This gives rise to the anomalous situation that what the requesting State regards as treason or sedition may well be regarded by the State of refuge as legitimate opposition to the government or the exercise of a constitutional liberty.[117] In such cases it is clearly no concern of criminal policy to grant extradition.[118]

More careful analysis indicates that treason, sedition and espionage are considered as political offenses under the law of extradition for at least four compelling reasons. First, they lack the essential elements of ordinary crime, as for instance, malice in the technical criminal law sense of this term.[119] For example, it is generally believed that persons guilty of these offenses do not act with *mala intentio*, since they do not intend to violate the national law.[120] The existence of *mens rea*, a necessary element of criminal responsibility, is totally absent when the offender ignores the unlawful consequences of his acts. Although this reasoning may not justify the commission of treason, sedition and espionage from the standpoint of the national law, it does explain why foreign countries are so reluctant to grant the extradition of persons accused or convicted of these offenses. Closely connected with this consideration is the second reason, namely, the underlying motive of the offender. While of course it is true that under a State's criminal law the requisite intent element of

116. See generally, García-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum*, 14 U. PITT. L. REV. 371, 389 (1953).

117. This point can be illustrated by reference to the many complaints from foreign governments regarding seditious publications in the United States. The United States answered that they cannot be suppressed, since freedom of speech and of the press are "under the Constitution of the United States, absolutely assured to those dwelling within its jurisdiction." Note of Secretary of State Knox to the Mexican Chargé d'Affaires, February 15, 1911, 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 142 (1941).

118. This policy is made effective by the generally recognized principle that the State of refuge has the right to determine whether the offense is political or a common crime. A provision to this effect is found in many extradition treaties, but even if it is absent, it has been said to be implicit in every extradition treaty that contains an exception in favor of political offenders. See 1 GUGGENHEIM, TRAITÉ DE DROIT INTERNATIONAL PUBLIC 361-62 (1953).

119. See Clark, Coudert & Mack, *The Nature and Definition of Political Offenses in International Extradition*, PROC. AM. SOC'Y OF INT'L L., April 23-24, 1909, p. 97.

120. *Cf.* Cramer v. United States, 325 U.S. 1, 29 (1945).

each of the offenses being discussed may be easily found, still, from the standpoint of extradition law, the motive of the offender may well be to rid his people of an intolerable oppression or, at any rate, to change a given political situation which he honestly regards as unjust and arbitrary.[121] It may further be suggested that a person committing treason, sedition or espionage may do so because of his political convictions and not because of more personal considerations. This is particularly true in societies where no legal methods are available to the individual to protect himself against aggressions from his own government. Therefore, the type of intent necessary for the commission of any of these crimes under municipal law may be regarded (by the extradition law and practice of the asylum State) as only incidental to an overriding political motive.[122] It is perhaps with this kind of consideration in mind that a Belgian Court of Appeal said not long ago that though a political offense normally constitutes a "*crime de droit commun*," it assumes the character of a political crime for which extradition is not granted because "the aim of the author [is] to injure the political regime."[123] Certainly, if this characterization can be given to political offenses in general, it can be applied to treason, sedition and espionage with even more reason and validity, for these offenses are directed exclusively against the security of the State, its internal peace and external defense.

The third reason for regarding treason, sedition and espionage as political crimes relates to the victim of these offenses. While it is clear that a common crime is directed against private individuals, treason, sedition and espionage are directed against the political and social organization of the State, without in any way affecting the private rights of individuals.[124] These offenses affect the body politic as an entity and not specific persons within it.[125] Thus, the

121. See note 114 *supra*.

122. See in this connection the Brazilian case *In re* De Bernonville, Brazil, Supreme Court, September 28, 1955, where France requested the extradition of a fugitive for "treason consisting in participation in acts aimed at the demoralization of the army or the country in time of war." The Brazilian Supreme Court said that since the Brazilian law is the one to be considered, it expressly includes "treason to country" among political crimes, "the authors of which are not subject to extradition." For text, see [1955] Int'l L. Rep. 527, 528 (1958).

