

Commentaries

Toward A Remedy for International Extradition by Fraud: The Case of Leonard Peltier

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[N]o declarations on human rights, nor even any conventions or laws protecting human rights, are sufficient for their purpose unless we recognize, as a personal responsibility, respect in word and deed for the dignity of the human being.¹

The successful operation of international extradition agreements requires good faith and fairness from sovereign states in their dealings with one another. Fraud in the performance of treaty obligations derogates the underlying norms of international public order. If sovereign states are to trust one another in discharging their mutual obligations under any treaty, some body of imperative norms—the violation of which is actionable by the victimized sovereign—is necessary. However, while international extradition treaties impose reciprocal obligations on sovereign states, remedies for the violation of these assumed norms are deficient. This comment highlights the potential for abuse of international extradition agreements through fraud and the injustice resulting from the lack of adequate remedies for such abuse.

The vehicle for this discussion is the case of Leonard Peltier.² Peltier, an American Indian, was extradited from Canada to the United States to face trial on two counts of first degree murder for the deaths of two agents of the Federal Bureau of Investigation at the Pine Ridge Reserva-

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1. D. Hammarskjöld, *Statement of the Human Rights Day Concert* (Dec. 10, 1960), in *PUBLIC PAPERS OF THE SECRETARIES-GENERAL OF THE UNITED NATIONS, 1960-61*, at 296 (A. Cordier & W. Foote eds. 1975).

2. This commentary does not explore the historical context of the Peltier prosecution. For this, I recommend P. MATTHIESSEN, *IN THE SPIRIT OF CRAZY HORSE* (1980); AMNESTY INTERNATIONAL, *PROPOSAL FOR A COMMISSION OF INQUIRY INTO THE EFFECT OF DOMESTIC INTELLIGENCE ACTIVITIES ON CRIMINAL TRIALS IN THE UNITED STATES OF AMERICA* 34-55 (1981); J. MESSERSCHMIDT, *THE TRIAL OF LEONARD PELTIER* (1983).

tion, South Dakota in 1975. This comment sketches the processing and resolution in Canadian and American courts of Peltier's objections to his extradition. Some observations about the law of international extradition and the obligations imposed on nations in seeking and rendering fugitives follow. Finally, the comment concludes with a call for reopening the Peltier case and for the development of an appropriate remedy to correct and deter future abuses and bad faith in the extradition process.

I. *The Procedural Development of United States v. Peltier*

Leonard Peltier was a prominent leader of the American Indian Movement (AIM), an organization dedicated "to encourage self-determination among American Indians and to establish international recognition of American Indian treaty rights."³ In early 1975, at the request of tribal elders, he and other AIM members went to the Pine Ridge Indian Reservation in South Dakota to alleviate conflict between those members of the reservation who supported the tribal form of government and those who supported AIM.⁴ Several of the AIM supporters stayed in a tent area known as "Tent City" near the Harry Jumping Bull Compound, a small group of houses close to Oglala, South Dakota. These supporters later testified at Peltier's trial that they feared an assault by Bureau of Indian Affairs (BIA) officers and some of the reservation residents, who they said were known to harass and assault AIM members.⁵

On June 26, 1975, two FBI agents and one American Indian, Joe Stuntz, were killed in a shootout that erupted near the Compound. A day earlier, the two FBI agents, Jack Coler and Ronald Williams, had gone to the Compound with two BIA agents to look for James Eagle, who was wanted for assault and theft. After being informed that Eagle had not been seen for several days, they left. Coler and Williams returned the next day. The two FBI agents followed a vehicle into the Compound. When the vehicle stopped at a fork in the road near Tent City, the FBI agents stopped at the bottom of a hill. Shooting began. The agents were seriously wounded by shots fired at a distance, and then they were killed with a high-velocity, small caliber weapon fired at close range. Four American Indians—Leonard Peltier, Darrelle Butler, Robert Robideau, and James Eagle—were later charged with the

3. 1 ENCYCLOPEDIA OF ASSOCIATIONS 1166 (18th ed. 1983).

4. *United States v. Peltier*, 585 F.2d 314, 318-20 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979).

5. Petitioner's Brief for Writ of Certiorari at 3-4, *Peltier v. United States*, 440 U.S. 945 (1979).

Extradition By Fraud

murders.⁶

The compound was quickly surrounded by law enforcement officials, but those at the compound escaped. The FBI suspected that Peltier was involved. Apparently, Peltier and others then fled to the Rosebud Indian Reservation in South Dakota. This group then split up with, at least three other AIM members—Robideau, Norman Charles, and Michael Anderson—fleeing south.