123. *In re* Barratini, Belgium, Court of Appeal, Liege, May 28, 1936, [1938-1940] Ann. Dig. 412 (No. 159) (1942).

124. *In re* Giovanni Gatti, France, Court of Appeal of Grenoble (Chambre des Mises en Accusation), January 13, 1947, [1947] Ann. Dig. 145 (No. 70), (1951).

125. In sentencing Soblen for conspiracy to commit espionage, Judge Harlands said: "A conspiracy to obtain and transmit American national defense secrets may imperil the lives of all Americans. Such a crime is, therefore, analogous to a conspiracy to commit mass murder." United States v. Soblen, 199 F. Supp. 11, 13 (S.D.N.Y. 1961).

public rights of the State are at stake in political offenses, even if in their commission public officials and private individuals may become incidentally involved.

Finally, the perpetrator of a common crime is motivated basically by such highly personal considerations as hate, revenge, profit and the like.[126] Conversely, a person accused or convicted of treason, sedition or espionage might have been motivated by "altruistic and patriotic sentiments."[127] It is no answer to this argument to assert that treason, sedition and espionage are always dishonorable acts and that, therefore, persons accused or convicted of these offenses are not entitled to any consideration at all. An alleged traitor, subversive or spy is usually depicted as a contemptible, detestable and misguided individual—an attitude frequently reflected in the language of the courts. This kind of reasoning, however, unduly simplifies the nature of the problem, for the commission of these offenses is so deeply rooted in a person's environmental and emotional make-up as to defy adequate analysis by the average man's mentality.[128] While to pass a moral judgment upon these offenders is not the business of this article, it should be emphasized that a traitor, a subversive or a spy, like any other political offender, may very well have committed his acts because of his political beliefs and convictions,[129] and that this is one of the reasons why governments are so reluctant to regard his actions as extraditable offenses. In all fairness it should be added that (especially in respect to espionage) cases can be found, where the offender acted wholly for personal gain. In such a case, since a political motivation is clearly absent, the extradition of the offender appears to be the only rational course of action.

Parallel with the foregoing analysis a conflict of policy between the State in which the offense was committed and the one in which the offender takes refuge seems apparent. This conflict, however, is more sham than real, for the State of refuge has the right under international law to refuse the extradition of persons accused of political offenses.[130] The cases reviewed above indicate the reasonable-

126. *In re* Vogt, Switzerland, Federal Court, January 24, 1924, [1923-1924] Ann. Dig. 285, 286 (1933).

127. *In re* Cámpora, Chile, Supreme Court, September 24, 1957, [1957] Int'l L. Rep. 518, 521 (1961).

128. For a psychological study of traitors, see WEST, THE MEANING OF TREASON 211-42 (1947).

129. In a study of some treason and espionage cases prosecuted in Great Britain after World War II, it was shown that the individuals involved were motivated by deep political beliefs and convictions. See MOOREHEAD, THE TRAITORS at 12-16 (1952). See also BOVERI, TREASON IN THE TWENTIETH CENTURY (1963).

130. See CORBETT, LAW AND SOCIETY IN THE RELATIONS OF STATES 174 (1951).

ness of this rule. By allowing a state to refuse to surrender persons accused or convicted of treason, sedition and espionage, the rule avoids setting a kind of international criminality upon the persons involved, and effectively provides a measure of international protection in respect to offenses which, though clearly in violation of domestic law, are most susceptible of inflaming public prejudice and passion which can adversely influence prosecutions on these charges.

III. Recent Limitations Upon Treason, Sedition and Espionage as Political Offenses

The preceding discussion has made it fairly clear that the traditional extradition law has regarded treason, sedition and espionage as non-extraditable offenses. However, in the immediate post-World War II era successful attempts were made to extradite persons accused of these offenses. Particularly in respect to treason, a new offense was devised technically known as collaboration with the enemy in time of war. Persons accused were referred to as "quislings and traitors."[131] Apparently the first international step in this direction took place in 1946, when the United Nations General Assembly enacted a resolution urging its members to hand over for trial "war criminals, quislings and traitors."[132] Since it was recognized that this resolution imposed no binding obligation upon the States, special multilateral and bilateral agreements were concluded obligating certain States to surrender traitors found within their jurisdiction. Thus, according to the Peace Treaty with Italy, signed on February 10, 1947,[133] Italy agreed to surrender "Nationals of any Allied or Associated Power accused of having violated their national law by treason or collaboration with the enemy during the war."[134] Substantially similar provisions are found in the Peace Treaties with Rumania,[135] Bulgaria,[136] Finland,[137] and Hungary.[138] It should be added that by exchanges of

131. See generally, Morgenstern, *Asylum for War Criminals, Quislings, and Traitors*, 25 Brit. Yb. Int'l L. 382 (1948).

132. For the text of this resolution, see U.N. Yearbook 1946-1947, at 170 (1947).

133. For text, see 49 U.N. Treaty Ser. 1, 143 (1950); 42 Am. J. Int'l L. Supp. 47 (1948).

134. Peace Treaty with Italy art. 45.

135. Art. 6. For text, see 42 U.N. Treaty Ser. 34 (1949); 42 Am. J. Int'l L. Supp. 252 (1948).

136. Art. 5. For text, see 41 U.N. Treaty Ser. 50 (1949); 42 Am. J. Int'l L. Supp. 179 (1948).

137. Art. 9. For text, see 48 U.N. Treaty Ser. 228 (1950); 42 Am. J. Int'l L. Supp. 203 (1948).

138. Art. 6. For text, see 41 U.N. Treaty Ser. 168 (1949); 42 Am. J. Int'l L. Supp. 225 (1948).

notes which took place on December 19, 1944, between France and Luxembourg,[139] and on January 10, 1947, between France and Belgium,[140] provisions were made for the surrender of persons "prosecuted or condemned for crimes or delicts against the internal safety of the State committed during war against a common enemy." Finally, on July 8, 1946, the Belgian Parliament passed a law authorizing the government "to surrender to allied governments, on the basis of reciprocity, any individual prosecuted or condemned for an offense against the external safety of the State."[141]

Although the above agreements may appear clear in principle, difficulties of a technical nature arose in their practical application. Indeed, the moral and legal confusion on this question was most clearly reflected in the contradictions of the French decisions. In *In re Colman*,[142] the Court of Appeal of Paris ordered the extradition of a Belgian subject, who had been sentenced to death by a court-martial in Brussels for assassination, intelligence with the enemy and carrying arms against Belgium. It is of some interest to note that the court, in examining the exchange of notes between France and Belgium of January 10, 1947,[143] reached the inevitable conclusion that this instrument amended the Franco-Belgian Treaty of August 15, 1874,[144] under which political offenders were exempted from extradition. Having thus set aside the only legal obstacle blocking the extradition of the offender, it was easy for the court to conclude that "the offence of intelligence with the enemy and of carrying arms against Belgium were not political offences" under French law.[145] It may be noted additionally that the court went further and considered such offenses as "crimes of common law," reasoning that "in time of war, in a country occupied by the enemy, collaboration with the latter *excludes the idea of a criminal action against the political organization of the State* which characterizes the political offence."[146] An identical result was reached in a subsequent case, *In re Spiessens*,[147] involving the extradition of a Belgian national also charged with collaboration with the enemy. Consistently with the *Colman* holding, the court approved the extradi-

139. Cited in [1947] Ann. Dig. 141-42 (1951).

140. Cited in *In re* Colman, France, Court of Appeal of Paris (Chambre des Mises en Accusation), December 5, 1947, [1947] Ann. Dig. 139-40 (1951).

141. *Id.* at 140.

142. [1947] Ann. Dig. 139 (No. 67) (1951).