Peltier eventually fled to Canada where he was arrested on February 6, 1976. Pursuant to treaty,⁷ and the enabling Canadian statute,⁸ the United States requested extradition for five felonies: a 1972 attempted murder of an off-duty police officer in Milwaukee, Wisconsin; an attempted murder of an Oregon state trooper in November, 1975; the burglary of a home in Oregon around the same time as the Oregon attempted murder; and the murders of the two FBI agents. The extradition hearing was assigned to Mr. Justice William A. Schultz, who was a justice of the British Columbia Supreme Court. The Canadian Department of Justice assigned one of its attorneys to represent the United States.

On June 18, 1976, the Canadian tribunal ruled that Peltier be extradited for all of the offenses except the Oregon attempted murder charge.⁹ In granting the United States extradition request for the deaths of the two FBI agents, Mr. Justice Schultz quoted extensively from two affidavits executed by an alleged witness named Myrtle Poor Bear. In those affidavits, Poor Bear stated that she was Peltier's girlfriend and had gone with him to the Jumping Bull Compound in June, 1975. She stated that she knew Peltier planned to murder FBI or BIA agents and that he had planned an escape route. After the FBI agents had been wounded from a distance, Poor Bear said, Peltier approached the agents as they attempted to surrender and executed them at close range with a rifle. She claimed that she had pounded on his back in an attempt to stop him. In August 1975, according to Poor Bear's state-

6. *United States v. Peltier*, 585 F.2d 314, 318 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979).

7. Treaty on Extradition Between the United States of America and Canada, Dec. 3, 1971, *United States-Canada*, 27 U.S.T. 983, T.I.A.S. No. 8237.

8. Extradition Act, CAN. REV. STAT. ch. E-21 (1970).

9. *In re Extradition Act, Leonard Peltier*, No. 760176, reasons for judgment at 86-87 (Vancouver: June 18, 1976) [hereinafter cited as *Peltier Extradition*]. Under the doctrine of specialty, a person may be tried only for those crimes for which he or she was specifically extradited. *See infra* text accompanying notes 32-34. Extradition proceedings are like "probable cause" proceedings in that the standard for determining extradition is "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty." *Peltier Extradition* at 25.

ment in the affidavits, Peltier discussed the killings with her.¹⁰

Mr. Justice Schultz's decision was based almost exclusively on the Poor Bear affidavits.¹¹ He briefly referred to a pathologist's report which tended to corroborate Poor Bear's account of how the agents were killed. However, this standing alone did not implicate Peltier in the murders.¹²

Meanwhile, Butler and Robideau had been apprehended and their trial begun in the United States. Since the government designated Poor Bear as a potential witness, the defense obtained in discovery a third Poor Bear affidavit (chronologically the first), dated February 19, 1976. This affidavit stated that Poor Bear knew of Peltier's plans to kill the agents and to plot an escape route and that she had met Peltier at Rosebud where he confessed the slaying to her. Contrary to the subsequent affidavits, however, the February 19 affidavit stated that Poor Bear had left the Jumping Bull Compound *before* the shooting occurred.¹³ The government did not call Poor Bear as a witness. Butler and Robideau were later acquitted.¹⁴

Still in Canada, Peltier sought review. He first sought review by the Federal Court of Appeal of Canada. He presented the February 19 Poor Bear affidavit and argued that, in light of it, the Poor Bear affidavits relied upon by Mr. Justice Schultz could not be believed. The appellate court, however, declined to reverse the lower court or to reopen the proceedings.¹⁵ Peltier then sought review by the Canadian Minister of Justice on the basis that he was being extradited for a political of-

10. Affidavits by Myrtle Poor Bear (Feb. 23, 1976 & Mar. 31, 1976), *reprinted in* Petitioner's Brief for Writ of Certiorari at 43a-48a, *Peltier v. United States*, 440 U.S. 945 (1979).

11. Peltier Extradition at 8-10. After quoting the Poor Bear affidavits, Justice Schultz noted, "There is, in addition, circumstantial evidence, comprising other affidavits of Ex. 18, relating to each of the two alleged murders, which it is unnecessary to relate." *Id.* at 10.

12. *See id.* The United States submitted the report of an FBI firearms expert that indicated that a shell casing found at the scene by an FBI agent had been expelled from a high-velocity rifle. The report suggested that a damaged rifle which was found in an exploded car driven by Robideau, Charles, and Anderson (and which was linked to Peltier) fired the casing. *See generally* P. MATTHIESSEN, *supra* note 1, at 282.