143. See note 140 *supra*.

144. For text of this Treaty, see BILLOT, TRAITÉ DE L'EXTRADITION 486-492 (1874).

145. *In re* Colman, [1947] Ann. Dig. 139 (No. 67) (1951).

146. *Id.* at 141.

147. France, Court of Appeal of Nancy, November 10, 1949, [1949] Ann. Dig. 275 (No. 89) (1955).

tion of the accused on identical grounds and used strikingly similar language.[148] Yet, in *In re Talbot*,[149] also decided by the Court of Appeal of Paris, the request for the surrender of another Belgian national charged with economic collaboration with the enemy was decisively rejected on the ground this offense was not included in the list of extraditable offenses provided for by the Franco-Belgian Treaty of August 15, 1874, previously mentioned.[150] The court declined to decide whether "economic collaboration with the enemy" is a political offense, and firmly refused to take into consideration the exchange of notes of January 10, 1947, between France and Belgium on the ground that such a diplomatic instrument was not invoked by the Belgian Government in its request for extradition. What requires special emphasis is that, in direct opposition to the *Colman* and *Spiessens* cases, where the exchange of notes of 1947 was regarded as actually amending the Treaty of 1874 in so far as the surrender of collaborators with the enemy was concerned, the court in a more carefully reasoned opinion, reconsidered its position and held that this exchange of notes could not possibly have the force of law unless ratified and published according to Article 26 of the Constitution.[151] It may be pertinent to add that the *Talbot* reasoning was applied subsequently in the case of *In re Van Bellinghen*,[152] which also involved the extradition of a Belgian subject accused of practicing a policy aimed against the resistance to the enemy. After sharply pointing out that in France this is an offense against the external safety of the State and, therefore, political, the court again refused to take into account the agreement of 1947 for exactly the same reason invoked in the *Talbot* case.[153] The *Talbot* and *Van Bellinghen* opinions probably represent the present law,[154] so that it may be safely said that collaboration with the enemy is still a political offense under French law.

148. *Id.* at 276.

149. France, Court of Appeal of Paris, March 18, 1947, [1947] Ann. Dig. 142 (No. 68) (1951).

150. See note 144 *supra*.

151. This is Article 26 of the Constitution of 1946, which said: "Diplomatic treaties duly ratified and published shall have the force of law even when they are contrary to internal French legislation; they shall require for their application no legislative acts other than those necessary to ensure their ratification." For text see 2 PEASLEE, CONSTITUTIONS OF NATIONS 12 (1950). For a discussion of this article see Preuss, *The Relation of International Law to Internal Law in the French Constitutional System*, 44 AM. J. INT'L L. 641 (1950).

152. France, Court of Appeal of Paris, November 28, 1950, [1950] Ann. Dig. 276 (No. 88) (1956).

153. *Id.* at 278.

154. See also the case *In re* Van Erck, decided by the Court of Appeal of Rouen on October 31, 1950, where the same principle was followed. For text, see [1950] Ann. Dig. 278 (1956).

From the special emphasis placed by the above decisions on the exchange of notes between France and Belgium it would seem to follow that collaborators can be extradited only if there is a treaty which explicitly calls for their surrender.[155] It is more likely, however, that in the absence of a treaty stipulation the State of refuge has complete discretion with respect to the surrender of quislings and traitors.[156]

This proposition can be more instructively illustrated by the *Denmark (Collaboration with the Enemy) Case*,[157] involving the request for the surrender of certain Danish nationals convicted of treason in that they collaborated with the German occupation forces by providing them with supplies. In denying their extradition, the Brazilian Supreme Court emphatically said that "the crime of assisting the enemy in time of war is a political one *lato sensu* because it is a crime against the State in its supreme function, namely, its external defense and its sovereignty."[158] A similar result was reached in the more recent case *In re De Bernonville*,[159] dealing with the request for the extradition of a French national convicted of treason in that he participated in acts aimed at the demoralization of the army or the country in time of war. Again refusing extradition, the Brazilian Supreme Court emphasized that under Brazilian law "treason to country" is included among political crimes, "the authors of which are not subject to extradition."[160]

It is clear that the Brazilian decisions put the offense of collaboration with the enemy in time of war squarely within the traditional meaning

155. See generally, García-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum*, 14 U. PITT. L. REV. 371, 392 (1953).