13. Affidavit by Myrtle Poor Bear (Feb. 19, 1976), *reprinted in* Petitioner's Brief for Writ of Certiorari at 43a, *Peltier v. United States*, 440 U.S. 945 (1979).

14. *United States v. Robideau & Butler*, Cr. 76-11 (N.D. Iowa July 16, 1976).

15. *Peltier v. United States of America*, Federal Court of Appeal, Canada, No. A-441-76 (Vancouver Oct. 27, 1976) (unreported judgment). At the time of Peltier's extradition, judicial review of the decision of the extradition judge could be sought before the Federal Court of Appeal, Canada, but the examination of the sufficiency of the requesting state's evidence was limited. *See* Federal Court Act, CAN. REV. STAT. ch. 10, § 28 (2d Supp. 1970). A petition for habeas corpus may be taken to a provincial superior court. However, in most cases, habeas corpus may only test the jurisdiction of the extradition judge. *Re Commonwealth of Virginia and Cohen (No. 2)*, 14 C.C.C.2d 174 (Ont. H. Ct. 1973). *See generally* G. LAFOREST, EXTRADITION TO AND FROM CANADA 118-32 (2d ed. 1977). The Canadian system is cogently criticized in Morrison, *Extradition from Canada: Rights of the Fugitive Following Commital for Sur-*

Extradition By Fraud

fense.¹⁶ The Minister refused relief on either political offense grounds or the use of the Poor Bear affidavits. On December 16, 1976, Peltier was transferred from Vancouver, British Columbia to Rapid City, South Dakota. The trial commenced in April, 1977 in Fargo, North Dakota.

At trial, the prosecution did not call Poor Bear. When the defense lawyers questioned her outside of court, she recanted her earlier affidavits. The defense then called her as a witness to establish that the government had manufactured false evidence to buttress a weak case.¹⁷ The trial judge allowed the defense to question Poor Bear in a proffer, but excused the jury. Poor Bear stated that she had never seen Peltier before the trial and that she had never lived in the Jumping Bull Compound. She explained that two FBI agents spent a considerable amount of time with her in February and March of 1976, and that the agents obtained the affidavits by threatening her with arrest, physical harm, and even death to herself and members of her family. According to her testimony, the agents took her to the Jumping Bull area at least twice and showed her a model of the scene in order to add credibility to the affidavits. Further, she testified that the affidavits were untrue, that she had never read them, and that she had signed them only under coercion and not in the presence of a notary.¹⁸ Based on his opinion of Poor Bear's unreliability, the trial judge found that her testimony was immaterial and that any relevance it did have was outweighed by the danger of confusing the issues and misleading the jury. At the same time, the trial court found that if Poor Bear's testimony were true, it would "shock the conscience of the Court and in the interests of justice should

render, 19 CRIM. L.Q. 366 (1976). Recent developments in the law concerning judicial review of the extradition judge's decision are discussed at 61 CAN. B. REV. 519 (1983).

Since the time of the Peltier extradition hearing, Canada has entrenched in its Constitution guarantees of civil liberties. See Canada Act, 1982 (U.K.) ch. 11; CAN. CONST., Canadian Charter of Rights and Freedoms, §§ 1-34. It is not clear what effect, if any, the provisions of the Charter may have in the circumstances stated here.

16. This is a recognized defense in extradition proceedings. When nations sign bilateral extradition treaties, they typically reserve, by treaty provision or specific domestic statutory law, the right of the executive of the asylum state to refuse to surrender a fugitive if the offense charged is of a political nature. Thus, a nation's head of state or its delegate may discharge a prisoner whose extradition is sought notwithstanding any order of a judge. See, e.g., Extradition Act, CAN. REV. STAT. ch. E-21, § 21 (1970). The United States has reserved the same power. See 18 U.S.C. § 3185 (1982).

17. This is similar to proof which is often offered by prosecutors against criminal defendants. A prosecutor is extremely likely to present a witness who can state that the accused attempted to coerce a false alibi story from the witness (whether or not it was successful) and most judges would admit the evidence. See *The Pizarro*, 15 U.S. (2 Wheat.) 227, 241-42 (1817) (Story, J.); C. McCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 273 (2d ed. 1972); Maguire & Vincent, *Admissions Implied from Spoliation*, 45 YALE L.J. 226 (1935).

18. Record at 4584-4665, United States v. Peltier, Cr. No. C77-3003 (D.N.D. June 1, 1977).

be considered by the jury."¹⁹ The jury returned a verdict of guilty, and Peltier was sentenced to two consecutive life terms.²⁰

The United States Court of Appeals for the Eighth Circuit affirmed.²¹ The defense contended that the judgment should be reversed because the evidence presented to the Canadian tribunal "consisted of the false affidavits of Myrtle Poor Bear, obtained by the government through coercion and deceit and known by the government to be false."²² Peltier's illegal extradition for the murder charges, according to the defense's theory, deprived the trial court of jurisdiction. The attorney for the United States stated at oral argument that his own examination of the submitted Poor Bear affidavits led him to the conclusion that they were false. He conceded that use of them in the Canadian proceedings was improper.²³ Counsel contended, however, that under the *Ker-Frisbie*²⁴ doctrine the jurisdiction of a trial court is not affected by the manner in

19. *Id.* at 4707-08.

20. Other evidence presented at the Canadian extradition proceeding also appeared at trial to be misleading. An FBI agent who had sworn in the extradition proceeding that he had found the shell casing used in the ballistics tests stated that his earlier affidavit was incorrect. He explained that the casing had been found by another FBI agent. The latter agent confirmed this testimony. *United States v. Peltier*, 585 F.2d 314, 329-30 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979).

The government's other evidence is summarized in the circuit court opinion. *Id.* at 319-20. Most of the government's evidence was circumstantial. A substantial portion of the trial record consists of the government's proof of "other crimes." The trial court allowed the prosecution to introduce evidence regarding the Milwaukee and Oregon incidents as relevant to motive and flight. A critical part of the government's case was the testimony of three witnesses—Wilford Draper, Michael Anderson, and Norman Brown—who placed Peltier in the vicinity of the agents' car near the time of the shooting. Record at 788, 1037-38, 1445-46, *Peltier*. All three witnesses were young American Indians who testified that they had been threatened, intimidated, or physically abused by FBI agents during the investigation. *Id.* at 841-44, 1083-89, 1097-1101, 4801-12. Defense witness Gene Day testified that the FBI agents threatened to take her children from her if she did not cooperate. *Id.* at 3553. The court of appeals later discounted this testimony, pointing out that all three of the witnesses stated that the testimony they gave at trial was the truth as they remembered it. *Peltier*, 585 F.2d at 329.

21. The defense had five grounds of appeal: (1) that evidence introduced at trial was so prejudicial and inflammatory that its admission constituted a denial of due process; (2) that the trial court refused to instruct the jury on Peltier's defense that he was a victim of an FBI frame-up and that it refused to allow him to introduce much of the available evidence of FBI misconduct; (3) that the trial court's refusal to reread testimony requested by the jury constituted an abuse of discretion; (4) that the trial court had no jurisdiction to try him because the United States Government deliberately violated the extradition treaty between the United States and Canada; and (5) that the prosecution is barred by the doctrine of collateral estoppel. *United States v. Peltier*, 585 F.2d 314, 320 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979). The focus in this article is on the fourth.

22. 585 F.2d at 335 (quoting defendant's contention).

23. The following exchange occurred between Judge Ross and the attorney for the United States at oral argument before the Eighth Circuit panel:

MR. HULTMAN: It was clear to me [Poor Bear's] story didn't later check out with anything in the record by any other witness in any other way [S]he was incompetent in the utter, utter, utter ultimate sense of incompetency [Once] I had a chance to look at [Poor Bear's statements] and tested them with all of the record [and

Extradition By Fraud

which the defendant's presence was obtained. While the Eighth Circuit agreed with the defense that the use of the affidavits "was, to say the least, a clear abuse of the investigative process by the F.B.I.,"²⁵ the court found it unnecessary "to decide what standard should be applied to the review of claims of government misconduct in international extradition proceedings" It held that Peltier's claim was, "on its face, lacking in substance." The court stated that it was convinced from its review of the trial transcript that other substantial evidence of Peltier's involvement in the murders was presented to the Canadian authorities, but the record of those proceedings had not been made available to the trial court or the circuit court.²⁶ The Supreme Court denied certiorari.²⁷

II. *Toward a Remedy for Abuses of International Extradition Proceedings*

The reluctance of the court of appeals to examine the fraud before the Canadian tribunal in this case is an unfortunate outgrowth of the Supreme Court's *Ker-Frisbie* doctrine.²⁸ The doctrine, essentially a form of abstention, holds that jurisdiction over an accused obtained through forceable abduction does not defeat the jurisdiction of a federal court.

all of the witnesses, there was not one scintilla that showed Myrtle Poor Bear was there, knew anything, did anything

JUDGE ROSS: But can't you see, Mr. Hultman, what happened happened in such a way that it gives some credence to the claim of the—

MR. HULTMAN: I understand, yes, Your Honor.