156. Thus, in Chandler v. United States, 171 F.2d 921, 935 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949), the Court of Appeals said: "An asylum State might, for reasons of policy, surrender a fugitive political offender—for example, a State might choose to turn over to a wartime ally a traitor who had given aid and comfort to their common enemy—in such a case we think that the accused would have no immunity from prosecution in the courts of the demanding State, and we know of no authority indicating the contrary." The same reasoning was used in respect to a spy in the Dutch case *In re* Flesche, Holland, Special Criminal Court, Amsterdam, February 17, 1949, [1949] Ann. Dig. 266, 267 (No. 87) (1955).

157. Brazil, Supreme Court, May 21, 1947, [1947] Ann. Dig. 146 (No. 71) (1951).

158. *Ibid.* As a secondary ground, the court held that the application of the Danish Law of June, 1945, under which the defendants were convicted, was retroactive, since their offense was committed before the enactment of the law. *Id.* at 147.

159. Brazil, Supreme Court, September 28, 1955, [1955] Int'l L. Rep. 527 (1958).

160. *Id.* at 528. It should be mentioned that Italy also refused the extradition of a Yugoslav national charged, *inter alia*, with treason or collaboration with the enemy during the war. This decision was reached despite the fact that Article 45 of the Peace Treaty with Italy compelled the latter to surrender such offenders. See *In re* Rukavina, Italy, Court of Appeal of Rome (Chamber of Accusations), July 28, 1949, [1949] Ann. Dig. 273, 274 (No. 88) (1955).

of a purely political offense precisely because of the fear that public prejudice will invariably influence this type of prosecution. Indeed, this is an almost certain possibility, for it is quite obvious that the essential elements of this offense require that prosecution be based on wartime events, when public sentiments and passions have undoubtedly reached their peak. When one recalls the bitter division between collaborationists and anti-collaborationists which greatly disturbed the political scene of some occupied countries during and after World War II, one can understand how such feelings are always ready to rush to the surface and prejudice prosecutions on these charges.

The conclusion is unavoidable that the protection of the accused against abuses of public passion is the major rationale underlying the nonextradition of persons charged with collaboration with the enemy in time of war. There does not seem to exist any justifiable reason why the principle of nonextradition of political offenders should be limited in one of its most vital aspects.[161]

Apart from the above wartime agreements and decisions, it may be pertinent to add that under the contemporary tendency of the States to group together under a banner of common political ideology, the practice of extraditing political offenders has developed among the members of each such group. For example, under the extradition practice of England in respect to the members of the Commonwealth there seems to be no discretion to refuse to surrender political offenders. Apparently extradition in such cases is regulated by the Fugitive Offenders Act of 1881,[162] and not by the Extradition Act of 1870,[163] where the exception in favor of political offenders is found.[164] It was precisely on this basis that in May, 1963, Home Secretary Henry Brooke signed an order for the deportation of Nigerian Chief Anthony Enahoro to Nigeria to stand trial for treason. It is of some interest to note that, while the matter was being discussed in the House of Commons, opinion was almost unanimous that had the offender been a foreigner extradition would not have been granted because of the political character of the offense.[165] While this practice

161. Morgenstern, *supra* note 131, at 383, 386.

162. For text, see 44 & 45 Vict. c. 69.

163. For text, see 33 & 34 Vict. c. 52.

164. For discussion, see Jennings, *The Commonwealth and International Law*, 30 BRIT. YB. INT'L L. 1953, at 320, 325-26 (1954). It may be added that apparently extradition between England and Ireland is handled in an administrative fashion, thus excluding any discretion to decline the surrender of political offenders. For discussion, see O'Higgins, *Irish Extradition Law and Practice*, 34 BRIT. YB. INT'L L. 1958, at 274, 304 (1959).