JUDGE ROSS: —the Indian people that the United States is willing to resort to any tactic in order to bring somebody back to the United States from Canada.

MR. HULTMAN: Judge—

JUDGE ROSS: And if they are willing to do that, they must be willing to fabricate other evidence. And it's no wonder that they are unhappy and disbelieve the things that happened in our courts when things like this happen.

MR. HULTMAN: Judge Ross, I in no way do anything but agree with you totally.

JUDGE ROSS: And you try to explain how they get there is not legally relevant in the case, and they don't understand that.

MR. HULTMAN: I understand, Your Honor.

JUDGE ROSS: We have an obligation to them, not only to treat them fairly, but not give the appearance of manufacturing evidence by interrogating incompetent witnesses.

United States v. Peltier, No. 77-1487 (8th Cir. 1978) (transcript of oral argument), *reprinted in* Petitioner's Brief for Writ of Certiorari at 50a-51a, *Peltier v. United States*, 440 U.S. 945 (1979).

24. *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952).

25. 585 F.2d at 335 n.18. A Canadian court later termed the American action in suppressing the original Poor Bear affidavit "unusual and reprehensible." *Halprin v. Sun Publishing Co.* [1978] 4 W.W.R. 685, 689 (B.C. Sup. Ct.).

26. 585 F.2d at 335.

27. *Peltier v. United States*, 440 U.S. 945 (1979). While these appeals were pending, the Oregon burglary charges were dropped and Peltier was acquitted of the attempted murder in Wisconsin. *State v. Peltier*, No. 2122C (Or. Cir. Ct., Malheur County Sept. 7, 1977); *State v. Peltier*, No. 7676 (Wis. Cir. Ct., Milwaukee County Jan. 27, 1978). Charges against James Eagle, the fourth person indicted, were later dropped.

28. *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952).

Scholars of international law have argued not only that *Ker-Frisbie* has no place in a modern world regulated by treaty, but also that it is not authorized by any credible view of international law.²⁹ American courts, however, have insisted upon mechanical application of the doctrine with little critical examination.³⁰ *Ker-Frisbie* is simply recited in support of the proposition that extradition treaties are for the benefit of the sovereigns concerned, not for the people whose liberty is affected.³¹

According to the doctrine of specialty, an accused may be prosecuted by the requesting state only for an offense upon which the extradition was based. This principle inhibits misrepresentation among nations and promises study of each charge as a potential political offense. An example of the application of specialty is *United States v. Rauscher*.³² In *Rauscher*, the defendant's presence was obtained ostensibly in order that he might be tried for murder. He was then tried for a different offense. The Court granted an order in arrest of the judgment because it found the government's action to be a "fraud upon the rights of the party extradited and . . . bad faith to the country which permitted his extradition."³³ Later decisions have held that specialty is a privilege of the asylum state, "designed to protect its dignity and interests," and not a personal right of the accused.³⁴ As a result of this limitation and *Ker-Frisbie*, American courts have placed the burden of complaining on the

29. The most lucid and informed discussion is contained in García-Mora, *Criminal Jurisdiction of a State over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative Study*, 32 IND. L.J. 427 (1957).

30. If an accused is extradited to the Second Circuit, he or she may be able to show a violation of due process if it can be proved that the United States authorities acquiesced in submitting the accused to brutality or torture. *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). This exception is very narrow and does not condemn kidnapping unless the conduct "shock[s] the conscience" of the court. *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 65 (2d Cir. 1975).

31. *See, e.g.*, *United States v. Cordero*, 668 F.2d 32, 37-38 (1st Cir. 1981) (defendant arrested in Panama by U.S. undercover agent and subjected to poor jail conditions: "[E]xtradition treaties are made for the benefit of the governments concerned . . . [i]t is the contracting foreign government, not the defendant, that would have the right to complain . . ."); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975) (Argentinian kidnapped in Bolivia: "[I]t is plainly the offended states which must in the first instance determine whether a violation of sovereignty occurred . . .") *United States v. Reed*, 639 F.2d 896, 902 (2d Cir. 1981) (American citizen kidnapped from Bimini: "[A]bsent protest or objection by the offended sovereign, [the defendant] has no standing to raise violations of international law as an issue."); *United States v. Romano*, 706 F.2d 370, 375 (2d Cir. 1983) ("[I]t is not suggested that Italy has asserted any violation of its rights of sovereignty.").

32. 119 U.S. 407 (1886).

33. *Id.* at 422. *See also* *Johnson v. Browne*, 205 U.S. 309 (1907) (United States unsuccessfully sought extradition of fugitive from Canada for an alleged offense not covered by treaty. United States reindicted for a covered offense, obtained extradition, dismissed the charge and incarcerated the accused for the original sentence); *Cosgrove v. Winney*, 174 U.S. 64 (1899) (defendant arrested while free on bail, after extradition, for charge based on conduct before extradition).

34. *Shapiro v. Ferrandina*, 478 F.2d 894, 906 (2d Cir.), *cert. denied*, 414 U.S. 884 (1973).

Extradition By Fraud

nation from which the accused was extradited. This comment submits that Canada has a domestic as well as an international obligation to redress the defrauding of its judicial institutions by another sovereign.

A. *Possible Responses by the Asylum State to Illegal Extradition*

If sovereign nations are to trust one another in carrying out their treaty obligations, there must be an obligation of fair dealing, good faith and truthfulness imposed on every contracting state making sworn representations in the tribunals of another sovereign. Admittedly, extradition treaties generally contain no explicit requirement that a requesting state be truthful in the presentation of evidence to the judicial body of the requested state.³⁵ However, implicit in any workable contract between nations in which they agree to submit evidence in support of probable cause to the courts of either state must be an understanding that the parties will not defraud one another. This understanding provides the necessary foundation for international relations.³⁶ It is beyond the scope of this comment to identify the most appropriate label for such generally accepted principles as truth-telling in international practice. Whether fraud in the execution of treaty obligations is barred by the fundamentals of natural law, international public policy, imperative norms, customary law, morality, or the requirement of public order is immaterial. No school of thought on the subject would argue that misrepresentation should be allowed to go uncorrected.³⁷ The nations of the world have a vital obligation not only to one another to preserve the international rule of law against illegal usurpation by another state but also to their own citizenry to redress fraud which taints their judicial institutions.

This analysis leads to an exploration of the appropriate remedy in the *Peltier* case. It is conceivable that Canada has jurisdiction to prosecute the subornation of Poor Bear's perjury,³⁸ an extraditable offense under

35. However, there are at least some minimum requirements of reliability. The Extradition Act of Canada, for example, provides that affidavit evidence must at least contain formal indicia of authenticity. See CAN. REV. STAT. ch. E-21, §§ 16-17 (1970).

36. "For good faith, in the language of Cicero, is not only the principle hold by which all governments are bound together, but is the key-stone by which the larger society of nations is united. Destroy this, says Aristotle, and you destroy the intercourse of mankind." H. GROTIUS, *THE RIGHTS OF WAR AND PEACE* 417 (M. Walter Dunne 1901).

37. See generally G.I. TUNKIN, *THEORY OF INTERNATIONAL LAW* (1974). Although imperative norms of international law are generally discussed in consideration of the hypothesis that some treaties may be facially void in the international community regardless of the intent of the contracting parties, some analysts have specifically recognized that the same body of imperative norms cannot be violated in the execution of treaty obligations. See *Law of Treaties*, 3d Report by G.G. Fitzmaurice, U.N. Doc. A/CN.4/115, reprinted in [1958] 2 Y.B. INT'L L. COMM'N 26 U.N. Doc. A/CN.4/SER.A (1958) Add. 1 p. 26.

38. See, e.g., *Kear v. Hilton*, 699 F.2d 181 (4th Cir. 1983) (bail bondsman and bounty

the treaty.³⁹ However, this would scarcely purge the taint on the extradition proceeding and would still permit the United States to benefit from its fraud.

There is a more complete and appropriate remedy. Since the *Ker-Frisbie* doctrine places the burden of complaint on the requested state, Canada should demand Peltier's return so that the extradition proceeding can be relitigated. This remedy, applied in similar circumstances when the findings of a tribunal rested on facts ultimately proven to be wrong, is supported by three principles: first, a party should not be permitted to retain the benefit of its own fraud;⁴⁰ second, relitigation is the only means of assuring and maintaining the integrity of the administration of justice;⁴¹ and third, the falsehood casts doubt upon the weight of all of the other evidence adduced at a proceeding.⁴² If Canada fails to act in situations like the one presented here, American application of *Ker-Frisbie* provides no review for extraditions obtained via misrepresentation.

Upon a new extradition hearing, the United States could offer any credible evidence it has in support of a probable cause finding. However, since the jurisdiction of the American trial court was based on the illegally obtained extradition, the Canadian courts should not view

hunter who captured a fugitive in Canada and returned him to the United States against his will can be extradited to Canada to face Canadian kidnapping charges).