165. He was subsequently convicted of treason. For the detailed story of the case see The Christian Science Monitor, May 17, 1963, p. 2, col. 6 (Eastern edition).

may be justified somewhat by the common legal tradition and institutions of the countries involved, recent experience in extradition cases would seem to reveal a developing tendency to regard the principle of nonextradition of political offenders as an instrument in the cold war between East and West. It has been accordingly observed by a distinguished jurist that in the extradition practice of Western countries the surrender of a political offender is likely to be denied when the fugitive escapes from a Communist State, and granted when a political offender from another Western country is involved.[166] No one will seriously question that the reverse is also true in the extradition practice of Communist States.[167] This is indeed a most regrettable development, for it makes the principle of nonextradition of political offenders entirely dependent upon the specific prejudices and preferences of the few rather than upon considerations of justice and humanity applicable to all.

The foregoing considerations can be most clearly illustrated by the recent *Soblen* case,[168] which has become a *cause célèbre* in the annals of the British extradition practice. The facts relevant here are as follows. After having been convicted in the United States of conspiracy to obtain secret information and to transmit it to the Soviet Union,[169] Dr. Robert Soblen escaped to Israel, from which he was promptly deported on the ground of illegal entry. While en route to London on his way back to the United States, he stabbed himself in the abdomen and slashed his wrists, thereby forcing his entry into England where he was taken to a London hospital. After a series of legal maneuvers, including his request for political asylum, which was rejected, and upon repeated representations made by the American Government to have Soblen returned to the United States, the Home Secretary served upon him a deportation order.[170] While this order was never made effective since Soblen killed himself by taking an overdose of drugs, the point that particularly stands out is that deportation was used by the British Government as a substitute for extradition in violation of well established international practice. Admittedly, a

166. See Thornberry, *Dr. Soblen and the Alien Law of the United Kingdom*, 12 INT'L & COMP. L.Q. 414, 439 (1963).

167. Thus, in the Treaties between East Germany and the Soviet Union of November 20, 1957, and with Czechoslovakia, Poland, Bulgaria, Rumania, and Hungary, which came into effect in 1957 and 1958, political offenders are not exempted from extradition, so that they are easily extradited between the parties to these treaties. See KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURES FOR POLITICAL ENDS 366 n.30 (1961).

168. Regina v. Secretary of State for Home Affairs, *Ex parte* Soblen, [1962] 3 All E.R. 373.

169. United States v. Soblen, 199 F. Supp. 11 (S.D.N.Y. 1961).

170. The proceedings in England are fully discussed in Thornberry, *supra* note 166, at 447-55.

State has a perfect right to deport undesirable aliens from its territory, with the exercise of which no other nation has any business to interfere. But the situation changes in complexion when the fugitive is deported to the very country that is requesting his surrender without resorting to the usual extradition process.[171] This practice is even more abhorrent when the deportee is sought on a political charge. Certainly, the offense for which Soblen was being returned to the United States was clearly political, namely, conspiracy to commit espionage. The Extradition Treaty of December 22, 1931,[172] between the United States and Great Britain unmistakably provides that "a fugitive criminal shall not be surrendered if the crime or offence in respect of which his surrender is demanded is one of a political character . . . ,"[173] and the British Extradition Act of 1870[174] contains a similar prohibition. Under these two instruments, therefore, a formal request for the surrender of Soblen would probably have been rejected. But apparently to give some semblance of legality to an act obviously inspired by motives of political solidarity between the two countries, the British Government resorted to the deportation device, and it is highly significant that in reviewing the deportation order the court never even hinted that a political offense was involved.[175] The decision of the court upholding the deportation order without a careful inquiry into its real motive is very strange, for precedents abound in English law where deportation has been strongly rejected by the courts in the case of political offenders. Thus, in the *Zausmer* case the Court of Criminal Appeal refused to recommend the deportation of an alien on the ground that, if expelled to Russia, he would be prosecuted for desertion, which was regarded as a political offense.[176] And even more relevant is the case, *Rex v. Governor of Brixton Prison, Ex parte Sarno,*