39. Treaty on Extradition Between the United States and Canada, Dec. 3, 1971, United States-Canada, art. 1, 27 U.S.T. 983, 986, T.I.A.S. No. 8237.

40. See *Mooney v. Holohan*, 294 U.S. 103 (1935) (acknowledging that a conviction based upon the presentation of testimony known to be perjured is a violation of the due process clause, but declining to grant habeas corpus relief on procedural grounds); *Napue v. Illinois*, 360 U.S. 264 (1959) (granting habeas corpus relief where the prosecutor failed to correct a false denial by a government witness that he received no promise of consideration for his testimony, even though the falsity went only to the credibility of the witness).

41. See *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115 (1956) (remanding with directions to allow additional evidence before the Subversive Activities Control Board; appellants alleged new evidence showing that witnesses relied upon by the Board had perjured themselves in similar proceedings. "The untainted administration of justice is certainly one of the most cherished aspects of our institutions." *Id.* at 124.); *Mesarosh v. United States*, 352 U.S. 1 (1956) (Smith Act conviction reversed and remanded for a new trial because of new evidence that a government witness lied; the court stated that federal courts have a responsibility "to see that the waters of justice are not polluted." *Id.* at 14.); *United States v. Basurto*, 497 F.2d 781, 785-86 (9th Cir. 1974) (prosecutor learned of perjury before a grand jury prior to attachment of jeopardy; the court held that the prosecutor was obliged to inform the court, dismiss the charges, and seek a new indictment "to correct the cancer of justice that had become apparent." *Id.* at 785.).

42. When there has been attempted subornation, coercion of a witness, or spoliation of evidence, "the inference, indeed, is one of the simplest in human experience," and "the inference is an indefinite one, that the whole cause must be an unfounded one since such means are employed to sustain it." 2 J. WIGMORE, EVIDENCE, §§ 278, 277, at 133 (Chadbourn rev. 1979). American juries are sometimes invited to draw a related inference with regard to a witness through submission of the *falsus in uno, falsus in omnibus* instruction. 2 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 73.04 (3d ed. 1977).

Extradition By Fraud

Peltier's conviction as binding on their independent judgment. Instead, they should consider the evidence presented by the United States in light of the entire course of the proceedings against Peltier. As part of the re-extradition process, the Canadian Minister of Justice would also reconsider Peltier's application for the political offense exception.⁴³ Even if Canada decided to extradite Peltier, a rehearing would deter future abuses of extradition proceedings and would promote greater respect for individual rights in the execution of international agreements.

Canada and the United States are both familiar with this remedy in practice. In 1891, the United States successfully demanded that Spain return a fugitive wrongfully taken from the United States by Spanish authorities, without prejudice to Spain's treaty right to commence proper extradition proceedings. In another instance, the British government returned to the United States a Canadian citizen who had been taken from the State of New York and sentenced to a reformatory in Canada. In 1909, Canada returned a fugitive to the United States who had been abducted from a border area in North Dakota.⁴⁴ Similarly, Canada should not hesitate to invoke the re-extradition remedy and demand Peltier's return.

B. *Possible International Procedures to Ensure Good Faith in International Extradition Requests*

Even if Canada is unwilling to discharge its international and domestic obligation to remedy the fraud upon its own judicial institutions, other nations of the world are not relieved of their general obligation

43. Before a fugitive is surrendered, the Minister of Justice routinely considers any application for the political offense exception. See G. LAFOREST, *supra* note 15, at 132. The evolution of Canadian and English extradition law on the political offense exception is complex and lies beyond the scope of this brief comment. See generally *id.* at 61-77; Castel & Edwardh, *Political Offenses: Extradition and Deportation—Recent Canadian Development*, 13 OSGOODE HALL L.J. 89 (1975). An excellent discussion of the various categories of political offenses which have been recognized is contained in García-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962). England has traditionally taken a broad view of the political offense exception. See, e.g., *In re Castioni*, [1891] 1 Q.B. 149 (extradition denied where accused was charged with killing a member of the Swiss government during a forceable possession of a municipal building in the course of a political insurrection).

44. Excerpts from these and similar proceedings are reprinted in 4 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* § 345, at 224-28 (1942) and 4 J. MOORE, *A DIGEST OF INTERNATIONAL LAW* § 603, at 328-32 (1906). Although demands are generally honored when it is clear that the rights of the demanding state have been violated, there is no uniformity in the course of these decisions or the analysis upon which the decisions are made. Consistent with the practice in American courts of noting that sovereigns may complain of extradition treaty violations, the United Nations recognized this right of a sovereign when it condemned Israel for kidnapping Adolf Eichmann, the Nazi war criminal, from Argentina. 15 U.N. SCOR (138th Mtg.) at 4, U.N. Doc. S/INF/15/Rev. 1 (1960).

beyond the interests of Canada, the United States, and Peltier, to promote the international rule of law.

Article Thirteen of the International Covenant on Civil and Political Rights states that an alien lawfully in a territory may be expelled pursuant only to a "decision reached in accordance with law."⁴⁵ An extradition resulting from a decision based on a misrepresentation before the requested state's courts violates the spirit—if not the letter—of Article Thirteen.

Since these provisions are largely hortatory and not an enforceable code, scholars and jurists repeatedly have emphasized the need for articulated remedies to avoid abuses in international extradition proceedings. Luis Kutner has proposed and drafted a world habeas corpus treaty-statute of the International Court of Habeas Corpus by which accepted principles of human rights could be enforced.⁴⁶ Both Justice Brennan⁴⁷ and Justice Douglas⁴⁸ have strongly supported Kutner's International Court of Habeas Corpus as a means of enforcing international due process.

The advantages of such a remedy include not only ensuring compliance with treaty obligations and promoting the rule of law among nations, but also protecting the individual defendant from abuse in international proceedings.⁴⁹ The need for adoption of an international forum to preside over domestic judicial institutions is particularly compelling when, as here, the courts of each sovereign defer to the other and both decline to inquire into the conduct of extraterritorial proceedings. Indeed, should Canada and the United States each fail to examine the record and to explore bilateral remedies, a higher forum is required.

The proliferation over the last forty years of international treaties, conferences, conventions and resolutions has been founded upon a belief

45. G.A. Res. 2200A, 11 U.N. GAOR Supp. (No. 16) at 170, U.N. Doc. A/6316, at 170 (1966). Cf. G.A. Res. 217A, U.N. Doc. A/811 (1948) (Article Nine of the Universal Declaration of Human Rights states that "[n]o one shall be subject to arbitrary . . . exile," while Article Ten states, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.").

46. Kutner, *World Habeas Corpus and International Extradition*, 41 U. DET. L.J. 525, 541-550 (1964) (the proposed treaty-statute sets forth the procedure, competence and structure of the court). See also Bassiouni, *International Extradition: A Summary of the Contemporary American Practice and a Proposed Formula*, 15 WAYNE L. REV. 733, 760-61 (1969).

47. Brennan, *International Due Process and The Law*, 48 VA.L. REV. 1258, 1260-61 (1962). ["It is a concrete program whereby the now only morally binding Universal Declaration of Human Rights would be made, by the voluntary consent of the nations of the world, a legally binding commitment"].

48. W. DOUGLAS, TOWARDS A GLOBAL FEDERALISM 73 (1968).

49. Cf. *Caplan v. Vokes*, 649 F.2d 1336, 1341 n.7 (9th Cir. 1981) (statute of limitations provision of extradition treaty "represents an important right of the accused.").

Extradition By Fraud

in law and its institutions as the most effective and just means of political order. Canada and all other nations which have contracted with the United States to provide for the processing of fugitives must recognize that a firm commitment to the modern development of the international rule of law requires that a remedy be sought when domestic legal institutions are abused and defrauded. As it now stands, the extradition treaty between the United States and Canada is but a hollow promise, another broken treaty.⁵⁰

III. *Conclusion*

The experiences of Leonard Peltier dramatically illustrate the need for a private remedy to redress international extradition by fraud. The successful operation of international extradition agreements requires good faith and fairness from sovereign states in their dealing with one another. Breach of these accepted norms should be actionable by affected individuals and sovereigns alike. The *Ker-Frisbie* doctrine, however, presents an out-dated barrier to just resolution of this problem. Further study is needed to develop an appropriate remedy to correct and deter future abuses and bad faith in the extradition process.

50. In 1982, Peltier filed a petition for a writ of habeas corpus under 28 U.S.C. § 2255 (1982) alleging, among other things, that certain FBI documents discovered after the trial under the Freedom of Information Act, 5 U.S.C. § 552 (1982), cast doubt on the veracity of the ballistics evidence presented at trial. The petition was denied without a hearing. An appeal from this order is now pending in the United States Court of Appeals for the Eighth Circuit. A brief was filed in support of Peltier's request for an evidentiary hearing by an *ad hoc* committee of fifty members of the United States Congress, as *amicus curiae*.