171. It is interesting that under § 243(a) of the United States Immigration and Nationality Law of 1952, the deportation of an alien "shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States." And by paragraph (h) of the same section "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution. . . ." 66 Stat. 212(a), (h) (1952), 8 U.S.C.A. §§ 1253(a), (h) (1953). For discussion of cases where this power has been exercised, see GARCÍA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT 123-26 (1956). It has been shown that this is also the position of England, France, Holland, and Sweden. For discussion, see Morgenstern, *The Right of Asylum*, 26 BRIT. YB. INT'L L. 1949, at 327, 346-49 (n.d.).

172. For text see T.S. 849.

173. Treaty with Great Britain art. 6.

174. For text see note 163 *supra.*

175. Regina v. Secretary of State for Home Affairs, *Ex parte* Soblen, [1962] 3 All E.R. 373.

176. [1911] 7 Crim. App. Rep. 41.

where the principle was laid down that the courts would oppose the misuse of the power of expulsion in order "to enforce the return of a real, genuine political refugee to the country of his origin."[177]

It is important for an accurate consideration of this problem to compare the *Soblen* case with *Ex parte Kolczynski*,[178] where the extradition of seven members of the crew of a Polish fishing vessel was denied, even though the Polish Government charged them with the commission of certain crimes, including the use of force, wounding a member of the crew and revolting on board ship. All of these crimes were listed as extraditable offenses in the Extradition Treaty of January 11, 1932,[179] between the United Kingdom and Poland. Nevertheless, the court denied the extradition of the members of the crew on the ground that if returned to Poland, they would have been tried for treason, which is a political offense.[180] Yet espionage is also a political offense, and unless it was proved that Soblen was engaged in espionage for financial considerations, which was not the case according to the available evidence, his offense was clearly political and, hence, nonextraditable. Enough evidence has been adduced to show that treason, sedition and espionage are political offenses, and it should make no difference whether the fugitive is requested by a democratic or dictatorial government. It may finally be observed that, though the British extradition practice has distinguished itself for its soundness and humanitarian concern, the British Government in the handling of the *Soblen* case has done a disservice to humanity both by resorting to the deportation of a political offender, thus bypassing carefully established procedures for the extradition of fugitives,[181] and by subordinating the principle of nonextradition of political offenders to shifting political demands.

IV. Conclusion

The body of international and domestic law and practice presented in this article leads to the inevitable conclusion that despite the attempts to limit the political character of the crimes of treason, sedition and espionage, they are still regarded as nonextraditable by the

177. [1916] 2 K.B. 742, 752.
178. [1955] 1 Q.B. 540 (1954).
179. Treaty of Extradition between the United Kingdom and Poland, January 11, 1932, art. 3, [1934] Gr. Brit. T.S. No. 10.
180. [1955] 1 Q.B. at 547, 550.
181. See the comments of the Harvard Research on Extradition against deportation of offenders instead of using extradition procedures. Harvard Research 38. See also 2 Hyde, International Law Chiefly as Interpreted and Applied by the United States 1014 (2d ed. 1945).

majority of the States of the world community. Although it has been conceded that a situation may arise where these offenses lack a political motivation, as when the offender acts solely for the purpose of personal financial gain, it must nevertheless be emphasized that restrictions based on other considerations, such as the political exigencies of the moment, are likely to deprive the principle of nonextradition of political offenders of its urgency and vitality when the need for it is most apparent. It is hoped that sufficiently persuasive reasons have been given to support the theory that the extradition of offenders should be denied when the political element of treason, sedition or espionage has been clearly established. Respect for the rights of the individual would seem to suggest this course of action. The denial of extradition in such cases is actually the only sanction of international law against the disproportionate increase of political offenses by governmental authorities.